Formulating a Fix: Past, Present, and Future State and Federal Efforts to Rectify the Abuses of Form Contracts

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The traditional formulation of the contract is dead, and we have killed it. The kind of contract the average person encounters in today’s world is not that of offer, acceptance, and consideration, which all first-year law students are subjected to and familiar with; the heyday of these documents was more than 100 years ago. Compared with their replacements, these traditional contracts have been replaced with forms that are not easily understood.

† J.D. Candidate, 2020, University of Minnesota Law School. Thanks to Professor Prentiss Cox for helping inspire in me an interest in consumer law. Thanks also to my family and friends, particularly my parents, Missy and Paul Hermes, for supporting me in my academic adventures. Finally, a special thanks to my grandfather, Dr. J. Kenneth McClatchy, with whom I cannot share this paper, but I’m sure he would have found it fascinating.


2. See, e.g., Daniel D. Barnhizer, Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts, 44 SW. L. REV. 215, 217 (2014) (“[A]s suren in adhesion contracts now really means ‘acquiescence rather than active agreement.’”) (quoting NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 27 (2013)); Cheryl B. Preston & Eli McCann, Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism, 91 OR. L. REV. 129, 143 (2012) (“[A]n adhesion contract is one that purports to form, or ‘adhere’ to the weaker party, without any overt manifestation of assent, such as signing. In fact, formation may occur without any reason to assume the weaker party is aware of the terms or even cognizant that a contract exists.”).

3. See Stephen E. Friedman, Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching, 44 GA. L. REV. 317, 323 (2010) (“The enforcement of standardized contracts also puts pressure on the concept of consideration . . . . A consumer’s promise or commitment to abide by standardized terms includes a number of subpromises and subcommitments . . . . These subcommitments are typically imposed on a consumer without the consumer’s knowledge.”). Some of the concerns Friedman discusses in his article could be addressed by giving consumers the option to receive a small discount in price in exchange for waiving jury rights and accepting arbitration, for example. See Barnhizer, supra note 2, at 220. This brings up additional questions about the propriety of such “fixes,” but they are outside the scope of this Note and will not be addressed further.

seem quaint or even archaic. The contract of adhesion has taken their place. These contracts provide little or no opportunity to negotiate the terms—and consumers agree to provisions they would never approve of otherwise. These provisions severely limit the rights and remedies consumers enjoy, even if consumers are not fully aware of what rights they have in the first place. On one side of this divide stand large companies with high-powered and expensive lawyers drafting virtually incomprehensible and incomprehensibly onerous contracts. On the other side stand lowly consumers, who never read such contracts and often lack the ability to understand the legalese of a boilerplate form contract.

5. See Preston & McCann, supra note 2, at 130 (discussing Karl Llewellyn’s opinions on the usefulness of adhesion contracts, but also his belief that such contracts needed to be controlled by judicially imposed limitations and that these limitations are not adequately used by modern judges).


7. See, e.g., Friedman, supra note 3, at 322 (“[B]ecause those terms are non-negotiable, buyers gain little from reading them.”).


9. See generally Lucian A. Bebchuk & Richard A. Posner, One-Sided Contracts in Competitive Consumer Markets, 104 MICH. L. REV. 827, 827–28 (2006) (discussing the asymmetry in form contract terms and mentioning certain oppressive terms, such as mandatory arbitration clauses and forum-selection clauses); W. David Slawson, Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form, 2006 MICH. ST. L. REV. 853, 854 (“Producers induce consumers to buy their products with promises and representations that they then nullify or contradict with their standard forms.”).

10. See Friedman, supra note 3, at 325 (stating that buyers are not aware of their “baseline rights” to which they are entitled, and even if they were, they would lack the legal knowledge to make an informed decision on what they lose when signing form contracts).

11. See Bebchuk & Posner, supra note 9, at 832 (describing the cost of reading a form contract as exceeding the benefit and providing rationale to ignore the fine print).

12. See NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 29 (2013) (“A contract may be used to deter litigation as much as it is used to win litigation. A consumer might read the contract after a problem with the transaction arises and believe that the egregious term is enforceable—and thus decline to have the grievance addressed.”). But see Bebchuk & Posner, supra note 9, at 828 (“The existence of a one-sided contract does not imply that the transaction will be one-sided, but only that the seller will have discretion with respect to how to treat the consumer.”) (emphasis added).

