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Defeating the Empire of Forms

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ARTICLES

DEFEATING THE EMPIRE OF FORMS

*David A. Hoffman**

For generations, contract scholars have waged a faint-hearted campaign against form contracts. It's widely believed that adhesive forms are unread and chock-full of terms that courts will not, or should not, enforce. Most think that the market for contract terms is broken, for both employees and consumer adherents. And yet forms are so embedded in our economy that it's hard to imagine modern commercial life without them. Scholars thus push calibrated, careful solutions that walk a deeply rutted path. Notwithstanding hundreds of proposals calling for their retrenchment, the empire of forms has continued to advance into new areas of social life: we now click to agree to more written contracts every few days than our grandparents did in their entire lives.

This Article argues that the swelling scope of the empire of forms is itself a social problem, and it demands both a new diagnosis and a structural reform. Forms are everywhere in our lives because we've brought them with us in our pockets, and on our devices. Contract law hasn't changed to make forms more valuable; the cost of contracting has fallen to make them ever cheaper to distribute. This encourages their distribution even though they individually are less valuable to

* William A. Schnader Professor, University of Pennsylvania Carey School of Law. Tara Martin-Chen, Abigail Kasdin, and J. Anes Sung provided extraordinary research assistance. Yonathan Arbel, Jane Baron, Samuel Becher, Bob Hillman, Jon Klick, Nate Oman, Gideon Parchomovsky, Guy Rub, Ari Shahdadi, Omri Ben-Shahar, and Tess Wilkinson-Ryan provided helpful comments, and I benefited from faculty workshops at Washington University School of Law, the University of Chicago Law School, and Yale Law School.

firms. All the while, cheap forms externalize too many harms and threaten important legal values which we should defend. What's needed is a remedy that cuts off the supply of cheap forms at its source and returns us to a world with fewer written contracts. I offer that reform with a proposed state law: the statute of frauds flipped upside-down. It would make low-stakes written-form contracts, directed at either employees or consumers, simply unenforceable. I defend the statute against charges that it is worse medicine than the mass contracting disease it seeks to cure.

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INTRODUCTION

Contract's empire of forms, on a generations-long march, continues to conquer new territory. Not content with dominating the worlds of commercial law and finance, written contracts now govern the most common consumer and employment relationships. Everywhere we look, adhesive terms stare back: they control our lives at the market,¹ at school,²

¹ See Uri Benoliel & Shmuel I. Becher, Termination Without Explanation Contracts, 2022 U. Ill. L. Rev. 1059, 1062 & n.14 (describing Amazon terms of use governing returns).

² See Serena Zhang, Students Are Expected to Follow the Campus Compact This Fall. Here's What It Means, Daily Pennsylvanian (July 30, 2020, 1:04 AM), <https://www.thedp.com/article/2020/07/campus-compact-explained-penn-fall-social-distancing> [<https://perma.cc/QD6E-2WQ2>].

at work,³ on vacation,⁴ and online;⁵ they constrain our public law rights⁶ and our private law duties;⁷ and they determine procedure we use to vindicate what's left of both.⁸ Forms, assented to on our proliferating portable screens, have never been more dominant, nor perceived to be less morally legitimate.⁹

There's a widely remarked consensus that there's *something* rotten at the heart of form contracts. And yet the rise in the sheer number and subject matter of form contracts has received less comment than you'd expect. Commentators focus on the trees: contract font and length,¹⁰ readability,¹¹ firms' monopoly power,¹² and lack of meaningful assent.¹³ Above all, scholars bemoan bad terms. Each archetype form contract provision has developed its own (generally hostile) scholarly community:

³ For a discussion of the role of arbitration agreements in employment contracts, see Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *J. Empirical Legal Stud.* 1, 1 (2011).

⁴ See David A. Hoffman, *Relational Contracts of Adhesion*, 85 *U. Chi. L. Rev.* 1395, 1437–38 (2018) (describing Airbnb's terms of use).

⁵ See Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 *U.C. Irvine L. Rev.* 659, 659 (2012) (“An online provider’s termination of user accounts that facilitate user-generated content can be a major—and potentially even life-changing—event for users.” (footnote omitted)); see also Rory Van Loo, *Federal Rules of Platform Procedure*, 88 *U. Chi. L. Rev.* 829, 882 (2021) (discussing the necessity of online platforms having flexibility in their contracts with consumers).

⁶ See Alexandra Lahav, *In Praise of Litigation* 126–27 (2017).

⁷ When sued by a journalist who was banned from the platform for spreading misinformation about COVID, Twitter used its terms and conditions as part of its defense. Twitter’s motion to dismiss was denied. *Berenson v. Twitter, Inc.*, No. 21-cv-09818, 2022 WL 1289049 (N.D. Cal. Apr. 29, 2022).

⁸ See generally David A. Hoffman, *Whither Bespoke Procedure?*, 2014 *U. Ill. L. Rev.* 389 (cataloguing growth in certain contract clauses controlling litigation).

⁹ See David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 *N.Y.U. L. Rev.* 1595, 1632 (2016) (describing age effects in views about morality of contracting).

¹⁰ See Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 *J. Empirical Legal Stud.* 862, 863 (2020) (discussing jurists’ emphasis on font).

¹¹ See Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 *B.C. L. Rev.* 2255, 2257 (2019) (testing readability of terms and finding them wanting).

¹² Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *Colum. L. Rev.* 629, 640 (1943).

¹³ See generally Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013) (offering an extended critique of modern contract doctrine for permitting contractual obligation without real assent).

arbitration clauses,¹⁴ class action waivers,¹⁵ damage limitations,¹⁶ stipulated remedies,¹⁷ choice of law,¹⁸ unilateral modification,¹⁹ privacy policies,²⁰ choice of forum,²¹ social media behavioral controls,²² nondisclosure clauses,²³ and noncompetes.²⁴ More rarely do scholars step

¹⁴ See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in the Courts, and the Erasure of Rights*, 124 *Yale L.J.* 2804, 2804 (2015) (noting a connection between weak forms of consent and the expansion of arbitration's theoretical reach and critiquing the subsequent loss of public law rights). But cf. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 *J. Am. Arb.* 251, 254–57 (2006) (“[W]hatever lowers costs to businesses tends over time to lower prices to consumers.”); Alan Kaplinsky, Mark Levin & Daniel McKenna, *Consumers Fare Better with Arbitration*, *Am. Banker* (Dec. 23, 2014, 12:00 PM), <https://www.americanbanker.com/opinion/consumers-fare-better-with-arbitration> [<https://perma.cc/VZP2-YQ2K>] (arguing that arbitration benefits consumers and must be analyzed relative to the alternatives of court and class action litigation); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 *Calif. L. Rev.* 1, 9 (2019) (finding repeat play effects for both plaintiffs and defendants).

¹⁵ See J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 *Vand. L. Rev.* 1735, 1770 (2006).

¹⁶ See, e.g., Debora L. Threedy, *Liquidated and Limited Damages and the Revision of Article 2: An Opportunity to Rethink the U.C.C.’s Treatment of Agreed Remedies*, 27 *Idaho L. Rev.* 427, 445 (1991) (discussing damage limitations).

¹⁷ See Carliss Chatman, *Twitter Wants to Force Musk to Buy It. But There’s a Hitch.*, *Barron’s* (July 30, 2022), <https://www.barrons.com/articles/twitter-elon-musk-thirteenth-amendment-51659101363> [<https://perma.cc/LD2Y-BBN4>] (suggesting Thirteenth Amendment issues with specific performance).

¹⁸ See generally William J. Moon, *Contracting out of Public Law*, 55 *Harv. J. Legis.* 323 (2018) (discussing commercial contracts contracting out of legal regimes). But cf. Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 *U. Chi. L. Rev.* 1151, 1152–57 (2000) (arguing that choice of law clauses allow parties to mitigate the effects of inefficient substantive laws).

¹⁹ See Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 *Ga. L. Rev.* 657, 663 (2021) (suggesting that there are social costs to unilateral contract modification); Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 *S. Cal. L. Rev.* 1, 6 (2010) (articulating problems caused by unilateral modification clauses).

²⁰ See Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 *Wash. U. L. Rev.* 1461, 1463 (2019) (criticizing notice-and-consent regime).

²¹ See Tom Cummins, *Shute: The Math Is Off*, 8 *J.L., Econ. & Pol’y* 1, 1 (2011) (discussing the costs of choice of forum clauses).

²² See Benoliel & Becher, *supra* note 1, at 1061–62 (exploring termination of contracts in the context of social media).

²³ See, e.g., David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 *Wash. U. L. Rev.* 165, 220 (2019) (proposing a public policy defense to nondisclosure clauses).

²⁴ See, e.g., Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 *Colum. L. Rev.* 547, 557 (2020) (noting an increase in noncompete agreements); On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, *Harv. Bus. Rev.*, Jan.–Feb. 2014, at 26.

back and consider the forest—what to do with the ballooning number of forms we must agree to simply to get through our lives.²⁵

Identifying, and solving, the many problems posed by mass contracting has preoccupied contract professors for the last hundred years, and it is this Article's goal to take another whack at the thicket.²⁶ It's my premise that scholars have largely gotten the diagnosis wrong. Terms may sometimes be bad for adherents, and firms might well seek to opportunistically take slices of the pie that previously belonged to consumers and employees. But the real story of forms is, counterintuitively, how useless and wasteful their empire has become, for drafters and adherents alike. Written contracts have become omnipresent in our lives largely because technology has made legal assent too cheap to obtain.²⁷ In many cases, they are nearly zero-cost products, thrown into commerce without real thought about the benefits they bring firms, because technology made them an afterthought. Simply put, without our phones, iPads, and tablets, we wouldn't see, or agree to, nearly so many written contracts: our swelling empire of forms is built on the portable screen.

²⁵ Cf. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 704–11 (2011) (using the hypothetical example of Chris Consumer to illustrate the omnipresence of disclosure a decade ago); Brett Frischmann & Evan Selinger, *Re-Engineering Humanity* 64 (2018) (coining the term “lollipop contracts” to describe contracts governing trivial affairs and suggesting that they exist only because transaction costs are low).

²⁶ The literature is vast. For examples of foundational works, see Nathan Isaacs, *The Standardizing of Contracts*, 27 Yale L.J. 34, 35 (1917); Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 Yale L.J. 704, 729–30 (1931); Kessler, *supra* note 12, at 629, 640; Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370–71 (1960) (articulating reasonable expectations doctrine for the non-dickered fine print); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 529 (1971). See also Ethan J. Leib, *What Is the Relational Theory of Consumer Form Contract?*, in *Revisiting the Contracts Scholarship of Stewart Macaulay on the Empirical and the Lyrical* 259, 259 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013) (“One of the most puzzling and embarrassing facts about contract law and contracts scholarship in the United States is that neither has found a consistent way to treat the real contracts of our lives: standardized consumer form contracts.”).

²⁷ See, e.g., Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. Cin. L. Rev. 1327, 1342 (2011) (“Given that digital terms are weightless, reproduction and distribution costs non-existent, and consumers highly unlikely to read online agreements, companies could add additional terms with no concomitant financial or reputational cost. Companies began using their online agreements to do more than contain costs and assess the risks of doing business.”).

It may seem obvious that the real foundation of contracts' expanding empire is collapsing transaction costs.²⁸ But that's not the dominant account. Today's scholarship looks at the hundreds of written contracts we each assent to in a year and assumes that they must benefit firms by enabling intentional exploitation. Scholars, having then suggested that contracting markets are evil, typically look to reform their content at the margins—focusing on improving mechanisms of consent, or invalidating certain clauses.²⁹ But such marginal reforms have been notably ineffective at reducing the number of aversive terms in contracts. Even outright legislative bans of certain terms only depress their use, leaving consumers subject to being swayed by terms that would be unenforceable in court.³⁰

Locating the problem in transaction costs, as I'll show, motivates a distinct solution. Many firms use forms because it is nearly free to do so, expanding the use of contract into areas where it really has very little social value at all. This Article proposes a legislative response to this economic problem, which likely will strike you as more of a Swiftian modest proposal than it's intended to be.³¹ Individual states could, and perhaps should, pass something like a *reverse statute of frauds*. The statute of frauds, as you may recall from your first-year contracts course, conditions enforceability on writing for deals of certain gravity of purpose—land, expensive goods, long-term service contracts, etc. I propose the converse: states should *deny* enforcement of a certain set of (mostly cheap) written contracts.

²⁸ Cf. Lizette Alvarez & Jeri Clausing, Senate Passes Bill Allowing Online Contract-Signing, *Pittsburgh Post-Gazette*, June 17, 2000, at A-1, A-7 (“‘The bill revolutionizes the way consumers, industry and government conduct business over the Internet,’ said Sen. Spencer Abraham, R-Mich. . . . ‘It is a tremendous cost-cutting tool because people and businesses can now enter contractual arrangements without having to drive across town, fly thousands of miles for a meeting or mail reams of paper back and forth.’”).

²⁹ One classic is Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *Harv. L. Rev.* 1173, 1262 (1983) (arguing “invisible terms” in adhesion contracts should be presumptively unenforceable). I assume you think I am exaggerating above the line. But cf. Peter Linzer, *Contract as Evil*, 66 *Hastings L.J.* 971, 975 (2015).

³⁰ See Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 *J. Legal Analysis* 1, 24, 39 (2017) (cataloguing a sample of Boston leases and finding a large percentage of unenforceable terms which likely affected consumer behavior).

³¹ See Jonathan Swift, *A Modest Proposal for Preventing the Children of Poor People in Ireland, from Being a Burden on Their Parents or Country, and for Making Them Beneficial to the Publick* (1729).

Under this reverse statute of frauds—which I’ll call the Statute Against Forms (or “SAF” for short)—for most goods and services contracts, there would be three legal regimes, tagged to deal value. At the lowest dollar amounts—say, \$100 for goods and services contracts, or those paying less than \$15 an hour—the *only* enforceable contracts would be oral ones. Then, for some class of contracts, including goods contracts between \$100 and \$500, the traditional floor for the statute of frauds, firms could either use written forms, or not, as they preferred. Finally, bigger contracts would be enforceable only when written, as has been the case for centuries.

The SAF would partially bring us back to the contracting world of 1980. Then, most of the products we bought regularly as consumers were governed by default rules of contract, not written forms.³² Employment law, too, was largely governed by unwritten defaults.³³ Nostalgia, like paranoia, isn’t always wrong: the past default contracting world was better for most of the people who operated in it. Not only did it avoid the tyranny of unread forms that has consumed contract scholarship of late, but the rare written contracts we saw had more moral weight and heft.³⁴

The SAF also has a singular practical advantage over competing reform proposals. The Federal Arbitration Act has defeated policymakers’

³² There’s nothing necessarily simpler or more transparent about the default rule regime. See Omri Ben-Shahar, Regulation Through Boilerplate: An Apologia, 112 Mich. L. Rev. 883, 889 (2014) [hereinafter Ben-Shahar, Regulation Through Boilerplate] (“Regulation by boilerplates means that one web of terms collected from many sources of law (the legally supplied default provisions) is replaced with a fairly comprehensive but concise substitute (boilerplate). The boilerplate version *appears* more complicated, but this is a superficial veneer due to the fact that boilerplates reproduce the entire set of governing rules in print.”); see also Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1205 (2003) (explaining the alternative to form contracts is imposed legal defaults).

³³ See *infra* text accompanying notes 83–86; cf. Rachel Leiser Levy, Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule, 72 U. Chi. L. Rev. 695, 701–02 (2005) (outlining the history of courts’ treatment of employee handbooks).

³⁴ There is evidence that younger citizens increasingly treat contracting itself as a sort of low-stakes joke, driven by increasing exposure to online forms. See Hoffman, *supra* note 9, at 1597–98. Eroding contracting’s symbolic power puts pressure on other doctrinal rules deeply embedded in contract law. Cf. Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, Expecting Specific Performance 13 (Inst. for L. & Econ., Research Paper No. 23-05, 2023) (noting that expectation damages under-compensate by leaving out the cost of moral harm). The empire of forms thus poisons real negotiated agreements, overall increasing the need for state enforcement.

attempts to regulate form contracts twice over.³⁵ First, it prohibits attempts to differentially police arbitration clauses, depriving states of the ability to argue that enforcement in public courts is necessary to vindicate particular rights. It also makes it difficult to develop common law defenses to particular contract terms, as increasing numbers of disputes happen in arbitral forums, which aren't just private: they are ill-disposed to innovate around terms, or processes of formation.³⁶ The SAF will avoid this two-pronged attack, as the growth of arbitration is primarily a phenomenon of increasing adoption of cheap contracts. Eliminate those written forms for certain kinds of goods and services, and more disputes will end up litigated in court. Thus, the SAF offers a practical legislative solution that states could use to reduce arbitration's reach and revitalize public and private rights.

That said, I face a steep uphill climb in convincing you that we should simply eliminate whole classes of employee and consumer forms. A world without certain written contracts is potentially socially disruptive. It's not necessarily better for all individual adherents. And notably, eliminating forms won't generate more formal legal autonomy, since the defaults that law provides us are just as adhesive as those that we click to agree to.³⁷ But I'm going to try to convince you that omnipresent, cheap forms have cost us dearly.³⁸ This presents a novel social problem on two levels.

Many form contracts we click to agree to today, on the margin, erode public goods, from safety to equality. They do so even where parties themselves arguably benefit from the form. In fact, perhaps it's because adherents prefer to make contractual tradeoffs that this problem has proven so wicked.³⁹ Externalities are rife even for terms that courts deem

³⁵ See 9 U.S.C. §§ 1–16, 201–208, 301–307.

³⁶ Cf. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 *UCLA L. Rev.* 600, 607–08 (2020) (illustrating the decline in state-made common law doctrine).

³⁷ Ben-Shahar, *Regulation Through Boilerplate*, *supra* note 32, at 888–89.

³⁸ For a general account of externalities and non-parties in contract law, see Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 *U. Pa. L. Rev.* 1095, 1110–12 (2023); see also Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 *U. Pa. L. Rev.* 1, 52, 56–57 (2008) (“[D]ata on credit card choice and use show that consumer mistakes cost hundreds of dollars a year per consumer. . . . The aggregate costs are staggering.”).

