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## BOOK REVIEWS

### CONSENT AND SENSIBILITY

BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW. By Margaret Jane Radin. Princeton, N.J.: Princeton University Press. 2013. Pp. 339. \$35.00.

*Reviewed by Michelle E. Boardman\**

Consumer contracts that attach to a product or service are different from negotiated contracts. But what follows from this fact? Professor Margaret Jane Radin invites us to recharacterize consumer form contracts — boilerplate — as involuntarily received “paperwork,” a “rights deletion scheme” aimed at shrinking legal redress, or in the extreme as an intentional tort. Her argument is crafted in the language of consent, but her proposed resolution, I will argue, concerns not consent but welfare. Despite this disconnect, the book is worth reading for two reasons: Radin’s novel view of contractual consent and her focus on the widespread waiver of our default rights to legal redress through boilerplate.

Radin’s target is the body of terms that affect where and how aggrieved consumers can bring a legal claim: arbitration clauses, forum selection clauses, and exculpatory clauses. Her position is that consumers do not, would not, and should not consent to these clauses. Because it is assumed that they would not and should not consent, much of the book is devoted to the argument that consumers do not consent. Radinian consent requires more than current contract doctrine requires. At a minimum it requires a form of highly informed consent; the consumer must have both specific knowledge of each clause and a sound understanding of the effect of the clause. Consent may also require a certain level of choice among alternatives.

When we enforce boilerplate as though it meets the standards of contractual consent, Radin argues, we degrade consent. Combined with the loss of legal redress, enforcement leads to “democratic degradation” (p. 33). Radin could have argued for the direct regulation of redress clauses as a welfare-enhancing solution to democratic degradation. Instead she argues for an autonomy-enhancing consent-based solution enforced primarily by the judiciary.

This Review will explore two primary observations. First, to the extent the widespread use of redress clauses leads to a collective harm — democratic degradation — the issue is not one of individual consent.

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If the rights at hand are basically inalienable, as Radin holds, the problem is not that one *doesn't* consent but that one is *permitted* to consent. Moreover, improving the quality of individual consent would not address the harm. Radin's goal is to eradicate or severely limit the relevant clauses. It is only because she assumes that consumers *would* reject such clauses *if* they were informed that Radin is willing to use the vehicle of consent to reach the goal of eradication. But Radin is not arguing that we in fact improve the quality of consent through notice, education, or another road; she argues that in the face of nonconsent we should feel free to forbid the clauses. Thus, Radin's key achievement is not on consent but on the substantive effect of the limited legal redress consumers experience as the result of millions of individual transactions.

Nonetheless, the book's second contribution is the concept of Radinian consent, which is worth reviewing in its own right. Therefore the second question I explore is how Radin confronts the challenge of presenting a conception of consent that delegitimizes boilerplate without delegitimizing "ordinary" contractual consent. The questions to keep in mind are these: Which of Radin's objections to boilerplate apply to ordinary agreements? Which of Radin's *consent-based* objections are resolved by her solutions?

#### I. BOILERPLATE IN BRIEF: THE WAR OF THE WORLDS

The problem: We should stop categorizing boilerplate as contracts to which consumers consent, Radin argues, and instead view it as paperwork delivered by vendors. Treating this paperwork as contract stems from a "normative degradation" of the voluntary consent that underlies our contract law (p. 19). Enforcing terms that limit or alter consumers' access to legal redress — enforcing "boilerplate rights delegation schemes" (p. 16) — leads to democratic degradation.

The proposition: Courts, and perhaps others, should apply heightened scrutiny to those boilerplate terms that supplant the default rules of legal redress with clauses on arbitration, forum selection,<sup>1</sup> or the exculpation of liability. Radin provides an analytic framework with three continua: the quality of consent, the alienability of the right at hand, and the "social dissemination" of the term (pp. 154–55). Using

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<sup>1</sup> Radin adds to the concern about forum selection clauses the concern that the forum selected will be one, such as Virginia, that does not permit class actions (p. xv). She must be correct that extremely few consumers would recognize the class action effect of a Virginia selection. She gives the impression, however, that the class action limitation is a common occurrence. It turns out that Virginia is the only state that completely rejects the class action form of litigation, although there are circumstances in which one could still bring a class action in the federal courts in Virginia. What little evidence there is does not support the implicit claim that it is commonplace to select Virginia as the forum for businesses that are not headquartered in Virginia.

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this framework, courts can declare some rights inalienable or identify the commission of a tort (pp. 157, 197–98). Other state actors can use the framework to regulate boilerplate by limiting or banning terms.

The book opens with a prologue comparing the worlds of Agreement, World A, and Boilerplate, World B. World A contains the fictional sale of a single bicycle between Sally and John, who dicker briefly over the price. Sally, the buyer, hands over her money first, but John never returns with the bike. Radin describes the possible damages. This is agreement — “the traditional basis of contract” (p. xiii).

World B contains several real-world examples of “nonideal ‘contract’” (p. xiii). The first is an arbitration clause in a contract between a divorced mother signing on behalf of her child and a tour company offering an African safari. The contract is offered in whole. The mother’s options are to sign it with the arbitration clause or choose another vacation, one assumes. On safari her child is mauled to death by hyenas. The father, who did not sign the contract, sues but fails to avoid arbitration (pp. xiii–xiv).

The description of World A is half a page long. World B’s description is seven times longer and is further explicated throughout the book. The contract in World A has but two explicit terms (item, price) and perhaps one implicit term (immediate delivery). The breach is a failure to deliver; we are not asked to consider whether there is an implied warranty of merchantability. But the number of total possible terms is likely small. John is not a merchant, and if the bike malfunctions or falls apart soon after the sale, Sally may bear that risk. It is an attractive world because it is simple. Its simplicity suggests freedom. Sally and John are assumed to be of equal bargaining power. Radin does not consider whether other nonmerchant sellers will offer terms that differ from John’s or what to do with John when he is not willing to dicker over terms.

The African safari contract has many terms, one assumes, and the mother is not “free” to change those terms. The case is complicated by a divorced parent signing on behalf of her child, as the law allows, in a manner that binds the other parent. The great risk of this exchange would appear to be death, rather than arbitration, but the law allows the mother to make that decision as well. Radin does not consider other vacation alternatives or the terms of those vacations. As with the rest of World B, this contract receives more attention than its counterpart in World A.

