

**INTRODUCTION TO 2011 SULLIVAN LECTURE  
SYMPOSIUM: BOILERPLATE TERMS IN CONTEXT**

JEFFREY T. FERRIELL\*

It has been nearly seventy years since Fritz Kessler popularized the use of the term “adhesion contract,” which he imported to the United States from France.<sup>1</sup> It was at this time that Kessler wakened American scholars to the absence of anything approximating the type of consent on which our rules of contract formation were originally based.<sup>2</sup>

Traditional contract rules of the type found in Langdell’s first law school casebook developed in an era when most deals were struck by parties who had roughly equal bargaining power.<sup>3</sup> They were under very little, if any, compulsion to enter into a deal with one another at all, much less under any compulsion to submit to specific terms. Having entered into their agreement at arm’s length and with a relative degree of sophistication about the subject matter of their transaction, their assent was usually well-informed and thoroughly voluntary.<sup>4</sup>

Since then, of course, things have changed. We commonly enter into a wide array of complex transactions for many of the goods and services we purchase and rely on in our daily lives.<sup>5</sup> These transactions include purchasing life, health, and automobile insurance; entering into credit card, debit card, automobile loan, home loan, and other financial services contracts; and entering into agreements for extraordinarily complex software licenses, cell phone service, airline tickets, and online consumer

---

Copyright © 2012, Jeffrey T. Ferriell.

\* Professor of Law, Capital University Law School. B.S., Ohio State University, 1975; J.D., Santa Clara University School of Law, 1978; LL.M, University of Illinois College of Law, 1983. Thanks to Capital University Law School Professors Brad Smith and Dan Kobil, and the editors of the Capital University Law Review, for providing me with the opportunity to offer this brief introduction to Professor Radin’s article and Professor Gold’s response.

<sup>1</sup> Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 629–31.

<sup>4</sup> *Id.* at 630.

<sup>5</sup> Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002).

goods.<sup>6</sup> Most of us candidly admit that we rarely read these agreements completely, and when we do, few of us take the time to carefully consider the meaning and impact of their terms. We nevertheless readily enter into the agreements, realizing that if we want to purchase the goods or services involved, our only real choice is to agree to the other party's terms.<sup>7</sup> In doing so, we are perhaps foolishly confident that nothing will go wrong with the transaction, and that if it does, either the agreement itself or the other party's customer service department will be able to solve the issue for us without serious consequences.

Our lives would be completely unmanageable if standardized contracts and the terms they contain were not generally enforceable. Nearly all but the most basic deals we make would be fraught with uncertainty. Maybe our purchases at the grocery store or the lunch counter would be manageable, but nearly every other deal we make would be hard to manage if we had to sit down with our contracting partners and come to a negotiated agreement about every topic our agreement might include.

None of us want the myriad of agreements we make to be thrown out the door completely. Life would simply be too difficult if standardized form contracts were unenforceable without the type of old-fashioned, arm's length negotiations and fully conscious assent that those who drafted the First Restatement contemplated.<sup>8</sup> It would take days, if not weeks or months, to negotiate the terms of some of the most basic deals we enter into every year, frequently after considering only the basic features of the product and its price. Negotiating even the most basic contract would be more daunting than the prospect of completing our federal tax returns. Members of the public would need something like the Voluntary Income Tax Assistance Program to assist consumers in entering into many of the basic transactions that govern their daily lives.

We all benefit from various types of standardization. Cars are easier to drive because the gas pedal is always on the right, the brake pedal is always on the left, and the clutch pedal, if you are inclined to drive a car

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 35–36.

<sup>8</sup> RESTATEMENT OF CONTRACTS § 20 (1950). *See also* Nancy W. Graml, *Bondholder Rights in Leveraged Buyouts in the Aftermath of Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.*, 29 AM. BUS. L.J. 1, 15 (1991) (“Classical contract doctrine recognized by Williston and the First Restatement presumes an adverse, arm's length relationship. Courts that draw on classical contract principles assume that each clause of an exhaustively drafted document embodies an exact allocation of risk.”).

with a standard transmission, is always a little further to the left. Tires come in uniform sizes. We all find it useful to use the same word processing software, even though the standard that has emerged is inferior in many respects to others that were once more widely used.