³⁹ Cf. Salomé Viljoen, *A Relational Theory of Data Governance*, 131 *Yale L.J.* 573, 598–600 (2021) (noting the gap between individual and social values in privacy); Frischmann & Selinger, *supra* note 25, at 78 (noting that adherents are perfectly rational maximizers).

unenforceable, as people respond to the contracts they read, not the ones that would stand up in court.⁴⁰ Forms are full of clauses that exclude tort remedies, waive property standards, and cut back on public law remedies for antidiscrimination. When coupled with procedural devices that make it harder to vindicate such small-stakes individual harms in court, small-stakes forms off-load risk to the public.⁴¹

But if it's true that firms benefit from such sloughed-off social costs, the argument against *all* forms is hard to maintain. Why not just—as so many law professors have argued (and argued)⁴²—try harder to reduce the incidence of bad terms? Punitive damages for bad contracts! Bar sanctions for bad contract drafters! Private attorneys general, given bounties to hunt down unenforceable terms! Put aside the obvious problem that these solutions are fanciful⁴³: they also beg the question. Rejecting cheap forms doesn't turn on convincing you that terms and forms are bad but rather that the entire apparatus of form production has gone off the rails.⁴⁴ Contracts are so cheap to produce that they can be stuffed to the gills with bad terms, benefiting lawyer-agents, without materially improving firm wealth. In fact, I'll argue that technology has so subsidized contract formation that it no longer is obvious that cheap forms have real benefits for drafters. Forms thus externalize diffuse harms without necessarily internalizing discrete benefits. The SAF would undo these systemic consequences at their root.

But even before diving into the details, the SAF may provoke a reaction in most readers: Are you serious? The idea of prohibiting contracts not

⁴⁰ See Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 *Stan. L. Rev.* 503, 504, 512 (2020) (discussing individuals' unwillingness to challenge unenforceable terms); Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 *Behav. Sci. & L.* 83, 91 (1997) (finding that exculpatory language deterred hypothetical willingness to sue).

⁴¹ See, e.g., Judith Resnik, *supra* note 14 (discussing the relationship between adhesion contracts and rights).

⁴² I even split up the preemption footnote into multiple parts and won't refer to it again here, lest you feel dispirited about the possibility of reform.

⁴³ Incentives matter, and toothy sanctions would marginally affect the likelihood of bad terms. But these solutions implicitly assume that cheap forms have positive social value. Perhaps strict liability is the right approach to this problem, not a negligence rule.

⁴⁴ To be clear, my argument is more attractive if you hold these beliefs, so I don't try very hard to dissuade you either.

based on their content,⁴⁵ the quality of assent, or party identity,⁴⁶ but rather because they are in writing runs against the main current of American contract law. Our law, developed by courts and legislatures alike, is pro-disclosure and pro-writing.⁴⁷ And for good reason: written contracts are more easily and predictably litigated, they are said to reduce the incidence of fraud,⁴⁸ permit firms to grow internally and yet maintain standard practices to outsiders,⁴⁹ and allow shoppers and policymakers to compare terms (if they read them) and thus price and analyze legal rights.⁵⁰ Depriving firms of the ability to contract in writing, even for small-stakes contracts, seems destined to lead to some very perverse outcomes indeed.

Consider the introduction to the argument section in a recent certiorari petition, which asked the Supreme Court to resolve a question about the preemptive scope of the Copyright Act in a way that favored contract over federal statute:

All across the internet, websites employ terms of service to impose conditions on visitors' access to their services. The laws of every state protect such terms as binding contractual obligations. That contractual protection is essential for a vast swath of internet businesses. They invest enormous resources in activities, such as aggregating information from various sources, that provide extraordinary benefits to the public. And they offer the fruits of their labors to the public, often for free. For many of them, contract law is the only way to protect their

⁴⁵ See U.C.C. § 2-302 (Am. L. Inst. & Unif. L. Comm'n 2023) (covering unconscionability rules).

⁴⁶ See, e.g., 5 Williston on Contracts § 9:1 (4th ed.), Westlaw (database updated May 2023) [hereinafter Williston on Contracts] (describing capacity doctrines).

⁴⁷ See 9 Williston on Contracts, *supra* note 46, § 21:1 (describing the importance of written contracts in the rise of the statute of frauds).

⁴⁸ *Hackney v. Morelite Constr. D.C. Corp.*, 418 A.2d 1062, 1065–67 (D.C. 1980) (recounting the anti-fraud role of the statute of frauds).

⁴⁹ See Rakoff, *supra* note 29, at 1178 n.13 (stating that without standardized contracts, “the making of offsetting transactions, covering, and the entire apparatus of speculation on an exchange would be impossible or much more difficult”); 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, 865 (2005) (highlighting corporations' use of employee discretion in departing from formal contractual terms); Restatement (Second) of Contracts § 211 cmt. a (Am. L. Inst. 1981) (“Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution.”).

⁵⁰ See *infra* text accompanying notes 66–68 (explaining the economics of boilerplate).

investment from exploitation by others, including exploitation by immensely powerful internet giants like Google.⁵¹

It's my goal to convince you that the normative claims in this passage, and the empirical data they appear to rest on, are overwrought at best. We *don't* need written form contracts for smaller goods and services transactions, nor for low-wage jobs. Making them unenforceable will neither create chaos in large firms nor kill the internet or other forms of modern commerce. And, though the SAF has no precise precedent, it's not invented whole cloth: we've experimented with regulation of forms before, without the sky falling. And, even if you aren't fully persuaded, I hope to make you think differently about the value of forms and what the law can do to suppress them on the margin.

I'll start by offering a summary of broadly shared complaints that modern scholars have lodged with our contracting regime. Then, in Part II, I present the solutions on offer, all incomplete, preempted, or resigned to failure. Part III provides the heart of my account about the relationship of technological change and transaction costs to the contracting world we live in, and what that means for current debates. Part IV describes, defends, and frets about the SAF.

I. FORMS AND THE PATHOLOGIES OF MODERN CONTRACTING

The following sketch of our form contracting market is brief and sets the stage for what comes next: the extraordinary variety of scholarly prescriptions to fix what ails us. Essentially all modern contract scholars, from left to (what exists of) the academic right, offer an increasingly dark vision of the field, built on an interlocking set of grim theses. I am going to describe this literature, without adopting its conclusions.

- Mass contracts are full of terms that no one can practically read: there are too many terms, buried in fine print, written in language humans can't parse. This is the *No Reading Thesis*.
- Because no one reads mass contracts, terms aren't priced. This is the *No Market Discipline Thesis*.

⁵¹ Petition for Writ of Certiorari at 1, *ML Genius Holdings LLC v. Google LLC*, 143 S. Ct. 2658 (2023) (No. 22-121), 2022 WL 3227953, at *1.

- Market discipline is even weaker online, as we read less intentionally on our devices. This is the *Online Disadvantage Thesis*.
- Firms have learned of the absence of market discipline, and over time, incrementally made deals worse. This is the *Feedback Loop Thesis*.

The depth of support, and logical coherence, of these claims varies. At this point, the *No Reading Thesis* is the central organizing principle in the contracts academy,⁵² and rests on careful empirical inquiry.⁵³ It conforms to your own common sense intuitions about how you approach the world:⁵⁴ that mass contracts are composed of unread and unreadable terms is the place from which we all start.⁵⁵

Whether the absence of reading is *bad* is a different matter. Perhaps readership is rationally as low as the stakes.⁵⁶ But many (or perhaps most) law professors offer a more cynical account: firms are to blame. They think that companies seek to trick adherents to give up important rights

⁵² See, e.g., Ian Ayres & Alan Schwartz, The No-Reading Problem in Consumer Contract Law, 66 Stan. L. Rev. 545, 551–52 (2014) (discussing instances when consumers think contracts have better terms than they actually do).

⁵³ See Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts, 43 J. Legal Stud. 1, 3 (2014) (explaining that consumers read terms and conditions clauses 0.2% of the time); see also Victoria C. Plaut & Robert P. Bartlett III, Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements, 36 Law & Hum. Behav. 293, 305 (2012) (exploring the relationship between lack of readership and trust).

⁵⁴ Maybe you, reading this footnote, think yourself similarly a reader of the fine print of your contracts. So let this be a comment about your more sensible friends.

⁵⁵ 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, 984 (2006) (observing that “most consumers do not read boilerplate provisions or, if they do, find them hard to understand”); Eyal Zamir, Contract Law and Theory: Three Views of the Cathedral, 81 U. Chi. L. Rev. 2077, 2102–05 (2014) (surveying evidence on non-readership); Uri Benoliel & Xu (Vivian) Zheng, Are Disclosures Readable? An Empirical Test, 70 Ala. L. Rev. 237, 238–39 (2018) (stating that certain disclosures require “more than twenty years of education to understand”).

⁵⁶ Zev J. Eigen, Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms, 168 J. Inst. Theoretical Econ. 124, 134 (2012) (citing “typical factors” of low readership, including “low stakes of the exchange”); Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 Ga. L. Rev. 583, 598–99 (1990) (noting consumer inability to understand the meaning of contract terms).

by burying the bad news in the fine print.⁵⁷ Implicitly, the argument is that *if* individuals read their agreements, they wouldn't have agreed to them.

This perspective finds popular expression in the movement against “forced arbitration” and “rip off clauses,”⁵⁸ and intellectual foundation in the work of many scholars.⁵⁹ However, direct evidence for the manipulation account is limited—there are, to my knowledge, no studies that offer direct proof from contract drafters that they deliberately set out to create unreadable contracts.⁶⁰

If you look hard enough, you'll find more charitable explanations. One focuses on the role of government regulation in creating too much text. Omri Ben-Shahar sits at the center of this intellectual universe.⁶¹ His famous article (later book) with Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure*, argued that it was rational

⁵⁷ See, e.g., Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* 29 (2013) (arguing sellers use one-sided clauses to prevent opportunistic and good faith plaintiffs alike); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *Stan. L. Rev.* 211, 243 (1995) (arguing that development of contract law must include an understanding of decision-making); Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* 18–21 (2012) (showing how sellers can exploit consumers' bounded rationality and systematic cognitive biases through contract design).

⁵⁸ Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 *B.U. L. Rev.* 873, 877–83 (2019) (describing debate about arbitration clauses).

⁵⁹ See, e.g., Radin, *supra* note 13, at 15–17; Kim, *supra* note 57, at 19; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. Rev.* 630, 743 (1999) (noting that firms “will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits”); Jeff Sobern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 *Wm. & Mary L. Rev.* 1635, 1644–60 (2006) (describing firms' techniques to avoid scrutiny of terms); Lauren E. Willis, *Performance-Based Consumer Law*, 82 *U. Chi. L. Rev.* 1309, 1317–21 (2015) (suggesting strategic manipulations of contractual text). But see Hoffman, *supra* note 4, at 1421–41 (offering examples of firms creating consumer-friendly text).

⁶⁰ But cf. Jeff Sobern, *Report That Companies Include Provisions in Arbitration Clause That They Know the Arbitrator Won't Enforce—But That Might Suppress Claims Even More*, *Pub. Citizen: Consumer L. & Pol'y Blog* (Mar. 8, 2018), <http://pubcit.typepad.com/clpblog/2018/03/report-that-companies-include-provisions-in-arbitration-clause-that-they-know-the-arbitrator-wont-en.html> [<https://perma.cc/7SPG-H5EH>] (reporting suggestive evidence that arbitration drafters know of certain terms' unenforceability); Mark A. Lemley, *The Benefit of the Bargain*, 2023 *Wis. L. Rev.* 237, 248–50 (arguing that *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), created a permission structure to change contract doctrine to lower barriers to assent).

⁶¹ See generally Omri Ben-Shahar, *Regulation Through Boilerplate*, *supra* note 32 (reviewing Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013)).

not to read our contracts, because they are full of too much text.⁶² It suggested that our system's attraction to disclosure-based regulation is in part to blame. Disclosure is a politically attractive regulatory strategy because it promises so much (better markets) while demanding so little (political costs) of regulators.

But used indiscriminately and across the economy, disclosure fails to inform. As all contracts in the market are subject to this precise pathology, the result is a wall of text everywhere we look. Ben-Shahar and Schneider delightfully invited readers to consider a typical consumer who faces endless screens of text, and droning voices, wherever she goes, and then asked, essentially, would we want that poor sucker (ourselves) to *actually* read the disclosures and contracts she needed to get through the day?⁶³

One problem with attributing the spread of forms entirely to regulatory overhang is that even in fields where contracts are *not* subject to increasing disclosure obligations, they appear to have gotten longer and more formal with time.⁶⁴ And most of the terms that appear to have increased the length of individual contracts arise from private legal choices, such as those that insert arbitration clauses and litigation tailoring clauses. These, and not, say, the Truth in Lending Act ("TILA") disclosures, are what typically make up the blocks of capital text which mark our mass contracting.⁶⁵ And, though it's true that disclosure obligations are part of the reason that contracts have gotten longer and more numerous, many disclosure rules could be satisfied without binding contracts, as I explore below.

The result is that although we all agree that contracts are increasingly long, numerous, and unread, the literature lacks a grounded account of how and why that came to be, let alone whether it is lamentable.

No Market Discipline is an even more complicated claim. To unpack it, consider the economics of boilerplate.⁶⁶ It's long been accepted lore

⁶² Ben-Shahar & Schneider, *supra* note 25; Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 56 (2014).

⁶³ Ben-Shahar & Schneider, *supra* note 25, at 705–09 (Chris Consumer story).

⁶⁴ See, e.g., David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 *J. Empirical Legal Stud.* 90, 123 (2022) (noting the increasing formalization of rental leases over time in the absence of significant changes in disclosure rules).

⁶⁵ 15 U.S.C. §§ 1601–1667f.

⁶⁶ See generally Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (or "The Economics of Boilerplate"), 83 *Va. L. Rev.* 713 (1997) (discussing network effects which promote use of inefficient boilerplate); Lewis A. Kornhauser, *Comment, Unconscionability in Standard Forms*, 64 *Calif. L. Rev.* 1151, 1183 (1976) (discussing inefficiencies in standard form contracting). Cf. Mark A. Lemley & David

that contract terms are priced.⁶⁷ That's true if the contract *is* the service—as in the case, say, of an intellectual property (“IP”) license to stream Disney+. But it's equally true if the contract accompanies a product, as the standard exculpatory “terms in the box” do when you buy a toy lightsaber and hope it doesn't shatter when you hit your friends with it. In either case, the first order idea is that the product/service's price reflects the terms: if firms make terms more favorable, the good's price should fall. This hydraulic relationship makes up the core of the efficiency case for enforcing standard form contracts.⁶⁸

No one ever thought that *all* consumers read terms and disciplined firms. In 1979, Alan Schwartz and Louis Wilde offered a way of thinking about how many active consumers needed to pay attention—the proverbial coupon clippers who helped cap grocery store prices.⁶⁹ In their work, this “informed minority” could be a small percentage of all buyers, but still needed to be some critical mass of people who cared enough about terms to make a difference to firm behavior.

The hypothesis largely dominated contracts scholarship from 1980 through 2000.⁷⁰ Then, Professor Florencia Marotta-Wurgler and colleagues began to study the actual readership of small-scale contracts in real life settings. Analyzing large, representative datasets, she and her co-authors found that vanishingly few people—6 in 1000 in one paper—even *glanced* at the fine print in online contracts.⁷¹ This brute fact

McGowan, Legal Implications of Network Economic Effects, 86 Calif. L. Rev. 479, 569–76, 587 (1998) (expressing skepticism about significant network effects).

⁶⁷ See generally Richard Craswell, Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships, 43 Stan. L. Rev. 361 (1991) (analyzing the relationship between contract terms and consumer demand as a function of price).

⁶⁸ See, e.g., Robert A. Hillman, More Contract Lore, 94 Tul. L. Rev. 903, 912 (2020) (“[C]ontract law enforces reasonable standard forms, not because consumers have consented to them, but because standard forms reduce costs and therefore facilitate exchange that, on the whole, benefits society.”). But see Lee Goldman, My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts, 86 Nw. U. L. Rev. 700, 716–21 (1992) (rejecting economists' assertions that contracts of adhesion are efficient).

⁶⁹ See Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. Pa. L. Rev. 630, 630–31 (1979) (exploring the question of “whether the existence of imperfect information has produced noncompetitive prices and terms”).

⁷⁰ See Zamir, *supra* note 55, at 2087–105 (reviewing Douglas G. Baird, *Reconstructing Contracts* (2013) (describing informed minority hypothesis and its history)).

⁷¹ Bakos et al., *supra* note 53, at 4, 22 (“We find that the fraction of consumers who read such contracts is so small that it is unlikely that an informed minority alone is shaping software license terms.”).

effectively killed most intellectual enthusiasm for the informed minority hypothesis.⁷² For without consumer pressure, how could prices reflect real preferences?⁷³

That said, we do shop for some contract terms and thus subject them to market discipline: there is evidence from a variety of sources that consumers price warranties.⁷⁴ Similarly, employees obviously value contract terms like security of position, vacation days, and the ability to work from home.⁷⁵ Another example comes from mortgage markets, where, as Manisha Padi has found, consumers react to changes in financing terms.⁷⁶ Finally, there are lab experiments that find that individuals will pay for particular damages terms in contracts.⁷⁷

But what about the mine run of terms that lawyers tend to fuss about—that is, what about boilerplate? Such provisions are less likely to be salient to consumers and employees.⁷⁸ Some have found that post-employment

⁷² Eyal Zamir (featuring Ian Ayres), *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 *Tex. L. Rev.* 283, 296 (2020) (“For all practical purposes, therefore, the informed-minority hypothesis may be disregarded, at least in routine transactions.”); Yonathan A. Arbel & Roy Shapira, *Consumer Activism: From the Informed Minority to the Crusading Minority*, 69 *DePaul L. Rev.* 233, 241 (2020) (“Exhibit A: Schwartz himself seems to believe that nobody reads contracts these days.”). Of course, consumers may serve this role incompletely post-purchase. 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.* 929, 929–30 (2020).

⁷³ Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 *U. Chi. L. Rev.* 1263, 1348 (2011) (discussing lack of shopping between insurance carriers despite differences in policies); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 *J. Institutional & Theoretical Econ.* 94, 115–16 (2012) (finding that exposure to a one-sided term in a software license agreement has no effect on likelihood to purchase the product in question).

⁷⁴ See, e.g., George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *Yale L.J.* 1297, 1347 (1981) (finding an informed minority of warranty purchasers discipline markets).

