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## Two Alternate Visions of Contract Law in 2025

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## Two Alternate Visions of Contract Law in 2025

*Nancy S. Kim*\*

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### INTRODUCTION

The topic of this symposium issue addresses the state of contract law in the year 2025, but it raises the question: What does it mean to enter into a contract *today*? Contract law presumes a certain paradigmatic scenario where two equally sophisticated parties negotiate terms to achieve a mutually beneficial bargain. This paradigmatic scenario has given way to contracts in a variety of forms, presented in different ways, and serving various functions. They can be paper or digital; they can be negotiated or adhesive. Contracts occupy different roles in a transaction, the marketplace, and society. They can be used to plan complex transactions between multinational corporations, but they can also be used to establish codes of conduct on a social networking site. Does contract law adequately respond to the needs of today's society? If not, how can it be expected to meet the needs of society in 2025?

Contract law's past portends its future. Technology has provided the impetus for many of the changes to contracts and contract law. Technological innovation has created new legal issues regarding business practices. Businesses have attempted to address these issues and reduce uncertainty and risk through private ordering. Technology has also enabled new forms of contracting and made it easier to engage in transactions and commercial relationships across great distances and time zones. Formerly the prov-

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\* Professor of Law, California Western School of Law. The author thanks Dr. John Murray for the invitation to contribute to this symposium on contract law in 2025.

ince of large corporations, today even sole proprietors may engage in international business transactions thanks to the Internet and other advancements.

Part I of this essay examines how businesses have shaped the evolution of contract's form from the past to the present and explains how courts have responded by reshaping contract law.<sup>1</sup> Part II of this essay anticipates changes in the business landscape and explains how these changes might create new challenges for contract law. Part III predicts two alternative visions for contract law in 2025. The first is as a diminished body of law, made nearly irrelevant by other laws and preempted by private rules administered by non-judicial entities. The second vision is that of a robust contract law administered by courts that understand the diversity of marketplace needs, acknowledge contracting realities, and consider the context of transactions in applying doctrinal rules. This essay concludes that the strength of contract law lies in its flexibility, but its relevance depends upon how courts use that flexibility to guide its development.

### I. CONTRACTS AND MARKETPLACE CHANGES

Contracts play an important role in a market economy. They differ from other promises because they are legally enforceable, and thus more reliable. Not surprisingly, the development of modern contracts took place alongside the growing sophistication of a market economy. As markets grew and became more competitive, due in large part to the increased sophistication of machinery, marketplace needs required the ability to engage in future planning.<sup>2</sup> Parties required assurance of future performances. Companies needed to project costs and predict sales in order to estimate their future use of materials. Businesses needed credit to purchase raw materials and equipment. Contracts encouraged trust, which was essential to credit-based transactions. By providing needed assurance, contracts facilitated planning for future events rather than limiting the parties to what they could present-

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1. This section references and incorporates my prior work discussing contract's evolution in light of societal and marketplace changes. See NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013); Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327 (2011).

2. See E. ALLAN FARNSWORTH, CONTRACTS § 1.3, at 8 (4th ed. 2004) ("Producers . . . saw the need to plan for the future in order to compete with other producers. An exchange of promises looking to a future exchange of performances would give a producer the basis for predictable calculation . . .").

ly purchase or trade. The security provided by contracts also emboldened parties to enter into transactions with strangers.<sup>3</sup> A larger pool of trading partners provides more opportunities for exchange and more possibilities for gain.<sup>4</sup> In the absence of contract, markets would have remained small and local. Contracts permitted a shift from a primitive, barter economy to a more sophisticated, credit-based one.

In the transition from a barter economy to one based on credit, a particular model of a contract emerged and flourished. Friedrich Kessler depicts this model as one where “free bargaining” parties are “brought together by the play of the market” and “meet each other on a footing of social and approximate economic equality.”<sup>5</sup> Contract law developed in response to this model of a contract as a private affair between two equals, and reflected free market principles such as autonomous decision-making and freedom from judicial intervention.<sup>6</sup>

Industrialization enabled the mass production of goods, which eventually created a change in contract’s form and contracting method. Companies increased the efficiency of standard transactions by standardizing terms in form contracts.<sup>7</sup> Form contracts also facilitated consumer credit, encouraging innovation and economic growth. Goods, such as sewing machines and automobiles, were too expensive for most consumers to purchase outright so companies instituted installment payment plans.<sup>8</sup> Without credit—and standard form contracts—the growth of new industries would have stalled. Socially useful but costly products might have failed as few consumers could afford to pay the total price at the time of purchase.

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3. Erin Ann O’Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1899 (2005) (“By expanding the possible trading partners for each person, contract law makes us all wealthier because it provides greater possible gains from exchange.”).

4. *Id.*

5. Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

6. *Id.* (stating that contracts as “the language of the cases tells us” are a “private affair” and, therefore, the judicial system “provides only for their interpretation, but the courts cannot make contracts for the parties.”).

7. *Id.* at 631 (noting that large scale enterprise and mass production and distribution made a “new type of contract inevitable—the standardized mass contract.”).