How are we to compare a child mauled to death with a missing bike? Better to equalize the contexts but retain an Agreement version and a Boilerplate version. Perhaps Sally receives the bike and her child dies the next day in a traffic accident because the brakes fail. Does John owe her estate nothing, as the contract would imply if the bike were sold “as is” and Sally could inspect it? Or is the sale governed by the background terms of common law and the Uniform

Commercial Code (U.C.C.), of which Sally was wholly unaware at the time of contracting? (Radin would call Sally's lack of awareness here "sheer ignorance" if Radin did not reserve the term for World B only (pp. 21–23).)<sup>2</sup> Or perhaps the World B contract could be modified to approximate the bike sale: the safari is cancelled and the family must enter arbitration for damages beyond reimbursement. Equally outraged?

The other examples of World B are an arbitration clause applied to alleged sexual harassment during employment, a choice of forum clause in an internet service provider contract, and an exculpatory clause in the rental contract for potentially dangerous equipment (pp. xiv–xvi). What these cases have in common, writes Radin, is "a deletion of legal rights that are otherwise guaranteed by the political order — by the constitution, or by legislation, or by other sources of law" (p. xvi). Boilerplate forms take us out of the existing legal world into the "legal universe" imposed by businesses (p. xvi).

One of Radin's most intriguing contributions is her argument that boilerplate is not contract at all. One cannot win the point, however, by comparing a sparse, incomplete, whimsical Agreement with the most trying of Boilerplate contexts. Agreements in the real world have troublesome clauses too, with which courts and scholars struggle. That Boilerplate might have more of the troublesome clauses does not support approaching the project as a fight between the forces of Light and Dark. It is perhaps fortunate then that although the book opens with the two Worlds, little of Radin's argument hangs on comparing the *facts* of World A to World B.

Rather, her argument is that the *theoretical* support for contract enforcement in the world of Agreement, laid out in chapter four, does not apply to the *facts* on the ground in the world of Boilerplate. In this ambitious chapter, Radin sets for herself a nearly impossible task — explain the centrality of consent in autonomy and welfare contract theories to the completely uninitiated. She succeeds in her goal of "demonstrat[ing] the deep embeddedness — the ineradicability — of the notion of voluntariness, which is not dependent on the type of theory one favors" (p. 56).<sup>3</sup> Contractual theories of autonomy (loosely, protecting self-government/consent) and welfare (loosely, maximizing gain, within a framework of presumed consent) both require voluntary action and eschew coercion.

In the chapters that follow, Radin examines and finds lacking various attempts to understand or support Boilerplate, World B, using

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<sup>2</sup> Sheer ignorance is a "situation where a person's entitlement [to property or a legal right] is being divested, but the person does not know that it is happening, or indeed, that anything is happening" (p. 21).

<sup>3</sup> Radin does, however, give short shrift to Professor Randy Barnett's theory of contract (p. 260).

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theories from World A. I found myself wishing she had first evaluated World A using theories from World A. Many of her objections stem not from the War of the Worlds but from the ill fit between theory and reality.

## II. UNATTAINABLE CONSENT

Radin's view of legal consent is one of informed, particularized, "bargained for" consent.<sup>4</sup> Consent to boilerplate is problematic or absent on this view: First, consumers are uninformed — they do not read or understand the boilerplate. Second, without knowledge of a clause (its existence, its content, and its implications), one cannot consent to it in particular; Radin brooks no global consent to a bargain in the whole. Third, the inability of the consumer to alter the term weakens consent — it becomes "assent" instead and perhaps pressured assent if the contract is one for a necessity such as medical services.

This Part explores Radin's analysis of nonconsent in World B, beginning with the effects of heuristic biases in section A before considering the absence of clause-specific consent in section B.<sup>5</sup> The *level* at which one must consent in order to effectively consent to a contract is at the heart of Radin's argument. Therefore, in section B, I compare Radin's view with several forms of blanket or general consent. Finally, in section C, I conduct a thought experiment on consenting to a continuum of options.

### A. *Lack of Consent in World B: The Heuristics Problem*

Underpinning much of the book's analysis are the ever-present heuristic biases of consumers. Consumers, like all people, are boundedly rational. People make decisions with less than full information, under time constraints, and using basic heuristics that lead us at times to miscalculate. Specifically, Radin notes that "[w]e are not good at assessing risk; we tend to stay with the status quo; and we make choices

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<sup>4</sup> "Bargained for" is in quotation marks here because the legal concept of bargained-for exchange found in American contract law does not require the physical act of bargaining or dicker-ing over terms that Radin requires. An exchange is bargained for in the contract law sense if the parties exchange their two sides in a bilateral trade. Among other purposes, this requirement of exchange differentiates enforceable contract promises from unenforceable promises to give a gift; a gift is not an exchange but a unilateral transfer.

<sup>5</sup> Radin offers information asymmetry as a third ground for lack of consent, but she does not rely on it. Information asymmetry in this context refers to the greater knowledge the drafter of boilerplate has as to its content compared to the weaker knowledge the consumer has. Radin's focus turns out not to be on the relative asymmetry, but on the low level of consumer knowledge as an absolute matter. Information asymmetry or deficit will therefore be discussed in section B along with nonspecific consent. Professor Oren Bar-Gill explores relative asymmetry to great effect in *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012).

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according to particular surrounding circumstances that are salient to us, ignoring others that may be more pertinent" (p. 26).

Naturally, this fact of the human condition is a fact of Agreement as much as Boilerplate; Radin does not address how the law might soften consent in World A in light of human failings. She raises the imperfect decisions born of bias in World B because she wants to answer a specific question: "Why do [consumers] think *it doesn't matter* what the clauses say about their legal rights?" (p. 26).<sup>6</sup> By "doesn't matter," Radin here means that consumers *are willing to enter into* bargains that include mandatory arbitration, for example. Her answer is that consumers are confused by their biases. Even a consumer well informed about an arbitration clause "would nonetheless be unlikely to take it seriously, because she is unlikely to think the risk [of wanting to bring suit is] applicable to her" (p. 27).

Where Radin sees bias, I see truth. It is unlikely that a consumer will experience a loss under a contract severe enough to warrant suit and *even more* unlikely that the average consumer would choose to sue in response. In other words, the expected value of retaining the right to sue is tiny. In addition, if the exchange is for an arbitration clause, the consumer has exchanged something of tiny expected value for something of teeny expected value.<sup>7</sup>

Nonetheless, one can make a poor decision about something of small consequence. The unspoken premise of Radin's argument is *how* these logical errors lead to degraded consent or problematic consent. The move from bias to poor consent is not as obvious as it may seem. All human decisionmaking is affected by our heuristic biases. If the application of the biases to decisionmaking is sufficient to declare the decision taken as lacking "consent," most if not all contractual agreement fails the test. Even the bike sale in World A requires Sally to decide if the risk of riding a bike is worth her purchasing the bike at all, or at the offered price. Sally doesn't bother to determine the unwritten warranty term the background law assigns to the contract because she thinks it unlikely she will need to make use of a warranty.<sup>8</sup> Is this problematic consent?