⁷⁵ See, e.g., Cevat Giray Aksoy, Jose Maria Barrero, Nicholas Bloom, Steven J. Davis, Mathias Dolls & Pablo Zarate, *Working from Home Around the World 11* (Nat’l Bureau of Econ. Rsch., Working Paper No. 30446, 2022), <https://www.nber.org/papers/w30446> [<https://perma.cc/U4XZ-EB7W>] (finding that employees value a work-from-home option at 5% of their salary).

⁷⁶ Manisha Padi, *Consumer Protection Laws and the Mortgage Market: Evidence from Ohio 14* (June 11, 2018) (unpublished manuscript) (on file with author).

⁷⁷ Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 *Mich. L. Rev.* 633, 659–60 (2010) (finding participants more likely to breach a contract containing a liquidated damages clause).

⁷⁸ See, e.g., Korobkin, *supra* note 32, at 1225 (“[P]roduct attributes that are evaluated, compared, and implicitly priced as part of the purchase decision [are] ‘salient’ attributes and product attributes that are not evaluated, compared, and priced as part of the purchase decision [are] ‘non-salient’ attributes.”); cf. Jonathan Klick, Comment, *The Microfoundations of Standard Form Contracts: Price Discrimination vs. Behavioral Bias*, 32 *Fla. St. U. L. Rev.*

terms—like nondisclosure agreements (“NDAs”) and noncompete agreements (“NCAs”)—can affect wages by in effect making employers pay wage premia to hide inculpatory information.⁷⁹ This would be true even if firms don’t sue workers to enforce such clauses: the effects are felt out of court. But the evidence is mixed. In a recent paper, Evan Starr and co-authors found that even though firms use noncompetes for low-wage workers, they do not appear to value those terms enough to change wages when they were made unenforceable.⁸⁰

Other litigation-shaping terms—like arbitration, class action waivers, exculpatory clauses—are nearly omnipresent in products markets and increasingly so in employment contracts as well. The rise of these clauses in consumer markets has been well-documented.⁸¹ In employment markets, written contracts have increased significantly over the last three decades.⁸² This enabled arbitration’s rise. In 1992, only 2% of nonunion

555, 558 (2005) (offering extended comment on Korobkin’s model and suggesting that consumer heterogeneity in response to terms better explains observed behavior).

⁷⁹ Eric A. Posner, Alexander Triantis & George G. Triantis, *Investing in Human Capital: The Efficiency of Covenants Not to Compete* 23 (John M. Olin Program in L. & Econ. Working Paper Series, Working Paper No. 11, 2004); cf. Natarajan Balasubramanian, Evan Starr & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation From Employees* 22 (Jan. 31, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 [<https://perma.cc/HD5A-FC EQ>] (finding that most of the wage premia observed for noncompetes is likely due to selection, and that clauses bundled together reduce wages).

⁸⁰ See Takuya Hiraiwa, Michael Lipsitz & Evan Starr, *Do Firms Value Court Enforceability of Non-Compete Agreements? A Revealed Preference Approach* 32 (Feb. 20, 2023) (unpublished manuscript) (draft on file with author).

⁸¹ See, e.g., Hoffman, *supra* note 8, at 395–96 (cataloguing procedural contract clauses).

⁸² The best evidence I’ve seen indicates that in the 1980s, outside the unionized workplace, arbitration and other formalized mechanisms governing relationships with workers pursuant to written contracts were rare. See John Thomas Delaney, David Lewin & Casey Ichniowski, *Human Resource Policies and Practices in American Firms* 4, 60 (1989) (indicating that only 17–24% of nonunion firms in 1986 and 1987 had an arbitration system in place); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 *Am. Socio. Rev.* 794, 795, 802 (1996) (finding grievance procedures were largely absent in the 1950s in nonunionized firms and had risen to around 30% of firms by 1985). By the mid-1990s, a large-scale survey found that employers increasingly tried disclosures or contracts that shaped (usually disclaimed) obligation. J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 *Wis. L. Rev.* 838, 867 (finding that, of employers who did not explicitly contract for at-will employment, a majority reported no documents regarding discharge, while much of the rest had disclaimers of for cause employment). It is not clear which of these firms used documents we would recognize as contracts and which used something more like nonbinding internal grievance mechanisms. Cf. Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 *Tex. Wesleyan L. Rev.* 1,

workers were subject to arbitration.⁸³ By 2020, that percentage had grown to approximately 54% of nonunion workers overall—a total of 60 million people—and 65% of workers at companies with more than 1,000 employees.⁸⁴ 30% of nonunion workers who are subject to mandatory arbitration have also signed agreements prohibiting class action lawsuits: more than 25 million employees can no longer participate in class actions.⁸⁵

The use of arbitration clauses notably increased since the beginning of the pandemic.⁸⁶ Between 2020 and 2021, around 240 companies registered or updated arbitration clauses with the American Arbitration

1–2 (2003) (noting the turn of the millennium state of play in the workplace marked by informal promises, handbooks, and some written agreements); Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 *Ariz. L. Rev.* 637, 638 (2007) [hereinafter Arnow-Richman, *Cubewrap Contracts*] (“Unlike other business relationships, employment relationships typically are not formalized in a written document. The rights of workers are set largely by statute and certain baseline common law assumptions, with the role of private ordering limited to the determination of compensation and job duties. The few negotiated terms of employment are likely to be memorialized, if at all, in a brief offer letter or job description. Recently, however, companies have gravitated toward the use of standardized agreements to ‘contractualize’ discrete aspects of workers’ obligations.”); Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 *Colum. L. Rev.* 1404, 1411–12 (1967) (“It seems fair to estimate that only a very small portion of the non-unionized employees in this country have succeeded in so altering the presumptively at will nature of the employment relationship.”).

⁸³ John Bickerman, *Increase in Workers Subject to Arbitration Coincides with Supreme Court Rulings*, *Am. Bar Ass’n* (Jan. 16, 2020), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/increase-in-workers-subject-to-arbitration-coincides-with-supreme-court-rulings/> [https://perma.cc/ZX5N-6YHJ].

⁸⁴ Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, *Bloomberg L.* (Oct. 28, 2021, 1:01 PM), <https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it> [https://perma.cc/M7Y9-UX6F].

⁸⁵ Bickerman, *supra* note 83.

⁸⁶ Of course, scholars have worried about arbitration in employment agreements for a long time. See generally Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 *UMKC L. Rev.* 449, 450–51 (1996) (suggesting that the arbitral process is an inappropriate forum for the resolution of some employment claims). As Stephen Ware described, in the 1990s, employment arbitration was “booming.” Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 *Hofstra L. Rev.* 83, 84 (1996). But he then noted that “arbitration of disputes involving non-union employees was virtually nonexistent until the 1970s. Since then, it has grown substantially, and its growth is likely to continue.” *Id.*

Association.⁸⁷ Spikes in arbitration filings among employees at large companies illustrate the increased enforcement of these clauses. Tinder closed 288 arbitration cases in 2020, which was five times as many as they closed in 2019; Tesla closed as many arbitration cases in 2020 as they did in the previous five years combined;⁸⁸ and Dollar Tree arbitrated 1,135 cases in 2020, which was a significant increase from the three arbitrated in 2019.⁸⁹

And yet despite their rising dominance, there is little evidence that these litigation-shaping contract terms affect wages or prices. In consumer markets, Natasha Sarin explains the absence of evidence with reference to the literature on shrouded product attributes and pricing.⁹⁰ As she argues, where consumers don't have the ability to experience the term prepurchase, they rationally do not buy with it in mind, permitting firms to successfully extract rents from consumers.⁹¹

This shrouded pricing effect is but one of several possible ways to think about why many contract terms do not appear to be reflected in product prices. In a recent study of hundreds of thousands of leases in Philadelphia, Anton Strezhnev and I asked whether contract price (i.e., rent) appears to reflect what the leases say. Particularly, we asked if leases that contained more clauses that were unlawful and favorable to landlords were cheaper—did landlords trade legal for financial gains? Surprisingly, we found that the opposite was true: relatively more expensive properties were more likely to contain leases with bad terms for renters.⁹² And the preponderance of unlawful and oppressive terms increased with time, particularly in middle-class neighborhoods. How could this be?

The answer, we hypothesized, offers a different perspective on the question of why terms are unpriced. We argued that landlords didn't

⁸⁷ Forced Arbitration in a Pandemic: Corporations Double Down, Am. Ass'n for Just. (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic> [<https://perma.cc/BK7B-Z8EJ>].

⁸⁸ *Id.*

⁸⁹ Abha Bhattarai, As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time, Wash. Post (Oct. 27, 2021, 7:00 AM), <https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/> [<https://perma.cc/N9PW-JAL5>].

⁹⁰ Natasha Sarin, Making Consumer Finance Work, 119 Colum. L. Rev. 1519, 1589–91 (2019); Xavier Gabaix & David Laibson, Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets, 121 Q.J. Econ. 505, 506–09 (2006) (providing examples of shrouded pricing).

⁹¹ Sarin, *supra* note 90, at 1568–78.

⁹² Hoffman & Strezhnev, *supra* note 64, at 105.

choose leases to minimize their litigation but rather transaction costs: they copied them from the most convenient available source. In the time period we studied, apartment buildings in Philadelphia increasingly pulled contracts from the internet, replacing formerly informal agreements with longer, written ones. The internet, by reducing the costs to landlords of obtaining contracts, had incidentally increased the preponderance of illegality and unfairness in deals.

This information cost theory of missing prices explains several puzzling features of our contracting landscape, and I will return to it later. However, it's important to remember that price is merely a proxy for market discipline. It's possible that firms adjust products in non-price ways after taking gains through terms. For example, perhaps they provide better products (funded by consumers). Thus, even if consumers didn't themselves act to discipline firms (by buying fewer but more expensive products) the *welfare* effects of aversive terms would be up in the air, and possibly positive.⁹³

That would be especially likely to be true if firms had ways to internally realize the gains that terms produced. Insurance premia might change in response to terms favorable to the firm—though the evidence here is missing, and that from cognate fields provides reasons to doubt that it will end up being the case.⁹⁴ Or, stepping back a bit, perhaps firms' enterprise value was affected by the terms, and consumers' reaction to them.

However, it's also possible that agents—lawyers, brokers—take nearly all the gains from shrouded terms, leaving little in consumer surplus. Agency costs drive churn in contract terms.⁹⁵ Whether those costs dominate over benefits is a question about which we simply have no good information. No one, for instance, has looked for stock price reactions in firms uniquely affected by the revolution in courts' treatment of arbitration clauses, or class action waivers.⁹⁶ Nor have scholars carefully studied if there is a relationship between lawyer rents in particular consumer industries and innovation or prices.

⁹³ Cf. Ware, *supra* note 14, at 254 (making the economic case).

⁹⁴ See Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 *Geo. L.J.* 1795, 1797–98 (2007) (finding insurers adjust premia or provide educational guidance in response to individual firm risk).

⁹⁵ See Mitu Gulati & Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* 142–44 (2013) (describing the role of elite lawyers in creating obscure terms).

⁹⁶ But see Hiraiwa et al., *supra* note 80, at 31 (finding no stock market reaction to changes in noncompete law).

Third, *Online Readership* has long been posited to make things worse. Around twenty years ago, Jeff Rachlinski and Bob Hillman wrote the first important and extended treatment of how online readership would affect contracting practices.⁹⁷ They offered contrasting predictions. On the one hand, because shopping across terms could be easier online, it was possible that contracts would more closely conform to buyers' preferences. But, on the other hand, people were more likely to read quickly online and be subject to impulse purchases. They concluded that online readers would be "as unlikely to investigate and to understand the importance of the standard terms as their paper-world counterparts."⁹⁸

Over time, the consensus on the effects of online readership has coalesced toward a darker view. Scholars have documented that individuals reading online retain less information.⁹⁹ And technology has continued to evolve to make reading a contract an increasingly less important part of the purchase experience. *The Restatement of Consumer Contracts*, which summarizes modern law, makes this explicit by de-emphasizing the importance of active consent to terms.¹⁰⁰ This follows from the actual way that individuals experience contracts online: we know that they exist—we *reasonably* are *aware*.¹⁰¹ We simply don't pay attention to the details.

This leads naturally to the final point, *a feedback loop: terms are bad and getting worse*. Here, the evidence that we do have is modestly consistent with the story that terms are getting worse for consumers. Marotta-Wurgler has found that end user license agreements ("EULAs") for technology firms are less favorable to consumers, as well as harder to

⁹⁷ See generally Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429 (2002) (concluding that online contracting would operate under largely the same framework as its physical counterpart).

⁹⁸ *Id.* at 485.

⁹⁹ See Anne Mangen, Bente R. Walgermo & Kolbjørn Brønnick, Reading Linear Texts on Paper Versus Computer Screen: Effects on Reading Comprehension, 58 Int'l J. Educ. Rsch. 61, 67 (2013) (finding subjects who read texts on paper had better comprehension than those who read on a screen).

¹⁰⁰ Restatement of Consumer Contracts § 2 (Am. L. Inst., Tentative Draft No. 2, 2022).

¹⁰¹ This was Llewellyn's general point about assent. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (1960) ("Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is 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.").

read, than they were a generation ago.¹⁰² And in my work on leases, I found that every type of unenforceable provision we studied had indeed grown more common in leases with time, as newer, longer, more averse contracts replaced older, shorter, more informal ones.¹⁰³

As I'll now describe, scholars have offered a variety of proposed solutions, with varying degrees of promise, to fix what they see as a bad status quo.

II. TODAY'S CONTRACT POLICY LANDSCAPE

For a hundred years, scholars have fretted about the rise of mass contracts. From Isaacs to Leff to Llewellyn to Radin, the law reviews are full of complaints about the quality of assent obtained in our new contracting environments and proposals that courts, regulators, and markets try to produce better outcomes.¹⁰⁴ Here, I'll briefly survey the state of play in contract law's multi-generational campaign to improve adhesive terms.

A variety of related laws seek to improve *market discipline* by focusing on readability.¹⁰⁵ One, ostensibly successful, has received almost no attention in modern law reviews: the Plain Language Movement. The theory of this movement is that if we somehow made contracts more readable, they would be more read. Over the last forty years, nearly every

¹⁰² See Giuseppe Dari-Mattiacci & Florencia Marotta-Wurgler, Learning in Standard Form Contracts: Theory and Evidence 5–6 (N.Y.U. Ctr. for L., Econ. & Org., Working Paper No. 18-11, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133791 [<https://perma.cc/68MB-DQKP>] (offering evidence of change in terms over time). But see Florencia Marotta-Wurgler, Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements, 38 J. Legal Stud. 309, 341 (2009) (finding boilerplate has not gotten worse for buyers).

¹⁰³ See Hoffman & Strezhnev, *supra* note 64, at 110. Yonathan Arbel points me to the possibly contrary example of returns, which consumers value. See Eric T. Anderson, Karsten Hansen & Duncan Simester, The Option Value of Returns: Theory and Empirical Evidence, 28 Mktg. Sci. 405, 421 (2009). But nothing in literature suggests that return policies were worse in the past: companies don't need to commit themselves in a binding contract to credibly communicate to their consumers that they will allow them to return a good post-purchase.

¹⁰⁴ See *supra* notes 13, 26. Compare Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 142–43 (1970) (criticizing the lack of bespoke collaboration in drafting adhesion contracts), with Karl N. Llewellyn, Common-Law Reform of Consideration: Are There Measures?, 41 Colum. L. Rev. 863, 869–71 (1941) (emphasizing that form-pad agreements wrongly presume consumer knowledge of contract terms).

¹⁰⁵ See, e.g., Oren Bar-Gill & Ryan Bubb, Credit Card Pricing: The CARD Act and Beyond, 97 Cornell L. Rev. 967, 1003 (2012) (advocating for new and better disclosure regimes including aggregated fee information).

state has passed a Plain Language law that purports to subject all consumer contracts to a rigorous review for compliance with a variety of formatting and grammatical standards:

Plain language recommends presenting information in a logical order; leading with the most important information; and deploying headers, topic sentences, and transitions. Plain language emphasizes brevity: short sentences, short paragraphs, and short sections. Plain language prefers using present tense verbs and active voice. At the same time, writing with simple words and phrases, while minimizing jargon, abbreviations, and definitions exemplify plain language.¹⁰⁶

Unfortunately, we have no evidence that these laws are widely enforced.¹⁰⁷ Simple observation suggests that they have not led to a set of readable form contracts.

Other scholars have recommended—and the federal government has mandated for certain financial contracts—forms of simplified disclosures.¹⁰⁸ The thought has been that by reducing the total quantity of information that consumers should know—to one or two key attributes of the contract—consumers could be led to better decisions about their contents. Unfortunately, evidence of the continuing efficacy of simplified disclosures over time is weak at best.¹⁰⁹

Other market-motivating solutions are more exotic still. Professors Yonathan Arbel and Shmuel Becher argue that software agents, using large-language models, will help consumers by translating form contracts into simpler text on demand.¹¹⁰ The idea, again, is that complexity itself

¹⁰⁶ Michael A. Blasié, *The Rise of Plain Language Laws*, 76 *U. Miami L. Rev.* 447, 463–64 (2022).

¹⁰⁷ *Id.* at 476 (noting lack of research into efficacy of these laws).

¹⁰⁸ See Ayres & Schwartz, *supra* note 52, at 549–50.

¹⁰⁹ Cf. Omri Ben-Shahar, *More Failed Nudges: Evidence of Ineffective “Behaviorally Informed” Disclosures*, *Jotwell* (Aug. 10, 2017), <https://contracts.jotwell.com/more-failed-nudges-evidence-of-ineffective-behaviorally-informed-disclosures/> [<https://perma.cc/3WPQ-CB2V>] (reviewing Enrique Seira, Alan Elizondo & Eduardo Laguna-Müggenburg, *Are Information Disclosures Effective? Evidence From the Credit Card Market*, 9 *Am. Econ. J.: Econ. Pol’y* 277 (2017)); Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence From Credit Cards*, 130 *Q.J. Econ.* 111, 115 (2015) (collecting evidence of effects); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts,”* 78 *U. Chi. L. Rev.* 165, 167–68 (2011) (arguing against the efficacy of disclosure duties).

