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# Implied, Inferred, and Imposed: Default Rules and Adhesion Contracts - the Need for Racial Surgery

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# Articles

## **“Implied,” “Inferred,” and “Imposed”: Default Rules and Adhesion Contracts—the Need for Radical Surgery**

**Peter Linzer\***

*[Nero Wolfe was burning his Merriam Webster New International Dictionary, page by page, because it no longer indicated proper word usage. He also did not want to talk with the young woman who had an appointment with him. Nonetheless, he reluctantly allowed his assistant (and narrator), Archie Goodwin, to show her in.]*

*He dropped sheets on the fire, turned to look at her, and inquired, “Do you use ‘infer’ and ‘imply’ interchangeably, Miss Blount?”*

*She did fine. She said simply, “No.”*

*“This book says you may. Pfu. I prefer not to interrupt this auto-da-fé. You wish to consult me?”*

*—Rex Stout, Gambit 3 (New Bantam ed. 1973).*

### Interpretation, Intent, Implication, Inference and Imposition

I was asked to speak at this symposium because our great friend and colleague, Professor Joseph Perillo, the General Editor of the Revised Edition of Corbin on Contracts, told Jim Fishman, the organizer of this gathering, that I was working on Volume 6, which included implied terms. My volume is one of two devoted to interpretation, and half the book is a chapter entitled in Corbin’s 1960 edition, “Interpretation: The Process

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\* Professor of Law, University of Houston Law Center. A.B., Cornell, 1960. J.D., Columbia, 1963. Editorial Reviser, Restatement (Second) of Contracts.

Called Implication.” Like Corbin I believe that the most important question in interpretation is simply “what did the parties intend?” On this reasoning I feel, however, that much of “the process called implication” has nothing to do with the parties’ intent, and really has little to do with freedom of contract. That makes it all the more important and all the more vulnerable.

*Wood v. Lucy, Lady Duff-Gordon*,<sup>1</sup> which gave me the excuse to talk about implied terms, is indeed about interpretation and interferes not at all with freedom of contract. It isn’t a very difficult case, but it has nothing to do with implication, not as that word is used in the English language, as opposed to legalese. When we lawyers speak of a court “implying” a term in a case like *Wood v. Lucy*, we really mean that it drew an inference. The issue in that case, as we all know, was whether Otis Wood had promised to use reasonable efforts to sell Lady Duff-Gordon’s products, and thus could defeat her argument that the contract lacked mutuality of obligation. Though Cardozo wrote “[w]e think . . . that such a promise is fairly to be implied,” he really meant that it was fairly to be inferred—from Lucy giving Wood exclusive control over her products’ marketing. Though Cardozo used the verb “implied,” he wasn’t making any implications. He was simply using common sense to interpret the imprecise language of the contract by drawing an inference.<sup>2</sup> The process of inference is certainly a proper tool of interpretation.

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1. 118 N.E. 214 (N.Y. 1917).

2. Some writers have found his opinion to be sexist, from his statement that “[t]he defendant styles herself ‘a creator of fashions,’” and his description of what she designed as “fabrics, parasols and what not.” *Id.* at 214. See Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Casebook*, 34 AM. U. L. REV. 1065, 1084 (1985). Whatever Cardozo may have thought of women’s fashions, his inference seems the only possible conclusion about this very shrewd business woman. See Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988). [For more sympathetic views of “Lucille,” see in this symposium, Larry A. DiMatteo, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, 28 PACE L. REV. 315 (2008).] If he had considered women’s fashions too trivial for the courts he would have found the contract unenforceable, which is what Lucy wanted.

On the substantive issue, our fellow panelist Mel Eisenberg, raised interesting ideas about someone offering a potential agent exclusivity without requiring him to make any sort of commitment, just to get a chance, and concluded that this still might create a binding contract. See Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 649-51 (1982) (With respect to Professor Ei-

As Nero Wolfe so pointedly implied, too many lay people, and virtually all contract lawyers and courts, collapse "to infer"—to deduce what might have been meant, but was not said expressly—with "to imply"—to (deliberately) make an oblique statement from which another person can draw an inference.<sup>3</sup> A moment or two later in the novel I quoted, after Wolfe refuses the case, Miss Blount says that she has been told that Wolfe is a wizard, and confronts him with "Does a wizard only do easy things? What if you're the only man on earth who can save my father from being convicted of a murder he didn't do?"<sup>4</sup> Archie Goodwin, his wise-cracking, but literate eyes and ears, writes: "He was scowling, not at the dictionary. She had hit exactly the right note, calling him a wizard and implying (not inferring) that he was the one and only—after mentioning what she had in her bag" (twenty-two thousand 1962 dollars in cash).<sup>5</sup>

The "implication" concept is further muddled because courts also say a contract has an implied term when in fact the courts themselves are imposing it. They do this not because they have inferred that the parties "must" have meant it or even "probably" meant it, but because our social system thinks that the term belongs in most contracts. Sometimes inference and imposition overlap. Consider Cardozo's words in *Jacob & Youngs v. Kent*,<sup>6</sup> another of his contract warhorses, where he spoke of "[c]onsiderations partly of justice and partly of presump-

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senberg's analysis, imagine a garage band that said to a famous producer, "We'll hold off for six months from hiring anybody else to represent us. Just think about it." Two months later they hire someone else and have a big hit. On Mel's analysis, there could be consideration without the producer's promise to do anything, and that conclusion is plausible to me. Of course a court seeking to uphold the contract could find consideration without needing Mel's subtle thinking by simply "implying" a promise by the spurned producer to give serious and good faith thought to the band's proposal, or by finding that he relied on the band's promise, but neither is what Mel was getting at, which is that consideration is a more supple concept than is generally thought or taught.).

3. Cardozo, of course, knew the difference. See *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921) ("We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in relation to the project.").

4. REX STOUT, *GAMBIT* 4-5 (New Bantam ed. 1973).

5. *Id.* at 5. Rex Stout couldn't let it go. When Wolfe is asked, at the end, how he knew who the murderer was he replies, "[I]t was an inference, not a conclusion from demonstrable evidence, for I had none. The inference had three legs." *Id.* at 151. Those wishing to learn of the three legs should read the book.

