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Contract Design in the Shadow of Regulation

James Fallows Tierney
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James Fallows Tierney*

Contract Design in the Shadow of Regulation

ABSTRACT

Does the threat of legal reform encourage companies to adopt high-quality contract terms that consumers ignore so that companies can use them in lobbying efforts to avoid reform? That may be an overlooked answer to a puzzle about consumer contracts. Consumers ignore most contract terms at the time of acceptance, so scholars usually expect companies to pick ignored terms of the lowest possible quality that courts will let them get away with. But some companies pick terms that are surprisingly high-quality. Courts do not require these terms that consumers ignore, so firms that pick them incur costs for seemingly little gain.

This Article identifies a novel function of these terms: their audience is not courts or consumers, but policymakers deciding whether to re-

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* Senior Counsel, Office of the General Counsel, U.S. Securities and Exchange Commission; Assistant Professor of Law, University of Nebraska College of Law (beginning 2020–21 academic year). Many thanks to Bill Araiza, Julian Arato, Yonathan Arbel, Roger Alford, Douglas Baird, Eric Berger, Lisa Bernstein, Kristen Blankley, Vince Buccola, Adam Cox, Chris Drahozal, Ben Edwards, Chris Ford, Jonah Gelbach, Maria Glover, Virginia Harper Ho, Jayme Herschkopf, David Hoffman, Peter Huang, Cathy Hwang, Aziz Huq, Gus Hurwitz, Brian Lepard, Adam Levitin, Jamie Liebentritt, Jonathan Marshfield, Brett McDonnell, Jonathan Remy Nash, Yaron Nili, David Noll, Alice Ristroph, Matthew Schaefer, Steve Schaus, David Schraub, Anthony Schutz, Miriam Seifter, Jess Shoemaker, Melissa Stewart, Brett Stohs, Lior Strahilevitz, Susannah Tahk, John Tierney, Susan Tierney, Matthew Turk, Urska Velikonja, Catherine Wilson, Charles Woodworth, Lua Yuille, as well as participants at talks at the Midwestern Law and Economics Association annual conference, the University of Chicago Legal Scholarship Workshop, and the University of Nebraska College of Law for valuable comments and conversation. I am also much obliged to the *Nebraska Law Review* for their thoughtful edits.

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form status quo legal rules from which companies profit. Drawing on behavioral law and economics, and illustrating with a case study of lobbying surrounding the Consumer Financial Protection Bureau's bank account overdraft rule, this Article shows how companies use the high-quality terms they adopt in anticipation of regulation to "frame" the status quo rule. High-quality terms help show how the status quo rule might benefit consumers, letting companies appeal to policymakers' cognitive biases so they are more likely to support the status quo rule. This Article addresses several practical and theoretical implications of anticipatory self-regulation to frame reform. On one hand, even the threat of legal reform might influence the kinds of contract terms businesses adopt. On the other, a small minority of contract terms can take on outsized role in policy debates about legal reform, potentially distorting policymaking. As a theoretical matter, moreover, the Article complements information revelation models of sequential policymaking by showing how actors at one stage can frame information so policymakers at a later stage resort to decision-simplifying heuristics that favor the status quo.

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I. INTRODUCTION

Contract designers work in the shadow of status quo legal rules.[1] Where those rules allow, firms can adopt contract terms that consumers ignore—"nonsalient" terms—to dump risk or increase the effective total price paid, even if the upfront price appears low. Consumers ignore these terms in entering into transactions; they are imperfectly rational, cannot effectively process complex contracts, are myopic, and overconfident about terms that will govern the present and future.[2] Many scholars expect firms will adopt self-serving terms whenever possible, subject only to enforcement constraints.[3]

Yet sometimes firms adopt terms that are puzzlingly high-quality from consumers' perspective.[4] For instance, a firm might include a term forbearing from a potential source of revenue—like posting transactions to a checking account in an order that does not maximize overdraft-fee revenue—that governing law otherwise allows. In examples like this,[5] the pattern is that the nonsalient term allocates more surplus, less risk, or more protection than we might expect, reducing the firm's opportunity for profit—for seemingly no gain.[6]

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1. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).
2. *See generally* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (demonstrating in retail credit markets that contract designers have an incentive to select terms that exploit these cognitive biases by decreasing salient price dimensions and increasing nonsalient price dimensions).
3. *See, e.g.*, Adam B. Badawi, *Rationality's Reach*, 112 MICH. L. REV. 993, 1002 (2014); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 257 (2013); *see generally* section II.A.
4. "Consumer" is shorthand for individuals in their roles as buyers of goods and services from firms, sellers of labor to firms, and even products for digital-platform firms. *See* David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1397–98 (2018) (noting that this definition is "intensely contested"); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1205 (2003).
5. *See infra* section II.B.
6. On the concept of surplus in legal analysis, see Michael D. Guttentag, *Law and Surplus: Opportunities Missed*, 2019 UTAH L. REV. 607 (2019).

One answer to the puzzle is an underappreciated public law implication of contract design: firms sometimes adopt terms for an audience of regulators or policymakers, rather than consumers or courts. When firms anticipate legal reform that would threaten a profitable term or practice, they may adopt contract terms that help them fend off reform. In doing so, firms can use high-quality terms to shape policymakers' perceptions about real-world consequences of what status quo rules let firms do. In short, a firm can fend off adoption of a mandatory rule prohibiting some profitable practice by adopting a high-quality term that gives back surplus with respect to only a small portion of that practice.

Terms that consumers ignore can still be relevant to policymakers because of their social consequences. Some terms affect consumers' or third parties' interests and legal rights. For example, Facebook's practice of collecting and selling user data may have influenced electoral outcomes.[7] Consumer groups, plaintiffs' attorneys, and other reformers might respond to events like these by publicizing the negative consequences of firms' contracts. That can be costly for firms—not just in reputation, but also in exposure to proposed reforms like mandatory rules that change what firms can and cannot do.[8] Reform proposals expand contracts' audiences to include the policymakers deciding whether to keep the status quo legal rule.[9] Firms that face significant risk from reform can pursue a midway strategy of anticipatory self-regulation: adopting apparently high-quality terms to show policymakers that market practices under the status quo rule benefit consumers, making reform undesirable. Firms can embed high-quality nonsalient terms within the broader low-quality term they seek to protect in the policy sphere.

Firms often use high-quality terms to influence policymakers' decisions by appealing to their imperfect rationality. Cognitive psychologists and behavioral economists have shown that people are imperfectly, rather than perfectly, rational.[10] We often use mental

7. *See, e.g.*, Ronald J. Deibert, *The Road to Digital Unfreedom: Three Painful Truths About Social Media*, 30 J. DEMOCRACY 25, 25 (2019) (describing negative externalities of these terms on political outcomes).

8. *See, e.g.*, Letter from Election Privacy Info. Ctr. to Senate Judiciary Comm. and Senate Commerce Comm. (Apr. 9, 2018) (on file with author) (calling for Facebook reform).

9. On contracts' audiences, see Cathy Hwang & Matthew Jennejohn, Contractual Depth 19–21 (2019) (unpublished manuscript) (on file with author) (noting that modern contract theories have "overlooked the fact that modern contracts" are "written to satisfy many audiences," such as "participants in secondary markets or regulatory institutions that will review the language of the agreement"); Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211 (2015).

10. *See* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1206–07 (2003); William J. Congdon, Jeffrey R. Kling & Sendhil Mullainathan, *Behavioral Economics and Tax Policy*, 62 NAT'L TAX J.

shortcuts in making choices, and can be susceptible to "framing effects"—the tendency to prefer one option based on how it is described or framed.[11] Policymakers are susceptible to framing effects, as mediated through certain heuristics and cognitive biases.[12] Firms can publicize high-quality terms in ways that frame the choice between status quo rules and reform, appealing to decision-simplifying heuristics and cognitive biases that encourage support for the status quo. If policymakers respond to this framing, they may prefer the status quo for reasons that may be only loosely related to an unbiased view of its normative desirability, potentially inhibiting reform.

In this Article, I aim to make two principal scholarly contributions about the important and unappreciated implications of framing reform using anticipatory self-regulation. First, I offer a novel theoretical account of how contract designers appeal to audiences other than courts and counterparties, both reacting to anticipated regulation and using their contract design to influence policymakers' choices.[13] This account ties together contract theory, collective choice of legal rules, and behavioral law and economics. If firms adopt contract terms in the shadow of anticipated reform, and use these terms to frame the status quo, they can influence how imperfectly rational policymakers perceive tradeoffs between the status quo rule and proposed reforms.[14] This Article thus fills a gap in the literature on how imperfect rationality bears on the selection of contract terms and legal rules.[15]

375 (2009) (imperfect rationality means people "are not especially good at choosing optimally," as they "find it hard to know what is optimal," "possess only limited computational capacity, meaning that they have trouble . . . optimizing at all," and have "bounded self-control").

11. *See, e.g.*, CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000) [hereinafter CHOICES]; Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 835 (2012).
12. *See infra* section III.A.
13. In an unpublished manuscript, Hwang and Jennejohn address the "novel" idea "in the contract theory literature" that contract designers sometimes appeal to an audience of regulators to avoid enforceability constraints—such as regulators' disapproval of a contract or an underlying transaction based on the presence or absence of certain contract terms. Hwang & Jennejohn, *supra* note 9, at 33, 43. Their work does not address how contract designers select terms in the shadow of, and in order to influence, regulators' anticipated policy choices.
14. It appears that only one work identifies contract terms' communicative function in improving perceived fairness, but that work does not discuss communication to a policymaking audience or connect this function to how imperfectly rational policymakers undertake policy choice. *See* David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 987, 1014–16 (2006); *see infra* section IV.A.
15. *See, e.g.*, Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 319–20 (2006). Nash's article offers a general theory of how framing might affect perceived viability of policy choices, but does not address (as this Article does) how contract terms can supply frames to shape prefer-

Second, this Article raises implications for behavioral market failures in political economy. Firms influence consumer behavior through contract design that appeals to their psychology, and use similar strategies to influence policymakers' selection of rules governing markets for contract terms. Experimental evidence suggests that policymakers react favorably to firms' voluntary adoption of practices that go beyond the requirements of existing law, reducing their demand for reform.[16] One upshot is that a credible threat of reform can encourage firms to adopt contractual terms that, to a first-order approximation, begin to address some of the policy goals sought to be achieved through reform. Yet if contract terms designed to influence imperfect rationality lead to behavioral market failures in the consumer context, in the policy context these may likewise inhibit reform and entrench status quo rules. As a practical matter, it is incumbent on reformers, scholars, and policymakers to understand how framing reform with anticipatory self-regulation effects can entrench status quo legal rules.

This Article proceeds as follows. Part II sets up the puzzle that this Article seeks to address. The behavioral theory of consumer contracts holds that, in equilibrium, firms have an incentive to appeal to consumers' imperfect rationality by competing on high-quality salient terms, and pairing these with self-serving or low-quality nonsalient terms. I then identify three examples of nonsalient contract terms that do not fit the prediction of the behavioral account: overdraft fee transaction reordering; privacy policies; and antidiscrimination policies on sharing economy platform apps. Why might firms select these costly provisions, which are not required to compete for consumers or to enforce these contracts?

Part III argues these private law contract terms have an important public law function: firms can present them to an audience of policymakers to frame the choice about whether to reform status quo rules. Even contract terms that consumers ignore can be salient to policymakers attuned to political accountability. After offering a brief overview of how framing can shape policymakers' preferences, I show how firms can use the terms they select in anticipatory self-regulation to appeal to policymakers' psychology. Firms and trade groups with an interest in the status quo can rely on these terms in lobbying efforts, at Congressional hearings, and in agency rulemaking comment letters

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ences for the status quo over competing options. For recent work discussing framing in contract theory, see Richard R.W. Brooks, Alexander Stremitzer & Stephan Tontrup, *Stretch It but Don't Break It: The Hidden Cost of Contract Framing*, 46 J. LEGAL STUD. 399 (2017); David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 408 (2013).

16. *See* Neil Malhotra et al., *Does Private Regulation Preempt Public Regulation?*, 113 AM. POL. SCI. REV. 19 (2019).

to illustrate how the contract terms adopted in anticipatory self-regulation lead to socially desirable outcomes for the policymakers' constituents—and how policymakers who adopted reform might be blamed for constituents' resulting losses. I undertake a case study to show how firms use the terms they select to appeal to the imperfect rationality of policymakers. By framing contracting practices under the status quo this way, firms and their lobbyists can exploit framing effects by appealing to different heuristics and biases—in particular, status quo bias, loss aversion, and availability—in order to influence policymakers' perceptions so they may favor the status quo. Moving from the specific to the theoretical, I offer a general account of why firms might select these terms, and then assess objections and alternative explanations.

Part IV addresses framing reform with high-quality terms fits with the existing literature, and how this phenomenon bears on firms' broader incentive to select terms that take advantage of their various audiences' imperfect rationality. Besides these implications, high-quality terms also raise practical questions and challenges. On one hand, even the threat of legal reform might influence the kinds of contract terms businesses adopt. On the other hand, a small minority of contract terms can take on outsized role in policy debates about legal reform, potentially distorting policymaking. In addition, reformers who work inside and outside policy debates may benefit from taking framing into account if they wish to succeed in their own policy initiatives. Doing so can shape the rhetorical strategies reformers use in offering their own reform alternatives, and in responding to defenses of the status quo.

A caveat before we begin. Although I discuss reform efforts in different contexts, this Article takes no position on the desirability of status quo rules or reform proposals discussed here, or about the social welfare effects of terms under those different sets of rules. Rather, the goal is to offer a positive and normative analysis of firms' strategy of selecting nonsalient high-quality terms to assist efforts to avoid policy reform. These terms serve an underappreciated but important role in framing policy debates and entrenching status quo rules.

II. UNEXPECTEDLY HIGH-QUALITY NONSALIENT TERMS

Market forces rarely constrain firms from selecting low-quality terms, as these do not factor into imperfectly rational consumers' contracting decisions. Behavioral theories thus expect firms in equilibrium to compete on salient terms (such as price) favoring the consumer and to pair these with other nonsalient terms favoring the firm.[17] Without market discipline, firms can select nonsalient terms of

17. *See generally* BAR-GILL, *supra* note 2.

the lowest quality—that is, those with a distributive effect most favoring the firm—that courts will enforce. But against this incentive, firms sometimes select nonsalient terms that are better than behavioral approaches would predict. This Part sets up why that is puzzling and identifies four examples of these high-quality terms.

A. The Expected Race to the Bottom

Standard economic theories suppose that consumer contracts are the product of rational firms and consumers in these markets.[18] Although consumers almost never bargain, even over price,[19] market discipline is supposed to provide an incentive for firms to offer goods with satisfactory attributes.[20] Boilerplate contract terms are, as much as any other attribute, part of the product offered and sold.[21] Thus standard terms should be susceptible to competitive pressure; firms are less able to attract buyers for goods with low-quality provisions at a given price, reducing the incentive to offer these provisions in the first place.

Yet these theories do not reflect how firms draft contracts or how most consumers assess them.[22] Rather, firms compete on a small number of product attributes, such as price, but not on standard contract terms. Most terms are irrelevant to a consumer's willingness to enter into a contract, and thus nonsalient. Because consumers "are boundedly rational rather than fully rational decisionmakers, when making purchasing decisions they take into account only a limited

18. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 863 (2006).