¹¹⁰ Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 *Geo. Wash. L. Rev.* 83, 89, 93 (2022).

is the major driver of bad terms, because it allows contracts to escape competitive pressures. These scholars believe there is a latent demand for simpler contracts, which could be solved if the cost of producing them were lower. Enter: algorithms. Firms will then sell (at low cost) translations of complex consumer contracts, enabling shopping on terms to reemerge and discipline the market.¹¹¹

Mark Lemley's recent work on *The Benefit of the Bargain* offers a new spin on an old reform path. He argues (as I do) that our social world today is marked by too many contracts.¹¹² He attributes this abundance to changes in doctrine: courts that permitted firms to achieve legal assent without giving real choices in online contracting.¹¹³ Because of this doctrinal permission structure, Lemley argues, online contracting grew exponentially, leaving consumers with the illusion of choice: they can shop from an infinite market, but the terms are roughly the same.¹¹⁴ Lemley offers a "simple but profound change": only permit firms to contract out of defaults if they give consumers *real choices* between defaults and contract terms the firms want.¹¹⁵ This procedural mechanism evokes that of many other scholars who insist that courts should only enforce those terms which result from actual bargaining, or are otherwise visible to adherents.¹¹⁶ This isn't a market motivating mechanism; it is one built on frank *policing of terms*.

Indeed, there are dozens, if not hundreds, of contract articles arguing that certain terms in adhesion contracts ought not to be enforced.¹¹⁷ Some would ban bad terms through administrative processes.¹¹⁸ Others, federal

¹¹¹ As Omri Ben-Shahar points out to me, there is a natural limit to these simplifying proposals: some contracts (like insurance) are complex by nature.

¹¹² Lemley, *supra* note 60, at 256–58.

¹¹³ *Id.* at 252–54.

¹¹⁴ *Id.* at 256; see also Mark A. Lemley, *Terms of Use*, 91 *Minn. L. Rev.* 459, 465–73 (2006) (arguing that changes in law permitted rise in terms of use online); cf. Kim, *supra* note 27, at 1333–37 (arguing that businesses found wrap contracts more efficient and courts followed that practice).

¹¹⁵ Lemley, *supra* note 60, at 267–68.

¹¹⁶ See, e.g., Rakoff, *supra* note 29, at 1236–38.

¹¹⁷ See, e.g., Nathan B. Oman, *The Dignity of Commerce: Markets and the Moral Foundations of Contract Law* 133–59 (2016) (considering arguments regarding consent for consumer boilerplate and concluding that policing on substance, not process, is desirable); Tal Kastner, *How 'Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts*, 7 *Drexel L. Rev.* 67, 123–24 (2014) (arguing for presumptive unenforceability of particular terms that can't be meaningfully assimilated).

¹¹⁸ Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 *Hous. L. Rev.* 975, 982–88 (2005) (pre-approval boards); Yehuda Adar & Shmuel I. Becher, *Ending the*

legislation.¹¹⁹ And most would empower courts to enforce only consumers' reasonable expectations,¹²⁰ police terms through fiduciary doctrines or unconscionability,¹²¹ create torts for rights deprivations,¹²² or advance a newly free-floating public policy defense.¹²³ As Arthur Leff argued fifty years ago, because form clauses aren't located in things that look like "real" contracts, they shouldn't get real contractual enforcement.¹²⁴ This ex post policing is, by and large, the approach adopted by the newly adopted *Restatement of Consumer Contracts*.¹²⁵

Finally, at least one scholar has suggested that firms could be prohibited from disclosing terms at all.¹²⁶ In her work, *The Perverse Consequences of Disclosing Standard Terms*, Professor Tess Wilkinson-

License to Exploit: Administrative Oversight of Consumer Contracts, 62 B.C. L. Rev. 2405, 2406 (2021) (proposing a system of public supervision of the drafting of consumer contracts); Bar-Gill & Davis, *supra* note 19, at 985–86 (regulatory boards for modifications); Hilary Smith, Note, The Federal Trade Commission and Online Consumer Contracts, 2016 Colum. Bus. L. Rev. 512, 514 (FTC enforcement against online contracts); Michael Simkovic & Meirav Furth-Matzkin, Proportional Contracts, 107 Iowa L. Rev. 229, 258 (2021) (tax); Manisha Padi, Contractual Inequality, 120 Mich. L. Rev. 825, 831–32 (2022) (data transparency); Caleb N. Griffin, Contracting as a Class 4–5 (Jan. 2, 2023) (unpublished manuscript) (on file with author) (agency to help consumers negotiate as a class).

¹¹⁹ Colin P. Marks, There Oughta Be a Law: What Corporate Social Responsibility Can Teach Us About Consumer Contract Formation, 32 Loy. Consumer L. Rev. 498, 498–501 (2020) (proposing regulation akin to the Magnuson-Moss Warranty Act to govern consumer contract formation); Meredith R. Miller, Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process, 75 Tenn. L. Rev. 365, 371 (2008) (recommending federal legislation).

¹²⁰ Robin Bradley Kar & Margaret Jane Radin, Pseudo-Contract and Shared Meaning Analysis, 132 Harv. L. Rev. 1135, 1198–201 (2019) (detailing and criticizing the reasonable expectations doctrine); Restatement (Second) of Contracts § 211 (Am. L. Inst. 2015); Wayne R. Barnes, Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3), 82 Wash. L. Rev. 227, 265 (2007).

¹²¹ See Lauren Henry Scholz, Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transactions, 46 J. Corp. L. 143, 143–47, 170–73 (2020) (supporting the recognition of fiduciary relationships between drafters of boilerplate contracts and consumers); Stephen E. Friedman, Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching, 44 Ga. L. Rev. 317, 373 (2010) (suggesting attorney's fee awards); Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. Chi. L. Rev. 1, 32 (1993) (using default rules in the place of terms where consent was unfounded).

¹²² Radin, *supra* note 13, at 198 (suggesting a tort of "intentional deprivation of basic legal rights").

¹²³ Hoffman & Lampmann, *supra* note 23, at 167–68.

¹²⁴ Leff, *supra* note 104, at 131–33.

¹²⁵ Restatement of Consumer Contracts (Am. L. Inst. 2022).

¹²⁶ Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017) (focusing on substantive regulation of terms).

Ryan conducted a series of novel and revealing experiments about how individual adherents experience terms that they read. Because we tend to think of contracts as lawful, we are disposed to accept that even unenforceable terms are binding, and are less likely to challenge them in court and to protest against firms' bad behavior as a result.¹²⁷ With this finding in mind, Wilkinson-Ryan offers what she calls a "thought experiment": firms could have terms, which would bind consumers, but would be prohibited from telling anyone about them. Calling the idea "fanciful,"¹²⁸ she then retreats to the more ordinary suggestion that courts should simply police terms rather than arguing about the fictions of consent—especially in a world where terms themselves have behavioral weight.¹²⁹

In evaluating these proposals, it's hard not to be struck by their lack of efficacy at solving the problem they've identified—terms remain aversive, forms grow longer and more complex, and no one reads. At the same time, it's equally difficult to feel sanguine that the literature has accurately captured the real problem with a mass contracting regime. It's to that project that we next turn.

III. TRANSACTION COSTS AND THE FAILURE OF REFORM EFFORTS

As I described, the best account for the contracting world we live in starts by observing that disclosure mandates have encouraged firms to stuff their contracts with clauses that will likely not be read.¹³⁰ When accompanied by changes in case law that make clauses more useful, scholars think they see a perverse cycle: firms extract increasing rents from consumers without paying the freight in the form of lower prices.¹³¹ As they do so, contracts become more useful for firms while less legible for consumers. The result: ever more complex and adverse contracts.

But what if this story is not quite complete: it misses the role of transaction costs in consumer form contract generation and transmission. In this Part, I argue that technological changes in contract drafting and distribution significantly reduced the cost of deploying contracts to new kinds of goods, services, and employment relationships. Written contracts

¹²⁷ *Id.* at 121; see also Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 *Iowa L. Rev.* 1745, 1758–60 (2014) (explaining the power of fine print).

¹²⁸ Wilkinson-Ryan, *supra* note 126, at 168–69.

¹²⁹ *Id.* at 170.

¹³⁰ Ben-Shahar & Schneider, *supra* note 25, at 705.

¹³¹ See Lemley, *supra* note 60, at 243–44.

displaced oral ones even in the absence of disclosure mandates, and where firms did not otherwise benefit from the change.

One thing this perspective does is move legal actors to the margin. Unlike some writers on contractualization, I don't posit that changes in doctrine that motivated clickwrap clauses are the primary driver of consumer contracting practices.¹³² Indeed, there is more continuity than change in how courts treated questions of assent from the analogue world to today. Simply reading law reviews from the 1920s to the 1950s illustrates the point: those scholars too bemoaned the quality of readership and assent to standard form contracts. They, like us, imagined a golden age of consent which had passed us by.¹³³ But I'd argue that though judges facilitated the rise of the empire of forms, they weren't its authors.¹³⁴

A. Transaction Costs and Form Contracts

Legal economists have built a sturdy literature on information costs in contract design.¹³⁵ In that literature, standard form contracts are often defended because they economize on drafting costs while providing increasing returns in the form of certainty. In a famous work from the mid-1990s, Michael Klausner and Marcel Kahan showed that as standardized commercial contracts became more widespread, network effects (like sociologically shared understanding of terms) would make them more valuable, even if the form is not otherwise the one best tailored for the contracting parties.¹³⁶

A different set of papers focuses on distribution costs. As Avery Katz explained early in the digital revolution, electronic digital contracting, by

¹³² See generally Lemley, *supra* note 60.

¹³³ For early work noting how vacuous assent to terms was, see, e.g., Llewellyn, *supra* note 101, at 370.

¹³⁴ The best case for judge-led change is the Supreme Court's role in pushing arbitration in employment. That change gathered force in the early aughts, when the Court laid the groundwork for permitting arbitration in the workplace. Chandrasekher & Horton, *supra* note 14, at 6–7. And 2018's *Epic Systems Corp. v. Lewis* significantly increased the use of employment arbitration. 138 S. Ct. 1612, 1619 (2018). But even these changes postdate the technological revolution that made them useful for employers.

¹³⁵ Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814, 814 (2006) (making the classic statement of tradeoff between ex ante drafting and ex post litigation costs); Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 *Case W. Rsv. L. Rev.* 187, 190 (2005); Eisenberg, *supra* note 57, at 243; Gilo & Porat, *supra* note 55, at 985–86, 988.

¹³⁶ Kahan & Klausner, *supra* note 66, at 716–17.

lowering such costs, will promote greater standardization in terms.¹³⁷ And as Kevin Davis argued, dissemination costs in a modern economy are negligible, but making documents available online makes them more likely to be known and shared.¹³⁸ He points out the example of nonprofits like the American Institute of Architects, which provided (as of 2013) a software package which both made adoption of a fillable standard form easy and explained what it did for its adherents.¹³⁹

Notwithstanding this literature, the story of distribution costs in the growth of *consumer* adhesion contracts is largely untold. It is self-evident that the costs of copying contract terms, and disseminating them, fell precipitously from 1980 through 2020, as individuals bought devices that allowed firms to push terms to them at effectively zero cost, and record the mechanics of obtaining assent without requiring the adherent to sign, copy, and mail the contract back. But I'd argue that it is not primarily the digital revolution that made contracting cheaper, but rather the iPhone, iPad, and tablet.

Consider a typical American worker in 1980. She would wake up in the morning and drink her Folgers instant coffee, with whole milk, and a side of bacon and eggs.¹⁴⁰ All had been bought earlier that week from the local grocery, with nary a written contract in sight.¹⁴¹ The market did post a sign warning consumers that the floor was wet, but those signs affected risk disclosures: they were not contracts.¹⁴² When she drove to the store, she did so in a car bought after physically signing a short printed contract,¹⁴³ but it lacked any software whose functionality turned on

¹³⁷Avery W. Katz, *Is Electronic Contracting Different?* Contract Law in the Information Age 5–7 (2005) (unpublished manuscript) (on file with the University of Texas School of Law), https://law.utexas.edu/wp-content/uploads/sites/25/katz_is_electronic_contracting_differential.pdf [<https://perma.cc/NDJ3-5CRN>].

¹³⁸Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. Rev. 83, 110–12 (2013).

¹³⁹*Id.* at 121.

¹⁴⁰It was the best part of waking up. Ginny MacColl, *Folgers Coffee Commercial 1980's*, YouTube (Mar. 7, 2013), <https://www.youtube.com/watch?v=rBDWKOONdto> [<https://perma.cc/XRM8-2U5T>].

¹⁴¹*Cf.* Terms and Conditions, Instacart, <https://www.instacart.com/terms> [<https://perma.cc/P5Q6-N8WM>] (last updated Aug. 15, 2023) (governing Instacart services such as selecting groceries for personal shoppers to pick up and deliver to a location).

¹⁴²*Kroger Co. v. Ward*, 267 N.E.2d 189, 189–90 (Ind. App. 1971) (upholding award in slip-and-fall case despite warning signs).

¹⁴³Compare to Uber's thirty-page license. U.S. Terms of Use, Uber, <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en> [<https://perma.cc/3JNA-4C45>] (last updated June 14, 2023).

signing a license and paying a regular fee.¹⁴⁴ (Nor did the car come with a digital contract to set the terms for satellite radio,¹⁴⁵ a click-to-agree warranty for her roadside assistance,¹⁴⁶ or terms and conditions governing her use of remote start.¹⁴⁷) Whether she booked a dinner for the weekend,¹⁴⁸ a birthday party for her children,¹⁴⁹ a hotel stay for a getaway,¹⁵⁰ or simply bought a radio at the local RadioShack,¹⁵¹ she faced virtually no written contracts at all.¹⁵² At work, true, 25% of her co-workers were unionized and subject to written collective bargains, but the rest labored at will pursuant to employee manuals that strenuously denied that they created bilateral contractual obligations.¹⁵³

Today, the world looks different, as the empire of forms has conquered products, procedure, and employment law. From books to cars, and apples

¹⁴⁴ Peter Valdes-Dapena, *Why BMW Is Offering Heated Seats on a Monthly Subscription*, CNN Bus. (July 14, 2022, 12:39 PM), <https://www.cnn.com/2022/07/14/business/bmw-subscription/index.html> [<https://perma.cc/JYD7-9KWK>].

¹⁴⁵ See *Customer Agreement—Please Read*, Sirius XM, <https://www.siriusxm.com/customer-agreement> [<https://perma.cc/MG2B-N9YS>] (last updated Oct. 14, 2021).

¹⁴⁶ See *Roadside Assistance Eligibility & Restrictions*, Mercedes-Benz USA, <https://www.mbusa.com/en/owners/roadside-assistance/eligibility> [<https://perma.cc/XQS7-RCKJ>] (last visited Aug. 26, 2023).

¹⁴⁷ See *Terms and Conditions*, Subaru, <https://www.subaru.com/support/terms-and-conditions.html> [<https://perma.cc/SG5L-WR8G>] (last updated Dec. 20, 2022) (governing use of the Subaru app).

¹⁴⁸ See *OpenTable Terms of Use*, OpenTable, <https://www.opentable.com/legal/terms-and-conditions> [<https://perma.cc/YQ8G-66WR>] (last updated June 2, 2022).

¹⁴⁹ See *Terms of Service*, Sky Zone, <https://www.skyzone.com/terms-of-service> [<https://perma.cc/9PDG-2LA6>] (last visited Aug. 26, 2023).

¹⁵⁰ See *Hyatt Terms & Conditions*, World of Hyatt, <https://help.hyatt.com/en/hyatt-terms.html> [<https://perma.cc/G8S6-8JY9>] (last updated Dec. 2022).

¹⁵¹ Cf. John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 *Seton Hall Legis. J.* 285, 291 n.29 (2000) (suggesting that some such purchases came with receipts providing warranties).

¹⁵² Admittedly, the evidence for this paragraph is impressionistic. See, e.g., Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 *U. Chi. L. Rev.* 237, 239–40 (1952) (discussing the limited use of consumer-facing forms by general contractors and subcontractors in Indiana and trade groups); James J. White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 *Washburn L.J.* 1, 2 (1982) (interviews of chemical company executives); John Samuels, Note, *Business Practices and the Flexibility of Long-Term Contracts*, 36 *Va. L. Rev.* 627, 627 (1950) (legal departments of “America’s largest industrial organizations”); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 *Wis. L. Rev.* 1, 1–2 (general counsels of organizations about their commercial practices); Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 *J.L. & Com.* 99, 108–09 (1997) (many buyers and sellers used oral contracts).

¹⁵³ See Levy, *supra* note 33, at 695–96; see also Ware, *supra* note 86, at 84 (discussing rise of arbitration and contracting at work).

to zebras (at zoos), our experience of goods, services, and employment is now entirely defined by digital, written contracts which vary the default rules. This is true at all price points: Instacart charges you a fee in the range of a couple of bucks to deliver your eggs, subject to a contract that disclaims liability and subjects your egg breakage to arbitration.¹⁵⁴ This revolution in our contracting lives came slowly, and then all at once. A *Yale Law Journal* note from the 1950s is illustrative. There, the editors surveyed 87 Connecticut manufacturers for their contracting practices. Most used written forms at least some of the time with their suppliers, but fewer did so with customers (who were likely not consumers, reading in context). As the note continued, vaguely, “oral promises are more prevalent in the transactions of small manufacturers than in the dealings of large ones.”¹⁵⁵ And then a 1999 article, studying a few dozen standard form consumer contracts from New Jersey, found:

Counter-intuitively, most standard form contracts are not comprehensive agreements, but terms printed on a card or slip of paper found in the product’s packaging. In the . . . study, twelve standard form contracts contained more than ten terms, thirty-nine contained less than ten terms . . . and a few contracts contained only a single term. Comprehensive standard form contracts were limited to the computer, banking and automobile industries, which are institutions likely to retain counsel to draft their contracts.

Most short contracts were printed on a written receipt and addressed two issues: scope of warranty and limitation of liability.¹⁵⁶

Receipts! How quaint.¹⁵⁷ Today, this study seems hopelessly anachronistic, though it is the most comprehensive pre-modern empirical study of consumer contracts.¹⁵⁸ Contracts today are significantly longer than the contracts that existed in the 1980s and 1990s, and their terms are more averse to consumers and employees. But the material change is not

¹⁵⁴ See *supra* note 141.

¹⁵⁵ Note, *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 *Yale L.J.* 1038, 1042, 1051 (1957).