6. 129 N.E. 889.

able intention.”<sup>7</sup> He seems to be saying, implicitly, that you probably meant *X* because you should have meant *X*. At other times, however, the term may not coincide at all with the parties’ unexpressed intentions, for instance the implied warranty of merchantability, where a seller of goods, no matter how unwilling, is bound unless he has complied with the formalities of disclaimer prescribed by U.C.C. section 2-316(2).<sup>8</sup> At still other times, what may originally have been a gap-filler, found by inference, becomes a rule of law by imposition, as the *Wood v. Lucy* rule did when it was codified by U.C.C. section 2-306(2).<sup>9</sup>

Most of these imposed rules of law are default rules that can be dispensed with by the parties if they choose to do so.<sup>10</sup> Default rules are, to my mind, much more important than inferences, though both are commonly described as “implied” terms. It is important, however, to emphasize that unlike inferences, default rules are not part of the interpretation process. To call them “implied,” even in the semi-barbaric legal usage of the word, is to create a fiction that has little to do with an attempt to figure out what the parties intended in their contract. The process of imposing default rules as implied terms is lawmaking, either by the legislature or by the courts. It is not done by the parties.

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7. *Id.* at 890.

8. “Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . . .” U.C.C. § 2-306(2) (2003).

9. “A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.” *Id.* Official Comment 5 to U.C.C. section 2-306 makes no distinction between “best efforts” and “reasonable effort and due diligence.” Not all courts agree.

10. See, e.g., U.C.C. § 2-306(2), *supra* note 8. Others, however, are immutable, like the “implied” covenant of good faith. See U.C.C. § 1-102(3). The Code speaks of good faith as an “obligation,” prescribed by the Code, rather than an implied term, but traditionally it has been called an implied term of the contract. See, for example, the foundation case, *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933), explaining that:

[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

*Kirke La Shelle Co.*, 188 N.E. at 167.

But the very concept of default rules suggests a possibility of choice for the parties. The term, of course, is an analogy drawn from computers. You may or may not choose to change the spacing in your word processing program from the single-spaced default set by the manufacturer, and your failure to make the change suggests that you are happy with single spacing and have chosen it by your inaction. This is surely better than having to make hundreds of decisions about margins, spacing, type face, language and many other things every time you turn on your computer. By analogy, goes the default rule mantra, the contracting parties have chosen to use the off the peg "implied" default rules rather than invest additional resources to draft a bevy of clauses every time they make a contract. On this reasoning, the parties have indeed "implied" by their silence that they are happy with the default rule, while if they change it, we are to "infer" that they have chosen another rule that they deemed better for them.<sup>11</sup>

#### "Implied" Default Rules and Imposed Contracts of Adhesion

The problem with all this is the use of the contract of adhesion to dispense with default rules. Within the past year there have been two massive and excellent symposia exploring the problems of adhesion contracts and the process of opting out of governing rules: one in the *Michigan Law Review*, entitled *Boilerplate: Foundation of Market Contracts*,<sup>12</sup> superintended by Professor Omri Ben-Shahar, and since published as a book by the Cambridge University Press;<sup>13</sup> the other in the *Loyola of Los Angeles Law Review* entitled *Contracting Out of the Uniform Commercial Code*, and shepherded by Professor Sarah Howard Jenkins.<sup>14</sup> Both are superb, and daunting. In them, thirty-one thoughtful writers grappled many aspects of the topic, coming from many different points of view.

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11. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

12. Symposium, "Boilerplate": *Foundations of Market Contracts*, 104 Mich. L. Rev. 821 (2006) [hereinafter Michigan Symposium].

13. *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* (Omri Ben-Shahar ed., 2007).

14. Sarah Howard Jenkins, *Contracting Out of the Uniform Commercial Code*, 40 LOY. L.A. L. REV. 1 (2006).

The two symposia, and the many other articles on the topic, are more than justified. Adhesion contracts, especially in the age of e-commerce and click-wrap, are the most important—and most dangerous—institution of contemporary contract law, precisely because they undermine “implied terms.” At the same time, adhesion contracts obviously can’t just be abolished. We’re not going to negotiate with Avis’s clerk every time we rent a car.

Because of my concern, and despite the intimidation I feel from these two symposia, the many classic articles on the topic,<sup>15</sup> recent articles outside the two symposia<sup>16</sup> and two American Law Institute projects that deal in part with standard forms,<sup>17</sup> I want to look at how the law should deal with attempts

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15. See Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Karl N. Llewellyn, 52 HARV. L. REV. 700 (1939) (reviewing OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)) [hereinafter Llewellyn, Book Review]; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960) [hereinafter LLEWELLYN, *THE COMMON LAW TRADITION*]; Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983). An important forebear of these articles is Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917).

16. See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853 (2006).

17. They are PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS 2 (Am. Law Inst., Preliminary Draft No. 4, Aug. 28, 2007) [hereinafter SOFTWARE PRINCIPLES] and INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (Proposed Final Draft, May 14, 2007) [hereinafter INTELLECTUAL PROPERTY PRINCIPLES].

The ALI uses “Principles” to describe a project that is more tentative and perhaps less sure of itself than a restatement:

In light of the many percolating legal issues that pertain to the formation and enforcement of software agreements, an attempt to ‘restate’ this law would be premature. . . . Instead of restating the law, a ‘Principles’ project accounts for the case law and recommends best practices, without unduly hindering the law’s adaptability to future developments.

SOFTWARE PRINCIPLES, *supra*, at 2.

The Software Principles Project came about after the collapse of the Uniform Computer Information Transactions Act (UCITA), which was abandoned by the National Conference of Commissioners on Uniform State Laws (NCCUSL) after

to dislodge implied terms by the use of contracts not involving active and roughly even bargaining by both parties.<sup>18</sup> This in turn forces us to look at the impact on freedom of contract of both the imposition of default rules and their replacement by the counter-imposition of adhesion contracts.