19. *See* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 905–06 (2006). Nor would consumers prefer bargaining many times a day over quotidian consumer contracts, given that they face significant search costs and bargaining disutilities even with respect to high-value purchases such as cars. *See* Fiona Scott Morton, Jorge Silva-Risso & Florian Zettelmeyer, *What Matters in a Price Negotiation: Evidence from the U.S. Auto Retailing Industry*, 9 QUANT. MKTG. & ECON. 365 (2011).

20. *See* Korobkin, *supra* note 4, at 1208–16; James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 166–80 (2013); *see, e.g.*, Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983) (offering the classic account).

21. *See* Korobkin, *supra* note 4, at 1206.

22. *See* Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135, 149 (2009). For discussion of how idiosyncratic consumers may fill the role of an informed minority ex post, see Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. (forthcoming 2020).

number of [salient] product attributes and ignore [nonsalient] others."[23]

This is a function of contractual complexity, myopia, and overconfidence.[24] Imperfectly rational consumers do not read and in fact ignore most contract terms and disclosures, even for financially significant transactions. They find it hard to process and understand complex terms and disclosures that they do read.[25] In addition, imperfectly rational consumers are overly optimistic about the good or service at issue, and myopically and optimistically underestimate the probability that they will trigger various contract terms.[26] Those who lack experience with a given contract term might also discount the payoffs associated with it.[27] Ignoring nonsalient terms may be rational if all contracts in the market include similar ones.[28] Still, by ignoring nonsalient terms, consumers do not take their costs into account.[29] As a result, market discipline is absent for nonsalient terms; competitive pressure is unlikely to select out of the market terms that informed consumers would not want.[30]

23. Korobkin, *supra* note 4, at 1206; *see also, e.g.*, Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, *Salience and Consumer Choice*, 121 J. POL. ECON. 803 (2013) (offering a model of consumer choice based on salient product attributes).
24. *See* BAR-GILL, *supra* note 2, at 17–23; *see also, e.g.*, *id.* at 78–97 (describing how these phenomena play out in contracting for credit cards).
25. On ignoring terms, see Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 36 (2017) (showing how consumers ignore terms in financially significant contracts); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (explaining the no-reading problem). On difficulty processing complex terms, see, e.g., Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 62–69 (2015); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1749 (2014).
26. *See, e.g.*, Michael D. Grubb, *Overconfident Consumers in the Marketplace*, 29 J. ECON. PERSP. 9 (2015); BAR-GILL, *supra* note 2, at 13–14 (describing consumers' underestimation of product use levels).
27. *See, e.g.*, Matthew J.B. Lawrence, *Mandatory Process*, 90 IND. L.J. 1429, 1433 (2015).
28. *See*, *e.g.*, David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1006 (2017).
29. *See, e.g.*, BAR-GILL, *supra* note 2, at 78–97 (describing credit card markets); Dina Srinivasan, *Why Privacy Is an Antitrust Issue*, N.Y. TIMES (May 28, 2019), https://nyti.ms/2Qt1uTe [https://perma.unl.edu/69JN-PWGG] (describing privacy policies and internet services).
30. *See, e.g.*, Hoffman, *supra* note 4, at 1410 (consumer contract terms "are not typically amenable to competitive pressures"); *id.* at 1459 ("firms are motivated to extract value from [consumers] in whatever ways at hand: contracts that give with one hand may take away with another in ways invisible to external observers"); G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J.L. ECON. &

Indeed, contracts scholars suggest that firms have an incentive to adopt particularly low-quality terms in their fine print. Where consumers are rational, firms might adopt rigidly self-serving terms for their "option value," such that they are exercised only against "opportunistic" consumers.[31] Where consumers are *imperfectly* rational, moreover, market competition creates an incentive to pair high-quality salient terms with low-quality nonsalient terms. Contrary to the predictions of the standard economic models, firms routinely draft standard contract terms that, from a perfectly rational and fully informed consumer's perspective, are "low-quality" or distributionally unfair because they maximize the amount of surplus the firm retains and the risk the consumer bears.[32] Enforcement constraints provide a lower bound: a court might refuse to enforce a low-quality term, or a regulator might disallow the contract or impose sanctions for violating some mandatory rule.[33]

As repeat players, contract designers have an incentive to pair terms of varying quality in order to exploit the cognitive biases of one-shotter counterparties. For deferred-fee pricing structures, "salience is a function of time," and "competition will drive short-term prices below cost, with sellers recouping losses through high long-term prices."[34] When salience is a function of the opaque costs associated with contractual complexity, firms may opportunistically select low-quality provisions that permit them to recoup their costs in offering high-quality salient terms, such as lower price.[35] Doing so lets firms

POL'Y 413, 439 (2015) ("there is no one true marginal customer policing each of the terms for the benefit of infra-marginal customers"); *cf.* Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 451 (2008) (empirical study doubting that "greater market power is associated with more pro-seller standard terms," except perhaps "on less salient" terms).

31. Hoffman, *supra* note 4, at 1401; *see* Johnston, *supra* note 18, at 877–80; Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006).

32. *See, e.g.*, Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 870, 873 (2011); *see also* Eric A. Zacks, *The Moral Hazard of Contract Drafting*, 42 FLA. ST. U. L. REV. 991, 1015–19 (2015) (describing how to identify problematic contracts).

33. *See, e.g.*, Hwang & Jennejohn, *supra* note 9, at 30 (reporting corporate general counsel's perception of the "huge role" regulators play in shaping "in contracts to which the regulators were not party" to fend off regulatory "'inquiry or lawsuit'"); Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965 (2019) (challenging consensus that unconscionability is toothless).

34. BAR-GILL, *supra* note 2, at 24.

35. Korobkin, *supra* note 4, at 1206, 1208–16, 1225, 1243; *see* Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 80 (2019) (explaining in the broader contract context that firms "take advantage of consumers' inferiority or ignorance and draft biased contracts"); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 134–35 (2017); BAR-GILL, *supra* note 2, at 16–23, 159; Oren Bar-Gill & Kevin Davis, *Empty*

maximize the surplus retained—including the risk allocated to or costs borne by the consumer—while competing on the price consumers perceive they will pay.[36] Nonsalient terms should become "more pro-seller over time relative to the default rules."[37]

Firms' incentive to appeal to consumers' imperfect rationality does not imply that firms are themselves perfectly rational. The human agents who act for firms have their own biases.[38] But two phenomena suggest firms will better manage their biases than consumers. First, firms invest in minimizing costly defects in product design that translate into competitive disadvantage.[39] A product that appeals less effectively to consumer psychology than competing products has a costly defect. Firms that cannot minimize their own cognitive biases in designing contracts that appeal to consumer psychology will, over time, lose market share to those that can.[40] Second, group decision-making and delegation to agents (such as expensive lawyers) may reduce the impact of individual employees' biases on the selection of terms that will maximize revenue generated from exploiting consumer psychology.[41]

B. Puzzling Examples of High-Quality Nonsalient Terms

Behavioral theories predict that firms will not select nonsalient terms that are high-quality if not necessary for enforcement. This subsection considers several puzzling examples of high-quality nonsalient terms: (1) checking account overdraft-fee policies; (2) website privacy policies; and (3) Airbnb's antidiscrimination clause. Part III offers a general account of why firms might adopt these policies in anticipation of regulation, and returns to the overdraft example as an illustrative case study.

Promises, 84 S. CAL. L. REV. 1, 19 (2010); *cf.* Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518, 533 (1990) (discussing incentive to select opportunistic and inefficient terms).

36. Gibson, *supra* note 20, at 213 (collecting evidence that this phenomenon exists in a wide variety of markets).
37. Marotta-Wurgler & Taylor, *supra* note 3, at 257.
38. *See* Roger P. Alford & James Fallows Tierney, *Moral Reasoning in International Law*, *in* THE ROLE OF ETHICS IN INTERNATIONAL LAW 1, 33–34 (Donald Earl Childress III ed., 2012) (explaining that "corporate entities[ ] are not cognitive agents," and that those "that make actual decisions" for such entities "are people whose rational behavior is bounded by human psychology").
39. *See* BAR-GILL, *supra* note 2, at 8–10.
40. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 726 (1999) ("Whether by design or not, the market will evolve to a state in which only firms that capitalize on consumer cognitive anomalies survive.").
41. *Cf.* Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 18–28 (2002) (discussing role of group decision making in reducing cognitive bias).

1. Overdraft Protection

Checking account depositors sometimes have insufficient funds for a transaction such as a debit card purchase. Many banks allow these transactions to go through, overdrawing the account for a convenience or "overdraft" fee.[42] These fees are effectively fixed interest payments on a short term loan.[43] While the terms of overdraft coverage must be disclosed,[44] these terms are typically nonsalient to consumers deciding whether to accept a depositor agreement upon opening a checking account. As in other retail credit markets, consumers ignore contractual complexity, are myopic about short-term benefits, and are overly optimistic about the likelihood of overdrawing their accounts.[45]

Overdraft fees are a significant revenue source for financial institutions, especially smaller institutions that rely heavily on fees associated with servicing consumer accounts.[46] Federal law lets banks pick overdraft fees and how to disclose them.[47] Banks thus should be expected to adopt terms and practices that "exploit consumer mistakes" and maximize revenue.[48] Recognizing this concern, the Federal Reserve adopted regulations in 2009 that attempted to address the behavioral market failure through "disclosure" of overdraft costs and "sticky defaults" requiring consumers to opt in.[49] But where banks act

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42. *See* Todd J. Zywicki, *The Economics and Regulation of Bank Overdraft Protection*, 69 WASH. & LEE L. REV. 1141, 1153–54 (2012) (drawing on bank lobbyists' surveys to conclude that "the availability and usage of overdraft protection is consistent with consumer preferences").

43. Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1653 (2014) (explaining that the fees, which average about $35, can "amount to an APR of over 1,000% on the [overdraft] loan"); *see* Consumer Financial Protection Bureau, CFPB STUDY OF OVERDRAFT PROGRAMS 14 (June 2013) [hereinafter CFPB STUDY] ("Overdraft coverage limits effectively constitute the amount an institution is willing to advance to a consumer on future deposits in return for paying per-item overdraft fees.").

44. For discussion of overdraft protection, see Ctr. for Responsible Lending, THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS 136–58 (July 2013) [hereinafter STATE OF LENDING]; Fed. Deposit Ins. Corp., FDIC STUDY OF BANK OVERDRAFT PROGRAMS (2008).

45. *See* Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1547, 1554 (2019); *cf.* BAR-GILL, *supra* note 2, at 88 (discussing overoptimism with respect to credit card liquidity needs).

46. CFPB STUDY, *supra* note 43, at 14–17.

47. Gutierrez v. Wells Fargo Bank NA, 704 F.3d 712, 724 (9th Cir. 2012) ("set account terms and . . . to charge customers non-interest charges and fees, such as . . . overdraft fees"); *see* 12 C.F.R. § 7.4002(b)(2) (bank has constrained discretion to choose "the method of calculating" non-interest charges and fees).

48. Bubb & Pildes, *supra* note 43, at 1653.

49. *Id*. at 1655–58; *see* Final Rule, *Electronic Fund Transfers*, 74 Fed. Reg. 59,003 (2009) [hereinafter Overdraft Rule].

consistently with these enforceability constraints, they retain wide latitude to adopt practices that maximize their overdraft revenue.[50]

Banks adopt widely varying practices that may alter the amount of overdraft revenue they generate.[51] One such practice involves altering the order in which transactions post to a checking account, such as posting higher-value before lower-value transactions. Consider a person who makes a series of three transactions of $30, $5, and $75, and whose $100 balance is insufficient to cover all three transactions. If a bank posts low-to-high or chronologically, only the third transaction will overdraw the account, incurring only one overdraft fee. But if a bank reorders them high-or-low, the second ($30) and third ($5) each overdraw the account, incurring two overdraft fees. Reordering high-to-low "drives the account negative more quickly so that each smaller transaction posted subsequently posts against a negative balance and triggers an additional overdraft fee," generating more revenue for the bank.[52]

This is controversial, and has generated litigation and calls for legal reform. Consumer class actions have challenged the practice.[53] Legislation proposed in 2013 would have required banks to "post . . . [so] the consumer does not incur avoidable overdraft coverage fees."[54] The next year, a study found the public was generally opposed to overdraft reordering and supported regulation.[55] Consumer advocates and policymakers continue to call for reforms that would prohibit reordering.[56] And the defense bar warns that this is "an important area in which the CFPB may regulate."[57]

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50. For discussion of the failure of an approach based solely on disclosure and sticky defaults, and the potential need for behavioral market failures to be addressed instead by mandatory rules, see Bubb & Pildes, *supra* note 43, at 1655–58; Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1186–87 (2013).

51. CFPB STUDY, *supra* note 43, at 44–48 (describing different approaches to processing and posting transactions).

52. STATE OF LENDING, *supra* note 44, at 141.

53. *See, e.g.*, Gutierrez v. Wells Fargo Bank NA, 704 F.3d 712, 716 (9th Cir. 2012) (holding that although federal banking law governs posting order and disclosures, banks may be liable on state-law claims related to "fraudulent or misleading representations" about posting order).

54. Overdraft Protection Act of 2013, H.R. 1261, 113th Cong. § 4 (2013).

55. Pew Charitable Trusts, OVERDRAWN: PERSISTENT CONFUSION AND CONCERN ABOUT BANK OVERDRAFT PRACTICES 12 (June 2014), https://bit.ly/2mfcnx1 [https://perma.unl.edu/6FM7-HASM].

56. *See, e.g.*, Letter from Consumer Reports, *Re: Overdraft Rule Review Pursuant to the Regulatory Flexibility Act, Docket No. CFPB-2019-0023*, at *3 (June 28, 2017) (calling for "further regulatory action").

57. Kevin L. Petrasic & Michael A. Hertzberg, *CFPB Review of Overdraft Protection Has Broad Implications for Banks*, STAY CURRENT: A CLIENT ALERT FROM PAUL HASTINGS (Paul Hastings), Mar. 1, 2012, at 2.

With reform on the horizon, a wide swath of the industry backed away from controversial reordering practices. In 2011, after high-profile litigation challenging transaction ordering practices, Citibank and Wells Fargo respectively announced that they would post low-to-high and chronologically moving forward.[58] Other banks followed suit, adopting more consumer friendly practices than the status quo legal rule allowed. A different study found that between 2013 and 2016, more banks voluntarily adopted low-to-high or chronological transaction posting; by 2016, 91% of the fifty largest banks' account disclosures revealed that they used no or limited high-to-low transaction ordering.[59] Banks' choices are not binding commitments, as they are free to "reinstate" high-to-low reordering "at any time."[60] Banks continue to face a threat of reform, including legislation introduced in 2018 and 2019, and the CFPB's periodic review in 2019 of the Overdraft Rule, that "could heighten pressure on banks to voluntarily change their practices."[61]

Firms can adopt *apparently* high-quality terms to release this pressure and avoid reform that would prohibit overdraft fees. But the actual quality may depend on other terms they adopt.[62] For instance, the Overdraft Rule gives depositors the right to "opt in" to overdraft coverage for "ATM and one-time debit card transactions."[63] There is no corresponding opt-in right for checks or scheduled electronic or ACH transactions.[64] This creates an incentive to adopt posting orders

58. Connie Prater, *Banks Scrap Check-Clearing Practices that Promote Overdrafts*, CREDITCARDS.COM (Apr. 7, 2011), https://bit.ly/2md3HHl [https://perma.unl.edu/L482-FV8V].

