

CONTRACTS WITH AND WITHOUT DEGRADATION

ANDREW S. GOLD*

I. INTRODUCTION

Margaret Jane Radin's recent Sullivan Lecture gives us a valuable new perspective on mass-market boilerplate contracts.¹ Others have noted the law-like nature of boilerplate contracts.² Radin gives us a different approach, however. As she suggests, mass-market boilerplate removes large swaths of rights, and then replaces them with different sets of rights.³ These rights are often important rights, such as the right to bring suit in a court of law.⁴ And, in the world of online transactions, these agreements are abundant.⁵ In Radin's view, mass-market boilerplate thus represents a normative degradation, and also a democratic degradation.

The alleged normative degradation stems from an absence of consent (or an absence of the type of consent often thought present in legally enforceable contracts).⁶ The democratic degradation relates to the manner in which mass-market boilerplate supplants the outcomes of democratically legislated rules.⁷ Radin contends that mass-market boilerplate deletes rights which are provided by the democratic process, substituting the rights

Copyright © 2012, Andrew S. Gold.

* Visiting Scholar, Harvard Law School; Professor, DePaul University College of Law. I wish to thank Margaret Jane Radin for very helpful comments regarding her lecture. Any errors are my own.

¹ See Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 CAP. U. L. REV. 617 (2012).

² See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) ("The privately made law imposed by standard form has not only engulfed the law of contract; it has become a considerable portion of all the law to which we are subject."); *but cf.* Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1149 (1998) (suggesting, in the statutory interpretation context, that "a statute differs from a contract in fundamental ways").

³ See Radin, *supra* note 1, at 633.

⁴ See *id.* at 618, 633.

⁵ See *id.* at 620.

⁶ See *id.* at 625–26.

⁷ See *id.* at 633.

which private firms choose to impose.⁸ The products of our democratic process are basically given short shrift.

To a degree, the concerns raised by Radin's lecture are empirical. For example, how do people really view the boilerplate agreements they enter into on a regular basis? Do they see them as contracts?⁹ As fully binding? As meaningless legalese? What is their thinking when they participate in these legal relationships? Do cognitive biases severely affect consumers' decision-making in these settings? To fully assess Radin's arguments, these types of questions need to be addressed.

Yet we also face important conceptual and normative questions. What do we mean by consent when we discuss contractual consent? What type of consent is adequate to avoid a normative degradation? Does the type of consent allegedly present in mass-market boilerplate qualify as the same kind of consent our legal system expects for ordinary contracts? Likewise, is it really a degradation for our democratic system if legislatively-enacted default rules are removed en masse by mass-market boilerplate? Is it really a degradation for our democratic system if mass-market boilerplate functions like a private eminent domain power?

The comments below focus on the conceptual and normative questions. In doing so, these comments do not attempt to resolve once and for all whether mass-market boilerplate actually does create a normative degradation or a democratic degradation. Rather, they suggest some potential challenges for the arguments Radin offers. Radin may well be right in her ultimate conclusions—at least as to some mass-market boilerplate—but there are also reasons to question whether there is degradation in a substantial subset of cases. Even if there should be no degradation with respect to this subset, however, Radin's arguments make a significant contribution. They give us reason to look much more closely at the legitimacy of mass-market boilerplate, and that scrutiny is a very healthy development.

⁸ *See id.*

⁹ The framing of this question may also matter. *Cf. id.* at 618 n.4 (providing an anecdote about Radin's class's reaction when asked if they had entered into any contracts during the past week). For example, if asked whether I entered any contracts last week, my first reaction might be "No." If asked specifically whether the click-wrap agreement I recently entered into is a contract, my first reaction would be "Yes." My reactions may well be anomalous, but the point is that the precise questions and their ordering could affect the answers given.

Part II of these comments focuses on the normative degradation thesis and its relationship to consent in contract law. This Part assesses theories of contract law that draw a distinction between consent to enter into a contract and consent to specific contractual content. Part II suggests that consent to enter into a contract may exist in many cases of mass-market boilerplate. Part III assesses whether claims that mass-market boilerplate is non-consensual (and thus a normative degradation) prove too much. If certain types of mass-market boilerplate are viewed as non-consensual, our notion of consent could also call into question our ordinary process of legislative enactment. Part IV assesses certain features of the democratic degradation argument. In particular, Part IV questions whether mass-market boilerplate transactions render democratic debate a sham, and whether the resemblance of these transactions to private eminent domain actually undermines private-law doctrine. Part V then concludes.

II. THE NORMATIVE DEGRADATION THESIS

Radin argues that the prevalence of boilerplate agreements regulating huge numbers of people has shifted our legal system to one in which the legal regime enacted by the state is gradually being displaced.¹⁰ These agreements, which she refers to as promulgated superseding rights regimes, divest individuals of their rights for the benefit of the firm that drafted the boilerplate provisions.¹¹ If Radin is correct, these agreements convert individuals' guaranteed rights into rights that can be effectively condemned by private firms.