¹⁵⁶ Burke, *supra* note 151, at 292 (footnotes omitted).

¹⁵⁷ Cf. *James v. McDonald’s Corp.*, 417 F.3d 672, 672–75 (7th Cir. 2005) (enforcing arbitration provision incorporated by reference on french-fry carton).

¹⁵⁸ The actual contracts the New Jersey Law Revision Commission focused on, presumably representative of those facing consumers at the time, were focused on financial services, software, and consumer services like dry cleaners where the merchant holds the goods. Burke, *supra* note 151, at 291–92 n.29.

in those details, but at 30,000 feet: there are simply orders of magnitude *more contracts* than there used to be.

Why did this happen? In each field, law and culture were comorbid. In intellectual property, court decisions made clear the utility of licenses over outright sales in controlling the behavior of opportunistic consumers.¹⁵⁹ In both products and employment law, pro-arbitration decisions gave that decision-making form legitimacy, while simultaneously the rise in mass adjudication increased the returns to escaping public courtrooms.¹⁶⁰ Courts' increasing friendliness toward private control over damages made the use of stipulated damages provisions a more tenable value proposition.¹⁶¹ The move in consumer finance from substantive regulation (usury laws) to procedural rules (disclosure) is made visible in the TILA regime.¹⁶² And overall, jurists acquiesced to extending the reasonable notice rules of formation to online markets, despite being urged to require more subjectively arresting forms of assent.¹⁶³

But these legal changes were downstream from the economic fact that written contracting had become dirt cheap. By the 1990s, a push by retailers to move sales online led to an enormous number of articles about the advantages of such markets, ranging from toys,¹⁶⁴ to ticket sales, to

¹⁵⁹ The literature is vast. See, e.g., Robert W. Gomulkiewicz, *Is the License Still the Product?*, 60 *Ariz. L. Rev.* 425, 425 (2018) (exploring the implications of licensing on copyright law); Nancy S. Kim, *Revisiting the License v. Sale Conundrum*, 54 *Loy. L.A. L. Rev.* 99, 99 (2020) (proposing solutions to problems caused by an increase in product licensing); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 *Fordham L. Rev.* 1025, 1028–29 (1998) (describing the beginning of changing mores in contracting and their effect on copyright law). See generally Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 *Emory L.J.* 741 (2015) (arguing that copyright exhaustion reduces information cost).

¹⁶⁰ David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *Geo. L.J.* 57, 63 (2015) (concluding that “elite corporations outperform their one-shot counterparts on win rates and damage payments”).

¹⁶¹ See Threedy, *supra* note 16, at 445.

¹⁶² See Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 *Harv. L. Rev.* 1594, 1640 (2014) (describing effect of the National Bank Act and disclosure mandates on usury laws).

¹⁶³ See generally Restatement of Consumer Contracts § 2 (Am. L. Inst., Tentative Draft No. 2, 2022) (recognizing the difficulty of striking a balance between streamlined contracting and protecting customers who may not read every contract term).

¹⁶⁴ See generally Dana Canedy, *Shopping for Toys Without the Kids; Virtual Stores Give the Big Retailers a Foothold Against On-Line Upstarts*, *N.Y. Times*, July 27, 1998, at D1 (discussing the draw of virtual toy stores).

cable,¹⁶⁵ to pharmaceuticals,¹⁶⁶ to business to business (“B2B”).¹⁶⁷ But also lawyers appreciated the medium’s other virtues: it reduced the cost of copying terms and increased their utility.¹⁶⁸ Lowered costs also increased the attractiveness of using written employment contracts, particularly as arbitration gained popularity.¹⁶⁹

But it’s not merely the costs of copying that cratered during the 1990s and 2000s, it was also the costs of obtaining and documenting assent. Click-to-agree boxes—first deployed on websites, and then on phones—enabled firms to instantaneously deploy mass contracts, obtain ready markers of assent, and move quickly toward exchange of currency for goods and services. This obviated the frictions, like the paper contracts in boxes, that bedeviled the court in *Hill v. Gateway 2000*.¹⁷⁰

Former Apple CEO Steve Jobs unveiled the first iPhone on June 29, 2007.¹⁷¹ Four years later, in 2011, still only 35% of people in the United States had smartphones of any kind.¹⁷² That percentage grew substantially in the subsequent decade, and, by 2021, 85% of people in the United States had smartphones.¹⁷³ The rise of smartphone usage created business models that depend on people using their mobile devices to buy goods,

¹⁶⁵ See generally Bell Atlantic Mobile Launches Online Bill Delivery, Payment, Verizon News Archives (Oct. 5, 1999), <https://www.verizon.com/about/news/press-releases/bell-atlantic-mobile-launches-online-bill-delivery-payment> [<https://perma.cc/2DK7-7LUK>] (informing wireless customers about accessing their accounts online).

¹⁶⁶ See generally Lisa Prevost, Drugstores Scramble to Find Choice Corners in Cyberspace, N.Y. Times, Sept. 22, 1999, at G62 (describing the convenience of online pharmacies).

¹⁶⁷ See generally Gene Linn, Internet Technology Links Buyers, Sellers of Steel Products, J. Com., Sept. 22, 1999, at 9 (reporting the first purchase of prime steel via an internet-based marketplace); Lynn Petrak, B2B Movement: Links to Profitability?, Nat’l Provisioner, Aug. 2000, at 70.

¹⁶⁸ Cf. Frank Saxe, Radio, Record Labels Chafe over Streaming, Billboard, May 26, 2001, at 77 (“Attorney Jay Rosenthal says that, as more contracts are being drawn in the Internet age, lawyers working on behalf of the labels have come up with more rigid and unavoidable contract clauses to hold against artists.”).

¹⁶⁹ See Bickerman, *supra* note 83.

¹⁷⁰ 105 F.3d 1147, 1147 (7th Cir. 1997).

¹⁷¹ Avery Hartmans, Apple Just Unveiled Its iPhone 14 Line. Here’s How Apple’s Iconic Smartphone Has Changed the World Forever Since 2007, Bus. Insider (Sept. 7, 2022, 4:49 PM), <https://www.businessinsider.com/apple-iphone-evolution-first-iphone-every-model-2019-12> [<https://perma.cc/4B9E-A2H3>].

¹⁷² Mobile Fact Sheet, Pew Rsch. Ctr. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/4AX6-XVUW>].

¹⁷³ *Id.*

sell products, and manage operations such as shipping and invoicing, all now potentially subject to written contracting.¹⁷⁴

Companies have developed a number of strategies to further depress the costs of obtaining assent.¹⁷⁵ Some websites have contracts that say that visiting the website itself is assent.¹⁷⁶ Others will put legal terms in submenus labelled, for example, “legal.”¹⁷⁷ Furthermore, online vendors and other websites include terms in their contracts that allow them to unilaterally modify their contractual agreements.¹⁷⁸ They have been successful in arguing that continued use of the given online service constitutes assent to the new terms.¹⁷⁹ All of these strategies have allowed companies to attach binding terms to an increasing number of behaviors and decisions online.¹⁸⁰

Portable purchasing enabled firms to attach written contracts to new kinds of services and products: Uber’s terms of use linked transit to smartphones;¹⁸¹ Instacart’s app permitted the contractualization of grocery shopping;¹⁸² Etsy permitted platforms to have contractual control over makers’ marketplaces.¹⁸³ And at work, firms could push out terms on screens and require consent, rather than leave them on an employee’s

¹⁷⁴ Orrin Broberg, 8 Ways Technology Is Changing Business, *Ins. Connection* (Feb. 23, 2022), <https://theinsconnection.com/8-ways-technology-is-changing-business/> [<https://perma.cc/Q327-UZJ4>].

¹⁷⁵ Professor Budnitz has also written a series of articles focusing on the changing modes of acceptance on devices. See, e.g., Mark E. Budnitz, *Touching, Tapping, and Talking: The Formation of Contracts in Cyberspace*, 43 *Nova L. Rev.* 235, 256 (2019); Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 *Ga. St. U. L. Rev.* 741, 743–45 (2000); see also Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 *Hofstra L. Rev.* 839, 878–79 (2016) (increasing use of personal screens in formation).

¹⁷⁶ Nancy Kim argues that some of these adhesive terms are not actually contracts but can still have legally binding effects when courts treat them as such. Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 *Seton Hall L. Rev.* 85, 110 (2022).

¹⁷⁷ *Id.* at 104.

¹⁷⁸ Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 *Md. L. Rev.* 452, 472 (2013).

¹⁷⁹ *Id.* at 473.

¹⁸⁰ Lemley, *supra* note 60, at 266.

¹⁸¹ See *supra* note 141.

¹⁸² See *supra* note 143.

¹⁸³ Terms of Use, Etsy, <https://www.etsy.com/legal/terms-of-use> [<https://perma.cc/7QYV-JNQF>] (last updated June 15, 2023).

desk.¹⁸⁴ Technological change—our screens—bundled the act of shopping, payment, and written contracting. The 2000 E-Sign Act¹⁸⁵ was a spark, to be sure, but it too was downstream from cheap contractualization.¹⁸⁶ It was our devices, not our judges, that permitted firms to consider whether to add terms where none had been previously present. Or, to put it differently, making arbitration clauses enforceable is a legal development, but firms would not have thought it useful in products or employment contracts if distributing those terms and obtaining assent were not now essentially costless.¹⁸⁷

This account is necessarily impressionistic. We lack good measures for the costs of contracting, as well as dissemination of terms and the utility of obtaining consent.¹⁸⁸ But if our phones all bricked tomorrow, no firm would be interested in mailing us new contracts to replace the hundreds of ones that bind us today. (Notably, the typical paper contracts we still

¹⁸⁴ See Arnow-Richman, *Cubewrap Contracts*, *supra* note 82, at 647, 650 (noting cubewrap contracts of physical and digital varieties).

¹⁸⁵ Fed. Deposit Ins. Corp., *The Electronic Signatures in Global and National Commerce Act (E-Sign Act)*, in *Consumer Compliance Examination Manual*, at X-3.1 (Jan. 2014), <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/compliance-examination-manual.pdf> [<https://perma.cc/SVU4-VV7B>].

¹⁸⁶ Lizette Alvarez & Jeri Clausing, *Senate Approves Bill That Allows Online Contracts*, *N.Y. Times*, June 17, 2000, at A1.

¹⁸⁷ See Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, The Federal Arbitration Act and E-Sign Notwithstanding*, 57 *Cath. U. L. Rev.* 377, 414–15 (2008) (describing using the then-novel iPhone to enter into contracts).

¹⁸⁸ There are various estimates of how many contracts we form a year, all impressionistic, and most dated. See, e.g., Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 *I/S: J.L. & Pol’y for Info. Soc’y* 543, 563 (2008) (estimating 244 hours per person per year to read privacy policies); Nicholas LePan, *Visualizing the Length of the Fine Print, for 14 Popular Apps*, *Visual Capitalist* (Apr. 18, 2020), <https://www.visualcapitalist.com/terms-of-service-visualizing-the-length-of-internet-agreements/> [<https://perma.cc/X6KM-TK2D>] (sharing the significant amount of time it takes to read the terms of use for several popular websites); *250,000 Words of App Terms and Conditions*, *Forbrukerrådet* (May 24, 2016), <https://www.forbrukerradet.no/side/250000-words-of-app-terms-and-conditions/> [<https://perma.cc/7ZJ7-DA7G>] (noting the average Norwegian consumer faces phone app terms and conditions that are collectively more than 250,000 words long); James Gibson, *Vertical Boilerplate*, 70 *Wash. & Lee L. Rev.* 161, 192 (2013) (finding that in 2013, the purchaser of a single computer confronted approximately 75,000 words of contracting text). The problem is worse as more devices become internet connected. “By entering into a single [Internet of Things] transaction, consumers are frequently required to assent to multiple different documents, including different terms of use, privacy policies, warranty agreements, end user licensing agreements (EULAs) and possibly service agreements, even when they contract with a single provider.” Stacy-Ann Elvey, *A Commercial Law of Privacy and Security for the Internet of Things* 120 (2021).

see—credit cards, cable bills, loans—are highly regulated documents that predated the device revolution.)

One advantage to focusing on these distribution costs as a driver of the mass contracting ecosystem we see today is that it motivates a series of predictions which are perhaps more empirically tractable than the alternative stories. The disclosure story, the legal regime story, and the manipulation story may have, as I've said, some elements of truth, but each is also extremely difficult to test. If, however, transaction costs have largely driven the changes we see in the ecosystem, then the following ought to be true.

First, where transaction costs to diffusing contracts are unusually high, we should see less growth in contracting and less innovation in terms as well. Thus, where firms provide services that require a human at the point of sale, we should be less likely to see contractualization. Or, to the extent that particular places or communities are less likely to have smartphone uptake, we should expect to see default terms, not written ones, govern relationships (that is, we would not expect to see written, paper contracts).

Next, cheaper contracting must be considered alongside agency costs. There is evidence that a driver of the use of cheap forms are firms' lawyers—who seek to demonstrate their value by churning terms.¹⁸⁹ This may explain why firms would push out unenforceable noncompetes for low-wage workers, or unenforceable lease provisions. Their professionals are convinced of their value, and the cost to doing so is nearly zero. In places with lowered agency costs, we might expect less use of unenforceable terms—that is, lawyering makes mass contracts appreciably worse, without benefit to the firm. We should not expect to see positive returns to firms for legal changes in adhesive terms, or at the least we should expect that such changes will be minimal in scope.

To put it differently, as economists like Ronald Coase have long taught us, we normally would expect that falling transaction costs will produce gains in social welfare. But, as recent work has begun to suggest, certain social systems are stabilized by transaction costs. Consider, for example, how the internet has reduced the transaction costs of developing nonlocal friendships but has perhaps destroyed local civic and friendship groups as a result.¹⁹⁰ Here, it may be true that a similar effect is at work. As the costs

¹⁸⁹ See Hoffman, *supra* note 4, at 1459–60.

¹⁹⁰ See Mitchell Chervu Johnston, *The Efficiency of Transaction Costs* 31–34 (Jan. 27, 2023) (unpublished manuscript) (on file with author) (arguing that falling transaction costs may produce losses in social welfare).

of transactions have fallen, general systems (like the litigation deterrence engine) are in danger of collapse, even as firms are not obviously internalizing benefits, which may be flowing to agents. To be clear, though this hypothesis is in theory empirically tractable, no work to date quite takes it up.

Focusing on transaction costs can thus inspire a different way of thinking about what's in fact troublesome about the mass contracting world. It's not just, or really, that contracts are particularly bad for consumers on an individualized basis. Nor that they are too long. Nor that they are unread, complex, badly styled, or slouching toward unfair distributive outcomes. Rather, the problem is that because they've become almost zero-cost products, they are more likely to be pushed out in circumstances where private benefits are lower than public costs of enforcement. All contracts externalize some harms: form contracts do so with increasingly little benefit for their drafters. As I'll now explore, this idea—that falling transaction costs perversely create problems for contracting ecosystems—has implications for a reform agenda.

B. On Legal Reform Efforts

Despite an academic consensus about form contracts that has held for all of living memory, their prevalence has grown, terms have grown worse, and they govern more parts of our lives. Of course, law professors tilt at many windmills. What's notable about this failure is that it's tied to a political movement that regards rip off clauses as bad for workers and consumers alike. But nonetheless, terms remain dismal. Why is that?

Many commentators point to sclerosis in national institutions. State courts and legislatures have significant appetite to experiment in contract regulation. But state action targeting terms faces a seemingly unsurmountable hurdle: the Federal Arbitration Act (“FAA”). The FAA dampens reforms effects in two ways. First, to the extent that arbitration is bad in and of itself, it preempts state action which would bring claims into public courts. Thus, while states after the #MeToo revolution passed laws limiting the use of arbitration,¹⁹¹ both federal and state courts have

¹⁹¹ See, e.g., Kevin Leblang, *New York Ban on Arbitration of Discrimination Claims Repeatedly Struck Down as Inconsistent with Federal Law*, *JD Supra* (Feb. 26, 2021), <https://www.jdsupra.com/legalnews/new-york-ban-on-arbitration-of-1210594/> [<https://perma.cc/M4RY-ZH5Q>].

found that such attempts were preempted by the FAA.¹⁹² In the decades since its passage, the only notable success at the federal level in reversing the FAA came two years ago: the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.¹⁹³ That Act makes mandatory arbitration clauses unenforceable in the context of sexual harassment or assault claims.¹⁹⁴ But for other types of claims, the FAA mandates that arbitration clauses be respected. Overturning the FAA, a dream of activists, has been repeatedly introduced but has never come especially close to making it out of committee in the Senate.¹⁹⁵

The FAA also affects reform by reducing the effectiveness of common law policing of other kinds of terms. There is thin but suggestive evidence that firms continue to promulgate contracts with unenforceable terms by using arbitration to blunt the effect of state law.¹⁹⁶ Arbitral adjudication creates real problems for a whole slate of common law solutions, which would require creating special notice rules for non-negotiated terms since they would (if they tended to make arbitration less enforceable) likely be preempted by the FAA. Section 2 of the FAA allows courts to invalidate arbitration clauses based on generally applicable contract defenses including unconscionability, fraud, and duress.¹⁹⁷ But the Supreme Court has limited the scope of this savings clause, finding that the FAA preempts any court rulings or state laws that interfere with the

¹⁹² See, e.g., *Whyte v. WeWork Cos.*, No. 20-cv-01800, 2020 WL 4383506, at *2 (S.D.N.Y. July 31, 2020) (holding that the FAA preempts New York's law prohibiting forced arbitration of discrimination claims); *Fuller v. Uber Techs. Inc.*, No. 150289/2020, 2020 WL 5801063, at *1–2 (N.Y. Sup. Ct. Sept. 25, 2020) (same).

¹⁹³ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified in scattered sections of 9 U.S.C.). See generally David L. Noll, *Regulating Arbitration*, 105 *Calif. L. Rev.* 985, 1033–37 (2017) (describing difficulty in amending the FAA).

¹⁹⁴ 136 Stat. 26. By 2020, some large companies, including Facebook, Google, Lyft, Microsoft, Uber, and Wells Fargo, had already enacted similar policies internally. See *Forced Arbitration in a Pandemic: Corporations Double Down*, Am. Ass'n for Just. (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic> [https://perma.cc/VH5T-BPPD].