59. Pew Charitable Trusts, CONSUMERS NEED PROTECTION FROM EXCESSIVE OVERDRAFT COSTS 9 (Dec. 2016), https://bit.ly/2kAnMan [https://perma.unl.edu/RQD4-5YKF] (from 2013 to 2016, proportion of banks using no or limited high-to-low reordering rose from 67% to 91%, and of those using no high-to-low reordering rose 47% to 59%).

60. *Assessing and Enhancing Protections in Consumer Financial Services: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. 23 (2014) (statement of Travis Plunkett, Senior Director, Family Economic Stability, Pew Charitable Trust).

61. Li Zhou, *Cory Booker Wants Banks to Stop Charging So Many Overdraft Fees*, VOX (May 22, 2019), https://bit.ly/2wjfRQV [https://perma.unl.edu/RQD4-5YKF]; *see* Stop Overdraft Profiteering Act of 2019, S. 1595, 116th Cong. (2019); Stop Overdraft Profiteering Act of 2018, S. 3343, 115th Cong. (2018); *see also infra* section III.B (case study of the Overdraft Rule); *cf.* Renae Merle, *Trump Administration May Overhaul Rules Limiting Bank Overdraft Fees*, WASH. POST (May 14, 2019), https://wapo.st/2lZRaXM [https://perma.unl.edu/2VH4-WWYL] (stating that these bills "have little chance of passing Congress this year," yet are "likely to become talking points during the 2020 presidential campaign" and are likely to be resurrected "if Democrats take control of the Senate").

62. Thanks to Adam Levitin for discussion on these following points.

63. Overdraft Rule, *supra* note 49, at 59,036.

64. *See id.* (noting that institutions cannot condition payment of overdrafts for these transactions on consent or opt-in to coverage for debit and ATM transactions).

that increase the likelihood of incurring overdraft fees for which consumers need not have opted in. A bank thus might group transactions by category—first certain bank fees, then ATM and one-time debit card transactions, before checks, scheduled ACH transactions, and the like—and posting within each category chronologically or low-to-high.[65] This nuance lets it post later the transactions for which it is more likely to be able to charge an overdraft fee. In this way, a bank might be able to tout its apparently high-quality chronological or low-to-high posting order, and still avoid certain costs of adopting high-quality terms.

Other sources of uncertainty about the quality of these terms include contractual discretion and lack of transparency about posting order in practice. A bank might retain the right to change its posting order at its absolute discretion. It might also say it generally posts transactions chronologically, but that it may not; there is often no way for depositors to determine ex post when the bank received and processed the transaction in order to confirm whether the bank is abiding by the "general" posting practice.[66] And even depositors who check their account balances ex ante to avoid incurring a fee may be unable to assess their available account balance, if the bank need not show holds or other claims on available funds.[67] This increases consumers' monitoring costs, potentially increasing the probability that they will incur an overdraft fee.[68] What is more, a firm that is non-transparent and retains significant residual discretion is in a better position to make nonverifiable claims about how "consumer friendly" their terms are. Such firms might bundle "high-quality" features of their terms with others that reduce the cost of offering those terms.

Adoption of chronological or low-to-high transaction ordering may be a type of anticipatory self-regulation. These terms can give financial institutions political cover against reform that would prohibit them from collecting overdraft fees at all. By purporting to forgo reve-

65. This is a simplified version of the posting order described in SunTrust Bank's depositor agreement. *See* SunTrust Bank, *Rules and Regulations for Deposit Accounts* 19– 20, https://www.suntrust.com/content/dam/suntrust/us/en/shared/documents/rules-and-regulations.pdf [https://perma.unl.edu/8S4H-UWSY] (last visited Dec. 4, 2019).
66. *See, e.g.*, Bank of America, *Deposit Agreement and Disclosures* 22–23 (Nov. 1, 2019), https://bit.ly/2QN2DXS [https://perma.unl.edu/5TQL-U5QX] (describing "general[ ]" posting practices, and providing that the bank "may treat [transactions] as if we received all . . . at the same time at the end of the business day").
67. *See, e.g.*, *id*. at 23–24 (noting that funds subject to holds "are not available to cover your transactions" and may be subject to overdraft, even though "we do not show holds" and a review of the account statement might reflect "that you had enough available funds in your account to cover a debit for which we charged you a fee").
68. *Cf.* Xiao Liu et al., *Analyzing Bank Overdraft Fees with Big Data*, 37 MKTG. SCI. 855 (2018) (discussing the role of monitoring costs in overdraft fees).

nue that the status quo rules allow them to generate—and that consumers generally ignore in selecting a bank account—financial institutions can show how they give back some contractual surplus under the status quo. As the case study in section III.B will illustrate, this allows them to frame the status quo for policymakers in ways that discourage reform.

2. Website Privacy Policies

Firms collect and share information about consumers, which can be a significant revenue source.[69] Many firms rely on a business model of providing some service for a low or zero salient fee, and recouping this with nonsalient cost dimensions like the sale of user data.[70] Firms that adopt more protective privacy policies forbear potential revenue.

Privacy policies are quasi-contractual statements that disclose how a firm will collect and use information.[71] They "develop[ed] first as industry's way to stave off regulation and spread[ ] further under state and federal mandates."[72] Today, the main constraint is in abiding by any terms adopted in a privacy policy, rather than adopting any particular terms.[73] Privacy policies remain largely self-regulated (or unregulated) under federal and state law.

Self-regulation means low quality terms have been historically pervasive, with limited opportunity for market discipline.[74] There is

69. *See generally* Stacy-Ann Elvy, *Paying for Privacy and the Personal Data Economy*, 117 COLUM. L. REV. 1369 (2017).
70. *See, e.g.*, Adam B. Thimmesch, *Transacting in Data: Tax, Privacy, and the New Economy*, 94 DENV. L. REV. 145, 153–56 (2016).
71. *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 596–97 (2014) (noting that violations are rarely litigated on contract theories and are often unsuccessful when they are, even though privacy policies "bear[ ] all of the [hall]marks of a contract") (citation and internal quotations omitted). The American Law Institute's Draft Restatement on the Law of Consumer Contracts would provide that upon a proposed minimal showing of consumer assent, the privacy policy would have contractual force. *See* RESTATEMENT OF THE LAW CONSUMER CONTRACTS § 1, cmt. 9 & Reporters' Notes (AM. LAW INST., Discussion Draft No. 4, 2017); *id.* § 2 & cmts. 2, 5; Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7 (2017); *see also* Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 37 YALE J. ON REG. 45, 47 (2019) (expressing skepticism based on precedent that privacy policies are contractual).
72. Ari Ezra Waldman, *Privacy, Notice, and Design*, 21 STAN. TECH. L. REV. 74, 80 (2018); *see* Steven Hecher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2046–47 (2000).
73. Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information?*, 111 PENN. ST. L. REV. 587, 603 (2007).
74. *See* Joel R. Reidenberg et al., *Ambiguity in Privacy Policies and the Impact of Regulation*, 45 J. LEGAL STUD. S163, S182 (2016) [hereinafter Reidenberg, *Ambiguity*] (reporting that "the market produces privacy policies that are more ambig-

mixed evidence about whether consumers respond to privacy policies, and vice versa.[75] In some markets where consumers are particularly sensitive to privacy, like adult websites, some firms appear to adopt unusually protective policies.[76] But in other markets, people do not comparison shop based on privacy policies, so a race to the bottom should be expected.[77]

Yet data privacy is a *politically* salient issue, even if it is not always salient to consumers at the time of contract. As Cathy Hwang and Matthew Jennejohn show in interviews with corporate general counsel, "[r]egulators [are] the most important audience" for privacy policies.[78] That is not only because regulators can "come in and either redesign your policy for you or try to shut you down," as one general counsel reported.[79] It is also because policymakers face pressure to enhance privacy protection in the face of technological advances and privacy breaches.[80] Privacy regulation is likely to be costly for firms that generate revenue from data sharing—especially internet firms that offer services for a low or zero salient price.[81] Firms therefore have an incentive to fend off reform.

Some firms have adopted more substantial privacy protections in anticipation of regulation. One measure of protection is terms' vagueness, such as the difference between disclosures that a firm "might collect," or "will" or "will not collect," particular data.[82] Vagueness can

uous," giving firms greater flexibility and raising the potential for misrepresentation, "than those subject to some form of regulation").

75. *Compare* Lior Jacob Strahilevitz & Matthew B. Kugler, *Is Privacy Policy Language Irrelevant to Consumers?*, 45 J. LEGAL STUD. S69 (2016) (reporting that people do not understand the policies they read, and that consumers may be unlikely to switch), *with* Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding*, 30 BERK. TECH. L.J. 39, 47–48 (2015) (collecting evidence that transaction choices depend on salience).

76. *See* Florencia Marotta-Wurgler, *Self-Regulation and Competition in Privacy Policies*, 45 J. LEGAL STUD. S13, S32 (2016) ("If there is a market and term category in which privacy is especially salient to consumers, [adult sites' third-party-sharing-related terms] is it.").

77. *See, e.g.*, Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, INFO. COMM. & SOC'Y 1 (2018); James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, 2005 U. ILL. J.L. TECH. & POL'Y 1, 5 (2015).

78. Hwang & Jennejohn, *supra* note 9, at 29.

79. *Id*.

80. *See, e.g.*, Klass, *supra* note 71, at 45, 47; *cf.* Laurence Dodds, *Tech Giants Back New US Data Privacy Law to Head Off Backlash*, TELEGRAPH (Sept. 26, 2018, 8:05 PM), https://www.telegraph.co.uk/technology/2018/09/26/tech-giants-back-new-us-data-privacy-law-head-backlash/ [https://perma.unl.edu/WJ9T-3PDT].

81. *See* James Campbell, Avi Goldfarb & Catherine Tucker, *Privacy Regulation and Market Structure*, 24 J. ECON. & MGMT. STRAT. 47 (2015).

82. Reidenberg, *Ambiguity*, *supra* note 74, at S174.

be a "signal[ ] of increased privacy vulnerability."[83] Researchers found that Time Warner, Comcast, Overstock.com, and Charter Communications had among the "most ambiguous" policies studied, while "the policies belonging to Costco and AT&T are almost twice as clear."[84] These less vague policies are higher quality because, at least on some dimensions (such as third party sharing), less vagueness means contractual audiences are better able to accurately assess risks to consumer information. In addition, clearer policies give firms less flexibility in adapting their collection, sharing, retention, and use practices, offering greater protection to consumers and making data less valuable to firms.

3. *Pro-Consumer Clauses in Relational Contracts of Adhesion*

Firms should have little incentive to innovate with the readability of terms that consumers never read in the first place. But in some circumstances, firms adopt nonsalient contract language that "at least sounds like it was written by a human."[85] In a series of case studies of firms that improved their contracts' readability, Dave Hoffman found evidence that they also jettisoned self-serving language and selected consumer-friendly terms.[86] For instance, the short-term rental platform Airbnb adopted an antidiscrimination policy that "increased the firm's explicit responsibility for preventing discrimination." This and other examples involved "abandoning or not taking up remedial limitations and defenses to actions by users," or otherwise "increas[ing] their formal legal exposure."[87]

None of these contract innovations were required for courts to enforce the contracts. Nor do they appear to be the sort of salient terms that consumers take into account at the time they are deciding whether to accept the terms of service and enter into a transaction. Although Hoffman suggests that these terms were meant to encourage users to remain "willing to contribute to a larger platform economy,"[88] the shadow of regulation may have been another factor. In Airbnb's case, for instance, Hoffman attributes adoption of a nondiscrimination policy to the firm's need to fend off a public relations

83. Jaspreet Bhatia et al., *A Theory of Vagueness and Privacy Risk Perception*, *in* PROCEEDINGS OF THE IEEE 24TH INTERNATIONAL REQUIREMENTS ENGINEERING CONFERENCE 26 (2016).

84. Reidenberg, *Ambiguity*, *supra* note 74, at S178.

85. Hoffman, *supra* note 4, at 1421.

86. *Id.* at 1427 (explaining social media website Tumblr's revision of terms to omit an arbitration clause and indemnification clause as an attempt to "build trust with users," but also because the general counsel reported a belief that "'user-friendly terms on the margins produce few real legal risks'").

87. *Id.* at 1443.

88. *Id.* at 1456; *see also id.* at 1444–46 (citing additional explanations).

crisis: by "putting out a public relations fire," firms might have been eliciting "user trust, and regulators' approval."[89]

Left unsaid is what approval firms might be seeking. The business model of firms like Airbnb is based on avoiding regulatory compliance and oversight.[90] Such firms might have particularly strong incentives to adopt apparently high-quality terms that can fend off regulation governing short term housing to implement regulatory priorities such as lost hotel-tax revenue, fighting gentrification, or avoiding discrimination.[91] Adopting high-quality terms on one of these dimensions may make it easier to combat regulation across other dimensions, as well. Indeed, observers have attributed the "specter of regulation" and liability as a precipitating factor in Airbnb's adoption of its antidiscrimination policy.[92]

4. *Do We See Anticipatory Self-Regulation Elsewhere?*

The examples discussed in this subsection show how contract designers sometimes add high-quality terms that are costly to them, nonsalient to consumers, and unnecessary to enforce the contract. These patterns point to an understudied public-law consequence for the private-law domain of contract law: anticipating legal reform, firms adopt contract terms that will be salient not ex ante to their counterparties, but ex post to the audience responsible for deciding whether to enact those reforms.[93] This reflects that contract designers innovate in response to "changes in legal aspects of the contracting environment."[94] They are acutely aware of the rules governing the goods or services they provide, and are sensitive to anticipated reforms to those rules. More broadly, evidence suggests that "it is largely fear of government regulation that drives the large majority of self-regulatory initiatives."[95]

Consistent with these scholarly findings, firms may respond by adopting contract terms—either for existing counterparties or for new

89. *Id.* at 1444–46.
90. *See, e.g.*, Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 506 (2016).
91. *See* Johanna Interian, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT'L. & COMP. L. REV. 129, 146–51 (2016).
92. Ray Fisman & Michael Luca, *Airbnb Isn't Doing Enough*, SLATE (Sept. 9, 2016), https://bit.ly/2kE4jWj [https://perma.unl.edu/7XU3-3L6H].
93. *Cf.* Hwang & Jennejohn, *supra* note 9, at 19–20 (noting that modern contract theories have "overlooked the fact that modern contracts are written for more than one or two ex post adjudicators," and are instead "written to satisfy many audiences").
94. Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83, 95 (2013); *see* Marotta-Wurgler & Taylor, *supra* note 3, at 242, 248–49 (discussing evidence that "corporate- and sovereign-bond contracts slowly adapted their language after a surprising and negative 'interpretive shock' by courts").
95. Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 L. & POL'Y 363, 400 (1997).

ones only[96]—that are higher-quality or more consumer-friendly than the behavioral account would predict. The examples discussed above will have to suffice for present purposes, though these terms may appear in the contracts of a wide range of firms across many industries. We might predict to find them adopted by firms that are exposed to a proposed reform to a status quo legal rule, those that retain significant contractual surplus from some term or practice under the status quo rule, and particularly those that can adopt a term that can be framed as high-quality but that is unlikely to be triggered or enforced in practice.