8. LENDOL G. CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* 162 (1999) (explaining how costly consumer goods led to the creation of installment plans which in turn fueled the growth of industries producing these goods).

Mass consumer form contracts were generally contracts of adhesion, meaning that their terms were non-negotiable and the consumer was made to agree to them on a “take it or leave it” basis. Businesses used form contracts with other businesses as well as consumers, but they did not use them in the same way. Form contracts between two businesses generally were not adhesive, although they were often unread.

Lawmakers and courts recognized that standard form contracts differed from negotiated ones, and that the role of standard form contracts in mass consumer transactions differed from their role in business-to-business transactions. State legislatures enacted special laws to regulate insurance and credit card contracts. They also adopted versions of the Uniform Commercial Code (UCC), which treats merchants differently from consumers. For example, section 2-209 states that “no oral modification” clauses in contracts are enforceable provided that, if the contract is between a merchant and a non-merchant, the non-merchant needs to separately initial that provision.<sup>9</sup> Section 2-207 of the UCC states that additional terms in a form acceptance should be construed as “proposals for addition”<sup>10</sup> and if the transaction is between a merchant and a non-merchant, these additional terms are not part of the contract.<sup>11</sup> Courts recognized that consumers often had no bargaining power and that form contracts were easy to ignore and difficult to understand.<sup>12</sup> They shaped contract law to take these

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9. U.C.C. § 2-209 (2012).

10. U.C.C. § 2-207(2) (2012).

11. *Id.* Section 2-207 (2012) states:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract.

Between merchants, such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

*See also* JOSEPH M. PERRILLO, CALAMARI AND PERRILLO ON CONTRACTS, § 2.21, at 88-89 (6th ed. 2009)(stating that if the records form a contract, the additional or different terms are treated as offers to modify the terms of the contract and “(i)f either party is a non-merchant, the terms of the offer constitute the contract without modification. The one exception is if the offeror expressly assents to the additional or different terms. The offeror’s silence will not normally be considered assent to the additional or different terms.”).

12. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (striking down warranty disclaimer). In discussing *Henningsen v. Bloomfield*, Jay Feinman and Caitlin Edwards write that “while not abandoning ‘freedom of contract,’ the court recognized the ubiquity of ‘the

contracting realities into account, developing the doctrine of unconscionability,<sup>13</sup> and rules governing interpretation and construction, such as the rule of *contra proferentem*,<sup>14</sup> the reasonable communicativeness test,<sup>15</sup> and the doctrine of reasonable expectations.<sup>16</sup>

At the end of the last century, another major shift in the business landscape created other changes in contracting form. The advent of personal computers, digital information, and the Inter-

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standardized mass contract' presented to consumers on a take-it-or-leave-it basis. Other courts had increasingly scrutinized the reasonableness of warranty disclaimers on claim checks, parking lot leases, contracts between banks and their customers and flight insurance policies." Jay M. Feinman & Caitlin Edwards, *Henningsen v. Bloomfield Motors, Inc. (1960): Promoting Product Safety by Protecting Consumers of Defective Goods, in COURTING JUSTICE: 10 NEW JERSEY CASES THAT SHOOK THE NATION* 35, 45 (Paul L. Tractenberg ed., Nov. 5, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2364772](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364772). Feinman and Edwards write that, as a result of *Henningsen*:

[The] vision of contract law changed . . . . The traditional approach to contracts envisioned two independent individuals bargaining on an equal footing about contract terms that would be to their individual advantage. In holding Chrysler's warranty disclaimer ineffective, the court recognized that that conception no longer fit an economy of mass distribution . . . . The traditional model of bargaining no longer applied, so rather than simply enforcing a contract, the court had to 'protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer.'

*Id.* at 53.

13. See *Williams*, 350 F.2d at 448-49 ("In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel . . . . [W]e hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced."); U.C.C. § 2-302(1) (2012) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.").

14. *Contra proferentem* means "against the offeror" and the technique, applied where contract language is reasonably susceptible to two interpretations, adopts the meaning less favorable in its legal effect to the party who chose the words. Margaret N. Kniffen, *CORBIN ON CONTRACTS*, Vol. 5, § 24.25 (1998). See also, e.g., *Florence Nightingale Nursing Serv. v. Blue Cross/Blue Shield*, 41 F.3d 1476, 1481 (11th Cir. 1995) (stating that the application of *contra proferentem* requires "ambiguities to be construed against the drafter of a document").

15. See, e.g., *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835-36 (9th Cir. 2002) (noting that under the reasonable communicativeness test, a disincentive to study the provisions of a cruise ticket is an extrinsic factor impeding the passenger's ability to become "meaningfully informed."); see also Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 *RUTGERS L. REV.* 1307, 1309 (2005) (stating that "courts recognized the traditional cautionary function served by the signed paper contract and fashioned new rules to account for the different signals sent to offerees by novel methods of contracting.").