13. An interesting example of this practice comes from health insurance contracts. Using the objective Flesch Reading Ease formula, many states have adopted a limit to the reading level which health insurance companies may use when
The omnipresence of the form contract and its puzzling fit into the jigsaw known as ‘contract law’ requires a reevaluation of the basic principles of contract law and their application to this new contract.14 This Note will specifically address legislative efforts to stem the most harmful terms that form contracts contain as a practical method of alleviating oppressive terms.15 State legislatures and the federal government have been slow to provide consumers with additional protections to counteract the effects of these standard form contracts. Combative measures that have previously assisted consumers in assessing the damaging effect contractual provisions have on their rights are not effective in this instance.16 Without additional protections, consumers will continue to lose rights and the ability to enforce whatever rights they still possess. This Note will discuss the efforts Congress and state legislatures have taken to address the crisis in consumer form contracts. It shall also recommend state legislative reforms, based on the successes of previous statutory schemes, to address many of the ills of consumer form contracts. Part I of this Note will discuss the origins of standard form contracts and the more pernicious terms contained therein. Part II will outline efforts of federal and state governments to limit anti-consumer terms in form contracts. Finally, Part III will advocate for further consumer protection reforms relating to form contracts at both the federal and state levels.

drafting their contracts. The limits are generally between a tenth- and thirteenth-grade reading level. The average American adult reads at an eighth-grade level. For a more in-depth discussion on the complexity of health insurance contracts, see generally John Aloysius Cogan, Jr., Readability, Contracts of Recurring Use, and the Problems of Ex Post Judicial Governance of Health Insurance Policies, 15 ROGER WILLIAMS U. L. REV. 93 (2010).

14. Cf. Farnsworth, supra note 4, at 602 (discussing how certain kinds of contracts are considered separate areas of the law, citing collective bargaining agreements as an example).

15. A Note or treatise arguing for this grand reevaluation of contract law is surely a noble and necessary pursuit for another time and another author. Cf. Arthur Allen Leff, Contract as Thing, 19 AM. U. L. REV. 131 (1970) (arguing in part for a separate categorization for contracts of adhesion, separate from normal contracts).

16. See Friedman, supra note 3, at 324 (“The challenges posed by standardized contracting cannot be fully met by requiring the use of attention-calling devices or devices designed to extract more reliable indicia of assent.”). Friedman goes on to discuss a variety of reasons for the inability of “attention-calling devices” to adequately protect consumer rights in form contracts.
Part I: The Standard Form Contract

In the beginning, there was nothing; then, there were contracts—or perhaps less dramatically, first there was a general theory of civil liability, then came a theory of contract law. Contracts used to be a “give and take,” entered into only when both parties so desired. Individuals were considered mostly autonomous economic actors, free from the interference of pesky courts. A failure to read the terms of a contract did not (and still does not) provide a basis for nonenforcement of the contract. Enforcing unread terms was necessary, rational, and furthered admirable goals. Circumstances exist where a failure to read terms does not result in the binding of the non-reader, but these instances are limited. The terms in the past formulation of contracts were mostly mutually agreed upon and reflected a give-

17. See GILMORE, supra note 1, at 5 (“[T]he common law had done very nicely for several centuries without anyone realizing that there was such a thing as the law of contracts.”).

18. See, e.g., Farnsworth, supra note 4, at 577 (“[E]ach party to an exchange seeks to maximize his own economic advantage on terms tolerable to the other party. Because of differences in value judgments and because of the division of labor, it is usually possible for each of them to realize what is for himself a substantial advantage. ‘When the baker provides the dentist with bread and the dentist relieves the baker’s toothache, neither the baker nor the dentist is harmed.’”) (quoting L. VON MISES, HUMAN ACTION 666 (rev. ed. 1963)).

19. See Preston & McCann, supra note 2, at 138 (“Men ought to be bound only when they deliberately chose to be and to the extent that they chose.”) (quoting Max Radin, Contract Obligation and the Human Will, 43 COLUM. L. REV. 575, 576 (1943)).

20. See GILMORE, supra note 1, at 103 (“[P]arties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision.”) (quoting LAWRENCE FRIEDMAN, CONTRACT LAW IN AMERICA 21 (1965)).