III. ANTICIPATORY SELF-REGULATION AND FRAMING EFFECTS

This Article's central claim is that contract designers sometimes select high-quality nonsalient terms in the shadow of anticipated regulation to avoid further costlier reforms. Firms seek to discourage those reforms by using anticipatory self-regulation in contract design, and by using these terms to shape policymakers' perceptions about the tradeoffs between the status quo and reform. This Part offers the theoretical basis for that claim and supports it with a case study of banks' lobbying about checking account overdraft protection regulations.

Contract designers shape policymakers' perceptions about the status quo by selecting contract terms, and describing them, in ways that appeal to policymakers' imperfect rationality. Like the rest of us, policymakers are susceptible to "framing effects," or the tendency to choose differently based on how otherwise identical options are described. Research suggests, in fact, that their institutional roles may make them even more subject to these effects than constituents. The Part then turns to showing how firms, lawyers, lobbyists, and others seeking to defend status quo legal rules to frame the choice between the status quo and more radical reform options in ways that encourage policymakers to rely on decision-simplifying heuristics that subtly lead them favor the status quo. This Part examines three kinds of strategies that firms and lobbyists might use to frame reform using the high-quality terms they adopt in the shadow of anticipated reform. In the overdraft context, contract designers and their lobbyists have framed contracts and reform by encouraging policymakers to use three decision-simplifying heuristics and biases: status quo bias, loss

96. *See* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 604 (2016) (noting that despite the conceit that "contract law does not allow one party to unilaterally change the terms of the deal," contract law in fact often permits firms these revisions through nonsalient "bill-stuffers" for which continued use of a service is deemed consent); *see also* Bar-Gill & Davis, *supra* note 35, at 12–16 (discussing examples of unilateral change in terms).

aversion, and availability. By using high-quality terms to frame policy choices these ways, firms influence how policymakers perceive, evaluate, and select between the status quo and reform proposals.

A. Framing the Status Quo in Policy Discourse with Contract Terms

1. Framing Effects

Cognitive scientists and behavioral economists have shown that people do not act in the perfectly rational ways assumed by the expected-utility theories that underlie rational choice models of decision-making.[97] Research in prospect theory has shown that people deciding under uncertainty often violate the invariance principle, which holds that how a choice is presented should not affect the decision.[98] Subtle differences in the language used to describe or frame options can significantly alter the choices that imperfectly rational people make: people are susceptible to *framing effects*.[99] These occur in a wide range of decision tasks.[100] As these include other-regarding decisions tasks, they are relevant to the policymaking process.[101] And when choices are complex—as is often true in policy debates—people often resort to heuristics to simplify the decision.

Frames can appeal to decision-simplifying heuristics, schema, cognitive biases, and other ways in which we make sense of the world, making these more salient to audiences. For example, people tend to perceive payoffs from some choice as losses or gains between a refer-

97. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060–66 (2000) (explaining how, in a policy-related decision task, people form preferences between the status quo and reform proposals based on perceptions of the final state of the world each generates).

98. *See* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, *in* CHOICES, *supra* note 11, at 1, 4 [hereinafter Kahneman & Tversky, *Choices, Values, and Frames*]; Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *in* CHOICES, *supra* note 11, at 209, 211.

99. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 454 (1981) [hereinafter Tversky & Kahneman, *Framing*]; Richard H. Thaler, *Mental Accounting Matters*, *in* CHOICES, *supra* note 11, at 241, 244–45. Communications theory sees framing as an agenda-setting strategy. *See* Dietram A. Scheufele & Shanto Iyengar, *The State of Framing Research: A Call for New Directions*, *in* THE OXFORD HANDBOOK OF POLITICAL COMMUNICATION 619, 619–20 (Kate Kenski & Kathleen Hall Jamieson eds., 2014).

100. *See, e.g.*, Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 482 (2010).

101. *See* Avital Moshinsky & Maya Bar-Hillel, *Loss Aversion and the Status Quo Label Bias*, 28 SOC. COGNITION 191, 194 (2010); Eyal Zamir & Ilana Ritov, *Loss Aversion, Omission Bias, and the Burden of Proof in Civil Litigation*, 41 J. LEGAL STUD. 165 (2012).

ence point (often the status quo) and a final state.[102] The classic early studies on framing effects showed how a choice's description in terms of losses or gains triggered their loss aversion, or the preference for avoiding losses from a given reference point to realizing equivalent gains.[103] Frames also appeal to other heuristics and biases discussed in greater detail below, such as status quo bias and availability.[104]

The process of making these mental shortcuts, heuristics, and biases more salient depends on other information at hand. Imperfectly rational people often attend only to the stated information at hand—where framing reflects one or the other of transparently equivalent information, "an individual normally sees only one [frame], and what she sees is all there is."[105] By the same token, framing effects can disappear when people have equivalent unstated information implied by a frame.[106]

Policymakers are subject to framing effects like the rest of us. They are imperfectly rational and exhibit "predictable patterns of mistakes," potentially resulting in "improvident regulatory policy."[107] Empirical research has progressed since early days when behavioral law and economics scholarship faced criticism that laboratory findings could not be extrapolated to the policymaking sphere.[108] Indeed, recent experimental findings suggest that policymakers may be *even*

102. *See* Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, *in* CHOICES, *supra* note 11, at 143.

103. *See* Zamir, *supra* note 11, at 835–37; *see also* Kahneman & Tversky, *Choices, Values, and Frames*, *supra* note 98, at 4–6 (detailing early studies on framing effects). On subsequent adjustments, see Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, *in* CHOICES, *supra* note 11, at 44.

104. *See infra* section III.B.

105. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 88 (2013).

106. *See* Paul M. Sniderman & Sean M. Theriault, *The Structure of Political Argument and the Logic of Issue Framing*, *in* STUDIES IN PUBLIC OPINION: ATTITUDES, NONATTITUDES, MEASUREMENT ERROR, AND CHANGE 133 (William E. Saris & Paul M. Sniderman eds., 2004); James N. Druckman & Kjersten R. Nelson, *Framing and Deliberation: How Citizens' Conversations Limit Elite Influence*, 47 AM. J. POL. SCI. 729 (2003).

107. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 571–72 (2002). For recent research, see Barbara Vis, *Heuristics and Political Elites' Judgment and Decision Making*, 17 POL. STUD. REV. 41 (2019); Lior Sheffer & Peter John Loewen, *Accountability, Framing Effects, and Risk-Seeking by Elected Representatives: An Experimental Study with American Local Politicians*, 72 POL. RES. Q. 49 (2019); *see generally* Lior Sheffer, *Behavioral Foundations of Elite Politics: How Individual-Level Characteristics Shape the Decision Making of Elected Politicians* (Ph.D dissertation 2018) [hereinafter Sheffer, *Behavioral Foundations*].

108. *See* William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 623–33 (2002). *But see* Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1692 (2003).

more susceptible than the rest of us to decision-simplifying heuristics and framing effects in policy choice settings. According to one study, policymakers from three countries demonstrated that they "adhere[d] very strongly to policy choices" described "as the status-quo, above and beyond the substantive content of the policy," and that their "risk calculus when" deciding between hypothetical policies with varying uncertainty "is strongly subject to framing effects."[109] Research suggests political accountability is why policymakers are susceptible to loss-averse framing. For incumbents concerned with reelection, framing an uncertain decision with reminders about "the public nature of the task at hand and its potential electoral consequences" may make more salient policymakers' aversion to losses that constituents suffer from the policy choices they make.[110]

The key point is that policymakers are susceptible to framing effects and to role-centered aversion to social losses from their choices. This susceptibility raises the stakes for controlling framing of the status quo and alternative policies. Given the economic stakes, affected parties have financial incentives to influence policy choice by "capitaliz[ing] on human irrationalities."[111] Those seeking to encourage one option can exploit framing effects to influence policymakers' preferences for that option. As Jonathan Remy Nash noted, this empowers those who successfully "present the option—i.e., to frame it—in such a way as to take advantage of framing effects and make the option seem more or less desirable" to policymakers.[112]

Opponents of a policy change might adopt frames that ascribe value to the status quo policy to set the reference baseline from which gains and losses from an alternative policy will be measured. Likewise, they might frame any change in outcomes as resulting in signifi-

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109. Sheffer, *Behavioral Foundations*, *supra*, note 107, at 51–52; *cf.* Rachlinski & Farina, *supra* note 107, at 603–06. As a theoretical matter, there may be obstacles to incorporating framing and other concepts from prospect theory into dominant theoretical models of collective choice. *See* Bruce Bueno de Mesquita & Rose McDermott, *Crossing No Man's Land: Cooperation from the Trenches*, 25 POL. PSYCHOL. 271 (2004) (discussing potential overlap between rational choice and prospect theory behavioral models of politics); *see also* Francesco Passarelli, *Risky Political Changes: Rational Choice vs. Prospect Theory* 9 n.12 (ISLA Working Paper No. 39, 2011) (noting that there is "quite limited" use of prospect theory in literatures on "political economy of reforms" and "policy alternatives . . . as lotteries").

110. Sheffer, *Behavioral Foundations*, *supra* note 107, at 81; *see also id.* at 53–54 (suggesting that reliance on heuristics and biases also might reflect systematic differences in who is elected to office, or experiences and learning in office).

111. Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 681 (2010).

112. Nash, *supra* note 15, at 317; *see* Nash & Stern, *supra* note 100, at 485; *cf.* Lisa Grow Sun & Brigham Daniels, *Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 357–60 (2016).

cant "losses" to the decisionmaker, to politically valuable constituencies, or to the public at large. Advocates try to encourage decisionmakers to accept and repeat that framing. By making loss aversion more salient, highlighting constituents' potential "loss" of benefits enjoyed under the status quo may inhibit policymakers' support for reform.[113]

In sum, research on cognitive science has long suggested the link between framing effects and how people evaluate proposed policies. This research also illustrate how policy entrepreneurs might frame policy options—and in particular way those options change the status quo—to influence perceptions and preferences about them.

2. *Contract Terms' Salience to Policymakers*

Even if policymakers are susceptible to framing effects generally, why would they take into account framing about contract terms that are nonsalient to consumers? This subsection suggests how terms have different functions for these audiences.

Status quo legal rules govern the contracts and practices firms adopt. But those rules, and the terms and practices that they allow firms to adopt, nonetheless have potentially significant social consequences in the markets that they regulate.[114] That terms are nonsalient to consumers does not mean they are so for policymakers, whose role differs. For consumers, the decision to contract has private and public benefits and costs. Consumers account for private consequences, and use decision-simplifying heuristics to choose based on salient features. This may be adaptive and rational; using decision-simplifying heuristics to ignore nonsalient features reduces private search costs, the savings of which accrue to the consumer. As the consumer does not internalize the public or social benefits or costs of her choice, she has little incentive to take them into account.

Policymakers, by contrast, have different stakes and face different choice problems. In their institutional roles, policymakers are not deciding whether to accept a contract, but instead whether to keep a status quo legal rule or adopt a reform alternative. The social consequences and practices that flow from those rules are central, not merely incidental, to that decision. Firms design contracts in the shadow of status quo legal rules, taking into account the likelihood

113. Zamir, *supra* note 11, at 890–91.

114. This is a common feature of legal rules. In areas other than contract law, status quo legal rules generate real-world outcomes for market participants who may not be aware of those rules or the private ordering that occurs in those rules' shadow. *See* Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031 (2019) (landlord-tenant law); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008) (intellectual property law).

that policymakers will adopt some alternative rule that will govern their contract or behavior instead. Those contracts confer private costs and benefits, and on society public costs and benefits. The possibility of picking an alternative to a status quo legal rule introduces uncertainty and risk into the transaction that the contract governs; one choice or another might grow or shrink the total amount of wealth or redistribute costs and benefits between market participants.

When policymakers decide between status quo and alternative policies that generate uncertain outcomes, affected parties have an incentive to bring to policymakers' attention real-world consequences of the decision at hand.[115] Suppose a proposed reform will adopt a mandatory rule that will mean the parties cannot enter into a certain kind of contract term that benefits one contracting party. The party that stands to lose that benefit would have an incentive to call policymakers' attention to the consequences of that choice. This makes the contract term salient to policymakers—even if they would ignore the contract term if entering into the transaction themselves.

This suggests how terms nonsalient to consumers might nonetheless be salient to policymakers and relevant in shaping their preferences. As research shows that policymakers deciding under uncertainty are susceptible to framing effects and aversion to social losses, we might begin to account for how the process of drawing policymakers' attention to real-world practices under status-quo rules shapes their preferences for those rules. Accordingly, here I suggest how framing effects might translate into policy outcomes, leaving validation for future work.[116] The hypothesis offered so far is that framing alters policymakers' perceptions of the status quo rule relative to their preferred outcomes. In particular, framing effects may encourage imperfectly rational policymakers in the position of vetogate

115. *See* Laurence M. Tai, *Harnessing Industry Influence*, 68 ADMIN. L. REV. 1, 20 (2016) (assessing claims that regulated parties may be "the best source for at least some of the information that regulators need"); Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 577 (2015) (noting that repeat-player firms often have a better understanding "than regulators" of empirical data about the consequences of policy choice). This is not to suggest that the affected parties will bring unbiased information to policymakers.

116. While this work raises questions about the potential causal links between the use of specific framing effects and legislative or policy outcomes, it is not my project here to draw causal inferences in specific cases. Recent advances in research have shown that policymakers are susceptible to heuristics and biases, including framing effects. *See supra* notes 107–110. Yet scholars generally have not extended this inquiry to establishing the causal relationship between specific frames and outcomes in specific policy debates in the wild, probably owing to concerns about endogeneity, data availability, causal overdetermination, and the like. *Cf.* Colin Bird, *Lobbying: The Question of Propaganda*, 12 GEO. J.L. & PUB. POL'Y 451, 453–54 (2014) (raising similar issues with respect to causal assessment of the effectiveness of lobbying on outcomes).

institutions—whose support is needed to adopt reform legislation—to perceive the status quo rule as being closer to their most preferred policy outcome than it really is.[117]

This account, which focuses on imperfect rationality rather than incomplete information, complements and offers fresh perspective on information-revelation theories that see the policymaking process as a sequential interaction between the three branches. Under such theories, information elicited in one stage, such as in litigation before the Supreme Court or in a Congressional hearing, can inform and thus potentially alter the preferences of policymakers who act at a later stage, such as Congress considering an override of a court decision or the President deciding whether to veto a bill.[118] If receiving audiences have "incompletely formed" views based on incomplete information, their preferences for policy may be "open to change based upon more information."[119] Actors at one stage can influence the preferences of those who will play in later stages by informing them about the benefits of a rule and how it operates.[120] The result of information revelation theories is an evolutionary iterated game as policymakers, over time, endogenously update their perceptions of the payoffs of status quo and alternative rules based on the information revealed in prior rounds of the game.[121]

These information-revelation theories focus on incomplete information received by rational actors. If policymakers are imperfectly rational, however, they will not take into account all available information in assessing the policies selected in earlier rounds. As a result, actors in an earlier round, such as policymakers in one branch or lobbyists, can shape information other policymakers take into account in subsequent rounds. For instance, because complex decision-

117. For discussion of how policymakers' support for reform might differ based on whether policymakers are risk-averse or risk-seeking about the uncertainty of how close the status quo rule is to their ideal points, compare Love Christensen, Attitude Formation Under Endogenous Uncertainty: Risk Preferences, Cheap Talk, and Credibility (Nov. 2017) (unpublished manuscript prepared for Toronto 2017 Political Behavior Workshop) (risk averse), with Passarelli, *supra* note 109, at 5, 26 (risk seeking for high-probability large losses).

118. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 379 (1991) [hereinafter Eskridge, *Overriding*].

119. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 657 (1991).

120. Eskridge, *Overriding*, *supra* note 118, at 413.

121. *See id.* at 385 (explaining ideal points in "the Court/Congress/President game evolve[ ] over time" to reflect "new information and political pressures" and changes to "personnel and the political landscape"). This contrasts with the view that takes the interests of constituents and actors to be exogenous to the process of statutory policymaking; the "more realistic view" is that those interests—or, more precisely here, the perceptions of those interests relative to the status quo and alternative policies—are "endogenous to the political process, that is, as shaped by that process." *Id.* at 356.

making is cognitively taxing, lobbyists and other stakeholders in an outcome have an incentive to frame a decision task in ways that alter the level of complexity to fit the decision they seek to elicit.[122] Framing effects can also be used to present less than all information about a policy and its outcomes and do so in a way that privileges and makes some information more salient.[123]

Framing is also a way firms influence political agenda control to inhibit reform.[124] Public choice theories suggest that relatively low "transaction cost[s] of mobilization" are a criterion for organized interests to influence agenda control in this way.[125] Where organized interests on both sides of a policy debate face low transaction costs of mobilization, we might expect them to have offsetting influence in framing issues, such that their ability to maximize comparative advantage is in equipoise.[126] Scholars have identified institutional design features relevant to our system's "built-in bias in favor of the policy status quo," even where organized interests are in equipoise.[127] This article's analysis suggests that anticipatory self-regulation to frame reform offers firms a way of influencing agenda control even beyond structural bias favoring the status quo.

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122. Consistent with this incentive, there is evidence that the Supreme Court selects denser, more complicated language in certain decisions, altering not only the extent of information Congress has, but also the complexity of evaluation its members' staff must undertake, in evaluating responsive policy choices. *See* Ryan J. Owens, Justin Wedeking & Patrick C. Wohlfarth, *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & COURTS 35 (2013).

123. *Cf.* Eskridge & Ferejohn, *supra* note 108, at 646 (arguing that imperfectly rational policymakers "may be even more prone to distribute rents to private groups" to those who can appeal to cognitive biases).

124. *See* Aziz Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1410 (2016).

125. *Id.* at 1410 n.34.

126. *Cf.* Eskridge, *Overriding*, *supra* note 118, at 365 (noting barriers to Congressional action). This equipoise may come about if organized interests' successes as to one goal generate countermobilization that makes it harder to achieve successes as to other goals. Organized interests pursue their goals in similar manner as other social movements. David Schraub, *Renewing Electricity Competition*, 42 FLA. ST. U. L. REV. 937, 942–49 (2017). As with other social movements, an organized interest's "high profile victory" may encourage "'backlash'" by "mobiliz[ing] opponents, creating an effective cadre of political activists where none had previously existed," discouraging further reforms consistent with the original victory (or even backsliding). David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1256, 1261, 1264 (2013). Framing effects that draw on anticipatory self-regulation may be one way contract designers can cast a victory as one for consumers (their potential opponents in reform battles) to discourage their mobilization and sap them of energy and support. *Cf. id.* at 1309–10 (noting incentive to "control . . . the framing [to] help[ ] dictate whether the event in question ultimately helps or hinders future social movement objectives").

127. KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 395–96 (1986); *see, e.g.*, Huq, *supra* note 124, at 1422–23, 1446.

The next section turns to a case study that shows how firms might make certain information salient in ways that appeal to decision-simplifying heuristics and biases. Firms and their interest groups can use contract terms to illustrate potential payoffs to a hypothetical consumer who is theoretically better off individually under high-quality terms than under some reform alternative.

B. Case Study: Using Anticipatory Self-Regulation to Frame Policy Choice

High-quality terms play a central role in how supporters assign value to the status quo and frame the consequences of reform. Firms, their interest groups, and lobbyists battle over reform proposals. Supporters of the status quo square off against reformers in legislative hearing testimony, in comment letters on agency rulemaking, in reports by interest groups, in scholarship, and in persuasive communications to constituents and lawmakers. These debates involve theoretical, empirical, and normative arguments about the relative desirability of the status quo rule and reform alternatives.

In these debates, firms and their allies can use high-quality terms to frame perceptions about the relative desirability of the status quo and of reform. Consider how this played out in fending off a specific reform proposal. The Regulatory Flexibility Act requires federal agencies to periodically review certain economically significant regulations to determine whether they should be retained or revised.[128] In 2019, the Consumer Financial Protection Bureau (CFPB) issued notice that it would be undertaking its periodic review of the 2009 rule that required disclosure and opt-in for overdraft protection services.[129] Interested parties filed comment letters with the agency, some urging the CFPB to retain the rule, others urging it to rescind the rule, and others urging it to amend it to add further regulation.

One of the major trade groups pointed to anticipatory self-regulation as a reason why the CFPB should continue the overdraft rule without change, rather than adopt more stringent regulations of overdraft protection services. The American Bankers Association (ABA) explained that under the Regulatory Flexibility Act, the CFPB should consider changed circumstances since the rule's adoption. Its member banks had "made a number of changes to their overdraft practices," resulting "in many instances [in] reduc[ing] the number of overdrafts

128. *See* 5 U.S.C. § 610(a) (requiring periodic review of regulations that "have a significant economic impact upon a substantial number of small entities").

129. Overdraft Rule, *supra* note 49; *see* Overdraft Rule Review Pursuant to the Regulatory Flexibility Act, 84 Fed. Reg. 21,729 (proposed May 15, 2019) (to be codified at 12 C.F.R. pt. 1005); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203 § 1061(b)(1), 124 Stat. 1376 (2010) (transferring responsibility for the rule to CFPB).

incurred by customers and the number of fees charged." Since the overdraft rule's adoption, the ABA explained, "many banks have changed the order by which transactions are posted, which has resulted in a diminution in the number of overdraft transactions."[130] In other words, many banks voluntarily chose to adopt low-to-high posting practices, rather than the controversial high-to-low practices. They chose to adopt contract terms that were higher quality than necessary, constraining themselves at the opportunity cost of revenue from posting in high-to-low order. The banks' trade group pointed to this anticipatory self-regulation in order to discourage the CFPB from adopting changes to a regulatory regime that would have generated even greater costs in the long run.

This section's case study of lobbying about the overdraft rule illustrates how firms can use high-quality terms to frame the desirability of status quo legal rules. Permissive status quo rules allow firms to select terms that, firms say, make consumers better off than under reform alternatives. Deployed this way, high-quality terms play a central role in appealing to policymakers' cognitive biases to encourage them to support the status quo policy. In particular, I argue, terms adopted in anticipatory self-regulation are used to make three decision-simplifying cognitive biases and heuristics—status quo bias, loss aversion, and availability—more accessible for policymakers. In the section that follows this case study, I offer some reasons why firms have an incentive to rely on framing to encourage policymakers to support the status quo over reform.

1. Status Quo Bias

One use for high-quality terms is to make status quo bias more accessible. Status quo bias is the tendency to prefer the current state of the world to alternative ones. One explanation is that the drawbacks of an alternative are seen as losses compared to the status quo, and "loom larger" than gains that would result.[131] The status quo frame makes loss aversion—discussed more in the next subsection—more salient by defining the baseline against which people will measure the changes from reform. As a result, it may make policymakers overweigh the social consequences, such as avoided losses, of retaining status quo rules compared to those of adopting reform proposals.

Framing can make status quo bias more accessible. One method is by explicitly labeling a policy as the status quo. Avital Moshinsky and Maya Bar-Hillel tested the effect on policy preferences of labeling a policy as the status quo, and found "the mere fact of labeling a policy

130. Letter from Am. Bankers Ass'n, *Re: Overdraft Rule Review Pursuant to the Regulatory Flexibility Act* 1, 4–5, 7 (July 1, 2019) (on file with author).
131. Kahneman & Tversky, *Choices, Values, and Frames*, *supra* note 98, at 13.

status quo enhances its likeability, by providing a biased viewpoint from which its relative pros and cons are evaluated."[132] Other researchers found that policymakers "adhere very strongly to policy choices in vignettes where they are presented as the status-quo."[133]

Consistent with these findings, frames in debates about the subjects of anticipatory self-regulation often exploit policymakers' tendency to favor policies labeled as the status quo. In comments on the overdraft rule, for example, lobbyists with the Consumer Bankers Association (CBA) emphasized the role of "the *existing* regulatory framework for overdraft services" in supporting "informed individual choice," and encouraged the agency to "maintain the *current* requirements" for imposing overdraft fees.[134] A trade group for credit unions likewise said that "[w]hile no rulemaking is perfect, credit unions have become accustomed to the current regulation in the nearly 10 years since its initial implementation."[135] Reinforcing the status quo nature of a rule may help avoid reform.

Contract designers also exploit the tendency to measure change from a reference point, typically the status quo, by focusing on benefits to consumers under the status quo rule.[136] The ABA's comment letter offered its "long-standing view that the Overdraft Rule [is] an effective, pro-consumer rule." According to the ABA, "customers value and benefit from overdraft," and that the existing regulatory framework "provides customers with substantial purchasing power."[137] One reason why the ABA could describe the status quo rule as "pro consumer" is that many banks had voluntarily "changed the order" for posting transactions, reducing "the number of overdraft transactions."[138] Likewise, the CBA asserted that overdraft fees are most likely to be used by "highly informed consumers who intended to use and *prefer*"

132. Moshinsky & Bar-Hillel, *supra* note 101, at 194, 196, 202.

133. Sheffer, *Behavioral Foundations*, *supra* note 107, at 51–52 (reprinting Lior Sheffer, Peter John Loewen, Stuart Soroka, and Stefaan Walgrave, *Nonrepresentative Representatives: An Experimental Study of the Decision Making of Elected Politicians*, 112 AM. POL. SCI. REV. 302 (2018)).

134. Letter from Consumer Bankers Ass'n, *Re: Notice of Section 610 Review and Request for Comments* 2 (July 1, 2019) (on file with author) (emphasis added).

135. Letter from Consumer Union Nat'l Ass'n, *Re: Overdraft Rule Review Pursuant to the Regulatory Flexibility Act* 1 (July 1, 2019) (on file with author).

136. Policymakers with a deregulatory orientation may be particularly attracted to framing about how companies can innovate by adopting high-quality or "consumer friendly" attributes of their businesses under the status quo rule in the absence of regulation. *Cf., e.g.*, *Fair Lending Report of the Bureau of Consumer Financial Protection*, 84 Fed. Reg. 32,420, 32,421 (July 8, 2019) (explaining that in light of the newly created Office of Innovation, the CFPB was "encourag[ing] responsible innovations that could be implemented in a consumer-friendly way to help serve populations currently underserved by the mainstream credit system").

137. Letter from Am. Bankers Ass'n, *supra* note 130, at 4.

138. *Id*. at 4–5, 7.

paying the extra fees.[139] By adopting "fair, transparent, and fully disclosed" overdraft fees, the CBA said, financial institutions have endowed consumers with a valuable right to "use [overdraft] strategically based on their financial situation."[140] For financial institutions that generate significant revenue from overdraft fees, the status quo baseline is a regime in which they may generate revenue from overdraft fees for consumers to whom the fees are disclosed and who opt in.[141] And for consumers, the trade groups say, the baseline is a regime that has "empowered consumers to make informed decisions about their use of overdraft" in ways that "best fits their individual needs and life styles."[142]

Finally, appeals to the status quo also encourage people to think about it as the natural state, rather than the product of a historically contingent process.[143] Framing based on presently enforceable contract terms treats the baseline as natural, not the result of a process of legal contestation and efforts to restructure economic regulation in ways that benefit firms.[144]

2. *Loss Aversion*

Another way the status quo's proponents use high-quality terms is to make loss aversion and the endowment effect more accessible to policymakers. Loss aversion is the tendency to prefer avoiding losses from a given reference point to realizing equivalent gains.[145] Loss aversion is one explanation for the endowment effect, which is the tendency for people to "place a higher monetary value on items that they own than on those that they do not own."[146] Empirical research has shown that is so even for intangible goods like entitlements to the protection of a legal rule.[147] As a result, people often express greater sup-

139. Letter from Consumer Bankers Ass'n, *supra* note 134, at 3.
140. *Id.* at 2–3.
141. *See* Overdraft Rule, *supra* note 49, at 59,037.
142. Letter from Am. Bankers Ass'n, *supra* note 130, at 3.
143. *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 39–40 (1988).
144. *See, e.g.*, Tal Kastner, *How 'Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts*, 7 DREXEL L. REV. 67, 69 n.3 (2014); *cf.* Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1290, 1292 (2016) (arguing "economics and politics are inextricable," as our political-economic order "rests on and presupposes a political-economic order," which in turn regenerates the political-economic order).
145. *See supra* note 103.
146. Korobkin & Ulen, *supra* note 97, at 1108; *see* Nash & Stern, *supra* note 100, at 482.
147. *See, e.g.*, Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 630–33 (1998) (default rules). For a study of class action settlement notice, see Alex A. Parkinson, *Behavioral Class Action Law*, 65 UCLA L. REV. 1090, 1136–38 (2018).

port for proposed policies framed as reducing potential social losses.[148] Loss-averse policymakers should therefore prefer status quo policies framed as resulting in smaller social losses than reform policies.

In policy debates, a common frame suggests that regulation or reform will "take away" from consumers some valuable benefit under the status quo, and that they will lose as a result. As discussed in the previous subsection, firms often suggest that the status quo policy endows consumers with a purportedly valuable right—the firm's efforts at anticipatory self-regulation have created a "fair" ability to use some contractual "benefit," and that reform would result in the firm being unable to provide this "benefit" anymore. Based on the theory that firms pass through cost changes associated with legal reforms,[149] defenders of the status quo often argue that regulation or reform will result in less access to services, higher prices, and lower wages. These comparisons may make loss aversion more accessible by encouraging policymakers to think about the social costs of reform proposals. In particular, encouraging policymakers to think about how reform would result in loss of a valuable right or endowment appeals to their role-centered aversion to social losses.