Radin's best response is regrettably one that is not much pursued in the book: "Consent is problematic . . . in cases in which a recipient

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<sup>6</sup> Emphasis has been added.

<sup>7</sup> The consumer may be giving up something of greater value in two of Radin's other targets — forum selection, particularly when a jurisdiction does not allow class actions, and exculpatory clauses — although the expected value of each at the moment of contracting remains small. I discuss elsewhere why giving up these small expected values might pose a free-rider problem. *See infra* pp. 1974–75.

<sup>8</sup> We might assume that the *substance* of the background law found in the common law, U.C.C., or other consumer-protective statutes is likely to be better for Sally than the terms drafted by a business. More favorable terms speak to Sally's welfare, not to her ability to consent.

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[of boilerplate] characteristically underestimates a risk that people consistently underestimate *and that the firm knows that people will consistently underestimate*" (p. 29).<sup>9</sup> Here the asymmetry of knowledge between vendor and consumer takes on real force. Take a clause that increases late penalty fees one year into a consumer service contract. Now imagine the vendor chooses the late-blooming fees because it knows consumers choosing a provider will discount terms that have effect later, focusing instead on today's interest rate.<sup>10</sup>

This is a problem, but is it a problem of consent? Can I not fully consent to that which is not in my best interest? Radin's argument does not dwell on or require consumer manipulation. Her position is that if I agree to an arbitration clause with full appreciation for the statistics of consumer harm and suit, I can be said to have consented. But if I "agree" because my calculation includes an error about the statistics, my consent is problematic or perhaps degraded to a stage below consent.

This distinction does not strike me as a tenable approach to the world, but if it is, it must be applied to World A as well as World B. Does Sally miscalculate the risks of buying a used bike from an individual with whatever warranty the background law provides her — of which she is ignorant — because she focuses instead on the lower price John offers? If she and John write up a contract for the sale of his car to her, will she be free of bias in estimating the value of each term? If Sally decides to buy from a used car lot instead because it will allow her to pay in installments while John will demand a lump sum, does she fail to consent because her understanding of interest rates and the time value of money is shaky? The challenge for Radin is to present a conception of consent that upholds World A while delegitimizing World B.

Before delving deeper into Radin's theory of consent, consider what is at stake in our treatment of boilerplate. Radin argues that the degradation of consent has allowed a "democratic degradation" where the law of the state is replaced with the "law" of the firm. In particular, the state-granted rights that allow access to redress in courts are replaced by arbitration clauses, forum selection clauses (including fora without class actions), and exculpatory clauses. "Mass-market form contracts that amount to boilerplate rights deletion schemes undermine the distinction between public and private ordering, and thereby undermine the ideal of private ordering itself" (p. 35). The problem is exacerbated when boilerplate proliferates such that in order to buy a

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<sup>9</sup> Emphasis has been added.

<sup>10</sup> See BAR-GILL, *supra* note 5, at 21–23.

particular good or service one must accept a particular clause; there is no option of finding a supplier with a different clause.<sup>11</sup>

Radin objects to these deviations from state-granted defaults in part because they occur without Radinian consent. Those who do not take her view of consent, however, still should take seriously the potential gravity of democratic degradation. Consent or not, there may be a free-rider problem when each individual consumer signs away her right to a legal process that in the aggregate provides public benefits.<sup>12</sup> If the potential for class action is to the benefit of all consumers but is paid for individually, for example, I may wish the threat of class action to cabin a vendor's behavior even as I willingly trade my own right in exchange for a slightly cheaper contract (or perhaps I retain the time it would take to discover the clause in exchange for the risk of the clause).

It is the nature of collective action problems that "the collective," meaning the state, can provide a solution. Legislatures can restrict the use of clauses that courts are rightly powerless to address collectively. Here is not the place to debate the benefit of class actions to the public.<sup>13</sup> The point is that *if* provisions that restrict class actions or the right to sue in a convenient forum, or other clauses used widely, leave vendors with an insufficient threat of suit from consumers, the polity may choose to reinstate the threat even though each individual would choose to accept the clauses. The problem is not caused by bounded rationality or degraded consent, however, and *cannot be solved by improved consent*.

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<sup>11</sup> Compare Radin's view that "[c]opycat boilerplate should be evaluated as a possible form of tacit collusion" (p. 41), with Judge Easterbrook's view that "the fact that language has been used before does not make it less binding when used again. Phrases become boilerplate when many parties find that the language serves their ends," *Rissman v. Rissman*, 213 F.3d 381, 385 (7th Cir. 2000).

<sup>12</sup> Richard Posner similarly argues that the small expected value of certain clauses in form contracts may render market forces weak: "Competition cannot be relied upon to eliminate this asymmetry because the benefits of the 'good' form to the consumer are too slight to overcome the information costs of making those benefits an effective selling point." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 145 (8th ed. 2011). We don't expect Best Buy to roll out a "No Arbitration Clause!" ad campaign because the number of consumers who switch sellers will not justify the cost of relinquishing the clause. Perhaps a better campaign would be: "Mention 'no arbitration' at the time of purchase and receive a free 'right to jury trial retained' clause with every purchase!"

<sup>13</sup> Compare Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 *LAW & CONTEMP. PROBS.* 75, 77-103 (2004) (arguing for legislation prohibiting companies from precluding class action through arbitration on both efficiency and public policy grounds), with Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — With Particular Consideration of Class Actions and Arbitration Fees*, 5 *J. AM. ARB.* 251, 264-69, 277-79 (2006) (arguing that courts should use an ex ante perspective to recognize that arbitration agreements generally benefit consumers as a whole). Radin is highly skeptical that the cost savings from boilerplate clauses are passed on to consumers (p. 80).

*B. Lack of Consent in World B: Nonspecific Consent*

Radin's second objection to boilerplate consent is that consumers do not consent at the requisite level of detail. We degrade the normative value of consent, she argues, by claiming there is consent to boilerplate when the consumer "consents" to the bargain but not to each clause: "In this process, consent is degraded to assent, then to fictional or constructive or hypothetical assent, and then further to mere notice (i.e., something that tells recipients that terms are there), until finally we are left with only a fictional or constructive notice of terms" (p. 30).

Unfortunately, Radin does not quite describe the move from consent to assent, nor does she define "assent," which lacks a specific meaning in contract law. Radin's conception of assent appears to turn on the power of the seller to influence terms, a power consumers typically lack. Radin's explicit objection is primarily that one cannot consent to that which one does not know. Looming in the background, though, is the fact that even a fully informed consumer has but three choices: accept the contract bundled with the purchase, choose another bundle from another vendor, or go without.