21. See, e.g., Chicago, St. P., M. & O. Ry. Co. v. Bellith, 83 F. 437, 440 (8th Cir. 1897) (“If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party.”); Slawson, supra note 9, at 857 (“[T]he duty to read has become so firmly established that it is now applied without regard to whether an application of the objective theory would lead to the same conclusion.”). Much of this theory is rooted in a belief in an absolute contractual liability theory. See GILMORE, supra note 1, at 49–53 (citing, in part, Paridine v. Jane [1647] Aleyn 26, 82 Eng. Rep. 897 (K. B. 1647), which states that “[i]though the whole army had been alien enemies [residing on the tenant’s leasehold], yet he ought to pay his rent.”).

22. See Becher, supra note 6, at 729–31 (describing the purposes of requiring contractual reliance despite a failure to read a contract on the grounds of preventing people from “avoiding bargains that turn out to be less beneficial than they seemed ex ante” and minimizing judicial interference in markets, among others).

23. See id. at 730 (noting that the Restatement (Second) of Contracts continues to have some exceptions to the duty to read, most notably if one party inserts a provision into a contract despite reason to know that the other party did not intend to have that term present).
and-take between multiple parties. Contracts lacking mutual agreement were less common pre-industrial revolution, especially compared to today’s contract environment. The early conception of form contracts arose in England in the mid-1700s. The use of form contracts grew, commonly defended for their convenience and cost savings. While the world changed around it, however, contract law stayed the same.

Karl Llewellyn, the esteemed professor and major drafter of the Uniform Commercial Code (UCC), stated that the only appropriate remedy for oppressive form contract terms was nonenforcement of the oppressive terms. At the time of Llewellyn and the drafting of the UCC, this may have been a valid response to individuals who did not read contracts, even those who did not read form contracts. However, this severability of oppressive terms provides little recourse to consumers, no penalty to the contract drafter, and encourages (or at least does not discourage) the use of invalid, oppressive terms to dissuade consumers from

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24. See id. at 725 (“[A] contract results from a negotiation process in which the parties freely engage. Negotiating parties, as Friedrich Kessler described in a famous phrase, meet ‘each other on a footing of social and approximate economic equality.’”) (quoting Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629, 629 (1943)).

25. See Kim, supra note 12, at 22 (describing the standardization of terms and contracts in consumer transactions as a result of the industrial revolution).

26. See id. at 144–46 (noting a series of English cases involving common carriers disclaiming liability for lost or stolen possessions).

27. See id. at 148 (discussing the case of Cole v. Goodwin, 19 Wend. 251 (N.Y. Sup. Ct. 1838), in which form contracts were defended as necessary to prevent requiring a separate formal legal document for each shipped package).

28. Gilmore, supra note 1, at 7 (“[Contract law] rules themselves changed less than the areas covered by them.”) (quoting Lawrence Friedman, Contract Law in America 23 (1965)).

29. See Friedman, supra note 3, at Part III. A. But see Kim, supra note 12, at 63 (“Llewellyn hadn’t foreseen wrap contracts.”).

30. See Kim, supra note 12, at 62 (describing a main problem with form contracts as being a “bastardized version of blanket assent,” which was “not outrageous in its original . . . context”).

31. See Friedman, supra note 3, at 332 (“These challenges cost money, primarily in the form of attorney’s fees associated with the challenge. Nonenforcement of contract terms does nothing to compensate for those expenditures. Indeed, the existence of an obligation without an accompanying right to pursue damages for breach of that obligation is something of an anomaly in the world of contracting.”).

32. See id. (“[M]ere nonenforcement fails to register that a mass-market seller has abused a privileged position. By giving the terms in standard form contracts presumptive enforceability, contract law has delegated a large share of power to such sellers. Mere nonenforcement fails to register the abuse of power that occurs in cases of unconscionability . . . .”) (footnotes omitted).
asserting their rights.\textsuperscript{33} Llewellyn himself was no blind adherent to form contracts, expressing concern about the degree to which terms of form contracts should be enforced.\textsuperscript{34} Modern attempts to entrench nonenforcement as the only available remedy for oppressive or invalid contract terms have been decried for their further harmful impact on consumer rights.\textsuperscript{35} This fear is especially relevant as courts begin throwing “doctrinal fidelity” out the window in favor of protecting business needs.\textsuperscript{36}

