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# Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age

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# PROPERTIZATION METAPHORS FOR BARGAINING POWER AND CONTROL OF THE SELF IN THE INFORMATION AGE

DANIEL D. BARNHIZER<sup>1</sup>

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## I. INTRODUCTION

Conceptions of property often begin with the proposition that the individual owns his or her own self—that “every man has a property in his own person.”<sup>2</sup> In the consumer contracting context, however, the growth of information technologies that permit the collection, processing, copying and dissemination of vast amounts of personal information threatens this concept of exclusive ownership and control of the self.<sup>3</sup> Specifically, producers<sup>4</sup> in the information era have the ability to collect extraordinarily detailed personal information about individual consumers and then use that data to develop a high-definition electronic double—a doppelgänger<sup>5</sup>—of those individuals.<sup>6</sup> Producers can then use this electronic reflection of a consumer’s interests, wants, habits and needs, to invade a consumer’s control over personal

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<sup>2</sup>John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 413 (Edwin A. Burt, ed. 1939) (“Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself.”); see also RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 54-59 (1995) (arguing in favor of self-ownership as fundamental rule for building system of property rights).

<sup>3</sup>See Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 *HASTINGS L.J.* 1321, 1326-32 (1992) [hereinafter Schwartz, *Data Processing*] (noting dangers to individualism and relations between individual and state presented by pre-Internet, industrial-age information collection and processing technologies).

<sup>4</sup>In analyzing bargaining power relations, I have adopted Professor W. David Slawson’s definitions of “producer” – a person who produces products, including both goods and services, for sale – and “consumer” – a person, including individuals and businesses, who buys a product to consume it. See W. DAVID SLAWSON, *BINDING PROMISES* 24 (1996).

<sup>5</sup>In German mythology, the doppelgänger was an evil spirit that took on the form of an individual, the appearance of which usually foretold impending doom for that individual. Alternatively, the doppelgänger is a literary device used to demonstrate that each individual’s “self” actually comprises multiple, schismatic reflections of the same person. See ANDREW J. WEBBER, *THE DOPPELGÄNGER: DOUBLE VISIONS IN GERMAN LITERATURE* 1-12 (1996) (surveying characteristics of doppelgängers in literature and noting the story of Dr. Jekyll and Mr. Hyde as one prominent example of the use of doppelgängers).

<sup>6</sup>For a detailed analysis of the development of electronic personae by government and private organizations, see generally Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 *BERKELEY TECH. L.J.* 1 (1996). Of course, individuals also can use the online environment to recreate their own identities and craft online personae that reflect an idealized version of their selves to the outside world. See Sonia K. Katyal, *Privacy vs. Privacy*, 7 *YALE J. L. & TECH.* 222, 252 (2004) (“Even outside of structured forums, a user can adopt a multiplicity of gender, sexual, racial, or other categorical identities, invent accompanying personal histories, and engage in an assortment of acts that she would probably not perform in real life. [V]irtual space allows individuals to construct identities they choose for themselves . . .”).

choices and interests. The doppelganger identifies the targets most susceptible to particular products and pitches, assists the producer in making the sale, and perhaps even suggests means of exploiting known cognitive biases that can interfere with free and rational choice by the consumer. And, most importantly, the doppelganger is the property of the producer or data miner who created it—individual consumers currently have no power to restrict or control others’ uses of these electronic manifestations of their selves.

This propertization of personal information accompanies an increasing disconnect between consumer contracts in practice and classical notions of contract as consensual, bargained-for agreements. Contract scholars have been more or less obsessed with the non-dickered, adhesive nature of standardized form contracts for much of the last century.<sup>7</sup> The modern reality of highly sophisticated forms of adhesion contract—browse-wrap and click-wrap contracts<sup>8</sup>—appears to exacerbate the lack of assent and take-it-or-leave-it nature of consumer adhesion contracts. As some commentators have noted, the fiction of consumer assent to such new forms of

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<sup>7</sup>See, e.g., Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211, 240 (1995) (“The problems raised by the use of form contracts have been a major preoccupation of contract law scholars for the past forty years. The primary areas of concern have been the enforceability of preprinted terms and the import of preprinted terms in determining whether a form sent in response to an offer constitutes an acceptance.”); see also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203, 1204-06 (2003); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 *U. PITT. L. REV.* 21, 23-46 (1984) (analyzing meaning of contract in light of changed social and economic conditions and surveying scholarly responses to standard form contracting phenomenon); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1173, 1242-51 (1983) (arguing against enforceability of non-salient terms in adhesion contracts); Freidrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629, 640 (1943) (“Standard contracts in particular could . . . become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a host of vassals.”); cf. Nathan Isaacs, *The Standardizing of Contracts*, 27 *YALE L.J.* 34, 39 (1917) (criticizing continued reliance on freedom of contract principles in light of growing use of adhesion contracts).

<sup>8</sup>Browse-wrap contracts comprise attempts by website owners to bind site visitors to the website’s “Terms of Service” or “Conditions of Use” by presenting a hyperlink to view such terms together with an assertion that use of the website constitutes acceptance of those terms. Click-wrap contracts differ in that the user is presented with a screen containing contract terms to which he must assent by clicking a hyperlink before he can proceed. See, e.g., James J. Tracy, Legal Update, *Browse Wrap Agreements: Register.com, Inc. v. Verio, Inc.*, 11 *B.U. J. SCI. & TECH. L.* 164, 164-65 (2005) (describing click-wrap and browse-wrap contracts and noting that recent cases suggest greater willingness by courts to enforce some browse-wrap contracts); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 *IND. L.J.* 1125, 1129 (2000) [hereinafter Radin, *Binding Commitment*] (describing onerous terms of service or conditions of use that commercial websites attempt to impose upon all site visitors); Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 *CARDOZO L. REV.* 319, 333-34 (1999) (describing click-wrap agreements as requiring “the purchaser to use his or her mouse to ‘click’ on buttons appearing on the computer screen, thereby assenting to the terms and conditions”).

adhesion contracts is even more absurd than with their paper-based counterpart.<sup>9</sup> Just as with the relatively crude paper-based contracts, few consumers ever bother to read these terms, and the nature of online contracting permits producers to hide their boilerplate terms far more effectively than even the finest of fine prints.<sup>10</sup> Consequently, some have suggested contract law should abandon models of contract based upon assent in favor of recognizing contract terms as part of the product being bought and sold.<sup>11</sup>

Taken together, these phenomena appear to suggest that the traditional conception of a property interest in the self has become—at least in the consumer contracting context—wholly fictional. The consumer no longer exclusively “owns” her own self because producers and data miners have access to an electronic simulation of that consumer, an evil twin who can often tell them which cognitive, emotional, and appetitive buttons to push to manipulate the consumer.<sup>12</sup> Similarly, producers also know in a general manner how to pressure the consumer to give “assent” to the producer’s preferred contract terms by manipulating the transaction costs involved in reading, understanding, and seeking alternatives to those contract terms.<sup>13</sup> To the extent that these qualities represent proxies for the “self” at the basis

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<sup>9</sup>See Radin, *Binding Commitment*, *supra* note 8, at 1125 (“Commercial practice has long deviated from the traditional picture of minds meeting about terms or autonomous consent.”); Goodman, *supra* note 8, at 319-22 (noting lack of notice to consumer of shrink-wrap or click-wrap terms and likelihood that consumer fails to read such terms).

<sup>10</sup>Browse-wrap contracts, for example, require web surfers to take affirmative steps to seek out a set of terms and conditions that they are unlikely to read in the first place. See Radin, *Binding Commitment*, *supra* note 8, at 1129 (describing, *inter alia*, www.Disney.com web site in which terms of use link appears in small print at bottom of page where most users would not likely scroll or bother to click on the link). Professor Radin notes that the Disney.com terms of use, despite their relative obscurity on the website, nonetheless purport to condition use of the site on a complete waiver of all rights in any intellectual property uploaded to the site’s discussion forums and impose a forum selection clause upon all disputes. See *id.* (noting several apparently onerous browse-wrap contracts).

<sup>11</sup>See Radin, *Binding Commitment*, *supra* note 8, at 1125-26 (suggesting “contract-as-product” model better describes “much of transactional practice” better than consent-based models of contract).

<sup>12</sup>See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW* 39 (1996).

[Computer] data processing creates a potential for suppressing a capacity for free choice. The more that is known about an individual, the easier it is to force his obedience. Through the use of databanks, the state and private organizations can transform themselves into omnipotent parents and the rest of society into helpless children.

*Id.*; see also Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 *STAN. L. REV.* 1393, 1396 (2001) (quoting SCHWARTZ & REIDENBERG).

<sup>13</sup>See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 *N.Y.U. L. REV.* 429, 466 (2002) (“Internet design companies consult traditional marketing gurus, but also cognitive psychologists and anthropologists in an effort to maximize the number of site visitors and to induce these visitors to engage in the desired responses.”); see also Eisenberg, *supra* note 7, at 216-25 (surveying categories of known cognitive biases that limit ability of parties to make fully rational contract decisions, including

of property, the information age appears to be not only propertizing the consumer's identity and will,<sup>14</sup> but also giving property rights in those qualities to producers and data harvesters, not the consumer whose personality, desires and choices generated that electronic double.<sup>15</sup>

This Article argues that the threatening consequences of this commodification and propertization of consumers' electronic selves represent only part of the picture. Information era technological developments provide more tools than ever available before by which consumers can place boundaries around their right to consent and exclude others from that arena.<sup>16</sup> Thus, Internet-based contracting allows consumers to access a broad range of bargaining power inputs to protect their power to withhold consent.<sup>17</sup> Instead of an amorphous, indefinable quality of contracting parties, bargaining power may now be characterized as a series of discrete inputs that can be identified, evaluated, exchanged and owned.<sup>18</sup> In essence, bargaining power may be treated as property or a commodity that in turn serves as a protection against unwanted manifestations of the self through coerced or unwitting exercises of consent.

This analogy of creating property rights in bargaining power and consent is intriguing, not because of the potential that these ephemeral concepts are property, but rather because it may help refocus the way that we think about bargaining power, personal responsibility and the ability of consumers to continue participating in a meaningful way with transactions in the information era. Internet-based contracting allows a much more finely-grained picture of the bargaining power of the parties. In the classical contract model of two "farmers haggling over the sale of a horse,"<sup>19</sup> for example, every transaction is a unique occurrence that cannot be replicated. Traditional judicial approaches to the phenomenon of bargaining power reflect this uniqueness, generally treating consumer bargaining power as an all-or-nothing affair

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overoptimism, framing effects, information availability, undersampling available data, inability to assess future costs and benefits, and underestimation of risks).

<sup>14</sup>Cf. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423-28 (2000) (arguing that strong protections of personal data privacy are necessary for the development of autonomous individuals through the exercise of free, unmonitored choices).

<sup>15</sup>See Andrew McClurg, *A Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 142 (2003) ("Our data selves have become commodities, bought and sold like bags of potato chips.").

<sup>16</sup>Cf. Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 398 (2005) ("The commodity metaphor [in the intellectual property and creative works context] creates an abstract 'fence' around (abstract) informational goods. While we may easily build a fence to keep others off our land, we cannot keep others from playing a musical composition hundreds of miles away.").

<sup>17</sup>See *infra* Part III.B.3.

<sup>18</sup>See *infra* Part IV.A.

<sup>19</sup>See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1908) ("Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals – as if they were farmers haggling over the sale of a horse?").

measured on the basis of a few crude heuristics such as availability of meaningful alternatives, necessity, wealth, gender, education and organizational size.<sup>20</sup> Measurement of the effect of various bargaining power inputs upon the quality of the outcome for one or both of the parties under the classical paradigm is impossible.

Although we cannot understand completely the bargaining power of transacting parties in the information era, it is easier to identify the existence of multiple, discrete bargaining power inputs and assess their relative value across similar transactions. First, information era contracting is standardized<sup>21</sup> to an extent the market can commodify many potential bargaining power inputs. Second, information and transaction costs can be reduced to the point where individual consumers can identify and access these bargaining power tools and information.<sup>22</sup> Consequently, by treating bargaining power as comprising many different but identifiable and discrete components, external observers such as courts, legislatures and commentators can craft a more detailed and textured picture of the power relationship between the parties than was possible before the information era.

The proptertization analogy is also intriguing for reconceptualizing bargaining power and consent. By treating bargaining power as a fence or wall with which consumers guard their power to grant or withhold consent, we create a framework in which it is easier to observe that both sides possess bargaining power. Notably, many of the responses to information era contracting have been strongly paternalistic<sup>23</sup> and often—explicitly or implicitly—characterize the consumer as powerless in transactions with producers.<sup>24</sup> Although there may be situations in which state policing and regulation are appropriate to protect against absolute disparities of bargaining power, recognizing the potential for bargaining power on the consumer side of the transaction is crucial for maintaining the personal responsibility that makes individual access to contract possible.

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<sup>20</sup>See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 199-223 (2005) (surveying factors used by courts in analyzing power relationship between bargaining parties).

<sup>21</sup>See Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125, 1138-46 (2002) [hereinafter Radin, *Online Standardization*] (noting that “the online environment facilitates standardization in various ways” at the same time it promotes customization of other aspects of the consumer-producer relationship).

<sup>22</sup>See Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1037 (1999) (“Not only is more personal information available now than ever before, but it is becoming easier and less expensive to obtain access to it. . . . Prices for many services are now at the point where information that formerly could be afforded only by businesses is not accessible to individuals.”).

<sup>23</sup>But see Hillman & Rachlinski, *supra* note 13, at 486-95 (“Although the electronic environment is a truly novel advance in the history of consumerism, existing contract law is up to the challenge.”).

<sup>24</sup>See, e.g., Solove, *supra* note 12, at 1393 (arguing in favor of privacy law metaphors based upon Franz Kafka’s “The Trial” that emphasize “the powerlessness, vulnerability, and dehumanization created by the assembly of dossiers of personal information where individuals lacking any form of participation in the collection and use of their information”).

Part II explores some of the characteristics of consumer contracting in the information age and some of the legal responses to the issues of information propertization, consumer privacy, and assent that are raised in that context. In Part III, this Article surveys the relationship between consumer bargaining power and the ability of individuals to control manifestations of their selves through contract. In contrast to crude contract-based notions of bargaining power, this Part develops a model of negotiating strength or weakness based upon the propertization metaphor that currently informs much of the intellectual property and privacy literature. Finally, Part IV analyzes the ramifications of that propertization metaphor for future developments in legal conceptions of bargaining power in the consumer-producer relationship.

## II. CONSUMER CONTRACTING IN THE INFORMATION ERA

### A. *Characteristics of Consumer Contracting in the Information Age*

The Internet is a dangerous place for consumers, at least according to many commentators. Amoral producers hawk their wares to unsuspecting and unsophisticated e-consumers who innocently enter the dark alleys of electronic commerce, lured by the siren call of bright and flashing neon signs promising selection, price and convenience.<sup>25</sup> Once there, the e-producer wraps an arm around the e-consumer's shoulder in a faux-friendly embrace and appears to recognize her by name,<sup>26</sup> suggesting some wares for which his data-mining skill has indicated she'll pay top dollar.<sup>27</sup>

As she shops, the producer keeps track of everywhere she looks<sup>28</sup> and gently asks for her most personal information<sup>29</sup>—he'll make some good money selling this

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<sup>25</sup>See, e.g., Anil M. Pandya, *B2C Failures: Toward an Innovation Theory Framework*, J. ELECT. COMM. IN ORG., Apr.-June 2005, at 73 (showing that e-commerce "reduces search costs . . . [and] is convenient, quick, easily accessible, and less expensive"); Rajiv Kohli et al., *Understanding Determinants of Online Customer Satisfaction: A Decision Process Perspective*, J. MGMT. INFO. SYS., vol. 21 no. 1., Summer 2004, at 115, 120 (noting that consumers achieve significant cost savings from online retail through both lower prices overall and savings "by purchasing products with the precise features they need, thereby not having to pay for features they do not need").

<sup>26</sup>See Rajiv Dewan, Bing Jin & Abraham Seidmann, *Adoption of Internet-Based Product Customization and Pricing Strategies*, J. MGMT. INFO. SYS., vol. 17 no. 2, Fall 2000, at 9, 23 ("The incredible communications and computing power of the Internet and other information processing technologies such as cookies and collaborative filtering is handing companies an unprecedented opportunity to collect and analyze consumer information. The Internet allows sellers to understand their customers' needs and wants on an individual basis.")

<sup>27</sup>See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2056-57 (2004) [hereinafter Schwartz, *Property, Privacy, and Personal Data*] ("Personal information is an important currency in the new millennium. The monetary value of personal data is large and still growing, and corporate America is moving quickly to profit from the trend.")