If the consumer has a fourth option, the power to bargain and dicker with the vendor, we have Radinian consent. Otherwise, we have mere assent. The World A bicycle example happens to be written to invoke the Radinian definition of consent, but many real World A exchanges also amount to assent only. Many a bike seller will offer "this bike, my price, this week, take it or leave it" plus all unwritten terms that the background law implies.

One curious feature of Radin's consent/assent line is that the power of negotiation colors consent *as to all* the contract terms. If a consumer can change none of the terms, she at most assents to the terms. If she can change some terms, she consents to the entire contract, including all the terms over which she has no power of explicit negotiation. Having drawn the line at active negotiation, this turns out to be the most sensible position. The alternative is to say that a consumer consents to some clauses, assents to others, and that judges must investigate the level of consent to any specific clause a party seeks to enforce in court.<sup>14</sup>

In addition to rejecting mere assent, Radin rejects the possibility of general consent and hypothetical consent. General consent or "whole" consent, sometimes called "blanket assent," is agreement to both known terms and unknown terms as a bundle, with the understanding that the consumer does not agree to extreme unknown terms.

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<sup>14</sup> Radin's analytic framework is more sophisticated than simply inquiring into specific consent, although the framework would invite a similarly great increase in litigation by opening clauses up to de novo judicial review.

“Hypothetical consent” has at least two forms or functions, which Radin does not tease out. Radin takes those who reference hypothetical consent to be claiming it equates with actual consent or is a form of consent; I think this is in error. Because the concept of hypothetical consent is woven through Radin’s attack on defenses of boilerplate, I address it first. Once understood, we can return to the central comparison between Radin’s term-specific consent on the one hand and forms of general consent on the other.

Hypothetical consent first arises in the context of an *incomplete* agreement where a court has to determine what the parties would have agreed upon had they foreseen and provided for a contingency that has now arisen. Starting with the assumption that parties wish to maximize the joint value of a contract, the judge (or scholar) attempts to divine what rational parties *would* have consented to if the two had had a chance to bargain.<sup>15</sup> The claim is *not* that because one “would” or “should” consent that one *has*.<sup>16</sup> At times Radin misses this.

Hypothetical consent also arises as a *defense* to claims of unconscionability and the like where an extant written term is called into question. The court may conclude that a clause is not substantively unconscionable if, in its determination, most parties in the position of the complaining party would be willing to accept the clause. Such a conclusion is not based upon a pretense that the party before the court has specifically consented; it is part of our understanding of what it means for a clause to be unconscionable. A clause that a rational consumer “would” consent to is not substantively unconscionable.<sup>17</sup> When a court endorses the defense of hypothetical consent in this context, it does so in a case where the ordinary outward manifestation of legal consent — a written clause in a voluntary bargain — is already present.

So much for hypothetical consent. What does actual or strong consent require? Radin requires clause-specific *knowledge* and clause-specific *alternatives*. It is not enough to consent knowing that there are terms one has not read, satisfied that reputation and other forces will keep obscene terms at bay. Surprisingly, it is also not enough to consent knowingly if the term cannot be changed by negotiation or go-

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<sup>15</sup> “As a general matter, parties will want incomplete contracts to be interpreted as if they had spent the time and effort to specify more detailed terms.” STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 301 (2004).

<sup>16</sup> Although, one could argue that by leaving a subject unsettled the parties have consented to allow a court to fill the hole using standard practices.

<sup>17</sup> Of course, one can question the institutional competence of a court to determine what most parties would (or what a rational party would) consent to, but this is a problem inherent in unconscionability.

ing to a different seller.<sup>18</sup> This second position undermines consent in World A, where there are, without doubt, terms that John and other bicycle sellers are unwilling to change. There is a minimum price. There are limited aesthetic options. If Sally wants to buy a used bike that week, her choice of seller might be very limited, perhaps to one seller. If none of the individual sellers is willing to offer more than an “as is” warranty with the minimum consequential liability the law requires, she is stuck. But she consents.

As for clause-specific *knowledge*, should we say that a consumer cannot consent to a boilerplate bargain unless she understands each individual term? This requirement is stricter than what we require for the other attributes of an exchange. I know some of the qualities of goods I purchase and not others. I have an imperfect understanding of how competing products compare with one another.<sup>19</sup> Yet we do not say that I do not consent when I buy. Similarly, in the safari example above, the family surely understood that the biggest risk the exchange carried was the risk of death; the risk of having to go to arbitration pales in comparison.

Consider two competing descriptions of a consumer’s consent:

(a) Full knowledge + individualized consent: The consumer is aware of and understands each clause. Note this does not require the consumer to *prefer* each clause. Only a childish notion of consent would require a party to actively desire each individual clause, as opposed to the bundle of traits.

(b) Knowledge of ignorance + consent to the bargain: The consumer is aware of his ignorance about many terms in the written contract. He concludes that he values the combination of the good plus the expected value (including the expected cost) of the contract terms more than he values the cost of the contract; in other words, he believes he

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<sup>18</sup> For the nonlawyer, to whom the text is at least partially addressed, the blurry line between Radin’s conception of consent and the actual requirements of American contract law is dangerous. The Worlds of Agreement and Boilerplate offer a useful contrast but the *legal* requirements for a binding contract in World A are mostly hinted at. Radin’s ambitious chapter on the theoretical underpinnings of contractual consent does not rectify the shortcoming. Thus, as Radin objects throughout the book, on consent grounds, to multiple aspects of boilerplate, the reader is left with the sense that boilerplate provisions do not currently merit enforcement under existing law. The layman will be entirely excused from coming away from the book believing that (a) contract law does not hold a person to have truly consented to a contract unless at least some of the terms are bargained for, in the sense of dickered over; and (b) one does not consent to an entire bargain but to each term one by one. The layman will probably be confused about whether one has to have bargained over a particular term to consent to it but he will have the strong impression that to accept a known term he dislikes is not consent if he could not get a different term elsewhere. Now, these are all legitimate positions within the philosophy of contractual consent but they are not an accurate portrayal of contract law *even in* World A.

<sup>19</sup> See DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 125 (2013) (“The typical buyer cannot easily rely on her own expertise or her ability to assess products from different sellers. Search costs are high.”).

is gaining through voluntary trade despite his partial ignorance. Moreover, he believes the cost of resolving his ignorance is not worth the expected increase in his decisionmaking capacity.

