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Finding Room for Fairness in Formalism--The Sliding Scale Approach to Unconscionability

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INTRODUCTION

Cell phones. Home mortgages. Online music. Health insurance. Vacation packages. Employment. Standard form contracts are used to secure luxuries and necessities alike. Indeed, nearly every written transaction carried out by Americans today is governed by a standardized form.[1]

Standard forms are ubiquitous, but hardly innocuous. In fact, form contracts are rife with the potential for abuse. Their nature and universality permit drafters to impose any number of onerous terms on unwary consumers, including arbitration agreements, class action waivers, liquidated damages provisions, warranty disclaimers, exculpatory clauses, and choice-of-law provisions.[2] Form contracts even empower drafters to shift risks at will, often without warning, through unilateral change-of-terms clauses—an increasingly common favorite of credit card issuers, banks, utility companies, and a host of other merchants and service providers.[3] Although essential to the American economy, form contracts expose consumers to a parade of one-sided, risk- and rights-shifting provisions.

The potential for abuse inherent in form contracting is intensified both by consumer behavior and by market forces at work in consumer transactions. A wealth of legal and interdisciplinary scholarship has definitively established that meaningful, voluntary assent to standardized terms is an impossibility, as consumers are largely unable to understand the contracts that they sign and are virtually powerless to find better terms elsewhere in the market.[4] Experts have long acknowledged that consumers do not read form contracts before signing them,[5] and have recently come to better understand the more fundamental, and sobering, truths about standard contracts: consumers who actually read consumer contracts do not understand them, either

1. David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 431 (2009) [hereinafter Horton, *Flipping the Script*].

2. 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, 229–30 (2007); *see infra* Part II.A.

3. Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1101–06 (2010). *See infra* Part II.A.

4. *See infra* Part II.A.

5. *See, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370–71 & n.338 (1960) [hereinafter, LLEWELLYN, DECIDING APPEALS] (arguing that it is conceivable to have no assent at all to unreasonable boilerplate terms in a contract when the boilerplate language undermines the reasonable meaning of the terms agreed to by the parties); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 469 (2008) ("People who sign standard form contracts rarely read them.").

because they lack the requisite legal training,[6] or worse, basic literacy skills.[7] Literate, savvy consumers suffer from cognitive limitations that render them unlikely to apprehend the meaning of and risks inherent in standard terms.[8] Market forces do not, as some once predicted, regulate the use of the most egregious terms.[9] And, as consumers increasingly "sign" onto unfavorable and one-sided terms with the mere click of a mouse, one can only predict an increase in abusive boilerplate.[10]

Despite their widespread use and marked departure from the classical model of the negotiated contract, standardized forms remain almost entirely unregulated. The primary, if not only, line of defense against unfair terms in standard form contracts is the general contract doctrine of unconscionability.[11] For decades, however, this doctrine has been an ineffectual tool for consumer protection.[12] Although unconscionability was mainstreamed into American contract law to empower judges to openly police unfair contracts,[13] the persistence of contract formalism—with its emphasis on freedom of will and assent and deemphasis on contractual fairness—discourages decision makers from inquiring whether boilerplate terms produce unacceptably harsh results.[14] Moreover, a surge in popular sentiment against judicial policy making,

6. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270 (1993) [hereinafter Meyerson, *Reunification*].

7. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002).

8. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995) ("[E]mpircial evidence shows that actors characteristically violate the standard rational-choice or expected-utility model . . . due to the limits of cognition."); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 452–54 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1291 (2003) [hereinafter Korobkin, *Bounded Rationality*]; Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 599–600 (1990) [hereinafter Meyerson, *Consumer Form Contract*] ("[O]nly one party in the typical consumer transaction, the business seller, will have the necessary legal knowledge to evaluate contract terms.").

9. Alces & Greenfield, *supra* note 3, at 1107 & n.22.

10. Hillman & Rachlinski, *supra* note 8, at 468. *See infra* Part II.A.

11. Barnes, *supra* note 2, at 230; Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 326 (2010) [hereinafter Friedman, *Contractual Overreaching*]; Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 2 (1981) [hereinafter Hillman, *Debunking Some Myths*]; Warkentine, *supra* note 5, at 471.

12. *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 90–102 (2006) [hereinafter Schmitz, *Safety Net*] (discussing the general trend of courts toward contract formalism and other criticisms of the unconscionability doctrine).

13. *See infra* Part III.A.

14. *See infra* Part III.A.

both generally and specifically with respect to contract law, further works against unconscionability—traditionally a flexible doctrine calling for judicial discretion.[15]

But the picture may not be so bleak. Court attention to the unconscionability doctrine has recently resurged, particularly as applied to consumer contracts.[16] And, as courts have reinvigorated unconscionability as a policing tool for standardized agreements, they have introduced into the doctrine a "sliding scale" approach that, if properly cultivated, can empower courts, and increasingly, arbitrators, to do what consumers, legislators, and legal scholars have yet been unable to do—control oppression and overreaching in consumer form contracts.

Unlike the conventional approach to unconscionability, the sliding scale approach deemphasizes traditional, formalist markers of assent.[17] Thus, the sliding scale approach provides decision makers with an effective means of responding to the emerging understanding of the deep deficiencies in consumer assent.[18] Also, unlike the conventional approach, the sliding scale permits meaningful scrutiny of contract terms on the basis of commercial fairness.[19] Moreover, the increased and evolving use of the sliding scale approach to unconscionability by courts signifies that judges are gradually and subtly challenging the doctrinal and societal forces that discourage judicial control of contracts.[20] Still, the sliding scale approach has been utilized with caution, evidencing that the increase in judicial intervention in contracts has not run amuck.[21] For these reasons, the sliding scale approach, if thoughtfully encouraged by scholars and carefully advanced by courts and arbitrators, has the potential to empower decision makers to police abuses in consumer contracts in both a balanced and politically legitimate fashion.[22]

This Article evaluates the sliding scale approach to unconscionability, defends its use, and advocates for its continued and expanded application to consumer standard form contracts. Part I

15. *See infra* Part III.A.

16. Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 619–26 (2009); Susan Randall, *Judicial Attitudes about Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–98 (2004). *See infra* Part III.B.

17. *See infra* Part II.C.

18. *See infra* Part II.C.

19. *See infra* Part III.C.

20. *See infra* Part III.C.

21. *See infra* Part III.C.

22. *See infra* Part III.C.

describes the sliding scale approach and its recent popularity in state courts, thereby filling a gap in academic scholarship, which has to date failed to fully examine this trend. Parts II and III defend the sliding scale approach, praising its potential to align the unconscionability analysis with interdisciplinary research regarding consumer decision making and to balance formalist concerns about judicial regulation of unfair terms in standard form contracts. Finally, Part IV calls for calibrations to the sliding scale approach and its application to standardized forms that will ensure its success as a protective device for consumers.

I. THE EVOLUTION OF UNCONSCIONABILITY: THREE APPROACHES

The last decade brought an important qualitative change in the doctrine of unconscionability and its application by courts. Increasingly, courts are employing a sliding scale approach to unconscionability that represents a significant transformation of, and departure from, the traditional two-prong analysis, under which strong evidence of both procedural and substantive unconscionability are required to justify judicial interference with a contract. Since 2000, twelve state supreme courts have either adopted or reaffirmed the sliding scale approach.[23] Of these courts, five have further expanded the sliding scale approach to hold that a finding of unconscionability may rest on evidence of either procedural or substantive unconscionability without requiring evidence of both.[24] The

23. *See, e.g.*, Gentry v. Superior Court, 165 P.3d 556, 572 (Cal. 2007); Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 22 (Mo. 2010) (en banc), *vacated on other grounds*, 131 S. Ct. 2875 (2011) (mem.); Gonski v. Second Judicial Dist. Court of Nev. *ex rel*. Washoe, 245 P.3d 1164, 1169–70 (Nev. 2010) (citing D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004)); Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 907–08 (N.M. 2009); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 370 (N.C. 2008); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 924 (N.D. 2005); Glassford v. BrickKicker, 35 A.3d 1044, 1049 (Vt. 2011); Adler v. Fred Lind Manor, 103 P.3d 773, 782–83 (Wash. 2004) (en banc); Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 289 (W. Va. 2011) (per curiam), *vacated on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 164–65 (Wis. 2006).

24. *See Razor*, 854 N.E.2d at 622 ("Unconscionability can be either 'procedural' or 'substantive' or a combination of both."); *Brewer*, 323 S.W.3d at 22 ("Under Missouri law, unconscionability can be procedural, substantive or a combination of both."); *Cordova*, 208 P.3d at 908 ("While there is a greater likelihood of a contract's being invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all."); *Glassford*, 35 A.3d at 1049 (citing Val Preda Leasing, Inc. v. Rodriguez, 540 A.2d 648, 652 (Vt. 1987)) ("The superior court was mistaken in assuming that the presence of procedural unconscionability is required to void a contract based on it containing unconscionable terms."); *Adler*, 103 P.3d at 782 ("Substantive unconscionability alone can support a finding of

significance of these decisions is underscored when one considers that just over a decade ago some commentators declared unconscionability to be "a relic" of contract law.[25] Against this backdrop, the recent swell of state supreme court decisions reflects an important shift in judicial thinking about consumer contracts and, more broadly, the judicial role in policing these agreements.[26]

Most major treatises acknowledge the sliding scale approach to unconscionability and its variations as alternatives to the more traditional unconscionability framework.[27] However, beyond bare recognition, these alternatives to the traditional unconscionability approach remain grossly under-analyzed. Little, if any, attention has been given to how the courts endorsing the sliding scale approach apply it, why those courts find the sliding scale attractive, and whether courts consistently apply the doctrine. While the sliding scale approach has been cursorily praised for strengthening the unconscionability doctrine,[28] little to no explanation has been provided for why this "vague[] mathematical metaphor"[29] might improve courts' application of unconscionability. Moreover, just as commentators have done little more than acknowledge the increased popularity of the sliding scale, the very courts employing this approach have failed to examine its merits.[30] As a result, the sliding scale is inconsistently applied and poorly

unconscionability.").

25. *See generally, e.g.*, Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287 (2000).

26. Some state supreme courts adopted the sliding scale approach much earlier than the last decade. *See, e.g.*, Helstrom v. N. Slope Borough, 797 P.2d 1192, 1200 (Alaska 1990). Further, the sliding scale approach is utilized by appellate courts in several jurisdictions whose high courts have yet to sanction the approach explicitly. *See, e.g.*, State v. Wolowitz, 96 A.D.2d 47, 68 (N.Y. App. Div. 1983). The single-prong approach, too, has enjoyed limited support for decades. *See, e.g.*, Maxwell v. Fidelity Fin. Servs., 907 P.2d 51, 59 (Ariz. 1995); Am. Home Improvement, Inc. v. MacIver, 201 A.2d 886, 888–89 (N.H. 1964); Brower v. Gateway 2000, 246 A.D.2d 246, 254–56 (N.Y. App. Div. 1998); Vasquez-Lopez v. Beneficial Or., Inc., 152 P.3d 940, 948 (Or. Ct. App. 2007); Res. Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1043 (Utah 1985).

27. *See, e.g.*, 2 DAN B. DOBBS, LAW OF REMEDIES § 10.7 (2d ed. 1993); E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28 (4th ed. 2004) [hereinafter FARNSWORTH ON CONTRACTS]; 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:9 (4th ed. 2011); 1–6 MURRAY ON CONTRACTS § 96 (4th ed. 2001) [hereinafter MURRAY ON CONTRACTS]; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.40 (6th ed. 2009); 1 LINDA J. RUSCH, HAWKLAND UCC SERIES § 2:302:5 (2010); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-7 (5th ed. 2000).

28. W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW 142 (1996) [hereinafter SLAWSON, BINDING PROMISES].

29. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17 (1993).

30. *See infra* notes 85–86 and accompanying text.

understood. The remainder of this Part first discusses the conventional approach to unconscionability, and then explores the sliding scale in detail, giving much needed attention to how courts apply the approach and the justifications for its use.

A. The Conventional Approach

The drafters of the Uniform Commercial Code (UCC) sanctioned the doctrine of unconscionability in Article 2, but did not define the term or establish a framework for its implementation.[31] The UCC's unconscionability provision—section 2-302—includes in its comments a purported "test" for unconscionability: "[W]hether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[32] The official comments to section 2-302 explain in general terms that the doctrine seeks "the prevention of oppression and unfair surprise" and also directs against the "disturbance of allocation of risks because of superior bargaining power."[33] The drafters of section 2-302 intentionally left the task of defining unconscionability beyond these vague directives to the courts.[34] With the assistance of contracts scholar Professor Arthur Leff, courts employing section 2-302 quickly developed a two-part analytical structure for the doctrine, which involves analysis of both "procedural" and "substantive" unconscionability.[35]

31. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487–88 (1967).

32. U.C.C. § 2-302 cmt. 1 (1952). Although UCC Article 2 was revised in 2003, no state has yet adopted the revision. UCC section 2-302 provides:

> (1) If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the court may afford the parties an opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Id. § 2-302.

The Restatement (Second) of Contracts contains an unconscionability provision nearly identical to UCC section 2-302. Section 208 of the Restatement provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

33. U.C.C. § 2-302 cmt. 1.

34. SLAWSON, BINDING PROMISES, *supra* note 28, at 140.

35. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); Leff,

1. Procedural Unconscionability

Procedural unconscionability, or "bargaining naughtiness," focuses on the bargaining process itself.[36] Borrowing language from the comments to section 2-302 of the UCC, courts look for evidence of "oppression" and "unfair surprise" indicating that the transaction lacked meaningful choice on the part of the complaining party.[37] The inquiry focuses on specific and objective indicia demonstrating that a consumer was unable to read and understand the terms of the agreement.[38] This fact-intensive analysis involves a range of factors, both personal to the individual consumer and present in the external contracting environment. The age, literacy, and business sophistication of the party claiming unconscionability are frequently taken into consideration, as are the consumer's level of education and socioeconomic status.[39] Any "bad behavior" exhibited by the merchant is also relevant, including the use of pressure tactics to obtain hasty signatures and the presence of boilerplate language buried in small print.[40] Conversely, a merchant's "good behavior," such as using simple and concise contractual language or large, bolded typeface to call attention to important provisions, militates against a finding of procedural unconscionability.[41]

Recognizing that the disparity in bargaining power between merchants and consumers often leaves consumers without an opportunity to negotiate, many courts also consider whether the contract is adhesionary as a relevant factor in the procedural

supra note 31, at 487.

36. Leff, *supra* note 31, at 487.

37. *See* LORD, *supra* note 27, § 18:10; PERILLO, *supra* note 27, § 9.40; WHITE & SUMMERS, *supra* note 27, § 4-7. *See also, e.g.*, Lindemann v. Eli Lilly & Co., 816 F.2d 199, 204 (5th Cir. 1987) (finding no procedural unconscionability where the parties had a twenty-year course of dealings, emphasizing that procedural unconscionability involves "oppression" and "unfair surprise").

38. WHITE & SUMMERS, *supra* note 27, § 4-3. *See, e.g.*, Jefferson Credit Corp. v. Marcano, 302 N.Y.S.2d 390, 393–94 (Civ. Ct. 1969) (finding procedural unconscionability where plaintiff had "at best a sketchy knowledge of the English language").

39. WHITE & SUMMERS, *supra* note 27, § 4-3; Brown, *supra* note 25, at 298. *See, e.g.*, Weaver v. Am. Oil Co., 276 N.E.2d 144, 145 (Ind. 1971) (finding procedural unconscionability where plaintiff, a gas station operator, "had left high school after one and a half years and spent his time . . . working at various skilled and unskilled labor oriented jobs").

40. FARNSWORTH ON CONTRACTS, *supra* note 27, § 4.28; Brown, *supra* note 25, at 297–98. *See, e.g.*, John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1574 (D. Kan. 1986) (finding procedural unconscionability where the contract provisions contained complex "legalese" written in fine print).

41. RUSCH, *supra* note 27, § 2-302:5. *See also* Bess v. DirecTV, Inc., 885 N.E.2d 488, 497–98 (Ill App. Ct. 2008) (holding that the dispute resolution provision in the Customer Agreement, which was printed in capital and boldface letters, did not support a finding of procedural unconscionability).

unconscionability analysis.[42] However, courts historically have been unwilling to find the procedural prong satisfied by the mere fact that the contract is a typical contract of adhesion.[43] Thus, while recognizing that an imbalance in bargaining power, the use of standard forms, and lack of an opportunity to negotiate are all *indications* of procedural unconscionability, most courts employing a conventional approach to procedural unconscionability will not find a typical consumer form contract, which meets these criteria, to be procedurally unconscionable per se.[44] Rather, the existence of a form contract is one of many factors taken into consideration by the court when addressing the possibility of procedural unfairness.[45] By requiring additional evidence of procedural unconscionability, the conventional approach takes into account the practical utility and universality of consumer form contracts and implicitly presumes their enforceability.[46] Only those form contracts that suffer from additional procedural deficiencies will be subjected to special scrutiny.

2. Substantive Unconscionability

Whereas procedural unconscionability targets the quality of the consumer's assent to the contract, substantive unconscionability targets the content of the terms themselves by looking for unfairness in the contract's substantive provisions.[47] Here, the inquiry is centered on

42. MURRAY ON CONTRACTS, *supra* note 27, § 96, at 547–49.

43. A contract of adhesion is generally defined as one drafted unilaterally by the party with greater bargaining power and presented to the weaker party on a "take it or leave it basis." *Id.* at 547 n.172.

44. *See, e.g.*, Fields v. NCR Corp., 683 F. Supp. 2d 980, 988 (S.D. Iowa 2010) ("Given that Plaintiff does not claim a lack of receipt of the [standard form policy], Plaintiff's surprise at the terms therein can hardly be characterized as 'unfair.'"); Lovey v. Regence BlueShield of Idaho, 72 P.3d 877, 883 (Idaho 2003) ("[A]n adhesion contract cannot be held procedurally unconscionable solely because there was no bargaining over the terms. Adhesion contracts are a fact of modern life. They are not against public policy."); 1 HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 191 (1986) ("Form contracts are not, of course, unconscionable per se."); LORD, *supra* note 27, § 18:13 ("A form contract will not generally be found unconscionable if there were negotiations on the essential terms at issue, such as price.").

45. *See, e.g.*, Home Fed. Sav. & Loan Ass'n of Algona v. Campney, 357 N.W.2d 613, 619 (Iowa 1984) ("[A] finding that a contract is adhesive does not require a determination of unconscionability. It merely alerts the court that the situation is one in which such a finding may be justified."). *See also* C&J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 80 (Iowa 2011) (stating that "assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness" are all relevant factors in assessing unconscionability).

46. *See, e.g.*, *Lovey*, 72 P.3d at 883 ("Adhesion contracts are a fact of modern life."); Hillman & Rachlinski, *supra* note 8, at 461 ("The law presumes the general enforceability of standard terms . . . .").