There is pretty wide-spread agreement that adhesion contracts are heavily loaded in favor of the dominant party, that the non-drafter or “adherent” either doesn’t know of the loaded terms or doesn’t understand them, and that in any case, the dominant party will not make changes in its standardized form contract. Nonetheless, at one end of the spectrum is the notion that if you don’t read what you sign, or assent to something that you don’t really want or don’t understand, you are bound and it’s your own fault.<sup>19</sup> In the famous high Victorian words of Sir George Jessell, M.R.:

If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their con-

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being passed in only Maryland and Virginia. UCITA itself was the successor to the abortive joint venture of the ALI and NCCUSL, proposed Article 2B of the Uniform Commercial Code, intended to cover licensing agreements, especially those for software. In the Introduction to Preliminary Draft No. 4 of the Software Principles, the Reporter, Professor Robert A. Hillman of Cornell, and the Associate Reporter, Dean Maureen A. O’Rourke of Boston University, wrote:

The issues of formation and content are closely related. UCITA suffers in part from the perception that it legalized formations methods highly favorable to software producers, thereby allowing them to dictate terms that deprived copyholders of their rights while diminishing the dissemination of information.

*Id.* at 4. They continued by noting that the interaction between freedom of contract and contracts of adhesion was not limited to software, and that “[a]ccordingly, these issues are fair game for these Principles, which will likely influence resolution of the issues in other contexts.” *Id.* at 5. The Intellectual Property Principles, which deal with similar issues, are discussed in text accompanying notes 26-28, *infra*.

18. Called at different times, mass marketing contracts, boilerplate, form contracts, or adhesion contracts.

19. No matter how he gussies up his theories in the language of philosophy, Randy Barnett’s lifelong theory of contracts has simply repeated this notion in sophisticated form. See, e.g., Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002). I should say that Todd Rakoff, who is more generous than I, described Barnett’s article as “a pretty good straight-on attack” in Rakoff, *supra* note 15; see Todd D. Rakoff, *Commentary, The Law and Sociology of Boilerplate*, 104 *MICH. L. REV.* 1235, 1236 n.5 (2006) [hereinafter Rakoff, *Commentary*].



tracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of Justice.<sup>20</sup>

But as Fritz Kessler said pointedly, “[f]reely and voluntarily’ should not be underemphasized.”<sup>21</sup> A form contract from which a dominant party will not budge raises serious questions about freedom, volition and freedom of contract, itself.<sup>22</sup> In a similar vein, W. David Slawson noted that allowing the dominant party to impose terms conflicts with the notion that laws in a democracy are made by the representatives of the people.<sup>23</sup> Karl Llewellyn suggested that the non-dominant party really agreed only to the “dickered” terms—primarily price, quality and delivery terms, and gave a blanket assent to other terms only if they were “not unreasonable or indecent.”<sup>24</sup>

Other scholars, such as Todd Rakoff, have argued that all terms of adhesion should be deemed procedurally unconscionable and should be struck down and replaced by implied default rules unless the dominant party can carry a burden of showing that they are worthy of judicial enforcement.<sup>25</sup> The ALI’s re-

20. *Printing & Numerical Registering Co. v. Sampson*, (1875) 19 L.R.Eq. 462, 465 (U.K.).

21. Friedrich Kessler, *Introduction: Contract As a Principle of Order*, in FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY T. KRONMAN, *CONTRACTS* 8 n.30 (3d ed. 1986).

22. See Kessler, *supra* note 15.

23. See Slawson, *supra* note 15, at 530.

24. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 15.

Instead of thinking about ‘assent’ to boiler-plate clause, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more . . . a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

*Id.* at 370. This passage, published at the end of Llewellyn’s life, built on his earlier pieces cited in note 15.

25. See Rakoff, *supra* note 15, at 1280. In a recent essay in the Michigan Symposium, *supra* note 12, Rakoff restated his Reconstruction article’s thesis as:

The burden should be on drafting firms to show their form terms were worth judicial enforcement rather than on adherents to the forms to show the terms were unconscionable; and if this burden were not met, the courts should apply the general, legally implied default terms instead of the drafter’s terms.

Rakoff, *Commentary*, *supra* note 19, at 1235. He said further that he still thought he was right. *Id.*

cently completed project on Intellectual Property Principles governing jurisdiction and choice of law<sup>26</sup> takes a similar but slightly more focused approach. It makes valid a choice-of-court or choice-of-law clause in “mass-market agreements” (its term for contracts of adhesion)<sup>27</sup> only if the clause “was reasonable and readily accessible to the nondrafting party,”<sup>28</sup> and specifies some factors to consider in deciding “reasonableness.”<sup>29</sup>

Against these critics, some others—especially believers in welfare economics—have argued that adhesion contracts should be strictly enforced, saying that those who can’t get the terms changed still have real choice, by choosing competitors who offer contracts with different terms or by refusing to buy the product. More recently, sophisticated apologists for contracts of adhesion have argued that concern for reputation and consumer good will and other rational business judgments will induce the dominant party not to exploit every legal advantage.<sup>30</sup>

I can sum up my position in a moment. The Jessell/Barnett freedom of contract/consent to adhesion contracts argument<sup>31</sup> was answered at length and long ago by Llewellyn, Kessler,

26. INTELLECTUAL PROPERTY PRINCIPLES, *supra* note 17.

27. “Mass-market agreement” means an agreement that:

(a) is prepared by one party for repeated use; (b) is presented to another party or parties (the “nondrafting party”) by the party on behalf of whom the draft has been prepared (the “drafting party”); and (c) does not afford the nondrafting party a meaningful opportunity to negotiate its terms.

*Id.* § 101(3).

28. *Id.* § 202(3)(a) (choice of court clauses); *Id.* at § 302(5)(a) (choice of law clauses).

29. See *infra* text accompanying notes 41-46 (further discussion).

30. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts In Competitive Consumer Markets*, 104 MICH. L. REV. 827, 830 (2006) (arguing that buyers, especially opportunistic buyers, have an advantage over repeat sellers who are concerned about their reputation, but that this imbalance can be evened by terms that favor the sellers but that sellers will not enforce against “fair buyers”); 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, 858 (2006) (arguing that “firms use clear and unconditional standard-form contract terms not because they will insist upon those terms, but because they have given their managerial employees the discretion to grant exceptions from the standard-form terms on a case-by-case basis,” but calling on courts to enforce pre-signing oral promises not to enforce the letter of form contracts). See also Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679.