16. *RESTATEMENT (SECOND) OF CONTRACTS*, § 211(3) (1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

net dramatically changed the marketplace. Technological advances brought with them unanswered questions about the viability of business models and the risks associated with offering certain goods and services.<sup>17</sup> Software and digital information providers were concerned that their products could be easily duplicated or unfairly exploited. The development of software was costly, but the end product could be easily copied and distributed. It was unclear whether software was protected by copyright. Furthermore, software could be unpredictable and often contained "bugs" or problems that impeded perfect operation. Content on one website could be scraped and reposted on another website, frustrating the original website's attempts to attract viewers and monetize information. In addition, users might post unlawful information, subjecting the website to copyright infringement or other liability.

Where the law was uncertain, companies tried to protect their products and limit their liability by using contracts. The digital era ushered in novel contracting forms such as the shrinkwrap, the clickwrap, and the browsewrap, which companies presented to consumers in ways intended to minimize transactional impediments.<sup>18</sup> Courts generally upheld these wrap contracts<sup>19</sup> provided that the contracts gave consumers notice and an opportunity to reject terms.<sup>20</sup> This meant that consumers would be deemed to have consented to an agreement by clicking "accept" on an icon or a "Terms of Use" hyperlink, even if the action was automatic and they did not realize the legal effect of what they were doing.

The low cost and ease with which digital contracts can be duplicated, and the proliferation of digital devices, have made contracts ubiquitous in today's society. Contracts govern nearly all online activity. They also regulate offline activity between businesses

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17. For a more detailed discussion, see KIM, WRAP CONTRACTS, *supra* note 1, at 17-30.

18. Shrinkwraps are agreements encased in plastic wrap that typically accompany software compact discs. Because they are contained within the product packaging, the consumer does not have an opportunity to review terms prior to purchase. Clickwraps and browsewraps are digital agreements. A clickwrap requires clicking agreement in some manner, such as on an "accept" box. A browsewrap is a hyperlink that is designated as an agreement by the words "Terms of Use" or similar language. *Id.* at 3.

19. I use the term "wrap contracts" to refer to a unilaterally imposed set of terms which the drafter purports to be legally binding and which the recipient does not sign with a pen to acknowledge assent. KIM, WRAP CONTRACTS, *supra* note 1, at 2.

20. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (upholding the terms of browsewrap); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (recognizing a contract that was received after sale was completed); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) (upholding a forum selection clause in an agreement contained in a scroll box that required a click).

and consumers. They often contain surprising and unfair terms. With print adhesive contracts, companies routinely impose mandatory arbitration, limitations of liability, and disclaimers of warranty. Wrap contracts include these and even more oppressive terms, such as the extraction of rights to user created content and to user personal information, unilateral modification clauses,<sup>21</sup> and even the curtailment of free speech rights.<sup>22</sup>

The pervasiveness of contracts and the resultant consumer habituation to them means that consumers fail to read or even notice them. Consumers object to being hijacked by contracts that are dense and impenetrable. Academics raise concerns about the deletion of important rights by form contract<sup>23</sup> and the inability of consumers to accurately assess information necessary to proper decision making.<sup>24</sup> Legislators have responded to some of these problems by implementing laws that address contractual abuses, such as the Credit CARD Act,<sup>25</sup> which includes disclosure requirements designed to counter the obscure terms in lengthy credit card agreements. The American Law Institute, too, has responded by undertaking a new project, Restatement of the Law Third, Consumer Contracts, which focuses on consumer contracts

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21. For a discussion of oppressive terms commonly contained in digital contracts, see KIM, WRAP CONTRACTS, *supra* note 1, at 44-69; Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1 (2011).

22. For example, one website states:

You agree not to file or initiate any complaint, chargeback, dispute, public comment, forum post, website post, social media post, or any claim related to any transaction with our website and/or company. By using our website, making any purchase, or conducting any transaction with us, you agree to all terms and conditions stated herein.... You agree that any breach of this agreement shall also constitute liability in the amount of \$200 plus any related costs directly or indirectly relating from any such breach.

*Terms and Conditions*, ACCESSORY TOWN, <http://acctown.com/pages/terms> (last visited March 24, 2014). Another company allegedly claimed that its customer had violated a non-disparagement clause in its terms of service assessed a \$3500 fine for violation of its terms of service, and reported non-payment of the fine to credit reporting agencies. See Susannah Kim, *Utah Couple Fined \$3,500 by Online Merchant KlearGear Retains Lawyer, Turns Tables*, ABC NEWS (Nov. 26, 2013), <http://abcnews.go.com/Business/couple-fined-3500-writing-negative-review/story?id=21018224>.

23. See MARGARET JANE RADIN, *BOILERPLATE* (2012); see also Zev J. Eigen, *The Devil is in the Details: The Interrelationship Among Citizenship, Rule of Law and Form Adhesive Contracts*, 41 CONN. L. REV. 381, 387 (2008) (arguing that the frequency of contracting may result in society's collective notion of contract being "watered-down").