For present purposes, I assume that the prevalence of these superseding rights regimes has worked a dramatic shift in the sources of rules governing individuals, and consequently that it has blurred the line between public and private law. If, however, the only concern is that public laws are being replaced with privately-crafted "law," then we are not necessarily confronting anything problematic. The state has never had a monopoly on the sources of rules governing its citizens.¹² Ordinary, uncontroversial contracts are a longstanding feature of the legal landscape,

¹⁰ *See id.* at 633.

¹¹ *See id.* at 631, 633.

¹² *See* W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 10 (1996).

and they allow people to change the rules which apply to their daily lives.¹³ For that matter, the distinction between public law and private law has been a matter of controversy for decades.¹⁴

It appears that the extensive scope of standardized boilerplate usage is a key component of Radin's critique. In aggregate, promulgated superseding rights regimes result in a sea change—a very large quantity of power that is traditionally associated with the state has moved to private firms.¹⁵ But even this need not call for censure.¹⁶ If we assumed perfect consent, no cognitive biases, fair contract terms, and a ready opportunity to enter into non-boilerplate contracts, would there be anything troubling in such a shift? There is, however, another factor. A major part of Radin's argument seems to be that mass-market boilerplate contracts are characteristically involuntary in important respects, with terms over which individuals cannot readily bargain.¹⁷ In effect, these contracts are imposing terms on private parties, as if by legislation.

If this interpretation of Radin's argument is correct, then consent—or voluntariness—is crucial to the legitimacy of mass-market boilerplate in a liberal legal system. If these boilerplate terms qualify as voluntary, then they need not give us normative degradation (in theory they could, but they need not). Voluntary superseding rights regimes might well represent a major change in the way our system of private ordering works, but the mere breadth of their impact on our society would not be cause for embarrassment. However, if private firms simply impose such large scale changes through mass-market boilerplate contracts, it may well be

¹³ See H.L.A. HART, *THE CONCEPT OF LAW* 41 (2d ed. 1994) (noting that the private citizen “is made competent to determine the course of the law within the sphere of his contracts, wills, and other structures of rights and duties which he is enabled to build”).

¹⁴ See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PENN. L. REV. 1349 (1982). For an insightful argument that private law is still distinctive, see Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 649–54 (Jules Coleman & Scott Shapiro eds., 2002).

¹⁵ See Radin, *supra* note 1, at 633–34.

¹⁶ To the extent that mere standardization, or mere quantity of aggregated contracts, might be viewed as a source of democratic degradation, I believe such views would be controversial. In any event, that possibility will be bracketed for purposes of these comments.

¹⁷ See Radin, *supra* note 1, at 619, 621, 624–28.

troubling. Voluntariness will thus be the primary focus of the comments below.

A. The Envelope Puzzle

An initial concern is to understand what we mean by consent. Problems of contractual consent are notoriously difficult, given that people often have different visions of what “consent” means.¹⁸ For some, consent is an objective notion, while for others, it is a subjective one.¹⁹ In addition, even if we share a common understanding of consent, there is a related question: Consent as to what? One might consent to a contract, or one might consent to particular terms contained within that contract.²⁰ Consent to the former does not automatically confer consent to the latter.²¹

In thinking about these problems, we will also want to consider the different types of mass-market boilerplate presently available. As Radin notes, some mass-market boilerplate involves terms that the individual never sees, and never even knows about.²² Radin asks whether you can agree by “walking past a sign.”²³ The answer is no, at least if any recognizable sense of consent is required for an agreement. These are the sheer ignorance cases.

I entirely agree that a sheer ignorance case does not meet the paradigm case of a voluntary agreement. For that matter, sheer ignorance cases present a normative degradation to the extent they may be enforced like ordinary contracts and are described as such. One might try to use a “hypothetical” consent to justify this type of case. Like Radin, however, I share the view that hypothetical consent is not consent.²⁴ There is a difference between things that we ought to agree to (assuming we adopt a hypothetical consent model) and things that we actually do agree to. For

¹⁸ For a helpful review of the ways in which consent is used with respect to contracts, see Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251 (Franklin G. Miller & Alan Wertheimer eds., 2010).

¹⁹ See *id.* at 252–53.

²⁰ See, e.g., *id.* at 252.

²¹ See, e.g., *id.*

²² See Radin, *supra* note 1, at 626.

²³ *Id.* Such cases might also create an accommodationist difficulty. Cf. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 712 (2007) (suggesting an accommodationist difficulty may arise where contractual and promissory principles diverge).