Standardized form contracts are just as useful. They simplify office procedures and make it possible for lower paid or even “electronic” agents to quickly and cheaply enter into thousands and perhaps millions of contracts on behalf of large national and international organizations.<sup>9</sup> Professor Kessler’s 1933 article explained how standardized terms facilitate the careful calculation and elimination of business risks that would be unacceptable without standardized terms.<sup>10</sup> Members of legal departments of these large organizations are confident that the language they have carefully drafted to take account of legislative and judicial developments is deployed throughout their organizations. Simply put, standardized terms help us take advantage of our experience.

Standardized terms have what many view as another benefit. They facilitate the development of secondary markets for the financial obligations that accompany many common transactions, including real estate mortgages, automobile loans, credit card receivables, and streams of rental payments.<sup>11</sup> These agreements contain substantially similar, or preferably identical, boilerplate terms that can be bundled together and sold in ways that diversify and minimize risk in securitization and other transactions that are made possible due to the use of standardized terms.<sup>12</sup>

However, these advantages are offset by a multitude of dangers. The principle risk is that one of the parties will take advantage of its role as a “repeat player” in a multiplicity of similar transactions.<sup>13</sup> This gives the party the ability to spread the cost of careful drafting and permits the party to slant the terms in its own favor, often in ways that are not evident to the relative neophyte on the other end of the deal.<sup>14</sup> The use of boilerplate creates moral hazard when it shifts risks to the newcomer who, because of

---

<sup>9</sup> Hillman & Rachlinksy, *supra* note 5, at 429–31.

<sup>10</sup> Kessler, *supra* note 1, at 631–32.

<sup>11</sup> Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 320–23 (2011).

<sup>12</sup> *Id.*

<sup>13</sup> Hillman & Rachlinksy, *supra* note 5, at 435–36; Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 532 n.219 (2010).

<sup>14</sup> *Id.*

the newcomer's naiveté, may not fully appreciate the stakes involved in some aspects of the deal.<sup>15</sup>

A second problem is that the less sophisticated party to the transaction is less likely to read the contract and even far less likely to peruse its terms and ask questions about its details.<sup>16</sup> We have things to do and promises to keep, and we are confident that if the terms were onerous, someone else, perhaps a more careful customer, consumer group, the Better Business Bureau, someone in the Ohio Attorney General's Consumer Protection Section, or even the ubiquitous "market," would object.

Even if parties take the time to read the entire agreement, its terms are frequently hard to decipher.<sup>17</sup> The terms are sometimes in small print that might require a magnifying glass to read.<sup>18</sup> Even when they are easy to see, they are sometimes hard to understand.<sup>19</sup> On this point, scholars sometimes point to the opinion of Justice Musmanno of the Pennsylvania Supreme Court in *Cutler Corp. v. Latshaw*,<sup>20</sup> which compared the language and placement of a "cognovit" clause in a five-page construction contract with the practice of Emperor Caligula, who "ha[d] the laws [of Rome] inscribed upon pillars so high that [Roman citizens] could not read them."<sup>21</sup> Justice Musmanno explained:

Diminutive type grossly disproportionate to that used in the face body of a contract cannot be ignored; it has its place in law, and, where space is at a premium, it allows for instruction, guidance and protection which might otherwise be lost, but where it is used as an ambush to conceal legalistic spears to strike down other rights agreed upon, it will receive rigorous scrutinization by the courts for the ascertainment of the true meaning which may go beyond the literal import.<sup>22</sup>

---

<sup>15</sup> Hillman & Rachlinksi, *supra* note 5, at 436.

<sup>16</sup> *Id.* at 436 n.38 (quoting Melvin Aron Eisenberg's thesis that "consumers who are faced with the dense text of form contracts characteristically respond by refusing to read, and that it is reasonable for them to do so").