24. See OREN BAR-GILL, *SEDUCTION BY CONTRACT* (2012).

25. Credit Card Accountability Responsibility and Disclosure Act of 2009, 15 U.S.C. §§ 1601-1667f (2014).



and consumer protection law.<sup>26</sup> Courts, by contrast, have been less responsive to consumers' claims of abuse by contracts than they have been in the past.<sup>27</sup> Most courts adhere to a mechanistic application of post-*ProCD* precedent,<sup>28</sup> where a click constitutes a manifestation of assent and the barrage of multi-page contracts has no bearing on a consumer's so-called "duty to read."

If history is any indication, the judiciary's failure to remedy contractual abuse may spur action in different quarters. Regulators such as the Federal Trade Commission (FTC) tend to step up their enforcement efforts when courts enforce contracts that permit what policy discourages.<sup>29</sup> For example, judicial enforcement of pre-dispute arbitration clauses in form contracts has raised concern among legislators, consumer advocates, and regulators. Accordingly, the Consumer Financial Protection Bureau (CFPB) has

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26. See *Current Projects, Restatement Third, The Law of Consumer Contracts*, A.L.I., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=25](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=25) (last visited Mar. 14, 2014).

27. I provide an extensive critique of recent court cases enforcing wrap contracts against consumers in a book. KIM, WRAP CONTRACTS, *supra* note 1. Cases include *Briceño v. Sprint Spectrum, L.P.*, 911 So.2d 176 (Fla. Dist. Ct. App. 2005) (upholding arbitration clause in updated terms of use); *A.V. v. iParadigms, LLC.*, 544 F.Supp. 2d 473 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom A.V. ex. rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (enforcing terms of use against minors); *Scherillo v. Dun & Bradstreet, Inc.*, 684 F.Supp. 2d 313 (E.D.N.Y. 2010) (upholding online agreement against plaintiff who did not remember reading terms). There have been a few heartening exceptions to this trend. See *Clark v. Renaissance West, LLC*, 307 P.3d 77 (Ariz. Ct. App. 2013) (finding an arbitration agreement unconscionable); *In re Google Inc. Gmail Litigation*, No. 13-MD-02430-LHK, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013) (interpreting Google's online agreement to limit its ability to access user emails).

28. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the Seventh Circuit ruled that a finding of assent did not require that the consumer have the opportunity to review terms prior to purchase but merely have an opportunity to return the purchased item after having an opportunity to review the shrinkwrap license *after* purchase. *ProCD*, 86 F.3d at 1452-53. Most courts have adopted the reasoning in *ProCD*. See *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638-39 (8th Cir. 2005). There have, however, been some notable exceptions. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340-41 (D. Kan. 2000); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006).

29. Furthermore, the existence of regulatory agencies themselves attests to another possible consequence, which is the creation of additional agencies to deal with specific problems caused by the failure of contract law—and the judiciary—to address abuses. The Federal Trade Commission resulted from the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, which was a legislative response, in part, to contracts restraining trade and competition. See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L. J. 1 (2003). The Consumer Financial Protection Board was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, in response to banking practices, typically implemented through contracts.

begun study of the use of these clauses in connection with consumer financial products or services.<sup>30</sup>

There is a synergy of sorts that plays out between and among the judiciary, the legislature, and regulatory bodies. Judicial inaction or complicity in the face of contractual abuse encourages action by regulators and legislators, which eventually diminishes the purview of contract law. Consequently, the future of contracts and contract law will, to a large extent, depend upon the interplay of marketplace changes and the judicial response to those changes. The next section explains how this might look in 2025.

## II. THE MARKETPLACE IN 2025 AND THE ROLE OF CONTRACTS

In this section, I will offer my predictions for what marketplace changes to expect in 2025. These predictions do not require a crystal ball as they merely extrapolate from existing trends. The first is that software or digital technology will become incorporated into more consumer goods and to a greater extent as society continues moving toward a norm of pervasive or ubiquitous computing and augmented reality. The “Internet of Things” refers to the concept where everyday products are seamlessly integrated with networked devices embedded with microprocessors. In the future, many more “things” will use electronic technology and will use it more extensively. While many cars currently have global positioning systems (GPS) and sensors to alert drivers to obstacles, future cars will use technology to gather and employ data based upon usage and to handle some or all of the driving. Consumers will monitor and control their homes from another country as easily as they now switch channels using a remote from their living room couch. A “smart” house today can turn on the lights and turn up the heat minutes before you get home, and track water and energy usage to help you conserve energy and save money. In the near future, however, houses may be able to capture much more data, some of it more personal than the amount of energy consumed. This information might include the number of people who enter your home, the duration of your shower, how often you

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30. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandates that the CFPB conduct the study and gives it the power to issue regulations on the use of arbitration clauses if doing so is in the public interest and for the protection of consumers. *CFPB Finds Few Consumers File Arbitration Cases*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/> (last visited Mar. 14, 2014).

brush your teeth, how frequently you look in a mirror, and how much time you spend in your bed (and with whom).