²⁴ See Radin, *supra* note 1, at 630–33.

certain contracts—the sheer ignorance cases—it seems plain that there is no actual consent under almost any theory of contracts as voluntary obligations.²⁵

Yet for other boilerplate cases, this is far less clear. Consider a click-wrap case, where the terms are adopted by clicking “I Agree.” For example, assume an individual consumer is confronted with a computer screen that says “Terms of Agreement” across the top, followed by a lengthy list of fine-print boilerplate terms. Suppose that this agreement concerns the right to use a computer to access the Internet and print documents. In many cases, people will scroll past the boilerplate terms without reading them, simply clicking the “I Agree” button at the bottom. Have they consented to the various boilerplate terms—terms which went unread, and which we can posit that most people would not read? If they have not consented to all imaginable terms, have they at least consented to any reasonable terms?

To see how consent can exist in such cases, consider the following example, offered by Randy Barnett:

Suppose I say to my dearest 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.” Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later?²⁶

The answers to Barnett’s questions may depend on our theory of consent, but it is at least plausible to think that we can commit ourselves in just such a fashion. This is a recognizable way in which people enter into voluntary agreements, even with consent understood in subjective terms.

Moreover, a good argument can be made that this type of consent should be permissible for purposes of contract law. As Barnett wryly comments:

True, when consenting in this manner one is running the risk of binding oneself to a promise one may regret when later learning its content. But the law does not, and should

²⁵ An exception might be developed based on consent to the legal system as a whole. This possibility will not be analyzed here.

²⁶ Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 636 (2002).

not, bar all assumptions of risk. Hard as this may be to believe, I know of people who attach waxed boards to their feet and propel themselves down slippery snow and tree covered mountains, an activity that kills or injures many people every year.²⁷

If these more risky types of activities are acceptable, Barnett adds, “they may legally choose to run . . . the much lesser, and more necessary, risk of accepting a term in an unread agreement they may later come to regret.”²⁸

Barnett is not alone in his views of consent. Omri Ben-Shahar offers a similar example to the envelope scenario. As he notes:

People can agree to buy a surprise. Sometime[s], the surprise is an attribute of the product or service. The most extreme example is a lottery ticket, in which the ‘surprise’ is affirmatively sought. But more commonly, various products or services are purchased knowing that they might not perform as hoped (. . . [for example] the arrival time of the flight, or the sweetness of the watermelon).²⁹

Just as a contracting party may consent to these more tangible forms of surprise, that party may also consent to surprises with respect to the terms of the contract itself. As long as the presence of hidden terms is not surprising, and as long as the contract itself may be avoided, Ben-Shahar argues that a blanket assent can be valid.³⁰

Each of the above analyses should give us pause before we conclude that mass-market boilerplate is, by its nature, in violation of consent-based norms. The mere possibility that particular contractual content was not

²⁷ *Id.*

²⁸ *Id.* at 636–37.

²⁹ Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. CONT. L. 1, 9 (2009). Note also that for consent purposes one might have a lottery where potential outcomes are negative, even where important rights are at issue. When people draw straws, hoping to not draw the short straw, they are often thought to consent to an unpleasant surprise (one which might matter to them a great deal).

³⁰ *Id.* A similar idea is also developed in the contract theory literature. See, e.g., STEPHEN A. SMITH, *CONTRACT THEORY* 61 (2004) (developing “distinction between the kind of intention required to *make* a promise and the kind of intention that matters in *determining the content* of a promise”); Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 32 (2009) (“At a minimum, consent means the promisor intended to communicate that the obligation set forth in the promise, whatever it might be, should be binding.”).

specifically consented to is not by itself sufficient to create a normative degradation.³¹ So long as the contract itself was entered into consensually, it is entirely possible that terms that were never read by the consumer are still binding as a product of that consent. In the case of click-wrap agreements, this may well mean that mass-market boilerplate is legitimate.

Of course, one could still find that the above examples are inapposite. We might ask whether mass-market boilerplate is a special circumstance, not analogous to the examples described above. In that case, we need to consider whether there is something in the particular features of mass-market boilerplate that makes the difference. For present purposes, let us focus on the envelope example. Why shouldn't the envelope example allow us to treat a large number of promulgated superseding rights regimes—click-wrap cases in particular—as voluntary agreements?

One potential answer can be found in Barnett's own writing. We may be dealing with terms that would never have been anticipated by the non-drafting party.³² Radin rightly draws our attention to boilerplate that

³¹ Radin suggests that Ben-Shahar's lottery ticket analogy is inapt if an individual recipient of boilerplate does not know what the risk at issue is, or if the risk impacts an important right. See Radin, *supra* note 1, at 629. Barnett's envelope example, however, suggests that we can sometimes consent to terms without knowing what the risks are with respect to those terms. The whole point of the envelope example is that we do not know what is in the envelope. The lottery idea can capture the same insight. The problematic case is the one in which a reasonable person would only perceive slight risks, yet the boilerplate contains terms that are different in kind. This type of case is discussed in Barnett's account. As he indicates, not just anything can be contained in the envelope. See Barnett, *supra* note 26, at 637. Presumably, the same limitation applies to lotteries. This concern, however, does not preclude consent in all cases, but instead raises consent questions with respect to particular terms. This concern is also contingent on the types of warnings included with the relevant boilerplate, as well as changing social understandings of boilerplate and its potential legal consequences.