47. *See* DOBBS, *supra* note 27, § 10.7.

whether the allocation of risks in the contract or one of its terms is commercially unreasonable or unexpectedly one-sided.[48] Scholars have struggled to define the contours of substantive unconscionability with precision;[49] they often describe the concept by listing the types of clauses most commonly deemed substantively unconscionable. Remedy limitations, penalty clauses, and price terms that impose a significant cost-price disparity are typically cited as the most egregious offenders.[50]

The prevailing understanding is that courts will not invalidate a provision as substantively unconscionable absent clear evidence of extreme unfairness.[51] The standard parroted by most courts requires the offending provision be one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other," a formulation that has remained unchanged for 250 years.[52] Thus, according to the conventional view, the offending provision must not merely be "unreasonable," but must be "harsh" or "oppressive" in nature, or the terms so one-sided as to "shock the conscience."[53]

3. Procedural and Substantive Unconscionability Together

The conventional approach to unconscionability has been to invalidate a contract or provision only when strong evidence of *both* procedural and substantive unconscionability is present.[54] Specific indications that a consumer lacked meaningful choice in the terms of the contract are required to justify the court's intervention in the ordering of private affairs. Nevertheless, even when those indications are present, a court may not "rewrite" the contract between the parties unless its substantive unfairness is particularly egregious.[55]

48. *See* PERILLO, *supra* note 27, § 9.40.

49. *See, e.g.*, Warkentine, *supra* note 5, at 482 (stating that terms are substantively unconscionable when they are either "harsh" or "one-sided").

50. *See* WHITE & SUMMERS, *supra* note 27, § 4-4; Brown, *supra* note 25, at 298–99; Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1079–80 (2006).

51. *See* White & Mansfield, *supra* note 7, at 255–56; FARNSWORTH ON CONTRACTS, *supra* note 27, § 4.28.

52. Earl of Chesterfield v. Janssen [1750], 28 Eng. Rep. 82, 100 (Ch.). *See* Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 743 & n.2 (1981) (noting that since the eighteenth century, most courts have parroted Webster's Dictionary definition—"not guided or controlled by conscience").

53. RUSCH, *supra* note 27, § 2-302:4.

54. LORD, *supra* note 27, § 18:10 (collecting cases); MURRAY ON CONTRACTS, *supra* note 27, § 96(B)(2)(b) (collecting cases); RUSCH, *supra* note 27, § 2-302:5 (collecting cases).

55. *See, e.g.*, Bakker v. Thunder Spring-Wareham, LLC, 108 P.3d 332, 338 (Idaho 2005) ("Courts do not possess the roving power to rewrite contracts in order to make them more

B. The Sliding Scale Approach

The sliding scale approach to unconscionability differs from the conventional approach in a number of important ways. First, although evidence of both procedural and substantive unconscionability are still generally required before a court will invalidate an offending provision, *strong* evidence of both prongs is no longer required to justify relief.[56] Second, courts have traditionally reviewed evidence of procedural and substantive unconscionability separately, requiring a minimum threshold or "quantum" of each type of unconscionability to justify intervention in the contract.[57] In contrast, the sliding scale approach does not require that procedural and substantive unconscionability each be present in any particular degree; rather, a relatively large quantum of one type of unconscionability can offset a relatively small quantum of the other.[58] Thus, under the sliding scale approach, the two prongs are viewed in tandem, permitting the court to make a finding of unconscionability if the overall weight of the facts and circumstances favors intervention.[59]

equitable. Equity may intervene to change the terms of a contract if the unconscionable conduct is serious enough to justify the court's interference.").

56. *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) ("The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability . . . . But they need not be present in the same degree."); Gonski v. Second Judicial Dist. Court of Nev. *ex rel*. Washoe, 245 P.3d 1164, 1169 (Nev. 2010) ("Although a showing of both types of unconscionability is necessary before an arbitration clause will be invalidated . . . a strong showing of procedural unconscionability mean[s] that less substantive unconscionability [is] required." (citing D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004))); Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006) ("Courts generally have applied a sliding-scale approach to determine overall unconscionability, considering the relative levels of both procedural and substantive unconscionability."); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009) ("While there is a greater likelihood of a contract's being invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all."); Brown *ex rel.* v. Genesis Healthcare Corp., 724 S.E.2d 250, 289 (W. Va. 2011) (per curiam) ("We perceive a contract term is unenforceable if it is both procedural and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' . . . ."), *vacated on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).

57. SLAWSON, BINDING PROMISES, *supra* note 28, at 142.

58. FARNSWORTH ON CONTRACTS, *supra* note 27, § 4.28; WHITE & SUMMERS, *supra* note 27, § 4-7.

59. *See, e.g.*, Kinney v. United Healthcare Servs., Inc., 83 Cal. Rptr. 2d 348, 352 (Ct. App. 1999) ("Although both elements must be present before a contract or contract provision is rendered unenforceable on grounds of unconscionability, they are reviewed in tandem such that 'the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause.'" (quoting Carboni v. Arrospide, 2 Cal. Rptr. 845, 849 (Ct. App. 1991))). *See also Gonski*, 245 P.3d at 1169 ("[A] strong showing of procedural unconscionability meant that less substantive unconscionability was required. The

Because the unconscionability analysis—under any approach—remains a fact-intensive inquiry, generalizations about the doctrine are difficult to make. However, careful study of unconscionability jurisprudence points toward the conclusion that the sliding scale approach amounts to a relaxation in the application of the traditional unconscionability analysis. This relaxation applies to each prong of the two-part framework and to the ultimate finding of unconscionability as a whole.

1. The Procedural Prong

First, the sliding scale approach to unconscionability represents some courts' willingness to make an overall finding of unconscionability on the basis of relatively limited evidence supporting the procedural prong. Significantly, some courts employing the sliding scale approach view the mere existence of a consumer contract of adhesion as sufficient to satisfy the procedural unconscionability prong without additional indicia of deficient assent. For example, courts in California, where the sliding scale approach has been utilized for some time, are generally willing to find procedural unconscionability established by the existence of a typical standard form contract.[60] Courts in other jurisdictions,

reverse is true also . . . ." (citing D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004))); *Delta Funding Corp.*, 912 A.2d at 111 ("Courts generally have applied a sliding-scale approach to determine overall unconscionability, considering the relative levels of both procedural and substantive unconscionability."); *Cordova*, 208 P.3d at 908 ("Procedural and substantive unconscionability often have an inverse relationship. The more substantively oppressive a contract term, the less procedural unconscionability may be required for the court to conclude that the offending term is unenforceable."); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 370 (N.C. 2008) ("The presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa."); *Brown*, 724 S.E.2d at 289 ("[C]ourts should apply a sliding scale in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa."); Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 165 (Wis. 2006) ("A determination of unconscionability requires a mixture of both procedural and substantive unconscionability that is analyzed on a case-by-case basis. The more substantive unconscionability present, the less procedural unconscionability is required, and vice versa."). The sliding scale approach is also termed the "balancing approach" because of this weighting feature. *See, e.g.*, WHITE & SUMMERS, *supra* note 27, § 4-7.

60. *See, e.g.*, Gentry v. Superior Court, 165 P.3d 556, 572 (Cal. 2007) ("The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, 'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *overruled on other grounds by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011))).

including New Jersey[61] and North Dakota,[62] have taken a similar approach. Thus, unlike the conventional approach, under which the enforceability of form contracts is strongly presumed, in these states the sliding scale potentially allows for a more lenient test of procedural unconscionability. Finding that procedural unconscionability is established by the mere existence of a form contract could permit the court to turn to the question of substantive unconscionability without becoming mired in details, such as the appearance of the contract, the educational level of the consumer, or whether the consumer had sufficient time to review and consider the contractual provisions.[63]

This relaxed approach to procedural unconscionability reflects what the drafters had in mind when the doctrine was first incorporated into the UCC. Indeed, a celebrated pre-UCC decision, *Campbell Soup Co. v. Wentz*, employed a sliding scale approach and was cited in the official comments to section 2-302 as an exemplar of the doctrine.[64] In *Wentz*, the Third Circuit Court of Appeals refused to enforce a contract it found to be "too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience."[65] The court's holding in *Wentz* was based almost entirely on the fairness of the substantive provisions of the contract, while the only discussion of "procedural" fairness was a bare statement that the contract was a preprinted form contract supplied by the defendant.[66]

Not all courts, however, address the sliding scale approach in the same manner. Therefore, the willingness to find consumer contracts of adhesion procedurally unconscionable as a matter of course is not uniformly observed. Some courts employing the sliding scale approach

61. *See, e.g.*, Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 96–97 (N.J. 2006) ("The determination that a contract is one of adhesion, however, 'is the beginning, not the end, of the inquiry' . . . . A sharpened inquiry concerning unconscionability is necessary when a contract of adhesion is involved." (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 605 A.2d 681, 686 (N.J. 1992))); Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006) ("This Court has recognized that contracts of adhesion necessarily involve indicia of procedural unconscionability."). *But see* Stelluti v. Casapenn Enters., LLC, 1 A.3d 678, 687 (N.J. 2010) ("Although a contract of adhesion may require one party to choose either to accept or reject the contract as is, the agreement nevertheless may be enforced.").

62. *See* Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 925 (N.D. 2005) ("When one party is in such a superior bargaining position that it totally dictates all terms of the contract and the only option presented to the other party is to take it or leave it, some quantum of procedural unconscionability is established. The party who drafts such a contract of adhesion bears the responsibility of assuring that the provisions of the contract are not so one-sided as to be unconscionable.").

63. *Delta Funding Corp.*, 912 A.2d at 111.

64. U.C.C. § 2-302 cmt. 1 (1952).

65. 172 F.2d 80, 83 (3d Cir. 1948).

66. *Id.* at 83.

refuse to find adhesionary contracts per se unconscionable, demanding additional, specific evidence that the consumer did not have a meaningful opportunity to read and understand the contract. These courts may scrutinize the age, socioeconomic status, and sophistication of the complaining party and scour the contracting environment for evidence of pressure tactics.[67] Other courts continue to require evidence of procedural defects that rise almost to the level of fraud or duress before finding the procedural unconscionability prong satisfied.[68] Courts that continue to apply the procedural prong with specificity defend the practice on the ground that a lessened standard of procedural unconscionability would result in the invalidation of too many contracts. As the Illinois Supreme Court stated:

> [Contracts of adhesion] are a fact of modern life. Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans, and other products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable.[69]

Additionally, some courts have found that objective indications that a consumer enjoyed an opportunity to read and understand the contract could serve to insulate a contract of adhesion from procedural unconscionability.[70] For example, the New Jersey Supreme Court, which adopted the sliding scale approach in 2006,[71] recently held in *Stelluti v. Casapenn Enterprises, LLC* that a "fairly typical adhesion

67. *See, e.g.*, Westmoreland v. High Point Healthcare Inc., 721 S.E.2d 712, 717 (N.C. Ct. App. 2012) (noting that the plaintiff was an "ordinary consumer" and the defendant a "sophisticated health care services provider"); Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 285 (W. Va. 2011) (per curium) (finding that procedural unconscionability involves a variety of inadequacies, such as "literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting" (quoting Muhammad v. Cnty. Bank, 912 A.2d 88, 96 (N.J. 2006))), *vacated on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).

68. *See, e.g.*, Adler v. Fred Lind Manor, 103 P.3d 773, 784 (Wash. 2004) ("If [defendant's] representative threatened to fire [plaintiff] for refusing to sign the agreement despite the fact that [plaintiff] raised concerns with its terms or indicated a lack of understanding, the manner of the transaction would lend support to [plaintiff's] claim of procedural unconscionability . . . . However, if as [defendant] contends, [its representative] explained the document and/or offered to answer [plaintiff's] concerns or questions, such facts will not lend support to [plaintiff's] claim of procedural unconscionability.").

69. Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 266 (Ill. 2006).

70. *See, e.g.*, Dotson v. Amgen, Inc., 104 Cal. Rptr. 3d 341, 346–47 (Ct. App. 2010) (finding a "minimal" degree of procedural unconscionability where the employment contract was a contract of adhesion but was written in clear language, arbitration was stated in bold numerous times as a condition of employment, and the employee was a highly educated attorney who was not "rushed or coerced").

71. *See* Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006).

contract" could not be found procedurally unconscionable where the complaining consumer had ample time to review and consider the contractual provisions and could have contracted elsewhere for the same services with less onerous terms.[72] *Stelluti* represents a shift in the law in New Jersey. Just four years earlier in *Delta Funding Corp. v. Harris*, the same court held that the fact that a contract was a consumer contract of adhesion was "sufficient" to find the contract procedurally unconscionable, concluding that the resolution of "certain [disputed] facts surrounding [plaintiff's] signing of the contract that suggest[ed] a high level of procedural unconscionability" was unnecessary.[73]

2. The Substantive Prong

Many courts employing the sliding scale approach have also visibly relaxed the strict requirements for substantive unconscionability. Where courts once routinely required "conscience-shocking" or "outrageous" unfairness to support a finding of substantive unconscionability, courts employing a sliding scale increasingly look to whether the terms are "unreasonably one-sided" or "commercially unreasonable."[74] In rejecting the conventional standard of unconscionability—"'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other'"[75]—the New Mexico Supreme Court noted that "[t]he repetition of this unhelpful terminology from a bygone age only serves to confuse the unconscionability issues without serving any constructive purpose."[76] The Illinois Supreme Court recently rejected a similarly "demanding" standard that the offending provision must be "'grossly one-sided'" such that "'only one under delusion'" would agree to it, calling such descriptions "under inclusive."[77]

72. Stelluti v. Casapenn Enters., 1 A.3d 678, 688 (N.J. 2010).

73. 912 A.2d at 111. This change in approach may be explained by differences in the facts of the two cases. Unlike the plaintiff in *Stelluti*, the plaintiff in *Delta Funding* was described as "a seventy-eight-year-old woman with only a sixth-grade education and little financial sophistication." *Id.* at 108.

74. *See, e.g.*, Little v. Auto Stiegler, Inc., 130 Cal. Rptr. 2d 892, 898 (Ct. App. 2003) (noting that substantively unconscionable contracts can be generally characterized as one-sided); *Kinkel*, 857 N.E.2d at 267 (citing Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006)) (same); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009) ("Contract provisions that unreasonably benefit one party over another are substantively unconscionable."); Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 166 (Wis. 2006) (explaining that analyzing unconscionability requires looking at the terms of the agreement and determining whether it is unconscionable).

75. *Cordova*, 208 P.3d at 909 (citing Hume v. United States, 132 U.S. 406, 411 (1889)).

76. *Id.* at 910.

77. *Kinkel*, 857 N.E.2d at 268–69 (quoting Basselen v. Gen. Motors Corp., 792 N.E.2d 498, 507 (Ill. App. Ct. 2003)); *In re* Estate of Croake, 578 N.E.2d 567, 569 (Ill. App. Ct. 1991),

Clear relaxation of the substantive unconscionability standard is not, however, a universal feature of the sliding scale approach. Some courts continue to require evidence of substantive unconscionability to meet a very high threshold, even while simultaneously embracing the sliding scale approach and touting its flexibility.[78] For example, one recent California appellate court specifically reaffirmed that the appropriate standard for substantive unconscionability involves "harsh" or "oppressive" terms that "shock the conscience," adding that "[t]he phrases 'harsh,' 'oppressive,' and 'shock the conscience' are not synonymous with 'unreasonable.'"[79] According to the court, a substantive unconscionability inquiry based on mere reasonableness "would inject an inappropriate level of judicial subjectivity into the analysis."[80] Another court, taking a similar approach, explained that the more conventional formulations of substantive unconscionability are preferable to a reasonableness standard because they are "more specific, more exacting, and more demanding . . . ."[81]

Additionally, courts that have applied a relaxed standard of substantive unconscionability have not clearly done so as a consequence of the sliding scale approach. On the one hand, the increased willingness of some courts to address the reasonableness of contractual provisions may simply reflect that some courts are more inclined to intervene in adhesive contracts on behalf of consumers, regardless of the particular approach to unconscionability applicable in a given jurisdiction. On the other hand, the recognition that "unreasonable" commercial behavior is sufficiently substantively unconscionable to justify the invalidation of a particular provision is perfectly consistent with a sliding scale or balancing approach to the doctrine. Provided that clear evidence of procedural defects in the contracting process is present, "unreasonable" commercial behavior may be egregious enough to tip the scale in favor of an overall finding that the contract is unconscionable.

3. The Two Prongs in Tandem

In theory, the most salient feature of the sliding scale approach is that it permits courts to view substantive and procedural unconscionability

overruled by Kinkel, 857 N.E.2d 250 (Ill. 2006).

78. *See, e.g.*, Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002) ("The second factor—substantive unconscionability—simply suggests the exchange of obligations so one-sided as to shock the court's conscience.").

79. Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 809 (Ct. App. 2005).

80. *Id.*

81. Cal. Grocers Ass'n v. Bank of Am., 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994).

"in tandem" rather than independent of one another, so that a greater quantity of one type of unconscionability could "make up" for a smaller quantity of the other.[82] Thus, one would expect courts that find procedural unconscionability based on scant evidence to require very strong evidence of substantive unconscionability in order to make an overall finding that a contractual provision is invalid. Conversely, when a contract contains unfair substantive provisions but falls short of "conscience-shocking," one might expect the court to require more extreme evidence of involuntary choice before invalidating the offending provision.[83]

In practice, however, courts seldom apply the sliding scale approach with this type of precision. Rather, most courts that espouse the sliding scale approach provide a brief description of its theoretical framework, then perform a fact-specific inquiry without ever engaging in any meaningful discussion of how the relative weight of each prong factors into the overall determination of unconscionability.[84] Moreover, courts have provided little explanation as to why a balancing approach to unconscionability represents an improvement in the application of the doctrine. Courts that favor the balancing method tend to defer to the "trend" without further discussion,[85] while others explain merely that the approach is supported by "a good deal of sense" given the "'amorphous'" nature of the doctrine of unconscionability.[86]

82. *See supra* note 59 (listing several cases that treat substantive and procedural unconscionability in practice).

83. *See, e.g.*, Dotson v. Amgen, Inc., 104 Cal. Rptr. 3d 341, 346–47 (Ct. App. 2010) (finding "minimal" procedural unconscionability and thus requiring a correspondingly "high" degree of substantive unconscionability).

84. *See, e.g.*, Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 165–76 (Wis. 2006) (concluding curiously, after extensive discussion of each prong, that "there is a sufficient quantum of both procedural and substantive unconscionability to render the arbitration provision invalid"). *But see* Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 634–36 (Mo. Ct. App. 1979) (performing a sliding scale analysis after analyzing each prong independently).