Option (b) is one of the various conceptions of consent that has evolved from the ideas of Karl Llewellyn. Llewellyn conceived of “blanket assent” to form contracts. “Blanket assent” accepts that consumers do not consent to many boilerplate terms individually. Instead, consumers consent to any “dickered terms,” the general type of transaction, and to “one more thing,” which is “blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.”<sup>20</sup> How to delimit the “unreasonable or indecent” terms is a matter of debate. Professor Randy Barnett’s position, a kind of “whole” rather than “blanket” consent, is that one can consent *to be legally bound* to unread terms as long as such terms are not “radically unexpected.”<sup>21</sup>

My own view is that whatever *legal* force it may have, general assent is accurate as a *descriptive* matter. While ideal consent may include full information, which of these descriptions of consent do we find in reality? We assume that (a) is uncommon. The theory of whole consent would find (b) commonplace. Consumers do not consent to each clause specifically but to the entire exchange, knowing that their rights will be limited by contract language they have not read. The much-battered common law “duty to read,” for example, is a rule in the world of Agreement that does not assume parties will read; it charges a party with the consequences of not reading.

Consumers mean to agree to the basic bargain they can see and touch, including individually chosen terms (length of warranty) or traits (the smallest size, the middle quality); this is the consumer version of “dickered.” Consumers agree to the fine print as well, knowing it is there, that it remains unread, expecting *to gain* from some clauses, and *on the understanding* that it does not greatly deviate from what the consumer thinks may be there.<sup>22</sup> Radin will reject this as a definition of “agree,” but I don’t see how. In the realm of adults, one agrees

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<sup>20</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960).

<sup>21</sup> Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 637 (2002) (internal quotation mark omitted). Barnett is comfortable empowering a court to decline to enforce a clause requiring the consumer to hand over his favorite pet in the event of breach, for example, because surely the consumer did not mean to be agreeing to such a radically unexpected term.

<sup>22</sup> Professor Lawrence Solan calls agreeing to the terms, whatever they may be, “opaque consent,” as opposed to the “transparent consent” of agreeing to each term. Both are consent to Solan, although opaque consent may call for a different judicial response. See Lawrence M. Solan, *Transparent and Opaque Consent in Contract Formation*, in *COERCION AND CONSENT IN THE LEGAL PROCESS* (Susan Ehrlich et al. eds., forthcoming 2014).

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to a trade if (a) one prefers it to *not* trading, (b) one has not been coerced or deceived, and (c) *one makes the trade*.

One point must be clarified: what limits hold over consumer expectations? Radin makes an excellent and neglected point when she states that “[i]f a draconian form of governance prevails in which many bad practices exist that unjustly allow harm to citizens, citizens will empirically come to expect the harm” (p. 85). Imagine, for example, that in order to receive any medical service (a category of contract where there is strong natural pressure on the consumer to choose the bad over the worse if there is no other choice) a consumer must sign a contract that includes a clause giving the doctor the right to kill instead of heal one percent of patients. Those with a life-threatening illness will nonetheless “contract” for medical care, expecting full well the death lottery clause. Naturally, no one rises to argue that this “expectation” justifies enforcement of the clause.

In my view, this extreme example and others like it need not be accounted for in our current system. American consumers do not expect such extreme clauses; businesses do not attempt to impose such extreme clauses. Consumers have a sense of the range of possible boilerplate provisions and voluntarily enter into agreements believing, *accurately*, that any clause like the death lottery clause will not be enforced. It is a sign of success, not failure, that the requirements of unconscionability are rarely met.

### C. *Consent on a Continuum*

By Radin’s lights, the ability to read boilerplate terms or mere notice of the existence of terms is not consent. This is right. Consent comes when the consumer *agrees* in the face of known but unread terms. It is some minimum level of awareness of the terms *plus* voluntarily entering into the bargain that equals consent.

I ask if the consumer can consent *to be bound* to the unread terms instead of asking, as Radin does, if the consumer can be said to consent *to the terms themselves*. If one adopts Radin’s particularized requirement of consent, consumers do not consent to most terms in form contracts, favorable and limiting alike, and the courts are thus invited to engage in weighing under Radin’s particularized consent framework. As explored elsewhere, this unwinding of our traditional notion of consent to the bargain, in favor of consent to the particular, undoes contracting far beyond boilerplate.

Here we come to an empirical impasse, one which shows that “notice” can carry more relevant weight than Radin allows. Recall that the degradation of consent goes from consent to assent, hypothetical assent, notice, and finally hypothetical notice. For Radin, an intentional purchase plus mere notice of contract terms carries no water.

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To see the value of notice, imagine a contract with a blank that will be filled by one of three possible clauses. Now imagine a consumer who is aware of the three options — who is on notice — but does not know which of the three clauses is written in the contract he receives. If he nonetheless chooses to enter into the contract, he has consented to any of the three clauses. If one accepts this, then one accepts this claim: *specific consent is not necessary to consent*.

Now assume that the possible options are not three but thirty-three. They span the gamut of modern warranty provisions. Or perhaps the options are on the continuum from arbitration in the seller's preferred location to a jury trial in the consumer's location. If the consumer knows of the continuum and still consents, he consents to all the possible clauses. Or perhaps if he does not know of the full continuum but knows of the most restrictive clauses and still chooses the contract, he consents to the "greater" including the "lesser." This is the power of nonspecific assent. It also explains why a clause falling outside of the range to which the consumer consents demonstrates either no consent or a weak form of consent.

The empirical impasse is that we do not know whether the legal redress terms that Radin targets fall along the consumer continuum or entirely outside of it. This dearth of knowledge reveals that a consent continuum analysis sets a higher bar than similar forms of blanket consent. The Llewellynian universe of terms that are "not unreasonable or indecent" and do not eviscerate the bargain is much larger than the universe of terms of which the consumer is minimally aware. Consent to a continuum of clauses thus offers a more concrete vision of the consumer's consent than does Llewellyn's blanket consent. The consumer knows there is the possibility of arbitration, even though she does not know precisely how arbitration is run. Now assume, as I believe Radin would, that redress clauses fall outside of this continuum. Where redress clauses fall — which is ultimately an empirical question — affects how courts and legislatures should regard arbitration or forum selection clauses, but it does not undermine the strength of the consent theory generally.

Nonetheless, if we are terminally unsure what consumers know or understand about *what might be* in their form contracts, we can consider another story. Perhaps when a consumer enters into a bargain the consumer has no idea what the categories of unread terms are, apart from some form of warranty and some form of return policy. In particular, let us assume consumers in general are completely unaware of the legal redress category. Can the consumer consent to be bound to these unread terms? Consider Barnett's defense, where he imagines telling a dear friend, "Whatever it is you want me to do, write it down

and put it into a sealed envelope, and I will do it for you.”<sup>23</sup> If it is not “categorically impossible” for Barnett to make such a promise, then it is likewise not impossible to promise to be legally bound to terms one has not read.<sup>24</sup> As a descriptive and linguistic matter, it seems to me that we *do* believe he has consented to the task but that he consents because there is a limit to what a dear friend will require. Consumer form contracts are offered by neither dear friends nor unrestrained enemies; courts may consider what falls outside of the circle of general consent.