¹⁹⁵ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *Yale L.J.* 3052, 3085 n.131 (2015) (describing the Arbitration Fairness Act); Noll, *supra* note 193, at 1031, 1033 (describing political economy).

¹⁹⁶ Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 *Conn. L. Rev.* 765, 782–83 (2002) (observing that employers in California often use unenforceable covenants not to compete); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 *J.L., Econ. & Org.* 633, 655 (2020).

¹⁹⁷ 9 U.S.C. § 2.

“fundamental attributes of arbitration.”¹⁹⁸ Based on this principle, it has invalidated attempts to prohibit arbitration clauses that were insufficiently conspicuous,¹⁹⁹ and which waived class-wide arbitration.²⁰⁰

But it’s also true that the FAA reduces the effect of substantive rules built on systematic effects (e.g., unconscionability and public policy defenses to obligation): in the FAA world, those claims will be largely heard in secret, in arbitral tribunals with weak incentives to promote public goods.²⁰¹ This will be true so long as firms find it more advantageous to fight small claims serially than *en masse*: if technology changes that balance of benefits, firms will seek to adjudicate in public again.²⁰²

Outside of the arbitration context, federal law has very occasionally cut back on forms’ domain. This is precisely the tact taken with the Consumer Review Fairness Act (“CRFA”) of 2016. The CRFA addressed fine print in contracts online that prohibited users from negatively reviewing service providers, sometimes enforced through penalty damages.²⁰³ The Act prohibited all such anti-review contract clauses.²⁰⁴ Similarly, the recently passed Speak Out Act bans judicial enforcement of NDAs that cover sexual assault or harassment when entered into before the dispute arises.²⁰⁵ It complements related state acts, which, though banning NDAs, were likely to be under-enforced given their adjudication in arbitration.

Regulatory strategies have also largely failed. True, regulators have, in theory, the ability to prohibit particular kinds of contracting. But the limits of such activity can be seen in the fate of the Arbitration Agreements Rule, promulgated by the Consumer Financial Protection Bureau

¹⁹⁸ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

¹⁹⁹ *Dr.’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

²⁰⁰ *AT&T Mobility*, 563 U.S. at 336, 352.

²⁰¹ For the classic account of the public good nature of public litigation, see William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235, 235 (1979). For an analysis of the effect of arbitration on public policy defenses, see Hoffman & Lampmann, *supra* note 23, at 217.

²⁰² See J. Maria Glover, *Mass Arbitration*, 74 *Stan. L. Rev.* 1283, 1289–90 (2022) (describing mass arbitration).

²⁰³ See Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 *Mich. Telecomms. & Tech. L. Rev.* 1, 2–4 (2017) (describing the history of anti-review clauses).

²⁰⁴ Consumer Review Fairness Act of 2016, 15 U.S.C. § 45b.

²⁰⁵ *Speak Out Act*, 42 U.S.C. §§ 19401–19404. Professor Stephen Sachs has argued that the Act is unconstitutional on Commerce Clause grounds. Stephen E. Sachs, *Is the “Speak Out Act” Constitutional?*, *Volokh Conspiracy* (Dec. 9, 2022, 2:30 PM), <https://reason.com/volokh/2022/12/09/is-the-speak-out-act-constitutional/> [<https://perma.cc/3AFD-XX9N>].

(“CFPB”) in 2017.²⁰⁶ When the Republican Congress, through the Congressional Review Act, overturned the rule, the CFPB lost the ability to do rulemaking on any related topic.²⁰⁷ Given the increasing partisanship in Washington, and rapid swings between the parties, it seems that the future of stable federal regulatory action is dim.

And yet let’s say that we could magically resolve these issues and there was neither an FAA nor political limits on federal regulatory action against particular contract terms. If you take seriously the transaction costs account I’ve offered above, we wouldn’t actually fix all the problems with forms that beset us.

Essentially, today’s contract law operates as an incomplete ex post policing machine. Courts and regulators deem terms unenforceable or change their meaning. But to affect contracts in the world, information about legal enforceability needs to be transmitted to lawyers, who then decide whether changing existing deals is worthwhile. While we might once have thought that they made this choice quickly and efficiently, we now know that lawyers rarely change contract terms in response to court judgments or regulatory choices.²⁰⁸ Even in the context of heavily negotiated and high-value contracts, firms only slowly adjust terms to account for judicial decisions.²⁰⁹ The likelihood that they’d change a nationally adhesive contract, drafted on the cheap, to account for individual state courts that don’t enforce terms, is vanishingly low.²¹⁰ As the number of contracts increases given falling distribution costs, the likelihood that individual bad or unenforceable terms will disappear becomes close to nil.

Stepping back, if it’s true that contracts’ expansion is driven by falling distribution costs, it might cause us to reconsider whether solutions

²⁰⁶ Arbitration Agreements, 12 C.F.R. § 1040 (2017) (prohibiting arbitration clauses in consumer contracts that prohibited class actions).

²⁰⁷ Under the Congressional Review Act, a federal agency cannot issue a rule that is substantially similar to one that was previously “disapproved” by Congress. Mark Kantor, Congress Disapproves CFPB Rule Prohibiting Arbitration, Am. Bar Ass’n (Nov. 3, 2017), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2017/congress-disapproves-cfpb-rule-prohibiting-arbitration/> [https://perma.cc/MMM9-5E4X].

²⁰⁸ See Gulati & Scott, *supra* note 95, at 140, 142.

²⁰⁹ See generally Mark Weidemaier, Robert Scott & Mitu Gulati, Origin Myths, Contracts, and the Hunt for *Pari Passu*, 38 Law & Soc. Inquiry 72, 74, 95–96 (2013) (describing origin stories lawyers told to explain why sovereign debt terms did not change).

²¹⁰ Cf. Hoffman & Strezhnev, *supra* note 64, at 108, 110 (showing rise in national leases and unenforceable terms).

focusing on individual terms make any sense at all. Ex post policing can only affect individual contracts; the problem we face is systemic and widespread. On the one hand, that means that the growth of contracts is external to doctrine, and changes to doctrine will be unlikely to stem the tide. And on the other, the arguments against “bad” terms are often weaker than their proponents assert. As I discussed above, for many consumers, un-priced contract terms may add value: arbitration is better in many instances for the aggrieved consumer, and a unilateral modification clause is unlikely to change the adherent’s bargained-for value.²¹¹ And it is possible that consumers and employees benefit from aversive terms in the form of firm growth and innovation.

And yet producing so *many* low-value contracts creates mischief. Many of the least salient terms are litigation focused and primarily have the effect of reducing the incidence of mass adjudication. This causes a decline in systemic deterrence about which scholars of procedure increasingly raise alarms.²¹² Simply because it is in the interest of individual consumers to arbitrate their claims does not mean it is the right thing for society at large to permit firms to avoid the consequences of low-value private torts and breaches of contract, or wage-and-hour violations. Leaving such claims without effective general remedies weakens the deterrent force of the law.

²¹¹ Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 *Harv. Negot. L. Rev.* 29, 107 (2017) (concluding that enforcing arbitration agreements benefits consumers); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 *Ohio St. J. on Disp. Resol.* 559, 563 (2001) (contending that “[a] properly designed arbitration system . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach”).

²¹² See generally Noll, *supra* note 193, at 1025–26 (describing how arbitration weakens the effect of public law); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 *Fla. L. Rev.* 575, 579–80 (2020) (discussing class-wide effects of arbitration); Glover, *supra* note 195, at 3057 (arguing that the Supreme Court has “authorized private parties to use mandatory private arbitration clauses to construct procedural rules that have the foreseeable, indeed possibly intended, consequence of preventing certain claims from being asserted at all, rendering those claims mere nullities” (footnote omitted)); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 *Fordham Urb. L.J.* 803, 807 (2009) (“Privatizing the enforcement of statutory rights erodes those rights, as rights that are not enforced publicly vanish from the public’s eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the laws’ violations.”); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 *Colum. L. Rev.* 669, 669 (1986) (“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).

Form contracts create externalities even outside of the missing general deterrence of litigation. For example, there is ample evidence that consumer forms are chock full of unenforceable terms. Consider the case of pro-landlord clauses in tenancies.²¹³ In previous work, examining fifteen years of data from Philadelphia, I found that the likelihood of seeing an exculpatory clause in a lease used for eviction rose from around 55% in 2000 to about 80% today. The likelihood of seeing a clause disclaiming the implied warranty of habitability rose from around 35% to around 65%.²¹⁴ To be clear, both of these clauses are nominally unenforceable under Pennsylvania law.²¹⁵

Unenforceable terms in forms matter because outside of court, they affect consumer behavior.²¹⁶ As Tess Wilkinson-Ryan has shown in a variety of contexts, consumers look to contracts to know what the law legitimately is—they are less likely to complain about a firm’s behavior if they are told the fine print disclaims their rights.²¹⁷ Professor Furth-Matzkin, in related work studying leases, demonstrated not only that tenants look at their leases to know the law,²¹⁸ but that even unenforceable terms affect out of court behavior.²¹⁹ People who see an as-is clause in a lease may be willing to accept a tenancy that otherwise would not comply with the implied warranty of habitability. Those who read an exculpation clause will be less likely to go to a lawyer after seeing a property-related tort. Thus, widespread use of unenforceable clauses has effects: in places like Philadelphia it lowers the aggregate quality of housing below a floor otherwise set by tort and property law.

²¹³ See, e.g., Furth-Matzkin, *supra* note 30, at 24 (finding most residential leases had unenforceable terms); Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 *Cin. L. Rev.* 845, 845 (1988) (“Contracts and leases commonly include terms that are unenforceable . . .”); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 *Ohio St. L.J.* 1127, 1128, 1130 (2009) (“[T]he phenomenon [of unenforceable terms] is common enough to raise questions [as to] why it persists.”).

²¹⁴ Hoffman & Strezhnev, *supra* note 64, at 101 fig.2.

²¹⁵ *Id.* at 130.

²¹⁶ See generally Starr et al., *supra* note 196, at 635–36 (showing empirically that employees comply with noncompetes even in states that do not enforce them); J.J. Prescott & Evan Starr, *Subjective Beliefs about Contract Enforceability*, *J. Legal Stud.* (forthcoming) (manuscript at 2), <https://ssrn.com/abstract=3873638> [<https://perma.cc/NU9X-QT9S>] (survey data finding same effects).

²¹⁷ Wilkinson-Ryan, *supra* note 126, at 121–22, 151, 161.

²¹⁸ Furth-Matzkin, *supra* note 30, at 4.

²¹⁹ Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 *Ala. L. Rev.* 1031, 1055 (2019) (offering experimental evidence).

That is, mass contracting, even when individually beneficial, decreases social welfare by leading to the underproduction of public goods.²²⁰ Advocates, recognizing that one problem with mass contracting is that unenforceable terms are under-deterred, have occasionally offered ways to increase the teeth of policing. Some have suggested that lawyers ought to be disciplined for drafting such terms.²²¹ Others have taken more aggressive action. The Public Interest Law Center, in Philadelphia, sued a lawyer who represented landlords under the Fair Debt Practices Collection Act, arguing that seeking to evict based on unenforceable terms violated federal law.²²² But these affirmative claims are few and far between: we lack a good systemic response to the externalities created by form contracts.

The result is that even though the law tries to cabin contract externalities, and increase incentives to produce public goods, it does so poorly.²²³ Where technology has so vastly increased the number of

²²⁰ Jennifer Arlen, *Contracting over Liability: Medical Malpractice and the Cost of Choice*, 158 U. Pa. L. Rev. 957, 992 (2010) (showing how contracts can lead to inefficiently low production of collective goods); Albert H. Choi & Kathryn E. Spier, *Should Consumers Be Permitted to Waive Products Liability? Product Safety, Private Contracts, and Adverse Selection*, 30 J.L., Econ. & Org. 734, 737 (2014) (showing that blocking parties from waiving product liability can improve social welfare).

²²¹ See, e.g., Lyle Moran, *A Call for an Ethics Opinion on California Lawyers Drafting Non-Competes, Above the L.* (June 6, 2019, 2:47 PM), <https://abovethelaw.com/2019/06/a-call-for-an-ethics-opinion-on-california-lawyers-drafting-non-competes/> [<https://perma.cc/7URB-VDYQ>].

²²² See Class Action Complaint at 6–7, 9, 12, *Baker v. Glenn M. Ross, P.C.*, No. 17-cv-04274 (E.D. Pa. settlement order filed Feb. 25, 2019), ECF No. 1.

²²³ The literature on contracts and externalities is growing. See, e.g., Aditi Bagchi, *Other People's Contracts*, 32 *Yale J. on Regul.* 211, 212 (2015) (proposing an interpretive rule that would cabin externalities by accounting for third-party interests); Hoffman & Lampmann, *supra* note 23, at 167, 169–70 (arguing that courts should not enforce agreements not to disclose sexual misconduct based on their negative externalities); David A. Hoffman & Cathy Hwang, *Essay, The Social Cost of Contract*, 121 *Colum. L. Rev.* 979, 997–98 (2021) (arguing that courts sometimes reform contracts given increased negative externalities); Kishanthi Parella, *Protecting Third Parties in Contracts*, 58 *Am. Bus. L.J.* 327, 336–38 (2021) (advocating for a duty to account for reasonably foreseeable negative externalities in supply chain contracts); Farshad Ghodoosi, *International Dispute Resolution and the Public Policy Exception* 39 (2017) (discussing negative externalities as a rationale for government involvement in contracts); Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 *Geo. Mason L. Rev.* 483, 493–94 (2010) (explaining that contract remedies do not account for social costs of illegal contracts in the form of negative externalities); Francis H. Buckley, *Perfectionism*, 13 *Sup. Ct. Econ. Rev.* 133, 143 (2005) (analyzing negative externalities in the context of contracts voided for promoting sexual immorality); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 *Tex. L. Rev.* 1943, 1945 (1996) (discussing the relationship of at-will employment with tort principles

contracts, each of which imposes small costs on third parties, it becomes impossibly hard for courts to effectively police these harms. To borrow a common analogy, form contracts have started to look somewhat like a teeming, expanding, polluting factory.²²⁴ Regulating them may require a more radical approach.

IV. ABOLISHING FORMS

My proposal is simple: any state could pass a law with the following text:

A Statute Against Forms

(a) Except as otherwise provided in this section, any written contract subject to this State's laws is not enforceable by way of action or defense if it is:

(1) for the sale of goods, including intellectual property, valued at less than \$100,

(2) for the provision of services, including electronic services, valued at less than \$100, or

(3) for employment, including that defined by an independent contracting relationship, with an indefinite term paying less than \$15 per hour.

(b) This Act shall have no effect on any contract required to be in writing under any other provision of state or federal law.

founded in public policy and based on external effects of termination); Note, A Law and Economics Look at Contracts Against Public Policy, 119 Harv. L. Rev. 1445, 1446–48 (2006) (arguing for externalities as the basis for voiding contracts as against public policy); cf. Kenneth Ayotte, Anthony J. Casey & David A. Skeel, Jr., Bankruptcy on the Side, 112 Nw. U. L. Rev. 255, 261–63 (2017) (proposing that when intercreditor agreements have the potential to cause value-destroying externalities, courts should limit remedies to expectation damages). But cf. Steven L. Schwarcz, Rethinking Freedom of Contract: A Bankruptcy Paradigm, 77 Tex. L. Rev. 515, 552–53 (1999) (expressing skepticism about externalities-based arguments in contract law)

²²⁴ Cf. Jay Pil Choi, Doh-Shin Jeon & Byung-Cheol Kim, Privacy and Personal Data Collection with Information Externalities, 173 J. Pub. Econ. 113, 122 (2019) (modeling externalities associated with data collection despite individual assent); Julie E. Cohen, *Lochner* in Cyberspace: The New Economic Orthodoxy of “Rights Management,” 97 Mich. L. Rev. 462, 540 (1998) (discussing difficulty in ascertaining the meaning of externalities in contracts).

(c) In the event a transaction is found to be governed by this Act, and the parties' intent to contract can be established by their conduct, the contracts' terms shall be those determined by the customary rules of the time and place of the transaction, including the common law of contracts, or the other provisions of this State's commercial code.

The SAF's first paragraph does the major work of reform. It defines three categories of covered transactions: (1) goods and (2) services sales with a value of less than \$100, and (3) employment contracts of indefinite terms where the hourly salary is less than \$15 an hour. None, if made by way of a written contract, would be enforceable under the SAF by way of action or defense.

The rule for goods in effect establishes a floor and a ceiling for a traditional goods contract. Enforceable promises for sales of goods valued at more than \$500 must be in writing to be enforceable under the Statute of Frauds;²²⁵ those under \$100 could not be in writing under the SAF. The Statute of Frauds thus sets a pragmatic and sensible limit on the ambitions of the SAF. Even outside of goods, large value contracts are ones where the terms are often themselves the product—insurance, finance, etc.—and aren't subject to the same transaction cost forces that have generated more forms than we need.

With a fixed ceiling, where exactly should we set the floor? There's no perfect answer. The \$500 rule created by UCC's version of the Statute of Frauds was set in the 1950s and reflects a price that in today's dollars would have been in the thousands—that is, significant purchases, typically outside of business-to-consumer contexts. Recent revisions, proposing to change that minimum, highlighted the incongruity: when grocery and gas bills are in the hundreds of dollars weekly, the Statute of Frauds simply has too much application to the mine-run of deals in consumer life.²²⁶

The SAF puts a ceiling on writings and is subject to the same problems of over- and under-inclusiveness. One possible threshold is zero: only contracts proposing free goods and services would be the subject of the SAF. This has certain advantages, as there is evidence that free goods and

²²⁵ U.C.C. § 2-201 (Am. L. Inst. & Unif. L. Comm'n 2022) (establishing statute of frauds).

²²⁶ The proposed modification to the UCC was never adopted by any state. It would have increased the amount to \$5,000 in 2000. See U.C.C. § 2-201(a) (Am. L. Inst. & Unif. L. Comm'n, Draft Nov. 2000).

services pose particular problems. In work on zero-price goods and services, Nina Mazar, Dan Ariely, and Kristina Shampanier found that such deals were particularly likely to attract consumers and depress self-protective defenses.²²⁷

However, the problem posed by cheap forms isn't limited to the kink at the zero price. True, many of the contracts we see online, from platforms to service apps to games, are free, but not all. Consider the growing market for piecemeal services, like low-cost delivery. Or for small-scale goods, like toys, or cheap consumer electronics. The social value of the fine print in contracts which exculpate business from having to pay consumer remedies for these small deals is low. Thus, somewhat arbitrarily, I've set \$100 as the contract ceiling. In different places, and over time, this line may change. The lower it goes, the fewer contracts the SAF would cover and the less mischief, and good, it could do. Litigation may help to settle whether particular contracts are covered by the SAF—for example, a contract that costs the consumer nothing but their privacy, which has a value to the firm in the hundreds of dollars.