Form contracts often contain terms so one-sided that adjectives like ‘aggressive,’ ‘onerous,’ and ‘oppressive’ hardly convey the degree to which they limit consumer rights. A forum selection clause in a tech contract forces an individual to travel hundreds of miles to the company’s local jurisdiction in order to assert well-established consumer rights.\textsuperscript{37} An arbitration clause in a home purchase agreement requires a consumer victimized by faulty installations to convince not a judge, but a member of the local Realtors’ association to determine the degree of liability, if any.\textsuperscript{38} A small restaurant owner cannot assert their ability to create a class action lawsuit in complicated and expensive litigation against one

\textsuperscript{33} See Jens Dammann, \textit{Flytraps, Scarecrows, and the Transparency Paradox: The Case for Redesigning the Law on Vogue Boilerplate Contracts}, 2018 U. ILL. L. REV. 185, 197 (2018) (“[These terms] may look burdensome, but, because they are void, they really do not impose any burden at all. The merchant may still be able to use the invalid provision, however, to deter the consumer from asserting his rights.”).

\textsuperscript{34} See Preston & McCann, \textit{supra} note 2, at 153 (“Even before the UCC, Karl Llewellyn, one of the most outspoken and influential drafters of the UCC, questioned the extent to which contracts of adhesion should be enforced.”).


\textsuperscript{36} See Kim, \textit{supra} note 12, at 46 (discussing Judge Easterbrook’s departure from contract law doctrine in the seminal shrinkwrap case of ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)); \textit{see also id.} at 109–11 (listing doctrinal rules unique to form contracts and/or differing from traditional rules of contract law, including in fundamental aspects like notice, acceptance, and modification).


\textsuperscript{38} See Michael K. Braswell & Stephen L. Poe, \textit{The Residential Real Estate Brokerage Industry: A Proposal for Reform}, 30 AM. BUS. L.J. 271, 305 (1992) (discussing how the National Association of Realtors’ mandatory policy is one of mandatory arbitration before a panel of other members of the National Association of Realtors).
None of these provisions even display the worst abuses of form contracts. In fact, each of these examples—or something substantially similar—is present in nearly every consumer contract in the United States today.\(^\text{40}\)

Though the fact that few, if any, consumers read such contracts is certainly a reason for limiting oppressive terms in form contracts in its own right,\(^\text{41}\) a more persuasive reason is the extremely unequal bargaining power between drafter and signer.\(^\text{42}\) Contract theorists like Nancy Kim also cite the degree to which these agreements constrict or erode consumer rights as reasons to limit consumer form contracts.\(^\text{43}\) Many of these form contracts allow unilateral modification by the drafter, who may provide little or no notice to the consumer of the changes.\(^\text{44}\) Clickwrap contracts provide prime examples of each of these contracting vices.\(^\text{45}\) Consumers must click on a prompt stating that the consumer agrees to the website’s terms of service, usually without actually viewing such terms, in order to access the contents of a website.\(^\text{46}\) Some websites go even further, stating that a consumer’s mere presence

\(^{39}\) American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013) (validating a class action arbitration waiver despite the lack of other realistic means of bringing an antitrust case).

\(^{40}\) See generally Kim, supra note 12, at 53–92 (discussing how provisions like forum selection, arbitration, and others are being used against consumers to change the legal standards surrounding general consumer contract law).

\(^{41}\) See id. at 26 (“If one did not know of a contract, or a particular contractual term, one could not have assented to it.”).

\(^{42}\) See, e.g., Margaret Jane Radin, Boilerplate Today: The Rise of Modularity and the Waning of Consent, 104 Mich. L. Rev. 1223, 1232–33 (2006) (describing how consent in form contracts is now a fiction due to unequal bargaining power). But see Becher, supra note 6, at 728 (briefly discussing, from a law and economics perspective, the relative advantages of form contracts).


\(^{44}\) See Kim, supra note 12, at 65–67 (discussing unilateral modification clauses).

\(^{45}\) See generally id. at 65–69 (discussing the ills of various kinds of wrap contracts).