<sup>28</sup>See *id.* at 1625 ("Once Web sites identify a specific visitor, they can match her to their rich stores of 'clickstream data,' which is information about the precise path a user takes while browsing at a Web site, including how long she spent at any part of a site."); Jessica Litman,



information to even more unscrupulous, bottom-feeding data miners<sup>30</sup> or use it himself the next time she visits.<sup>31</sup> Amazed that the producer seemed able to read her mind, to know her every desire,<sup>32</sup> the mark ogles the merchandise and doesn't even notice that she has spent far more time than she thought examining the goods.<sup>33</sup> Finally, she makes a selection and the slick huckster cleverly slips a few pages in

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*Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1283 (2000) ("Everything we look at on the Internet is noted and retained.").

<sup>29</sup>See Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1621-32 (1999) (describing "privacy horror show" in which personal information about email communications, web browsing activity, interactions with various online content providers, Internet Service Providers, and data miners who place malicious spyware on users' personal computers to harvest users' personal data); see also Joan Stableford, *Retailers Capture Buyers Online with Advanced Technology*, WESTCHESTER COUNTY BUS. J., July 25, 2005, at 15 ("Every time a person shops on the Web site, Lillian Vernon tracks the history of what the shopper buys and what types of merchandise a person views in detail, Shapiro said. The next time a shopper goes to the site, the Web site engine remembers what a shopper purchased and what types of merchandise the shopper was interested in. The next time they land on the Web site, those types of items will be automatically highlighted on the home page.").

<sup>30</sup>See Sovern, *supra* note 22, at 1045-46 (noting that "some companies reportedly earn more from selling customer lists than from selling their own goods and services").

<sup>31</sup>See, e.g., Matthew Haeberle, *Innovation Wins in E-Retail*, CHAIN STORE AGE, Dec. 2004, at 92 ("When we recognize that a customer who is a time-compressed mom is on our site, we customize our messaging to her and show her promos for digital cameras and DVDs that we think she will like . . . . We also tell her about our local store that is catered to her, and the kids area it features.") (quoting Sam Taylor, senior VP of on-line stores at Best Buy Co.).

<sup>32</sup>See Litman, *supra* note 28, at 1283-84 ("All of this information is collected, aggregated, and stored on computers. . . . The resulting dossier may be used, sold, published, or correlated with other sources of data."); Dewan et al., *supra* note 26, at 10 ("The Internet allows the buyer and the seller to interact on a one-to-one basis and allows the seller to collect information from online user registration, cookies, log pages of the Web server, etc. This, combined with a collaborative filtering and data mining, allows the seller to design products for individuals. On-line sellers are using these technologies to target their most valuable prospects effectively with personalized messages and products[.]").

<sup>33</sup>The claims of some Web marketing specialists are chilling in this respect. See, e.g., PR Newswire, *Coremetrics and Offermatica Partner to Boost Online Conversion through Targeted A/B and Multivariate Testing*, Apr. 4, 2005, <http://global.factiva.com/ha/default.aspx> (press release from Web site testing and optimization firms touting ability to use online customer and visitor behavior to fine tune web pages to increase customer conversions).

"Marketers need to know with certainty which online content will increase the odds that visitors will become customers," said Offermatica CEO Matthew Roche. "Coremetrics provides the data that powers precision marketing. Offermatica takes this data and automatically generates combinations of Web site content to determine which version will have the greatest impact on sales and profitability. Guessing doesn't work. Knowing does."

*Id.* (providing testimonial on apparent relation between being able "to quickly test 81 different combinations of 4 key elements on our home page to find the best combination of promotions and copy. This made a huge impact – we saw an almost 20% lift in conversions by making one simple change to the call to action on our main navigation zone. With Coremetrics and Offermatica, my site is becoming an acquisition weapon.").

front of her with an outstretched pen – “just sign here, ma’am”<sup>34</sup> – and she is out the door with her new purchase.

The information culture self-consciously defines itself<sup>35</sup> by the technologies that permit the collection, processing and dissemination of vast amounts of data.<sup>36</sup> In the consumer context, this information capacity permits marketers and producers to create detailed electronic dossiers<sup>37</sup> of a consumer’s interests, wants, habits and needs. The reality of consumer life in the information era is that marketers, data miners, and producers collect, process, and store incredible amounts of data about everything a consumer does online. This includes the Internet searches a consumer performed, web sites visited, items viewed, purchases made, as well as any personal data surrendered by the consumer in the course of his or her shopping.<sup>38</sup> Likewise, many offline interactions between consumers and producers generate a wealth of information on the consumer’s habits and preferences that may be collated with the online persona. In the information era, consumer activities are transparent and known by those who can pay for that knowledge, and in most cases consumers have no control over how others use their personal information.<sup>39</sup>

Producers use these electronic dossiers to identify consumers least likely to resist their marketing efforts, to design and market products most likely to entice the consumer into purchasing, and to lower the consumer’s resistance to granting consent to a proffered transaction.<sup>40</sup>

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<sup>34</sup>See *supra* notes 8-11 and text accompanying (describing problems of assent in context of click-wrap and browse-wrap adhesion contracts).

<sup>35</sup>See, e.g., Seth Godin, *The New Digital Divide*, Seth’s Blog, May 7, 2005, [http://sethgodin.typepad.com/seths\\_blog/2005/05/the\\_new\\_digital.html](http://sethgodin.typepad.com/seths_blog/2005/05/the_new_digital.html) (describing emergence of a new class of sophisticated information technology users called “digiterati” who choose to be on the cutting edge of new information technologies).

<sup>36</sup>See Schwartz, *Property, Privacy, and Personal Data*, *supra* note 27, at 2056 (“Modern computing technologies and the Internet have generated the capacity to gather, manipulate, and share massive quantities of data; this capacity, in turn, has spawned a booming trade in personal information.”); see also Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996) (describing information and data copying and dissemination capacities of the Internet as “continu[ing] a trend that began when Gutenberg invented movable type”).

<sup>37</sup>See Litman, *supra* note 28, at 1284 (describing scope of information collected on every aspect of consumer transactions and noting “[t]he resulting dossier may be used, sold, published, or correlated with other sources of data”).

<sup>38</sup>Many websites, for example, ask consumers directly to provide personal information in exchange for some purported benefit such as the ability to receive future emails with “special offers,” news about the purchase, a discount, faster processing on a rebate or just the producer’s ability “to serve you better.” And to complete an order in either the online or offline context, of course, the consumer must divulge sufficient personal information to complete the order fulfillment process.

<sup>39</sup>See Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1130-33 (2000) (“[T]he law does not generally recognize the legal right of individuals to control uses or disclosures of personal data.”).

<sup>40</sup>See, e.g., Dewan et al., *supra* note 26, at 11, 23-24 (“The incredible communications and computing power of the Internet and other information processing technologies such as

Almost worse than the absolute transparency of our commercial activities is that we willingly acquiesce in the system of collection and exploitation, often to the point of active promotion. Consumers themselves directly assist producers and data miners in collecting this information by agreeing to provide that information to a producer whenever they browse the Internet, purchase online, register purchased products, sign up for frequent shoppers' cards at their grocery store, fill in sweepstakes cards, and engage in the myriad other activities of informational life.<sup>41</sup> As one commentator notes, commerce between producers and consumers now comprises "an exchange of goods or services for money and information."<sup>42</sup> Moreover, consumers remain only vaguely aware that producers and data miners collect this information, unaware of the scope of the information collected, and generally unaware that producers and data miners usually disseminate their private information to anyone willing to pay for it.<sup>43</sup> A recent Annenberg Public Policy Center report on consumer awareness of online information gathering practices, for

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cookies and collaborative filtering is handing companies an unprecedented opportunity to collect and analyze customer information. The Internet allows sellers to understand their customers needs and wants on an individual basis.").

<sup>41</sup>Professor Jessica Litman offers an especially chilling description of the scope of such data collection:

Almost everything each of us does seems to generate transactional information. Walks [a]round the block are still unrecorded, except in those communities with cameras. Interactions that begin and end and stay within the home are still largely unreported, although everything entering and leaving by way of the phone lines, cable lines, satellite dishes or wireless, non-broadcast spectrum is documented. Non-cash purchases are memorialized and toted up. Large cash purchases are memorialized and turned in. Cash withdrawals and deposits are recorded and saved. Visits to the doctor, diagnoses, prescriptions, and referrals are coded and passed along. Everything we look at on the Internet is noted and retained. All of this information is collected, aggregated, and stored on computers. Anyone with reason to do so can correlate the information stored on one computer with the information stored on another, and another, and another. The resulting dossier may be used, sold, published, or correlated with other sources of data. In the United States, that's completely legal.

Litman, *supra* note 28, at 1283-84.

<sup>42</sup>Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2402 (1996) ("[T]he typical transaction between a merchant or seller and a consumer increasingly can be characterized as an exchange of goods or services for money and information."); see also Tal Zarsky, *Desperately Seeking Solutions: Using Implementation-Based Solutions for the Troubles of Information Privacy in the Age of Data Mining and the Internet Society*, 56 ME. L. REV. 13, 20-21 (2004) (arguing in favor of viewing data collection as "a transaction between the collector and the collectee rather than collection of information from a passive subject" and suggesting we are selling a piece of ourselves to collectors in exchange for convenience and other benefits); Sovern, *supra* note 22, at 1040-43 (quoting and expanding upon Murphy's characterization).

<sup>43</sup>See Frank Main, *Your Phone Records Are For Sale*, SUN-TIMES (Chicago), Jan. 6, 2004, <http://www.suntimes.com/output/news/cst-nws-privacy05.htm> (last visited Jan. 6, 2006) ("To test the [cell phone records] service, the FBI paid Locatecell.com \$160 to buy the records for an [FBI] agent's cell phone and received the list within three hours. . . ."); see also Sovern, *supra* note 22, at 1035 (relating test case in which reporter obtained profiles of neighborhood children from data service while posing as a child molester who was on trial at the time of the request).

example, shows that a majority of online consumers do not know that charities and supermarkets can and do sell their personal information to other companies,<sup>44</sup> that website “privacy policies” do not mean the websites will not share personal information with other websites and companies,<sup>45</sup> or that Internet sites engage in price discrimination based upon consumer profiles.<sup>46</sup> Worst of all, while consumers reported substantial concern with their ability to control use of their private information, “[i]n the face of all this nervousness and seeming confusion, it is startling that 65% of Internet-using adult Americans nevertheless say they ‘know what I have to do to protect myself from being taken advantage of by sellers on the web.’”<sup>47</sup>

*B. Legal Responses to Information Era Consumer Contracting – Privacy and Assent*

These technological developments surrounding consumer contracting in the information age have generated substantial concern for contract, intellectual property and privacy law scholars. In response to these phenomena, intellectual property and privacy law commentators have variously called for greater protections for individual privacy<sup>48</sup> and tools that protect consumers from enforcement of perceived unfair or unreasonable terms.<sup>49</sup> Individual information should either be proptertized<sup>50</sup>

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<sup>44</sup>See JOSEPH TUROW ET AL., ANNENBERG PUBLIC POLICY CENTER, *OPEN TO EXPLOITATION: AMERICAN SHOPPERS ONLINE AND OFFLINE 3* (2005) (reporting 72% of American adults unaware that charities may sell names to other charities without permission, and 64% were unaware that supermarkets may sell personal information about buying habits to other companies).

<sup>45</sup>*Id.* (“75% do not know the correct response – false – to the statement, ‘When a website has a privacy policy, it means the site will not share my information with other websites and companies.’”).

<sup>46</sup>See *id.* at 3-4.

<sup>47</sup>*Id.* at 4.

<sup>48</sup>See Schwartz, *Property, Privacy, and Personal Data*, *supra* note 27, at 2094-116 (2004) (describing five necessary characteristics of successful system of property rights in personal information); Samuelson, *supra* note 39, at 1130-36 (surveying arguments in favor of creating property rights in personal information); Sovern, *supra* note 22, at 1074-81, 1094-116 (1999) (noting that producers have incentives to increase transaction costs for consumers attempting to protect their private information and suggesting mandatory regime in which consumers must affirmatively opt to permit third parties to use and sell their personal data); Mell, *supra* note 6, at 68-76 (suggesting that individuals should have a strong property interest in their personal information to control the uses to which third parties put that information).

<sup>49</sup>See Hillman & Rachlinski, *supra* note 13, at 430-31 (“Lawmakers and theorists currently are debating the need for a new set of rules to support these innovative transactions.”); John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 286-88 & 308-12 (2000) (describing need for regulation of standard form contracting practices in both online and real world environments); Radin, *Online Standardization*, *supra* note 21, at 1145 (noting that characteristics of online contracting may lead to erosion of the “traditional understanding of contract”); see also Korobkin, *supra* note 7, at 1244-55 (noting market failures affecting form contracts generally and surveying possible regulatory and judicial responses to such market failures).

<sup>50</sup>See, e.g., ALAN F. WESTIN, *PRIVACY AND FREEDOM* 324-25 (1967) (“[P]ersonal information, thought of as the right of decision over one’s private personality, should be

– so that it can be restricted, guarded, alienated, or transferred in a market – or rendered inalienable and inviolate.<sup>51</sup> Privacy torts and statutory schemes should be strengthened.<sup>52</sup> Alternatively, computerized databases and other collections of personal data should be freely copiable without restrictions based upon contractual licenses.<sup>53</sup>

Similarly, on the contract side, this view of information era contracting challenges the continued legitimacy of contract models based upon volitional bargaining and individualized assent to contract terms.<sup>54</sup> Contract law commentators

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defined as a property right, with all the restraints on interference by public or private authorities and due-process guarantees that our law of property has been so skillful in devising.”); *see also* Zarsky, *supra* note 42; Schwartz, *Property, Privacy, and Personal Data*, *supra* note 27, at 2094 (suggesting bundle of rights property model for personal data); Julia Gladstone, *Data Mines and Battlefields: Looking at Financial Aggregators to Understand the Legal Boundaries and Ownership Rights in the Use of Personal Data*, 19 J. MARSHALL J. COMPUTER & INFO. L. 313, 328-29 (2001) (arguing that consumer information “belongs” to consumer, who has a fundamental right to his privacy and should have that information protected as a property right).

<sup>51</sup>*See* Paul M. Schwartz, *Privacy Inalienability and the Regulation of Spyware*, 20 BERKELEY TECH. L.J. 1269, 1269-72 (2005) [hereinafter Schwartz, *Privacy Inalienability*] (arguing in favor of a “hybrid inalienability” model of privacy that restricts alienability of private consumer information unless consumer affirmatively opts to permit use of information by collector).

<sup>52</sup>*See* Litman, *supra* note 28, at 1302-11 (arguing that property-based models for protection of individual privacy offer “only illusory protections” and suggesting instead tort protections based upon breach of trust); Samuelson, *supra* note 39, at 1136-46 (arguing that a property rights based scheme for protection of personal information would be problematic because of the complexities of establishing a market infrastructure for information trades and prevention of unauthorized transfers, dissimilarities between property rights in personal information and other types of intellectual property, and lack of congressional authority to establish such a property rights system and suggesting instead direct regulation of information trade); Katyal, *supra* note 6, at 338-44 (suggesting legislative program to protect individual privacy rights against invasion by copyright holders seeking evidence of copyright violations).

<sup>53</sup>*See, e.g.*, Murphy, *supra* note 42, at 2381-82 (surveying rights-based and law and economics-based challenges to privacy rights); William M. McGeeveran, Note, *Programmed Privacy Responses: P3P and Web Privacy Law*, 76 N.Y.U. L. REV. 1812, 1822-26 (2001) (noting importance of and benefits from disclosure and free flow of private information on Internet); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 755-57 (1999) (analyzing proper limits of regulation of privacy rights in light of needs of liberal society, but noting “Coercing privacy in the strong sense of dictating what people must always keep to themselves and what they may disclose to others would threaten the liberal egalitarian ideal of tolerance.”). *But see* Richard A. Epstein, *Privacy, Property Rights and Misrepresentations*, 12 GA. L. REV. 455, 462-64 (1978) (characterizing invasion of privacy as relatively unimportant tort).

<sup>54</sup>*See, e.g.*, Margaret Jane Radin, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295-96 (1998) (arguing that Realist observation that “there can be no free-standing purely ‘private’ regime of property and contract” should be reiterated in cyberspace). *But see* Hillman & Rachlinski, *supra* note 13, at 430 (noting that most commentators on contracting in Internet era agree “that the existing law is inadequate, but disagree about what changes need to be made” but concluding that in

have argued that consumer assent and bargaining power are fictions, particularly in the Internet context.<sup>55</sup> The Internet-based consumer contract appears to stretch the volitional nature of contract past the breaking point through the use of browse-wrap and click-wrap terms, and to deprive e-consumers of all bargaining power except the naked ability to walk away from the deal. As Professor Radin has observed, consumer assent to Internet-based adhesion contracts is even more fictional than with the traditional paper versions.<sup>56</sup> And, as marketing models grow more sophisticated and intrusive,<sup>57</sup> they threaten even that tenuous grasp on control. Consequently, the classical model of “contract-as-assent” arguably should be replaced with a new model of “contract-as-product” in which the terms of a transaction are treated merely as one more characteristic of the good or service being sold.<sup>58</sup> As products or

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general existing contract doctrines are adequate protections for consumers contracting on the Internet).