To be clear: we may well have a different view of enforcement of this consent, but it is inaccurate to say there is no consent in these two examples. *Because the consent is about terms with negligible expected value* to the consumer, we may take a more paternalistic approach to enforcing the clauses or allowing the terms in the first place. As Richard Posner posits, the small value of any given clause and the high cost of getting consumers to pay attention to a more attractive clause may mean there is little competitive pressure to offer optimal terms.<sup>25</sup> (This is not to say that vendors are not constrained by reputation; if a clause is bad enough, word will get out.)

*Because the consent is general*, we may more readily conclude that the strength of the consumer’s preference for the clause is weak or even negative. In other words, the consumer’s consent is not necessarily an affirmative preference; it may be a product of relative indifference. After all, the consumer was willing to accept any of the clauses on the continuum. The consumer might actively dislike the clause but still prefer the bargain as a whole to no bargain. This generalized consent to low-expected-value clauses weakens the default assumption that legislatures should be wary of encroaching on consumers’ revealed preferences. Simply intuiting that consumers do not value a decrease in cost in exchange for a limiting term is insufficient to overturn this assumption. But perhaps low-profile, low-value clauses to which consumers only generally consent are fair game.

Ironically, Radin’s project stems from a platform of hypothetical consent. She directs the judiciary to step into the fray only when two facts are true: (1) consumers do not individually consent to a term; *and* (2) Radin does not believe consumers *would or should* consent to the term (pp. 180–81). A law and economics scholar may believe that consumers would and should accept clauses that limit their judicial access in exchange for the decrease in contract price. Radin believes that consumers would and should reject many such clauses, even if offered

<sup>23</sup> See Barnett, *supra* note 21, at 636 (internal quotation marks omitted).

<sup>24</sup> *Id.* (“Whether or not it is a fiction to say someone is making the promise in the scroll box [during an online purchase], it is no fiction to say that by clicking ‘I agree’ a person is consensually committing to these (unread) promises.”).

<sup>25</sup> POSNER, *supra* note 12, at 116.

in exchange for a lower price. The resolution is either to gather data about who is right, thus permitting clauses to which consumers hypothetically consent but do not specifically consent, *or* to paternalistically outlaw those clauses that consumers should reject but do not. Neither solution improves active consent.

While consent is at the heart of the book, Radin is sensibly not arguing that consumer form contracts be presumptively unenforceable on the ground of lack of consent. Form contracts are replete with terms to which consumers do not individually consent but for which Radin is not arguing dismissal. Her call to action is limited to those clauses that she believes — without evidence — consumers *would* reject *if* freed from their biases. Or perhaps she is willing to call for action on those clauses she believes they *should* reject even if they would not once informed, in which case her aim is to improve welfare at the expense of autonomy.<sup>26</sup>

### III. THE SOLUTION: A FRAMEWORK FOR EVALUATING BOILERPLATE TERMS

Second to her analysis of consent, Radin's central contribution is her analytic framework for evaluating boilerplate provisions. Although consent is relevant to it, one need not share Radin's view of consent to adopt the framework. She proposes three continua a judge (or other decisionmaker) can combine to decide whether to enforce a particular boilerplate clause: (1) from full alienability of a right to inalienability, (2) from clear consent to nonconsent (specific to the clause), and (3) from use in one contract to widespread use. For example, if a clause removes (1) a limitedly alienable right under (2) problematic consent and (3) is applied to large numbers of people, Radin invites judges to deny the clause.

The idea that certain rights require special procedures to waive, and are therefore alienable but not by rote contract, is a familiar one. Radin's vision is new in two ways. First, the analytic framework invites courts to consider alienability in combination with the other two aspects. Second, she encourages courts to be more aggressive in declaring inalienability or limited alienability. Of course, to take advantage of the framework courts would also have to delve deeply into consent to specific clauses and take judicial notice of the prevalence of a clause. This latter inquiry may mirror the earliest "adhesion contract" cases, in which courts looked to see whether alternative clauses were available from competitors.<sup>27</sup>

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<sup>26</sup> I, too, would be willing to support federal or state legislation limiting clauses that shrink judicial access if a collective action problem is proven.

<sup>27</sup> See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960).

The focus on “social dissemination,” as she calls it, is powerful because the prevalence of a clause may generate support from those who are not moved by the consent question. Those who believe consumers freely consent to the deal package, and not to each clause, can still agree that competition may be insufficient to support optimal clauses in widespread form contracts or, as I believe, that the negative externality from a widespread reduction in the threat of consumer suit will not be solved by consumer choice because of free riding. Thus, for divergent reasons, “[t]he analytical framework . . . proposed suggests that mandatory arbitration clauses should be disallowed in mass-market deletion schemes . . . , where their practical effect is to deny any remedy; such as a case where only a class action would be effective” (p. 183).

In addition to this tripartite (mostly judicial) framework for deciding when to enforce, forbid, or individually evaluate boilerplate, in part IV of the book Radin proposes a multitude of possible changes to our current boilerplate regime. The options include private, government, and hybrid solutions — government naturally includes legislative, judicial, and administrative actors. This substantial offering is a strength of the book but a challenge for a reviewer. Noting that some solutions may be unworkable and thus what follows does not necessarily earn her full endorsement, Radin evaluates:

- (i) Reclassifying bad boilerplate as a defective product in tort or as a new tort: “intentional deprivation of basic legal rights” (pp. 211–12)
- (ii) Regulating the content of boilerplate on a product safety model, including (p. 233):
  - (a) disclosure
  - (b) legislation or agency rules forbidding certain clauses or approving others<sup>28</sup>
  - (c) judicial identification of legal redress rights as fully or partially inalienable
- (iii) Comprehensive regulation based on the European Union model, with the benefit of international standardization (pp. 233–42)
- (iv) Rating agencies or watchdog groups that monitor, report on, and approve boilerplate (pp. 192–93)
- (v) Legally supporting market solutions, such as safe harbor for notice (p. 220), coupled with a ban on clauses that restrict inalienable legal redress rights (pp. 229–30)
- (vi) Automated filtering software that allows consumers to engage in automated contracting, including alerts or rejection of contracts with unwelcome terms (pp. 193–96)

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<sup>28</sup> Radin discusses black lists, “white lists,” and “grey lists,” which contain terms that are perhaps permissible but subject to greater judicial scrutiny (p. 231).

I will elaborate on what I take to be the two solutions Radin prefers — boilerplate as tort and direct regulation of terms.