³² See Barnett, *supra* note 26, at 637 (giving a "favorite pet" example to suggest how certain terms may fall outside the consent given); Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 190–93 (2005) (suggesting limits to scope of application for Barnett's argument). Likewise, even where terms are quite clearly consented to, courts may conclude that particular applications fall outside of their ambit. The absurdity doctrine is a good example. See, e.g., *AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 577 (7th Cir. 1995).

An absurdity in the application of the plain-meaning rule usually results
from a comparison of the apparently plain meaning to the real-world

(continued)

removes important rights, in settings where reasonable individuals may not expect this outcome. Assessing this concern will require us to resolve some empirical questions. Do people, in fact, believe that mass-market boilerplate will leave their important rights unaffected? Even if they do hold such a belief, do they nonetheless recognize that there is a risk that important rights will be affected? Do they see that risk as substantial?

Radin's work should encourage us to inquire further into the way people see mass-market boilerplate. The empirical data, however, may suggest that there is no consent as to particular terms. That outcome as to particular terms is different from a conclusion that mass-market boilerplate agreements are non-consensual across the board. The issue would then become how to interpret the scope of consent for mass-market boilerplate, rather than the existence of consent to the agreement as such.

There is also an alternative worth considering. Perhaps there are further concerns that relate to the envelope example itself. We may think that the envelope example does not resemble mass-market boilerplate given the close relation between the parties in that example. The next subpart will consider this possibility.

B. Consent and the Relation Between Contracting Parties

In thinking about the envelope example, we might conclude that Barnett has stacked the deck a little because his example involves a friend, rather than a stranger.³³ Promulgated superseding rights regimes are hardly agreements among friends. If, however, we can consent to the envelope type of contract when a friend is involved, what is there in the concept of consent that would be different with a stranger? Policy-wise, we may be more concerned about the stranger example—the risks of surprise are different—but it is not evident why these policy concerns are relevant to our calculus as to whether consent can exist at all. They seem to involve a

setting in which the [contract or] statute is to be applied. It is the same point that a clear document can be rendered unclear—even have its apparent meaning reversed—by the way in which it connects, or fails to connect, with the activities that it regulates.

Id. On the significance of the absurdity doctrine for textualist interpretation, see Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25 (2006).

³³ For a link between friendship and contract law, see Ethan J. Leib, *Contracts and Friendship*, 59 EMORY L.J. 649, 674–80 (2010).

different concern (i.e., whether and to what extent we should respect that consent when it comes to matters of enforcement).

As Brian Bix has emphasized:

Though consent is itself a morally loaded term (we are more likely to “find consent” in situations where we believe that a promise *is* morally binding or that the transaction *should* be enforced), it is always open for a commentator (or judge) to conclude that even though there *was no* consent (or no consent in the fullest sense), the transaction *should* be enforced, or that even though there *was* consent, the transaction *should not* be enforced.³⁴

Perhaps there is something distinct about the relation between firms that promulgate mass-market boilerplate and consumers, as compared to the relation between friends in the envelope example. Yet this seems like a difference that goes to issues of likely manipulation and not to the possibility of consent existing in cases where consumers click their willingness to adopt a click-wrap contract.

Furthermore, consent of the envelope type may be particularly valuable in the case of strangers. Dori Kimel has developed a theory of contractual obligation which specifically focuses on contracts as a desirable means for strangers to enter into binding agreements, rather than as a means for friends to interact.³⁵ Although Kimel’s arguments do not exhaust the justifications for contract law, they offer a powerful basis for the legal practice of enforcing agreements. Consequently, if our concern is with policy, we might actually be interested in showing a special respect for consent between strangers. The force of the envelope example need not be undermined by its context: the trusting relation that exists between friends.

This is not the only way we could focus on the parties and their relationship. Instead of focusing on the friendship between the parties in the envelope example, we might shift our focus to the sheer quantity of individuals affected by mass-market boilerplate. Thousands or even millions of people may be roped into the same contractual terms, by means of a simple click-wrap agreement. Maybe we think that a different kind of consent should be legally required where large swaths of the public are

³⁴ See Bix, *supra* note 18, at 253.

³⁵ See DORI KIMEL, FROM PROMISE TO CONTRACT 30–31, 65–66 (2003).

being regulated by the conduct of private firms.³⁶ The normative degradation concern may thus be tied into the democratic degradation concern. Nevertheless, if we are focused solely on the issue of consent, it is unclear why the envelope example is not on point for certain types of mass-market boilerplate.