The second major trigger under the SAF is indefinite services contracts, including both traditional employment relationships and independent contractor ones. Here, there are two conditions for the SAF's application: the contract must be indefinite in nature, i.e., not a fixed term of work; and the hourly rate must be below \$15 an hour. The first part tries to carve out contracts that we'd expect to be in writing: fixed-term contracts over a year are already covered by the Statute of Frauds, and if the parties intend to make a fixed-term contract of less than a year, a written contract seems reasonable.

The second carves out more expensive contracts. Here, as in the noncompete context, policymakers may wish to provide specially protective rules for low-wage workers.²²⁸ Thus, in Washington State, the legislature created a special rule forbidding enforcement of noncompetes

²²⁷ See Kristina Shampanier, Nina Mazar & Dan Ariely, *Zero as a Special Price: The True Value of Free Products*, 26 *Mktg. Sci.* 742, 745 (2007) (describing the power of the “zero-price effect”). But cf. Kenneth A. Bamberger, Serge Egelman, Catherine Han, Amit Elazari Bar On & Irwin Reyes, *Can You Pay for Privacy?: Consumer Expectations and the Behavior of Free and Paid Apps*, 35 *Berkeley Tech. L.J.* 327, 332–33 (2020) (finding an absence of evidence of difference in terms between free and paid apps).

²²⁸ That is, if the FTC's proposed nationwide ban on noncompetes survives both the rulemaking process and challenge. See *Non-Compete Clause Rule*, 88 *Fed. Reg.* 3482, 3537 (Jan. 19, 2023).

for workers making less than or equal to \$100,000.²²⁹ Again a concern, to work out in later case law, is to determine the statute's coverage when the hourly wage cannot easily be determined. I have chosen \$15 an hour because it covers approximately one in three American workers and has been the target of multiple minimum wage campaigns in recent years.²³⁰

Third, the SAF gestures toward the class of contracts where a writing is required. The set of contracts where federal or state law mandates a writing—outside of the Statute of Frauds—is unclear. There are a few odd examples: reviving a debt barred by bankruptcy, extending the statute of limitations, authorizing certain agents, purchasing business assets, and assigning some kinds of intellectual property.²³¹ For other types, a writing might be preferred, but the alternative is an established default regime. The federal regulations that govern workers who labor under H-2A visas are illustrative. Those workers must either be provided with a written contract *or* their working conditions are governed by the terms and conditions posted at the State Workforce Agency where they were recruited, together with the application the employer filed to justify the visa itself.²³²

It's true, there are required *disclosures* in many fields, which must be in writing. But those disclosures need not be contracts. A classic example is a privacy policy. Although many courts have found privacy policies to

²²⁹ Wash. Rev. Code § 49.62.020 (2019), <https://app.leg.wa.gov/rcw/default.aspx?cite=49.62&full=true> [<https://perma.cc/9YG9-CL3S>]; Hiraiwa et al., *supra* note 80, at 5; Chip Collins, Legislative Trends in Noncompete Law, 32 *Intell. Prop. & Tech. L.J.* 20, 20 (2020). Similarly, Maryland passed a law prohibiting employers from enforcing a noncompete clause against an employee who makes less than \$15 an hour (or \$31,200 a year). In Maine and New Hampshire, employers cannot enter into a noncompete agreement with employees unless those employees earn more than 400% of the federal poverty level or more than 200% of the federal minimum wage, respectively. Collins, *supra*, at 20.

²³⁰ See Ella Ceron, One in Three U.S. Workers Earns Less Than \$15 an Hour, *Bloomberg L. News* (Mar. 22, 2022, 6:38 PM), <https://www.bloomberg.com/news/articles/2022-03-22/federal-minimum-wage-1-in-3-us-workers-make-less-than-15-an-hour> [<https://perma.cc/Y9DC-299M>] (describing failed federal minimum wage push); Kaitlyn Henderson, Oxfam, The Crisis of Low Wages in the US 8, 20 (2022), https://webassets.oxfamamerica.org/media/documents/low_wage_report_2022_final.pdf [<https://perma.cc/K6DU-KVT7>] (advocating for federal minimum wage increase to \$15).

²³¹ 9 *Williston on Contracts*, *supra* note 46, § 21:4; see also, e.g., Ala. Code § 8-26B-10 (2022) (requiring agency contracts to be in writing).

²³² 20 C.F.R. § 655.122(q) (2022); Samantha Mikolajczyk, Rights of H-2A Workers, *Nat'l Agric. L. Ctr.* (Apr. 21, 2022), <https://nationalaglawcenter.org/rights-of-h-2a-workers/> [<https://perma.cc/ZFH7-RH5F>].

be contractual in nature,²³³ privacy laws require consent, not contract.²³⁴ Risk-shifting tort warnings (“This floor is wet”) are not contracts, and the legal status of enforceable waivers of liability is at best unclear.

Now that its parameters are clear, consider the case for the SAF. In states that adopt it, the primary effect would be to reduce the incidence of written contracts for a variety of goods or services where the social value of a writing is low, and the default (implicit) non-price terms are sensible.²³⁵ That is, it would replace some forms with the law of the in-person market. But the same is true for a variety of minimum-wage jobs, which were not subject to written contracts before the last generation.²³⁶ Thus, the SAF would return to the world of employee handbook policies: no arbitration clauses, noncompetes, and disclosure agreements as a condition of employment for low-paying work.

I am unaware of a precise analogue prohibiting written contracts but permitting defaults.²³⁷ (Ordinarily, when law prohibits a contract, such as one in restraint of trade, it doesn’t matter if it is in writing or oral.) There are, however, many proposals, some adopted by courts, which make particular *terms* unenforceable in the absence of meaningful choice, or which prohibit suspect clauses altogether.²³⁸ But these proposals often presume a hypothetical consumer who (if only they read the contracts in the right light) would advocate for themselves and refuse to accept a clause that scholars deem bad for them. The question is whether there are different and pressing objections to the SAF, which sweeps away

²³³ Restatement of Consumer Contracts § 1 cmt. 9 & reporters’ notes (Am. L. Inst., Tentative Draft No. 2, 2022).

²³⁴ For instance, privacy policy disclosures are mandatory in many jurisdictions. See, e.g., California Online Privacy Protection Act of 2003, Cal. Bus. & Prof. Code §§ 22575–22579 (Deering 2023); see also Mike Hintze, In Defense of the Long Privacy Statement, 76 Md. L. Rev. 1044, 1046–49 (2017) (describing privacy disclosures required by California and federal law); cf. Cynthia Estlund, Just the Facts: The Case for Workplace Transparency, 63 Stan. L. Rev. 351, 365–66 nn.48–51 (2011) (discussing the elements of mandatory disclosure regimes in the workplace).

²³⁵ Instead of thinking of the SAF as dampening externalities, we could see it as increasing the supply of public goods. Cf. Cohen, *supra* note 224, at 549–51 (describing how contracting can lead to the undersupply of public goods in innovation).

²³⁶ See *supra* note 82 and accompanying text.

²³⁷ Julie Cohen suggested adding “superficial transactional inefficiency” to digital rights management to make contracting more difficult, but didn’t go so far as to suggest that written contracts themselves are unlawful. Cohen, *supra* note 224, at 562.

²³⁸ Cf. Cummins, *supra* note 21, at 1 (arguing procedural clauses carry negative externalities and arguing that written choice of forum and choice of law clauses should be declared unenforceable by statute).

objectional clauses, but also the anodyne boilerplate and precatory fine print that are those bad terms' fellow travelers.²³⁹ I will consider several, in a question-and-answer format.

Shouldn't We Prefer Written to Oral Contracts?

In *Hill v. Gateway 2000*, the patriarch of “terms that follow” cases,²⁴⁰ Judge Easterbrook scoffed at those who would privilege oral over written terms:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.²⁴¹

Easterbrook thus argued (and many legal economists would still agree) that writings benefit firms *and* consumers. Forms efficiently provide terms—no need to drone at the consumer.²⁴² Enforcement of forms (and not requiring robust consent) subsidizes commerce at scale.

As I have previously argued (and won't recap) these market arguments are quite hard to maintain for cheap forms.²⁴³ But the law's pro-writing ideology runs deep. It finds voice in doctrines as diverse as parol

²³⁹ Hoffman, *supra* note 4, at 1398–99 (describing “precatory fine print”).

²⁴⁰ 105 F.3d 1147 (7th Cir. 1997).

²⁴¹ *Id.* at 1149.

²⁴² See, e.g., Eric A. Posner, *ProCD v. Zeidenberg* and Cognitive Overload in Contractual Bargaining, 77 U. Chi. L. Rev. 1181, 1183–84 (2010) (discussing forms of consent in contracts).

²⁴³ See *supra* text accompanying notes 52–103.

evidence,²⁴⁴ agreements to agree,²⁴⁵ and the Statute of Frauds itself.²⁴⁶ On one reading, the Statute of Frauds has its roots in the law of consumer protection: in a less literate world, litigation was a “form of sanctioned aggression,” and preventing perjury an important social goal.²⁴⁷

Over time, criticisms of the statute (and other pro-writing doctrines) have proliferated: it privileges parties with lawyers over those without, judges over juries, and predictability over accuracy.²⁴⁸ Ultimately, the statute has survived, with many exceptions, because it balances two kinds of harm: plaintiffs fraudulently testifying to oral contracts that did not in fact exist, and defendants fraudulently denying the existence of those same deals. And it does so rooted in a set of intuitions about the kind of contracts that naturally ought to be in writing. The statute’s logic is that when such contracts—land sales, large deals in goods, and long-term service contracts—are alleged to be oral, we should be suspicious that they really exist as the plaintiff avers.

The SAF flips the import of that same intuition. For many contractual settings, we do *not* expect the terms in written agreements to depart significantly from reasonable expectations.²⁴⁹ I’d argue that—at least until lately—we didn’t expect contracts to govern those situations at all.²⁵⁰ Thus, the SAF tries to restore the psychological *status quo* and conform the ambit of written contracts to their more appropriate place in society. The SAF does not solve all problems, of course: it does not cover larger goods contracts, or service contracts like those with your cable company, most leases, or those with certain platform firms, where the size of the deal would cause it to fall outside the statute’s scope. But it would

²⁴⁴ See *Mitchill v. Lath*, 160 N.E. 646, 647 (N.Y. 1928) (providing the classic statement of the four-corners parol evidence rule to preclude oral testimony about a collateral agreement).

²⁴⁵ See, e.g., *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 426 (7th Cir. 1989) (prioritizing written documents over external pieces of evidence about intent).

²⁴⁶ 9 Williston on Contracts, *supra* note 46, § 21:1.

²⁴⁷ A.W. Brian Simpson, *A History of the Common Law of Contract* 603 (1987).

²⁴⁸ See generally Joseph Perillo, *The Statute of Frauds in Light of the Functions and Dysfunctions of Form*, 43 *Fordham L. Rev.* 39 (1974) (reviewing arguments for and against the Statute of Frauds); Morris G. Shanker, *In Defense of the Sales Statute of Frauds and Parole Evidence Rule: A Fair Price of Admission to the Courts*, 100 *Com. L.J.* 259 (1995) (defending the statute).

²⁴⁹ Cf. Restatement (Second) of Contracts § 211 cmt. e (Am. L. Inst. 1981) (suggesting that courts should “effectuate the reasonable expectations of the average member of the public”).

²⁵⁰ Hoffman, *supra* note 9, at 1598–99, 1632 (summarizing experimental studies about age effects in perceptions of written contracting).

significantly decrease the total number of written contracts that you would experience daily.

But what if it works too well? Some might worry that a world without forms for small-stakes transactions is one where firms will chisel their consumers orally, leaving no written evidence behind of their misdeeds.²⁵¹ This is a misguided objection. Yes, firms will make oral promises to consumers or employees that they would then seek to avoid. That problem does not seem notably different from the current world, where unread forms typically make it explicit that such promises are not reliable bases for court actions. And consumers are likely to adopt self-protective devices (recording conversations) if firms repeatedly seek to avoid justified reputational sanctions.

Ok, you might say, you are half-convinced that we don't need written contracts all the time. But won't that trigger Easterbrook's other worry—we'll replace written contracts with oral ones? Here, I can only speculate, but my bet is that in a world without forms, firms would only rarely verbalize their terms. The evidence that the businesspeople who make decisions about their consumer experience care about terms is weak:²⁵² lawyers are not going to convince salespeople to recite a choice of law clause if the price is a bored consumer fleeing the store. And the suggestion that oral disclosures will become routine for e-commerce is farcical.

Don't Written Contracts Help Consumers by Sometimes Giving Them Rights They Want?

A different objection to the SAF is that sometimes terms do benefit consumers—not in the abstract, or in the armchair, but in the specific instance. A return term in a written contract may be better than the default.²⁵³ Firms which make platforms available for users to interact may make them agree not to sue each other for certain kinds of speech (just as, for example, visitors to the ballpark may agree not to be legally aggrieved

²⁵¹ Cf. Shmuel Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. Rev. 753 (2021) (arguing firms make many manipulative oral promises and that law should police them more intensely).

²⁵² Hiraiwa et al., *supra* note 80, at 1 (finding no firm changes in response to change in noncompete law).

²⁵³ Cf. U.C.C. § 2-509 (Am. L. Inst. & Unif. L. Comm'n 2021) (risk of loss transfers absent agreement).

when hit by a ball by contract).²⁵⁴ Sellers of software may provide warranties where the default law does not.²⁵⁵ And so on.²⁵⁶

But just as firms do not insist on their contractual rights where they wish to appease consumers they particularly covet, so too will they find ways to pre-commit to rewarding consumers who have “lost” rights that written forms provide.²⁵⁷ Today, firms post return signs and warranties in stores hoping to exclude liability and sometimes succeed.²⁵⁸ In the SAF world, they would not be able to accomplish that precise goal, but they would be stuck with posted pro-consumer signs for reputational reasons.

Recall, too, that posted signs can have noncontractual effects. Firms can shift tort risk with warnings, absent the agreement of consumers or employees, and they can (and have!) governed behavior in the workplace without the aid of written bilateral agreements.²⁵⁹ Firms can (and do) seek to affect behavior on platforms using community guidelines, not just terms of use. Indeed, the efficacy of using terms to dampen litigation about access to social media is deeply contested.²⁶⁰

Thus, the *net* effect of making illegal low-stakes written contracts will be pro-consumer and pro-employee. That’s so because firms have incentives to make salient those terms that benefit consumers—they are

²⁵⁴ The “Baseball Rule,” which prevents baseball teams from being liable for injuries caused when balls fly into the stands, is generally accepted as a common law doctrine. Four states have codified the rule as a statute. Nathaniel Grow & Zachary Flagel, *The Faulty Law and Economics of the “Baseball Rule,”* 60 *Wm. & Mary L. Rev.* 59, 84 (2018).

²⁵⁵ *Principles of the Law of Software Contracts* (Am. L. Inst. 2010) seeks to replace UCC provisions in the context of warranties. They create an objective test for determining whether a promise or representation amounts to an express warranty and create an implied warranty of no hidden material defects for software. See Robert A. Hillman & Maureen A. O’Rourke, *Principles of the Law of Software Contracts: Some Highlights,* 84 *Tul. L. Rev.* 1519, 1532–35 (2010).

²⁵⁶ Taking this further, in an SAF state, firms might begin to lobby to change the defaults to make them more seller/employer friendly.

²⁵⁷ For work modeling this phenomenon, see Richard A. Posner & Lucian Arye Bebchuk, *One-Sided Contracts in Competitive Consumer Markets,* 104 *Mich. L. Rev.* 827, 831–33 (2006).

²⁵⁸ See, e.g., *Cobaugh v. Klick-Lewis*, 561 A.2d 1248, 1251 (Pa. Super. Ct. 1989) (holding that a posted sign at a golf course constituted an enforceable contract); *Adage Towing & Recovery, Inc. v. City of Tucson*, 930 P.2d 473, 475 (Ariz. Ct. App. 1996) (explaining that posted signs can create a legally binding contract between the towing company and parking violator).

²⁵⁹ See supra note 33 (discussing manuals).

²⁶⁰ See supra note 7 (discussing Twitter).

already priced and can be sold separately.²⁶¹ (And the distribution of negative consequences for the SAF will be tilted toward those employees/consumers who can navigate complex legal systems and emerge with contractual guarantees in hand.) To the extent that the current regime of enforceable small-stakes contracts benefits any adherents, they are relatively wealthier and better educated.²⁶²

Don't Firms Need Cheap Forms to Manage Large Workforces (and Thus Become Efficient Producers)?

A different defense of forms is that they enable firms to expand by reducing the time they spend making sure that employees don't bind the firm to unwanted contracts with consumers. Terms consolidate suits in convenient places and thus reduce litigation costs,²⁶³ cut off foreseeable consequential losses, and reduce monitoring costs of employees who interface with the public.²⁶⁴ Employees could undo these benefits by making contrary oral promises. Forms, controlling employee promising, thus enable firms to expand and manage their internal affairs at low cost. The monitoring cost argument has intuitive appeal. And in some areas, it's more clearly true than others.

Consider Walmart and its electronic store, Walmart.com. In the physical store, you can buy a t-shirt, or a toy, or food, without agreeing to any written contracts. (Though shopping in person might subject you to tort risk, partially disclaimed by signs on the floor.) But online, buying those same goods subjects you to an arbitration clause, all-cap warranty and damage disclaimers, rules enabling the firm to sell your shopping

²⁶¹ Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 *J.L. & Econ.* 461, 485 (1974) (arguing that competition is based on price and not other terms).

²⁶² Sarin, *supra* note 88, at 1529–30 (discussing problem of cross-subsidy).

²⁶³ See *Carnival Cruise Lines, Inc. v. Shute*, 11 U.S. 1522, 1527 (1991) (“[A] reasonable forum clause in such a form contract . . . well may be permissible . . . [if it] has the salutary effect of . . . sparing litigants the time and expense of pretrial motions to determine the correct forum.”).