85. *See, e.g.*, Helstrom v. N. Slope Borough, 797 P.2d 1192, 1200 (Alaska 1990) (electing to follow the sliding scale approach set out in the Restatement); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 22 (Mo. 2010) ("Under Missouri law unconscionability can be procedural, substantive or a combination of both."), *vacated on other grounds*, 131 S. Ct. 2875 (2011) (mem.); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009) ("The more substantively oppressive a contract term, the less procedural unconscionability may be required for a court to conclude the offending term is enforceable."); State v. Wolowitz, 468 N.Y.S.2d 131, 145 (App. Div. 1983) ("Generally, there must be a showing of both lack of a meaningful choice and the presence of contract terms that unreasonably favor one party."); *Wis. Auto*, 714 N.W.2d at 165 (defining unconscionability as, "the absence of a meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party").

86. *See, e.g.*, Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 922–23 (Super. Ct. Ch. Div.

C. The Single-Prong Approach

As the sliding scale approach to unconscionability has gained popularity, a growing minority of courts have applied a "single-prong" approach to the doctrine, under which extreme evidence of one type of unconscionability alone is used to justify an overall finding of unconscionability, without inquiry into the second prong.[87] This variation represents a significantly more liberal application of the doctrine. Just as the sliding scale approach remains largely unexplored by both commentators and courts, the merit, utility, and theoretical underpinnings of the single-prong approach are also almost entirely undeveloped, even as additional jurisdictions embrace it. Careful study of the single-prong approach—both its rhetoric and its actual application by courts—reveals that even though the single-prong approach has the potential to transform the doctrine of unconscionability, it is narrowly applied by modern courts.

1. Substantive Unconscionability Alone

First, using the single-prong approach, a number of courts have premised an overall finding of unconscionability on the basis of substantive unfairness alone. A well-known example is *Brower v. Gateway 2000, Inc.*, in which a New York state court found an arbitration provision contained in several standard form computer and software sales agreements substantively, though not procedurally, unconscionable.[88] According to the court, "[w]hile it is true that, under New York law, unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable."[89] Although *Brower* has been criticized for its extreme application of the unconscionability doctrine,[90] other courts have similarly found contract terms unconscionable on the basis of substantive unconscionability alone.[91] Thus, while the

2002) (citing Kugler v. Romain, 279 A.2d 640, 651 (N.J. 1971)).

87. *See supra* note 24 (citing state supreme court decisions that adopted a single-prong approach).

88. 676 N.Y.S.2d 569, 574–75 (App. Div. 1998).

89. *Id.* at 574.

90. *See, e.g.*, Amy J. Schmitz, *Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses*, 49 S. TEX. L. REV. 841, 859–60 (2008) (criticizing *Brower* for electing not to enforce the provision requiring arbitration before the ICC); Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187, 199–200 (2008) ("[T]he contract gave the plaintiffs an 'unqualified right' within thirty days of purchase 'to return the merchandise because the goods or terms are unsatisfactory or for no reason at all.'").

91. *See, e.g.*, Helstrom v. N. Slope Borough, 797 P.2d 1192, 1200 (Alaska 1990) (holding that a liquidated damages clause was unenforceable based upon substantive unconscionability alone);

substantive unconscionability-alone approach was exceptional just two decades ago,[92] courts employ it more commonly today.

However, the substantive unconscionability-only approach is limited in its breadth, as it is generally employed in cases involving excessive pricing[93] or extreme limitation of remedies clauses,[94] most recently in the form of arbitration provisions[95] and class action bans.[96]

State *ex rel.* Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006) (noting that if a court determines a contract, or any particular clause of the contract, to have been unconscionable at the time the contract was made, the court may find the contract or that particular term unenforceable); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 910 (N.M. 2009) (holding that the arbitration provisions of a contract were so substantively one-sided that the court did not consider procedural unconscionability before declaring the provisions unenforceable); Fiser v. Dell Computer Corp., 188 P.3d 1215, 1221 (N.M. 2008) (holding a contract substantively unconscionable and unenforceable without considering the procedural history of the contract); Adler v. Fred Lind Manor, 103 P.3d 773, 786–88 (Wash. 2004) (ordering the trial court to require further discovery regarding substantive unconscionability upon remand).

92. *See* Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 942 n.14 (1986) (reporting that (at the time of the article), "[s]ince 1971, no court has declared a contract unconscionable solely on substantive unconscionability grounds").

93. *See, e.g.*, Toker v. Perl, 247 A.2d 701, 703 (N.J. Super. Ct. Law Div. 1968) ("It is the opinion of the court that the exorbitant price of the freezer makes the contract unconscionable and therefore unenforceable."); Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966) ("The court finds that the sale of the appliance at the price and terms indicated in this contract is shocking to the conscience."), *rev'd on other grounds*, 281 N.Y.S.2d 964 (App. Term 1967); Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532, 541 (Sup. Ct. 1976) ("To charge them $67,000 for carvings worth less than half that amount is unconscionable."); Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969) ("[T]he sale of a refrigerator costing $348 for $900 plus credit charges of $245.88 was unconscionable as a matter of law."); Toker v. Westerman, 274 A.2d 78, 81 (N.J. Dist. Ct. 1970) (holding that the plaintiff was entitled to receive reasonable profit from the sale of a good); Am. Home Improvement, Inc. v. MacIver, 201 A.2d 886, 889 (N.H. 1964) (holding a contract unconscionable that required a payment of $1,609 "for goods and services valued at far less"). These price-disparity cases have "dwindled to a trickle" over time. *See* WHITE & SUMMERS, *supra* note 27, § 4-5.

94. WHITE & SUMMERS, *supra* note 27, § 4-6 (noting that "remedy meddling" can take many forms, including liquidated damages clauses, limitations on consequential damages, and warranty disclaimers).

95. *See, e.g.*, *Cordova*, 208 P.3d at 910 ("Applying the settled standard of New Mexico unconscionability law, we conclude that World Finance's self-serving arbitration scheme it imposed on its borrowers is so unfairly and unreasonably one-sided that it is substantively unconscionable."); Brower v. Gateway 2000, 676 N.Y.S.2d 569, 574 (App. Div. 1998) (upholding an arbitration clause as enforceable).

96. *See, e.g.*, *Fiser*, 188 P.3d at 1221 (finding a New Mexico law on class actions bans unconscionable for contravening public policy). The U.S Supreme Court's recent ruling in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), seriously curtails the use of the unconscionability doctrine to strike down arbitration agreements containing class action waivers. In *Concepcion*, the Court overturned *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), a California Supreme Court decision holding class action bans in arbitration agreements unconscionable under state law. *Concepcion*, 131 S. Ct. at 1750. The Court held that *Discover Bank* was preempted by the Federal Arbitration Act because it "interfere[d] with arbitration" by

Additionally, the majority approach still requires some showing of procedural unconscionability, however small, in order to justify invalidating an offending provision.[97]

2. Procedural Unconscionability Alone

Most courts have not expanded the sliding scale approach to find unconscionability on the basis of procedural unconscionability alone. Although a number of courts have suggested that procedural unconscionability alone would suffice,[98] very few courts have actually invalidated contracts on the basis of purely procedural defects.[99] Indeed, several courts have rejected the possibility that an overall finding of unconscionability could rest on procedural deficiencies alone.[100] Other courts, though embracing the single-prong approach as

permitting "any party to a consumer contract to demand [classwide arbitration]." *Id.* For an excellent discussion of the ramifications of *Concepcion*, including the potential limitations on the Court's ruling, see Michael A. Helfand, *Purpose, Precedent, and Politics: Why* Concepcion *Covers Less than You Think*, 4 Y.B. ON ARB. & MEDIATION (forthcoming 2012).

97. *See, e.g.*, Gentry v. Superior Court, 165 P.3d 556, 573 (Cal. 2007) ("The logical conclusion is that a court would have no basis under common law unconscionability analysis to scrutinize or overturn even the most unfair or exculpatory of contractual terms."), *overruled by Concepcion*, 131 S. Ct. 1740 (2011), *and* Iskanian v. CLS Transp. L.A., 142 Cal. Rptr. 3d 372 (Ct. App. 2012); Riggs Nat'l Bank of Washington, D.C. v. District of Columbia, 581 A.2d 1229, 1251 (D.C. 1990) (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)) (noting that establishing unconscionability requires both that one party lacked a "meaningful choice" and that the contract's terms favor the other party); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 265 (Ill. 2006) (citing Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006)) (noting that a court will likely find a contract to be unconscionable in a consumer context where bargaining power is unequal and "the consequential damages clause is on a pre-printed form"); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 923–24 (N.D. 2005) (holding that both procedural and substantive unconscionability must be present for a term or contract to be deemed unenforceable); Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 285 (W. Va. 2011) (per curium) ("Under West Virginia law, we analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability."), *vacated on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 164 (Wis. 2006) ("A determination of unconscionability requires a mixture of both procedural and substantive unconscionability.").

98. *See, e.g.*, Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 409–10 (Ill. App. Ct. 1980) ("Unconscionability can be either procedural or substantive or a combination of both.").

99. *See, e.g.*, E. Ford, Inc. v. Taylor, 826 So. 2d 709, 717 (Miss. 2002) ("Because we find that the arbitration clause in this case is procedurally unconscionable, we find it unnecessary to address [plaintiff's] . . . arguments regarding substantive unconscionability.").

100. *See, e.g.*, Commc'ns Maint., Inc. v. Motorola, Inc., 761 F.2d 1202, 1210 (7th Cir. 1985) (holding a contract enforceable after analyzing only substantive unconscionability); NEC Techs., Inc. v. Nelson, 478 S.E.2d 769, 773 n.6 (Ga. 1996) (quoting Fotomat Corp. of Fla. v. Chanda, 464 So. 2d 626, 629 (D.C. Fla. 1985)) (explaining that courts require a certain quantum of both procedural and substantive unconscionability); Stelluti v. Casapenn Enters., 1 A.3d 678, 687 n.10 (N.J. 2010) ("[A] finding of a high level of procedural unconscionability alone may not render an

applied to substantive unconscionability, remain agnostic on the issue of whether procedural unconscionability suffices to justify judicial intervention.[101]

3. Justifications for the Single-Prong Approach

The single-prong approach to unconscionability is in no way novel. Indeed, in the seminal case of *Williams v. Walker-Thomas Furniture Co.*, the court alluded to the possibility that substantive unconscionability alone may suffice to invalidate a contract.[102] The official commentary to the Restatement's unconscionability provision likewise recognizes the validity of such an approach in exceptional circumstances,[103] as do some primary contracts treatises.[104] But the theoretical justifications for the single-prong approach remain largely unexplored. The most significant expositions of the single-prong approach have been conducted by courts rather than commentators, although most courts that have embraced a single-prong approach have failed to explicitly provide any grounds for doing so.[105]

According to one explanation, the existence of especially severe substantive unconscionability implies deficiencies in assent. In other words, if the terms of the contract are extremely one-sided in favor of the merchant, it must be presumed that the consumer lacked either knowledge of, or meaningful choice with respect to, the contractual provisions; otherwise, the consumer would not have agreed to the

entire agreement unenforceable."); Carey v. Lincoln Loan Co., 125 P.3d 814, 828 (Or. Ct. App. 2005) ("The primary focus, however, appears to be relatively clear: substantial disparity in bargaining power combined with terms that are unreasonably favorable to the party with the greater power may result in a contract or contractual provision being unconscionable.").

101. *See, e.g.*, Adler v. Fred Lind Manor, 103 P.3d 773, 782 ("[S]ince Adler has yet to prove a valid claim of procedural unconscionability, we decline to consider whether it alone will support a claim of unconscionability.").

102. 350 F.2d 445, 449 n.7 (D.C. Cir. 1965) ("[A] one-sided bargain is itself evidence of the inequality of the bargaining parties."). *See* SLAWSON, BINDING PROMISES, *supra* note 28, at 142–43.

103. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981) ("Theoretically, it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable. Ordinarily, however, an unconscionable contract involves other factors as well as an overall imbalance.").

104. *See, e.g.*, WHITE & SUMMERS, *supra* note 27, § 4-4, at 158 ("[S]ubstantive unconscionability alone can be enough."); MURRAY ON CONTRACTS, *supra* note 27, § 96[B][2][b], at 557 ("Other courts are not convinced that both types [of unconscionability] are necessary.").

105. *See, e.g.*, Glassford v. BrickKicker, 35 A.3d 1044, 1048–49 (Vt. 2011) ("The superior court was mistaken in assuming that the presence of procedural unconscionability is required to void a contract based on it containing unconscionable terms."); Val Preda Leasing, Inc. v. Rodriguez, 540 A.2d 648, 652 (Vt. 1987) (holding a contract unenforceable despite not finding the formation of the contract procedurally unconscionable).

prejudicial terms. For example, the Arizona Supreme Court, in holding that the substantive unconscionability of a loan agreement was serious enough to justify non-enforcement of its provisions, explained that "[t]he apparent injustice and oppression of these security provisions not only may constitute substantive unconscionability but also may provide evidence of procedural unconscionability."[106] From this perspective, the single-prong approach is simply the sliding scale approach in disguise: *both* procedural and substantive deficiencies are factored into the determination of a contract's validity, but only one type of deficiency is immediately apparent. In this way, the single-prong approach may be viewed as an extension of the sliding scale approach rather than a distinct approach to the doctrine.

According to another view, the two prongs are viewed as distinct in their content, but extreme evidence of substantive unconscionability is simply not to be tolerated, even in the absence of procedural deficiencies. Here, substantive oppression is enough to invalidate a provision, and no implication of procedural unfairness is required. Thus, one Florida appellate court reasoned:

> "[W]here it is perfectly plain to the court that one party . . . has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, . . . a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness."[107]

This approach views the courts' role as one of policing the outer limits of contractual fairness and is reserved for the most egregious cases of overreaching.

At least one court, in defending the substantive unconscionability-alone approach, has equated the continued requirement of procedural unconscionability with excessive formalism on the part of courts and commentators. According to the Arizona Supreme Court, the procedural/substantive dichotomy is "based more on the historical reluctance of courts to disturb contracts than on valid doctrinal underpinning."[108] The court also observed that nothing in the text of the UCC suggests requiring a finding of procedural unconscionability and further pointed out that section 2-317 of the UCC, which provides for the unconscionability of contractual provisions limiting

106. Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 60 (Ariz. 1995) (citing DOBBS, *supra* note 27, § 10.7, at 706–07).

107. Hialeah Auto., LLC v. Basulto, 22 So. 3d 586, 592 n.4 (Fla. Dist. Ct. App. 2009) (quoting Steinhardt v. Rudolph, 422 So. 2d 884, 889 (Fla. Dist. Ct. App. 1982)).

108. *Maxwell*, 907 P.2d at 59.

consequential damages for injury to the person, contemplates a finding of unconscionability on the basis of substantive unconscionability alone.[109]

Although courts that explicitly reject the substantive unconscionability-alone approach have rarely provided any clear reasons for doing so, the most plausible explanation for requiring evidence of procedural unconscionability is that some deficiency in the parties' assent is needed to justify judicial intervention in the private ordering of affairs. In rejecting a single-prong approach, the California Supreme Court has explained:

> [A] conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated poorly, it is not the court's place to rectify these kinds of errors or asymmetries.[110]

In other words, courts should not engage in any assessment of the substantive fairness of freely negotiated contracts.

The merits of a procedural unconscionability-alone approach to standard contracts remain even more mysterious. A handful of commentators have defended the possibility that procedural deficiencies could be severe enough to justify relief in the absence of substantive unfairness. According to these writers, extreme procedural unconscionability undermines consent in the same manner as fraud or duress and thus should not be tolerated.[111] However, recognizing that the bulk of consumer contracts today are not freely negotiated, most courts and scholars maintain that invalidating contracts on procedural foundations alone would produce so much instability in the marketplace as to be counterproductive.[112] Moreover, there are practical barriers to a procedural unconscionability-alone approach. Most significantly, unless the substantive rights of a party are involved, the validity of the

109. *Id.*

110. Gentry v. Superior Court, 165 P.3d 556, 573 (Cal. 2007), *overruled by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), *and* Iskanian v. CLS Transp. L.A., 142 Cal. Rptr. 3d 372 (Ct. App. 2012).

111. *See* SLAWSON, BINDING PROMISES, *supra* note 28, at 143; Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 796 (2004) [hereinafter Stempel, *Equilibrium*] ("Logic would appear to support a role for procedural unconscionability standing alone.").

112. Stempel, *Equilibrium*, *supra* note 111, at 796 ("One at least hopes that most courts would not take a 'no harm, no foul' approach to such procedural abuses.").

contract is unlikely to be litigated. As one court observed, "No matter how the contract came about, it would be unlikely that a party would complain—or a court would listen—if the contract was otherwise fair or reasonable."[113]

D. The Promise of the Sliding Scale

The conventional wisdom is that most courts employ some variation of the sliding scale approach when addressing unconscionability claims.[114] As the above description makes clear, however, the sliding scale approach is far from settled law.[115] While courts in a majority of states have explicitly adopted a sliding scale approach, a number of jurisdictions have not clearly espoused this more flexible version of the unconscionability doctrine.[116] Furthermore, a minority of courts continue to utilize the conventional two-prong approach to unconscionability, even while an opposed, but growing, minority have embraced a single-prong approach to the doctrine.

Conflict rages within individual jurisdictions as well. For example, the uncertain state of the sliding scale approach was recently revealed by an Eleventh Circuit decision certifying whether Florida law recognized the doctrine and, if so, whether unconscionability could be based upon substantive unconscionability alone.[117] The court observed that Florida appellate jurisprudence is divided, with some courts explicitly rejecting the sliding scale,[118] others endorsing it while

113. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 n.13 (N.J. Super. Ct. Ch. Div. 2002). *See* Paul Bennett Marrow, *The Unconscionability of a Liquidated Damages Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 50 n.37 (2001) ("If an otherwise fair and just agreement is entered into as a result of procedural irregularities, an overreaching for example, one wonders—so what?").

114. *See supra* note 27 (citing major contracts treatises that discuss the prevalence of the sliding scale approach).

115. *See Sitogum*, 800 A.2d at 921–22 (noting disagreement among jurisdictions); Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 58 (Ariz. 1995) (same). *See also* Stempel, *Equilibrium*, *supra* note 111, at 795 (noting that some cases require both forms of unconscionability while others only require one).

116. For example, the supreme courts of Alabama and Indiana have yet to consider a sliding scale or balancing approach to unconscionability, though the jurisprudence of these states suggest that a conventional approach is preferred. *See, e.g.*, Blue Cross Blue Shield of Ala. v. Rigas, 923 So. 2d 1077, 1086–87 (Ala. 2005); DiMizio v. Romo, 756 N.E.2d 1018, 1023–24 (Ind. Ct. App. 2001).

117. Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1133–34 (11th Cir. 2010).