III. IS LEGISLATION VOLUNTARY, IF MASS-MARKET BOILERPLATE IS NOT?

We should also consider the implications of our theory of consent if it is carried over to other fields. For example, one might think that mass-market boilerplate presents a normative degradation—even where the consumer has clicked to signal consent to the entire agreement—as long as the individual terms of the agreement were unread. Suppose we call this the broad normative degradation view. The broad normative degradation view suggests not only that sheer ignorance cases are a normative degradation, but also that most of the cases in which agreement has been “clicked” by a consumer are also normative degradations. Even Barnett’s envelope case would be troubling on this view.

If we adopt the broad normative degradation view, what would this mean for our system of legislation? Whatever our theory of democratic legitimacy, the odds are good that an important component of our theory calls for legislation to be a product of individual legislators’ intent to enact a law when they vote in its favor. Like contracts, legislation requires a deliberate choice by those enacting the laws.³⁷ Legislation does not occur by accident. Yet legislators rarely read all the terms of a proposed law.³⁸ This creates an awkward circumstance for the broad normative degradation view, for if click-wrap presents us with a normative degradation—if even the envelope case presents us with a normative degradation—then much of our legislation probably does, too.

A. *The Minimal Intent to Legislate*

Joseph Raz’s work helps us to see the problem here. In his writings on interpretation, Raz gives us a careful analysis of how intent relates to

³⁶ Cf. Bix, *supra* note 18, at 252 n.8 (noting the possibility that consent could mean different things in different contexts).

³⁷ See Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 263, 263–68 (Robert George ed., 1996) (discussing the relation of intent to legislation).

³⁸ See *id.*

legislation.³⁹ Raz begins with the following claim, which he calls the Authoritative Intention Thesis: “To the extent that the law derives from deliberate law-making, its interpretation should reflect the intentions of its lawmaker.”⁴⁰ This is a relatively modest claim, and it seems right. It is hard to think of legislation detached from the intent of its authors. Raz then asks the following question: What is the minimum level of intent necessary to satisfy the Authoritative Intention Thesis?⁴¹

As Raz notes: “Only acts undertaken with the intention to legislate can be legislative acts.”⁴² The very idea of legislation includes *voluntary* control over lawmaking by those who are legislators, and “[t]his is inconsistent with the idea of unintentional legislation.”⁴³ A person might take this reasoning a step further, however. Someone might think that “legislation requires not merely intending to legislate, it requires knowing what one legislates.”⁴⁴ On this view, “[o]ne is hardly in control over the development of an aspect of the law, if, while one can change the law by acts intending to do so, one cannot know what change in the law one’s action imports.”⁴⁵

But this view would be problematic. And here is the key step in Raz’s argument. As he suggests:

[T]his characterization of the required intention is open to an obvious objection: *surely legislators do not have to know the precise details of the legislation they vote for.* Many of them are likely to know only its general outlines, and some of them may have very little idea of what they are voting for.⁴⁶

In other words, a large number of texts that we commonly think of as legitimate binding statutes would not satisfy the required level of intent necessary for legislation, if we think that legislators must know precisely what they are legislating.

³⁹ See *id.* at 249–86.

⁴⁰ *Id.* at 259.

⁴¹ See *id.* at 263.

⁴² *Id.* at 265.

⁴³ *Id.* at 265–66.

⁴⁴ *Id.* at 266.

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added).

Admittedly, it is an empirical question how many purported statutes fall into this category of unread or only partly-read texts. Perhaps legislators always read entire bills, from start to finish. Yet Raz's empirical premise is hard to dispute. Legislators commonly concede that they have not read the entirety of the bills on which they have voted,⁴⁷ and in many cases, those bills are so lengthy that it would strain credulity to expect a complete reading.⁴⁸ We should certainly hope that voluntary legislation does not always require legislators to know the content of each statutory provision.

Given the probability that many legislators do not know precisely what they are voting for, Raz offers the following alternative theory of minimal legislative intent:

A person is legislating . . . by expressing an intention that the text of the Bill on which he is voting will—when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country—be law.⁴⁹

That is enough to be intentional. Legislators do not need to know the content of the bill they are voting upon.⁵⁰ To satisfy the Authoritative Intention Thesis, the minimal intent to enact a particular text in light of existing conventions is sufficient.⁵¹ As Raz concludes: “The minimal intention is sufficient to preserve the essential idea that legislators have control over the law.”⁵²

I think Raz is correct in his statement of the minimal intent necessary for legislators to have control over the law—i.e., for legislators to legislate. We might hope our legislators know more than the bare minimum, yet that minimum is enough for the legislation to be under the legislators' control. Now consider what this means for contract law. Notice the striking parallel between enacted but unread legislation and Barnett's envelope example.

⁴⁷ See, e.g., James A. E. Macpherson, *Legislative Intentionalism and Proxy Agency*, 29 L. & PHIL. 1, 4 n.4 (2010).

⁴⁸ See, e.g., *id.*

⁴⁹ Raz, *supra* note 37, at 267.