<sup>17</sup> *Id.* at 436.

<sup>18</sup> *Id.* at 446.

<sup>19</sup> *Id.* at 448.

<sup>20</sup> 97 A.2d 234 (Pa. 1953).

<sup>21</sup> *Id.* at 237.

<sup>22</sup> *Id.*

Generally, terms included in a traditional exchange are entitled to enforcement.<sup>23</sup> “As a general legal matter, parties are entitled to judicial enforcement of contract terms, including standard terms.”<sup>24</sup> Parties are expected to read and understand the terms of agreements they make and are normally bound to the terms of their agreements, regardless of their negligence, ignorance, or misunderstanding.<sup>25</sup> Not surprisingly, therefore, traditional doctrine took a permissive approach to standardized terms.<sup>26</sup> The objective approach to contract formation asked little more than whether the parties’ signatures on the standardized form were genuine.<sup>27</sup> The fact that one of the parties had not read the document or had not understood its terms was irrelevant, almost to the point of being inadmissible evidence.<sup>28</sup> The law was largely unsympathetic to the cries for mercy of those who foolishly signed something they did not understand.<sup>29</sup> Even poor, illiterate, and intellectually challenged parties sometimes end up bound by the terms of documents they sign.<sup>30</sup>

As explained by the court in *Smith v. Humphreys*<sup>31</sup> at the turn of the last century,

Any person who comes into a court of equity admitting  
that he can read, and showing that he has average  
intelligence, but asking the aid of the Court because he did

---

<sup>23</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

<sup>24</sup> Hillman & Rachlinski, *supra* note 5, at 437.

<sup>25</sup> *Id.* at 437–38.

<sup>26</sup> See John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 294–95 (2000).

<sup>27</sup> See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1183 (1983); Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1084 (2010).

<sup>28</sup> Rakoff, *supra* note 27, at 1185.

<sup>29</sup> *Id.* at 1184.

<sup>30</sup> See *Miner v. Farm Bureau Mut. Ins. Co., Inc.*, 841 P.2d 1093, 1102 (Kan. Ct. App. 1992) (“Even where a contracting party is unable to read, the party is under a duty to have a reliable person read and explain the contract to them before signing it.”); *May Co., Inc. v. Riverside Life Ins. Co.*, 546 So. 2d 328, 331 (La. Ct. App. 1989) (“Even though there was testimony at trial to the effect that Ms. Ballio was a relatively uneducated woman, there is no evidence whatsoever that she lacked the capacity to contract. Thus, . . . since she signed the [contract], we find that she was bound . . .”).

<sup>31</sup> 65 A. 57 (Md. 1906).

not read a paper involved in the controversy, and was thereby imposed on, should be required to establish a very clear case before receiving the assistance of the court in getting rid of such document. It is getting to be too common to have parties ask courts to do what they could have done themselves if they had exercised ordinary prudence, or, to state it in another way, to ask courts to undo what they have done by reason of their own negligence or carelessness.<sup>32</sup>

Nearly one hundred years later, the Alabama Supreme Court echoed this sentiment regarding the enforcement of an arbitration clause in a contract for the sale of a mobile home to Mr. Melvin Holt.<sup>33</sup> Holt had only a sixth grade education and was illiterate.<sup>34</sup> Nevertheless, the court explained:

Melvin cannot avoid enforcement of the arbitration provision merely on the basis that he could not read what he was signing. He admits in his deposition that he would have been embarrassed to tell Smith [the sales agent he dealt with] that he was illiterate, and his wife admits in her deposition that she did not tell Smith that Melvin was illiterate because her doing so would have embarrassed Melvin. Thus, neither Melvin nor Patricia informed Smith nor Johnnie's Homes that their reading ability was limited, and neither Smith nor Johnnie's Homes had independent knowledge that would have led them to believe they needed to point out the arbitration provision or to explain it. Moreover, Patricia freely admits that she merely looked at the contract—that she did not read it—and Melvin admits that he relied on his wife to “do all of the paperwork” in regard to looking over the agreements and checking all of the numbers. In short, Johnnie's Homes and Smith did all they were obligated to do under the law to facilitate Melvin's purchase of the mobile home. Melvin cannot now avoid one particular provision of the

---

<sup>32</sup> *Id.* at 59.