118. *Id.* at 1134 (citing Bland v. Health Care & Ret. Corp. of Am., 927 So. 2d 252, 257 (Fla. Dist. Ct. App. 2006)); *see* Mobile Am. Corp. v. Howard, 307 So. 2d 507, 508 (Fla. Dist. Ct. App. 1975) ("Of those cases dealing with price at all, most require, in addition to a grossly excessive price, some element of nondisclosure, fraud, overreaching, or manifestly unequal bargaining position.") (emphasis omitted)).

rejecting a single-prong approach,[119] and a third camp explicitly finding that substantive unconscionability alone will not suffice.[120] The Florida Supreme Court has declined to reconcile the conflict.[121] Showing similar disagreement, the Ohio Supreme Court recently reaffirmed its adherence to the conventional approach to unconscionability[122] over the vigorous objection of a dissenting member.[123]

The continued multiplicity of approaches to unconscionability is unsurprising given that the rationales for the sliding scale and single-prong approaches remain largely undefined. Moreover, it remains unclear whether courts consider the single-prong approach as an extension of the sliding scale approach or a stand-alone application of the doctrine. However, the failure of courts and commentators to fully explain the motivations behind the evolving approaches to unconscionability should not lead to a conclusion that these approaches cannot be justified. On the contrary, a sliding scale approach to unconscionability can be defended both for its potential to align the unconscionability analysis with interdisciplinary research regarding consumer behavior and for its capacity to balance formalist concerns about judicial regulation with the need for judicial oversight of unfair terms in standard form contracts.

II. SOLVING THE DILEMMA OF ASSENT

Although scholars disagree fiercely about the appropriate solution to the problems posed by standardized forms, there is little doubt that the treatment of standard contracts is one of the most important puzzles facing modern contract law[124]—and perhaps one of the most difficult.[125]

119. *Pendergast*, 592 F.3d at 1134 (citing Romano v. Manor Care, Inc., 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003)).

120. *Id.* at 1134 (citing Nat'l Fin. Servs., LLC v. Mahan, 19 So. 3d 1134, 1136–37 (Fla. Dist. Ct. App. 2009); *see* Belcher v. Kier, 558 So. 2d 1039, 1040 (Fla. Dist. Ct. App. 1990) (holding that appellees did not establish both unconscionability prongs).

121. *See* Pendergast v. Spring Nextel Corp., No. SC10-19, 2012 WL 2948594, at *1 (Fla. July 17, 2012).

122. Hayes v. Oakridge Home, 908 N.E.2d 408, 412 (Ohio 2009).

123. *See id.* at 420–21 (Pfeiffer, J., dissenting) (advocating for a sliding scale approach).

124. *See, e.g.*, LLEWELLYN, DECIDING APPEALS, *supra* note 5, at 362 ("[F]ew 'private' law problems . . . remotely rival the[ir] importance . . . ."); Scott J. Burnham, *Incorporating the Doctrine of Reasonable Expectations in Article 2*, 11 DUQ. BUS. L.J. 217, 217 (2009) ("The greatest problem facing modern contract law is how to deal with the contract of adhesion."). *See also* Warkentine, *supra* note 5, at 485 (noting the recent resurgence of scholarly interest in standard form contracts).

125. *See, e.g.*, Barnes, *supra* note 2, at 229 ("[T]here is no uniform line of thought regarding the appropriate treatment of [standard form] contracts."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983) [hereinafter Rakoff, *Adhesion*]

Standard form contracts pervade the consumer arena.[126] The proliferation of standard agreements follows their indispensable character—the mass production and distribution of goods, software, and services render form contracts vital to the continued functioning of the economy.[127] By their very nature, standard form contracts are intended for repeated use by the drafter.[128] Form contracts, therefore, are efficient because they obviate the need to consider and draft contract terms on a case-by-case basis, and this efficiency translates directly to savings for the vendor.[129] The reduction in transaction costs facilitated by standardized forms in turn keeps prices lower, thus also benefiting consumers.[130]

Savings also flow from the fact that the drafter can, and often does, effectively shift risks comprised within the transaction.[131] Common risk-shifting clauses incorporated into form contracts include: warranty disclaimers,[132] liquidated damages provisions,[133] exculpatory

(calling the problem of form contracts "inherently intractable").

126. *See* Barnes, *supra* note 2, at 233 ("The practice of standard form contracting is a universally accepted and acknowledged phenomenon."); Horton, *Flipping the Script*, *supra* note 1, at 431 ("Virtually all modern contracts are standard forms."); Korobkin, *Bounded Rationality*, *supra* note 8, at 1203 ("[N]early all commercial and consumer sales contracts are form driven."); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 973 (noting that the "real world" of sales "tends to be dominated by form contracts, rather than contracts that are actually negotiated").

127. *Cf.* Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 201 (2010) ("Most frequently, the costs of negotiating individual contracts will exceed the potential profit from 'routine' transactions.").

128. Warkentine, *supra* note 5, at 469.

129. Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 944. The primary transaction costs avoided by the use of standardized forms are the costs associated with drafting and analyzing the effect of new contract provisions. Steven R. Salbu, *Evolving Contract as a Device for Flexible Coordination and Control*, 34 AM. BUS. L.J. 329, 376–77 (1997).

130. Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002) [hereinafter Hillman, *Rolling Contracts*].

131. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943). *See* Russell A. Hakes, *Focusing on the Realities of the Contracting Process—An Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 115 (2011) (describing "risk allocation provisions" in non-negotiated contracts).

132. *See, e.g.*, Kessler, *supra* note 131, at 631–32 (positing that the "desire to avoid judicial risks" motivated the use of warranty disclaimers in the machine industry); Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 15–16 (2009) ("[O]ur data shows that licensors are not reticent to make rather bold claims about their products on their websites only to reverse position on their standard forms. These circumstances are likely to mislead consumers, regardless of whether they read their e-standard forms, especially if the claims are sufficiently clear and distinct to constitute express warranties and the consumer reads the promises and representations shortly before committing to a purchase.").

133. *See* Marrow, *supra* note 113, at 33–34 ("Liquidated damages clauses are designed, for

clauses,[134] indemnification provisions,[135] and merger clauses.[136] One of the most important risks that firms seek to minimize through the use of form provisions is "judicial risk"—the possibility that a court or jury called upon to settle a dispute between contracting parties will decide unfavorably and unpredictably against the merchant.[137] Thus, choice of law provisions[138] and forum selection clauses[139] are often included among standard boilerplate language in consumer contracts. Given the potential volatility of judicial risk, it should come as no surprise that a highly charged body of jurisprudence and scholarship debates the inclusion of remedy limitation clauses in consumer standard form contracts, particularly arbitration agreements and class action waivers.[140] Finally, the ultimate risk-shifting provision may be the unilateral change-of-terms clause, which gives the drafter the authority to reallocate risks in its own favor at any time after the initial formation of the contract.[141]

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the most part, to accommodate real life commercial concerns by predictably controlling the risks associated with human behavior.").

134. *See* James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011, 1023 ("The waiver and exculpation clauses reverse the ordinary and predictable common law result. They tend to shelter negligent behavior, behavior primarily within the control of the party benefitted by the clause.").

135. *See id.* at 1016 (defining indemnification provisions as clauses "purporting to require one party to hold the other harmless for the other's negligence").

136. *See* Warkentine, *supra* note 5, at 478 ("[A]n unsophisticated buyer of goods may enter into a contract relying on promises and representations made by the seller. When a dispute arises later, and the buyer bases a claim on those promises and representations, the buyer may find that a court will not enforce them because of a merger clause in the contract of which the buyer was unaware.").

137. Kessler, *supra* note 131, at 631.

138. *See* Jillian R. Camarote, *A Little More Contract Law with My Contracts Please: The Need to Apply Unconscionability Directly to Choice-of-Law Clauses*, 39 SETON HALL L. REV. 605, 605 (2009) (noting that firms manage the risk of state law invalidating contract provisions through the use of choice of law provisions). Camarote notes that although UCC section 1-301 gives a very narrowly defined class of consumers some protection from choice-of-law clauses, most consumers are affected by choice-of-law provisions included in standard form contracts. *Id.* at 606 & n.7.

139. *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, 700 (1992) ("The [choice of forum] clause reduces uncertainty and the risk of litigation over the proper forum for suit should unforeseen problems develop.").

140. The depth and variety of scholarship addressing the use of arbitration clauses and class action waivers in standard form contracts cannot be captured in a single footnote. A sampling of recent articles discussing the fairness of these provisions includes the following: Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695; David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); and Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

141. *See, e.g.*, Alces & Greenfield, *supra* note 3, at 1100–06 (discussing generally the many

A. Barriers to Knowing Assent and Voluntary Choice

If any of the risk-shifting terms previously described appeared in agreements negotiated between persons of equal bargaining power, there would be arguably little cause for concern. The central principle of contract law—freedom of contract—maintains that parties may freely enter into transactions on the terms that they voluntarily choose for themselves through a process of mutual negotiation.[142] However, a powerful set of complex and interwoven forces, both psychological and market-driven, seriously undermine consumer assent to form terms. The sliding scale approach to unconscionability offers courts a means of addressing these forces without undermining the practical utility of the standard form. In this way, the sliding scale represents an improvement over not only the conventional approach to unconscionability, but also over other proposed approaches to standardized contracts, all of which fail to fully appreciate the deep deficiencies that plague consumer assent in form transactions.

1. Psychological Barriers to Knowing Assent

One cannot meaningfully assent to terms contained in a contract without first having knowledge of the existence of those terms and the capability to understand their meaning and potential consequences.[143] Unfortunately, consumers suffer from a variety of practical, cognitive, and behavioral limitations that, working together, render them ignorant of standardized terms and largely incapable of assessing their associated

contexts in which one party reserves the right to unilaterally change the terms of a contract). *See generally* Oren Bar-Gill & Kevin Davis, *Empty Promises*, 83 S. CAL. L. REV. 985 (2010) (exploring the ways in which sellers use contract modifications to increase profits at the consumer's expense); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010) [hereinafter Horton, *Shadow Terms*] (arguing that the manner sellers use to unilaterally amend contract terms "undermines the foundational conservative theory that sophisticated adherents can exert market pressure on drafters to offer efficient procedural terms"); Eric Andrew Horwitz, Comment, *An Analysis of Change-of-Terms Provisions as Used in Consumer Services Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75 (2006) (examining the application of change-of-terms provisions to various types of adhesive service contracts); Daniel Watkins, Note, *Terms Subject to Change: Assent and Unconscionability in Contracts that Contemplate Amendment*, 31 CARDOZO L. REV. 545 (2009) (discussing assent and unconscionability inquiries in dealing with change-of-terms provisions).

142. *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that is yet to be Met*, 45 AM. BUS. L.J. 723, 725 (2008) [hereinafter Becher, *Asymmetric Information*] ("According to the classical paradigm of contract law, a contract results from a negotiation process in which the parties freely engage."); Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT 251, 251 (Franklin G. Miller & Alan Wertheimer eds., 2010) ("Contract law, both in principle and in practice, is about allowing parties to enter arrangements on terms they choose, each party imposing obligations on itself in return for obligations another party has placed upon itself.").

143. Bix, *supra* note 142, at 253.

risks.

First, contract scholars have long accepted the notion that most people who sign standard contracts do not read them.[144] What little empirical research that has been conducted on the veracity of this claim supports it,[145] as does anecdotal evidence[146] and the personal experience of legal scholars[147] and judges.[148] Consumers' failure to

144. Rakoff, *Adhesion*, *supra* note 125, at 1179 & n.21.

145. *See generally, e.g.*, Becher & Unger-Aviram, *supra* note 127, at 215–16 (concluding that most consumers do not read contracts at the time of contracting, though some read contracts after signing); Hillman, *Rolling Contracts*, *supra* note 130, at 759 (surveying first year law students and finding that seventy-six percent do not read the terms enclosed with delivered goods); Robert A. Hillman, *Online Consumer Standard Form Contracting Practices*: *A Survey and Discussion of Legal Implications*, *in* CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 283 (Jane Winn ed., 2006) (surveying law students regarding reading practices and concluding that only four percent to thirteen percent actually read the terms of online contracts); Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99, 106 (1982) (describing extensive interviews with over a dozen buyers and sellers in which "virtually none" read the contract beyond the key terms); Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2703–04 (2000) (detailing interviews of twenty-five companies in which half stated they believed the other side in the contract process never or rarely read the standard forms); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 56–62 (1963) (discussing a study of 1960s businessmen that addressed informal contracting practices and stating that most purchasing agents do not read the "fine print" of standard contracts); Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 256 (1970) (describing a survey of 100 residential tenants in Michigan that revealed that only fifty-seven percent actually read the entirety of their lease agreement); John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 778–79 & n.207 (1982) [hereinafter Murray, *Standardized Agreement*] (noting that the author conducted seminars with over 5000 purchasing agents and had "never discovered one who read or understood printed terms"); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 628 (2009) (surveying law students and members of the public and concluding that "a sizeable number of consumers fail to read the contracts that they sign").

146. *See, e.g.*, Ting v. AT&T, 182 F. Supp. 2d 902, 930 (N.D. Cal. 2002) (reporting that AT&T found that only 30% percent of its customers would read its entire form agreement updating contract terms, 10% would not read it at all, and 25% would throw away the mailing without even opening it), *aff'd in part, rev'd in part*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

147. *See, e.g.*, Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 358 ("Personally, I neither read most of the contracts that I sign nor know anyone who does. I do not believe that this makes me unusually irrational, particularly stupid, or unreasonably lazy."); American4FinanReform, *Elizabeth Warren Defends the Consumer Financial Protection Agency*, YOUTUBE (July 17, 2009), http://www.youtube.com/watch?v=lYd08e5Cjvs&feature=player_embedded ("I teach contract law at Harvard, and I can't understand half of what [a credit card contract] says.").

148. *See, e.g.*, Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, A.B.A. J. (Oct. 20, 2010, 7:17 AM), http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/ ("It has, 'the smallest type you can imagine and you unfold it like a map,' he said. 'It is a problem,' he added, 'because the legal system obviously is to blame for that.'"); David Lat, *Do Lawyers Actually*

read the contracts that they sign is not necessarily irresponsible. In fact, scholars recognize that form contracts are designed *not* to be read,[149] and thus maintain that consumers' failure to read is an effect of "rational ignorance"—the irrationality of reading standardized agreements when the costs of reading outweigh the risks of failing to do so.[150] Many factors point away from the rationality of reading. Form contracts are typically difficult to read, as they are often lengthy and printed in small type.[151] Consumers are well aware that they will likely not understand the contracts that they sign. Thus, they are largely discouraged from expending the effort required to carefully review the fine print.[152] Moreover, the futility of reading is underscored by consumers' cognizance that they are generally powerless to negotiate standard terms.[153] Furthermore, the contracting environment often makes reading less likely; already hurried consumers are rushed through the contracting process and made to feel as though careful review of the provisions is socially inappropriate.[154] As a result, many consumers are reluctant to carefully scrutinize boilerplate contract language at the time of signing for fear of appearing awkward or confrontational.[155]

The failure of consumers to read standardized terms is highly problematic, but is only one of many forces that influence consumer assent to those provisions. For instance, experts have discovered that many consumers lack the legal[156] and financial[157] literacy to navigate

Read Boilerplate Contracts?, ABOVE THE LAW (June 22, 2010, 2:42 PM), http://abovethelaw.com/2010/06/do-lawyers-actually-read-boilerplate-contracts-judge-richard-posner-doesnt-do-you/ ("For my home equity loan, I got 100s of pages of documentation; I didn't read, I just signed.").

149. *See, e.g.*, Leff, *supra* note 31, at 504.

150. *See* Peter A. Alces, *Guerrilla Terms*, 56 EMORY L.J. 1511, 1529–30 & n.60 (2007) [hereinafter Alces, *Guerrilla Terms*] ("[T]he 'search' cost of discovering the higher price and greater risk is too great given the benefit the buyer imagines she would derive from discovering the cost."); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 832 (2006) (arguing the cost imposed on consumers in gaining information may exceed the benefit, resulting in consumers' rational ignorance); Eisenberg, *supra* note 8, at 243 ("Where form contracts involve a low dollar value of performance, the cost of thorough search and deliberation on preprinted terms, let alone the cost of legal advice about the meaning and effect of the terms, will usually be prohibitive in relation to the benefits."). *See also* Prentice, *supra* note 147, at 358–62 (arguing that given high information costs and time constraints, failure to read boilerplate constitutes rational, rather than irrational, behavior).

151. Becher, *Asymmetric Information*, *supra* note 142, at 731.

152. Hillman & Rachlinski, *supra* note 8, at 446.

153. *Id. See* Prentice, *supra* note 147, at 361 (arguing that there is little benefit from reading boilerplate because the seller's agent is typically powerless to alter the terms of the deal).

154. Hillman & Rachlinski, *supra* note 8, at 448.

155. *Id.* at 448–49.

156. Meyerson, *Consumer Form Contract*, *supra* note 8, at 598.

complex standard contracts, which are often filled with technical jargon and "legalese."[158] Other researchers have uncovered a more alarming fact—most American consumers lack the basic reading skills to understand the contracts that they sign.[159] One commentator, reviewing a recent study of U.S. Department of Education data concerning literacy rates, concluded that 96% to 97% of all American adults lack the basic literacy skills required to understand consumer standard form contracts of even moderate complexity.[160] Put differently, only 3% to 4% of the population can understand the basic, everyday contracts that they sign.[161] This data illustrates that "[t]he degree of literacy required to comprehend the average disclosure form and key contract terms simply is not within the reach of the majority of American adults."[162] The rising number of American consumers for whom English is a second language often face even greater difficulty grasping the full meaning of

157. *See* Marianne A. Hilgert & Jeanne M. Hogarth, *Household Financial Management: The Connection Between Knowledge and Behavior*, *in* FED. RES. BULL. 309 (July 2003) (analyzing consumer survey research on household financial-management practices); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 232 (2005) (questioning whether consumers are sufficiently educated or well-informed "to comparison shop for credit"); Jinkook Lee & Jeanne M. Hogarth, *The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates*, 18 J. PUB. POL'Y & MARKETING 66, 70, 74–75 (1999) (discussing a study in which only ten percent of closed-end mortgage borrowers understood the relationship between the contract interest rate and the APR). *See generally* William R. Emmons, *Consumer-Finance Myths and Other Obstacles to Financial Literacy*, 24 ST. LOUIS U. PUB. L. REV. 335 (2005) (exploring skills needed for financial literacy, the myths of consumer finance, and obstacles to achieving widespread financial literacy).

158. *See generally* Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI. KENT L. REV. 59 (2001) (discussing the manner and complexity in which legal terminology is used in contracts).

159. *See* Edwards, *supra* note 157, at 232 (addressing "general literacy and educational problems" that limit consumer understanding); Melvin A. Einsenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) ("The average consumer knows that he probably will be unable to fully understand the dense text of a form contract, either term-by-term or as an integrated whole."). *See also* Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 208 (2008) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURE TO CONSUMERS 38 (2006), *available at* http://www.gao.gov/new.items/d06929.pdf) ("Only slightly more than half the adult U.S. population can read above an eighth grade level."); White & Mansfield, *supra* note 7, at 234 ("New research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to 'read' contemporary consumer contract documents are unlikely to understand them.").