Framing loss aversion of the status quo as a valuable endowment appears frequently in legislative testimony, comment letters, scholarship, and other strategic communication. Consider the following illustration, in which the ABA comment letter to the CFPB described anticipatory self-regulation as resulting in a benefit to consumers that they would stand to lose if reforms were adopted. The ABA told the CFPB that "the bank practices" described in the letter—which include voluntarily addressing transaction reordering practices—"have in many instances reduced the number of overdrafts incurred by customers and the number of fees charged." The letter explained that this demonstrated how, under the existing rule, "bank overdraft practices fairly and transparently respond to consumer needs"—but then further warned that reform could "stifle innovation and consumer choice."[150] Likewise, a representative of the CBA said in an opinion piece in *American Banker* magazine that the "current regulatory framework concerning overdraft services afford[s] consumers strong

148. *See* Tversky & Kahneman, *Framing*, *supra* note 99 (different support for policy to combat fictional disease based on framing of mortality outcomes as lives saved or lost); James N. Druckman, *Evaluating Framing Effects*, 22 J. ECON. PSYCHOL. 91, 93 (2000) (replication); *see also* Anjala Slena Krishen et al., *Promote Me or Protect Us? The Framing of Policy for Collective Good*, 48 EUR. J. MKTG. 742, 752–53 (2014) (finding evidence that people showed more support for prosocial policies when outcomes were framed in terms of shared values and avoiding collective losses).

149. *See* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

150. Letter from Am. Bankers Ass'n, *supra* note 130, at 6.

protections."[151] Regulating overdraft services would "reduce access to" or even "take away a well-regulated source of financial liquidity, causing consumer harm" in the process.[152] Scholars making normative arguments in defense of status quo rules also often use the loss aversion frame.[153]

This focus on the social benefits of the status quo legal rule—and in particular those "consumer-friendly" benefits adopted in anticipation of regulation—and the social costs of a reform alternative, is central to efforts to shape perceptions that the status quo legal rule endows consumers with a valuable right. The flip side is to demonstrate that the alternative rule will never result in outcomes that consumers are willing to accept for giving up their endowments under high-quality terms, because they involve lower benefits and higher costs. And to the extent that firms can adopt high-quality terms that are not fully transparent,[154] they can frame the benefits for constituents in ways that are not easily verifiable.

If reform stands to take away from consumers this valuable endowment, constituents may punish responsible policymakers at the next election. Reminding policymakers of their electorally mediated role-centered aversion to social losses—and in particular constituents' losses of valuable endowments—may make policymakers less willing to select outcomes that result in consumers parting with a good with which consumers have been endowed. It likewise may increase the amount policymakers perceive consumers, as their constituents, would be willing to accept to part with it without incurring electoral penalties.

3. *Availability*

Policymakers may also assess the status quo legal rules based on the perceived market incidence of high-quality terms that firms have adopted. Like the rest of us, policymakers have an imperfect ability to evaluate probabilities relevant to policy choice. People are bad at calculating probabilities, and typically assess them using heuristics such as availability (the ease of examples coming to mind) and representativeness (correspondence with salient characteristics of a parent cate-

151. David Pommerehn, *Policymakers Shouldn't Undermine Existing Overdraft Regulations*, AM. BANKER (July 18, 2019), https://bit.ly/2kBcbb6 [https://perma.unl.edu/FSU8-T3LC].

152. *Id.*

153. *See, e.g.*, Zywicki, *supra* note 42, at 1149, 1194 (arguing that regulation would "result in consumer harms" ranging from "dishonored payments" to "eviction"). For a contrary view of consumer preferences, see Bubb & Pildes, *supra* note 43, at 1654.

154. *See, e.g.*, *supra* notes 67–68 and accompanying text.

gory).[155] By inducing policymakers to rely on heuristics, firms can encourage them to make biased calculations about probabilities relevant to policy choice, such as the market incidence of contract terms adopted in anticipation of regulation. This probability, for instance, is relevant to both the input and the output of policy choice.

Policymakers' preferences for reform may depend on the perceived breadth of industry participation in voluntary self-regulation.[156] That creates an incentive for firms to encourage them to overestimate the market incidence of contract terms. Firms can encourage reliance on the availability heuristic, and thus potential overestimation of the breadth or market incidence of some term, by making salient for policymakers examples of how specific firms' contract terms benefit hypothetical individual consumers under the status quo rule.

As a normative matter, retention of the status quo can be improvident if the salience of benefits under the status quo does not accord with the base rates with which those benefits occur. Policymakers may misperceive the breadth of contract terms and thus their social consequences. Where fewer than all firms in the market have adopted the contract term at issue, encouraging policymakers to rely on the availability heuristic can lead them to overestimate the probability that the sort of consumer about whom they are concerned will be subject to the high-quality term.

A similar phenomenon can occur based on policymakers' perceptions about the incidence of consumers' benefits under the status quo rule. Consumers are not all alike in their product use patterns. In the bank overdraft context, some consumers are more economically precarious than others; some systematically overdraw their accounts, others do so less often and tactically when necessary, and still others

155. *See* Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430, 431 (1972); *see also, e.g.*, Korobkin, *supra* note 4, at 1232–33 (discussing the availability heuristic); Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 295 (1983) (representativeness heuristic); Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973). Frames that exploit availability can potentially encourage imperfectly rational policymakers to construct preferences for the status quo versus reform based on beliefs about the salience of examples that come to mind. *See* Timur Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 687 (1999). Although irrational fear of small risks may lead policymakers to support improvident and costly regulation, the availability heuristic does not necessarily have a pro-reform bias. Rather, even those who favor the status quo can take advantage of availability to encourage policymakers not to undertake reform based on salient examples of how contract terms benefit constituents under the status quo.

156. *See* Malhotra et al., *supra* note 16, at 35 (reporting experimental results showing that anticipatory self-regulation may reduce activists' and policymakers' support for reform, and that these effects are greater when more of the regulated industry participates in these voluntary efforts).

never do so.[157] Regulators may be concerned primarily with adopting reforms aimed to protect the economically precarious, who may be less sophisticated and less aware of their other options for avoiding costly overdraft fees, and who may be least able to afford them.[158] Yet regulators may also not know which consumers contract with which firms, or how terms are distributed between firms. By making examples of high-quality terms more salient, banks can encourage policymakers to overestimate the probability of these terms compared to base rates. They can, moreover, encourage policymakers to conclude that the consumers potentially in need of protection are clustered around the firms that have adopted high-quality terms, rather than randomly distributed across contractual relationships.[159] Framing consumer contracts as likely to involve high-quality terms thus can lead imperfectly rational policymakers to distort base rates at which consumers are likely to use the contract term that a firm has adopted.

In these ways, framing effects have the potential to distort how policymakers assess the benefits and costs of the status quo rule. Contract designers encourage imperfectly rational policymakers to believe that the status quo rule is valuable, the average consumer is likely to be the one to benefit from it, and reform would take this away from them. This helps construct policymakers' preferences against reform.

C. A General Account of Anticipatory Self-Regulation to Frame Policy

The preceding section illustrated the role of anticipatory self-regulation in the context of the CFPB's periodic review of its overdraft rule. This section moves from the specific to the general, offering a theoretical framework for situating anticipatory self-regulation within contract law and the political economy of regulation.

Contract designers take into account the imperfect rationality not only of their consumers, but also of the policymakers who have a role

157. *See* Julie Andersen Hill, *Transaction Account Fees: Do the Poor Really Pay More Than the Rich?*, 15 U. PA. J. BUS. L. 65, 117–26 (2012) (assessing evidence about who uses overdraft services, and the distributional impact among them).

158. *Cf. id.* at 102, 104 ("While all consumers are likely impacted by some cognitive biases, unsophisticated consumers of limited means may be more prone to overpay for transaction account services. . . . While the jury may still be out as to whether cognitive biases impact the poor more than the rich, regulators have recently started to embrace the theory of cognitive biases as a justification for new regulation.").

159. We might even speculate that the consumers about whom policymakers are most concerned may be clustered around firms that adopt neutral or low-quality terms. *Cf.* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1537–38, 1554–55 (2015) (noting that some firms engage in practices that "overexpose[ ]" certain consumers or make them "more susceptible" to unlawful conduct).

in selecting whether to retain a status quo contract rule or adopt an alternative rule. High-quality nonsalient contract terms allow contract designers and their lobbyists to appeal to framing effects so imperfectly rational policymakers perceive the payoffs of the status quo as being closer to their most-preferred policy than they really are. In this way, anticipatory self-regulation to frame reform complicates the prediction of a "race to the bottom"—that in equilibrium firms select nonsalient terms of the lowest enforceable quality to maximize surplus. Under some circumstances, contract designers have an incentive to embed high-quality nonsalient terms within the broader low-quality term they seek to protect in the policy sphere. One important and overlooked function of high-quality terms in these cases is to exploit framing effects in debates about regulating low-quality terms firms care about.

Contract terms have many functions. Perhaps most terms' functions are to allocate risk and surplus between the parties. Other terms have communicative functions.[160] Sometimes, such as in heavily regulated industries and in transactions such as mergers subject to regulatory scrutiny, this communicative function appeals to an audience of regulators to show how a contract satisfies mandatory rules.[161]

Yet contracts scholars have generally overlooked how contract terms with communicative functions can shape policy debates. According to David Gilo and Ariel Porat, some contract designers adopt terms that serve what they call the "façade" function: these terms "create the appearance of a fair contract" for audiences such as courts and the public by pairing "value-reducing terms" with "offsetting beneficial terms."[162] But that conception of contract terms' communicative function is too narrow. Contract terms communicate information in ways that extend beyond merely insulating the contract from enforceability challenges or protecting the firm from reputational costs. Contract terms adopted in the shadow of anticipated regulation can also help frame debates about the selection of rules governing markets for contract terms.

Firms use these terms not only defensively as a shield against criticism but also offensively as a sword in policy debates. As a shield, these terms help ensure that other, more valuable surplus-allocating terms are enforced in the first place. Firms are heterogeneous in their intertemporal preferences; in designing contracts, they make tradeoffs between the payoffs from surplus today versus surplus tomorrow.

160. *See* Hoffman, *supra* note 4, at 1460 (demonstrating how some firms adopted terms that served as marketing about the firm's values in relationships with consumers).

161. *See* Hwang & Jennejohn, *supra* note 9, at 29–30.

162. Gilo & Porat, *supra* note 14, at 987, 1014–16 (noting but not developing the point in detail).

Some may prefer low quality terms because they want to retain the surplus sooner rather than later. They may care less about the threat of enforceability constraints or regulatory reform, preferring the short-term gains to any long-term costs. But other firms, perhaps those with significant and long-term exposure, may care more deeply about avoiding the longer-term costs associated with reform. Indeed, we might predict that the firms most likely to invest in high-quality nonsalient terms in anticipatory self-regulation are those with large market shares, significant business or legal risk from reform, and that are not solely reliant on the revenue that it at risk from reform. These features also make their contract terms potentially more politically salient than the average firm's terms might be.

As a sword, anticipatory self-regulation to frame reform is valuable to contract designers. Competitive pressures induce contract designers to select salient terms that are attractive to imperfectly rational customers. But because few competitive pressures exist for nonsalient terms, models of consumer contracting predict that firms will use these terms to dump risk on consumers and retain surplus.[163] This not only increases the total price of the good (and thus firm revenue), but also permits subsidies of salient price dimensions on which firms compete for marginal consumers.[164] The mix of high- and low-quality terms can be profitable for firms. And the contract rules that allow firms to design contracts with this mix of terms are a valuable endowment. Contract law governs the content of terms that parties can select. Some provide mandatory rules, others default rules, and others provide parties wide and enforceable berth to select contract terms that meet their needs. Terms adopted under these permissive contract law rules can often be controversial and lead to calls for reform because of their potential distributional effects, both between types of consumers,[165] and between consumers and other stakeholders.[166]

For this reason, firms that adopt low-quality terms face the risk of reform efforts that threaten to take away that valuable endowment. Low-quality terms that firms value might harm consumers or generate externalities.[167] Sometimes those costs fall on groups represented directly by member-based organized interests or indirectly and vicari-

163. *See, e.g.*, Badawi, *supra* note 3, at 1002.
164. *See* BAR-GILL, *supra* note 2, at 23.
165. *Cf., e.g.*, Hill, *supra* note 157, at 70–71 (explaining that "regressive cross-subsidization is often offered as a justification for regulatory transaction account price reforms").
166. *See, e.g.*, Maurice E. Stucke, *Lessons From the Financial Crisis*, 77 ANTITRUST L.J. 313, 335–36 (2010) ("[C]onsumers may be paying supracompetitive overdraft fees to large financial institutions, which in turn distribute the rents unequally (namely to CEOs and other senior executives).").
167. *See* Bagchi, *supra* note 9, at 255 (suggesting that contract law should limit "the harms jointly imposed by contracting parties on third party losers").

ously by professional or trade-group organized interests (e.g., the plaintiffs' bar).[168] Interest groups who oppose the status quo rule can advocate for legal reforms making these terms unenforceable.[169]

Firms that benefit from permissive contract rules have an incentive to make other investments that protect those benefits. They may select high-quality terms that allow them to influence and inhibit reform efforts that would prohibit or restrict the enforcement of the terms they highly value. In other words, firms may adopt a midway solution that forgoes the maximum rents that can be extracted under a permissive contract rule, but helps fend off a costlier reform option. These midway high-quality terms can be used to persuade policymakers about the desirability of those permissive status quo rules. And if these terms are unlikely to be triggered, they serve a communicative or framing role at relatively low cost.[170] More precisely, firms that select high-quality terms incur potentially small costs today—such as costs associated with delivering and obtaining assent to a revised contract to existing or new customers, and costs associated with performing the term—for greater payoff tomorrow. This deferred payoff comes from avoiding reform. By pairing high- and low-quality nonsalient terms, firms may be able to avoid reform attempts.

This is consistent with theories of political economy. Firms and trade groups lobby to avoid losing valuable benefits and bearing new costs.[171] Just as contractual default rules endow payoffs and shape preferences for status-quo contract terms, so too may status quo policies allocate default entitlements and thus shape the parties' preferences for retaining or altering that distribution through lobbying efforts.[172] Indeed, loss aversion is consistent with predictions that special interests will work to thwart policy reforms that impose concentrated costs on them in order to generate widely diffused benefits.[173] According to the canonical work on organized interests, "an organization seeking to stymie a threatening measure is in a much better position than one seeking positive policy action."[174] As a result, exploiting framing effects using high-quality terms may be a particularly effective tool for defending status quo policy.

168. *See* Schlozman & Tierney, *supra* note 127, at 401 (membership-driven and vicarious representation).
169. *Cf.* Eskridge, *Overriding*, *supra* note 127, at 361. On equipoise, see *supra* note 126.
170. *See* Gilo & Porat, *supra* note 14, at 1016 (firms can "still use transaction costs and boilerplate language in order not to bear the costs of providing the benefits").
171. *See, e.g.*, Schlozman & Tierney, *supra* note 127, at 314.
172. *See* Russell Korobkin, *Wrestling with the Endowment Effect, or How to Do Law and Economics without the Coase Theorem*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 300, 321 (Eyal Zamir & Doron Teichman eds., 2014).
173. *See* Zamir, *supra* note 11, at 874–75.
174. Schlozman & Tierney, *supra* note 127, at 395–97.

D. Objections and Alternative Explanations

This section briefly assesses objections to the preceding analysis. It also considers alternative explanations for why firms might adopt high-quality nonsalient terms, but finds each explanation lacking.

1. Assessing Objections

a. Collective action. First-mover firms that frame status quo policy based on incidence of high-quality terms can give cover to free riders, who do not invest in these terms. Appealing to the availability heuristic, for instance, may lead policymakers to conclude that high-quality terms are widespread, including among free-rider firms that have not adopted them.[175] Free riders benefit from not investing in the terms that may lead policymakers to be satisfied with the status quo.