*A. Boilerplate Under Tort Law*

Radin proposes the tort of the “intentional deprivation of basic legal rights” (p. 211). If adopted, the tort, by definition, would apply only to boilerplate terms affecting “basic legal rights” and would require suit to invite the judicial regulation of those terms. In comparing the strength of the tort with the more direct regulation of boilerplate terms, this brief section also asks how the tort fits into Radin’s larger project.

“Receipt of boilerplate is often more like an accident than a bargain,” writes Radin (p. 197). On the one hand, this analogy is tempting. One is innocently walking down the street looking to buy a product when one is blindsided by a forum selection clause. On the other hand, to the extent the analogy is frail, the tort framework is a fragile fit. Consider a forum selection clause that selects Virginia, a forum that does not permit class actions. Using Radin’s triad framework, including such a clause in a consumer contract would surely be an intentional commission of the tort.

The clause will involve little to no specific consent, satisfying the second continuum, and it will be widely disseminated, satisfying the third. Some percentage of consumers will realize that forum selection is a possibility, but very few outside the lawyering class will further realize the possible class action implications; plenty of lawyers will not have this thought either. This leaves Radin’s first question: how alienable should these rights be?

Radin would find these rights close to inalienable, at least in the consumer context. But consider both her position and more moderate ones in order to see that in this case the tort is committed even if the rights are alienable. Given the “sheer ignorance,” as Radin would say (pp. 21–23), of the vast majority of consumers as to the clause, very little weight need be carried by the other two continua. Whether the right is completely inalienable (in which case consent is irrelevant) or the right is alienable with some show of informed consent, it cannot be alienated here.

What then is the role of the tort? Nothing unexpected has happened between the tortfeasor and the victim: the relevant act is intentional, premeditated, and completely public. In other words, there is no need to wait for the “tort” to occur before action can be taken. In addition, the court need not engage in any genuine factfinding as to the particular plaintiff before it. If a widespread, intentional, repetitive, and public act is wrong, and wrong regardless of victim, why choose tort over statutory law? What advantage does a court have over a legislature? Radin sees one: the court may be more likely to act.

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This sheds light on what Radin means by the “democratic” in democratic degradation (pp. 16–17). She is not referring to the franchise or any particular legislative outcome. She refers to the greater concept of the foundational rights we as a body politic bestow upon ourselves, including the rights of legal redress. Inherent in her concept is the partial market-inalienability of these rights.

Thus, while there is no error in Radin’s use of “democratic,” there is a missed opportunity. No one will argue *for* democratic degradation; that portion of the book may therefore escape debate. But to the extent the charge of the book solidifies into whether we should forbid people from being able to sell their right to various methods of legal redress, the question should be richly explored.

This point is not a detour: is there a “right” to the class action form of litigation at all, in the sense in which Radin uses the word “right”? In the United States, we allow states to choose not to extend this right. As a consumer living in Virginia I may (erroneously?) believe I prefer the convenient forum of my home state to another forum, not realizing that I thereby forgo the class action option. If this is a form of democratic degradation, the issue engages long before I sign a contract with boilerplate terms.

Also at the heart of the book is the question of whether one can commit to mandatory arbitration or whether to do so is to improperly alienate the right to judicial access (pp. 130–38). This is a serious and difficult question with which neither Radin nor I fully engage. Arbitration does not result in a public case outcome, and it often does not include the ability to bring class actions. We may value the public benefit of these options, including the reputational effects of a negative judgment against a company, but it is not obvious that individual consumers value these options enough to pay an increased contract price. This suggests that society needs to decide how arbitration should be handled in the consumer context.

Although one would not know it from casually reading *Boilerplate*, these questions have already been decided through the American democratic process. The first half of the book, which does not admit the existence of the Federal Arbitration Act,<sup>29</sup> leads one to understand that courts wildly permit arbitration clauses to our collective *democratic* degradation, when of course it was federal *legislation* that made arbitration enforceable.<sup>30</sup> That Radin rejects the Supreme Court’s interpretation of the Act as applied to consumers requires a much larger

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<sup>29</sup> 9 U.S.C. §§ 1–16 (2012).

<sup>30</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 10–16 (1984) (holding that the Act is binding on state courts and preempts state statutes).

discussion than she grants it.<sup>31</sup> Her explanation, and the fact that Congress has not cabined the Court's reading, should have been presented to lay readers in the first discussion of arbitration.

In short, because the *democratic* process has failed to make certain rights to legal redress inalienable, the point of the tort is to ask *courts* to declare those rights inalienable. We know already that the legal redress terms Radin has in mind — those of the “boilerplate rights deletion scheme[]” (p. 16) — satisfy the other two requirements for court intervention: the clauses lack specific Radinian consent and are widespread. The triad framework, if fully adopted by courts, leaves only the question of alienability standing.

### B. *Improving Consent or Welfare?*

Whether it is judicial or direct regulation that prohibits boilerplate redress terms, the question to ask is this: which of Radin's consent-based objections are resolved if a term is prohibited? Vendors will then either include a permitted term or leave a blank to be filled by background law (as has always been an option for most topics addressed by boilerplate). If a contract does not address a subject, such as warranty or remedy, the background statutory or common law will govern. The consumer has not read this background law, will not fully understand it if he does, and has no power to change it. Unlike most instances of boilerplate, the consumer may not even know this background law exists.<sup>32</sup>

The written permitted term is better substantively than the seller's unregulated term, or so we may assume, but any improvement does not stem from an improvement in term-specific consent. In the case of an express permitted term, the consumer similarly has not read it, will not fully understand it if he does, and has no power to change it. Thus Radin's consent objections stand even if the objectionable clauses are forbidden or subject to heightened scrutiny under the tripartite framework. For a book based on consent, this is baffling.

Two important gains are possible through regulation, however, and are worth noting. First, although Radin herself dislikes the concept of hypothetical consent, it may be that “hypothetical” consumer consent increases. The improvement is not to the *act* of consenting but to the

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<sup>31</sup> For a good example of the argument Radin might have made, see David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 81–109.

<sup>32</sup> Of course, many background legal rules are defaults that can be changed by the parties through contract. But just as a consumer has no hope of personally replacing an explicit term in a form contract, he has no hope of personally replacing an implicit term that is unwritten and supplied by existing law. On the assumption that the background law is more favorable to the consumer, this again is an improvement in welfare but not autonomy.

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*state* of being bound to a term “we” believe would garner consent. There is an odd form of autonomy gain here, assuming “we” are right, but more to the point this is a *welfare* gain. We take consumer preference for a clause as a sign that the clause increases consumer welfare because consumers know best what is in their interest. Radin’s analysis might instead encourage us to take mere consumer *toleration* of low-expected-value clauses as a neutral signal, removing any autonomy concerns we might have about taking away the consumers’ choice of the clause.