⁵⁰ As Raz puts it: “On this understanding the required intention is very minimal, and does not include any understanding of the content of the legislation.” *Id.*

⁵¹ *Id.*

⁵² *Id.*

If we are ready to claim that the level of intent in the envelope example is inadequate to count as consent, why would we not think the same for legislation enacted by legislators who do not know the content of the relevant legislation? For many members of Congress, it is as though the law were hidden in an envelope. Indeed, Raz's example demonstrates why we cannot distinguish the envelope case on the basis of the large-scale impact of boilerplate contracts, for our legislative enactments are also large-scale in their effects.

Nor can we say that the consent we look for in the legislative setting is metaphorical. Radin may well be right that citizens' consent to the state, or consent to the states' laws, is different from the consent at issue with mass-market boilerplate.⁵³ Perhaps we can get by with metaphorical consent to the state's authority, but must have real consent when we speak of contractual obligations. However, it is not at all clear that we can have anything less than real consent when assessing the voluntariness of legislative enactments. As with contracts, we count on the existence of real, non-metaphorical consent in the legislative setting.

If the envelope case and the legislative case are analogous, this leaves us with a choice. We could bite the bullet and decide that there is a serious normative degradation for both click-wrap contracts and for much of our duly-enacted legislation. More likely, we will wish to revisit what we mean by consent. If we are convinced that legislators' consent to the enactment of statutes that the legislators have not read is still a sufficient form of consent for the resulting texts to qualify as legislation, then we may reach a similar conclusion with respect to a large subset of mass-market boilerplate.⁵⁴ Many of these texts may qualify as contracts.

IV. THE DEMOCRATIC DEGRADATION THESIS

These comments have emphasized the normative degradation problem. The democratic degradation problem may seem like the more significant one. The democratic degradation problem is also a very complex problem. Among other things, a proper discussion of the democratic degradation

⁵³ See Radin, *supra* note 1, at 630–33 (drawing this distinction).

⁵⁴ Other options might be available. One might say that the envelope case is not like the click-wrap case, for example. It is unclear on what basis the envelope case and click-wrap case would be relevantly different, but this is theoretically possible. Or, one might say that individuals should have to consent in different ways from legislators. Again, the basis for such a claim is unclear. That said, it is arguable that different types of consent are appropriate to different contexts, and that the differences matter here.

problem requires a foray into political theory. These comments are not the place to address our theory of the state (and legislation) in full detail, and accordingly not all features of Radin's democratic degradation argument will be fully assessed. That said, some initial thoughts regarding Radin's argument and the concerns it raises are outlined below.

This Part focuses on two main concerns. First, we might be troubled because mass-market boilerplate appears to supplant legislatively enacted provisions. What is the point of our lengthy enactment process if it is without any lasting effect? Why would a legislature devote so much time to setting rules when they can be readily bypassed on a large scale?⁵⁵ Second, we might be troubled that mass-market boilerplate seems like a form of private eminent domain. Is private eminent domain really consistent with the principles of our private law system? Each of these concerns is considered in turn.

A. Are Democratic Debates a Sham When Defaults Are Waived by Mass-Market Boilerplate?

Have legislative debates over default provisions really become a sham? It is not clear that they have, for the debate over legislative provisions need not be a waste of energy in mass-market boilerplate cases. Much depends on whether there are reasons—other than political theater—for legislators to seriously debate default rules which could be waived on a large scale. Much also depends on whether these default rules will still have an effect, even when there is a substantial subset of transactions to which those default rules will not apply in light of mass-market boilerplate provisions.

In fact, there are reasons for legislatures to debate even where mass-market boilerplate could come into play. For example, legislatively promulgated defaults may be “sticky,” either because of cognitive biases, or due to simple transaction costs.⁵⁶ A legislature might not mind if waivers occur, yet might devote substantial time to selecting the right default given the risk that waivers of sub-optimal defaults by individuals will be unlikely or difficult. In such a case, when a large-scale waiver does

⁵⁵ See Radin, *supra* note 1, at 634 (suggesting that this outcome makes the democratic process look like “a sham”).

⁵⁶ See Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 651–52 (2006); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625–33 (1998) (discussing how status quo bias can cause parties to develop preferences for default provisions).

occur, it need not indicate that the debate over legislative terms was a sham.

Default rules may also serve an information-forcing purpose, such that a waiver of the default provision itself provides a social benefit.⁵⁷ In some cases, the very fact that a much-debated default rule has been waived can indicate that the legislature got what it desired. An information-forcing default has worked as intended. In other cases, a mass waiver may simply represent a failure of a would-be majoritarian default rule to coincide with majoritarian preferences. Where that occurs, we should be quite glad to see that the default was readily evaded. In neither circumstance is the legislative process a sham.