\(^{46}\) Slawson, supra note 9, at 874 (stating that not only do consumers state they agree without reading or understanding these wrap agreements, but also that producers know, or should know, that no consumer reads and understands the agreements).
on the website manifests consent to the terms and conditions. The consumer may also have to search contracts hyperlinked within a hyperlinked terms of service. Obfuscating and outright hiding terms, this kind of contract-within-a-contract confuses the consumer. Many of the most utilized websites, including those maintained by Wells Fargo, Google, and Amazon, have unilateral modification of terms clauses within these contracts-within-contracts. Not to imply that form contracts serve no pro-consumer purpose or are purely evil, rather this obfuscation is only primarily the case, and especially true given the market incentivization towards foisting more onerous contractual obligations upon consumers.

Part II: Legislative Action to Limit Oppressive Terms in Form Contracts

The ills of form contracts have been clear for some time, but legislators have been slow to enact legislation tempering the more aggressive uses of form contracts. For much of American jurisprudential history, a consumer’s only potential legal recourse was a common law action for fraud or breach of warranty. This practice changed when the federal government began regulating

47. See Kim, supra note 12, at 3 (“[A] browserwrap requires no affirmative act and is accessible via a hyperlink, typically located at the bottom of the homepage . . . .”). But see id. at 107–08 (arguing that the more involved a consumer is in the act of review and consent of a contract the more valid their assent is to the contract).

48. See id. at 62 (“[Companies] burrow multiple pages of terms several hyperlinked pages deep.”).

49. See id. at 66 (discussing unilateral modification clauses in each of the above companies’ terms of service).

50. See Friedman, supra note 3, at 320 (describing the standardization of terms as “essential to a system of mass production” and a reducer of costs).

51. See id. at 320–21 (describing form contracts as “invit[ing] abuse,” “a bullying device,” and “put[ting] tremendous pressure on the underlying principles of contract law”).

52. See, e.g., Kim, supra note 12, at 60–61 (describing companies’ incentives to adopt more and more unfair contract terms); see Preston & McCann, supra note 2, at Part V (discussing the weakening of restraints on form contracts); Eric Goldman, Understanding the Consumer Review Fairness Act of 2016, 24 Mich. Telecomm. & Tech. L. Rev. 1, 4 (2017) (discussing how anti-consumer terms “take root” in an industry and a “race-to-the-bottom” ensues due to a pressure to gain competitive edge over competitors). It is important to note that Goldman is discussing specifically the use of anti-consumer review clauses in his paper, but his point here is applicable to form contracts generally.

53. See, e.g., W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971) (discussing the incentives of contract drafters to use unfair contractual provisions).

industry in the so-called “Progressive Era.” The following portion of this Note will first describe federal efforts to limit oppressive terms in form contracts, focusing primarily on enacted legislation, then will proceed to discuss state legislation and pending bills.

A. Federal Action to Limit Oppressive Terms

The first major effort towards consumer protection originated at the federal level in the form of the Federal Trade Commission (FTC). Though created in 1914, this organization did not hit its stride until the 1930s. The FTC has broad powers and jurisdiction. Early versions of the FTC Act would have created a list of prohibited practices, but Congress quickly scrapped these versions because it expected unprincipled businesses to find ways to slightly modify prohibited practices to avoid enforcement. Additionally, for the early part of the FTC’s existence—until the Franklin D. Roosevelt administration—the FTC fought only “unfair methods of competition.” While the FTC’s efforts often touched on

55. See, e.g., Robert L. Rabin, Reflections on Tort and the Administrative State, 61 DEPAUL L. REV. 239, 246 (2012) (“The worker-protective labor legislation in the Progressive Era, just discussed, was but a single aspect of a broader emerging commitment to federal health and safety legislation, ranging from meat inspection to purity in food and drugs.”).

56. Arguably, the Sherman Act of 1890 could be the first major effort at consumer protection as it tried to prevent price-fixing and other trade practices that benefited super-corporations. However, the Sherman Act and antitrust enforcement at the time was more interested in the deconcentration of economic resources, not so much on protecting consumers. See William E. Kovacic, Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration, 74 IOWA L. REV. 1105 (1989) (arguing that Sherman Act actions wax and wane based on public opinions about “bigness” in corporations). This Author, and many others thus consider the FTC Act the first major consumer protection legislation, and this Note will continue referring to it as such. Cf. Spanogle et al., supra note 54, at 47.