The information gathered by our networked everyday items might be combined with information gleaned from other sources. At the time of the writing of this essay, Google recently announced its \$3.2 billion acquisition of Nest, a company that makes stylish thermostats and smoke and carbon monoxide detectors which use sensors and algorithms to track and influence user behavior.<sup>31</sup> Google could obtain a clearer, more intimate picture of its users by combining information obtained from online Google sources (Google Plus, Gmail, and Google Search) with data obtained from Nest thermostats and smoke detectors. Furthermore, by combining that information with data collected from its driverless cars and wearable computing devices, it could obtain an alarmingly comprehensive picture of your daily activities as well as the activities of those who live, work, and socialize with you. Companies like Google can use that information to make inferences about their customers—such as their religious beliefs, sexual orientation, and political affiliation—and try to influence their behavior. Some companies currently do just that. Pandora, Netflix, and Amazon, for example, all have developed algorithms based upon customers' preferences, profiles or past usage that enable these companies to recommend tailored products and services.<sup>32</sup> The difference will be that in the future the extent and type of information will mean that their inferences may be more accurate, more revealing, and their ability to manipulate consumer behavior more successful.

In the near future, we, too, will be altered and enhanced versions of our present selves. The term "augmented reality" generally refers to enhancing human senses with computer generated technology and making real world experiences digitally manipulable. In this brave new world, people will not carry their devices, they will *be* their devices. Even now, embedded chips can restore

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31. Claire Cain Miller, *For Google, a Toehold Into Goods for a Home*, N.Y. TIMES (Jan. 14, 2014), <http://www.nytimes.com/2014/01/14/technology/google-to-buy-nest-labs-for-3-2-billion.html>.

32. See, e.g., Natasha Singer, *Listen to Pandora, and It Listens Back*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/technology/pandora-mines-users-data-to-better-target-ads.html> ("People's music, movie or book choices may reveal much more than commercial likes and dislikes. Certain product or cultural preferences can give glimpses into consumers' political beliefs, religious faith, sexual orientation or other intimate issues. That means many organizations now are not merely collecting details about where we go and what we buy, but are also making inferences about who we are.").

hearing, track the location of lost pets and regulate the beating of the human heart. The Internet of Things will include networking the thing called the human body. Google has already garnered much attention for Google Glass, a wearable computer device that looks like glasses.<sup>33</sup> It also recently announced that it is working to develop contact lenses that, with a wireless chip and sensors, will measure glucose levels.<sup>34</sup> While technology may result in better health care, what happens to the data collected from those microchips embedded in your body? Who will control what you see and how you see it? Who owns the data gathered from our future cyborg selves? Who can use it? And who is responsible when the system breaks down—the user, the manufacturer of the product, or the various third parties that install, integrate, implement or upgrade portions of the system? What happens if the network is hacked<sup>35</sup> and all the faucets in your home are remotely turned on, flooding the interior?

While technology holds great promise for enhancing daily life and advancing society and the economy, it also poses great challenges and raises unanswered questions. Can marketers use information obtained through these smart devices (that you take long showers, use scented creams, or cheat on your spouse) to sell you things? The technology to collect this information will be available before legislation exists to govern its use. What about the information collected about third parties who have had their picture taken, their movements monitored, and their preferences recorded simply by being around you and your networked things? In this legal “no man’s land,” businesses (and their lawyers) must confront the many unanswered questions raised by new technologies. Without established laws, precedent or norms to govern behavior, businesses will turn to private ordering to set their own rules. The boundaries of the law are blurred when it comes to new technologies but contracting makes them clearer—and gives companies an advantage when it comes to putting down stakes regarding the acceptability of certain practices.

As they have in the past, businesses will use contracts to legitimize dubious new business practices, which may, over time, be

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33. *What it Does – Google Glass*, GOOGLE, <http://www.google.com/glass/start/what-it-does> (last visited Mar. 14, 2014).

34. *Introducing our smart contact lens project*, GOOGLE BLOG (Jan. 16, 2014), <http://googleblog.blogspot.com/2014/01/introducing-our-smart-contact-lens.html>.

35. “Hack” is defined as “to gain access to a computer illegally.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 520 (10th ed. 2001).

come accepted norms. Software companies, for example, use contracts to limit their liability for failures so that even though Microsoft is a multi-billion dollar company, it is not liable when a system crash causes a company to lose business or a consumer to lose important files. They also use contracts to legitimize privacy-invasive tracking practices. Most of the existing laws, and those currently being proposed, allow companies to obtain consumers' consent in order to establish authorization to otherwise illegal monitoring or use of information.<sup>36</sup> By shaping contract doctrine in a way that makes consent easy to establish, courts defeat the protections expected of this legislation. A recent Government Accountability Office (GAO)<sup>37</sup> Report on consumer privacy states that "consumers often were not aware of, and had not always consented to, personal information being repurposed for marketing and other uses."<sup>38</sup>

Given recent history in the area of online privacy and data collection, and absent any regulation, businesses will likely continue to collect and use this information before consumers are even aware of it. Companies, finding it undesirable to discard potentially valuable data, will likely include limitations of liability and waiver clauses in their contracts, which effectively insulate them from responsibility for their products and services. They may also include provisions that expressly permit repurposing of data, require consumers to warrant the data collected and require consumers to indemnify companies against third party-claims of misappropriation or misuse. Businesses will use contracts to set the boundaries of acceptable business practices regarding information use, ownership and liability by having the consumer "consent" to these oppressive terms in an unobtrusive contract when the consumer signs up for the networked home service or purchases a "smart" house.