<sup>55</sup>See Jane K. Winn, *Contracting Spyware by Contract*, 20 BERKELEY TECH. L.J. 1345, 1349-54 (2005) (analyzing problems of consumer assent in relation to purported “agreements” to place malicious spyware programs upon the consumer’s hard drive); Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1319-33 (2005) (describing process of Internet contracting and reviewing judicial decisions analyzing problems of assent associated with click-wrap and browse-wrap agreements); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1311-13 (1998) (noting that Internet regulation through private orderings – rather than through public regulation – is problematic where those most responsible for private ordering – domain registries, sysops, and content creators – often have power to force terms on consumers through threat of exclusion); see also Eisenberg, *supra* note 7, at 240-41 (noting preoccupation of contract scholars with enforceability of standard form contract terms); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) (addressing assent problems in standard form contracts generally and noting “But the overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered”).

<sup>56</sup>See Radin, *Binding Commitment*, *supra* note 8, at 1155-60.

<sup>57</sup>One looming marketing intrusion, for example, is the question of whether marketers can broadcast ad content to nearby cell phone video screens. See Matt Richtel, *Marketers Want to Appear on the Small Screen*, N. Y. TIMES, Jan. 16, 2006, at C1.

Marketers said they were particularly excited about the prospect of eventually using cellphones, many of which are equipped with global positioning systems, to send ads to consumers based on their location. With that information, marketers could, in theory, send pitches from retailers to cellphone users who might be in the vicinity of a store.

*Id.*

<sup>58</sup>See, e.g., Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 441-42, 446-52 (2003) [hereinafter Madison, *Rights of Access*] (noting problems raised by “contract-as-assent metaphor” in context of shrinkwrap and click-wrap Internet licensing agreements); Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 315-16 (2003) (arguing that apparent consumer assent to software licensing terms only represents acquiescence to industry custom and consumers have no real choice if they want to “acquire use of needed computer software”); Hillman & Rachlinski, *supra* note 13, at 429-31 (surveying arguments suggesting that existing contract rules, including protections for consumer assent are inadequate); Radin, *Online Standardization*, *supra* note 21, at 1139-40 (suggesting that lack of real consent to contract terms in online transactions

commodities, such contract terms are thus subject to greater state regulatory control, just as the state already regulates product characteristics such as safety standards, warranties, and labeling.<sup>59</sup>

### III. BARGAINING POWER AND CONSENT AS BOUNDARIES AROUND THE SELF

Although the debates over propertization and ownership of personal information on the one hand, and the validity of consumer assent to browse-wrap and click-wrap terms on the other are interesting in their own right,<sup>60</sup> these phenomena are also important for what they say about bargaining power in the information age.

#### A. *The Nature of Bargaining Power*

Bargaining power represents the ability of a party to achieve a preferred outcome in an exchange relationship.<sup>61</sup> Although courts and commentators often tend to think of contract terms and the bargaining outcome as identical,<sup>62</sup> it is important to

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may eventually erode the lay conception of contracts as negotiated or dickered agreements); John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 286-88 & 308-10 (2000) (asserting that classical assent-based model of contract does not hold in standard form contract context and arguing for legislatively imposed contract terms to govern such relations); see also Korobkin, *supra* note 7, at 1203-07 (describing generally problems with consumer assent in adhesion contract context); Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176-80 (1983) (same).

<sup>59</sup>This complaint, of course, is not unique to the information age. See, e.g., Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 149-50 (1970).

First of all, [regulation of contracts as things] would open up the law's long tradition, accelerating of late, of direct, explicit governmental control of the quality and safety or [sic] products. Autos now have mandatory seatbelts, milk is bereft of its tubercles, and outright poisonous substances are barred from the marketplace. Even less reified 'things,' when seen as products, have been regulated as to quality for a long time. Life insurance contracts, for instance, have been in effect written by deputy insurance commissioners for years.

*Id.* (emphasis in original); see also Radin, *Online Standardization*, *supra* note 21, at 1139 ("The prevalent economic view of contract has broken down the distinction between agreement, . . . formerly thought of as a functional object or a collection of functional features.").

<sup>60</sup>A full analysis of these issues is beyond the scope of this Article.

<sup>61</sup>See LARRY A. DiMATTEO, ROBERT A. PRENTICE, BLAKE D. MORANT & DANIEL D. BARNHIZER, *VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION* (forthcoming 2006) (manuscript at 9, on file with authors) (an earlier version of this piece is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=578578](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578578)) [hereinafter BARNHIZER, *BARGAINING POWER AS CONTRACT THEORY*] ("A party has bargaining power if she has the ability to effect intelligently a preferred outcome in a bargaining relationship."); cf. Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAVIORAL SCIENTIST 149, 150 (1983) (defining "negotiating power" as the ability to affect favorably another party's decision).

<sup>62</sup>Many courts, for example, have concluded that the use of adhesion contracts alone indicates an inequality of bargaining power. See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) ("A contract of adhesion is one which is prepared by the party with excessive bargaining power who presents it to the other party for signature on a take-it-or-leave-it basis."); *Pardee Const. Co. v. Super. Ct.*, 123 Cal. Rptr. 2d 288, 292-95 (Cal. Ct. App. 2002) (treating adhesive contract as evidence of inequality of bargaining power); *Lytle v.*

recognize that terms alone – even machine-imposed, adhesive, click-wrap, browse-wrap, or paper form contract terms – represent only one facet of the parties’ power relationship.<sup>63</sup> The consumer-producer bargaining power relationship also manifests through other indicia such as price, the “fit” between the good or service and the consumer’s needs, and the continuing, post-contract, post-fulfillment relationship.

Thus, a consumer that pays through the nose for extremely favorable contract terms may obtain a worse outcome than one who gets a great price with lousy terms. Similarly, a consumer who can identify a good or service with a near-perfect “fit” may in fact be better off than one who obtains a less-suitable product at a lower price or on better terms.<sup>64</sup> Moreover, as producers have matured into information era business practices, many have started focusing more upon developing long-term customer relationships that necessarily depend upon both delivering a positive shopping experience at the front end<sup>65</sup> and maintaining a positive reputation and relationship after the sale has supposedly completed.<sup>66</sup> Each of these developments

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Citifinancial Servs., Inc., 810 A.2d 643, 658 (Pa. Super. Ct. 2002) (defining adhesion contract as form contract to be signed by the weaker party). Even outside of the strictly adhesive contract context, Professor Korobkin suggests that the ability to set the default terms from which the parties’ bargaining proceeds still provides the drafter with a bargaining advantage because the opposing party’s psychological bias for inaction imbues those default terms with “inertia” or “stickiness.” Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 *VAND. L. REV.* 1583, 1586 (1998) (“A bargaining party can gain a strategic advantage by establishing a set of favorable contract terms as the reference point for negotiations.”).

<sup>63</sup>As Professor Ian MacNeil observes, contract terms often may be a relatively unimportant element in how the parties structure their relationship. See Ian R. MacNeil, *Restatement (Second) of Contracts and Presentation*, 60 *VA. L. REV.* 589, 595-96 (1974) (noting importance of party relationship in generating expectations of performance and that “most actual exchanges are at least partly relational”).

<sup>64</sup>See Kohli et al., *supra* note 25, at 120.

<sup>65</sup>See Paula Klein, *Measuring E-Customer Satisfaction*, *OPTIMIZE*, July 2005, at 30 (reporting close correlation between consumer satisfaction with website shopping experience and online purchases); Zhenhui Jiang & Izak Benbasat, *Virtual Product Experience: Effects of Visual and Functional Control of Products on Perceived Diagnosticity and Flow in Electronic Shopping*, *J. MGMT. INFO. SYS.*, vol. 21 no. 3, Winter 2005, at 111, 114-18, 131 (analyzing of whether tools that permit consumers to engage in virtual manipulation or operation of products improves online shopping experience and increases likelihood of purchase); see also Stephen L. Vargo & Robert F. Lusch, *Evolving to a New Dominant Logic for Marketing*, 68 *J. MARKETING*, 1, 2 (2004) (“[M]arketing has moved from a goods-dominant view, in which tangible output and discrete transactions were central, to a service-dominant view, in which intangibility, exchange processes, and relationships are central.”).

<sup>66</sup>See Khawa A. Saeed et al., *The Relationship of E-Commerce Competence to Customer Value and Firm Performance: An Empirical Investigation*, *J. MGMT. INFO. SYS.*, vol. 22 no. 1, Summer 2005, at 223, 226-27 (“Superior presale and postsale service rendered by the seller can substantially add to the benefits received and also reduce the buyer’s nonmonetary cost such as time, effort and mental stress.”); Kohli et al., *supra* note 25, at 116-17 (discussing importance of producer assistance in customer decision making process to promote customer retention). This transition to a customer service and retention marketing strategy is likely an economic necessity since producers cannot continue the excessive and unsustainable customer acquisition practices of the late dot-com era. See Pandya, *supra* note 25, at 70-72 (noting that 1999 customer acquisition costs averaged between \$800-\$1100 per customer but customer



increases the ability of the consumer to achieve a preferred outcome despite a complete lack of control over the terms of the producer's adhesive, click-wrap contract.

I have argued elsewhere that bargaining power is an infinitely complex and dynamic phenomenon.<sup>67</sup> The complexity of bargaining power arises from the fact that almost any quality, characteristic or external event can create conditions that allow a bargaining party to influence the transaction to achieve a preferred outcome.<sup>68</sup> Moreover, bargaining power comprises multiple forms,<sup>69</sup> and courts generally lack the institutional competence necessary to perceive the real power relationship between the parties.<sup>70</sup> Consequently, while bargaining power appears throughout contract law,<sup>71</sup> courts have generally approached the phenomenon in a bipolar fashion. A party either has bargaining power or it doesn't, an on-off switch that determines in an incredibly sloppy fashion whether the apparently weaker party

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spending averaged only about \$400 per customer, suggesting importance of producer focus on maintaining customer satisfaction).

<sup>67</sup>For a detailed examination of the nature of bargaining power generally and judicial responses to bargaining power as a legal phenomenon, see generally Barnhizer, *supra* note 20. For a discussion of the role of bargaining power in defining the boundaries of core contract doctrine and the proper scope of state regulation of exchanges, see generally BARNHIZER, BARGAINING POWER AS CONTRACT THEORY, *supra* note 61. The following section summarizes many points explored in greater detail with those two articles.

<sup>68</sup>See Barnhizer, *supra* note 20, at 166-72.

<sup>69</sup>See *id.* at 172-76. Specifically, most instances of power fall within three dichotomous characteristics: Power may be visible or hidden, real or false, exercised or unexercised. See *id.* Visible power is that which is open and known to both sides, while hidden power includes sources of power known to only one of the parties that would be ineffective if revealed. The real versus false dichotomy captures the fact that power depends upon perception, and that deception and falsehood often provide a crucial factor in achieving preferred bargaining outcomes. Finally, power may be exercised or unexercised – that one of the parties had the ability to change the outcome of a bargain does not mean that the party will choose to do so or even know she has that ability. See *id.* (discussing in detail the matrix created by these dichotomies and its usefulness for drawing attention to non-obvious sources and forms of power in analyzing party relationships).

<sup>70</sup>See *id.* at 199-223 (analyzing general failure of judicial attempts to identify and assess bargaining power disparities in individual cases).

<sup>71</sup>Contract law includes doctrines that purport to assign legal consequences to bargaining power disparities between the parties both as an explicit element and implicitly. For example, courts often treat a disparity of bargaining power as an explicit element in unconscionability and public policy determinations. See, e.g., *Wille v. Sw. Belle Tel. Co.*, 549 P.2d 903, 906-07 (Kan. 1976) (identifying various bargaining power disparities as elements of unconscionability analysis); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003); cf. National Labor Relations Act of 1935, 15 U.S.C. § 151 (congressional findings that federal regulation of relations between organized labor and management is necessary because of social and economic disruptions caused by inequality of bargaining power). Implicitly, bargaining power analyses appear to influence the outcomes of apparently unrelated doctrines such as parol evidence rule determinations, principles of contract interpretation and analyses of consideration. See Barnhizer, *supra* note 20, at 149.

will gain access to a host of contract doctrines that work to the detriment of the apparently stronger party.<sup>72</sup>

Outside of the indeterminacy and incoherence of bargaining power doctrines at the level of individual cases, our fuzzy conception of this phenomenon also causes problems at a macroscopic level of analysis. Specifically, despite this legal indeterminacy, bargaining power is a real phenomenon that induces practical consequences in real-world interactions between bargaining parties. Gross disparities of bargaining power threaten the legitimacy of contract as an institution premised upon voluntary interactions of the bargaining parties.<sup>73</sup>

Contract law directly and indirectly polices power asymmetries through internal doctrines such as unconscionability, fraud, duress, the parol evidence rule and consideration.<sup>74</sup> Courts and legislatures also regulate bargaining power relationships on a macroscopic level by moving interactions marked by systemically flawed power relations along a continuum between private autonomy and public ordering.<sup>75</sup> Where the bargaining power relationship between transacting parties is “legally cognizable”—that is where courts and legislatures can consistently and credibly identify and assign legal consequences to a perceived power relationship—great disparities may justify moving the parties’ relation along this continuum away from “core contract” doctrines<sup>76</sup> to other regimes such as labor or criminal law.<sup>77</sup>

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<sup>72</sup>Thus, in *Lloyd’s Bank Ltd. v. Bundy*, 1975 Q.B. 326, 339 (C.A. 1974), the English jurist, Lord Denning, observed that inequality of bargaining power underlies many contract defenses, including duress, undue influence and unconscionability and suggested policing bargaining power disparities directly. See also Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 344-46 (1999) (analyzing Lord Denning’s theory of inequality of bargaining power on equitable grounds). Bargaining power also informs judicial analysis in the context of interpretation. See, e.g., *First Fin. Ins. Co. v. Purolator Sec., Inc.*, 388 N.E.2d 17, 21-22 (Ill. App. Ct. 1979) (bargaining power disparities affect judicial interpretation of contract terms); *Ferguson v. Lakeland Mut. Ins. Co.*, 596 A.2d 883, 885 (Pa. Super. Ct. 1991) (same); *Smith v. Westland Life Ins. Co.*, 539 P.2d 433, 440-42 (Cal. 1975) (applying reasonable expectations doctrine to interpret ambiguities in insurance contract against insurer in light of insured’s reasonable expectations); cf. Karl Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 673 (1925) (describing contra proferentum interpretation doctrine as judicial device to correct information disparities about the meaning of the terms of an adhesion contract). Similarly, courts may vary application of the parol evidence rule depending on the parties’ power relationship. See Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 7, 24 (1972) (noting empirical evidence suggests that courts do not apply parol evidence rule rigorously where parties suffer asymmetrical bargaining power).

<sup>73</sup>See SLAWSON, *supra* note 4, at 23-24 (“A lack of bargaining power in one or both parties is a reason for limiting their freedom of contract, their contracting power, or both.”).

<sup>74</sup>See *supra* note 71-72 and sources cited therein.

<sup>75</sup>See BARNHIZER, *BARGAINING POWER AS CONTRACT THEORY*, *supra* note 61, at 59-61.

<sup>76</sup>See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543-45 (2003) (noting that no one theory can explain the enforceability and non-enforceability of promises across all of what is called “contract law” and instead developing a positive and normative theory of a core of contract law based upon transactions between business firms); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1465 (2004) (“I argue that contracts involving individuals properly occupy

Thus, for example, the National Labor Relations Act of 1935 explicitly recognizes that relations between management and organized labor suffered from systemic bargaining power disparities that threatened interstate commerce.<sup>78</sup> Similarly, the fact that both parties in a charitable subscription transaction can be described as possessing bargaining power justifies actions by courts and legislatures in some jurisdictions to move charitable subscriptions from the regimes of gift and property to a contract model in which such subscriptions are enforceable.<sup>79</sup> In contrast, the bargaining power relation between parties making donative promises in the intrafamily context are typically tainted by messy and complicated power relations between family members that are not subject to easy unraveling, and consequently such promises are often treated as outside of contract law and unenforceable.<sup>80</sup>

One problem with this theory of bargaining power as defining the scope and extent of contract law is that, as discussed above, courts and legislatures analyze and account for bargaining power on only the crudest and most simplistic level.<sup>81</sup> This is primarily a consequence of the fact that the inputs to the power relationship – both in general and with respect to bargaining specifically – are generally impossible to measure, assess, isolate, or identify outside of a laboratory context.<sup>82</sup>

In identifying the legally cognizable power relations that can move a transaction closer to and further from core contract doctrines, however, legal decision makers do

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the center of our intuitive conception of contract, and I identify costs of allowing contracts that involve organizations to be governed by a legal regime that departs from the collaborative ideals that I am developing.”); cf. STEPHEN A. SMITH, *CONTRACT THEORY* 8-9 (2004) (asserting that scope of legal relations and doctrines comprising “contract” are determined by a generally accepted consensus of scholars and legal decision makers).