²⁶⁴ See Rakoff, *supra* note 29, at 1229–30 (arguing that the enforcement of forms gives firms an “ability to control relationships across a market” and creates “economic utility”). Rakoff also argues that firms use consequential damages to avoid having to keep track of customers’ special needs in accordance with *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145. Rakoff, *supra* note 29, at 1224. See also Ian Ayres & Gregory Klass, *One-Legged Contracting*, 119 *Harv. L. Rev. F. 1*, 10 (2019) (making argument against oral communication of terms).

information to third parties, and the like.²⁶⁵ But the very existence and growth of Walmart (the physical store) is evidence that form contracts aren't necessary for this kind of commercial activity. If the SAF eliminated Walmart's terms, it could probably lump it.

Amazon.com, a native digital site, is arguably different. Amazon's terms try to accomplish similar goals, but they additionally try to disclaim the tort and contract duties attending Amazon's status as a seller of goods.²⁶⁶ It has been only intermittently successful at avoiding this risk, and permitting contracts to control is not obviously socially an optimal outcome.²⁶⁷ But at least there's a business case for these terms—and a similar argument could be made for certain risk shifting for gig economy firms that seek to avoid both employment and agency law.²⁶⁸

But regardless, it is not the case that Amazon needs terms to manage its internal workforce: the firm can (and does) manage its consumer experience through scripts. This is generally true for most e-commerce firms: firms today have technological tools at their disposal to monitor employee conversations with customers by outsourcing to AI chat bots or monitoring through real time call center transcripts. Thus, the risk that the SAF would increase internal monitoring costs seems low.

The SAF Is a Second-Best Solution. What Is Wrong With the First-Best Solutions?

The SAF is a residue of a century-long failure to regulate forms, but it's a second-best solution nonetheless. Wouldn't it be better if we directly made pro-consumer defaults non-disclaimable, or amended the FAA, or increased sanctions for drafting unenforceable terms? This question re-emphasizes the SAF's political virtues: state statutory approaches have been under-explored in the contracts literature because of FAA preemption issues that the SAF elides.

²⁶⁵ Walmart.com Terms of Use, Walmart, <https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0> [<https://perma.cc/LHM8-8DL6>] (last visited Oct. 1, 2023).

²⁶⁶ Conditions of Use, Amazon, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM> [<https://perma.cc/6D54-KF3R>] (last updated Sept. 14, 2022).

²⁶⁷ Tanya J. Monestier, Amazon as a Seller of Marketplace Goods Under Article 2, 107 Cornell L. Rev. 705, 761–62 (2022) (arguing that Amazon ought to be treated as a seller).

²⁶⁸ Cf. Ayres & Klass, *supra* note 264, at 11 (defending boilerplate as enabling innovative firms).

Because the SAF is a statute that a state can adopt, it permits progress in the face of significant federal gridlock. Congress has passed three limited acts cutting back private law contracting. But not only were those acts small in scope, they might not be constitutional as written.²⁶⁹ There is, as I mentioned, very little hope of repealing the FAA, or significantly loosening its application to employment disputes.²⁷⁰ But states are both more diverse in outlook and contain more places where organizing could make a difference. Populist or liberal states might very well take up the SAF's banner where the national Congress would not: consider that it was state action against NDAs which fueled the movement against them, years before Congress agreed to do so.²⁷¹

Second, state legislative solutions which make written contracts unenforceable should survive FAA preemption. The FAA only applies to pre-dispute agreements to arbitrate, so if the state law does not recognize the validity of pre-dispute agreements, the FAA cannot preempt the law.²⁷² Since the SAF would make a whole class of forms unenforceable, the FAA should not apply.²⁷³ Additionally, since the SAF does not single out arbitration clauses as uniquely unenforceable, it would not violate the FAA even if the statute did apply.²⁷⁴ Problems would arise only if states

²⁶⁹ Stephen Sachs's argument that the silence act violates constitutional rules on the Commerce Clause, cited above, should also apply to the Congressional Review Act, since it doesn't contain a jurisdictional hook either. Sachs, *supra* note 205.

²⁷⁰ The newly passed carve-out for pre-dispute arbitration of sexual harassment disputes is an important exception, though a limited one. See David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 *Yale L.J.F.* 1, 1–2 (2022).

²⁷¹ *Id.*

²⁷² Christopher R. Drahozal, *FAA Preemption After *Concepcion**, 35 *Berkeley J. Emp. & Lab. L.* 153, 172 (2014).

²⁷³ In notable Supreme Court cases on FAA preemption, the parties before the Court had knowingly agreed to mandatory arbitration clauses with specified procedures. See *Am. Express Co. v. Italian Colors Rest.*, 133 U.S. 2304, 2309 (2013) (explaining that respondents had contractually agreed to arbitrate claims individually); *AT&T Mobility LLC v. Concepcion*, 131 U.S. 1740, 1744 (2011) (explaining that the *Concepcions* had signed an agreement with AT&T that required individual arbitration and permitted the company to make unilateral amendments to the agreement); *Epic Sys. Corp. v. Lewis*, 138 U.S. 1612, 1619–20 (2018) (explaining that plaintiffs in the initial suits had signed agreements that mandated individual arbitration).

²⁷⁴ See *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 n.2 (2017) (“We do not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case. We simply reiterate here what we have said many times before—that the rule must in fact apply generally, rather than single out arbitration.”).

tried to invalidate solely the arbitration clauses in the forms that qualify under the SAF.

At the same time, the SAF can be tailored to particular states' politics. In some states, agricultural migrant labor is particularly important. There, exceptions that would align this act closely with federal regulations stating that employment must be in writing would seem desirable. In another state, perhaps a large employer has reasons to want to put deals in writing: the state legislature could make concessions in discrete ways. (For example, consider whether a state with a large theme park industry might want to permit firms to create enforceable written contracts disclaiming risk for one-day tickets which would otherwise fall under the SAF.²⁷⁵)

Stepping back, the SAF offers a novel regulatory hook that should be better than *ex post* policing, since it provides bright-line rules that can be harnessed to the regulatory power of state attorneys general. However, our under-enforced plain language laws should give you pause before swallowing that claim. Why have our plain language statutes been so unenforced? A possibility, built on the transaction costs argument, is that there are simply too many forms out there for regulators to effectively approve or for courts to police on the back end. The SAF offers advantages over more targeted solutions primarily because it acts to reduce the total stock of forms in the world. Fewer forms would improve the efficacy of other kinds of contract regulation.

What About Privacy, IP, and Platforms?

Let's revisit the problem of privacy policies, as they epitomize the terms-of-use culture we're embedded within. Social media firms and others may argue that without treating such policies as contracts, they can't collect the personally identifiable information whose sale enables them to make their services available at no explicit cost. And the SAF would then prevent the data use practices which enable many "free" social media platforms to exist.

Indeed, just recently European regulators found that requiring assent to privacy disclosures in Facebook's terms and conditions violated the

²⁷⁵ Such experiments are better hedged than federal solutions. See generally Shmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 *Tul. L. Rev.* 105, 128–31 (2018) (discussing the advantages of gradually experimenting with consumer protection laws).

General Data Protection Regulation (“GDPR”).²⁷⁶ In response, Facebook will have to start giving European consumers a choice about whether to assent or not. Merely giving that choice would lead to a *global* drop of revenue of 5–7% (of \$118B in total), a “major gut punch” to the firm.²⁷⁷ The SAF might have this kind of stunning effect across a variety of firms, which surely is not an argument that would compel economy-minded state regulators.

It’s notable that the gut-churning nature of the outcome implies that Facebook’s terms’ privacy rules have enabled it to shroud the cost of privacy disclosures from users. Facebook is “free” only notionally: individual targeting could impose costs on each user of a material amount—perhaps hundreds of dollars—each year.²⁷⁸ Perhaps it’s just as well that Facebook hides those costs, if you think that Facebook has used the billions it’s skimmed from shrouded terms to develop important new virtual reality goggles. Facebook could argue that its forms don’t fall under the SAF because they accomplish an exchange of value of more than \$100. This same valuation approach could also shelter platforms that encourage the uploading of user-generated-content (“UGC”), and which seek to exploit that content both externally and internally to improve their operations.

The SAF could also be amended to exclude certain IP-related legal forms, like the privacy’s notice-and-assent system. Nothing in current law requires privacy disclosures to be full-fledged bilateral contracts.²⁷⁹ The SAF could clearly state that privacy notices are not covered contracts if they do nothing more than providing consumers notice of what’s being done with their data. Firms could (as they do under the GDPR) provide

²⁷⁶ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 4(11), 2016 O.J. (L 119) 34 (EU) (requiring consent to be “freely given, specific, informed and unambiguous”).

²⁷⁷ Adam Satariano, *Meta’s Ad Practices Ruled Illegal Under E.U. Law*, N.Y. Times (Jan. 4, 2023), <https://www.nytimes.com/2023/01/04/technology/meta-facebook-eu-gdpr.html> [<https://perma.cc/B2PW-GGU4>].

²⁷⁸ It’s difficult to say exactly how much, but one site estimated that in 2018, Facebook made \$0.01/user per minute and \$26/user per quarter. *How Much Facebook Makes, Per User, Per Minute Spent on Facebook, Who Targets Me?* (Feb. 21, 2018), <https://whotargets.me/hu/much-facebook-makes-per-user-per-minute-spent-facebook/> [<https://perma.cc/A8UQ-X96T>].

²⁷⁹ See generally Daniel Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4333743 [<https://perma.cc/L2J5-AF2M>] (describing regime).

satisfactory privacy warnings without creating other contractual obligations. The same safe harbor system might work for UGC licenses, though the details matter, and we might worry that the exception would swallow the rule.

Will There Be Cliff or Other Perverse Effects?

In various areas of policy, where contractual enforcement is subject to a bright-line rule—that both parties must be 18 years old,²⁸⁰ employees signing a noncompete must make more than \$100,000 a year,²⁸¹ contracts paying less than a certain amount an hour are unenforceable—scholars worry about cliff effects. That is, what if we distort the behavior of firms who work to avoid coverage under the law by increasing prices? Here, perhaps the SAF will have an inflationary effect on the margin. It could also skew firm conduct in employment markets, though there is some evidence, discussed above, that firms do not value written contractual rights strongly enough to change salary setting.²⁸²

The backfire effects might be severe, which is why states considering adoption of the SAF would be well advised to engage in serious study of firms' anticipated reactions. Of particular concern is firms' ability to arbitrage the law itself, including directly in some circumstances choosing law from states where the SAF is not adopted. Just as in the many other contexts where we have strong evidence that legislative enactments can only deter and do not eliminate disfavored contractual clauses, the SAF will not eliminate all written small-stakes contracts. In the best case, it will merely materially depress their use. That's likely true even if we give the SAF real teeth by permitting affirmative causes of actions under state law for violating its prohibition.

²⁸⁰ See, e.g., Karen A. Shiffman, *Replacing the Infancy Doctrine within the Context of Online Adhesion Contracts*, 34 *Whittier L. Rev.* 141, 158–59 (2012) (arguing that courts should not allow infancy defenses to protect minors from being held accountable for harmful behavior online, especially when adults do not read clickwrap contracts anyway).

²⁸¹ Norman Bishara and Evan Starr argue that researchers have not adequately studied the collateral effects of policies that limit the use of noncompete clauses. Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 *Lewis & Clark L. Rev.* 497, 501 (2016). Specifically, they cite an effort to ban noncompete agreements for low-wage workers as an example of a policy that is based on insufficient empirical research about potential unintended consequences. *Id.* at 544.

²⁸² See *supra* note 80 and accompanying text.

Why Not Focus on Adhesion (and Motivate Choice)?

Finally, you might ask whether a different version of the SAF could provide a safe harbor for cheap forms if firms provide real choice to consumers and employees. This would bring the proposal in line with much of the existing scholarship, which seeks to tie enforcement to knowledgeable consent.²⁸³ I can see its appeal, especially for those who think that the major problem with forms is that they are adhesive.

One concern is Hobson's: Is it really a choice if the only way to access goods, a job, or services is to choose between one of two or three unpleasant terms? You can have your minimum wage job and can choose either an arbitration clause or a class action waiver; you can buy your Walmart lawn darts and can either pay 20% more or agree to exculpate all liability against the store. You can take an Uber and either agree to lose control over your private information or consent to their choice of forum. That firms might present unpleasant options and escape adhesive labels illustrates how much mischief *choice* does as a principle when considering boilerplate. And would consumers and employees want to live in a world where firms continually asked you to make these sorts of trade-offs between money and terms that affect general deterrence? Choosing is exhausting.²⁸⁴

Normatively, I am skeptical that giving individuals choices about non-salient terms is truly autonomy enhancing, and I don't think it necessarily results in better social outcomes.²⁸⁵ Administratively, the litigation that results would be complex and difficult to predict *ex ante*: firms would likely be seeking to use a supposedly negotiated term to avoid liability, while adherents would deny that they actually wanted what they were offered as an option. Firms play this game repeatedly, while consumers and employees don't. Such realities suggest why existing policing solutions, which valorize consent, have done so little to change the contracting market.

²⁸³ See, e.g., Lemley, *supra* note 60, at 242.

²⁸⁴ See generally Cass Sunstein, *Choosing Not To Choose*, 64 *Duke L.J.* 1 (2014) (articulating advantages and disadvantages of choice-maximizing solutions).

²⁸⁵ This argument was succinctly made by Nate Oman. Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles*, 83 *Brook. L. Rev.* 215, 242–44 (2017).

CONCLUSION: A REAL PROPOSAL OR A THOUGHT EXPERIMENT?

Over ten years ago, Eric Felten claimed that “most of us make more legal agreements in a year than our grandparents made in a lifetime.”²⁸⁶ The same statement—assuming “legal agreements” is given the meaning of “written contracts”—would be true today only if you changed “year” to “every day or two.” So entwined are written contracts in our lives that unwinding the ball may seem hopeless. That’s why though almost all commentators agree that forms present a problem of growing scope, they can’t agree on a solution, nor sufficiently engage a political coalition to make real change happen.

Do we need the cheap forms that result from falling transactional costs? In this Article, I’ve tried to reset the debate and provide a practical path by which policymakers could consider reducing the external harms caused by the problem of too many contracts. The SAF would do so by prohibiting certain written, small-stakes contracts and reverting to the default rules that law makes available for buyers and sellers of goods and services. If adopted by individual states, the SAF would reduce the number of arbitration clauses, nondisclosure clauses, choice of forum, and class action waivers that collectively cut back on the protective scope of public and private legal rights. Finally, fewer written contracts also means less fine print containing *unenforceable* terms that bully us into giving up what we’re owed by trading on our intuitions about the formality of law.²⁸⁷ And the SAF would mean that the contracts we do see have more moral weight, making breach less likely and engendering interpersonal trust.

The SAF may seem radical.²⁸⁸ That’s so in part because it appears to take information away from consumers and employees. In this way, the SAF offers a thought experiment as well as a practical proposal: what do we get from cheap forms (and what can we live without). Forms seem to provide evidence of firms’ intentions, rights, and privileges, and we are

²⁸⁶ Eric Felten, *Postmodern Times: Are We All Online Criminals?*, *Wall St. J.*, Nov. 18, 2011, at D8.

²⁸⁷ See generally Tess Wilkinson-Ryan & David Hoffman, *The Common Sense of Contract Formation*, 67 *Stan. L. Rev.* 1269 (2015) (showing that most think of contract law as formal); Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 *U. Pa. L. Rev.* 2109 (2015) (same).

²⁸⁸ For some, this will be a feature. See James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 *Neb. L. Rev.* 874, 874–75 (2020) (arguing that firms may adopt high-quality terms to avoid regulation).

hardwired to think that more words can't hurt.²⁸⁹ Worse: we tend to think that the biases of information processing that we know affect other adherents are a bit less likely to impact us. *We* are savvy; *they* are rubes.²⁹⁰ Thus it would be natural to respond to this proposal by thinking that it's risky! What if we (by accident) take away a key piece of data that on which our choices in the world depend? Or deprive ourselves of the possibility of making a good choice?

But if you buy the argument that transaction costs have driven the growth in forms, it's worth considering what law can do to make sure that the forms we get are socially valuable for all parties. The SAF won't (in fact) defeat the empire of forms. At best, it nudges the contracting market a bit in a less harmful direction.²⁹¹ Many forms would be unaffected by the SAF, including all those that govern large-scale licenses (think: your cable company); consumer intellectual property that sits at the center of the modern consumer economy; and the two of three employees in the country who make more than \$15 an hour.²⁹² The SAF pushes against the expanded use of forms for increasing numbers of cheap goods and services and would shift the market towards a regime of tort-adjacent risk disclosures, community guidelines, and the law's defaults. So imagined, even if widely adopted, the SAF's potential effects on commerce would be moderate. But if you don't buy the SAF, or think it's too radical, one of my aims is to suggest that even more modest solutions which would *reduce* the growth of forms are superior to ones that aim to pick off individual terms.

²⁸⁹ See generally Jonathan Baron, Jane Beattie & John C. Hershey, Heuristics and Bias in Diagnostic Reasoning II: Congruence, Information, and Certainty, 42 *Org. Behav. & Hum. Decision* 88 (1988) (describing information bias as the desire for more information even when the subject knows rationally that it won't help the decision-making matrix).

²⁹⁰ Wilkinson-Ryan, *supra* note 127, at 1767–73 (noting that we tend to imagine ourselves as less blameworthy for failing to read the fine print).

²⁹¹ My dear and notably self-effacing friend Bob Hillman suggested the title Making a Dent in the Empire of Forms. Would you have read the 291st footnote of an article with that modest title? {Editors' Note: Yes, but mostly because it is our job.}

²⁹² See *supra* note 230 (describing wage coverage).

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Defeating the Empire of Forms

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A world (and an internet) without cheap forms is a new vehicle for an old idea: courts should enforce only those contract terms that are either subject to market discipline or are otherwise fair (enough). What distinguishes the Statute Against Forms from other proposals is that it takes seriously the confluence of two ideas: technology has made it too cheap to produce contracts, and courts have failed to police the rising number of forms that resulted from those falling costs. After a hundred years of retreat, perhaps it's time that policymakers try something different. Cancel (some) contracts!