160. Barnes, *supra* note 2, at 261–62 (citing White & Mansfield, *supra* note 7, at 237–38).

161. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 712 (2011). Ben-Shahar and Schneider also review rates of innumeracy revealing that most people have serious difficulties performing simple mathematical operations. *Id.*

162. White & Mansfield, *supra* note 7, at 239.

contract provisions.[163]

Furthermore, psychologists who study consumer cognition and decision making have demonstrated that consumers suffer from a range of limitations on their capability to understand the risks inherent in contracting.[164] Even assuming that consumers are willing and able to read form contracts, they are highly unlikely to understand their contents. According to the theory of "bounded rationality," consumers suffer from limitations on their time, financial resources, available memory, and cognitive powers that combine to prevent a perfect or "optimal" decision in the contracting process.[165] Consumers tend not to invest in an exhaustive process of acquiring and understanding information about the risks of standardized terms, but rather are satisfied by a limited—and often inadequate—search for information about contractual risks.[166] After an incomplete information search, consumers often base their decisions about whether to contract on a limited number of factors, such as price and product characteristics.[167] Moreover, consumers tend to underestimate the possibility of negative consequences resulting from their actions and ignore what they perceive to be low-probability risks.[168] Together with numerous other consumer

163. Edwards, *supra* note 157, at 232 (citing Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1075–77 (1995)).

164. Barnes, *supra* note 2, at 254 (citing Eisenberg, *supra* note 8, at 213); Hillman & Rachlinski, *supra* note 8, at 445–54; Marrow, *supra* note 113, at 57.

165. Barnes, *supra* note 2, at 254–55 (citing Eisenberg, *supra* note 8, at 214); Korobkin, *Bounded Rationality*, *supra* note 8, at 1222–25.

166. Hillman & Rachlinski, *supra* note 8, at 451–53. Empirical evidence demonstrates that this behavior, known as "satisficing," is a poor substitute for fully informed, rational decision making. *See* Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1531 (2006) ("Cognitive experiments demonstrate that individuals adopt time-saving strategies in order to simplify complex decisionmaking. . . . Some of these shortcuts systematically color and bias the decisions that individuals reach and undercut the notion that consumers should be modeled as rational actors."); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1111–13 (2000) (explaining that boilerplate is difficult to contract around because contracting parties see default terms as part of the "status quo" and therefore, all else being equal, prefer them to alternate terms). *See also* Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 507 (1979) (explaining that people often reach decisions based on a "search of only a tiny part" of the total available information). Simon is credited with coining the term "satisficing." *Id.*

167. Hillman & Rachlinski, *supra* note 8, at 451–53.

168. Barnes, *supra* note 2, at 257–59; Marrow, *supra* note 113, at 63–66. This effect results from the operation of the "availability" heuristic, according to which consumers assess the probability of an event by reference to similar events, and the "representativeness" heuristic, according to which the probability of an event is evaluated by its familiarity. For further discussion of heuristics that influence decision making, see Richard A. Hasen, *Efficiency Under*

tendencies identified by cognitive psychologists,[169] these limitations render most consumers incapable of meaningfully assenting to the risks imposed by standard contract provisions.[170]

Finally, a number of scholars predict that online contracting will exacerbate rather than improve these cognitive barriers to meaningful assent.[171] Many of the perceived "benefits" of online contracting—for example, the fact that consumers have additional time to gather information and review contract provisions—are undermined by the same cognitive limitations that operate on consumers in traditional settings.[172] First, most cognitive limitations are largely "internal to consumers" rather than a product of the contracting environment.[173] Moreover, the online contracting environment contains a number of specific features that may significantly undermine consumers' access to, and understanding of, standard form provisions. The location of contract terms in hyperlinks unlikely to be accessed by consumers is one such feature, as is the lack of any live interaction with a representative of the merchant during the contracting process.[174] In some cases, contract terms are not supplied to the consumer until after the consumer enters into the contract. Although consumers are generally cognizant of the importance of affixing their signatures to paper contracts, it is unclear whether clicking "I agree" denotes the same level of solemnity for Internet consumers.[175]

Informational Asymmetry: The Effect of Framing on Legal Rules, 38 UCLA L. REV. 391, 395–96 (1990); Marrow, *supra* note 113, at 63–66.

169. The literature covering the cognitive limitations that effect contracting behavior is vast. This Article merely attempts to highlight some cognitive effects that impede meaningful assent to standard form contracts. For a more complete discussion of such limitations, see Cass. R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997).

170. Psychologists who study judgment and choice acknowledge that all consumers do not suffer from identical cognitive vulnerabilities; rather, individuals' cognitive and decision making abilities vary. However, experimental evidence tends to show that individuals' cognitive abilities, expertise levels, and demographic variables such as race, sex, and age do not predictably influence the quality of decision making. *See* Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, *in* LAW AND PSYCHOLOGY 125, 125–26 (Belinda Brooks-Gordon & Michael Freeman eds., 2006).

171. *See, e.g.*, Alces, *Guerilla Terms*, *supra* note 150, at 1554 ("[T]echnology will lead to more rather than less obfuscation by 'streamlining' the contract formation process and encouraging the proliferation of more settings in which constructive consent will suffice.").

172. Hillman & Rachlinski, *supra* note 8, at 484–85.

173. *Id.*

174. *Id.* at 464–68; Hillman & Barakat, *supra* note 132, at 13–15.

175. *See* Hillman & Rachlinski, *supra* note 8, at 480–81 ("[O]vereager, 'click-happy' e-consumers may engage in impulse purchasing without investigating standard terms at all."); Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL'Y 405, 408, 418–32 (2010) (describing how passive users of online content are often unwittingly bound by terms in user agreements).

2. Market-Based Barriers to Voluntariness

The cognitive and psychological factors described above seriously affect consumer decision making, but they are not solely to blame for the poor quality of consumer assent to standardized forms. Market forces also undermine consumers' voluntary choice with respect to form terms.[176] Consumer form contracts are "contracts of adhesion," drafted unilaterally by the party with greater bargaining power and presented on a "take it or leave it" basis.[177] The adhesive quality of standard form contracts is inextricably tied to their utility—the drafter loses much of the efficiency of pre-drafting and pre-printing a standard contract if the individual terms are later renegotiated.[178] Further, in view of the objective theory of contract formation and the so-called "duty to read," form contracts generally meet the traditional requirements for enforceability, provided they are supported by objective indicia of assent.[179] The profound disparity in bargaining power present in contracts of adhesion prevents consumers from negotiating their content.[180] Thus, consumers routinely sign form contracts without meaningfully assenting to standardized terms contained within.[181]

What about reasonable alternatives offered by other firms in the marketplace? Assuming that some consumers will successfully access and fully comprehend standardized provisions, does the marketplace

176. Bix, *supra* note 142, at 254.

177. Kessler, *supra* note 131, at 632. *See* Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (applying, for the first time, the term "adhesion" to a form contract). Although some experts in the past have maintained that form contracts are not necessarily adhesionary, both courts and commentators increasingly have recognized that practically all contracts signed by consumers are not only standard in form, but are also adhesionary. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long past."); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 24.27A, at 155 (rev. ed. Supp. 2008) [hereinafter CORBIN ON CONTRACTS] ("[T]he bulk of contracts signed in this country are adhesion contracts.").

178. RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 102 (2007); Horton, *Flipping the Script*, *supra* note 1, at 474.

179. John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 341–42 (1974).

180. *See* Alces & Greenfield, *supra* note 3, at 1099–102 (discussing the impact of unilateral change-of-terms agreements on the already disparate parties' bargaining power); Morant, *supra* note 129, at 944–45 (noting that because the advantaged party often drafts the preformed contract, it may "prejudice the interests of the more disadvantaged party").

181. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) ("[I]n the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms."). *See generally* David D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 208–22 (2005) (discussing whether disparities in bargaining power leave meaningful opportunities for negotiation).

offer consumers a choice of standardized terms from which they can select? Economists once predicted that market forces would regulate standardized forms, particularly those containing extremely one-sided and risk-shifting terms.[182] According to the theory of "market assent," the form terms used by merchants would be influenced by a small proportion of informed consumers who read standardized agreements and shopped for favorable standard terms.[183] Firms would then compete for market share by omitting onerous terms or even including more favorable ones.[184] Proponents of this view hypothesized that firms are sensitive to their market reputations and thus will not impose onerous terms at the risk of driving away their customer base.[185]

However, recent contributions to economic theory suggest that the model of the self-regulating market is false.[186] Even savvy, informed consumers suffer from biases and cognition limits that render them unlikely (at best) or incapable (at worst) to consider the ramifications of

182. *See* Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 862–63 (2006) ("Regardless of whether any particular consumer had ever read, understood, or bargained over the terms of the standard form, informed consumers generated a form of hypothetical market assent, which would bind all consumers."); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1299–302 (1981) (noting general trends in contract content over time); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1391–92 (1983) (explaining the effect that significantly informed consumers can have on market forces); 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, 672 (1979) (addressing the impact consumer actions may have on market competition); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1065–67 (1977) (discussing the immense advantages sellers currently have over consumers and courts when ascertaining the fairness of standardized forms). *See generally* Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679 (discussing reasonable alternatives to current standardized contract provisions).

183. Becher & Unger-Aviram, *supra* note 127, at 205 n.22; Johnston, *supra* note 182, at 862–63.

184. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 843 (2006) [hereinafter Hillman, *Online Boilerplate*].

185. *See* Bebchuk & Posner, *supra* note 150, at 827.

186. Alces, *Guerilla Terms*, *supra* note 150, at 1523 (citing Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505 (2006)); Becher & Unger-Aviram, *supra* note 127, at 199, 214; Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 638–40 (1996); Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 YALE L.J. 829, 843 (2003). *See* Korobkin, *supra* note 8, at 1212 (arguing that because contract terms may not enter buyers' decision making processes, drafting parties may have an incentive to include inefficient contract terms in standard forms).

most risk-shifting provisions.[187] Because standardized terms do not influence consumer behavior, drafters have little incentive to compete on the basis of those provisions.[188] Thus, the forms utilized by competing suppliers of goods and services remain largely uniform,[189] rendering consumers virtually powerless to avoid unfavorable standardized terms.[190] While recent empirical research demonstrates that some merchants grant their agents the authority to exercise discretion to forgive contract breaches and extend benefits beyond those provided in standardized terms,[191] this type of merchant behavior is completely discretionary and leaves the consumer with no real power over the contract.[192]

Moreover, a wealth of literature has established that firms target consumers' cognitive vulnerabilities in their marketing and sales practices.[193] Aware that consumers are unlikely to read contracts, some firms dispense with the "formality" of showing the contract to the consumer at all.[194] Others manipulate the contracting environment to purposefully exploit consumers' cognitive limitations.[195] Worse, the

187. Horton, *Shadow Terms*, *supra* note 141, at 647–48.

188. Alces, *Guerilla Terms*, *supra* note 150, at 1547; Hillman & Rachlinski, *supra* note 8, at 446–47; Horton, *Shadow Terms*, *supra* note 141, at 648.

189. Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 194 (2005).

190. *See* Alces & Greenfield, *supra* note 3, at 1137 ("Given the prevalence of change-of-terms clauses, a consumer cannot reasonably avoid them. In that sense then, there is an absence of meaningful choice.").

191. Johnston, *supra* note 182, at 864. *See* Lucian A. Bebchuck & Richard A. Posner, *One-Sided Contracts in Competitive Markets*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 3, 4 (2007) (arguing that one-sided boilerplate permits sellers "discretion with respect to how to treat the consumer").

192. Johnston, *supra* note 182, at 885. Professor Johnston acknowledges that a firm that "rigidly enforces the harsh terms of its standard-form contracts . . . is just doing what it has a contractual right to do and is in a sense a much more straightforward actor than the firm that awards discretionary forgiveness and discretionary benefits." *Id.* at 886–87.

193. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 715–22 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*] (discussing an ALI Reporter's study and other articles that ultimately support the authors' conclusion that consumers are susceptible to manipulation by manufacturers because of consumers' cognitive anomalies); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1425 (1999) [hereinafter Hanson & Kysar, *Some Evidence of Market Manipulation*] (providing evidence that manufacturers manipulate consumers' perceptions and cognitive biases, which influences their decision making). *But see* James A. Henderson, Jr. & Jeffery J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 233 (2000) (arguing that proponents of enterprise liability have not produced evidence showing how advertisements or other sales methods effectively manipulate consumers).

194. SLAWSON, BINDING PROMISES, *supra* note 28, at 31.

195. Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 193, at 673

perception that firms are self-regulating appears to further impede rational decision making. Consumers have a tendency to trust the entities with which they contract to refrain from including boilerplate terms that would exploit consumers at the risk of their reputations. This sense of trust further persuades consumers not to read and carefully consider the implications of contract provisions.[196]

One could argue that despite the fact that these market forces tend to dictate the content of form provisions, consumers retain voluntariness in their ability to choose *not* to contract at all. However, this argument is an empty one. Form contracts permeate all aspects of consumers' lives, as they have been adopted by nearly all industries and trades.[197] Forms are used for transacting in all manners of goods and services, by cellular service providers, financial lenders, health clubs, mortgage companies, credit card issuers, rental companies, online music stores, and even healthcare service and insurance providers.[198] "A person today who refused to contract unless he understood what he was committing himself to would deny himself most of the means of living in society."[199]

B. Incomplete Approaches to Incomplete Assent

The standard form contract dilemma, while both controversial and multidimensional, is also a moving target. As social scientists make new discoveries about the limitations on consumers' abilities to access, understand, and make rational choices concerning standardized terms, the legal norms that govern standard contracts should evolve accordingly.[200] However, legal theory has not kept pace with advancements in the understanding of consumer cognition and behavior. Many recent scholarly approaches to form contracts fail to fully explore and account for the full panoply of barriers to meaningful and voluntary choice faced by consumers. Indeed, most conceive of the standard contract dilemma as no more than a problem of incomplete information.

(discussing an experiment demonstrating how the status quo bias affects consumer individual preferences in contracting); Hanson & Kysar, *Some Evidence of Market Manipulation*, *supra* note 193, at 1429 (examining several instances in which manufacturers manipulated general consumer perceptions in the purchasing context).

196. Hillman & Rachlinski, *supra* note 8, at 446–47 & nn.95–97.

197. Barnes, *supra* note 2, at 229.

198. Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 384 (2008).

199. SLAWSON, BINDING PROMISES, *supra* note 28, at 21.

200. *See* BEHAVIOR, LAW, AND ECONOMICS 2 (Cass R. Sunstein ed., 2000) ("Analysis of law should be linked with what we have been learning about human behavior and choice. After all, the legal system is pervasively in the business of constructing procedures, descriptions, and contexts for choice.").

According to this view, consumers cannot meaningfully assent to standardized provisions in form contracts because they are not fully apprised of their content and meaning. The remainder of this Section reviews the recent approaches to standardized contracts espousing this view and explains why they fall short of rectifying the profound deficiencies of assent and fairness implicit in form contracting.

1. Mandatory Disclosure and Heightened Assent

A number of scholars have argued that standardized terms in form contracts should be enforced only if they are explicitly brought to consumers' attention. These "disclosure" models are of two types. One type suggests that courts should control the enforceability of form terms by requiring a showing that nonbargained-for terms in a form contract are both conspicuous and specifically assented to by the consumer. Thus, form terms are presumptively unenforceable absent specific evidence of objective assent to the particular terms. Numerous scholarly proposals of this type have been advanced over the years. Professor Todd Rakoff famously asserted that nonbargained-for or "invisible" terms should be presumed unenforceable when challenged in litigation, unless the drafter could show their "visibility."[201] Professor Alex Seita later proposed that form contracts should be governed by default terms and overcome by standardized provisions only when the consumer gives "intelligent and meaningful" approval.[202] Professor Michael Meyerson suggested that "consumers should only be bound by those contract terms that they know and comprehend."[203] More recently, Professor Edith Warkentine called for a "knowing assent" approach, whereby standardized terms that unfairly favor the drafter would be enforceable only upon a showing that the term was conspicuous and explained to the consumer, who in turn specifically and objectively assented to the inclusion of that term in the contract.[204]

Another variation of the disclosure model proposes legislatively mandated disclosure of potentially onerous form terms. Mandated disclosure requirements naturally tend to be industry-specific, aimed at providing consumers with access to information about products and contractual contingencies in an easy to understand form.[205] One well-known mandatory disclosure scheme, enacted under the Truth in

201. Rakoff, *Adhesion*, *supra* note 125, at 1245, 1258.

202. Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 132 (1984).

203. Meyerson, *Reunification*, *supra* note 6, at 1299.

204. Warkentine, *supra* note 5, at 473.

205. *See* Becher, *Asymmetric Information*, *supra* note 142, at 755 (discussing the purposes of mandated disclosure requirements and when they are typically imposed).

Lending Act,[206] requires disclosure of a number of contractual contingencies in certain financial transactions, including the circumstances under which fees may be imposed.[207] Like judicially enforced disclosure models, some legislatively mandated disclosure models deny the enforceability of particular provisions unless drafters comply with certain disclosure requirements.[208]

Proponents of disclosure argue that mandated disclosure provides consumers with information necessary to make better decisions.[209] Moreover, proponents predict that once consumers are educated about the terms of the contracts they sign, they will demand more favorable terms from the marketplace.[210] Disclosure will motivate sellers to excise unfair terms from their contracts, lest they place their reputations in jeopardy or risk losing consumers to merchants with more favorable terms.[211] Increased and targeted information thus will result in the self-regulation of the marketplace. Disclosure requirements are also attractive to lawmakers because they address efforts to make the substance of form contracts transparent rather than substantively regulating the terms of consumer contracts, which is often politically challenging.[212] Mandated disclosure is therefore an alluring response to standard contracts because it is a solution that is likely to be adopted.[213]

Disclosure models are laudable for their efforts to increase the flow of information to, and improve the decision making capabilities of, consumers.[214] Many academics, however, question the wisdom of relying on these models to improve the quality and authenticity of consumer assent.[215] Critics of mandated disclosure argue, and even some proponents admit, that consumers are not substantially more likely to read disclosures than the form terms themselves.[216] Moreover, even

206. 15 U.S.C. §§ 1601–1667 (West 2012).

207. Ben-Shahar & Schneider, *supra* note 161, at 653–55.

208. *See, e.g.*, U.C.C. § 2-316 (1962) (requiring warranty disclaimers to be "conspicuous" as a prerequisite to enforceability).