<sup>77</sup>See BARNHIZER, *BARGAINING POWER AS CONTRACT THEORY*, *supra* note 61, at 68 (“This continuum of contract and contractlike transactions comprises a wide array of state interactions, ranging from unenforceable donative promises, to the relatively private “core”-contract arrangements between businesses in the pluralist theory envisioned by Schwartz and Scott, through judicial interventions such as good faith and unconscionability, state-mandated substantive terms such as warranties and interest-rate caps, state-mandated bargaining procedures, state definitions of property rights, and on to wholly noncontract regimes such as criminal law.”).

<sup>78</sup>29 U.S.C. § 151 (1935) (citing “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers” as justification for federal regulation of labor-management relations); see also Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 131 (1992) (suggesting that state “sought to cure inequalities in contractual bargaining positions in such areas as antitrust, insurance, labor law, transport and banking”).

<sup>79</sup>See BARNHIZER, *BARGAINING POWER AS CONTRACT THEORY*, *supra* note 61, at 90 - 91.

<sup>80</sup>See *id.* at 85-91 (comparing donative promises in intrafamily and charitable subscriptions contexts).

<sup>81</sup>See Barnhizer, *supra* note 20, at 199-201.

<sup>82</sup>See Robert A. Dahl, *The Concept of Power*, in *POLITICAL POWER: A READER IN THEORY AND RESEARCH* 79 (1969) (concluding that the study of power as a discrete phenomenon is “a bottomless swamp”).

not need to be completely accurate. So long as those determinations are consistently repeatable and credible to other participants in and observers of the legal system, they continue to justify and support legislative regimes that regulate certain transaction types within contract and move others further away. Thus, while an insured may occasionally have superior bargaining power over an insurer,<sup>83</sup> practically everyone accepts the proposition that insurers systemically possess superior bargaining power in their dealings with insureds.<sup>84</sup> This consistent and credible statement of the power relationship justifies moving the policing of insurance contracts further from core contract doctrines through state insurance regulation of insurers,<sup>85</sup> special rules of contract interpretation,<sup>86</sup> and other non-contract doctrines.

But that explanation works only while the legal description of the power relation bears some relation to the reality it purports to regulate. For instance, early twentieth-century descriptions of power relations between firms and individuals with respect to employment contracts involved free individuals and free employers, both capable of protecting their own interests in dealing with the other.<sup>87</sup> These descriptions justified policing those bargains under the strong freedom of contract regime represented by cases such as *Lochner v. New York*<sup>88</sup> and *Adair v. United States*.<sup>89</sup> More and more, as the industrial age progressed, as employers grew in size

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<sup>83</sup>See, e.g., *Fisher v. Crescent Ins. Co.*, 33 F. 544, 545 (W.D.N.C. 1887) (“In cases of contracts for insurance the parties are not, in all respects, on equal footing, as the applicant for insurance has a better knowledge of the subject matter of the contract than the insurer . . .”).

<sup>84</sup>See, e.g., *Dean Witter Reynolds, Inc. v. Super. Ct.*, 259 Cal. Rptr. 2d 789, 796 (Cal. Ct. App. 1989); *David v. Oakland Home Ins. Co.*, 39 P. 443, 444 (Wash. 1895) (“[T]he insured and insurer . . . do not stand upon an equal footing. The insurer is always represented by persons of experience in such matters, while the insured is usually a man of much less general information . . .”).

<sup>85</sup>See, e.g., Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 374 (1921) (noting that state regulation governs all aspects of insurance contracts other than “whether they will insure or not, with whom they will insure, and for how much”).

<sup>86</sup>See *supra* note 72 and sources cited therein (discussing, inter alia, reasonable expectations and contra proferentum doctrines).

<sup>87</sup>See, e.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 250-51 (1917) (coal mine owner free to refuse to employ miners who were also members of union and miners were similarly free to accept such terms or seek work elsewhere); *Ocean Accident & Guarantee Corp. v. Indus. Comm’n of Ariz.*, 257 P. 644, 645 (Ariz. 1927) (noting that under laissez faire and strong freedom of contract theories “it was gravely insisted by bench, bar, and the leaders of society that the individual working man, without money, friends, or influence, must be ‘protected in his right to contract freely with his employer . . .’”).

<sup>88</sup>198 U.S. 45, 61 (1905) (holding that state has no power to interfere with employment contract between employee and employer by attempting to set hours and working conditions because such regulations interfere with parties’ constitutional liberty interest in freedom of contract), *overruled on other grounds by Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

<sup>89</sup>208 U.S. 161, 175 (1908) (“[T]he employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract

and market power, as individual workers perceived themselves to have lost whatever bargaining power they had in the pre-industrial era, the equal bargaining power claims of the *Lochner* regime no longer seemed to fit the actual experiences of labor market participants.<sup>90</sup>

Similar to the fundamental changes in social, economic, political and cultural patterns that accompanied industrialization, the information age also challenges our underlying notions of power relationships between contracting parties. Although the real impacts of these changes are still speculative, it can be argued that many of the industrial era protections for consumer transactions that are premised upon stereotyped caricatures of consumer/producer relations no longer make sense. Contract doctrines such as unconscionability, for example, depend in part upon clear divisions between powerful producers and weak consumers. Likewise, much consumer protection legislation depends upon the informational and other power disparities between producers and consumers. As the real power relations underlying these pre-information era legal regimes change, it is unlikely that the crude contract law models of bargaining power can continue to provide credible explanations for state regulation of some classes of consumer contracts.

*B. Development of a Property Metaphor for Bargaining Power, Consent and the Self*

The propertization metaphor offers a compelling alternative to the crude contract conception of bargaining power as an all-or-nothing affair. Many commentators have argued that the propertization of personal information and the commodification of contract in the information era justify additional regulation of consumer transactions.<sup>91</sup> While both questions are interesting in their own light, they

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which no government can legally justify in a free land.”), *overruled on other grounds* by *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

<sup>90</sup>See, e.g., Pound, *supra* note 19, at 454-56 (noting problems with assumption of strong freedom of contract regime that all parties had equal power to protect their interests in light of great perceived power disparities between large scale employers and individual employees); Isaacs, *supra* note 7, at 47 (noting that for many bargainers disenfranchised by business and employment practices of the early twentieth century, “freedom of contract has become a mere mockery”); JEROME FRANK, *LAW AND THE MODERN MIND* 156-57 (1930) (Anchor Books ed. 1963) (noting cases upholding regulation of working conditions as an example of initial step in “abandoning ‘medievalism’ when [judges] begin to procure, and to rely on, carefully prepared factual data as to the social setting of the cases which come before them for decision”); Karl N. Llewellyn, *What Price Contract? -- An Essay in Perspective*, 40 *YALE L.J.* 704, 751 (1931) (“Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass relationships.”); cf. Harold J. Laski, *The Basis of Vicarious Liability*, 26 *YALE L.J.* 105, 140-44 (1917) (suggesting that formalistic employment doctrines such as the fellow-servant rule should be abandoned in light of changes in the employment relationship and working conditions wrought by advent of industrial age).

<sup>91</sup>See Solove, *supra* note 12, at 1396 (“The more that is known about an individual, the easier it is to force his obedience. Through the use of databanks, the state and private organizations can transform themselves into omnipotent parents and the rest of society into helpless children.”); Michael J. Madison, *Reconstructing the Software License*, 35 *LOY. U. CHI. L.J.* 275, 322-25 (2003) (noting that wealthy can opt out of oppressive private contractual licensing regimes and critiquing consumer acquiescence as one cause of current oppressive practices in software licensing contracts); Katyal, *supra* note 6, at 290-316 (arguing that

potentially offer much more in the context of the overall bargaining power relation between consumers and producers in the information age.

Both phenomena impact the ability of consumers to affect the outcome of their interactions with producers. Producers already possess a significant bargaining power advantage over consumers through superior information regarding the product being sold and the value of the terms contained in their contracts.<sup>92</sup> But while access to information and the ability to set the default terms of the parties' bargain are usually important aspects of bargaining power,<sup>93</sup> they are not determinative. Instead, the commodification and/or propertization of these sources or components of bargaining power illustrates the deeper truth that the information age, with its defining characteristics of cheaper access to information, communications,

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privacy invasions by private entities, such as demands for data on consumer downloading activities and unauthorized remote searches of consumer hard drives to monitor violations of intellectual property rights, are oppressive and should be more closely regulated); Hillman & Rachlinski, *supra* note 13, at 429-31 (surveying articles suggesting existing contract rules, including protections for consumer assent, are inadequate); cf. Radin, *Online Standardization*, *supra* note 21, at 1139 (suggesting that Internet-based contracting may lead laypersons to reconceptualize their understandings of contract in favor of regulation under contract-as-product model).

<sup>92</sup>See SLAWSON, *supra* note 4, at 26-31. As Professor Slawson succinctly notes, while consumers must investigate characteristics and qualities of thousands of different products in myriad combinations, a producer "only needs to understand the products he produces." *Id.* at 26. Moreover, surrogates for direct investigation by the consumer, such as relying upon a producer's reputation or reports by third party investigators cannot solve the informational disparity because both measures provide only incomplete information about the particular product being purchased, if the consumer relies upon these sources at all. *See id.* at 27. Likewise, legislative attempts to improve consumer power, such as consumer protection laws, do not significantly affect the power dynamic because most products today – from loans to automobiles – are highly complex with many attributes that producers can manipulate to make consumer understanding or comparisons difficult. *See id.* at 28-29. And finally, the near-universal application of standard-form contracts to all consumer transactions "enables the producer to take maximum advantage of his superior understanding of the product and the law." *Id.* at 30.

<sup>93</sup>See, e.g., ROGER FISHER ET AL., *GETTING TO YES* 97-101 (2d ed. 1991) (emphasizing importance of developing information about each party's Best Alternative To Negotiated Agreement ("BATNA")); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 11-13 (2002) (emphasizing importance of information development and protection to the negotiation process); H. Lee Hetherington, *The Wizard and Dorothy, Patton and Rommel: Negotiation Parables in Fiction and Fact*, 28 PEPP. L. REV. 289, 311-15 (2001) (noting, inter alia, importance of information as source of bargaining strength); cf. HENRY S. KRAMER, *GAME SET MATCH: WINNING THE NEGOTIATIONS GAME* 98 (2001) (noting that "[d]ata collection and analysis is a key to negotiation success" and "[a]lthough good data can never in itself substitute for negotiation power, correct information will greatly facilitate your ability to wring from a negotiation the most advantageous outcome reasonably attainable"); STEVEN J. BRAMS, *NEGOTIATION GAMES: APPLYING GAME THEORY TO BARGAINING AND ARBITRATION* 227 (2d ed. 2003) (noting potential for information about other party's preferences to disrupt bargaining power).

information processing,<sup>94</sup> and incentives for customization, specialization and standardization<sup>95</sup> has created the conditions for reconceptualizing bargaining power and the consent power as either property rights in themselves or as boundaries that define, control, and protect from invasion the fundamental property interest in the self.

### 1. Invasions of Self in Information Era Consumer Contracting

With the constant onslaught of targeted marketing and commercial invasion of our personal privacy, the individual self is under attack, and individuals' ability to control that self grows more elusive. While rationally we might easily decide that the emergence of new powers and conditions allowed by the Internet and information technology is only a natural linear extension of the past and therefore a matter of degree, it is also possible that these new capabilities represent a change in kind distinct from historical conditions on which contract doctrines are grounded. After all, a nuclear bomb is still a bomb, but no one thinks of it in the same way as a stick of dynamite. The general category "bomb" is the same but entirely different rules apply to all phases of deployment, storage, transport and use. Similarly, pre-information age producers gathered and used their customers' personal information to increase sales and used adhesion contracts to control their risk exposure, but the invasion, collection, processing and use of private information and the active use of that information to attack the individual's ability to withhold consent is so unprecedented that it can only be described as a different kind of interaction than the quaint standard form paper contracts of yesteryear.

Before the information era, producers did generate consumer profiles based upon information gleaned from their interactions with those consumers.<sup>96</sup> But the informational inputs for those models were incomplete compared to what can be gathered and processed today, and much of the data lacked the fluidity that characterizes today's models.<sup>97</sup> While such incomplete profiles could provide

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<sup>94</sup>See Schwartz, *Property, Privacy, and Personal Data*, *supra* note 27, at 2060-73 (describing methods of data collection, processing and commodification of personal information).

<sup>95</sup>See Radin, *Online Standardization*, *supra* note 21, at 1144-46 (noting that online contracting environment makes possible new kinds of customization such as manufacturing goods to order or customization of terms, but also fosters standardization of contract terms to facilitate increased use of machine-made contracts).

<sup>96</sup>See TUROW ET AL., *supra* note 44, at 8:

The offline activity [collection of consumer data and using that data for targeted marketing to consumers] has actually been going on for quite a while. As early as the 1980s, financial and leisure firms as well as elite retailers were following the logic of developing relationships with customers based upon digital repositories and their treating them differently based on what they learned. They created the databases by soliciting information from their customers, buying information about their lifestyles from data brokers, and tracking their interactions with them.

<sup>97</sup>See Schwartz, *Data Processing*, *supra* note 3, at 1325-39 (noting that historically, information profiles of individuals were incomplete and that "[t]he computer changes personal information into a fluid form, which allows it to be applied at many stages of administrative decisionmaking").

commercial benefits by allowing producers to track their best-valued customers, the limitations of the paper medium and the costs associated with maintaining such profiles and reacting to them would restrict the types of customers and transactions in which they would be most commercially exploitable.<sup>98</sup>

In contrast, information era producers and data miners can use data harvested from nearly every interaction between consumers and providers of goods, services, charities, and political and social organizations to produce a “finely-grained”<sup>99</sup> electronic copy or doppelganger of individual consumers.<sup>100</sup> Producers create and purchase this data solely for the purpose of building these electronic doppelgangers of individual consumers to tell the producer what cues and stimuli will create a desired response in consumers.<sup>101</sup> In a very real sense, the doppelgangers provide producers with proxies for the individual’s self. In the right combinations the doppelgangers may merely doom us to the boredom of fulfilled expectations. My doppelganger on Amazon.com, for instance, has led me to exceed my margin of diminishing returns in several sub-genres of science fiction.<sup>102</sup>

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<sup>98</sup>Cf. TUROW ET AL., *supra* note 44, at 8 (noting that early commercial use of consumer profiles was restricted to high-value transactions such as financial, leisure and “elite” retailing firms).

<sup>99</sup>Schwartz, *Privacy and Democracy*, *supra* note 29, at 1620 (“As a result of cyberspace code, surfing and other cyberspace behavior generate finely granulated data about an individual’s activities – often without her permission or even knowledge.”).

<sup>100</sup>See Govern, *supra* note 22, at 1034-43, 1045-47 (detailing amount of information collected from individuals, use of information to create individual consumer profiles, and commercial use of profiles to increase sales); Katyal, *supra* note 6, at 241-44 (noting that careless consumers now transfer and sell personal information to third parties “often without the individual’s knowledge”).

<sup>101</sup>See Katyal, *supra* note 6, at 241-44. And although a full discussion of the issue is beyond the scope of this Article, it is useful to note that information and communications technology in many ways has increased our control over how our selves and identities manifest to the outside world. First, by lowering search and information costs, the Internet and similar technologies assist consumers in identifying and acquiring those products that best fit the self image they wish to project and assist producers in identifying formerly unexploitable niche markets and exploiting them. Thus, as Professor Julian Velasco suggested in response to an early workshop presentation of this paper, the Internet makes it possible for a manufacturer of leg lamps to identify and market to the geographically dispersed group of oddball consumers who would purchase such products. The availability of such unique goods in turn helps the oddballs better express their inner selves through the purchase and display of lamp icons generally deemed unacceptable in polite society. Second, “[o]n the Internet, nobody knows you’re a dog.” Peter Steiner, *Cartoon*, *NEW YORKER*, July 5, 1993, at 61. The general anonymity and separation of person from identity allowed by information culture allows participants to craft their own preferred identity, whether it be a hip and sexy swinger at the other end of a particularly witty text message, a political firebrand on a discussion forum or blog, or an umpteenth-level battle-mage in popular massive multi-user roleplaying adventure games like Everquest.

<sup>102</sup>Interestingly, the doppelgangers may produce at the margins a feedback effect between the consumer and her electronic profile. Take Amazon.com’s recommendation list, which appears to be based partly on their own algorithms and upon the behavior of other consumers who purchase or review the same products. When I make a purchase, for example, of Robert A. Heinlein’s “Starship Troopers,” Amazon.com logs that purchase in my profile and suggests



In other combinations, however, the doppelganger is manipulative and vaguely evil – it tells producers whether and how much to serve me as a customer,<sup>103</sup> who I am and how to get me to jump when the producer pushes the right buttons.<sup>104</sup> For instance, as I learned with the births of my two daughters and resulting deluge of junk mail, pop up ads, spam, and targeted banner ads, producers who know a consumer’s income, address, local school choices, and family status can prey upon a new parent’s insecurities regarding the future and significantly increase the chances of selling increased life insurance, homeschooling materials, private school options, college savings accounts and purported child-safety devices for the home.<sup>105</sup> While many of these offers were interesting, some were so invasive and blatantly manipulative that I actively fantasize about where Dante would have placed marketers of childrens’ educational products.