59. See Dee Pridgen & Richard Alderman, Consumer Protection and the Law, § 8.1 (2018) (“[T]he reach of the FTC Act is not nearly as limited as the common law of fraud, misrepresentation or deceit.”).

60. See James Cooper & Joanna Shepherd, State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis, 81 ANTITRUST L.J. 947, 951 (2017) (discussing the balance Congress wished to find between broad principles-based enforcement and specific prohibitions).

61. Spanogle et al., supra note 54, at 47.
consumer issues, the FTC would not pursue the regulation of business in the explicit defense of consumers until 1938 when the passage of the Wheeler-Lea Act broadened the FTC’s delegation of power. Among the primary examples of both the breadth of the FTC’s jurisdiction and its amount of power is its mandate to enforce the prohibition of unfair trade practices. This ability to adapt to changing market practices has kept the FTC’s consumer protection efforts relevant more than 100 years after the agency’s initial creation. Despite the FTC’s importance to consumer protection, it is not presently well-positioned to combat the abuses of form contracts. This impotence has much to do with the FTC Act lacking a private enforcement provision. An alternative explanation for the FTC’s inefficacy at fighting form contract abuses is the fact that while the FTC fights fraud in an extremely effective manner, form contract provisions are not fraud, per se, but are of a more abusive nature. Put another way, form contracts implicate unfairness and abusiveness more than implicating deceptiveness.

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in the wake of the 2008 financial recession. Dodd-Frank, among other accomplishments,
created the Consumer Financial Protection Bureau (CFPB). The CFPB and FTC have, to some degree, similar mandates to take action against unfair and deceptive acts or practices, though the CFPB also returns illegally disgorged money back to consumers. Once again, these agencies deployed principles-based attempts to combat anti-consumer trade practices, and again, principles-based enforcement has proven extremely effective.

Consumers play an important role in consumer protection by reviewing services provided. The internet has made rating services and products incredibly easy, but businesses have tried to


71. Dodd-Frank added “abusive” to the list of prohibited acts and practices for the CFPB to address. Compare 15 U.S.C. § 45(a)(2) (“The [FTC] is hereby empowered and directed to prevent . . . unfair or deceptive acts or practices in or affecting commerce.”), with 12 U.S.C. § 5531(a) (“The [CFPB] may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act.”) (emphasis added).


73. Prentiss Cox, Amy Widman & Mark Totten, Strategies of Public UDAP Enforcement, 55 HARV. J. ON LEGIS. 37, 80 (2018) (discussing the types and amounts of damages and penalties received by CFPB enforcement actions).

74. See Pridgen & Alderman, supra note 59, at § 8.1 (“Congress gave the agency a good deal of discretion in order to prevent or punish forms of consumer abuses that could not be foreseen by the legislative drafters.”).

75. The ability for some consumers to leave product reviews provide for two of the more persuasive arguments that consumer protection for form contracts is unnecessary. See Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. PA. REV. 630, 660–61 (1979) (arguing that a sufficient number—approximately one-third of purchasers, though this argument was made pre-internet—of informed consumers will lead to a market equilibrium, including as it relates to contract terms); R. Ted Cruz & Jeffrey J. Hinck, Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information, 47 HASTINGS L.J. 635, 662 (1996) (arguing that the informed minority argument is not viable in practice, but other factors—including a seller’s concerns about its reputation—provide protection to consumers). The “informed minority” argument is based on the premise that businesses do not want to lose the percentage of consumers that read form contracts. See Dammann, supra note 33, at Part II. A. 1. The informed minority can also inform the majority about the existence of boilerplate abuses. See Clay Calvert, Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship, 24 WIDENER L. REV. 203, 211 (2018) (“One way that markets become more efficient is by information getting out there, consumer to consumer.”) (quoting Professor Lauren Willis). For another discussion of the problems with the informed minority argument, see Becher, supra note 6, at 757–54. All of these benefits would be defeated by allowing the limitation of consumer review of products, however.
limit the ability of consumers to review products. Many medical professionals have adopted anti-review form contracts that assert an outright ban on patient reviews or assigned reviews yet to be written to the patient’s health care institution. Other industries soon followed. In a particularly egregious case, a company named KlearGear.com sued Jennifer Palmer, a consumer who purchased KlearGear merchandise that never arrived, after Palmer left a negative review of the company on a consumer review website. In fact, the KlearGear non-disparagement clause had not been present at the time Palmer made her purchase, but that did not stop KlearGear from suing her for $3,500 in liquidated damages and reporting the unpaid damages to credit reporting agencies.