31. See *supra* text accompanying notes 16-18.

Rakoff and Slawson among many others.<sup>32</sup> Adhesion contracts are a bullying device, and “consent” to a bully is no consent at all.<sup>33</sup> The argument that buyers will compare contract terms and buy the product with the most favorable terms has a shred of reality to it, but only a shred. Forty-odd years ago, virtually all automobiles came with the same very restrictive “repair or replace” adhesion warranty, which the New Jersey Supreme Court famously refused to enforce against a car owner in *Henningsen v. Bloomfield Motors, Inc.*<sup>34</sup> Today, car makers compete over warranty terms, and it is fair to assume that a buyer takes them into account. True, the car maker won’t tailor its warranty, just as it probably won’t tailor interest terms, but it does compete with them. Warranties and interest, if not actually “dickered” terms are something like car colors. If you want a shocking pink F-150 and Ford doesn’t make trucks in that color, you can’t bargain over the color, but you can vote with your feet, by buying a rival product, and you may well do so—for “non-negotiable” items like color, warranties and interest rates.

But how likely are you to do so over arbitration clauses, choice of law and forum clauses, limitations on consequential damages and items like the famous cross-collateralization clause used by the Walker-Thomas Furniture Company?<sup>35</sup> And if an audience of law review readers is unlikely to shop these terms, what possible chance is there that non-lawyers will do so?<sup>36</sup> When we move into the twenty-first century and consider the intellectual property arcana included in the typical EULA

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32. See *supra* note 15.

33. As Robin West showed us most spectacularly in her famous article on consent by Kafka’s troubled characters. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

34. 161 A.2d 69 (N.J. 1960). Doug Baird has a perceptive, if unsympathetic, analysis of *Henningsen* in the Michigan Symposium. See Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 940-42 (2006).

35. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). Baird also discusses this case perceptively, though with rather more sympathy. Baird, *supra* note 34, at 944-45.

36. 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), as described by Jason Johnston, *argue*:

[I]n a general theoretical setting [that] even a quite small proportion of smart consumers who actually read and shopped for good standard-form contract clauses could put enough competitive pressure on firms so that they

(End User License Agreement) attached to software that you can't install without clicking on the "Accept" button, the concept of buyers shopping adhesion contract terms becomes ludicrous.

The more sophisticated argument for enforcement of adhesion contract is that the dominant parties will use discretion and not enforce the terms strictly against all customers.<sup>37</sup> Jason Johnston argues that the dominant party will favor the knowledgeable customer who aggressively asserts his rights (allegedly an efficient result),<sup>38</sup> while Bebchuk and Posner say that sellers will reward "fair buyers," who don't push their claims to the limit (apparently an ethical result).<sup>39</sup> Both these rationales—which contradict each other—were, to my mind, dispatched with ease by Professors Margaret Jane Radin and Todd Rakoff in their commentaries to the Michigan Symposium.<sup>40</sup> In either of these cases, giving the dominant party the power to impose harsh terms, trusting it to use discretion has an enormous impact on liberal democracy, even if we naively assume that Citicorp and the like are benevolent despots. The obvious normative question is why the dominant party should have this discretion, why, in Radin's words, "[t]he law of the legislature is being superceded by the law of the firm,"<sup>41</sup> why, in

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would adopt efficient standard-form terms (terms whose cost to the firm was less than the value that consumers place upon them).

Johnston, *supra* note 30, at 862-63. While Johnston is satisfied with Schwartz and Wilde's explanation, I think it highly unlikely in practice, and I see no evidence of wide-spread favorable modifying of adhesion contract terms to deal with these highly theoretical "smart consumers." Johnston seems to concede this. *See id.* at 843-44. *See also* Jeffrey Davis, *Revamping Consumer-Credit Law*, 68 VA. L. REV. 1333 (1982).

37. *See supra* text accompanying note 25.

38. *See* Johnston, *supra* note 30, at 881-82.

39. *See* Bebchuk & Posner, *supra* note 30, at 830. Bebchuk and Posner write, with apparent straight faces, that:

The buyer side of the market consists of parties that—[because they do not have repeat dealings with sellers and because sellers cannot easily share reputational information about buyers]—do not have a sunk cost in reputation and hence have no incentive to deal fairly with sellers in the sense of honoring the terms of the contract.

*Id.* at 829-30 (emphasis added).

40. *See* Margaret Jane Radin, *Commentary, Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1227-29 (2006); Rakoff, *Commentary, supra* note 19, at 1235-36.

41. Radin, *supra* note 40, at 1233.

Rakoff's words, "consumers are forced to be nothing more than supplicants."<sup>42</sup>

Adhesion contracts have grown in importance with the rise of e-commerce and changes in mass marketing. In the old days many transactions were really barter. You bought a book and handed cash to the clerk. Any problems were controlled by implied terms imposed first by the common law or law merchant and later by the Uniform Sales Act or the U.C.C. Now you go online to Amazon or BarnesandNoble.com and at some point click on an overriding agreement that is supposed to govern your transactions, and that changes many of the default rules. You pay by credit card, subject to a long, printed agreement that, according to its terms, can be changed unilaterally by the card issuer. You download software connected with the book and click to "accept" the EULA (often expanding the manufacturer's property interest under the copyright laws) as part of the installation. Et cetera, et cetera.

So there definitely is a problem. The question, though, is what to do about it.

### The Suggested Cures

Todd Rakoff put the burden on the drafting party to show that the adhesive provisions were "worth judicial enforcement" over the applicable default rules.<sup>43</sup> David Slawson suggests that the consumer's reasonable expectations of the transaction should be deemed to be the contract,<sup>44</sup> and that if the standardized form gave the drafter "contractual discretionary power," that power's exercise "cannot nullify or contradict the contract."<sup>45</sup> The Restatement Second of Contracts, also building on a concept of reasonable expectations, said that if the dominant party had reason to know that a party nominally assenting to a standardized writing "would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."<sup>46</sup> All of these approaches are better than blind en-

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42. Rakoff, *Commentary*, *supra* note 19, at 1236.