209. Ben-Shahar & Schneider, *supra* note 161, at 650.

210. Burnham, *supra* note 124, at 223.

211. Hillman, *Online Boilerplate*, *supra* note 184, at 839, 845–46.

212. Ben-Shahar & Schneider, *supra* note 161, at 681.

213. Hillman, *Online Boilerplate*, *supra* note 184, at 839.

214. Ben-Shahar & Schneider, *supra* note 161, at 649.

215. *See, e.g.*, Hillman, *Online Boilerplate*, *supra* note 184, at 849–50 (suggesting that mandatory website disclosure may not be effective as consumers do not act predictably and may even backfire); Alan Scott Rau, *Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 10–12 (2003) (urging that even conspicuous arbitration clauses may be ineffective in drawing consumers' attention); White & Mansfield, *supra* note 7, at 234 (questioning the efficacy of disclosure forms for consumers generally and specifically whether consumers would understand such forms).

216. *See, e.g.*, Becher, *Asymmetric Information*, *supra* note 142, at 757 (discussing some of

when consumers are provided with disclosures, the cognitive limitations that prevent consumers from making rational decisions about contractual contingencies continue to operate.[217] As stated by Professors Omri Ben-Shahar and Carl E. Schneider in their recent comprehensive critique of mandated disclosure, disclosure is "fundamentally misconceived because its solution to the problem of choice is information alone," and it ignores the evidence that "people's problems choosing go well beyond ignorance."[218] Another commentator has remarked, "[t]o the extent that one does not understand the terms of the agreement, requiring the same to be printed in bold letters is like yelling at a deaf man."[219] Additionally, mandated disclosures may actually worsen consumers' decision making capabilities. Disclosures can provide excessive information, resulting in cognitive overload and increased confusion.[220] And because disclosures are unlikely to improve the quality of decision making with respect to standardized terms, they are likewise unlikely to motivate businesses to self-regulate the content of those provisions.

Ultimately, the notion that voluntary assent and personal autonomy are empowered by disclosure is misguided. While additional information may, under some circumstances, be useful to consumers, on balance, attempts to disclose and explain standardized provisions do little to improve the quality of consumer assent to those terms or the content of those provisions.

2. Expectations Doctrines

Expectations-based approaches to standard contracts, according to which only those form provisions that conform to consumers' expectations should be enforceable, are also popular with some academics today.[221] Expectations doctrines are an outgrowth of Karl Llewellyn's theory of "blanket assent" to standardized forms.[222]

the deficiencies of information disclosure in light of consumer behavior); Hillman & Barakat, *supra* note 132, at 12–17 (arguing that consumers do not read standard electronic forms).

217. Marrow, *supra* note 113, at 98–99; Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1177 (2003).

218. Ben-Shahar & Schneider, *supra* note 161, at 720.

219. Jacqueline R. Baum, Note, *Medical Malpractice Arbitration: A Patient's Perspective*, 61 WASH. U. L.Q. 123, 148 n.198 (1983).

220. Becher, *Asymmetric Information*, *supra* note 142, at 758.

221. *See, e.g.*, Barnes, *supra* note 2, at 227 (arguing in favor of the increased use of Restatement (Second) of Contracts section 211 to police standardized agreements); White & Mansfield, *supra* note 7, at 263 (arguing that unconscionability should converge with the reasonable expectations approach).

222. *See* W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 33 (1984) [hereinafter Slawson, *New Meaning*]

Llewellyn famously posited that the notion that consumers assent to standardized terms is purely fictional and instead suggested that, beyond the "dickered" terms contained in the contract, consumers assent only to the "broad type of the transaction" and "any not unreasonable or indecent terms the seller may have had in his form, which do not alter or eviscerate the reasonable meaning of the dickered terms."[223] Llewellyn's theory thus stands out as a rejection of the strict application of the objective theory of contract formation and the duty to read as applied to consumer form contracts by holding "unreasonable" terms unenforceable despite external indications of assent.[224] Expectations-based approaches similarly provide exceptions to the duty to read in the consumer form context by limiting the effect of terms found to be "unexpected" by the parties.

Scholars advocating expectations-based approaches call for an expansion of one of two devices currently employed by courts: the doctrine of reasonable expectations and section 211 of the Restatement (Second) of Contracts. Section 211 was developed specifically for the treatment of standardized agreements and embraces the traditional duty to read by declaring that a party who signs a standardized agreement is bound by its terms.[225] The provision, however, goes on to create an exception to this general approach, under which a term may be excised from the agreement when "the other party has reason to believe that the party manifesting such assent would not do so" had he known of the provision.[226] The doctrine of reasonable expectations is a judicial doctrine related to, but distinct from, section 211. This doctrine holds that the objectively reasonable expectations of consumers regarding contract terms will be honored even though a painstaking study of the

(discussing Llewellyn's theory of "blanket assent").

223. LLEWELLYN, DECIDING APPEALS, *supra* note 5, at 370. Llewellyn contrasts "dickered" terms—material terms that are negotiated by the parties—with "boilerplate." *Id.* at 370–71.

224. Warkentine, *supra* note 5, at 489–90.

225. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). Section 211, titled "Standardized Agreements," provides:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those terms similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

Id.

226. *Id.* § 211(3).

provisions would have negated those expectations.[227] While section 211 requires courts to consider whether the terms conflict with the *drafter*'s reasonable expectations of the consumer's behavior, the doctrine of reasonable expectations permits courts to eliminate terms that conflict with the *consumer*'s reasonable expectations.[228] The difference between the results reached under either approach turns on which point of view the court adopts. Both doctrines, however, are cognizant that consumers are often not apprised of the content in standardized provisions and seek to remedy this deficiency in assent.

Expectations approaches share a number of attributes that should point to their success. First, it is axiomatic that "[c]ontract doctrine is designed to protect the expectations of the parties."[229] Thus, expectations doctrines comport with the fundamentals of classical contract theory. Second, expectations approaches discourage merchants from creating unreasonable or inaccurate expectations through the use of marketing or promotional materials.[230] Moreover, expectations approaches implicitly recognize that consumers will not read or understand form contracts, and thus these contracts are fertile ground for overreaching and oppression.[231] Therefore, these approaches appear capable of satisfying concerns of both traditionalists and consumer advocates.

In practice, however, expectations doctrines have not thrived. Both section 211 and the reasonable expectations doctrine have been limited primarily to the policing of insurance contracts.[232] Additionally, when measured against the realities of consumer behavior in the marketplace, expectations approaches admit a number of structural flaws. Expectations approaches are premised on the assumptions that consumers develop specific expectations about the standardized terms

227. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970); *see id.* at 966–67 (arguing that increase-of-risk language in insurance policies could be interpreted to honor consumers' reasonable expectations).

228. *But see* Schmitz, *Safety Net*, *supra* note 12, at 83–84 (noting that many courts in the application of section 211 have focused on the consumers', rather than the drafters', expectations).

229. Hartzog, *supra* note 175, at 408. *See* 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.1, at 2 (1963) [hereinafter 1 PERILLO, CORBIN] ("The law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise.").

230. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 6.3(a)(4), at 634–35 (student ed. 1988).

231. Barnes, *supra* note 2, at 250–51; Hillman, *Rolling Contracts*, *supra* note 130, at 748–49; Warkentine, *supra* note 5, at 498, 508; James J. White, *Form Contracts under Revised Article 2*, 75 WASH. U. L.Q. 315, 324–25 (1997); White & Mansfield, *supra* note 7, at 262–64.

232. White & Mansfield, *supra* note 7, at 262–63.

of the contracts that they sign and that these expectations are based on rational evaluations of available information.[233] However, newly emerging psychological evidence of consumers' cognitive limitations demonstrates that both of these assumptions are flawed.[234] Consumers generally do not undertake a comprehensive evaluation of standardized terms nor do they form expectations about those provisions.[235]

Additionally, both expectations approaches admit the enforceability of provisions of which the consumer is made aware.[236] Thus, provisions that are made conspicuous to the consumer or otherwise disclosed by the merchant are automatically included within the expectations of consumers. Worse, provisions that consumers may have failed to understand or incorporate into the decision making process due to cognitive limitations will also fall within consumers' expectations. Expectations approaches are further weakened by market-based limitations to consumer assent. These approaches tie the enforceability of standardized terms to their familiarity. Presumably, if onerous form terms are highly present in the marketplace and generally recognized by the public, they will come to form the consumer's "reasonable expectations" regardless of how one-sided those terms may be or whether the consumer had any real opportunity to shop for better terms elsewhere in the market.

Section 211 is particularly flawed because, unlike the reasonable expectations doctrine, it requires the consumer to show, as a prerequisite to striking an unexpected form term, that he would not have consented to the contract at all had he known of the term in advance.[237] Thus, section 211 rests on an assumption that, once apprised of an unfavorable standardized term, the consumer would decline to enter the contract. This assumption ignores the cognitive factors that limit consumer decision making, particularly the fact that consumers do not base their decisions about whether to contract on the standardized provisions that section 211 seeks to regulate.[238] It also fails to account for the fact that, because form terms are often uniform across the marketplace, consumers lack any real choice among alternatives.

233. Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 300 (1998).

234. *Id.* at 304–05.

235. *Id.* at 305.

236. Hillman, *Rolling Contracts*, *supra* note 130, at 749–50; KEETON & WIDISS, *supra* note 230, § 6.3(c) at 641–42.

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

238. *See* Slawson, *New Meaning*, *supra* note 222, at 62–63 (explaining that consumers do not make purchasing decisions based on particular terms, but rather a rough, subjective evaluation of all the terms).

In sum, while expectations approaches provide much needed exceptions to the traditional duty to read in the context of consumer form contracts, they do not fully account for the full gamut of internal and external forces that impede consumer assent, nor do they necessarily operate to eliminate excessively onerous terms from the marketplace. While calls for the expansion of these approaches are praiseworthy for their efforts to bring contract doctrine in line with the realities of form contracting, they fail to do so in a comprehensive manner.

C. The Sliding Scale's Meaningful Assent Inquiry

Early supporters of the unconscionability doctrine held high hopes for its potential to reshape traditional notions of freedom of contract in the realm of standardized agreements by authorizing courts to police contracts lacking in meaningful assent.[239] However, courts have struggled to identify those contracts in which consent is sufficiently lacking to justify judicial intervention in the first place. The evolution of the sliding scale approach represents a continued effort to identify with more precision those agreements deserving the attention of the court.

Under the two-part analytical framework, the procedural prong serves to identify those contracts lacking meaningful assent.[240] Additionally, the conventional approach to finding procedural unconscionability requires specific indicia of surprise or oppression in the contracting process. Because strong evidence of procedural deficiency has historically been required to justify judicial intervention, courts employing a conventional approach are unlikely to find the procedural prong satisfied in the absence of multiple factors traditionally associated with lack of choice, such as the use of fine print, a high pressure environment, and the fact that the complaining party was too old, impoverished, or unsophisticated to understand the significance of the terms. [241]

However, interdisciplinary research studying consumer cognition and market forces demonstrate that the traditional objective indicia of assent seized upon by most courts are not useful indicators of meaningful

239. *See, e.g.*, John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 935–36 (1969) (explaining that the unconscionability doctrine permits "freedom of contract" to encompass the ability of parties to "co-determine the terms of a contract").

240. DOBBS, *supra* note 27, at 706, 709.

241. DiMatteo & Rich, *supra* note 50, at 1111–12 (discussing "predictive power" of external markers of consent in unconscionability decisions).

choice with respect to standard form contracts.[242] Social psychologists and behavioral economists have established that consent is undercut far more dramatically by practical and cognitive limitations on consumers' abilities to evaluate the risks associated with standardized terms and the very futility of such an evaluation than by incomplete information. Therefore, the conventional approach to procedural unconscionability is a weak indicator of meaningful assent. Moreover, the conventional approach is not merely unhelpful, but also harmful in its adherence to faulty and obsolete assumptions about consumer decision making. As a result, the conventional approach to procedural unconscionability suffers from the same shortcomings of recent scholarly solutions to standard form contracts, namely mandated disclosure, heightened assent, and reasonable expectations doctrines.

The sliding scale approach, on the other hand, allows decision makers to incorporate the emerging understanding of consumer behavior into the unconscionability framework. First, the sliding scale's reduced threshold for procedural unconscionability deemphasizes the importance of unhelpful external markers of assent. Indications that language in the contract was bolded or that the consumer was given an opportunity to review contract terms can be ignored when the facts clearly demonstrate that the consumer lacked the power to negotiate contract terms in the first place. Second, the use of the sliding scale by some courts to find procedural unconscionability through the existence of a contract of adhesion, without a detailed analysis of the particularized contracting environment, focuses courts' attention on consumers' bargaining power, which is by far the most significant factor affecting meaningful assent to standardized terms.

III. ADDRESSING FORMALIST CONCERNS

Although the unconscionability doctrine was specifically designed to provide courts with a means of correcting deficiencies in consent and fairness that plague standard form contracts, until very recently its use has been restricted both in scope and frequency. Courts' reluctance to employ the doctrine to control form contracts is tied directly to the dominance of formalist thinking about contract enforcement and judicial intervention in private agreements. While the persistence of contract formalism once threatened to destroy unconscionability's viability as a policing device, a recent surge in unconscionability jurisprudence evidences increasing judicial resistance to formalist thought. The sliding scale approach further pushes against formalist

242. *See supra* Part II.A.1 (discussing the psychological barriers to knowing assent).

thinking, but sufficiently balances formalist concerns such that it does not run too far afoul of traditional contract doctrine.

A. Formalist Restraints on Judicial Interventionism

Unconscionability was mainstreamed into contract law with a single and express purpose—to permit courts to police contracts on fairness grounds.[243] Prior to the doctrine's adoption, some courts took the liberty of setting aside contracts that they determined to be so unfair as to "shock the conscience."[244] However, the vast majority of courts were uncomfortable with such unconcealed judicial subjectivity and, as a result, found indirect ways to deny enforcement of terms tinged with overreaching, oppression, and unfair surprise.[245] These courts either stretched existing doctrines of fraud, duress, and failure of consideration beyond their boundaries or engaged in aggressively strict interpretation of contractual provisions to prevent unfair results.[246] Out of regard for "freedom of contract," these courts did not explicitly invalidate contracts on the basis of fairness, but rather concealed such determinations behind accepted consent doctrines and devices of construction.[247]

Concerned with the "covert tools" employed by courts,[248] the drafters of the UCC crafted a doctrine of unconscionability that would invite jurists to employ a more intellectually honest approach to judicial oversight.[249] The codification of unconscionability also served an

243. CORBIN ON CONTRACTS, *supra* note 177, § 29.2; RUSCH, *supra* note 27, § 2-302:1; Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 468–69 (1995); LORD, *supra* note 27, § 18:9.

244. *See, e.g.*, Eyre v. Potter, 56 U.S. 42, 60 (1853) (proposing that courts "ought to interfere" when there is unconscionability). The equitable power of the Court to set aside an "unconscionable" contract was recognized as early as 1816. *See* Hepburn v. Dunlop & Co., 14 U.S. (1 Wheat.) 179, 197 (1816) ("But if the contract ought not, in conscience, to bind one of the parties, . . . a court of equity will interpose and afford a relief, which a court of common law cannot, by setting aside the contract . . . .").

245. CALAMARI & PERILLO, *supra* note 27, § 9.40; CORBIN ON CONTRACTS, *supra* note 177, § 29.2, at 381; MURRAY ON CONTRACTS, *supra* note 27, § 96(A)(2).

246. Dando B. Cellini & Barry L. Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 203–04 (1967); CORBIN, *supra* note 177, § 29.2, at 380–81; MURRAY ON CONTRACTS, *supra* note 27, § 96(A)(2).

247. CORBIN ON CONTRACTS, *supra* note 177, § 29.2; MURRAY ON CONTRACTS, *supra* note 27, § 96(A)(2).

248. Karl N. Llewellyn, 52 HARV. L. REV. 700, 702–03 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937) [hereinafter Llewellyn, Book Review] ([W]e have developed a whole series of semi-covert techniques for somewhat balancing these bargains. . . . Covert tools are never reliable tools.").

249. U.C.C. § 2-302 cmt. 1 (1952) provides:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing

expressive function, alerting the judiciary of the need for judicial intervention in contracts infected by bad faith bargaining and overreaching.[250] In his testimony before the New York Law Revision Commission, Llewellyn lamented that by indirectly policing unfair bargains, courts failed to set minimum standards of decency for the commercial community and to alert drafters when those standards had been violated.[251] Codifying unconscionability, he predicted, would correct that problem.[252]

Early on, the judiciary embraced the flexibility and promise of unconscionability by expanding it beyond the borders of the UCC and integrating it into the broader realm of contract doctrine.[253] The American Law Institute soon adopted an unconscionability provision in the Restatement (Second) of Contracts nearly identical to the one found in the UCC.[254] Both sources of the doctrine are broadly formulated, drawing no distinctions between merchants and consumers or preprinted and negotiated contracts.[255] As a result, courts have applied the doctrine to all types of contracts, both as a stand-alone doctrine and in conjunction with other policing devices.[256]

Soon after the adoption of the UCC, courts successfully deployed unconscionability in a number of landmark decisions to protect consumers from overreaching by form drafters.[257] The initial

> has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.

Additionally, the legislative history of the UCC's unconscionability provision makes clear that the doctrine was imported into the UCC for the purpose of giving judges a sanctioned doctrine with which to declare contractual terms invalid on fairness grounds. RUSCH, *supra* note 27, § 2-302:1.

250. DiMatteo & Rich, *supra* note 50, at 1072; Knapp, *supra* note 16, at 609.

251. I LAW REVIEW COMM'N, REPORT OF THE LAW REVIEW COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 176–78 (1954).

252. *Id.*

253. DOBBS, *supra* note 27, § 10.7, at 703–04; SLAWSON, BINDING PROMISES, *supra* note 28, at 135, 140–42. *Williams v. Walker-Thomas Furniture Co*. was the first decision to explicitly declare unconscionability to be part of the common law of contract. 350 F.2d 445, 449 (D.C. Cir. 1965). Some courts refuse to apply the UCC's formulation of unconscionability outside the realm of sales of goods, acknowledging that the common law doctrine would be applicable to services contracts. *See, e.g.*, Troy Mining Corp. v. Itmann Coal Co., 346 S.E.2d 749, 752 (W. Va. 1986).

254. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

255. *See* DiMatteo & Rich, *supra* note 50, at 1077–78 (pointing out courts' apparent failure to "define merchant in relationship to the unconscionability doctrine").

256. *Id.* at 1078–79.