<sup>33</sup> *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 960 (Ala. 2001).

<sup>34</sup> *Id.* at 957.

contract simply because he and his wife had a limited ability to read and comprehend.<sup>35</sup>

This attitude is apparent even in the writings of some of the great legal scholars of the time. For example, Learned Hand, in *Hotchkiss v. National City Bank*,<sup>36</sup> famously explained that “[a] contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties[,] . . . [but] is an obligation attached by the mere force of law to certain acts . . . .”<sup>37</sup>

Other courts take a more compassionate view. Traditional doctrines, such as fraud<sup>38</sup> and mistake,<sup>39</sup> are easily deployed when the facts warrant. However, courts are loathe to appear to be judicial activists. Thus, courts sometimes strike down harsh terms in standardized agreements by using traditional rules of contract law in creative ways.<sup>40</sup> One familiar method, which might have been deployed in favor of Melvin and Patricia Holt, treats boilerplate terms that appear inconspicuously on the back of a signed form or in a completely separate document as not part of the deal at all.<sup>41</sup> Pay no attention, these courts seem to suggest, to the Parol Evidence Rule behind the curtain.<sup>42</sup>

Although it would not have worked in *Johnnie’s Homes v. Holt*,<sup>43</sup> courts have sometimes regarded simple standardized terms, like those that appear on the back of a parking lot receipt, as not rising to the level of an offer under the traditional objective test.<sup>44</sup> Modern decisions holding that terms in a “shrink wrap” software license package are not enforceable

---

<sup>35</sup> *Id.* at 961.

<sup>36</sup> 200 F. 287 (S.D.N.Y. 1911).

<sup>37</sup> *Id.* at 293.

<sup>38</sup> *See, e.g.*, *Belew v. Griffis*, 460 S.W.2d 80, 81 (Ark. 1970).

<sup>39</sup> RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. a (1981).

<sup>40</sup> *Drans v. Providence Coll.*, 383 A.2d 1033, 1037 (R.I. 1978).

<sup>41</sup> *Id.*

<sup>42</sup> Robert L. Gottsfield, *Darner Motor Sales v. Universal Underwriters: Corbin, Williston and the Continued Viability of the Parol Evidence Rule in Arizona*, 25 ARIZ. ST. L.J. 377, 377 (1993).

<sup>43</sup> 790 So. 2d 956 (Ala. 2001).

<sup>44</sup> *E.g.*, *Klar v. H. & M. Parcel Room, Inc.*, 61 N.Y.S.2d 285, 289 (N.Y. App. Div. 1946); *Jones v. Great N. Ry.*, 217 P. 673, 676–77 (Mont. 1923). *See also* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1268 (2003).

might be viewed as a modern version of this approach.<sup>45</sup> Melvin Holt, however, undoubtedly understood that the document he signed was a contract.<sup>46</sup>

Still other courts, similarly inclined, simply interpret harsh terms strictly against the drafter, much in the way that the judge in Shakespeare's *Merchant of Venice* constrained the secured lender from spilling any blood when he prepared to remove the "pound of flesh" that the loan agreement permitted him to remove from Antonio's body.<sup>47</sup> Thus, in *Galligan v. Arovitch*,<sup>48</sup> the court construed a provision that purported to protect a landlord from liability for injuries that occurred on leased land as not applying to injuries that occurred on the "lawns" of the premises, where sidewalks and other areas were specifically included.<sup>49</sup>