## 2. Inadequacy of Contract-Based Power Models in Information Era Consumer Contracting

In the information era context, the crude bargaining power models used by contract law cannot explain the rich and detailed texture of the real power relationship between consumers and producers. In contract, courts often determine the parties’ bargaining power relationship and then justify that determination by piling on one or more categories of situations or classes that typically suffer bargaining power weakness. Thus, in *Northwest Acceptance Corp. v. Almont*

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other books based upon that profile and upon purchases by other consumers who also bought that book. Importantly, though, my doppelganger is not a perfect match for my tastes. It will tend to make some recommendations that match well – i.e., Joe Haldeman’s “The Forever War” – and some that lie outside the margins of my current preferences – i.e., Ursula K. LeQuinn’s “The Left Hand of Darkness.” By actively marketing LeQuinn’s novel, however, Amazon.com increases the chances that I will read it and potentially develop a new taste for that sub-genre. To the extent my tastes represent my self, Amazon.com’s doppelganger will, in effect, have changed my preferences and thus, to a slight extent, developed my personality or self in direction it would not have gone absent the doppelganger’s influence.

<sup>103</sup>See Anthony Danna et al., *All that Glitters is not Gold: Digging Beneath the Surface of Data Mining*, 40 J. BUS. ETHICS 373, 373-74 (2002) (noting uses of sophisticated data mining and analysis software to identify high-value customers with whom the producer should develop a relationship management strategy to retain the customer and to offer different content and service than that provided to low-value customers); Saeed et al., *supra* note 66, at 228 (noting that organizations can use technology to “personalize, augment, or even transform the services they provide to customers”).

<sup>104</sup>In a more dangerous example of the potential for harm raised by the availability of such detailed pictures of ourselves, the Chicago Police Department has recently warned its undercover officers that dozens of data mining services can provide any interested buyer with detailed records of their cell phone activity. See Main, *supra* note 43 (noting “[c]riminals can use such records to expose a government informant who regularly calls a law enforcement official” or an undercover officer who uses an undercover cell phone to call “personal numbers such as home or the office”).

<sup>105</sup>See also *Kugler v. Romain*, 279 A.2d 640, 643-53 (N.J. 1971) (condemning as unconscionable and deceptive trade practice door-to-door educational book sellers’ practice of targeting low-income, limited education consumers living in primarily minority neighborhoods for high-pressure sales efforts to sell educational materials at 2.5 times actual retail value).

*Gravel, Inc.*,<sup>106</sup> the court determined that a buyer of manufacturing equipment lacked bargaining power because the negotiations occurred over 45 minutes, the contract was signed in a parking lot and the buyer later stated he “felt he had a gun to his head.”<sup>107</sup> Similarly, in *Pardee Construction Co. v. Superior Court*,<sup>108</sup> the court explicitly excluded evidence that first-time homebuyers might have had meaningful alternatives to purchasing a home from the defendant’s development project.<sup>109</sup> And in the other direction, as Professors Larry Garvin and Blake Morant have observed, small businesses typically are denied access to doctrines based upon bargaining power asymmetries merely because they are presumed to be sufficiently sophisticated to avoid the impacts of such disparities.<sup>110</sup>

This crude model of bargaining power as an inherent quality or characteristic of the parties may have been necessary in the industrial and post-industrial periods. An individual grunt laborer attempting to contract with a large producer probably does lack bargaining power in negotiating for employment terms.<sup>111</sup> The employer has a functionally unlimited supply of workers, while the employee must sell his labor at

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<sup>106</sup>412 N.W.2d 719 (Mich. Ct. App. 1997).

<sup>107</sup>*Id.* at 720-23.

<sup>108</sup>123 Cal. Rptr. 2d 288 (Cal. Ct. App. 2002).

<sup>109</sup>*See id.* at 294.

<sup>110</sup>*See* Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 297 (2005) (“In their dealings with consumers, small businesses must give protections based on asymmetries that may not exist. In their dealings with larger businesses, small businesses are treated as though the parties are essentially equal, which will not usually be true save in the most formal sense.”); Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 244-46 (2003) (reporting results of empirical survey showing that small businesses often face substantial challenges to viability, including lack of bargaining power).

<sup>111</sup>The contemporary controversies surrounding employment of day laborers in many cities, for instance, is at least partly concerned with the hiring and “negotiation” process in which prospective day laborers – who are often illegal immigrants – congregate at a common hiring site and are hired on a job-by-job basis. *See, e.g.*, Nathan Thornburgh, *Inside America’s Secret Workforce*, TIME, Feb. 6, 2006, at 39 (describing hiring of day laborers and noting that influx of illegal workers is driving down wages even for more established illegal immigrants); David Cho, *\$400,000 to Aid Day Laborers*, WASH. POST, May 12, 2005, at T03 (noting that many day laborers are illegal immigrants, problems associated with laborers congregating at hiring sites such as business parking lots, and problems experienced by day laborers including lack of breaks and shorted pay from employers). *But see* P.S. ATYIAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 339 (1979) (noting that increased bargaining power of trade unions was not the cause of rise in wages from early- to later-industrial era).

The reason why the wage of the worker of (say) 1850 was only a fraction of his wage today is because the national product in 1850 was only a fraction of the national product today. The difference made by the shift in the relative bargaining power of employers and workmen only affects the additional, relatively small proportion of the wage which the employer can pay without bankrupting himself on the one hand, and the worker can forgo without serious loss to himself on the other hand.

*Id.*

some price or starve.<sup>112</sup> Similarly, it may have been enough for Judge Skelly Wright that Mrs. Williams of *Williams v. Walker-Thomas Furniture Co.*<sup>113</sup> fame was a poor, unsophisticated black woman on welfare to justify his suggestion that she lacked bargaining power and could not understand the meaning of the add-on security clause at issue in that case.<sup>114</sup>

In the “bad old days” before widespread use of the Internet and other information technologies, consumers had high information costs, little time to shop, few sources from which to shop, and a relatively narrow selection of mass produced, standardized products and contract terms from which to choose. The process involved significant costs, including time spent obtaining information about a product or terms, scheduling requirements, and the cost and time of transport to different sites at which the desired products could be found. Any efforts that a consumer made at improving his or her bargaining position versus an individual seller were generally expensive, could affect only limited aspects of the deal, and the benefits were uncertain. In purchasing an automobile, for example, a consumer might stop by the local library or subscribe to magazines such as Consumer Reports, might search the newspapers for sales and discounts, might get word-of-mouth references from other consumers (who were likely as ignorant as she was) about various products and sellers. In other words, that consumer might spend days seeking out low-quality bargaining power inputs.

The cost of these bargaining power improvements was high and the benefits could not clearly be measured. Moreover, it was impossible to determine the value of each incremental investment in developing additional bargaining power.<sup>115</sup>

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<sup>112</sup>See, e.g., James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1106-07 (1987) (“[U]nlike producers of other perishable commodities, workers cannot save costs in an unfavorable market by ceasing production. . . . The worker cannot cease to maintain her labor power without starving her body.”); Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. LEGAL HIST. 413, 414 (1994) (“The fact is that the working man has only his labor to sell, and he must sell it in order to purchase the necessities of life for himself and his family.”); cf. RICHARD C. OVERTON, PERKINS/BUDD: RAILWAY STATESMEN OF THE BURLINGTON 5-6 (1982) (relating 1870s business opinions of Charles E. Perkins, then vice-president of the CB&Q Railroad, that “[i]f one man can by frugality get along on fifty cents a day, and will work for that, another man who requires a dollar is not entitled to have it”). But see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 975-76 (1984) (arguing that employees often do possess substantial bargaining power in dealing with employers).

<sup>113</sup>350 F.2d 445 (D.C. Cir. 1965).

<sup>114</sup>See *id.* at 449-50 (suggesting that plaintiffs lacked bargaining power but remanding for further findings). But see Eben Colby, Note, *What Did the Doctrine of Unconscionability do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 652-54 (2002) (containing a historical investigation suggesting that local residents who dealt with Walker-Thomas Furniture Co. were aware of the practical effects of defaulting on credit payments, regardless of whether they actually understood the specific contract terms).

<sup>115</sup>Cf. Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 8-14 (2000) (“Power is not precisely quantifiable because it is complex – arising from numerous factors and their interrelationships both within the individual and the relationship (‘social context’) of the individual with the opponent – and based upon a nearly purely subjective analysis of those

Visiting one more dealership, doing one more hour of research, bringing a friend to the bargaining session—all of these actions theoretically could increase the bargaining power of a car shopper. But given the variations between transactions and the high costs of collecting and organizing information on different transactions, whether any given investment in bargaining power could potentially yield greater benefits than costs was impossible to determine. Similarly, variations between shoppers—in wealth, demeanor, bargaining skill, experience, knowledge, gender, and stubbornness—could also significantly impact the shopping process.<sup>116</sup>

Even the most assiduous bargainer in that context could likely do little to improve her bargaining position, regardless of additional time, education, information search, and other costs incurred. Moreover, even if Mrs. Williams—or any pre-information era consumer, for that matter—had taken specific steps to improve her bargaining position, the effects of those steps could not be measured because her interaction with Walker-Thomas Furniture would be unique compared to any other consumer. Under these conditions, legal decision makers had no real choice in adopting a rough-and-ready conception of bargaining power because a more complex and more nuanced model could not yield superior results.<sup>117</sup>

### 3. Developing an Information Era Model of Bargaining Power

The information era, in contrast to the paper contracting paradigm, offers a much more interesting picture of bargaining power. Consumers and producers in the information era possess many options for improving bargaining power, options that are discrete, identifiable, low-cost, and—thanks to advances in data collection and processing, communication and standardization—carry measurable benefits. Information era bargaining power inputs are, in essence, commodities that can be identified, priced, bought, sold and owned by producers and consumers. This does not mean, however, that consumers or even producers can adequately measure the value of every specific bargaining power input.<sup>118</sup> Rather, with reduced information

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factors.”). As Adler & Silverstein note, power is based largely upon perceptions and without an actual contest the parties are only guessing about each other's actual bargaining power. *See id.* at 14.

<sup>116</sup>During my post-high-school employment at a small auto dealership a few miles outside the relatively wealthy community of Chagrin Falls, OH, for example, I observed first-hand substantial differences in the way the sales staff approached bargaining with young car buyers from inside town versus local buyers. One sales person actually told me that they explicitly steered the buyers from town to sporty cars and rarely lowered the price significantly, whereas local buyers tended to bargain harder for cheaper, more practical cars. Similarly, Professor Linda Babcock and Sara Laschever report that women generally negotiate less for similar products than men, and consequently end up paying significantly more for the same good or service. *See generally* LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

<sup>117</sup>Of course, courts and legislatures always had the option of doing away with specific bargaining power-based standards altogether. *See* Barnhizer, *supra* note 20, at 193 & n.223 and accompanying text (suggesting that legal conception of bargaining power “has proved so slippery and indefinable, so vague and nebulous, and so open to uncertainty that its utility for explaining any element of the bargaining relationship is doubtful”).

<sup>118</sup>*See infra* notes Part IV.C and accompanying text (noting that despite information collection and processing tools it is still likely impossible to accurately assess power in

and transaction costs, markets can now provide additional products and services that increase or reduce consumer and producer bargaining power.<sup>119</sup>

Thus, information tools lower costs associated with search, information acquisition and evaluation, and other transaction costs for many different consumer

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individual cases and arguing that contract law should abandon inequality of bargaining power as relevant consideration in such cases).

<sup>119</sup>These bargaining power inputs may be positive - increasing a party's ability to control the outcome of the bargain - or negative - decreasing the other party's power. On the positive side, consumers, for example, have access to nearly unlimited information about producers, their products, their prices and their reputations. *See supra* notes 121-130 and accompanying text (surveying informational tools available to consumers in e-commerce). Consumers also can easily access inexpensive brokers for a wide range of products, have lower search costs to identify products that satisfy their needs and desires, and can educate themselves regarding the meaning of contract terms, bargaining and shopping tactics, and their legal or extra-legal options in the event of a dispute. *See* AllBusiness.com, *What Are Boilerplate Provisions in Contracts?*, <http://www.allbusiness.com/articles/Contracts/789-1551-1777.html> (last visited Mar. 4, 2006) (describing purposes and uses of boilerplate clauses and providing links for defining boilerplate contract terms); May Wong, *Consumer Reports: Shopping Online Smarter*, ASSOCIATED PRESS, Nov. 4, 2005, available at [http://www.livescience.com/technology/ap\\_051104\\_shop\\_online.html](http://www.livescience.com/technology/ap_051104_shop_online.html) (last visited Mar. 4, 2006) (providing advice on effective online search, shopping and purchasing).

On the negative side, consumers can take some steps to decrease producer bargaining power, such as installing protective software that prevents most types of covert online data mining and using Internet browsers with robust privacy protections. *See, e.g.*, Ad-Aware Personal, <http://www.lavasoftusa.com/software/adaware/> (last visited Feb. 23, 2006) ("Ad-Aware Personal provides advanced protection from known data-mining, aggressive advertising, Trojans, dialers, malware, browser hijackers, and tracking components."). The Mozilla Foundation's open-source Firefox web browser, for example, provides strong privacy protections with the base program, including easily accessible features that permit users to exercise substantial control over typical invasions such as pop-up advertisements, cookie downloads and an easy means of deleting all clickstream data from the user's hard drive. *See* Firefox 1.5, <http://www.mozilla.com/firefox/> (last visited Feb. 23, 2006) (reviewing security and privacy features of Firefox web browser); *see also* Allen Fear & Richard Vamosi, *CNET Review of Firefox 1.5*, [http://reviews.cnet.com/Firefox\\_1\\_5/4505-9241\\_7-31516411-2.html?tag=nav](http://reviews.cnet.com/Firefox_1_5/4505-9241_7-31516411-2.html?tag=nav) (last visited Feb. 23, 2006) (reviewing features of open-source Firefox web browser program, including security enhancements). Other programs permit consumers to bar all incoming email, cookies, javascript programs, and other privacy invasions except for those coming from trusted "whitelisted" sources, i.e., a list of trusted sources that are always permitted to operate upon the user's computer or interface. *See* Wikipedia, <http://en.wikipedia.org/wiki/Whitelist> (last visited May 7, 2006). Finally, the truly paranoid can access a wide array of free- and pay-site Internet browsing anonymizers that will prevent data miners from grabbing any meaningful clickstream data, disposable email addresses, and remailers. *See* *How Anonymizers Work*, [http://www.livinginternet.com/i/is\\_anon\\_work.html](http://www.livinginternet.com/i/is_anon_work.html) (last visited Feb. 24, 2006) ("An anonymizer protects all of your computer's identifying information while it surfs for you" by routing the individual web surfer's clickstream through a separate computer or network, thereby placing a virtual wall between third-parties and the individual's clickstream data); Heinz Tschabitshtcher, *Top 10 Disposable Email Address Services*, <http://email.about.com/cs/dispaddrrevs/tp/disposable.htm> (last visited Jan. 9, 2005) (describing disposable email services that permit consumers to provide producers with valid email addresses that can be deleted if used to send spam and providing links to popular sites); Living Internet, *Remailers*, [http://www.livinginternet.com/i/is\\_remailers.htm](http://www.livinginternet.com/i/is_remailers.htm) (last visited Feb. 25, 2006) ("A remailer enables you to send and receive email while keeping your real email address secret, by retransmitting your email with an anonymous return address.").

transaction types to near zero.<sup>120</sup> The cost of performing an Internet price comparison search for most products is *de minimus*, but often yields significant price advantages.<sup>121</sup> Similarly, information technology lowers the cost of identifying suitable products and salient product features, as well as research on negotiation tactics,<sup>122</sup> the meaning and legal effect of boilerplate contract terms,<sup>123</sup> and easy access to legal representation if the deal goes sour.<sup>124</sup> Consumers unskilled at

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<sup>120</sup>See Michael R. Galbreth et al., *A Game-Theoretic Model of E-Marketplace Participation Growth*, J. MGMT. INFO. SYS., vol. 22 no. 1, Summer 2005, at 295, 298 (“given the possibility of a high level of buyer and seller participation, electronic markets can enable nearly perfect competition”); Cenk Kocas, *Evolution of Prices in Electronic Markets Under Diffusion of Price-Comparison Shopping*, J. MGMT. INFO. SYS., vol. 19 no. 3, Winter 2003, at 99, 100 (noting that Internet creates potential for efficient markets, although that potential has not yet been fully realized); Amy E. Cortese, *Good-bye to Fixed Pricing?*, BUS. WK., May 4, 1998, at 71-72 (projecting that Internet and information technology will reduce menu costs – the costs that producers incur to adjust their prices – and interaction costs so much that competitive bidding will become the norm for purchasing goods and services).