Furthermore, in those cases where default legislative provisions have been waived via mass-market boilerplate, the default provisions did not necessarily lack an impact. Default provisions are capable of shaping public opinion and, perhaps, altering or reinforcing social norms.⁵⁸ The subset of cases where the default has not been waived may be an important one. Likewise, consumers with substantial bargaining power may benefit from the default with respect to their individual contracts even if the default is of little relevance in other contractual settings. Each of these suggestions raises empirical questions, but they are questions which matter for purposes of the argument that democratic debate has become a sham.⁵⁹

⁵⁷ On information-forcing, or penalty, default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 97 (1989).

⁵⁸ For a helpful discussion of how legal provisions may affect norms by signaling a consensus or providing a focal point, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 *VA. L. REV.* 1649, 1687–88 (2000) (discussing how law can provide “a focal point around which individuals may coordinate their behavior”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338, 402–03 (1997) (discussing how law can signal a societal consensus).

⁵⁹ At certain points in Radin’s argument, it sounds like appearances are a major part of the problem. See Radin, *supra* note 1, at 634 (indicating democratic governance may “look like a sham” and that hard-fought compromises are made to “seem like an ironic form of theatrics”). If the argument is not that legislative debate over default rules is actually a sham debate, but rather that mass-market boilerplate creates the appearance of a sham debate, this may not be a true democratic degradation. We may, for lack of a better phrase, have the appearance of a democratic degradation. If so, we may not need to reform boilerplate contracts on that basis—it is quite possible that the benefits from mass-market

(continued)

Moreover, if a legislature does not want the rules it promulgates to be waived, it may always use mandatory rules instead. The absence of a mandatory term may mean the legislature is not troubled should a mass waiver come to pass. This is not to say that legislative inaction always means that all is well. A legal status quo is hardly fine just because a legislature has left it alone. When mass-market boilerplate changes the default effect of legislation, this mass waiver could, in theory, result in suboptimal regulation of private transactions. Yet, the claim at issue is that we have a democratic degradation, not that we have less than perfect laws as a result of mass-market boilerplate. If a legislature fails to change a poor outcome, that fact standing alone is a democratic disappointment, rather than a degradation.

B. Is Private Eminent Domain a Problem?

Another component of Radin's argument draws on the possibility that private firms are effectively exercising powers of eminent domain.⁶⁰ This claim may depend on the view that mass-market boilerplate is non-consensual. As indicated above, that view is debatable for a subset of mass-market boilerplate transactions (e.g., click-wrap agreements). Let us assume, however, that the eminent domain argument would apply even if click-wrap is, in a sense, consensual.

Private eminent domain powers are not typically seen in private law doctrine.⁶¹ Indeed, the prospect of contracts that resemble a kind of private eminent domain may initially seem disturbing. That said, the oddity of a private eminent domain power is likely a matter of context. The notion of private eminent domain is not necessarily a problem in business settings, and, depending on what we mean by private eminent domain, it may even be a routine feature of our legal doctrine.

For example, it has been suggested that the system of forced exchanges and appraisal rights for mergers between corporations results in shareholders being subject to a form of private eminent domain.⁶² Given

boilerplate would outweigh the costs resulting from the appearance (but non-reality) of a democratic degradation.

⁶⁰ See Radin, *supra* note 1, at 624, 637–38.

⁶¹ See *id.* at 624, 638.

⁶² For an early instance of this suggestion, see James Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1191 (1964) ("First, it is important to inquire whether the availability of appraisal forecloses other relief to such an extent that the majority can use a basic transaction for the purpose of eliminating an

(continued)

the right circumstances, one set of investors can effectively force another set of investors to part with their shares in return for cash or other consideration.⁶³ In the modern era, it is rarely thought that this system of cash-out mergers and appraisal rights offends the public/private distinction or otherwise jeopardizes the principles of private law doctrine. In all likelihood, if an individual investor wishes to invest in a public corporation, the risk of being forced out by a merger will be a given feature of the corporate contract on offer. Once upon a time, appraisal rights for take out mergers were a new aspect of corporate law, and investors could plausibly claim that when they first invested in a business it was not a feature they had anticipated.⁶⁴ That is no longer the case.⁶⁵ The version of private eminent domain that we see with corporate mergers is relatively common and unremarkable. For many investors, it is also hard to avoid.⁶⁶

We might think corporate law is *sui generis*, of course. Arguably, mergers are a different type of fact pattern from what we see with mass-market boilerplate, and an exceptional fact pattern at that. Investments in public corporations are a very common event for many individuals. Still, one might say that these individuals do not have to invest in public corporations, while they do pretty much have to accept mass-market boilerplate language on a regular basis.

Corporate law, however, is not the only sphere of private law in which legally permissible conduct resembles a form of private eminent domain.

unwanted minority stockholder and forcibly acquiring his interest—a sort of private eminent domain proceeding.”).

⁶³ *See id.*

⁶⁴ For discussion of the history of take out mergers, see Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624 (1981). As Weiss indicates, there was a point in time when “no state legislature expressly granted a corporation or its majority shareholders the power to force a minority to relinquish its interest in an ongoing corporate enterprise.” *Id.* at 629.