Other courts attack the problem head-on. One of the most famous examples is *Henningsen v. Bloomfield Motors*,<sup>50</sup> in which a standardized term disclaimed liability for breach of the implied warranty of merchantability and substituted the warranty with a promise to replace any defective parts.<sup>51</sup> The term was struck down largely because the manufacturer was one of what used to be regarded as the "big three" automobile manufacturers in the United States, with an effective monopoly

---

<sup>45</sup> See Korobkin, *supra* note 44, at 1268–69; *Specht v. Netscape Commc'n Corp.*, 306 F.3d 17 (2d Cir. 2002) (indicating that there was no mutual assent where the license terms were visible only upon scrolling to the bottom of the screen); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. March 7, 2003) (distinguishing *Specht* by finding assent where the home page of a website stated that anyone who goes into the interior web pages accepts certain conditions). Courts routinely find assent to what they have termed "clickwrap," "browse wrap," or "shrink wrap" contracts in which software buyers must click on a box on the computer screen indicating that they assent to the seller's terms before being able to use the software. See Kaustuv M. Das, Comment, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the 'Reasonably Communicated' Test*, 77 WASH. L. REV. 481, 500, 500 n.179 (discussing and listing cases that have addressed the specific question of forum selection clauses in clickwrap agreements).

<sup>46</sup> *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 960 (Ala. 2001).

<sup>47</sup> William Shakespeare, *Merchant of Venice*, act IV, sc. 1.

<sup>48</sup> 219 A.2d 463 (Pa. 1966).

<sup>49</sup> *Id.* at 465.

<sup>50</sup> 161 A.2d 69 (N.J. 1960).

<sup>51</sup> *Id.* at 86–88.

position over the terms of the agreements it made with its customers.<sup>52</sup> Because of the disparity in bargaining power between the parties and the harsh effect of the term, the disclaimer of liability was unenforceable.<sup>53</sup> Although the court did not use the moniker “unconscionability,” the court’s public policy analysis combined elements of substantive and procedural unfairness that easily fits into modern unconscionability analysis.<sup>54</sup>

The doctrine of unconscionability is now enshrined in § 2-302 of the Uniform Commercial Code (U.C.C.), the provision that Professor Arthur Leff characterized as “The Emperor’s New Clause.”<sup>55</sup> Standard unconscionability analysis usually involves an inquiry into whether the substantive terms of the contract are “unreasonably favorable” to the party who benefits from the questionable terms and whether the contract was entered into as a result of some procedural unfairness that left the party burdened by the unfavorable term with an “absence of meaningful choice.”<sup>56</sup> Although courts have sometimes found terms unconscionable without making a specific finding of procedural unconscionability, the facts of these cases usually reflect some degree of unfairness in the creation of the agreement. The unfairness may be the result of a disparity in the bargaining power of the parties, microscopic text and indecipherable language, or a simple lack of education and sophistication on the part of the subservient party.<sup>57</sup>

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* See also 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, 1133 n.96 (2010); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) (“[Unconscionability] overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.”).

<sup>55</sup> See generally Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

<sup>56</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

<sup>57</sup> See *Fischer v. Gen. Elec. Hotpoint*, 438 N.Y.S.2d 690 (Dist. Ct. 1981) (disparity in bargaining power); *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986) (color and size of print); *Scott Reising Jewelers, Inc. v. ADT Sec. Servs.*, Nos. C-050322, C-050329, 2006 WL 6576746, at \*2–3 (Ohio Ct. App. May 10, 2006) (indecipherable boilerplate language); *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1972) (lack of education); *Ryan v. Weiner*, 610 A.2d 1377, 1385–87 (Del. Ch. 1992) (vulnerability and lack of sophistication).

Not to be outdone by the drafters of the U.C.C., the Restatement (Second) of Contracts has a specific section dealing with standardized contracts.<sup>58</sup> Restatement (Second) § 211, not found in the First Restatement's more traditional approach, begins by acknowledging the traditional "duty to read" rule.<sup>59</sup> However, § 211 subjects this duty to read to an important exception: "Where the other party has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."<sup>60</sup> Thus, if Johnnie's Homes had reason to know that Melvin and Patricia would have objected to the arbitration agreement if they had realized it was there, the term would be excluded from the deal.