<sup>121</sup>See Pandya, *supra* note 25, at 70 (“[I]nstead of clicking across multiple sites, 80% to 90% of buyers of books and CDs visited only one site, even though prices of books and CDs across Web sites varied by as much as 25% to 30%.”); see also TUROW ET AL., *supra* note 44, at 7-8 (noting overall lack of consumer sophistication regarding Internet pricing practices, data collection, and fraudulent schemes).

<sup>122</sup>See, e.g., Kelly Blue Book, <http://www.kbb.com> (last visited Jan. 20, 2006) (providing links to articles providing advice on researching, financing, negotiating and purchasing new and used automobiles); Edmunds.com, <http://www.edmunds.com/advice/> (last visited Jan. 20, 2006) (same). Intriguingly, Edmunds.com also provides an extensive advice section relating specifically to women that identifies the existence of a gender gap in dealership treatment of car buyers and advises women about avoiding common discriminatory tactics. See Edmunds.com, *The Women and Family Car Guide*, <http://www.edmunds.com/women/index.html> (last visited Jan. 20, 2006); cf. BABCOCK & LASCHEVER, *supra* note 116, at 115-16 (noting that women “are willing to pay as much as \$1,353 to avoid negotiating the price of a car, compared to half as much, \$666, for men”).

<sup>123</sup>See, e.g., Curt M. Langley & Jason T. Martin, *Boilerplate Terms, Rules of Interpretation, and Developments in Drafting Contracts*, <http://images.jw.com/com/publications/204.pdf> (last visited May 7, 2006) (explicitly identifying and explaining numerous types of boilerplate terms); Jordan Schrader P.C., *Don't Get Burned By the Boilerplate*, <http://www.jordanschrader.com/articles/article0062.html> (last visited May 7, 2006) (discussing legal effect of boilerplate terms and surveying reasonable expectations doctrine); Allbusiness.com, *Top 10 Contract Drafting Mistakes*, [http://smallbusiness.yahoo.com/r-article-a-1401-m-1-sc-11-top\\_ten\\_contract\\_drafting\\_mistakes-i](http://smallbusiness.yahoo.com/r-article-a-1401-m-1-sc-11-top_ten_contract_drafting_mistakes-i) (last visited May 7, 2006) (listing boilerplate terms of particular importance to contract drafters in small business context).

<sup>124</sup>A Google search on February 18, 2006 for “Legal Services,” for example, produced 1.25 billion hits, with the top three commercial links leading to Prepaid Legal Services, Inc. and two attorney referral services, Legal Connection and Legal Match. See Pre-Paid Legal Services, Inc., <http://www.prepaidlegal.com> (offering a variety of legal services plans with varying levels of consultation and representation for about \$25 per month, depending upon jurisdiction); LegalMatch, <http://www.legalmatch.com> (lawyer referral service); Legal Connection, <http://www.legalconnection.com> (lawyer referral service).

negotiation can obtain free advice or locate negotiation training,<sup>125</sup> acquire the services of agents or brokers for many different types of transactions,<sup>126</sup> including insurance, automobiles, homes and employment, and – more importantly – check agent reputations and the results delivered by the agents.<sup>127</sup>

In other contexts, the ability of the parties to improve their own or diminish their opponent's bargaining power is less clear. The relative détente in terms of information between consumers and producers means that consumers in the United States<sup>128</sup> have lost the battle for control over their private information,<sup>129</sup> but

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<sup>125</sup>The Internet is replete with free content advising consumers on shopping and negotiation strategies and tactics. See, e.g., May Wong, *Consumer Reports: Shopping Online Smarter*, [http://www.livescience.com/technology/ap\\_051104\\_shop\\_online.html](http://www.livescience.com/technology/ap_051104_shop_online.html) (last visited Feb. 20, 2006) (providing search, information gathering, and shopping strategies and tactics); Kelley Robinson, *5 Ways to Negotiate More Effectively*, <http://sbinfocanada.about.com/cs/marketing/a/negotiationkr.htm> (last visited Feb. 20, 2006) (providing strategies and tactics for improving negotiation skills). At least one negotiation services firm – The Negotiation Skills Company, Inc. – provides a discussion forum in which forum participants can submit specific questions regarding negotiation tactics and strategies to a specialist and review and search past answers dealing with a wide array of situations. See The Negotiation Skills Company, Inc., *Questions from our Website Visitors and Answers from TNSC*, <http://www.negotiationskills.com/qa.php> (last visited Feb. 20, 2006).

<sup>126</sup>See, e.g., Mike Hudson, *Using a Car Broker to Buy Your Next Vehicle*, <http://www.edmunds.com/advice/buying/articles/103283/article.html> (last visited Jan. 21, 2006) (offering advice on hiring and using a broker for automobile purchases); see also Ken Shaw, *Hiring an Auto Broker Rarely Saves You Money; It's Like Two People Trying to Share a Meal that's Meant for One Some in the Business Double-Dip, Collecting Fee From Client, Dealer*, *TORONTO STAR*, Apr. 30, 2005, at G12 (arguing that automobile brokers are unlikely to deliver significant savings to clients given auto manufacturer and dealer movements toward higher-volume/lower-margin sales strategies).

<sup>127</sup>See Hudson, *supra* note 126 (“But like any deal, it's important to do a little research on the broker before you jump headlong into their arms, drawn by promises of lower prices and advocacy for your needs.”).

<sup>128</sup>The European Union purports to take a much more protective attitude toward propertization of personal information through its Data Privacy Directive. See, e.g., Julia M. Fromholz, *The European Data Privacy Directive*, 15 *BERKELEY TECH. L.J.* 461, 466-69 (2000) (surveying Data Privacy Directive protections against collection of personal information).

<sup>129</sup>Theoretically, it is possible to maintain some control over personal information. A substantial portion of American adults, for example, choose to remain offline for various reasons, including lack of interest, lack of time, fear or lack of understanding of technology, fear of fraud, pornography, and lack of access. See SUSANNAH FOX, *THE PEW INTERNET & AMERICAN LIFE PROJECT, DIGITAL DIVISIONS 2-4* (2005); AMANDA LENHART ET AL., *THE PEW INTERNET & AMERICAN LIFE PROJECT, THE EVER-SHIFTING INTERNET POPULATION 10-13* (2003). Market forces, as well as general pique with Microsoft over its perceived reputation for privacy and security protections, have driven the development of technological privacy protections such as the Firefox browser, Privacy Protection Protocols (P3P), adblockers, Internet browsing anonymizers, remailers, and encryption. On the other hand, in researching this paper, I attempted to install a robust suite of such privacy tools. After much investigation, downloading, installing, tweaking, cursing, and more tweaking, my Internet browsing has slowed to a crawl, and I am still often forced to rely upon the Internet Explorer browser to view important legal research databases and .pdf files.

producers have likewise lost or given up substantial control over their pricing information<sup>130</sup> and online reputations.<sup>131</sup> And, as the e-commerce format matures, producers are shifting from a customer acquisition model of marketing and service to a customer retention model.<sup>132</sup> Under the latter model, producers increasingly compete on the basis of customer service and improving or maintaining customer relationships, rather than on price.<sup>133</sup>

On the producer side of the scale, it is important to note that such dramatically expanded access to information is not a panacea to consumer bargaining power deficiencies.<sup>134</sup> Consumers still cannot negotiate or shop contract terms beyond a

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<sup>130</sup>See F. GERARD ADAMS, *THE E-BUSINESS REVOLUTION & THE NEW ECONOMY* 140-42 (2004) (noting significant cost savings in B2C and B2B e-commerce contexts over paper contexts, as well as substantial unmeasured gains resulting from convenience and greater access to information).

<sup>131</sup>As one example of this lack of producers' control over their online reputations, consumers have developed many "corporate complaint" websites designed to spread information about negative experiences the consumers have suffered with particular businesses. Because such sites are as readily available to consumers as the producer's own site, they may have a significant impact on some firms. See Ronald F. Lopez, *Corporate Strategies for Addressing Internet "Complaint" Sites*, Aug. 1999, [http://www.constructionweblinks.com/Resources/Industry\\_Reports\\_\\_Newsletters/August\\_1999/august\\_1999.html](http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/August_1999/august_1999.html) (last visited Feb. 13, 2006) (noting stories of two businesses – EPS Technologies and Express Success, Inc. – that apparently suffered significant lost revenues as a result of poor responses to corporate complaint sites). Courts have generally rejected firms' attempts to shut down such negative websites. See *Lucas Nursery and Landscaping, Inc. v. Grosse*, 359 F.3d 806, 810 (6th Cir. 2004) (stating that a noncommercial consumer complaint site does not violate Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), where consumer operated site solely to complain of producer's service and did not register domain name to sell to business); *TMI, Inc. v. Maxwell*, 368 F.3d 433, 439-40 (5th Cir. 2004) (same); *Bally Total Fitness Holding Corp. v. Faber*, 29 F.Supp. 2d 1161, 1162 (C.D. Cal. 1998) (rejecting claims of trademark infringement, trademark dilution and unfair competition against consumer who operated website titled "Bally's Sucks"). But see *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 680-81 (9th Cir. 2005) (stating that a noncommercial consumer complaint site that uses firm's mark in domain name may violate Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), if cybersquatter registered domain name with "bad faith intent to profit").

<sup>132</sup>See *supra* notes 63 - 66 and accompanying text.

<sup>133</sup>See, e.g., Hillman & Rachlinski, *supra* note 13, at 469-70 (suggesting that Internet producers are particularly sensitive to maintaining their online reputations and may thus avoid enforcing onerous contract terms); Report Shows Top Online Retailers Are Leaving Money on the Table; Improvements in Online Customer Satisfaction Could Improve Bottom Line, *BUS. WIRE*, June 1, 2005 ("In many cases, companies that are competing primarily on . . . price are competing on the wrong thing. Our study shows that price matters some of the time but key aspects of the site experience matters (sic) 100 percent of the time – literally 100 percent.").

<sup>134</sup>Professor Slawson has expressed substantial skepticism about the ability of consumer product information providers to affect significantly the producer's substantial advantage over the consumer in information and bargaining power. See SLAWSON, *supra* note 4, at 27 (noting that while Consumer Reports and other special interest magazines can slightly reduce the producer advantage, the usefulness of such reports is limited by both the consumer's ability to understand the information presented, the consumer's limited attention span, and the fact that it is impossible to investigate more than a small fraction of the total purchases made by consumers).



few salient product characteristics such as price, the color of the good, or the length of the insurance term. Moreover, at least some producers appear to be responding to price transparency and low menu costs by either hiding their prices<sup>135</sup> or by offering different prices to different buyers based upon characteristics such as buyer loyalty or buyer sophistication.<sup>136</sup> Similarly, many providers have incentives to vary the

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<sup>135</sup>For example, I have noticed that some of the larger web retailers such as Amazon.com have started withholding prices of some sale items unless I put those items in my online shopping cart. Theoretically, this practice could prevent competitors from employing web search programs to survey Amazon.com's prices on various items. Cf. Patricia L. Bellia, *Defending Cyberproperty*, 79 N.Y.U. L. REV. 2164, 2176-78 (2004) (surveying cases involving property-based claims by e-commerce producers against third parties who used software robots to extract producer pricing information for commercial use). Amazon.com's explanation for this practice suggests that they are attempting to prevent third parties from undercutting their prices:

The "click for price" message indicates an additional discount is in effect, and this discount is calculated in the Shopping Cart. You can see this price by clicking the product name and then selecting the Add to Cart button on the product information page. Please be assured that simply adding an item to your cart does not obligate you to buy it--you can always delete the item from your cart if you decide not to purchase it.

Amazon.com, *Why Don't We Show the Price?*, <http://www.amazon.com/exec/obidos/tg/feature/-/174014/002-9516208-0776028> (last visited Dec. 30, 2005). An equally plausible, albeit more cynical, explanation is that a consumer is more likely to purchase something that is already in his online shopping cart than something that can be evaluated and ignored without taking any steps toward commitment. Cf. Melissa Carpanelli, *Combatting Shopping Cart Abandonment*, Entrepreneur.com, available at <http://www.aol.entrepreneur.com/aolsb/article/0,4558,318313,00.html> (last visited May 7, 2006) (noting econsumers abandon approximately half of online shopping carts).

<sup>136</sup>See Anita Ramasastry, *Web Sites Change Prices Based on Customers' Habits*, CNN.com, June 24, 2005, <http://ucg.net/2005/LAW/06/24/ramasastry.website.prices/index.html> (last visited Feb. 24, 2006) (noting Internet "enables businesses to collect detailed information about a customer's purchasing history, preferences, and financial resources – and to set prices accordingly"); Paul Krugman, *Reckoning: What Price Fairness?* N. Y. TIMES, Oct. 4, 2000, at A35 (opining that price discrimination (or 'dynamic pricing'), while unfair, may actually be good for the economy because the practice efficiently segments markets); Joseph P. Bailey, *Internet Price Discrimination: Self-Regulation, Public Policy, and Global Electronic Commerce*, May 1, 1998, at 3-4, <http://www.tprc.org/abstracts98/bailey.pdf> (noting that reduced menu costs in e-commerce context promote ability of producers to engage in price discrimination, but that "in many cases, consumers can develop a strategy to counteract price discrimination"). As Turow et al. note, "[P]rice discrimination is a logical corollary to behavioral targeting." TUROW ET AL., *supra* note 44, at 10. In addition to offline environments in which producers such as financial institutions, department stores and supermarkets profile customers and offer differentiated service to high- and low-value customers, e-commerce provides a unique dynamic pricing opportunity for producers:

Merchants consider the online environment a particularly ripe area for such "dynamic pricing" -- that is, for first-degree price discrimination driven by behavioral targeting. Writing in *Harvard Business Review*, associates from McKinsey & Company chided online companies that they are missing out on a "big opportunity" if they are not tracking customers' behavior and adjusting prices accordingly. Consultants urge retailers to tread carefully, though, so as not to alienate customers.

*Id.* (citations omitted).

quality of their informational offerings in order to better segment their markets.<sup>137</sup> And the jury is still out on whether increased competition and information on contract terms will force producers to adopt efficient terms in their online or offline adhesion contracts.<sup>138</sup>

The bottom line for this contest is that both consumers and producers have a wider, more robust, and more clearly defined array of bargaining power tools available than at any time in the past. But more important than potentially heightened consumer power, the costs of many bargaining inputs have diminished and the benefits are sufficiently identifiable that investments in additional bargaining power inputs now make sense in many more contexts than in pre-information era consumer contracting. In other words, the significance of information era bargaining power tools is not just that there are more potential ways to improve consumer bargaining power, but also that consumers are better able to take advantage of those tools over a wider variety of transactions.

#### IV. BARGAINING POWER AND THE RAMIFICATIONS OF A PROPERTIZATION METAPHOR

The contract law model of bargaining power cannot account for these drastically varied and dynamic changes to the bargaining power relationship between consumer and producer. In contrast, the commodification and propertization of personal information and producer contract rights provide a useful metaphor for

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<sup>137</sup>See Frederick J. Riggins, *Market Segmentation and Information Development Costs in a Two-Tiered Fee-Based and Sponsorship-Based Web Site*, J. MGMT. INFO. SYS., vol. 19 no. 3, Winter 2003, at 69, 73-74 (noting that while information dissemination and distribution on Internet is essentially costless regardless of quantity of information disseminated, many providers of information goods on the Internet have incentives to offer low-quality information goods to low-end consumers and superior-quality information goods to high-end consumers willing to pay). Thus, many content providers maintain Web sites with two tiers of content – free low-quality content and high-quality content available for a subscription or fee.