43. *Id.* at 1235.

44. *See* Slawson, *supra* note 16, at 871.

45. *Id.* at 876.

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

forcement of adhesion contracts, but they suffer from the vagueness of the standards chosen to apply across the board.

The ALI’s project on Intellectual Property Principles governing jurisdiction and choice of law<sup>47</sup> allows the enforcement of choice-of-court and choice-of-law clauses in “mass-market agreements”<sup>48</sup> only if the clause “was reasonable and readily accessible to the nondrafting party.”<sup>49</sup> That alone doesn’t improve things much, but the Intellectual Property Principles go on to define “reasonableness” in terms relevant to these two specific provisions, in both cases including “the parties’ locations, interests, and resources, taking particular account of the resources and sophistication of the nondrafting party”<sup>50</sup> and adding as a factor for choice of court clauses, the availability of online adjudication in the chosen court and its particular expertise;<sup>51</sup> and for choice of law clauses the closeness of the chosen law to the agreement and the parties.<sup>52</sup>

I don’t find the solutions offered by Llewellyn, Rakoff, Slawson, the Second Restatement or even the Intellectual Property

47. *Supra* note 17.

48. “Mass-market agreement” means an agreement that:

- (a) is prepared by one party for repeated use; (b) is presented to another party or parties (the “nondrafting party”) by the party on behalf of whom the draft has been prepared (the “drafting party”); and (c) does not afford the nondrafting party a meaningful opportunity to negotiate its terms.

INTELLECTUAL PROPERTY PRINCIPLES, *supra* note 17, at § 101 (3).

Note that this definition is not limited to consumers. Whether it would include employment contracts, which Chuck Knapp includes in his valuable concept of an “individual contract” is not certain, since employers may modify their employment contracts while retaining the most objectionable terms. Employment contracts, though not completely congruent, raise problems very similar to consumer contracts. On individual contracts, see Charles L. Knapp, *Opting Out Or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOX. L.A. L. REV.* 95, 120 (2006).

By this I mean not a contract between individuals, but a contract between a flesh-and-blood individual, on the one hand, and a commercial enterprise on the other . . . [F]or our purposes here the contract of an individual worker as contrasted with a collectively bargained labor contract has enough in common with the ordinary consumer contract to treat them together.

*Id.*

49. INTELLECTUAL PROPERTY PRINCIPLES, *supra* note 17, § 202(3)(a) (choice of court clauses); *Id.* § 302(5)(a) (choice of law clauses).

50. *Id.* § 202(3)(b)(i) (choice of court clauses); *Id.* § 302(5)(b)(2) (choice of law clauses).

51. *Id.* § 202(3)(iii) & (iv).

52. *Id.* § 302(5)(b)(i).

Principles to be of great practical help to the non-drafting party, since he still has to go to court and litigate the issue against the drafter, who is probably a repeat player and thus has economies of scale and a much greater incentive to litigate the specific issue.<sup>53</sup> The easiest possible way of rebalancing the economies of scale, the class action—itself more a windfall to lawyers than a device for legal reform—has been stymied by arbitration clauses in the adhesion contracts themselves.<sup>54</sup> The question, then, is assuming we agree that contracts of adhesion are bad, how can we do something practical about them?

### Radical Surgery

The solution, I think, is not to try to deal with all adhesion provisions, but to focus on those that are particularly bad and to make them unenforceable per se; in other words, to make the most important default rules immutable when no real bargaining is possible by imposing an “implied” term on contracts of adhesion that forbids them from changing specific rules. If there is actual bargaining, the parties may do what they want, but when a dominant party imposes its will without real bargaining, the state should override that imposition and return the implied term to power.<sup>55</sup>

There have been several examples of specific restrictions by type, rather than generic restrictions based on unconscionability and the like. After the Uniform Computer Information Transactions Act (UCITA)<sup>56</sup> was passed in Maryland and Virginia, four states not only rejected UCITA but passed “bomb-

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53. The Intellectual Property Principles' additional clause-related specific factors in dealing with “reasonableness” may be more valuable in its specific area of practice, where the non-drafter may be larger and more of a repeat player than the typical non-drafter of an adhesion contract. See INTELLECTUAL PROPERTY PRINCIPLES, *supra* note 17.

54. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

55. My writings, and those of many others, have been immensely influenced by Ian Macneil, who pioneered the concept of relational contracts. See Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 695 n.\*\*. In this regard, the critical point of adhesion contracts is that the relationship between the contracting parties is one of no relationship at all, unless it is one of master and servant—and under the common law servants had more rights against their masters than some adhesion contracts give the non-drafting party.

56. See *supra* note 17.

shelter bills," which made unenforceable provisions in software contracts choosing the law of a state that had passed UCITA.<sup>57</sup> The ALI Intellectual Property and Software Contracts Principles projects make an attempt in the direction of dealing with specific problems rather than adhesion contracts generally, but they do not go nearly far enough.

We have already seen how the Intellectual Property Principles made a start in the direction of clause-specific remedies, by defining "reasonableness" specifically for choice of law and choice of forum clauses. The reporters of ALI's Software Principles Project,<sup>58</sup> while aware of the abuses of adhesion contracts, state a sentimental regard for "freedom of contract,"<sup>59</sup> but also deal specifically with some of the more common adhesion issues.<sup>60</sup> The choice of law clause must bear a reasonable relation

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57. See William J. Woodward, Jr., *Constraining Opt-Outs Shielding Local Law and Those It Protects From Adhesive Choice of Law Clauses*, 40 *LOY. L.A. L. REV.* 9, 84 (2006). See also *America Online, Inc. v. Superior Court of Alameda County*, 108 Cal. Rptr. 2d 699, 710 (Ct. App. 2001) (refusing to enforce AOL's choice of Virginia law (its home state, which had adopted UCITA), based on California venue statute favoring consumers' residence). I testified in favor of a bomb-shelter bill before an Ohio legislative committee, with no apparent success, though Ohio did reject UCITA.