Section 211 represents an effort to articulate the common law doctrine that boilerplate terms of which a party was not aware are not enforceable if the term goes beyond the party's "reasonable expectations."<sup>61</sup> However, as other scholars have observed, both § 211 and the reasonable expectations approach have been largely ignored by courts, except with respect to insurance contracts,<sup>62</sup> and perhaps in Arizona, where the approach has taken hold more generally.<sup>63</sup>

Curiously, courts rarely conduct a thoughtful inquiry into the economic efficiency of specific boilerplate provisions. A notorious counterexample of this appears in *Carnival Cruise Lines v. Shute*,<sup>64</sup> where the Court upheld a forum selection clause in a cruise line contract on the theory that the provision provided a benefit to the cruise line's customers by helping the cruise line reduce costs and thus prices.<sup>65</sup> However, economic efficiency is

---

<sup>58</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). See also 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 (2007).

<sup>59</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981).

<sup>60</sup> *Id.* § 211(3).

<sup>61</sup> Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 213–14 (2008). See also Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 968 (1970).

<sup>62</sup> Korobkin, *supra* note 44, at 1271

<sup>63</sup> James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L. Q. 315, 324–25 (1997). See, e.g., *Broemmer v. Abortion Servs. of Phx. Ltd.*, 840 P.2d 1013 (Ariz. 1992) (striking down an arbitration clause in an abortion contract via § 211).

<sup>64</sup> 499 U.S. 585 (1991).

<sup>65</sup> *Id.* at 594.

usually considered in enforcing allegedly unconscionable boilerplate terms and rarely invoked in striking them down.<sup>66</sup>

The two articles in this symposium issue of the Capital University Law Review, initially presented in connection with the annual Sullivan Lecture at Capital University Law School, draw on this backdrop to present a fresh look at the problem of enforceability of boilerplate contract terms. Professor Margaret Jane Radin's article focuses on the premise that the opportunity to read terms in a modern "shrink wrap," "click wrap," or other standardized term contract presents the consumer with a meaningful choice, despite the difficulties that modern consumers have in understanding those terms.<sup>67</sup> She explains how the reasons that are customarily given for why individuals rarely read and decipher the meaning of boilerplate, and our legal system's willingness to nevertheless enforce it, results in both "normative" and "democratic" degradation for our legal system and our society.<sup>68</sup> This normative degradation arises from the incompatibility between boilerplate and our supposed adherence to a system for contract enforcement that purports to depend on voluntary assent.<sup>69</sup> Democratic degradation arises from our system's willingness to permit boilerplate to be used to circumvent legislative norms that have been developed through our constitutional and legislative process.<sup>70</sup>

In his commentary, Professor Gold assesses how Professor Radin's theory of normative degradation squares with theories of contract that distinguish between consent to enter into a contract and consent to specific terms included in that contract, especially in the mass-market context that Professor Radin addresses.<sup>71</sup> He criticizes her claims about both normative and democratic degradation as painting with too broad a brush.<sup>72</sup>

As readers of the articles included in this short symposium will quickly discern, both authors make meaningful contributions to the literature on standardized terms. Professor Radin's article supplies us with a new

---

<sup>66</sup> 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, 728 (1992).

<sup>67</sup> Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 CAP. U. L. REV. 617 (2012).

<sup>68</sup> *Id.* at 624–38.

<sup>69</sup> *Id.* at 624–28.

<sup>70</sup> *Id.* at 633–38.

<sup>71</sup> Andrew S. Gold, *Contracts With and Without Degradation*, 40 CAP. U. L. REV. 657, 661–65 (2012).

<sup>72</sup> *See id.* at 658.

perspective and makes us interested to see how she more fully develops her thesis in her upcoming book. Professor Gold's response makes us curious to learn how Professor Radin's book will deal with the criticisms he raises.