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36. Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1563 (2006) (noting that consent is a defense to federal laws governing privacy).

37. The GAO is an "independent, nonpartisan agency that works for Congress" whose mission is "to 'help improve the performance and ensure the accountability of the federal government for the benefit of the American people . . . with timely information that is objective, fact-based, non-partisan, nonideological, fair, and balanced.'" See *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Mar. 14, 2014).

38. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-663, INFORMATION RESELLERS: CONSUMER PRIVACY FRAMEWORK NEEDS TO REFLECT CHANGES IN TECHNOLOGY AND THE MARKETPLACE 35 (Sept. 2013), available at <http://www.gao.gov/assets/660/658151.pdf>.

Consumer habituation to ubiquitous contracts, the overwhelming volume of terms, and cognitive limitations mean that consumers will be even less likely to read contracts and identify troublesome terms. Present-bias,<sup>39</sup> optimism bias,<sup>40</sup> and other heuristic biases will continue to exist in 2025. Exacerbating the natural tendency of human beings to avoid reading fine print, terms are frequently updated to reflect constantly changing business practices which increases both the burden on consumers of reading terms and the likelihood that businesses will continuously modify terms in their favor. For example, Nest's current terms of use restricts how the company uses information obtained through its products. But the company reserves the right to modify its terms of service:

Nest reserves the right to make changes to these Terms. You should ensure that you have read and agree with our most recent terms of service when you use the Services. Continued use of the Services following notice of such changes shall indicate your acknowledgment of such changes and agreement to be bound by the terms and conditions of such change.<sup>41</sup>

As Nest matures as a company, it is highly likely that it will modify its terms of use to allow greater exploitation of data collected<sup>42</sup> just as other companies have done, most notably Facebook and Google.<sup>43</sup>

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39. "Present-bias" refers to a focus on the short term rather than the future or long-term. See Ted O'Donoghue & Matthew Rabin, *Doing it Now or Later*, 89 AM. ECON. REV. 103 (Mar. 1999); see also BAR-GILL, SEDUCTION BY CONTRACT, *supra* note 24, at 22 (noting that myopia is common in consumers who prefer "immediate benefits even at the expense of future costs.").

40. "Optimism bias" refers to an overestimation of the potential benefits and an underestimation of the risks of an activity. See Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in CHOICE, VALUES AND FRAMES 86 (Daniel Kahneman & Amos Tversky, eds., Cambridge University Press, 2000) (noting a "common tendency of people to overestimate their ability to predict and control future outcomes."). *Id.* at 476.

41. *Terms of Service*, NEST, <https://nest.com/legal/terms/> (last visited Mar. 14, 2014).

42. See also Miller, *supra* note 31 (quoting analyst Danny Sullivan as saying that "Google likes to know everything they can about us, so I suppose devices that are monitoring what's going on in our homes is another excellent way for them to gather that information . . . . The more they're tied into our everyday life, the more they feel they can deliver products we'll like and ads.").

43. See Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELEC. FRONTIER FOUND. (Apr. 28, 2010), <https://www.eff.org/deeplinks/2010/04/facebook-timeline> (showing how Facebook's privacy policies have eroded user's control over their information over time). Google recently announced updated Terms of Service that would permit it to use information about users in paid advertisements. See *Google Terms of Service*, GOOGLE POLICIES & PRINCIPLES (Nov. 11,

Companies' attempts to fill the legal gap created by technological innovations go beyond privacy into areas such as employment and criminal law. What happens when your networked "smart" car, which monitors how quickly you are driving, whether you braked, and whether you were listening to music, eating or glance in your rearview mirror, collides with another?<sup>44</sup> It is currently unclear who can access the data contained in your car's black box. But if your insurance company inserts a clause in your insurance policy which gives it the right to access the data, your "consent" legitimizes its access and settles the matter—at least until one of two things happens: a court refuses to enforce the contract, or a law is passed prohibiting the practice.

The trend of current cases indicates that the former is unlikely to happen anytime soon. On the contrary, the attenuated notion of consent in wrap contract cases requires only "constructive notice" and a subsequent failure to reject or immediately terminate the transaction. This leads to some predictable behavior by opportunistic contract drafters. Some employers have recently started to remotely delete *all* information on departing employees' personal devices which are networked to the company's system, including non-company related, personal information such as family photos, music and email programs.<sup>45</sup> Some of these companies engage in "phone wiping" even when the phone belongs to the employee and was purchased with the employee's money. This practice falls into the gap created when technology surpasses the law. Not surprisingly, companies have resorted to contracts to fill the gap, using wrap contracts to get employees to click "agree" to phone wiping practices.<sup>46</sup> The act of clicking constitutes a mani-

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2013). <http://www.google.com/intl/en/policies/terms/update/>; *Summary of Changes, GOOGLE POLICIES & PRINCIPLES* (Nov. 11, 2013) <http://www.google.com/intl/en/policies/terms/changes/>; see also Claire Cain Miller & Vindu Goel, *Google to Sell Users' Endorsements*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/technology/google-sets-plan-to-sell-users-endorsements.html>.