58. See SOFTWARE PRINCIPLES, *supra* note 17.

59. Software contracts create a wide array of new issues on the substantive side.

One central issue is whether contracting parties are free to broaden or narrow the protections afforded by federal and state intellectual property law. Resolution of this issue requires not only attention to contract law, but sensitivity to the balance of rights created by intellectual property law. Another issue involves the limits of freedom of contract. What terms should be stricken on unconscionability, public policy, or related grounds? A third important issue involves the appropriate level of quality protection for users of software in light of the engineering challenges and diverse methods of producing it, on the one hand, and defective software's potential to cause calamitous harm, on the other. A fourth issue involves the permissible range of software remedies providers may employ, including self-help mechanisms and remedy limitations.

SOFTWARE PRINCIPLES, *supra* note 17, Introduction, at 5. All four of these categories may be affected by terms in adhesion contracts, which, in the case of software, often involve "click-wrap" and other techniques that undermine even the shred of autonomy involved in signing a tangible printed form contract.

60. The Software Principles also have to deal with questions of what kind of contract is involved (sale of goods? sale of information? license? lease?), see SOFTWARE PRINCIPLES, *supra* note 17, § 1.06, and what constitutes assent (click-wrap? terms sent after sale? barter over the phone or on line?). See *id.* §§ 2.01-2.02. These issues, which are intimately involved with the adhesion issue, are be-



to the selected jurisdiction and not be against the public policy of the jurisdiction that would otherwise govern.<sup>61</sup> This, however, is nothing more than the present rules governing domestic choice of law,<sup>62</sup> and is less specific than the parallel provision of the Intellectual Property Principles.<sup>63</sup> A similar comment can be made about the Software Principles' section on forum selection clauses.<sup>64</sup> Its provisions on disclaimers of warranties<sup>65</sup> and limitations of remedies<sup>66</sup> basically parallel Article 2 of the U.C.C. These provisions are timid, and still require the non-drafting party to go through a trial on the merits before getting any relief.<sup>67</sup>

We need hard, formal, protective rules, not standards like "reasonable," "reasonable expectations," "not unconscionable" or "not indecent." We need rules, either court-made or legislative, that make specified clauses illegal and unenforceable in adhe-

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yond this paper, though the writer, as a member of the Software Principles Members Consultative Group, has strong opinions about them as well.

61. SOFTWARE PRINCIPLES, *supra* note 17, § 1.13(a). The default governing law is currently that of the place of delivery, *id.* § 1.13(b), though the buyer's residence has been suggested as a substitute by a member of the Members Consultative Group in a memo transmitted to the Group by the Reporters.

62. In fact, an attempt to allow choice of law not related to the contract in the Revised U.C.C. section 1-301 has proven to be very controversial.

63. See *supra* text accompanying notes 47-49.

64. Section 1.14 of the Software Principles allows choice of exclusive forum unless the choice is "unfair or unreasonable" and includes, in what appears to be a non-exclusive list of factors to be considered in deciding unfairness or unreasonableness, that the forum is not reasonably convenient, that the agreement as to forum was obtained by misrepresentation, duress, abuse of economic power or "other unconscionable means," that the forum does not have competence to hear the case or award remedies "otherwise available," or that enforcement of the clause would be "repugnant to public policy as expressed in the law of the forum in which suit is brought." SOFTWARE PRINCIPLES, *supra* note 17, § 1.14. See *supra* notes 48-53, and accompanying text for the parallel provision in the Intellectual Property Principles.

65. See SOFTWARE PRINCIPLES, *supra* note 17, § 3.06.

66. *Id.* § 4.01.

67. The Software Principles' treatment of merger clauses is better, both substantively and because it becomes important only if the parties are already in or seriously contemplating litigation, since only then would the parol evidence rule be critical. Section 3.08(c) says that for contracts of adhesion, "a term indicating that the record is fully integrated or partially integrated should be probative but not definitive on the issue." SOFTWARE PRINCIPLES, *supra* note 17, § 3.08(c). This is close to the position that I take in the Corbin revision, though I think the word "probative" is too strong and should be replaced by "relevant."

sion contracts,<sup>68</sup> if possible with a requirement that the contracts state prominently that these provisions are legally forbidden and may not be included in a contract, even with the non-drafter's consent.<sup>69</sup> Certainly, we still need overriding rules of fairness for adhesion contracts generally,<sup>70</sup> and to catch the new techniques that mass marketing contract drafters will come up with, but we need to cut the worst clauses out completely.

We need to consider which clauses are so unfair and have such a great impact that they should be anathematized. My candidates are first the procedural traps laid for lay people: mandatory arbitration clauses, choice-of-forum and choice-of-law clauses, very short time periods to file complaints. We also need to consider restrictions on substantive rights. I would ban or strictly limit the ability of the drafter to change contract terms after execution. In e-commerce, we need to know a lot more about restrictions on reverse engineering, unauthorized usages and sellers' self-help by disabling software or Internet connections against the will of their customers. Certainly, for some of these provisions the drafters will argue that the provision is substantively justified, and should be adopted by the law-maker as a substitute default rule. If the drafters can do

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68. For articles pointing the way to this approach, see, e.g., Ian Ayres & Robert Gertner, *Filling Gaps In Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006). See also Stephen J. Choi & G. Mitu Gulati, *Contract As Statute*, 104 MICH. L. REV. 1129 (2006); 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 (2006). Of course, my ideas, like those of so many other writers on contracts would likely never have developed if it were not for Stewart Macaulay's contributions over the past fifty years. He has always preferred results to elegant overarching theories. Results are what we're supposed to achieve as lawyers. Stewart, at least, has always got this right.

69. Such a provision would prevent form contract writers from putting in unenforceable clauses to discourage uninformed non-lawyers from contesting the provision or to allow low-level "consumer service representatives" to use the unenforceable clause to bully those making complaints. See generally Christina L. Kunz, *The Ethics of Invalid and "Iffy" Contract Clauses*, 40 LOY. L. REV. 487 (2006); Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002). Professor Kunz's article lists many other discussions of lawyers pushing the ethical envelope in drafting adhesion contracts.

70. For instance, I would not bar merger clauses, but I would weaken their force considerably if they have not actually been discussed. See *supra* note 67.

that (and they have a lot of money to use to make their case), at least a governmental body will have changed the default rule, rather than just the dominant party.