Why would firms adopt these terms given free riding? This is another way of asking why firms would lobby for legal rules as public goods.[176] Firms often minimize that collective action problem by joining trade associations to spread the costs of lobbying across many members. Trade associations allow firms to address industry-wide issues that are not worth lobbying for individually. They also provide members with selective benefits or club goods not available to nonmembers, such as technical knowledge, to sweeten the pot.[177]

Firms sometimes also tolerate free riding by other members of a trade association. Within a trade association, one member may care about a given policy goal more than other members. Where industry views are heterogeneous, trade associations often lobby for lowest-common-denominator policies.[178] Yet where a firm feels strongly about an issue that is being watered down by the association's position, the firm may have to break out on its own and lobby individually, or otherwise make side investments to get its point across.[179] Firms with a particular interest in some policy outcome—perhaps because they have relatively greater exposure to the policy than other member firms—may make these side investments, yet make fewer such invest-

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175. *See supra* text accompanying notes 155–159.
176. *See* KAY LEHMAN SCHLOZMAN et al., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 276–84 (2012); *see generally* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).
177. *See* JAMES Q. WILSON, POLITICAL ORGANIZATIONS 36 (1973); *see also, e.g.*, Matthew Potoski & Aseem Prakash, *Green Clubs: Collective Action and Voluntary Environmental Programs*, 16 ANN. REV. POL. SCI. 399 (2013).
178. *See, e.g.*, Neil Gunningham, *Environmental Management Systems and Community Participation: Rethinking Chemical Industry Regulation*, 16 UCLA J. ENVTL. L. & POL'Y 319, 350 (1998).
179. Thanks to Sue Tierney for this point.

ments for goals they care less about.[180] A firm in these circumstances can still recoup private benefits that exceed the cost of its fixed and marginal investments within the coalition; these may be preferable to lobbying on its own without spreading fixed costs of a lobbying apparatus. In addition, the shifting long-term portfolio of a trade group means members are in an iterated relationship for which free riding washes out over time; they may overlook free riding on some issues by competitor firms because they will be free riders on other issues important to their competitors. Finally, it may be that the terms a firm adopts are only apparently high-quality,[181] so the firm does not bear significant costs for purposes of tolerating free riders.

Free riding is not riskless, however. First-moving firms might tolerate free riding on their high-quality terms if lobbying efforts can fend off reform, benefiting the first movers too. But first movers might have little incentive to adopt a full-throated defense of the status quo if policymakers are highly likely to adopt *some* kind of reform. Under those circumstances, first movers might convince policymakers to select mandatory rules with safe harbors or other provisions calibrated to the first movers' terms. After all, the first movers have remained profitable despite adopting these high-quality terms, and can demonstrate to reformer policymakers that a workable compromise exists. Policymakers may adopt these terms as the new rule, instead of taking some more radical reform that would further threaten first movers' profitability. This leveling-up regulatory response can increase free-riding rivals' costs, entrenching the first mover's advantage at rivals' expense.[182]

b. *Political economy*. What role do exogenous policymaker preferences, interest group politics, public-choice rent-seeking and regulatory capture, polarization, and the like play in this theory? In other words, it is plausible but not a foregone conclusion that high-quality terms will lead policymakers to prefer the status quo. Policy choice is usually overdetermined and multicausal. Policy debates feature competing frames and messaging strategies that resonate with policymakers (and their constituents) in different ways.[183] In any controversial issue area, policymakers are likely to have strong priors on the rela-

180. *Cf.* KEVIN W. HULA, LOBBYING TOGETHER: INTEREST GROUP COALITIONS IN LEGISLATIVE POLITICS 41–42 (1999).

181. *See supra* notes 62–68, 170 and accompanying text.

182. *See* Malhotra et al., *supra* note 16, at *7 (explaining that large firms may adopt voluntary measures and "lobby for government to impose the same standards on other firms," helping them "gain a competitive advantage by pricing out smaller competitors who cannot afford" compliance with those standards); Stephen L. Puller, *The Strategic Use of Innovation to Influence Regulatory Standards*, 52 J. ENVTL. ECON. & MGMT. 690 (2006).

183. *See, e.g.*, Sheffer, *supra* note 107, at 137–38 (collecting findings that framing is often ineffective).

tive desirability of the status quo and of various reform alternatives. For instance, even though overdraft fees are controversial and unpopular, they are also important revenue sources for smaller financial institutions that might face significant financial constraints—and even face net losses—if prohibited from charging overdraft fees.[184] If policymakers are responsive to the interests of these financial institutions, these firms' need to retain this source of rents is like to remain an obstacle to reform.

Even so, we might predict that framing reform with high-quality terms will have an effect at the margin. And this will be relevant to policy choice primarily with respect to those policymakers whose preferences matter because they sit at institutional vetogates. Consider the nontrivial examples of proposed reforms in which the preferences (and votes) of policymakers at institutional vetogates are actually up for grabs. In these cases, inframarginal policymakers may have some reason to support the status quo or reform wholly apart from how firms can use anticipatory self-regulation to frame the status quo. To make the point concrete: a particularly conservative Republican on the House Financial Services Committee could be expected to oppose efforts to adopt further overdraft regulation, regardless of banks' efforts to engage in anticipatory self-regulation to frame the status quo. But that inframarginal policymaker's preferences may bear only weakly on the role of anticipatory self-regulation in shaping the preferences of the marginal policymaker sitting at other institutional vetogates, such as the committee chair, House Rules committee, median House member, senate committee, filibuster, etc.[185] These are the policymakers sought to be influenced by framing with anticipatory self-regulation.

c. Rational choice. Finally, is a behavioral account needed to explain the emergence of these high-quality terms? After all, these terms might be a rational response to policymakers' preferences for private ordering solutions to some policy problem. If these terms generate real-world outcomes that are closer to policymakers' ideal

184. *See, e.g.*, Gideon Weissman & Edmund Mierzwinski, *Big Banks, Big Overdraft Fees* 8, 11 (Dec. 2016), https://bit.ly/2QMn7QM [https://perma.unl.edu/2Q6Z-GX5X] (reporting on banks for which overdraft and NSF revenue is more than their total net income); *see also* Amanda Dixon, *Banning Fees Won't Solve All of Our Problems with Bank Overdraft Programs*, BANKRATE (Sept. 20, 2018), https://bit.ly/2seiZib [https://perma.unl.edu5TLH-PZ2D] (noting that if reform were to "drastically reduce[ ]" overdraft fees, "a key issue for banks would be coming up with another revenue stream," as many smaller institutions have 'sort of been stuck relying on overdraft'").

185. *See* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1447 (2008) [hereinafter Eskridge, *Vetogates*] (providing examples of vetogates).

points, firms might thereby reduce policymakers' demand for further reform, which is costly for policymakers.

The rational choice objection raises the question of how firms use the quality of their contract terms to influence policy choice.[186] To discourage support for reform, contract terms must enter policy debate through a mechanism that encourages policymakers to conclude that the status quo rule's consequences are closer to their ideal points than alternatives. Policymakers might have a most-preferred set of outcomes corresponding to their ideal policy. But the outcomes of policy choice are uncertain, "stochastic and never perfectly known."[187] Policy choice is complex and cognitively taxing. It rarely occurs under conditions of full information.[188] As a result, in assessing the claims of interested parties on either side of the policy debate, policymakers will rely on the facts that are presented to them. In turn, interested parties and their lobbyists have an incentive to provide information in ways that make certain aspects of the decision more salient.[189]

In doing so, interested parties can potentially alter policymakers' perceptions of how the status quo and reform align with their ideal policies. By adopting contract terms in the shadow of regulation, and feeding those terms back into the policymaking process, firms can influence how policymakers perceive the status quo by encouraging them to focus on high-quality terms, and thus to overlook or place less weight on other "true" attributes of the status quo rule. In turn, this can alter policymakers' view of whether the perceived status quo or reform alternatives are closer to their ideal policies, shaping and potentially distorting their preferences for the status quo rule. That strategy is distinct from one that seeks to appeal directly to policymakers' undistorted preferences. Rather, the mechanism involves appealing to heuristics and biases so policymakers think the status quo is good for their constituents—and that reform will lead to social losses that their constituents will blame them for.

2. *Alternative Explanations to Anticipatory Self-Regulation*

This subsection assesses two plausible alternative explanations for why firms might adopt high-quality nonsalient terms. The first is unpersuasive and the second is inadequate to explain these terms.

186. This objection also restates the broader debate between rational choice and behavioral theories of human or legal behavior. *See supra* notes 108–109. This Article takes no position on that debate. Rather, it addresses the behavioral account on its own terms, exploring why contract designers might adopt high-quality nonsalient contract terms against the behavioral account's predictions.

187. Christensen, *supra* note 117, at 2.

188. *See supra* note 74.

189. *See* Dorie Apollonio et al., *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 30 (2008).

a. Firms' altruistic preferences. Some terms suggest preferences for treating consumers well, or even "altruism."[190] Appearing to have such preferences may not reflect a firm's altruism, but instead its interest in maximizing shareholder value.[191] It is unsatisfying to attribute these terms to true or apparent altruism for two reasons. First, as for "true" altruism, attributing behavior to different preferences for that behavior is nearly tautologous.[192] How could we know if firms were adopting these terms from "true" altruism rather than some other reason? Second, as for purported apparent altruism, we have already seen that consumers are unlikely to select transactions on the basis of these terms, whether or not firms adopt them out of altruistic motive. In short, it is unclear how apparent altruism would translate into competitive success for firms.

b. Path dependence. Firms sometimes retain high-quality non-salient terms because of path dependence. Perhaps the firm found the term legally useful under an old legal rule, but after a deregulatory change in law the term is no longer strictly necessary. Contract design often involves reusing boilerplate terms from deal to deal, or retaining them across time. There are benefits to doing so: it reduces drafting costs and litigation risks, which thus may lead to sticky terms.[193] By the same token, it may be that not enough time has elapsed to see firms respond to intervening changes in law. Given transaction costs of revision, a firm may lack incentive to immediately revise its contract to strike a term that is slightly higher quality than necessary.[194] The term may stick around unattended for some time. Finally, besides these ways in which path-dependent retention of old terms may be rational, it can also be a problem for firms. It can reflect a principal-agent problem in which lawyers shirk by recycling old terms or delaying revisions even when a client would have preferred new terms.[195]

Path dependence, of course, is likely to be in play only when a firm has adopted *and retains* a contract provision. It does not explain newly adopted terms. Nor does it explain terms that impose costs that ex-

190. *Cf.* Amaan A. Shaikh, *The Post-*Concepcion *Contract Landscape: The Role Socially Conscious Business Can Play*, 57 SANTA CLARA L. REV. 223, 254–56 (2017) (such firms might pay "costs incurred").
191. *See, e.g.*, Hoffman, *supra* note 4, at 1459.
192. *See, e.g.*, ERIC POSNER, LAW AND SOCIAL NORMS 39 (2000).
193. *See, e.g.*, Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 675 (2018) (surveying arguments); Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 64–65 (2017).
194. *See, e.g.*, Mitu Gulati & Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design*, 40 HOFSTRA L. REV. 1, 6 (2011) (describing the transaction costs of revision).
195. *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 353 (1996).

ceed the transactions costs of revision. From a firm's perspective, recycling high-quality nonsalient terms or failing to update them to account for intervening changes in law may be surplus-destroying. That is so when the old terms are no longer needed for enforceability or risk allocation, and they generate significant costs of performance or opportunity costs.[196] Indeed, firms have an incentive to monitor and evaluate the profitability of their product lines, and alter their product attributes accordingly.[197] And in many contracting contexts where terms of service are delivered electronically and updated frequently, the transaction costs of revision may be low enough that firms will respond by striking high-quality terms that are not profit maximizing, though this is ultimately an empirical question. We should expect contract designers to abandon these terms if they imposed costs greater than they generated offsetting benefits. Where high-quality terms are unnecessary and can be revised relatively cheaply, as for a website's terms of service, we might ask what offsetting benefit the terms generate. For terms like these, one underappreciated offsetting benefit is in demonstrating anticipatory self-regulation to avoid more costly legal reform.

IV. IMPLICATIONS

Anticipatory self-regulation and the ways it can be used to frame reform has implications not only for contract design but also for public law. It raises tantalizing questions about the extent to which firms engage in these strategies, and the implications for efforts at law reform. This Part sketches the outlines of theoretical, empirical, and normative implications of anticipatory self regulation.

A. Theoretical, Empirical, and Normative Implications

Self-regulation has a special place in our political economy, owing to its long history as a common and recurring way in which humans organized to overcome collective action problems.[198] Today, increased demands on regulators' attention—combined with industry and neoliberal disfavor for government intervention—generated greater reli-

196. *See* Hoffman, *supra* note 4, at 1416.
197. Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 563–64 (2016).
198. *See* Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 124–25 (2015). On self-regulation, see Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*, 54 CURRENT LEGAL PROBS. 103, 118 (2001); Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411 (2011); Gunningham & Rees, *supra* note 95.

ance on self-regulatory regimes.[199] And for business interests with deregulatory preferences, self-regulation offers a ready opportunity to discourage legal and financial obligations from government-led reform efforts.

We might begin by asking whether the voluntary adoption of high-quality contract terms in anticipation of regulation is desirable. Firms' adoption of terms that purport to benefit consumers in order to fend off reform may be normatively desirable or not in any given case. For example, it may well be that voluntarily adopted overdraft reordering practices, privacy policies, platform-economy antidiscrimination measures, consumer-friendly arbitration clauses, and the like generate welfare effects that are more desirable than those from proposed reforms. And experimental evidence suggests that activists, the general public, and policymakers all respond to voluntarily adopted practices like these by reducing their support for reform interventions.[200] In assessing whether voluntary measures under the status quo are preferable to reform, we can take into account that these terms may be valuable for firms in fending off reform, and that these terms can be presented in a way that makes certain aspects of policy choice more salient for policymakers. But how those phenomena alter the desirability of the status quo versus reform is a question that cannot easily be answered in the abstract. Indeed, both aspects of this phenomenon—the adoption of contract terms to fend off reform, and the way these terms are presented to policymakers toward that goal—raise theoretical and empirical questions that inform the desirability of anticipatory self-regulation to frame reform efforts.

As a theoretical matter, this Article's primary claim relates to the understudied public-law aspects of contract design, which are usually considered a concern of private law. Firms adopt contract terms with many audiences in mind, including the policymakers responsible for assessing and adopting legal rules governing their contracts. Scholars have long been concerned with how actors can manipulate other actors' strategic choices under uncertainty to favor outcomes close to their own preferred policies.[201] Firms may be particularly effective at shaping policymakers' preferences by making predictive claims that proposed policies will not generate social gains that are worth the costs of reform, and by encouraging their audience—policymakers—to

199. *See, e.g.*, Gunningham & Rees, *supra* note 95, at 364.

200. *See generally* Malhotra et al., *supra* note 16.