44. See Jaelyn Trop, *The Next Data Privacy Battle May Be Waged Inside Your Car*, N.Y. TIMES (Jan. 11, 2014), <http://www.nytimes.com/2014/01/11/business/the-next-privacy-battle-may-be-waged-inside-your-car.html> (reporting that a device commonly called a "black box" collects information like direction, speed and seat belt use and is in nearly every car today and may soon be mandatory).

45. Lauren Weber, *Leaving a Job? Better Watch Your Cellphone*, WALL ST. J., Jan. 22, 2014, at B7.

46. *Id.* ("Many employers have a pro forma user agreement that pops up when employees connect to an email or network server via a persona device . . . but even if these documents explicitly state that the company may perform remote wipes, workers often don't take the time to read it before clicking the 'I agree' button").

festation of assent, even though the employee is not actually aware of the practice.<sup>47</sup>

As they have in the past, businesses will present consumers with new contractual forms and courts will ponder new questions regarding consent. Courts play an important role in the development of business practices. Rather than watering down the standard of notice and consent required for contract formation, judges could apply a standard that reflects contracting realities from the consumer's standpoint. They could require that businesses do more to make these new business practices salient through heightened notice or specific assent requirements. Consumers' subsequent actions would more closely reflect their acceptance or rejection of these new practices. Rather than becoming normalized through inattention or lack of awareness, the growth or obsolescence of these practices would reflect consumer desires and enhance market efficiency.

Courts can also shape the development of business practices through the use of policing doctrines such as unconscionability and duress.<sup>48</sup> They can strike down certain practices and force companies to modify them (or motivate legislators to expressly permit them). Courts can also do the converse. They can define assent in a way that fails to reflect norms of reasonable human behavior. They can promote business interests in the name of efficiency and ignore the relationship between efficiency and informed decision-making. They can refuse to acknowledge market failures and disregard doctrinal defenses like unconscionability and duress. They can ignore contractual abuse and pretend that when they do so, they are merely being impartial and respecting "freedom to contract."<sup>49</sup>

My focus so far has been on the legal disruption created by new technologies and the effect on consumers and consumer contracts, but new technologies have also changed the way companies interact and contract with each other. Ronald Gilson, Charles Sabel,

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47. *Id.* One former employee stated that after he was terminated, the phone he purchased went blank and that "[h]e has no memory of signing a release or user agreement, though he concedes that a dialogue box may have appeared when he first connected to [the company's] server 'and like everyone else, I was like, 'OK, check.'"

48. See Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI. KENT L. REV. 265 (2014) (proposing that a doctrine of "situational duress" apply in certain electronic contracting situations).

49. As the court in the landmark case of *Henningsen* noted, "freedom of contract is not such an immutable doctrine as to admit of no qualification in the area of which we are concerned." *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960).



and Robert Scott report that companies are moving away from “vertical integration,” where one company owns its suppliers.<sup>50</sup> By controlling its supply chain, the company is able to avoid the “hold-up” game where one of its suppliers engages in opportunistic behavior. By contrast, they observe “vertical disintegration” in a number of industries where firms engage in “a process of iterative collaboration and co-design of both the interface and the components it joins.”<sup>51</sup> Rather than one firm controlling all aspects of its supply chain, it engages with other firms that specialize in a particular aspect of production. Yet, the rapid pace of innovation means that any firm along the chain may alter or reconfigure what it produces. Because the firms in the chain depend upon each other to maintain compatibility of products and retain market relevance, each must engage cooperatively in the event of chain disruptions. Gilson, Sabel, and Scott argue that “the vertical disintegration of the supply chain observed in many industries is mediated neither by fully specified explicit contracts . . . nor by entirely implicit relational contracts supported only by norms of reciprocity and the expectation of future dealings.”<sup>52</sup> Rather, they have identified a new form of contracting which they refer to as “contracting for innovation” which “supports iterative collaboration between firms by interweaving explicit and implicit terms that respond to the uncertainty inherent in the innovation process.”<sup>53</sup>

Many United States firms have overseas suppliers. Apple, for example, has at least two hundred suppliers, most of whom are based outside of the United States.<sup>54</sup> As more United States firms engage overseas companies to handle various stages of production, the potential for changes from original plans—and the corresponding need for flexibility—increases. Political upheavals, factory accidents, new laws and regulations and even cultural misunderstandings may cause delays or require changes in production or distribution. While some parties may engage in opportunistic behavior without stringent contract terms to keep them in check,

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50. Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 434 (2009) (“Despite conventional industrial organization theory, however, contemporary practice is moving away from vertical integration.”).

51. *Id.* at 434.

52. *Id.* at 435.