An example of how this might work would be a ban on restrictions on consequential damages. Attempts to eliminate all consequential damages are common in the battle of the forms, and it is common for drafters to try to do this in adhesion contracts. The existing rule of *Hadley v. Baxendale*<sup>71</sup> already creates a default rule limiting the buyer to predictable consequentials unless she gives notice of a special risk,<sup>72</sup> and the very concept of the mass marketing contract makes individual disclosure difficult or impossible. That means that the existing “implied term” already protects the seller against unusual risks. The seller is left only with the predictable risks he should be able to factor into his pricing scheme without adding boilerplate stripping his buyer of this modest remedial right, which she has had for 154 years.<sup>73</sup> Perhaps the sellers can convince the courts or Congress that their risk is still too great; they convinced the revisers of U.C.C. Article 2 to give them the ability to cut off consequentials to “remote purchasers.”<sup>74</sup> (So far, however, only the Virgin Islands has passed Revised Article 2, and it seems to be going the way of UCITA). Obviously, there are many other candidates, and maybe the drafters will be able to convince the rule-makers that they need to be able to continue to take specific rights away by what they call an agreement. But at least a body of government will be making the decision, someone besides the drafters of adhesion

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71. (1854) 156 Eng. Rep. 145 (Exch.).

72. Restatement Second of Contracts section 351(1) limits recovery to what is foreseeable as the probable result of a breach. Section 351(2) says that loss may be foreseeable “because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.” U.C.C. § 351(2). See also U.C.C. § 2-715(2)(a). That the *Hadley* rule is a penalty default forcing a contracting party to disclose factual information about its risks from a breach is shown elegantly by Ian Ayres and Robert Gertner in *Filling Gaps In Incomplete Contracts: An Economic Theory of Default Rules*. Ayres & Gertner, *supra* note 68.

73. See Symposium, *The Common Law of Contracts as a World Force in Two Ages of Revolution: A Conference Celebrating the 150th Anniversary of Hadley v. Baxendale*, 11 TEX. WESLEYAN L. REV. 225 (2005).

74. See Proposed Revised U.C.C. §§ 313A(5) & 313B(5).

contracts and pliant judges mouthing platitudes about freedom of contract.

It was Fritz Kessler who showed us that the term "freedom of contract" had no business being applied to contracts of adhesion, but I have always understood his 1943 *Columbia Law Review* article<sup>75</sup> to be an attempt to neutralize the evils and cleanse adhesion contracts so that what remained could be included within traditional contract law, "contract as a principle of order" as Kessler put it in his great essay at the beginning of his casebook.<sup>76</sup> Kessler brought a European and civil law point of view to American contract law, and helped to eliminate some of the excesses of classical theory, but he had no desire to pull it down, as is shown by his debate with Grant Gilmore in their unpublished teacher's manual.<sup>77</sup> The same is true for Llewellyn and other critics of form contracts.

The great justifications of freedom of contract are the intrinsic value of the exercise of free will and the efficacy of individuals planning their individual lives as opposed to legislatures working en masse. Neither of these justifications has any relevance to contracts of adhesion. The mass marketing contract has *nothing* to do with freedom of contract: the non-dominant party has neither free will nor an opportunity for individual planning. The only issue is whether the administered terms should be imposed by the dominant party or by the social system as a whole, speaking through the legislatures, Congress and the courts. Those bodies represent us all, however imperfectly. Contract drafters represent their clients. I have no con-

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75. See Kessler, *supra* note 15. The article was part of a symposium on "compulsory contracts," which included several other articles that are still valuable, more than sixty years later.

76. See *supra* note 17.

77. See GRANT GILMORE, *Introduction and Teaching Notes from Teacher's Manual*, in *CONTRACTS* (Friedrich Kessler & Grant Gilmore, eds., 2d ed. 1970), reprinted in PETER LINZER, *A CONTRACTS ANTHOLOGY* 39, 41 (2d ed. 1995). It is in his footnotes (signed F.K.) to Gilmore's contributions to the *Teacher's Manual* to the second edition, as well as in his introductory essay in the casebook, *supra* note 13, that Kessler expresses his view that despite its flaws, classical contract is valuable. See also Friedrich Kessler, *Grant Gilmore As I Remember Him*, 92 *YALE L.J.* 4 (1982). The *Teacher's Manual* was made available to contracts teachers but was never published. I am happy to have served the profession by publishing excerpts from it (including the "debate") in Peter Linzer, *A Contracts Anthology* 39-42 (2d ed. 1995).

fidence in the drafters or their clients as benevolent despots, and, even more important, I have no desire to have private despots running my life, however benevolent they may be. The answer is not to try to turn contracts of adhesion into quasi-negotiated contracts—it can't be done. The way to bar their worst aspects is by radical surgery, judicial or legislative.<sup>78</sup>

I think that legislation, state or federal, is a more promising and efficient way to cleanse adhesion contracts than judicial imposition.<sup>79</sup> I have nothing against courts doing this,<sup>80</sup> but twenty-five years of conservatism has filled many of our state courts and most of our federal courts with judges who are fond of classical contract law and say that they do not “make” law, despite the indisputable historical fact that so much of their beloved classical contract law was made by judges and the indis-

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78. In the terms used by Professor William J. Woodward, Jr., this is a formalist approach. See William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 1003-04. Professor Woodward made a strong case why formalism is not a good idea for most business contracts, especially in matters of interpretation, but his article was not concerned with “consumer contracts” (writ generally), nor with the prohibition of specific terms favoring the dominant party. I find it surprising to find myself favoring formalism. Formalism, however, is not always something that favors the dominant, as any absolute ban on a business practice shows. Cf. Justice Hugo Black's view that the First Amendment's protection of freedom of speech (“Congress shall make no law . . . abridging the freedom of speech”) is an absolute, *Konigsberg v. State Bar of California*, 366 U.S. 36, 57 (1961) (Black, J. dissenting). On the problems with “absolutes versus balancing” with respect to the First Amendment, see Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 750-51 (16th ed. 2007).