It should be obvious by now that this move cannot be Radin’s. If I conduct an experiment in which consumers are forced to understand their waiver of a right, and I present data on both consumer grievance and suit, what is Radin to do with the result if consumers still accept a redress limitation in exchange for a dime? Her arguments in the book strongly suggest she would either reject their choice as a result of sticky heuristic bias or conclude that we should nonetheless forge ahead because at times consumers cannot be made to understand what is at stake. I may join her in result, either because it is certainly possible for people as a group to not know their best interest in a complex situation or because there is a free-rider problem to solve. But these conclusions are about welfare and welfare improved through paternalism. Paternalism is not famous as a method for enlarging consent.<sup>33</sup>

The first effect of forbidding a term on legal redress is thus that consumer welfare may improve but without an increase in consumer freedom through *consent*. (Note that I am not here arguing consumer freedom has *decreased* by the removal of a clause option.)

The second possible advantage of regulation is that it improves actual consent as I envision it, although not, I think, as Radin does. Recall that my theory of a consent continuum requires at the extreme an empirical answer.<sup>34</sup> (“At the extreme” because no other theory of consumer consent requires actual proof in court of what consumers on the whole know or understand.) Do, for example, consumers understand from the many news reports of cruise vacations gone awry that they may be subject to arbitration but have no idea that they may be forced

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<sup>33</sup> Choice architecture may be an exception, but this is not the type of paternalism Radin is advocating. For basic discussion of choice architecture, see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

<sup>34</sup> Recognize that not all formulations of blanket consent require the level of consent on the continuum. An option may not be in one’s mind but still be outside of what destroys the benefit of the bargain or is extremely unexpected. If I go into a toy store and ask the clerk to quickly grab and wrap any toy suitable for a boy’s birthday gift, I may not realize Legos are an option, but I “know” that an uncooked ham is not an option. Indeed, in any of these cases the universe of terms fully outside what is expected will be vast compared to the limited number of options on the continuum.

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to litigate in Florida?<sup>35</sup> If so, when a consumer signs up for a cruise she consents on this theory to the possibility of arbitration but not to the forum selection clause. By forbidding forum selection in consumer contracts, therefore, we decrease the number of clauses to which consumers agree but do not consent. This is an improvement in autonomy, although not necessarily an improvement in economic welfare. (It may be, for example, that our consumer *would have* agreed to the forum selection clause had she thought about it, or that she *should have*, and thus in both cases we decrease her welfare by removing the option.)

In deciding whether one prefers Radin's or my view of consent, consider a difficulty for my view. What are we to do with the clause that *would* garner consent — thus, hypothetical consent — but of which the consumer is ignorant? Imagine it can be proven empirically that the vast majority of consumers would consent to the clause but also that the vast majority are unaware such a clause might be in the contract when they agree to a deal. To make it worse, assume that in our considered judgment we conclude that the clause is in the consumer's interest. The clause is thus welfare enhancing and would be consented to if the consumer bothered to consider it. But on the continuum theory the consumer has *not* consented because she did not include it in her general consent.

One response is to say that consent is a value among many, not an absolute value. The starting point of all American contract law, boilerplate included, is that to give outward manifestation of agreement to a deal is to agree to be legally bound. Thus we may keep the clause in the name of consumer welfare and one form of autonomy, to the detriment of more particularized consent. Another response is to preference consent over welfare: the clause is not permitted unless consumers can be made aware of it, either by a vendor campaign or state action.

All of this should make us uncomfortable on behalf of the individual. Why should I be bound to an arbitration clause simply because most others agreed to the entire deal knowing it was a possibility, when I had no idea? Or because most others would agree if educated, when I would not? Some may be satisfied with the pragmatic answer that either we accept this cost or we forego all the benefits of mass-contracting (welfare). Others may be satisfied with the fact that I could have protected myself by not agreeing (autonomy). No doubt neither of these is particularly satisfying for many, or for Radin.

But note that Radin's approach is no more satisfying. Her tripartite framework does not turn on whether the individual person before

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<sup>35</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

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a judge gave informed consent or even whether that person would have consented. Radin is justly reluctant to fully require specific consent in World B because to do so would mean its destruction. In a sense, as the boilerplate contract is common, so must consent be.

#### IV. CONCLUSION

No book can be a theory of everything, let alone a proof of everything. *Boilerplate* will be most persuasive to those who agree with the following assumed propositions: redress-limiting clauses harm consumers on net; contracts are not made less expensive by redress clauses — businesses do not pass on savings; individual consumers value redress rights in any one contract at above a negligible value;<sup>36</sup> and thus no rational informed consumer would accept the clauses “in exchange” for a cheaper product.

The democratic degradation analysis will be most persuasive to one who already agrees that: the Supreme Court overstepped Congress in making arbitration clauses in consumer contracts widely permissible; the class action form of litigation is a fundamental right of legal redress; the class action form benefits consumers; non-boilerplate contract law requires informed consent to specific clauses; *and* consumers know and understand the contract terms they accept in other contracts, such that consent in the boilerplate universe is substantively different from other forms of consumer consent.

However one comes down on these background assumptions, if we conclude that boilerplate regulation is justified, we must then choose the regulator. Save for the unusual clause triggering a finding of unconscionability, *ex post* restrictions meted out by courts are inferior to *ex ante* legislative restrictions on grounds of transparency and equal application. (Avoiding unnecessary litigation and clarity of terms *ex ante* are some other reasons.) A legislature’s task is not simple, of course. A legislature should not forbid a term solely on proof that consumers do not expect it in the continuum of possible clauses. Most with homeowners insurance, for instance, are unaware they have coverage for personal goods lost outside the home; why ruin the happy surprise? The legislature must determine that the clause falls outside the continuum *and* either would be (a) majority unwelcome or (b) welcome individually but unwelcome collectively.

If we lay the power to exclude certain categories of clauses with legislatures, what then is the import of the debate about consumer consent? Radin’s dim view of consumer consent is not necessary to empower or justify Congress in forbidding the use of consumer arbi-

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<sup>36</sup> I argue the expected value in any one contract of the right to sue in a particular format is minuscule. *See supra* p. 1972.

tration clauses. After all, one may be subject to desirable clauses to which one has nonetheless failed to consent if consent requires specific knowledge. To convince the public of the wisdom of a ban, it is more direct to argue that consumers *should not want* to be able to consent to arbitration clauses than to argue that they currently *do not* consent. In the end, *Boilerplate* offers an elaborate analysis of consent and a clarion call to address the systematic degradation of rights of legal redress; the two need not be related.