53. *Id.*

54. *Supplier Responsibility*, APPLE, <http://www.apple.com/supplierresponsibility/our-suppliers.html> (last visited Mar. 14, 2014).

interdependency and reputational concerns will likely regulate and control bad faith behavior. A contract is a weak mechanism for controlling behavior where the likelihood of enforcement is low. Companies may find contracts useful for outlining shared goals and expectations but other, extralegal mechanisms—such as trade organizations or pressure from other businesses—may be more effective at reigning in uncooperative actors. Business lawyers, anticipating the need for flexibility, will create contracts that enable companies to maneuver and accommodate innovation while still providing a modicum of assurance and a means by which to rein in opportunistic behavior.

### III. TWO ALTERNATE VISIONS OF CONTRACT LAW

The overarching purpose of contract law is not to improve the efficiency of transactions or redistribute wealth—it is to enforce the intent of the parties and protect their reasonable expectations. Other considerations—efficiency, fairness, and redistribution—pertain to the reasonableness inquiry. Contract law fails when it disregards parties' intent and their reasonable expectations. When contract law fails, other law must fill the gap.

Contract law is failing in the area of consumer contracts, leaving this area ripe for regulatory and legislative action. Consumers are being held to contracts to which they did not intend to agree. This is especially true with wrap contracts, which are both ubiquitous and unobtrusive, and therefore, often ignored. Consumers do not reasonably expect to be bound by contracts they did not actually *see* much less read. Not surprisingly, we are already seeing sector specific regulations of consumer contracts in certain areas, most notably banking but also increasingly, privacy. If courts fail to adopt a more equitable approach to consumer contracts—one that reflects reality—then other regulation will certainly follow. The role of the courts and contract law will shrink accordingly and consumer contracts as a category will grow increasingly more segmented and subject to different legal rules and regulatory regimes.

By contrast, the behaviors and needs of parties in sophisticated commercial transactions differ from those of parties in mass consumer transactions. Contracts between two sophisticated commercial entities typically do reflect their intentions and courts should defer to the contract and to the extralegal channels ap-

proved by the parties.<sup>55</sup> Even in business-to-business transactions, contracts play different roles. Contracts may be more aspirational than regulatory in some business relationships but not others. They may be viewed as works-in-progress in some transactions but not others. They may be customized and heavily negotiated or they may be standardized and unread. Contract law in 2025 should recognize the different roles contracts play depending upon the nature of the transaction or relationship.

A judiciary that applies rules without context ignores the intent of the parties—and so loses sight of contract law’s purpose. Commercial actors may seek alternative forms of dispute resolution, essentially “opting-out” of contract law. Meanwhile, legislators and regulators may seek to right contractual wrongs ignored by the judiciary. Consumer protection laws will step in where courts fear to tread. As in the past, contract law’s domain may then be carved into subspecialties, such as employment or insurance law,<sup>56</sup> or overrun by other areas of the law such as property, privacy, or tort.<sup>57</sup> Under this vision, contract law in 2025 is diminished and meager, muscled out in the consumer arena by other laws and shunned in the business-to-business environment by commercial entities mistrustful of what courts may do.

But there is a more promising, alternate vision of contract law. Under this vision, contract law responds to the needs of contracting parties in a flexible manner that recognizes marketplace needs and realities. The judges who administer the law realize that a mass consumer contract is not the same as a negotiated commercial agreement. They understand that a contract has different functions in different transactions and that a contract’s role, and the application of doctrinal standards, may shift depending upon the type of transaction and the parties involved. Under this vi-

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55. As Gilson, Sabel and Scott write: “[C]ourts must follow the instructions of the contracting parties as to how their contract is to be adapted to its particular context . . . in responding to contract innovation driven by changes in the contracting parties’ business environment, courts must practice the passive virtues: The parties, not the courts, drive innovation.” Robert J. Gilson, Charles F. Sabel, & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 174 (2013).

56. Lawrence Friedman first made this observation when he noted that “[t]he most dramatic changes touching the significance of contract law in modern life also came about, not through internal developments in contract law, but through developments in public policy which systematically robbed contracts of its subject-matter.” LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 24 (1965).

57. Grant Gilmore famously pronounced that contract law was “dead” and its rules reabsorbed into tort. GRANT GILMORE, *THE DEATH OF CONTRACT* 95 (1974).

sion, the judiciary takes advantage of the adaptability of contract law to fulfill its promise—to promote the intent of the parties and protect their reasonable expectations.

#### CONCLUSION

While society's definition of a contract—as a legally enforceable promise—may not have changed much, the delivery mechanisms, the methods of contracting, the role of the contract, and the application of the doctrine itself have changed. Contracts—and contract law—will continue to evolve as drafting parties invent new ways to meet the needs of a changing marketplace. Courts will evaluate new contracting forms, assess their enforceability, and establish their limits. In doing so, courts should be guided by the function of the contract and the context of the transaction. The strength of contract law lies in its dynamism and adaptability. The development of the law is not predetermined or inevitable; judges shape its direction and guide its path. The future of contract law then—its relevance and its vitality—depends upon the wisdom of the courts.