257. *See* Knapp, *supra* note 16, at 612–13 (discussing the impact of the landmark

momentum of the unconscionability doctrine, however, was short lived. Following widespread adoption of Leff's two-part framework, unconscionability claims became increasingly less successful. Beginning in the 1970s, case law applying the unconscionability doctrine was rather scarce, leading some commentators to declare its demise.[258] Unconscionability claims were likewise rarely litigated, and even more rarely successful, during the 1980s and early 1990s.[259] As stated by one commentator, "[t]he conventional wisdom is that most unconscionability claims fail."[260]

The forces that have operated against the success of the unconscionability doctrine are many and varied.[261] By far the most significant of these forces is the persistence of formalism in contract theory—a rule-based approach to contract that is concerned primarily with enforcing bargains clothed in objective indicia of consent.[262] Formalist thinking about contract formation and enforcement was a natural outgrowth of the burst of commercial growth and accompanying laissez-faire approach to economics that dominated commerce during the nineteenth century.[263] In short, contract law developed so as to encourage individuals to freely enter bargains without fear of government intervention.[264]

Formalist thinking in contract doctrine has since persisted and has, in fact, experienced a surge in popularity in recent years due to its many

unconscionability case, *Williams v. Walker-Thomas Furniture Co.*); Martin B. Shulkin, *Unconscionability—The Code, the Court, and the Consumer*, 9 B.C. INDUS. & COM. L. REV. 367, 377–78 (1968) (reviewing early cases decided under UCC section 2-302).

258. *See, e.g.*, Brown, *supra* note 25, at 287–89 (noting the uncertainty surrounding courts' applications of the unconscionability doctrine).

259. *See* Prince, *supra* note 243, at 463–64, 463 n.15 (noting that during the 1990s, the study group appointed to consider revising Article 2 of the UCC found that section 2-302 had not proven to be the "unruly and fearsome creature that critics first anticipated"). *See generally* James W. Johnson, *Unconscionability and the Federal Chancellors: A Survey of U.C.C. Section 2-302 Interpretations in the Federal Circuits During the 1980's*, 16 LINCOLN L. REV. 21 (1985) (finding that only one of the reported federal cases during the 1980s involving UCC section 2-302 clearly accepted the unconscionability claim).

260. Randall, *supra* note 16, at 194.

261. *See* Stempel, *Equilibrium*, *supra* note 111, at 813 (discussing various interrelated factors that contributed to the decline of the unconscionability doctrine); Knapp, *supra* note 16, at 613 (attributing the decline to the shift in consumer protection law from a litigation-based approach to a legislative- and regulatory-based approach).

262. Morant, *supra* note 129, at 928. *See* Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 498 (2010) (defining formalism as "a theory of contract law that, above all else, elevates the content of the parties' written contract (its form) over any concerns for normative values or societal notions of fairness").

263. Morant, *supra* note 129, at 930.

264. *Id.* For a general discussion of classical contract theory and the role of government, see SLAWSON, BINDING PROMISES, *supra* note 28, at 9–12.

benefits.[265] Adherence to the objective theory of contract formation fosters legal certainty and as a result, market stability.[266] Reliance on formalist rules also provides for simplicity, both in bargain formation and the adjudication of disputes.[267] Those who champion formalism also argue that strict enforcement of contract rules promotes efficiency and optimal distribution of economic resources.[268]

However, since the nineteenth century, social and economic conditions have changed dramatically. The vast majority of contracts today are made between producers and consumers of products, with consumers entirely dependent upon producers for nearly everything that they eat, wear, and use.[269] Merchants almost always enjoy superior bargaining power and exercise that power by controlling all terms in the agreement.[270] The diversity and proliferation of products available on the market and the sheer number of contracts made prevent the consumer from gaining a deep understanding of either the product or the contract made to secure it.[271] As a result, contracts are often very unfavorable to consumers.

Classical contract doctrine generally makes little concession for the bargaining power inequalities that plague consumers. The freedom of contract principle prohibits a court from interfering with a contract that may be perceived as unfair.[272] The objective theory of contract formation and the accompanying duty to read prevent courts from looking beyond objective manifestations of assent to determine if the consumers understand contract terms.[273] And, although formalist decision making may not always accurately reflect the realities of contracting behavior, clear rules provide certainty without which the economy could not function effectively. Reversal of the duty to read, for example, would result in invalidation of all contracts an overwhelming majority of consumer contracts. The unconscionability doctrine, therefore, was designed to address the inadequacies of

265. Morant, *supra* note 129, at 942.

266. *Id.*

267. *Id.*

268. Schmitz, *Safety Net*, *supra* note 12, at 73.

269. SLAWSON, BINDING PROMISES, *supra* note 28, at 22.

270. *Id.* at 25.

271. *Id.* at 26.

272. *Id.* at 35. As explained by Professor Slawson, the freedom of contract principle prohibits courts from either invalidating unfair contract provisions or supplanting unfair contract terms with court-created substitutes: "The first option would violate the parties' 'freedom to' include anything in their contracts they chose. The second would violate their 'freedom from' laws that would limit this freedom." *Id.*

273. *Id.* at 36.

classical contract theory by permitting limited exceptions to formalist enforcement of bargains.[274]

Unsurprisingly, the unconscionability doctrine has met considerable criticism on formalist grounds.[275] The primary complaint concerns the doctrine's vagueness.[276] The lack of a precise definition provides judges with wide latitude in its application and, as a result, judicial determinations regarding unconscionability are perceived as overly subjective.[277] Because the doctrine lacks clear statutory guidelines, judicial findings of unconscionability are largely fact-based and difficult to generalize.[278] Unconscionability is therefore condemned for creating uncertainty regarding which agreements will be enforced and which will be struck down. Furthermore, critics of unconscionability complain that judicial intrusion into private dealings threatens contractual liberty and conflicts with the freedom of will that is central to contract doctrine.[279] These critics fear that judges will impose their personal values at the expense of the individual will of the parties.[280] Such judicial oversight is viewed as paternalism at its worst, shaking the very foundation of contract law and market efficiency.[281] Broad social and political backlash against "judicial activism" in matters outside of the contract law realm have further compounded unconscionability's disrepute.[282]

The academic response to the tension between unconscionability and classical contract theory has consisted primarily of a rejection of the doctrine in favor of approaches to standardized contracts that arguably fit more squarely with the resurgence in formalist thought.[283] Even

274. Schmitz, *Safety Net*, *supra* note 12, at 74.

275. *Id.* at 94–102.

276. *See, e.g.*, Leff, *supra* note 31, at 559 (criticizing section 2-302 for "say[ing] nothing with words"); WHITE & SUMMERS, *supra* note 27, § 4-3, at 155 ("Experimentation with even a single case shows this [litmus] test to be . . . useless; in no sense is the Comment an objective definition of the word. It is simply a [hopelessly subjective] synonym[] laden covered with a heavy value burden: 'oppression,' 'unfair,' or 'one-sided.'"); Spanogle, Jr., *supra* note 239, at 942 ("The terms 'unfair surprise' and 'oppression' are no more concretely definable than the term 'unconscionable' so the Comment seems to offer slogan words rather than an explanation of the purposes behind the statute."); *cf.* Randall, *supra* note 16, at 188 ("[T]he malleability of the doctrine . . . is acknowledged as one of its chief virtues."); Schmitz, *Safety Net*, *supra* note 12, at 73–74 (describing unconscionability as "*a flexible safety net*").

277. Morant, *supra* note 129, at 942.

278. *See* Warkentine, *supra* note 5, at 484 ("[A]lthough there are now many cases that address unconscionability, they have little value as precedents.").

279. Schmitz, *Safety Net*, *supra* note 12, at 94.

280. *Id.* at 96.

281. *Id.* at 95–96.

282. Stempel, *Equilibrium*, *supra* note 111, at 763–64; Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 189–204 (1998).

283. *See, e.g.*, Barnes, *supra* note 2, at 264 ("[T]he common law of contracts can and should

scholars concerned with contract fairness and consumer protection advocate legislative or administrative solutions to unconscionable terms in standard contracts due to concerns about judicial interventionism in contract disputes.[284] Repeated condemnation of unconscionability, together with the association between unconscionability and unrestrained judicial activism, discourage judges from thoughtfully considering unconscionability claims.[285] Furthermore, as a result of judicial distaste for the doctrine, consumers have become reluctant to plead it.[286] As the number of claims dwindles, so too does the remaining judicial appetite for the doctrine. Indeed, formalist scholars praise the relative disuse of unconscionability as a triumph.[287]

B. The Revival of Unconscionability

For decades, the story of unconscionability has been one of survival rather than of growth. Despite persistent formalist criticism, the last decade has been a period of reinvigoration for the doctrine. The number of reported decisions in which unconscionability has been raised has increased dramatically.[288] Perhaps more importantly, the success rate of unconscionability claims has steadily risen as well. A number of empirical studies demonstrate the revival of the unconscionability doctrine in sharp detail. One study of reported decisions addressing claims of unconscionability in 2002 and 2003 found 42.5% of those claims proved successful for plaintiffs.[289] While this figure indicates that unconscionability claims remain difficult to win, a comparison across time indicates that unconscionability claims are becoming more successful.[290] Another study that analyzed decisions between 1990 and

change in response to the changing needs of the day . . . ."); Prince, *supra* note 243, at 462 (noting that some fear giving too much power to courts to strike items will lead to inconsistent and unpredictable interference in contracts); Stempel, *Equilibrium*, *supra* note 111, at 780 n.82, 840–41 (noting a trend toward formalism that extends beyond just the Supreme Court and that "the prevailing norm posits that the judicial role in policing contracts should be circumscribed").

284. Stempel, *Equilibrium*, *supra* note 111, at 821.

285. Schmitz, *Safety Net*, *supra* note 12, at 92.

286. Morant, *supra* note 129, at 947.

287. *See* Schmitz, *Safety Net*, *supra* note 12, at 92–99.

288. *See* Knapp, *supra* note 16, at 621–22 (noting that the "tide was beginning to turn" as early as the mid-1990s).

289. Randall, *supra* note 16, at 194.

290. *Id.* at 196. For instance, Professor Randall found that only 16.7% of unconscionability claims were successful between 1982 and 1983. *Id.* Other empirical studies have reached similar findings. *See, e.g.*, Knapp, *supra* note 16, at 619–26 (reporting a "substantial" increase in unconscionability cases between 1990 and 2008); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1436–41 (2008) (reporting an increase in unconscionability challenges in cases involving arbitration from 1% to 15–20% over time). Not all empirical studies support the

2008 reported a "very definite increase" in the number of cases involving unconscionability claims and an overall increase in the success of those claims.[291]

The bulk of the reported decisions raising unconscionability, and the lion's share of those in which the claim is successful, address the unconscionability of arbitration clauses.[292] However, unconscionability jurisprudence is not limited to arbitration clauses alone. A significant number of decisions address a range of additional risk-shifting provisions in standard form contracts.[293] In particular, unconscionability claims attacking liquidated damages clauses, limitation of liability or remedy clauses, and warranty disclaimer clauses also enjoy a relatively high degree of success.[294]

The increased popularity and success of the unconscionability doctrine reflect a greater willingness among judges to exercise their mandate to police unfair contracts. Moreover, the high success rates for claims involving arbitration, remedy limitation, warranty disclaimers, and liquidated damages clauses signal that judges are particularly concerned with the substantive aspect of unconscionability.[295] While some scholars initially speculated that the resurgence in unconscionability was "activist" in nature, citing its restriction to particular geographical areas,[296] recent empirical evidence indicates that

conclusion that the number of successful unconscionability claims is rising. For example, Professors Larry A. DiMatteo and Bruce Louis Rich compared decisions reported between 1968 and 1980 with those reported between 1991 and 2003 and concluded that, although there was a slight increase (7%) in the number of successful cases between the two time periods, the increase was not significant. DiMatteo & Rich, *supra* note 50, at 1100–01. It is possible that this reported increase was less dramatic than that seen in other studies because it included decisions rendered in the late 1960s, before judicial interest in the doctrine experienced its first decline.

291. Knapp, *supra* note 16, at 621.

292. *See* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48 (2006) (finding that unconscionability challenges succeed more frequently in California appellate courts when they involve arbitration clauses); Knapp, *supra* note 16, at 622 ("Of the total number of unconscionability decisions gathered in our study, those involving arbitration clauses accounted for the lion's share of the overall increase."); Randall, *supra* note 16, at 194 (finding, in a study of unconscionability decisions reported between 2002 and 2003, that courts found nearly twice as many arbitration agreements unconscionable as other types of clauses).

293. DiMatteo & Rich, *supra* note 50, at 1113.

294. *See id.* (citing a 60% success rate for claims against liquidated damages clauses, a 51% success rate for claims against limitation of liability or remedy clauses, and a 41% success rate for claims against disclaimer or warranty clauses; compared to a 75% success rate for claims against arbitration clauses, and a 37.8% success rate for all other claims).

295. *See id.* (noting that these types of claims are highly "policed due to their inherent substantive naughtiness").

296. Broome, *supra* note 292, at 39–40; Prince, *supra* note 243, at 465; Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L.

both federal and state courts across the nation are increasingly responding to unfair terms in standard form contracts.[297] Thus, on the one hand, the empirical evidence suggests a broad and building trend toward judicial rejection of the formalist opposition to unconscionability. On the other hand, because the upward trend of unconscionability is still relatively "mild," with less than fifty percent of unconscionability claims successful, there appears to be little risk of the widespread judicial interference in contract that is so feared by the doctrine's critics.[298]

C. The Sliding Scale's Balance of Fairness and Formalism

The sliding scale approach may further assist in insulating the doctrine from formalist attacks that undermine judicial oversight of standardized terms. Although proponents of unconscionability have long praised the doctrine for its ability to "protect core human values" through judicial creativity,[299] few have directly addressed the chief formalist critiques.[300] However, contract doctrine is unlikely to shed the dominance of formalism.[301] Therefore, the continued vitality of unconscionability and its utility as a tool for preventing abuses of bargaining power depends upon its ability to accommodate formalist concerns.

The conventional approach to unconscionability is decidedly formalist. Requiring strong evidence of procedural unconscionability maintains the ideal of freedom of contract by permitting judges to interfere only in contracts that exhibit clear deficiencies in consent.[302] High thresholds for substantive unconscionability prevent judges from intervening in all but the most egregious of cases, ensuring that judges will not use the doctrine inappropriately to impose their own subjective views of fairness onto consumer contracts in the absence of clear evidence of oppression or overreaching.[303] Thus, the conventional approach to the doctrine carefully restricts judicial intervention to a narrow subset of cases involving extreme unfairness and overreaching.

REV. 123, 142 (2007).

297. DiMatteo & Rich, *supra* note 50, at 1096; Knapp, *supra* note 16, at 623–35; Randall, *supra* note 16, at 194–95.

298. Stempel, *Equilibrium*, *supra* note 111, at 809–10.

299. Schmitz, *Safety Net*, *supra* note 12, at 73.

300. *See, e.g.*, Stempel, *Equilibrium*, *supra* note 111, at 792–93 (stating that the doctrine is "perfectly consistent with the governing norms of contract and policy reasons underlying freedom of contract: consent, bargain, free will, free exchange, and wealth maximization").

301. Morant, *supra* note 129, at 929.

302. DOBBS, *supra* note 27, § 10.7.

303. *Id.*

The sliding scale approach, on the other hand, represents resistance against the formalist trend by the judiciary. The sliding scale's relaxation of the procedural inquiry permits judges more freedom to substantively scrutinize the content of consumer contracts. Furthermore, the sliding scale's relaxed approach to substantive unconscionability demonstrates that courts are increasingly comfortable passing on the question of what is "unreasonable" or "unfair" in the marketplace, though perhaps short of "outrageous."

However, the sliding scale approach does not necessarily work against formalist norms. For example, formalists are concerned with individual freedom and fear that a liberal application of the unconscionability doctrine will permit judges to supplant free choice with personal notions of fairness.[304] Such thinking rests in part on an assumption that consumers make rational choices that will lead to the inclusion of efficient terms in negotiated contracts.[305] It therefore fails to take cognizance that the vast majority of consumer contracts are not freely negotiated and that consumers' choices regarding the risks inherent in those contracts are far from rational. Formalist thinking about contract law is based also in concerns about economic efficiency and optimal distribution of resources. However, such thinking is premised on the discredited hypothesis that market forces will regulate contract terms when consumers do not. A more robust use of unconscionability to police consumer contracts in fact promotes contractual freedom and economic efficiency by counterbalancing the effects of consumers' disadvantaged bargaining position.[306]

The principal complaint regarding unconscionability concerns the doctrine's vagueness—formalists fear that fact-dependent, result-oriented unconscionability decisions will unpredictably upset contractual expectations.[307] However, use of the sliding scale approach should actually increase predictability in unconscionability jurisprudence. Much of the uncertainty in the unconscionability analysis concerns the procedural prong, as courts struggle to identify specific factors indicating a lack of meaningful choice and disagree as to what factors are the most appropriate indicators. To the extent that the sliding scale approach deemphasizes these factors and instead emphasizes the substance of contractual provisions, a more coherent and predictable body of jurisprudence will evolve, particularly if courts endorsing the sliding scale approach coalesce in finding the procedural

304. Schmitz, *Safety Net*, *supra* note 12, at 94–96.

305. *Id.* at 97.

306. *Id.* at 76.

307. *Id.* at 94, 97–98.

unconscionability prong satisfied by the existence of a contract of adhesion.

Importantly, many judges employing a sliding scale approach continue to exercise their power to invalidate offending contractual terms in moderation. This self-limitation stems from judges' underlying belief in the importance of standardized contracts to the stability of the marketplace and commercial operations.[308] At the same time, judges who employ the sliding scale approach recognize that a measured application of the unconscionability norm is both appropriate and necessary for the proper functioning of the economy. One court, addressing the tension between formalist concerns and contractual fairness, explained:

> Regardless, however, of the unease which its potential use produces, the doctrine of unconscionability has a place in our jurisprudence so that grossly unfair or one-sided contracts may be properly "policed."
> . . . In appropriate cases, the doctrine of unconscionability provides a more than proper and valid basis for interdicting an inequitable result which would otherwise flow from the cold enforcement of the terms of a contract.
> . . . .
> . . . While the risk of defining the doctrine through such a case-by-case approach is the possible loss of restraint and consistency, the advantage is a device inherently governed by the particular circumstances of each case measured against the experiences of past and present judges, the lifeblood of the common law.[309]

The sliding scale approach, with its continued emphasis on defective assent as a prerequisite to judicial intervention, permits judges to engage in the policing of agreements only when the contracting process did not effectively safeguard the individual will of the parties.

IV. CALIBRATING THE SLIDING SCALE APPROACH

Although the sliding scale's relaxed approach to unconscionability shows promise, it requires some fine-tuning to achieve its full potential. Specific calibrations for the sliding scale approach are needed so as to facilitate a careful and controlled expansion of the unconscionability doctrine. The following recommendations seek to bring the unconscionability analysis into closer parallel with the realities of consumer contracting while preventing it from attracting formalist aggression that will impede its continued growth. These calibrations are not intended to constrain the malleability of the unconscionability

308. Warkentine, *supra* note 5, at 472.
309. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 918–20 (N.J. Super. Ct. Ch. Div. 2002).

doctrine. Unconscionability's flexibility remains one of its chief virtues. However, some tempering is required to achieve greater uniformity between the various state approaches and to ensure that the doctrine continues to evolve toward greater protection of consumer interests.