<sup>138</sup>Professors Hillman and Rachlinski, for example, note that in the paper and online contracting paradigms “[t]he ability of businesses to identify efficient allocation of risks [through contract terms] also gives them the opportunity to exploit consumers by getting them to accept terms that inefficiently shift risks to consumers.” Hillman & Rachlinski, *supra* note 13, at 440 (citing Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1269-73, 1275 (1993) (“[T]he law has given drafters of form contracts the power to impose their will on unsuspecting and vulnerable individuals.”)). Theoretically, competitive pressures should force reputation-sensitive producers with inefficient contract terms to adjust those terms in response to market demands, even if only a small portion of potential customers are savvy enough to demand such terms. *See id.* at 442-44 (also noting situations in which producers would not have incentives to provide efficient contract terms, including lack of sufficient number of savvy consumers, lack of concern over reputation, and producers’ ignorance of their own contract terms). The online business environment – where disgruntled e-consumers can quickly communicate their beefs with particular producers to all other interested e-consumers – potentially ameliorate producers’ ability to impose inefficient terms or at least their willingness to enforce particularly harsh terms. *See id.* at 469-74. *But see* Korobkin, *supra* note 7, at 1217-44 (arguing that producers have strong incentives, in light of boundedly rational nature of consumers, to offer low-quality, non-salient contract terms and other product attributes and compete only on nearly universally salient product characteristics such as price).

reconceptualizing how to account for and react to bargaining power between contracting parties. First off, let me make clear that in analogizing the consent power or bargaining power to property rights, I am not talking about a return to *Lochnerian* ideals of a substantive due process right or a property right in freedom of contract.<sup>139</sup> Nor am I addressing whether consent should be protected under a regime of property or liability rules.<sup>140</sup>

Rather, I am intrigued by the idea of property as a means of protecting the individual against claims of the state and of other private entities. As Professor Radin notes, the creation or elimination of property rights in any subject matter has profound policy implications not just for the “thing” being propertized, but also within surrounding legal “neighborhoods” such as “contractual ordering, competition, and freedom of expression.”<sup>141</sup> For Radin, propertization refers to a dynamic process by which a society debates and defines which tangible or intangible things should be subject to control by property owners and how much control those owners should have in relation to the rights of other members of society.<sup>142</sup> The information propertization phenomenon is the process by which the state and society recognize property rights in information, data collections, and creative works and determine how much control the “owners” of these newly-created property interests should have over that information.<sup>143</sup> In that context, Radin makes a key observation that the policy debate over whether and how much to propertize such information “should take account of information propertization’s legal milieu” to maintain coherent “doctrinal, policy, and practical boundaries . . . [and] achieve sound economic and social policy as expressed and implemented through the law as a whole.”<sup>144</sup>

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<sup>139</sup>See *Adair v. United States*, 208 U.S. 161, 180 (1908) (finding statute that prohibited termination of employee for membership in labor union unconstitutional as “illegal invasion of the personal liberty as well as the right of property of the defendant, Adair”) *overruled on other grounds by Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

<sup>140</sup>See Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 2-3 (1993) (distinguishing between unconscionability as a property rule that prohibits enforcement of any part of contract obtained improperly and as a liability rule that prohibits only enforcement of unreasonable terms).

<sup>141</sup>Margaret Jane Radin, *A Comment on Information Propertization and its Legal Milieu*, 54 CLEV. ST. L. REV. 23 (2006).

<sup>142</sup>See *id.* at 23-24. Radin identifies five characteristics of the “investigation of whether something is or ought to be property or a property right.” First, property is controlled by society. Second, propertization (and by implication “depropertization”) is a dynamic process whereby things move in and out of a property regime. Third, “becoming property is a process,” and, fourth, a thing involved in that process may move anywhere along a continuum of greater or lesser property rights. Finally, the lines between property and not-property are subject to debate. See *id.*

<sup>143</sup>See *id.* at 25-26.

<sup>144</sup>*Id.* at 27; see also Craig Anthony Arnold, *The Reconstruction of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 363 (2002) (“[I]f courts and legislatures treat idea-expression, identity-expression, and information-expression as property, they should consider the range of interests in the objects of this intellectual property, particularly interests in using such objects for free expression of political, educational, and cultural speech. Property is a web of interests, not a unitary entitlement.”).

While Radin's observations are important for the suggestion that intellectual property law must account for doctrine and policy in surrounding regimes like contract, competition law, and free speech, it is also true that the surrounding legal regimes can benefit from improved heuristics drawn from the propertization metaphor. This is particularly true with conceptions of bargaining power in contract law, which traditionally have underdeveloped notions of the real power relations between bargaining parties and relied instead upon stylized, formalistic, and static legal responses to perceived power imbalances.<sup>145</sup>

In contrast to the equal/unequal power dichotomy typically found in judicial contract law analyses, property speaks directly to discrete interests subject to the control of the property owner and to the owner's right to exclude others from invading that interest.<sup>146</sup> The meaning or core idea of private property itself is uncertain,<sup>147</sup> ranging from nothing more than a temporary and revocable license granted by the state and subject to change at any time<sup>148</sup> to a strong or near-absolute dominion by a private person over things, land, ideas, and information.<sup>149</sup> But at its

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<sup>145</sup>See Barnhizer, *supra* note 20, at 213-16 (surveying judicial use of status characteristics in bargaining power analyses); see also Arthur Allen Leff, *Unconscionability and the Code--The Emperor's New Clause*, 115 U. PA. L. REV. 485, 556-57 (1967) (noting courts "seem continually to have taken a kind of sub rosa judicial notice of the amount of power of certain classes of people to take care of themselves, often without too much inquiry into the actual individual bargaining situation.").

<sup>146</sup>See, e.g., Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 372, 377-390 (2003) (surveying theories of property and characterizing "the right to exclude [as] part of the unified set of rights that constitute the concept of property that is defined and protected by our legal institutions").

<sup>147</sup>See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 4 (2003) ("We seem, in fact, to have multiple conceptions of the power of property in law – some of which strongly protect individual interests, in the way that rights are traditionally understood, and some of which do not."). Given that I am interested in property and propertization solely for metaphorical purposes in developing a reconception of bargaining power in the consumer context, this Article is purposefully agnostic regarding the debate over the true nature and justification of property and property rights.

<sup>148</sup>See Kevin Gray & Susan Francis Gray, *The Idea of Property in Land*, in *LAND LAW: THEMES AND PERSPECTIVES* 41-43 (Susan Bright & John Dewar, eds. 1998) ("[T]he concept of property in land may well denote no more than a temporarily licensed form of utility or user privilege which may be extended, varied, or withdrawn at the sole discretion of the state and on terms dictated by it."); Daniel W. Bromley, *Private Property and the Public Interest: Land in the American Idea*, in *LAND IN THE AMERICAN WEST: PRIVATE CLAIMS AND THE COMMON GOOD* 29 (William G. Robbins & James C. Foster eds. 2000) ("Land rights are granted by the polity because of the larger social benefits that arise therefrom. . . . But that grant of ownership, that consent, must always be predicated upon the larger social good."); see also UNDERKUFFLER, *supra* note 147, at 3 n.9 (quoting Gray & Gray, *supra*, as one extreme in range of possible theories of property rights).

<sup>149</sup>See, e.g., Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1697 (1999) ("Courts seem to be replacing the traditional rationale for trademark law with a conception of trademarks as property rights, in which trademark 'owners' are given strong rights over the marks without much regard for the social costs of such rights."); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895-904 (1997) (observing trend in favor of treating information and intellectual

heart, the idea of property concerns control and exclusion.<sup>150</sup> Property rights are those rights that permit an individual to secure and control his relationship with the claimed property to the exclusion of others.

This metaphor incorporates well into the analysis of bargaining power. At its core, bargaining power represents the ability of a party to achieve a preferred outcome in an exchange transaction. In exercising bargaining power, a party asserts a species of control or dominion over his self, expressing preferences for one bargain or set of terms over another. Thus, at this level, bargaining power establishes one set of boundaries by which a bargaining party controls or owns his self in the bargaining context.<sup>151</sup> At another level, individual inputs to bargaining power may be described as being propertized. For example, information is often noted as a key element of bargaining power. The information economy represents the current pinnacle of a process of developing vast quantities of information into collections that can be manipulated, processed, and divided into discrete units that markets can evaluate and offer for sale to producers and consumers alike. As information becomes propertized and “ownable” in the information economy, that component of bargaining power likewise becomes more and more like property.<sup>152</sup>

By viewing bargaining power in terms of discrete, property-like inputs supplied by the market that consumers can evaluate and invest in to improve their position and in turn protect their ability to control manifestations of their selves through contract, the propertization metaphor creates the potential for developing a more realistic mechanism for evaluating the parties’ relative power. As discussed below, however, this improved heuristic for assessing relative power ironically may destroy the inequality of bargaining power doctrine as a legally meaningful device for judicial evaluation of individual cases. The value of the propertization heuristic instead lies on the more general level of legislative action in which both courts and

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property as strong or absolute property rights and concluding that propertization of intellectual property law is “a very bad idea”); cf. Schwartz, *Property, Privacy, and Personal Data*, *supra* note 27, at 2058 (defining property as “any interest in an object, whether tangible or intangible, that is enforceable against the world”).

<sup>150</sup>See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967) (“Private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner's private rights.”); LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 18-23 (1970) (“[O]wnership typically has something to do with the right to use, the right to transfer, and the right to exclude others from the thing owned”); David D. Haddock & Lynne Kiesling, *The Black Death and Property Rights*, 31 J. LEGAL STUD. 545, 558-61 (2002) (noting that while private property rights imply that “use by one individual precludes simultaneous use by another,” few property interests are purely open or purely private); cf. Mossoff, *supra* note 146, at 377-92 (observing that the right to exclude is an essential, but not sufficient, characteristic of property and is a corollary of the substantive possessory rights of acquisition, use and disposal).

<sup>151</sup>Cf. Katyal, *supra* note 6, at 233 (“[I]n real space, property rights, coupled with architecture serve as a defensive shield to protect privacy.”).

<sup>152</sup>While information is the easiest example of a bargaining power input that is in the process of propertization, other facets of negotiation strength are also subject to this process. For example, another common indicator of bargaining power – the availability of meaningful alternatives – is the implicit foundation of many Internet-based goods and services, such as price comparison websites, online travel agencies, and Internet auction sites.

legislatures determine which transaction types should be regulated according to “core” common law contract doctrines and which suffer from such systemic disparities of bargaining power as to require state intervention to protect weaker parties against exploitation.

*A. Propertization as an Improved Heuristic for Assessing Power Relationships*

Property’s foundation in discrete boundaries upon the rights of individuals potentially provides a much more detailed depiction of bargaining power in the information age than the on/off dichotomy of contract law. The contract model for assessing bargaining power looks primarily to limitations on a party’s bargaining power. Did the parties lack meaningful alternatives? Was one of the parties operating under necessity? Did the parties fit within the traditionally weak or strong status classifications such as poverty, gender, age, education, business sophistication and so on?<sup>153</sup> Once the court satisfies that determination – one way or the other – the inquiry stops.<sup>154</sup>

This contract-based view of bargaining power phenomena may make sense in a pre-information era context in which the noise created by high information costs and wide variations between transactions obscures the availability, effects, and benefits of actions that could possibly increase or decrease bargaining power. Under this view, bargaining power is not a means for protecting consent or control of the self, it is just a medium, like air, in which interactions take place. We may know when it is present or absent, and we can occasionally sense movements in that medium, but we generally do not attempt to discern its component parts or track its impact upon other objects. As a consequence, it makes little sense to ask what parties could have done to improve their bargaining power or to protect their ability to withhold consent because post hoc judicial assessments of any particular course of action will be purely speculative.<sup>155</sup>

Post-information era advances in information and communications technology, however, mean that parties (and possibly courts and legislatures) can now identify

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<sup>153</sup>See Barnhizer, *supra* note 20, at 200-01 (“Typical characteristics of individual parties relied upon by courts to support an inference of inequality of bargaining power include wealth, business sophistication, education or knowledge, race, gender, “size” of the parties, monopoly power, and consumer status. And as a final alternative, many courts eschew standards for assessing inequality of bargaining power, relying instead upon a “we-know-it-when-we-see-it” approach.); *see also supra* notes 115-117 and accompanying text (noting traditional bargaining power inputs).

<sup>154</sup>See *supra* notes 67-72 and accompanying text (noting bipolar fashion in which courts approach bargaining power analyses).

<sup>155</sup>Notably, however, courts have occasionally suggested that parties could – and should – have taken alternative courses to improve their bargaining position. *See, e.g., Deminsky v. Arlington Plastics Machinery*, 638 N.W.2d 331, 342-43 (Wis. Ct. App. 2001) (holding that provision requiring purchaser of plastic manufacturing machinery indemnify seller for seller’s negligence or product defects was not unconscionable, in part because purchaser could always have chosen to buy machinery elsewhere or to forego acquiring machinery entirely); *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 403-04 (Utah 1998) (observing that employee presented with adhesive employment contract including at-will employment clause was not coerced into signing agreement because employee always had the option of quitting and seeking work elsewhere).

discrete bargaining power inputs and, in many cases, make rough value assessments of those additional inputs in relation to the proposed transaction. More importantly, we can assess whether a party had any meaningful options for improving his or her negotiation position and whether the party unreasonably failed to do so. Again using the automobile shopping context as an example, buyers with Internet access<sup>156</sup> can acquire basic information on the product, the manufacturer, the seller, prices, warranty options, and other salient characteristics at minimal expense. For about five dollars, a car buyer can subscribe to Consumer Reports for one month and order new car price reports that include information on dealer incentives and rebates.<sup>157</sup> Twenty to twenty-five dollars will buy a vehicle history report detailing whether the vehicle has ever been in an accident, flooded, burned, rejected under state lemon laws, and other major issues.<sup>158</sup> For as little as \$200, a buyer with little time or bargaining skill can hire an auto broker to negotiate the purchase for them.<sup>159</sup> And on the back end of the deal, third-party insurers compete for extended warranty business on both new and used cars.<sup>160</sup> While the market values of such services do not necessarily portray the exact benefits a consumer will receive in terms of increased bargaining power, the fact that the market offers and identifies a particular value for such services permits consumers at least to evaluate and make a decision as to whether to invest in a particular input.

*B. Bargaining Power as a Protection of the Property Interest in the Self*

Contract concerns manifestations of the self in the objective world through the exercise of consent. Consent provides an indication of personal identity to the world as the self manifests its preferences for some types of contracts and not others.<sup>161</sup>

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<sup>156</sup>Approximately 22% of American adults claim they have not used the Internet or email and that they do not have Internet access at home. See SUSANNAH FOX, DIGITAL DIVISIONS 3 (2005). The Pew Internet & American Life Project reports that 32% of these non-Internet users have no interest in accessing the Internet, while only 31% of the non-users completely lack access, and smaller minorities of non-users avoid accessing the Internet because “they are too busy or think going online is a waste of time,” or getting access is difficult, frustrating or expensive. *Id.*

<sup>157</sup>See ConsumerReports.org, Consumer Reports Bottom Line Price, <http://www.consumerreports.org/cro/cars/the-consumer-reports-bottom-line-price-405.html> (last visited Jan. 21, 2006).

<sup>158</sup>See Carfax.com, <http://www.carfax.com> (last visited Jan. 21, 2006).

<sup>159</sup>See, e.g., Mike Hudson, *Using a Car Broker to Buy Your Next Vehicle*, <http://www.edmunds.com/advice/buying/articles/103283/article.html> (last visited Jan. 21, 2006).

<sup>160</sup>See, e.g., Carbuyingtips.com, *How To Buy An Auto Extended Warranty*, <http://www.carbuyingtips.com/warranty.html> (last visited Jan. 21, 2006).

<sup>161</sup>Importantly, consent is only a subset of the overall class of voluntary actions and choices that form every individual’s character and project that character to the world. Professor Jonathan Jacobs, for example, persuasively and elegantly develops the Aristotelian notion that individuals voluntarily develop their own characters through the exercise of personal choices and habituation of those choices, and thus bear responsibility for the manifestations of that character in the world. See JONATHAN JACOBS, CHOOSING CHARACTER 10-33 (2001). Sartre similarly builds on this theme of choice and responsibility as voluntary manifestations of the self:

Thus, by consenting to a contract for a particular product—an automobile, refrigerator, mortgage, or a law school education—an individual consumer adopts and promotes a particular external picture of the self.<sup>162</sup> If external forces impair the power to grant or withhold consent, such that a party is compelled to enter a particular contract or eschew another, in a sense that party no longer fully “owns” his self because he cannot exclusively control how that self operates or manifests to the world. The property interest in that manifestation of the self has been impaired.

If the consent power is one manifestation of a property interest in self-identity, bargaining power represents the fence around it. By analogy, a rancher may own both a parcel of real property and the length of barbed wire and fence posts around that parcel, but the proper use of one piece of property enhances and defines the other property. Similarly, bargaining power comprises these separate inputs that may be property analogs in themselves, but their true value lies in maximizing the consent power they surround and protect. Thus, for example, an individual may invest tremendous labor, time, and money in obtaining a business education, or in developing decision-management software, or in hiring legal counsel to assist in business negotiations. The individual “owns” those bargaining power inputs, but they have value primarily as means of protecting the individual’s power to grant or withhold consent in various transactions and contexts.

Despite the availability of such discrete and identifiable bargaining power inputs, consumers display wide heterogeneity in the degree to which they take advantage of readily available tools that will maximize their ability to achieve a preferred outcome in the transaction. As noted previously, even in situations involving homogenous commodities such as CDs and books, some, if not most, e-consumers regularly fail to perform price comparisons or shop at more than one site.<sup>163</sup> Others routinely do so.

Such heterogeneity is not surprising. Parties often possess bargaining power that they fail to exercise.<sup>164</sup> They may not be aware that they possess that power, may not know the results of exercising their power, may be restrained by obligations to third

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The most terrible situations of war, the worst tortures do not create a non-human state of things; there is no non-human situation. . . . [I]n addition the situation is *mine* because it is the image of my free choice of myself, and everything which it presents to me is *mine* in that this represents me and symbolizes me.

JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMAN EMOTIONS* 52-59 (Hazel E. Barnes, trans.) (1957). There are many other opportunities for development and expression of the self—including consent or choice in the political, social, familial, and religious contexts. But while action in those contexts—our votes, friendships or enmities, support, and tithes—will advantage or disadvantage other actors in a relatively restricted and unmeasureable sense, our choices in the commercial context provide the most tempting targets for manipulation by everyone else who wants our money.

<sup>162</sup>See Allen, *supra* note 53, at 751-57 (analyzing privacy as necessary context in which individuals develop moral autonomy necessary to participate through exercise of personal choices and in response to external obligations in the public sphere and emphasizing need for morally autonomous individuals to separate actions in public sphere from private sphere).

<sup>163</sup>See *supra* note 121 and accompanying text.

<sup>164</sup>See Barnhizer, *supra* note 20, at 171-72 (noting that parties may often possess sources of power that they do not exercise for various reasons, including ignorance, lack of willpower, external pressures from other parties, and hopes for maintaining good future relations between the parties).



parties, or may merely be unwilling to use that power.<sup>165</sup> The important question in the consumer transaction context asks whether contract law should hold consumers responsible—by denying them access to protective doctrines such as unconscionability, undue influence, duress, avoidance for public policy, the parol evidence rule, the reasonable expectations doctrine, and interpretive rules like *contra proferentum* that are based upon bargaining power weaknesses—for their failure to take reasonable, low-cost steps to improve their bargaining power and protect their ability to withhold consent. If Mrs. Williams knew that Walker-Thomas Furniture Co. would repossess all items financed under the add-on security clause, and she intelligently accepted the risk, should she be barred from claiming unconscionability under an inequality of bargaining power theory when she defaults on her loan payments?<sup>166</sup> If a single Internet search would have shown this problem, did the consumer lack bargaining power, or just fail to access a cheap and readily available source?

Contract law doctrines employing bargaining power do account for the role of personal responsibility to some extent. The official comment to U.C.C. § 2-302, for example, explicitly provides that “[t]he principle [of unconscionability] is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”<sup>167</sup> Reliance upon a misrepresentation or promise that the party knows to be false or unreliable will generally preclude claims of fraud or promissory estoppel arising from one party’s monopoly on truthful information.<sup>168</sup> Likewise, although more relevant to questions of assent than issues

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<sup>165</sup>*See id.*

<sup>166</sup>This question is actually important and intriguing. As Eben Colby observes in a well-researched and documented historical analysis of the *Williams* backstory, the community serviced by Walker-Thomas Furniture Co. was probably generally aware that the company would repossess all financed items upon any default in payments. *See Colby, supra* note 114, at 625 n.1, 652. As Colby notes, even rioters trashing the store in response to the assassination of Rev. Martin Luther King Jr. specifically called for looters to “Get the books! Get the books!” *See id.* at 625 n.1 (quoting William Raspberry, *The Day the City’s Fury Was Unleashed: Lessons of the Riots*, WASH. POST, Apr. 3, 1988, at A1). Likewise, while Mrs. Williams “testified that she did not understand the actual contracts . . . Walker-Thomas Furniture Company had filed approximately one hundred writs of replevin each year for many years preceding Williams’s litigation and appears to have acquired a reputation for its actions.” *Id.* at 652.

While not sure about Ora Lee Williams in particular, an attorney that has represented the furniture company is of the opinion that many of the people in the neighborhood, and many customers of the store, were familiar with the repercussions of not making timely payments – specifically that the company would repossess all items sold to that customer.

*Id.*

<sup>167</sup>U.C.C. § 2-302 cmt. 1.

<sup>168</sup>*See, e.g.,* *Foremost Ins. Co. v. Parham*, 693 So.2d 409, 421 (Ala. 1997) (holding party who was “fully capable of reading and understanding . . . documents, but nonetheless made a deliberate decision to ignore written contract terms” could not show reasonable reliance necessary to support claim of fraud); *Nei v. Burley*, 446 N.E.2d 674, 676-77 (Mass. 1983) (rejecting, for lack of reasonable reliance, real property buyer’s claim of fraud against seller and real estate broker for failure to disclose seasonal water problem on site where buyer had notice of seasonal water issues and purchased property anyway); RESTATEMENT (SECOND) OF

of bargaining power disparities, court decisions relating to shrink-wrap and click-wrap contracts have shown little sympathy to consumer claims that they were unable to learn about, read, print and understand the terms of these contracts. In *Hill v. Gateway 2000, Inc.*,<sup>169</sup> for example, the Seventh Circuit's affirmation of the enforceability of "money now—terms later" shrink wrap contracts in effect imposes responsibility on consumers to take the additional step of returning the purchased product to the producer in order to protect both their bargaining power and their power to withhold consent.<sup>170</sup>

*C. Propertization of Bargaining Power at the Judicial Level of Analysis: The End of the Inequality of Bargaining Power Doctrine*

By creating the basis for a wide heterogeneity of individual bargaining power, information technology has potentially destroyed bargaining power as a legally meaningful concept in many consumer contexts. Arguably, courts could continue employing the tired old proxies for negotiating strength—wealth, education, sophistication, gender, race, and so on—and just add "Internet access and sophistication" as one more item in the list.<sup>171</sup> To the extent that approach deviates at all from traditional contract models for assessing bargaining strength, it will likely merely add additional factors to be considered in an already indeterminate and incoherent inquiry.

The problem with that approach is that the propertization of bargaining power inputs is not just an exercise in identifying items for the list of attributes that

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CONTRACTS § 90 cmt. b (stating that enforcement of promise under promissory estoppel theory may depend upon reasonableness of promisee's reliance).

<sup>169</sup>105 F.3d 1147 (7th Cir. 1997).

<sup>170</sup>*See id.* at 1151; *see also* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 401-402 (2d Cir. 2004) (observing that user of online domain name registration information is bound by use restrictions of which it became aware after first request for registration information); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (holding that shrink wrap contract in which consumer has opportunity to review terms and reject if unacceptable is sufficient to create enforceable contract upon use of product); Caspi v. Microsoft Network LLC, 732 A.2d 528, 125 (N.J. Sup. Ct. 1999) ("The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement."); *cf.* In re RealNetworks, 2000 WL 631341, at \*2-3 (N.D. Ill. 2000) (holding in context of "written agreement" requirement under Federal Arbitration Act that "the process of printing the License Agreement is no more difficult or esoteric than many other basic computer functions, and the melodrama and over exaggeration with which Intervenor describes the alleged impossibility of printing the License Agreement is disingenuous").

<sup>171</sup>Many commentators have worried, for instance, that the "digital divide" will create a new social class division between those with Internet access and those without. *See, e.g.*, Patricia M. Worthy, *Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of "Universal Service,"* 26 HASTINGS COMM. & ENT. L.J. 1, 39-48 (2003) ("[T]oday's digital environment has evolved to the point that a 'digital divide' between distinct groups of Americans is at risk of becoming a form of 'information apartheid' . . . based on income, . . . race, and geography. . . ."); Andrea M. Matwysyn, *Silicon Ceilings: Information Technology Equity, the Digital Divide and the Gender Gap Among Information Technology Professionals,* 2 NW. J. TECH. & INTELL. PROP. 2, 2-4 (2003) (noting that while "women use the Internet in greater numbers than men, the number of women who are information technology professionals . . . lags far behind that of men").

typically give rise to power in most relationships. Instead, by looking at bargaining power as comprising discrete, identifiable, valuable and “ownable” inputs, which in turn act to fence or guard the individual self’s ability to fend off unwanted approaches, we move from a gross weighing of crudely-recognized limits on the individual’s power to the much more interesting question of what an individual could do to improve her situation. Many of the traditional considerations are relatively immutable—an individual generally does not quickly become sophisticated, educated, wealthy or poor, or change races or genders easily.<sup>172</sup> But the Internet changes everything. With low information and transaction costs, the Internet and accompanying information technology creates the potential for consumers to identify additional bargaining power inputs and to acquire them cheaply, quickly and easily.

Power, at least in social situations, is generally about the potential, not the actual, and that is the question that the Internet throws squarely in the face of the contract model for measuring relative bargaining strength. What if Mrs. Williams had a friend over when the Walker-Thomas Furniture Co. rep knocked on her door? How about a competitor’s catalog showing substantially better terms and promising “we won’t repo your whole house for one missed payment”? A quick reference guide discussing the pros and cons of add-on security clauses? A lawyer sitting quietly on the kitchen stool? Each of these possibilities is a hammer blow to her claims of bargaining weakness and at a certain point we just lose sympathy. Instead, we ask “what did Mrs. Williams know and when did she know it?”

As power becomes commodified and propertized, discrete and identifiable, marketable and marketed, the onus should shift to the allegedly weak parties to justify why they did not take reasonable steps to improve their bargaining position. A friend of mine recently got a great bargain on his vehicle insurance from an insurance provider that eventually denied his claim when the vehicle caught fire. Afterward, he discovered that his Secretary of State’s website prominently listed that insurer as having engaged in numerous deceptive trade practices and bad faith claim denials. A simple Google search would have revealed significant problems. While the insurer may have violated state insurance regulations and potentially committed fraud or other deceptive trade practices, it seems unreasonable to assert inequality of bargaining power as a justification for an unconscionability claim in that case because the insured could have found other providers and could have known the reputational issues surrounding the “great” price on watercraft insurance.

Tempting as such ideas are from an individual responsibility and strong personal autonomy point of view, the most likely outcome of these scenarios is not a refinement of traditional approaches to assessing bargaining power. Instead, in the context of individual cases, the propertization of bargaining power and consent power illustrates the absurdity of attempts to impose legal consequences based upon relative bargaining power.

First, the Internet creates as many power issues as it resolves. The same technological developments that permit consumers to drive better bargains may also generate new sources of bargaining power disparities, as with the digital divide

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<sup>172</sup>Of course, other factors often employed by courts to weigh relative bargaining power may change quickly, including availability of meaningful alternatives, necessity, and opportunity to negotiate. See Barnhizer, *supra* note 20, at 213-15 (analyzing relationship between individual characteristics such as wealth or sophistication and transactional characteristics such as availability of meaningful alternatives or necessity).

phenomenon<sup>173</sup> and Seth Godin's second divide between the digiterati and the technological herd.<sup>174</sup> No matter how many new sources of bargaining power the information era creates for producers and consumers, there are always additional, unknown and perhaps unknowable sources of power outside of what we can see, and those sources will be outcome determinative.

Second, the easy availability of potential sources of power may finally destroy inequality of bargaining power as a legally meaningful construct in individual cases. Analogous to Radin's suggestion that the strongly adhesive nature of Internet-based contracting may finally change lay perceptions that contracts are worthy of enforcement because they are "bargained for" or "agreed to,"<sup>175</sup> the ability of a consumer to make reasonable, cheap, and quick improvements in their bargaining position may erode perceptions of power as a static phenomenon. The availability of so many reasonable and affordable means for consumers to increase their bargaining power strongly suggests that if courts insist on assessing the parties' relative bargaining power then the parties should be responsible for their decisions not to make reasonable investments in developing their positions. If it is widely-known that many consumers improve their bargaining strength, then that potential becomes at least as important to the analysis of relative strength as the parties' actual power. While we may fool ourselves into thinking that we can figure out the actual balance of power between contracting parties, it seems unlikely that any court could sit through arguments relating to the potentially infinite array of things the weaker party could have done to get a better deal.

*D. Propertization of Bargaining Power Inputs Informs Legislative-style Decisionmaking Regarding State Intervention into Private Contracts*

On the macro level, treating bargaining power as an analog to property may be useful for grounding normative judgments that a particular class of transactions should be moved closer in or further out from "core" contract doctrine.<sup>176</sup> The problem with the bargaining power justification for defining where along the continuum between pure private autonomy and pure public orderings a particular transaction type belongs is that those placements are based upon systemic assessments of the relative bargaining power of the parties. Where those bargaining power assessments are legally cognizable—that is where legal decision makers can consistently repeat those assessments across similar transaction types and where

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<sup>173</sup>See *supra* note 171 and accompanying text.

<sup>174</sup>See Godin, *supra* note 35 (describing "new" digital divide between technologically savvy "digiterati" and the rest of us who are merely content to adopt new technologies after they enter the mainstream).

<sup>175</sup>See Radin, *Online Standardization*, *supra* note 21, at 1140 (noting that while lay people tend to "conceive of contract as dickered consent between two people," an online contracting environment will erode that conception).

<sup>176</sup>See *supra* notes 78-81 and accompanying text (using examples of National Labor Relations Act of 1935 and charitable subscriptions law to illustrate situations in which courts and legislatures have moved transaction types closer to or further from the "core" of common law contract).

observers accept those assessments as credible—they justify decisions on the degree of regulation appropriate for a particular transaction type.<sup>177</sup>

Where the initial determinations do not reflect the parties' actual power relationship or changing circumstances over time alter traditionally accepted power assessments, the decision to move the transaction closer in or further from core contract doctrine becomes insupportable. Thus, while the traditional assessment of the bargaining power relationship between strong insurers and weak insureds<sup>178</sup> likely was correct when made, the information era has undoubtedly increased the bargaining power of insureds who can now easily compare coverage, prices, claim denial rates, firm reputation, and sanctions or warnings issued by state regulators, and in many cases, fine tune their insurance requirements to a greater degree than was possible in the pre-information era. Admittedly, insureds have never, and likely never will, have greater bargaining power than insurers,<sup>179</sup> but it is also true that the traditional picture of the completely helpless insurance consumer no longer makes sense.

Treating bargaining power as comprising a body of discrete potential inputs in the information era, however, may partly resolve this problem. The property model of bargaining power creates a more finely-grained picture of bargaining power by identifying additional discrete sources of bargaining power and the potential value of additional investments in developing those sources. Traditionally acknowledged sources of power such as wealth, education, and business sophistication remain relevant to power assessments, but the availability of additional discrete inputs such as price and warranty shopping, information on producer reputation and others necessarily changes the nature of such inquiries. But the bargaining power story of oppressed consumers makes sense only where the consumers cannot take reasonable steps to improve their situation. The proper analysis in the information era is not whether consumers, women, ethnic and racial minorities, the elderly, the poor, the uneducated, the needy, buyers in monopolized markets, and so on lack bargaining power or lack meaningful alternatives. Rather, the question should focus on how much bargaining power they have or could have across different categories of transaction types. In refocusing the inquiry toward a more dynamic and complex bargaining power analysis, the propertization model potentially promotes more accurate (or at least more credible) initial assessments of typical power relationships and a justification for state responses to changed circumstances.

## V. CONCLUSION

The Internet and its accompanying host of information technologies have created a different kind of power relationship between producers and consumers. Many aspects of that relationship appear unchanged from traditional models. Producers still have near-complete superiority in information about their products, still know their markets, and still generally control the terms of their contracts with consumers.

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<sup>177</sup>See *supra* notes 80-81 and accompanying text.

<sup>178</sup>See *supra* notes 83-86 and accompanying text (analyzing insurer bargaining power over insureds in most cases).

<sup>179</sup>*Cf.* SLAWSON, *supra* note 4, at 25 (“[A] producer almost invariably possesses substantial bargaining power over its own products in an absolute sense. It would not stay in business long if it did not.”).

Consumers still fail to read and understand their form contracts, still blithely give away valuable information and rights, and still cannot bargain in any meaningful way over their contract terms.

But other aspects of that relationship are radically different. In addition to their past advantages, producers now possess an Orwellian database of information about their consumers and can invade their customers' lives with sophisticated and targeted marketing designed to increase the likelihood that an individual consumer will succumb to their blandishments. Although they largely have lost control over their own information and have even less ability to bargain over the terms of their contracts, consumers, likewise, have dramatically expanded their bargaining power through information-gathering capabilities, an ability to monitor producer reputation and quality, and the capacity to strike back at underperforming producers.

On the one hand, these new sources and forms of power merely complicate the job of courts attempting to assess the parties' bargaining power for purposes of determining a contract's enforceability under unconscionability, public policy, reasonable expectations, duress, fraud, undue influence, and other doctrines based upon explicit or implicit weighing of that relationship. Courts will likely continue to attempt to apply the inequality of bargaining power doctrine to individual cases and will continue to generate incoherent and indeterminate results. Perhaps, if we are lucky, the Internet may provide the basis for determining that power relations are so complex, so dynamic, so subject to the widely-varying activities of different consumers at different times that we will finally abandon the doctrine in individual cases. I'm not holding my breath.

But the neat thing about the Internet is that it makes everything "macro" – data is the breath of the Internet and the blood of the information economy, and it is in the nature of the beast to collect, collate process, and report this data. Since at least the first third of the twentieth century, courts and legislatures have been shifting discrete transaction types into and out of the core of contract law. In some cases, those movements have reflected underlying systemic power relations, some well and some not so well. The metaphor of bargaining power as a property right provides a unique opportunity to reconceptualize that contract-based bargaining power heuristic that has justified legislative-style movements such as insurance, banking and consumer law. With a property-based approach to bargaining power, we potentially gain a mechanism that addresses the discrete inputs available for each side to protect itself and that can better assess the relative costs and benefits of current and future legislative interferences with consumer contracts.