79. Given the Supremacy Clause of the Constitution, Art. VI, clause 2, it will probably take Congress revising the United States Arbitration Act (FAA), 9 U.S.C. §§ 1-14 (2006), to ban adhesive arbitration clauses. See *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (FAA preempts state law requiring arbitration clauses to be conspicuous on the first page of a contract); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (FAA bars California from barring arbitration of claims). On both the evils of arbitration clauses in adhesion contracts and the need for federal legislation to restrict them, see Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 777-80, 787-98 (2002), and Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 *HOUS. L. REV.* 1237, 1264 (2001).

80. We can see some pretty radical judicial surgery in classics like *Henningesen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960) (Justice Robert Francis for the New Jersey Supreme Court barring a warranty implicitly excluding consequential damages in a car sale) and *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (Judge J. Skelly Wright for the Court of Appeals for the District of Columbia Circuit creating a warranty of habitability for residential property), not to mention Cardozo's creation of products liability by eliminating the need for privity of contract in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

putable contemporary fact that so many politically conservative judges are in fact judicial activists.<sup>81</sup>

But, you say, what makes you think that Congress and the legislatures will be any better? That's a fair question. The Democratic leadership in the 110th Congress has shown little kidney for a fight, whether it's over deadlines in Iraq, modest restrictions on warrantless wiretaps or even Turkish culpability for its massacre of Armenians ninety years ago. Why would it take on every business lawyer in America to fix form contract abuse, an issue that most Americans either ignore or accept as a fact of life?

The answer my friends, is less blowing in the wind than swinging like a pendulum do. I am a great fan of Grant Gilmore, James Joyce and Giambattista Vico, all of whom believed that history was a series of cycles.<sup>82</sup> We were in a conservative, Republican and business-oriented cycle from the end of the Civil War until the Depression, the years of the birth and flowering of classical contract law. Then we had a liberal, mostly Democratic period from 1933 to 1968, as contracts became Corbinized, Traynorized and Skelly Wrightized, followed

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81. Obvious examples are Frank Easterbrook in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). Alex Kozinski provides further example in his attack on the California parole evidence rule (though he was *Erie*-bound) in his notorious *Trident* opinion. See *Trident Center v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

82. Gilmore, after discussing history's swings between the classical and the romantic, wrote in 1970, "It may be that, in this centennial year [of Langdell's case method], some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-Tide may bring?" GRANT GILMORE, *THE DEATH OF CONTRACT* 107 (Ronald K. L. Collins ed., Ohio State University Press 1995) (1974) (citations omitted). I have suggested that Richard Posner was at least the John the Baptist of the resurrection that Gilmore correctly predicted. See Gilmore's views on this question in Grant Gilmore, *The Ages of American Law* (1977). Joyce's first sentence in *Finnegan's Wake* (which starts in the middle and begins as the book's last sentence) includes the phrase "commodious vicus of recirculation." JAMES JOYCE, *FINNEGAN'S WAKE* 3 (1939). This simultaneously describes the movement of the Anna Liffey River in Dublin, makes a toilet joke and sends innumerable graduate students to the writings of Giovanni Battista Vico (1668-1744), an influential Neopolitan philosopher who put forth a theory of history as cyclical. On Vico, see the Stanford Encyclopedia of Philosophy, *Giambattista Vico*, available at <http://plato.stanford.edu/entries/vico/> (last visited Mar. 27, 2008).

by twelve years of moderate,<sup>83</sup> but increasingly weakened presidents and an activist liberal Congress, which produced some important legislation affecting private citizens despite the growing conservatism of the country. All this ended with the oil boycott, inflation, the hostages in Iran and the election of Ronald Reagan. For the past quarter-century, the Democrats have sounded like Republicans, the Republicans made Barry Goldwater into an environmental activist, and the law-and-economics boys and girls have done their best to paint Llewellyn, Corbin and the like as wooly-headed idealists who never met a payroll.<sup>84</sup>

But times, they seem to be a-changin' and to mix a metaphor, I think the pendulum is swinging to the blue. Now is the time to start making proposals for legislative change, proposals that won't get enacted this year and may not in the next Congress or two, but eventually could become law. OSHA was passed when Richard Nixon was President, the Family Medical Leave Act when the elder Bush was President. Even in Texas, where you scratch a Democrat and find a Republican underneath, in the early seventies a group of young Turks got the legislature to pass an aggressive Deceptive Trade Practices Act that has survived despite legislative and judicial attempts at emasculation over the past 35 years.<sup>85</sup> If I am correct, and we

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83. I never thought I'd describe Richard Nixon as a moderate, but sixteen years of Ronald Reagan and the younger Bush certainly show him in that light.

84. Referring to Justice Francis, who wrote *Henningsen*, *supra* note 34, and Judge Wright, who wrote *Walker-Thomas*, *supra* note 35, Douglas Baird wrote that "[a]t the time these judges went to law school, Arthur Corbin and Fritz Kessler's efforts to understand how the law worked in mass markets, as primitive as they may seem today, were state of the art." Baird, *supra* note 34, at 951, text accompanying n.60. Baird is a little less patronizing in the footnote. For what she, at least, perceives as Llewellyn's romanticism about businessmen's usages of trade, see Lisa Bernstein, *Formalism in Commercial Law: The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). On Bernstein and Llewellyn, see Woodward, *supra* note 78, at 980-81. See generally, Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 N.W. L. REV. 775 (2000).

85. See also Richard M. Alderman, *The Deceptive Trade Practices Act 2005 - Still Alive and Well*, 8 J. TEX. CONSUMER L. 74 (2005), available at SSRN: <http://ssrn.com/abstract=922790>. Admittedly, in the 1970s Texas was still Democratic, if pretty reactionary. Today it is solidly Republican, but other states have changed,

do have at least a moderate swing a little to the left of center (I am not predicting the French Revolution), this can create an atmosphere where serious proposals to solve a profoundly serious intrusion on the average citizen could find a friendly reception. Now is the time to get our thinking straight and now is the time to start to act.

I infer that change for the better is possible.

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and even south-western Republicans could some day start caring about consumers and workers, especially if the proposal got support from the growing cadre of Hispanic voters.