A. A Dual-Prong Approach

Despite academic[310] and judicial[311] criticism of unconscionability's two-prong analytical framework, a dual-prong approach is critical to its continued success. The concepts of procedural and substantive unconscionability are analytically distinct—each serves a unique purpose.[312] Courts should therefore continue to require both procedural and substantive unconscionability before refusing to enforce an offending provision.

Procedural unconscionability—which looks for defects in the bargaining process—is essential for establishing deficiencies in assent that justify judicial intervention in contractual dealings.[313] A sliding scale approach that continues to require some evidence of process failure accommodates formalist concerns by preventing judicial overreaching into freely negotiated contracts; a single-prong approach that permits a finding of unconscionability on the basis of substantive unconscionability alone goes too far by allowing courts to impose personal or societal notions of fairness at the expense of personal liberty.[314] Furthermore, a substantive unconscionability analysis devoid of procedural inquiry doubles as a "public policy" inquiry in disguise, to the detriment of the clarity of both devices for invalidating contracts.

Additionally, to the extent that courts view extreme evidence of substantive unconscionability as implying some procedural deficiency,[315] courts should take care to make this inference explicit.

310. *See, e.g.*, MURRAY ON CONTRACTS, *supra* note 27, § 96(B)(2)(c) (proposing alternatives to the "procedural/substantive dichotomy"); Schmitz, *Safety Net*, *supra* note 12, at 109 ("[T]he rigid two-prong test does not adequately address the needs of the textured and ever-changing contracting market."); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 374 (1969) ("The proposal here made is that the element of assent be excised from the determination of unconscionability in consumer transactions.").

311. *See, e.g.*, Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995) (noting that the two-prong unconscionability framework is "based more on the historical reluctance of courts to disturb contracts than on valid doctrinal underpinning").

312. *See supra* Parts I.B.I and I.B.2 (explaining the procedural and substantive prongs).

313. *See supra* Part I.A.1 (explaining procedural unconscionability and the factors courts take into consideration to determine whether a contract is procedurally unconscionable).

314. *See supra* Part I.C.1 (explaining that some courts have premised the finding of unconscionability on substantive unconscionability alone).

315. *See supra* Part I.C.3 (explaining that the single-prong approach may be viewed as an

The act of directly acknowledging procedural deficiencies permits courts the opportunity to explore the deep problems with consent associated with form contracts and, in particular, to explicitly acknowledge that extremely one-sided contract terms are usually the result of a lack of meaningful choice resulting from inequalities in bargaining power. The assent inquiry afforded by a procedural unconscionability analysis therefore serves both an expressive and an evaluative function.

Moreover, evidence of substantive unconscionability, in the form of unfairness or unreasonable risk allocation, ensures that economic stability is not undermined by the needless invalidation of standard form contracts on the basis of lack of meaningful assent alone. As experts' understanding of the limits of consumer cognition and decision making deepens, the argument that consumers are capable of meaningfully assenting to standard form contracts becomes difficult to defend.[316] Invalidation of contracts on the basis of lack of assent without evidence of a substantive flaw in the contract would therefore result in the disruption of the majority of contracts made by consumers in their everyday dealings. Evidence of intolerable substantive unfairness is needed to identify those contracts in which judicial interference is justified.

Finally, the disruption of standard form contracts on the basis of lack of assent alone does not serve any fruitful purpose. If the deficiencies in consent could be remedied by providing consumers with streamlined forms, additional information disclosures, and time to consider the transaction, then invalidating contracts on the basis of procedural unconscionability alone would encourage merchants to engage in behaviors that would improve the overall contracting process. But the evidence suggests that while the complexity of forms and pressures of the contracting environment may exacerbate failures in consumer decision making, more time and information do not cure them. Thus, invalidation of form contracts on the basis of procedural deficiencies alone promotes inefficiency by encouraging merchants to alter the contracting process without any appreciable benefit to consumers in terms of the content of form provisions.

B. A Meaningful Assent Inquiry

The primary strength of the sliding scale approach is its relaxation of the procedural unconscionability prong. In applying the approach,

extension of the sliding scale approach).

316. *See supra* Part II.A.1 (describing the psychological barriers to knowing assent).

courts should continue to refine the procedural unconscionability analysis to deemphasize factors relating to the personal characteristics of the contracting parties and the contracting environment that are unhelpful in the determination of whether a party's consent is flawed. This adaptation of the procedural unconscionability prong should not continue to be obscured by traditional common sense notions that a party's age, sophistication, or literacy level—or the particular form of the contract—are central to the determination of free consent. Rather, courts' analyses should be informed by interdisciplinary research regarding the actual realities of consumer decision making.

In applying the sliding scale approach, courts should treat the procedural unconscionability prong as definitively established by the existence of a consumer form contract of adhesion without requiring additional factual evidence relating to either the consumer's personal characteristics or the specifics of the contracting environment. The weight of the social science literature establishes that free consent is undermined in consumer transactions wherever consumers are in fact powerless or believe themselves to be powerless to negotiate contract terms. Moreover, it is these situations in which the risk of overreaching by merchants is greatest. The availability of a meaningful opportunity to negotiate contract terms is therefore central to the procedural unconscionability analysis.

Such an approach will require courts to refine their understanding of bargaining power and, in so doing, unify many conflicting definitions of the term "contract of adhesion." While courts and commentators agree that most form contracts are adhesionary, there is some disagreement about the characteristics of a particular form contract that justify the designation.[317] The main ingredient of an adhesion contract is the inability to negotiate its terms.[318] But questions remain as to whether inferior bargaining power is sufficient to destroy the opportunity to negotiate,[319] or whether a complaining party must also show a lack of

317. *Compare* Rakoff, *Adhesion*, *supra* note 125, at 1177 (delineating seven individual characteristics of adhesion contracts), *with* 1 PERILLO, CORBIN § 1.4 (describing, through examples, adhesion contracts as those that are rigid and negotiable only as to a few provisions), *and* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12, at 476–79 (4th ed. 1999) (defining adhesion contracts generally while citing to cases from several states on the unconscionability of various adhesion contracts).

318. 11 WILLISTON & LORD, *supra* note 317, § 32:12, at 476–79 (defining an adhesion contract as "a contract entered without any meaningful negotiation by a party with inferior bargaining power").

319. *See, e.g.*, Alexander v. Anthony Int'l, LP, 341 F.3d 256, 264 (3d Cir. 2003) (noting that an agreement to arbitrate is procedurally unconscionable, and therefore unenforceable, because there is no opportunity for the parties to negotiate); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (stating that there was "little dispute" that an arbitration

reasonable market alternatives.[320] Additionally, some courts have held that otherwise adhesionary contracts cease to be so if the adherent had an opportunity to review and reject individual terms after assenting to the contract as a whole.[321]

Furthermore, in assessing procedural unconscionability, courts should resist the urge to find that evidence of heightened consent or disclosure protects an adhesionary contract from scrutiny. Interdisciplinary research makes clear that tactics aimed at providing consumers with greater information do not alleviate the disparities in bargaining power and free choice that undermine consent to consumer contracts.[322] When judges improperly equate increased information with increased freedom of choice, they risk insulating consumer contracts from appropriate judicial review.[323]

Finding the procedural unconscionability prong established by the existence of a form contract of adhesion will also serve formalist norms.

agreement was adhesive because "[i]t was imposed on employees as a condition of employment and there was no opportunity to negotiate"); Lona v. Citibank, N.A., 134 Cal. Rptr. 3d 622, 638 (Ct. App. 2011) ("Absent unusual circumstances, evidence that one party has overwhelming bargaining power, drafts the contract, and presents it on a take-it-or-leave-it basis is sufficient to demonstrate procedural unconscionability and require the court to reach the question of substantive unconscionability, even if the other party has market alternatives." (citing Gatton v. T-Mobile USA, 61 Cal. Rptr. 3d 344, 356 (Ct. App. 2007))).

320. *See, e.g.*, Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 807 (Ct. App. 2005) (stating that for a contract to be adhesionary, the consumer must lack "*any realistic opportunity to look elsewhere for a more favorable contract;* he must either adhere to the standardized agreement *or forego the needed service*" (quoting Madden v. Kaiser Found. Hosps., 552 P.2d 1178, 1185–86 (Cal. 1976) (emphasis added))).

321. *See, e.g.*, Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002) (holding that an arbitration provision was not procedurally unconscionable based on a thirty-day opt out clause); Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 WL 364450, at *8–10 (E.D. Pa. Jan. 29, 2010) (same); Fluke v. Cashcall, Inc., No. 08-5776, 2009 WL 1437593, at *8 (E.D. Pa. May 21, 2009) (holding that an arbitration provision containing a sixty-day opt out clause was not unconscionable); Guadagno v. E*Trade Bank, 592 F. Supp. 2d 1263, 1270 (C.D. Cal. 2008) (same); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) (holding that an arbitration provision containing a class action waiver and providing for a thirty-day opt out period was not unconscionable); Martin v. Del. Title Loans, Inc., No. 08-3322, 2008 WL 4443021, at *4 (E.D. Pa. Oct. 1, 2008) (holding that an arbitration provision containing a fifteen-day opt out clause was not procedurally unconscionable); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-CV-918-J-33HTS, 2008 WL 150479, at *7 (M.D. Fla. Jan. 14, 2008) (holding that an arbitration provision containing a class action waiver and providing for a thirty-day opt out period was not unconscionable).

322. *See supra* notes 215–18 and accompanying text.

323. *See* Hillman, *Online Boilerplate*, *supra* note 184, at 854 (predicting that mandatory website disclosures will "backfire" under a sliding scale unconscionability analysis); WHITE & SUMMERS, *supra* note 27, § 4-7 (noting that courts have not yet clearly addressed the question of whether "super-conscionable" behavior can insulate a contract from scrutiny); Ben-Shahar & Schneider, *supra* note 161, at 739 ("[A]n empty but formally correct disclosure can keep the contract from being unconscionable, however problematic its terms.").

By deemphasizing factors unrelated to bargaining power, courts will streamline the procedural unconscionability analysis, thus introducing much needed consistency into the unconscionability framework. Merchants may begin to make predictions regarding the scrutiny to which their contracts will be subjected on the basis of external factors related to the marketplace, rather than case-specific factors related to the personal characteristics of the consumers with whom they transact. Avoiding unnecessary analysis of the amount and quality of additional information provided by merchants to consumers also will prevent merchants from expending resources on disclosures that do little to aid in consumer decision making. Thus, the sliding scale approach will contribute to economic efficiency.

C. A Robust Fairness Inquiry

Streamlining the procedural unconscionability analysis provides the additional benefit of permitting decision makers, commentators, and merchants to focus their attention on the substance of consumer contracts and to begin to develop clearer standards for the substantive unconscionability norm. Of central importance is the question of "how much" substantive unconscionability is required before a term found in a standard contract of adhesion should be invalidated according to a sliding scale analysis. In other words, does the existence of a form contract of adhesion establish a "large" quantum of procedural unconscionability sufficient to justify invalidation of an offending term on the basis of the mere unreasonableness of an offending provision? Or does the existence of a form contract of adhesion alone establish a "small" quantum of procedural unconscionability, which must be offset by extreme unfairness in order to justify relief?

The disparities in bargaining power characteristic of most consumer form contracts of adhesion are serious in that they undermine consent to most form terms. Therefore, when considering a form contract of adhesion, it is inappropriate for courts to continue to apply conventional standards for substantive unconscionability that would require offending provisions to "shock the conscience." Rather, the existence of a form contract of adhesion should "tip the scale" significantly toward an overall finding of unconscionability provided that the offending provisions are found to be "commercially unreasonable" in their one-sidedness. Recognition of the full extent to which assent is impaired by disparate bargaining power will empower courts to more freely consider the fairness of standardized terms without fear of overstepping formalist limitations on judicial interventionism. However, in order to steer a middle course between fairness and formalism, courts should demand

evidence of significant unfairness to consumer interests before utilizing their supervisory power to control form content. Consequently, courts should routinely look to the commercial purpose of the provision in question to determine whether it appropriately balances consumer and merchant concerns. A substantive unconscionability inquiry too attuned to consumer preferences will have the undesirable effect of upsetting market stability and efficiency.

Courts should also avoid the "reasonable expectations" of consumers when assessing substantive unconscionability.[324] First, attention to reasonable expectations can result in the over-policing of commercially reasonable form terms. A provision outside of the reasonable expectations of a consumer may impose only slightly on consumer interests while serving an important commercial purpose. Although such a term may "surprise" consumers unfamiliar with industry practices, absent an unjustified burden on consumer interests, the term can hardly be considered sufficiently "oppressive" to justify relief. Therefore, such a provision included in a consumer form contract should not be subject to invalidation on the basis of substantive unconscionability. A "reasonable expectations" inquiry may also result in the under-policing of form provisions if well-known but oppressive industry standards are allowed to escape judicial scrutiny.

Finally, a true sliding scale approach to unconscionability could permit courts to more effectively police opportunistic or exploitative merchant behavior in the marketplace. For example, although disclosure does little to ameliorate defects in consumer decision making, deliberate obfuscation by merchants may exacerbate deficiencies in consent. When faced with such evidence of "bad acts" on the part of merchants, courts could conclude that this "greater" evidence of procedural unconscionability warrants non-enforcement of offensive provisions in the face of relatively mild unfairness in the substance of the provisions themselves. Such an approach could be reserved for egregious cases of consumer exploitation so as to deter opportunistic behavior without unduly interfering in routine consumer transactions.

324. A number of courts currently consider the "reasonable expectations" of the consumer as central to the question of substantive unconscionability. *See, e.g.*, Parada v. Superior Court, 98 Cal. Rptr. 3d 743, 755 (Ct. App. 2009) (stating that if a contract is one of adhesion, the next inquiry is whether it is "outside of 'the reasonable expectations of the [weaker] part[y]'" (quoting Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172–73 (Cal. 1981))); Blue Cross Blue Shield of Ala. v. Rigas, 923 So. 2d 1077, 1086–87 (Ala. 2005) (quoting *Ex parte* Thicklin, 824 So. 2d 723, 731 (Ala. 2002)) (stating that "unreasonably and unexpectedly harsh terms" are an element of substantive unconscionability).

CONCLUSION

The unconscionability doctrine will not single-handedly defeat the use of unfair terms in standard form contracts. Moreover, the judicial process is not necessarily the ideal forum for the development of far-reaching and long-lasting regulation of contracts.[325] Courts develop the law slowly and on a case-by-case basis and cannot, acting alone, provide a comprehensive and timely solution to every problematic form term in the market.[326]

However, unconscionability need not be a panacea in order to be an important and effective means of protecting consumers in the modern marketplace. Though numerous reforms of, and alternatives to, the doctrine of unconscionability have been proposed, none have taken hold. The most promising opportunity for improvement to the doctrine, the 2003 revision of Article 2, produced only cosmetic changes to the UCC's unconscionability provision.[327] Other legislative attempts to regulate standard form contracts in a comprehensive fashion have failed, often miserably.[328] Industry-specific regulation of standardized terms has been marginally more successful, but these narrowly targeted schemes provide insufficient protection for consumers.[329] Proposals for comprehensive administrative oversight of form contracts,[330] though attractive on some levels, remain practically and politically unworkable.[331] Judicial control of standard form contracts is therefore the best available means of providing the broadest cross section of meaningful consumer protection against one-sided provisions in standardized forms.

325. Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 6–8 (2002).

326. Becher, *Asymmetric Information*, *supra* note 142, at 771–72. *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1244–45 (2006) [hereinafter Rakoff, *Boilerplate*] (arguing that judges can only police the outer limits of problematic contracts, leaving the rest to be solved by the legislature and administrative agencies).

327. Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 384–85 (2001). The drafting committee changed only one thing—the word "clause" to "term." This change resulted from the drafter's desire to incorporate the word "term," which was defined by Article 2 and is thus more meaningful and clear than "clause." *Id.*

328. Warkentine, *supra* note 5, at 505–06 (discussing failed legislative proposals on the problem of standard form contracts and concluding that "it is highly unlikely that the legislature will solve the issue of assent to standard form contract terms").

329. *See* Schmitz, *Safety Net*, *supra* note 12, at 101–02 (discussing state legislative treatment of catfish products, health spa memberships, used watches, and dance lessons).

330. *See generally* Bates, *supra* note 325 (advocating in favor of administrative regulation of standard form contracts).

331. Rakoff, *Boilerplate*, *supra* note 326, at 1245 (discussing problems of "political will" affecting legislative and administrative oversight of standard form contracts).

Moreover, if effective legislation or administrative regulation of form contracts is ever to be achieved, some consensus must be reached regarding the appropriate limitations necessary to balance the interests of consumers and industry. The judiciary has a crucial role to play in developing these limitations. Judicial intervention in standard contracts has long served an important "signaling function"—calling attention to gaps in the law that have failed to protect consumers against overreaching.[332] This judicial signaling function is exactly what Llewellyn had in mind when he suggested that the "courts' business is eminently the marking out of the limits of the permissible . . . ."[333] American contract law is, after all, predominantly judge-made law.[334]

Although unconscionability has fallen out of vogue among academic commentators,[335] its continued and often creative use by courts demonstrates that it is still a vital doctrine, and one that is sufficiently flexible to respond to the realities of consumer contracting. Academics will, and should, continue to search for optimal solutions to the standard contract dilemma. In the meantime, judicial control of standardized terms should be fostered, encouraged, and guided toward the highest probability of success. Professor Todd Rakoff recently cautioned that "the traditional analysis of what is 'best' may cause us to lose sight of what is only 'better,'" and suggested that "[i]t is a mistake to assume that, because judges cannot do everything, therefore they can do, or ought to do, nothing."[336] A judicial solution to form contracts should not be discouraged simply because legislative and administrative solutions remain lacking.[337] Instead, the critical role of the judiciary in shaping norms for contractual fairness should be embraced and empowered.

332. Knapp, *supra* note 16, at 614. Recent anecdotal evidence suggests that the increased use of the unconscionability doctrine to police arbitration provisions has discouraged in-house counsel from enforcing the arbitration provisions contained within their own forms. Warkentine, *supra* note 5, at 546 (citing Leslie A. Gordon, *Clause for Alarm, as Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, 92 A.B.A. J. 19 (Nov. 2006)).

333. LLEWELLYN, DECIDING APPEALS, *supra* note 5, at 367 (quoting Llewellyn, Book Review, *supra* note 248, at 704).

334. SLAWSON, BINDING PROMISES, *supra* note 28, at 10.

335. *See* Stempel, *Equilibrium*, *supra* note 111, at 840 ("The unconscionability norm has unfortunately become a disfavored stepchild of contract law.").

336. Rakoff, *Boilerplate*, *supra* note 326, at 1245.

337. Stempel, *Equilibrium*, *supra* note 111, at 842.