⁶⁵ *See* Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 226 (1962).

⁶⁶ Query whether the average shareholder’s consent to corporate charter provisions which facilitate these mergers is analogous to a consumer’s consent to click-wrap provisions. In both cases, we are likely dealing with take-it-or-leave-it terms, unread by the relevant parties.

In the famous case of *Vincent v. Lake Erie Transportation Co.*,⁶⁷ one individual wanted to use another's dock to protect his boat in a storm.⁶⁸ The dock owner has a property right to the dock, yet in this emergency, it is often thought that the interests of the boat owner should prevail.⁶⁹ It is reasonable for the boat owner to try and protect his boat.⁷⁰ He gets to use the dock, even though the ultimate (and foreseeable) result is that the dock is harmed.⁷¹ Can the dock owner then seek damages after the fact? According to cases like *Vincent*, the answer is yes.⁷²

Notice how the power exercised in *Vincent* is like a private eminent domain power.⁷³ The dock owner is effectively forced to give up a property interest—the right to exclude others from his dock—and at the choice of another private individual. There is compensation, just as there is compensation with a public exercise of eminent domain. Nonetheless, one private party has the privilege of imposing on another, limiting the other's important rights. Unlike the mass-market boilerplate context—in which people at least arguably choose to be subject to the applicable contract—the *Vincent*-type cases apply to anyone who falls within the appropriate jurisdiction. The claim for consent in cases like *Vincent* is actually more attenuated than it is for mass-market boilerplate.

Now, we may conclude that this is a reason to reform the law of torts, and overturn the reasoning in precedents like the *Vincent* case. I doubt that would be a good idea. In any event, it is not typically thought that cases like *Vincent* undermine our private law system. Private eminent domain (or something that resembles it) may not be a characteristic feature of private law, but nor is it inconsistent with private law reasoning.⁷⁴

⁶⁷ 124 N.W. 221 (Minn. 1910).

⁶⁸ *Id.* at 221.

⁶⁹ See JULES COLEMAN, RISKS AND WRONGS 371–72 (1992) (noting that the dock owner has a right to exclude the boat from his dock, but concluding that “it would have been wrongful of him to do what he had a right to do”).

⁷⁰ *Vincent*, 124 N.W. at 221.

⁷¹ See *id.* at 222.

⁷² See, e.g., *id.*

⁷³ See Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1734 (2004) (“The law of private necessity bears some resemblance to eminent domain.”).

⁷⁴ Cases like *Vincent* may also be relevant in a broader domain than torts. In my own work, I have suggested that *Vincent*-type reasoning can help us to understand important features of contractual remedies. See Gold, *supra* note 30, at 56–58.

A crucial feature of Radin's argument seems to be the mass-market feature of the applicable boilerplate. Very large numbers of private relationships are driven by the choices of private firms, rather than the choices of public legislatures. In addition, the relevant terms are standardized, with a consequent narrowing of a potential contracting party's choices.⁷⁵ Perhaps this is a bad thing.⁷⁶ As noted, these comments do not fully address the democratic degradation thesis. If, however, there is a democratic degradation, it is questionable whether that degradation is because mass-market boilerplate renders legislative debate superfluous. Likewise, it is questionable whether the problem is a resemblance to private eminent domain.

V. CONCLUSION

Margaret Jane Radin's Sullivan Lecture is an important invitation to revisit boilerplate contracts, as well as our basic premises about how we wish to regulate our society. Her analogy between mass-market boilerplate and acts of legislation is compelling. Her insight about normative degradation is also significant, especially when we focus on cases of sheer ignorance. Not everything that goes by the name of a "contract" is contractual in the standard sense.

The democratic degradation claim is also noteworthy. A striking feature of mass-market boilerplate is that the sources of many of the rules which guide us are now texts promulgated by private firms. Boilerplate has been around for a long time, but in the world of online transactions, it is now much more common. How we should feel about this change is a complicated issue, and Radin's work points us to the key questions we will want to address.

⁷⁵ This result is not necessarily undesirable. In some contexts, standardization may provide significant benefits. *See, e.g.,* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 762 (1997) (indicating how standardization may involve network benefits in corporate context); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 100 YALE L. J. 1, 42 (2000) (indicating how standardization may limit information costs in property context).

⁷⁶ One concern, not addressed in these comments, is that the ostensible aims of private contracts are quite different from the ostensible aims of public legislation. *See Radin, supra* note 1, at 631 ("The laws of the state are expected to be promulgated in the public interest, not in the private interest of a particular firm."). This is an important distinction, and Radin helpfully draws our attention to it.

That said, it is reasonable to think that a significant subset of mass-market boilerplate can be squared with core notions of contractual consent. It is also reasonable to think that large-scale waivers of legislative defaults can be a success for our democratic system. Much depends on the individual cases under consideration. For many of our mass-market boilerplate transactions, however, there is no cause for embarrassment.