201. William H. Riker, The Strategy of Rhetoric: Campaigning for the American Constitution 9 (1996) (showing how actors construct support for preferred outcomes not through rhetoric and persuasion, but heresthetic and manipulation: "composing the alternatives among which political actors must choose" so they feel "compelled by the situation to support" the outcome).

rely on schema and heuristics to corroborate those claims.[202] Firms' efforts will be relatively unmatched if, because other constituents are subject to their own cognitive biases, constituents are less effective at detecting firms' efforts to manipulate policymakers' preferences or at sharing this information with other voters.[203]

This raises a number of empirical questions. One set of questions addresses the scope and efficacy of anticipatory self-regulation efforts. If firms respond to the threat of regulation by supporting overt efforts toward industry self-regulation over government intervention,[204] how often and under what circumstances might they take the subtler step of adopting contract terms that address the social problems sought to be addressed through reform? For any given effort to avoid reform, are industry efforts at anticipatory self-regulation broad in the sense that a large number of industry firms have adopted these voluntary measures? Are these efforts deep, in the sense that they "go far beyond the requirements of current law," or are they "shallow reforms [that] represent smaller departures from the status quo"?[205]

A second set of questions addresses the strategies that firms use to frame anticipatory self-regulation by making information about the benefits of the status quo rule, and costs of reform, more salient for policymakers. In policy debates, do firms appeal to heuristics and biases other than those discussed in Part III? Strategies to anticipate and frame reform might be variable, common, and widespread. The incentives to influence imperfectly rational policymakers' preferences using framing should exist anywhere constituencies seek to protect status quo rules. How might we measure the effectiveness of efforts to use framing to shift policymakers' perceptions of the status quo to avoid reform?[206]

Further questions address what kinds of firms are likely to adopt these terms, and whether any undesirable distributive consequences flow as a result. Some firms, such as smaller financial institutions that generate most or all of their net income from overdraft fees,

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202. *See* Jennifer Jerit, James Kuklinski & Paul Quirk, *Strategic Rhetoric, Emotional Citizens, and the Rhetoric of Prediction*, *in* THE POLITICAL PSYCHOLOGY OF DEMOCRATIC CITIZENSHIP 100 (Eugene Borgida, Christopher M. Federico, & John L. Sullivan eds., 2009).

203. *Cf.* Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181, 208–09 (2017) (discussing similar behavioral market failure for retail investors).

204. *See supra* note 75 and accompanying text.

205. Malhotra et al., *supra* note 16, at 9 (finding experimental evidence that voluntary efforts are more effective at diminishing support for reform among activists and policymakers when they are broad and deep, but that depth is generally irrelevant to the general public's response).

206. *Cf.* Frank R. Baumgartner & Christine Mahoney, *The Two Faces of Framing: Individual-Level Framing and Collective Issue Definition in the European Union*, 9 EUR. UNION POL. 435, 444 (2008) (noting lack of evidence regarding effectiveness of "strategic reframing").

might rely heavily on low-quality contract terms.[207] These firms are particularly exposed to the possibility of reform. Should we nonetheless expect them to be able to afford adopting high-quality terms to frame the status quo and fend off reform? How common is adverse selection, in which firms with asymmetric information about their need to rely on low-quality terms opt out?[208] If policymakers concerned with the welfare effects of low-quality terms nonetheless forbear from reform based on narrowly adopted high-quality terms, are constituents most exposed to the negative distributional effects of low-quality terms left behind as a result?

Answering these empirical questions would not resolve normative questions about the overall desirability of anticipatory self-regulation to frame policy choice. Framing to make certain aspects of policy choice more salient to policymakers is a problem primarily if those aspects do not encourage informed and rational policy choice. Behavioral market failures can result in consumer choice that is neither welfare-maximizing nor what consumers would have chosen under perfect information or rationality.[209] Likewise, it may be that imperfectly rational policymakers—for whom terms adopted in anticipatory self-regulation are salient—will misperceive the social consequences of the choice between reform and retaining the status quo, and will under-produce reform as a result. For instance, policymakers that overestimate the breadth and depth of voluntary efforts at self-regulation might overestimate the extent to which those efforts have generated real-world consequences that match their preferred policies, artificially inhibiting their preferences for reform over the status quo.

What is more, policymakers may be especially likely to under-produce desirable reform if, in assessing claims about the status quo rules, they fail to account for the possibility of behavioral market failures among consumers. Consider that a firm that uses contract terms to reduce exposure to liability or to regulation may be in a better position to compete by passing some of those cost savings to consumers through lower salient prices.[210] Yet firms may lower salient prices while raising nonsalient ones by an even greater amount, recouping more surplus than they purport to pass on to consumers. If policymakers focus on the effect of anticipatory self-regulation on salient terms, but ignore the effect on nonsalient terms, then they may be seduced into thinking that high-quality terms under the status quo are welfare

207. *See supra* notes 159, 184 and accompanying text.

208. *See* Malhotra et al., *supra* note 16, at 9 (noting that this kind of adverse selection suggests why breadth of participation in self-regulation is important).

209. *See, e.g.*, BAR-GILL, *supra* note 2, at 23–26; *cf.* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 648 (2010) ("[T]here is growing acceptance that bounded rationality prevents even informed adherents from making welfare-maximizing choices.").

210. *See supra* note 149.

enhancing. For similar reasons, scholars have called on regulators to enact mandatory rules governing nonsalient contract terms.[211]

More troubling from a structural perspective, anticipatory self-regulation to exploit framing effects could impede alignment of voters' and policymakers' preferences.[212] Policymakers' susceptibility to framing effects may be "undesirable unless it channels the preferences of political constituents in a democratically legitimate way."[213] That is because framing effects can (though do not always) lead to distorted judgments based on arbitrary aspects of a given choice.[214] Likewise, the malleability of reference points—and thus of gains and losses—raises concerns about the systematic manipulation of frames to favor certain outcomes.[215] And given unequal access to policymakers' attention, the potential for potential overexposure to business lobbyists' views only exacerbates concerns about systematic manipulation.[216] Using contract terms to frame reform thus poses a normative challenge to the integrity of processes by which voter preferences are aggregated into policy.

These are not abstract concerns. The potential influence of framing effects on policy has implications for shifts in regulatory and judicial policy, as well as for the stickiness of those policy choices. Regulatory and judicial policy are sometimes criticized for departing from the enacting legislative coalition's original bargain.[217] Yet this overlooks that the selection of statutory policy is a function of Congress's current preferences. For instance, to judicial actors primarily concerned with having their decisions overridden by Congress and the President, the original bargain is less relevant than the what actors at the political vetogates will tolerate today.[218] If Congress prefers the status quo rule to the original bargain, no override will restore it. That is norma-

211. *See, e.g.*, Sarin, *supra* note 45, at 1560–68.

212. *See, e.g.*, McNollGast, *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, in 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1666 (A. Mitchell Polinsky & Steven Shavell eds., 2007). Policymakers may exacerbate this misalignment if they choose reforms that appear to tackle some policy problem but confer real-life benefits that are "more illusory than real." Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CIN. L. REV. 573, 610–12 (2017).

213. Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 382 (2011).

214. *See* Kahneman, *supra* note 105, at 370; Rachlinski & Farina, *supra* note 107, at 557.

215. *See* Zamir, *supra* note 11, at 892.

216. *See* Schlozman & Tierney, *supra* note 127, at 165 ("[I]f access is unequal, it would not be surprising if it were to have consequences for influence.").

217. *See, e.g.*, Luke Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249, 290 (2018).

218. *See* Eskridge, *Overriding*, *supra* note 118, at 415; Eskridge, *Vetogates*, *supra* note 185, at 1459.

tively troubling if framing effects construct policymakers' preferences in ways that ignore public preference for the original bargain.

Despite these normative concerns, we should neither conclude that the use of framing effects in policy communications, nor of their use in anticipatory self-regulation, is undesirable or reduces the credibility of self-regulatory efforts. If persuasive communications exploit framing effects because it is an effective strategy, framing does not inherently convey any normative information about the desirability of the policy sought to be defended (such as anticipatory self-regulation as a shield against further reform). Not all reform is desirable. Not all efforts are self-regulation are undesirable. And there is no inherent normative orientation to framing effects. That is especially so if reformers take up my suggestion—offered in the next section—that they draw upon framing effects in their own persuasive communications.

Finally, anticipatory self-regulation may be desirable if wielding the threat of reform generates social outcomes more cheaply than actually enacting reform. Defenders of self-regulation often make the (contested) claim that it can achieve desirable ends more cheaply than government intervention.[219] If self-regulation is in fact cheaper, then threatening reform can encourage firms to alter contract terms voluntarily in ways that, to a first-order approximation, address some of the policy goals sought to be achieved through reform.

B. Practical Implications for Policymakers and Reformers

If effective, framing with anticipatory self-regulation may impede efforts to adopt legal reforms to status quo rules. Yet reformers may overlook the headwinds that framing effects generate. Some consumer groups, for instance, ignore dominant frames and instead focus on other aspects of policy choice, such as narratives about worst-case outcomes for individual consumers. By focusing on anecdotal narratives, these communications strategies may be intended to encourage empathetic policymakers to the availability heuristic; this substitutes the "easy question" of whether examples can easily come to mind for the "hard question" of base rates and probability.[220] Widespread reliance by the media, interest groups, and politicians in "publiciz[ing] . . . incident[s] that might trigger both availability and salience" suggests that these strategies may be effective.[221] Even so, by not taking framing effects into account, reformers are less prepared to respond to attempts to exploit and distort policymakers' perceptions about the status quo rule.

219. *See* Edwards, *supra* note 203, at 603–04 (describing claims and skepticism).

220. *See, e.g.*, Cass R. Sunstein*, What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1297 (2003).

221. *Id.* at 1309.

Debiasing is a common response to cognitive bias, designed in this context to encourage policymakers to assess policy choices using preferences undistorted by cognitive bias.[222] But debiasing's efficacy may be limited. Advice from credible third-party validators may reduce or eliminate framing effects,[223] yet these strategies are likely to be impractical in policy campaigns for which there is no pool of credible third parties. Another debiasing strategy, counterframing, uses alternative frames or direct rebuttals.[224] A reformer might use direct-rebuttal counterframing, such as by suggesting that reforming a status quo rule wouldn't result in "much of a loss" because few people benefit from the status quo rule. But direct-rebuttal strategies may be ineffective when audiences believe outcome probability is high.[225]

Rebutting or negating dominant frames thus should be less effective than exploiting the same heuristics and biases. The key may be triggering policymakers' aversion to salient rather than nonsalient social losses in ways that prime them to think about political accountability.[226] Voters respond to frames that make salient the loss of some endowment they find valuable through easy cognitive recall. Focusing on the loss of some right or endowment that voters have never used may be a less effective strategy. But if the goal is to influence policymakers directly, rather than indirectly through voters, then focusing on issues salient *to policymakers* may be more effective.

In any case, debiasing and counterframing approaches each mistakenly assume that policymakers remain receptive to neutral analysis of the payoffs of anticipatory self-regulation under the status quo.[227] In some areas of law, few policymakers may be undecided about the optimal policy or legal rule that should be selected. If framing effects altered policymakers' opinions on that policy or rule—and even if their preferences are overdetermined—then we might be skeptical that a neutral, objective analysis would further alter their opinions.

For this reason, one practical takeaway for reformers and policymakers is that we should understand and account for the ways that contract terms can be used persuasively in legal reform debates to structurally bias policymakers to support the status quo rule over re-

222. *See generally* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

223. *See, e.g.*, James N. Druckman, *Using Credible Advice to Overcome Framing Effects*, 17 J.L. ECON. & ORG. 62, 77 (2001).

224. Dennis Chong & James N. Druckman, *Counterframing Effects*, 75 J. POL. 1, 13–14 (2012).

225. Jennifer Jerit, *How Predictive Appeals Affect Policy Opinions*, 53 AM. J. POL. SCI. 411, 421 (2009).

226. *See supra* notes 110–113, 149 and accompanying text.

227. Thanks to David Noll for this insight. *Cf.* Eric Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

form. By understanding that firms select legal instruments they can present to policymakers to discourage reform, observers and participants in the reform process will be better equipped to assess claims about the costs and benefits of what status quo rules let firms do. We might pay closer attention to claims about the desirability of status quo rules—and what manipulations, such as nonsalient contract terms, might exploit perceptions about those rules' desirability. It may be that firms promise contractual benefits on an assumption that most consumers will not take them up on it—a distortion that loops back directly on to the probability-distortion framing effect. How should we assess claims that status quo rules generate "benefits" for consumers by allowing firms to adopt contract terms or do similar things? Acknowledging that anticipatory self-regulation can frame reform might lead us to question how firms use contract terms to neutralize purported social "benefits."

It is not necessarily the case that anticipatory self-regulation, combined with framing effects, should lead us to doubt claims about those "benefits." Rather, anticipatory self-regulation under the status quo rule may result in social outcomes that are more or less desirable—tested by whatever criterion of efficiency, distributive fairness, or the like—than some alternative rule. Yet assessing the desirability of those choices is never a one-size-fits-all endeavor. All things considered, we might consider some instance of anticipatory self-regulation under the status quo to be as desirable, or more so, than an alternative reform. But we cannot begin to adequately answer those normative questions without accounting for the role that anticipatory self-regulation plays in framing policy choice between the status quo and reform.

V. CONCLUSION

This Article demonstrated an underappreciated function of standard contract terms in influencing debates over proposals to adopt different legal rules governing contract law. Firms derive significant value from status quo legal rules predictably enforcing allocative terms that dump risk and retain surplus. As reforms to those legal rules potentially destroy this surplus, firms can use other, otherwise unnecessary high-quality contract terms to improve the perceived benefits of the status quo legal regime—influencing the policy debate and potentially avoiding reforms that reduce firms' ability to retain the surplus. We would not expect rational firms to do otherwise, and various models of participation in the policymaking process have long studied how firms and their interest groups compete for material resources.

But contract designers' efforts at anticipatory self-regulation to frame and avoid legal reform are an entirely different mechanism of

influence. These efforts operate not through currying the favor of elected representatives or winning a debate of ideas, but rather by exploiting cognitive biases to construct policymakers' preferences about the choice between a status quo policy and alternatives. Under the informal model proposed in this Article, contract designers and their lobbyists use nonsalient high-quality terms to encourage imperfectly rational policymakers to tolerate the status quo rule.

Acknowledging this function provides a first step toward a better understanding not only of contract terms, but also of the inputs into legal-reform processes. In particular, only by recognizing the potential distortions that framing effects introduce into policymaking processes can we begin to make better assessments of claims about the relative benefits and costs of various policy choices. At a systemic level, that might lead us to worry about potential distortions in policy debates. After all, preferences should not depend on how the decision at hand is framed. But policymakers are human like the rest of us, and thus are susceptible to reliance on heuristics, biases, and other mental shortcuts that generate the framing effects that contract designers and their lobbyists exploit. Our understanding of the political economy of regulation will improve if scholars take seriously framing effects' role in discouraging support for alternatives to the status quo.

At a micro level, the potential for distortion might also make us think differently of claims in specific contract law policy debates about the quality of terms under the status quo legal rule. Contract terms that appear high-quality in isolation may be a phantom if they are rarely, if ever, triggered—and if their main purpose is to act as a shield against alternative rules. In assessing whether society should adopt alternative rules, scholars and policymakers alike should take framing effects into account in assessing whether to credit or doubt claims about the payoffs of the status quo rule.