Stories like Jennifer Palmer’s moved Congress to pass one of the more recent and tangible pro-consumer laws regarding form contracts in the Consumer Review Fairness Act (CRFA). This bipartisan law voids any “form contract” clause that “prohibits or restricts” a consumer from leaving a negative review or punishing a consumer who leaves a negative review. While the CRFA lacks a private right of action, state attorneys general have jurisdiction to enforce the CRFA, and the FTC has also begun

76. See Calvert, supra note 75, at 208–09 (discussing the ease of consumer review thanks to apps like Yelp and businesses attempts to prohibit or prevent negative reviews).
77. See Goldman, supra note 52, at 2.
78. Id. at 3–4.
79. Calvert, supra note 75, at 215–17 (detailing the KlearGear saga).
80. Id.
83. 15 U.S.C. § 45b(a)(3) (2018) defines a form contract as “a contract with standardized terms—(i) used by a person in the course of selling or leasing the person’s goods or services; and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.” The statute goes on to exempt employer-employee contracts and independent contractor contracts. Interestingly, the statute makes no attempt to define “standardized terms,” a term fundamental to understanding the scope and enforcement of the law. Future legal challenges or attempts at maneuvering around the law will likely focus on this ambiguity in the definition.
enforcing the Act.\textsuperscript{87} Since the passage of the CRFA in 2016, the FTC has initiated about ten enforcement actions focusing on the CRFA.\textsuperscript{88} While enforcement of the CRFA has been somewhat limited thus far, it remains a potential tool to attack the limitation on consumer commercial speech.\textsuperscript{89}

Despite Congress's begrudging pace on tackling consumer issues in form contracts, it has made progress. The creation of the CFPB and the passage of the CRFA—causing increased FTC enforcement actions (including limited excursions into unfair form contracts)—both have positive effects for consumers. Some of these are large, important changes (such as creating the CFPB) and others are somewhat minor (such as the CRFA), but any improvements are beneficial for consumers in the assertion of their rights. Thankfully, state legislatures are also creating pro-consumer legislation, including some causing large, fundamental changes to consumer law.

\textbf{B. State Action to Limit Oppressive Terms}

In the 1960s and 70s, as dissatisfaction with the FTC grew,\textsuperscript{90} states led the way in consumer protection efforts.\textsuperscript{91} This took the form of “Unfair or Deceptive Acts and Practices” statutes—among other names.\textsuperscript{92} Every state in the nation passed some version of a

\textsuperscript{87} See, e.g., Noah Joshua Phillips, Comm’r, Fed. Trade Comm’n, The FTC and the Digital Marketplace: Highlights from the Last Year at the ANA/BAA Marketing Law Conference (Nov. 5, 2019) (2019 WL 5872670) (“This past spring, we brought five administrative cases exclusively enforcing the CRFA, alleging that these defendants illegally used non-disparagement provisions in consumer form contracts in the course of selling their products and services.”); Letter from Mary K. Engle, Assoc. Dir., Div. of Advertising Practices, to Daniel S. Blynn, Venable LLP (Feb. 5, 2018) (2018 WL 949982) (advising Mr. Blynn that the FTC would not be pursuing enforcement actions against Venable for violating the CRFA at the time of writing).


\textsuperscript{89} For further debate about the CRFA, see Wayne R. Barnes, The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law After the Consumer Review Fairness Act, 53 GA. L. REV. 549 (2019).

\textsuperscript{90} See Cooper & Shepherd, supra note 60, at 953.


\textsuperscript{92} See Cooper & Shepherd, supra note 60, at 947, 954–56 (discussing Uniform Deceptive Trade Practices Acts (UDTPA) and Model Unfair Trade Practices and Consumer Protection Law (UTPCPL) as separate from UDAP statutes because of
UDAP statute. These statutes radically changed the way consumers could protect their interests by protecting what the FTC Act could not—they allowed for the private enforcement of consumer rights. This expansion of private rights of action continued through the 1980s. Despite providing greater consumer protection enforcement, state legislatures designed these UDAP statutes to mirror the FTC. As such, few if any were designed to deal with oppressive terms in contracts. States have begun looking at amending their UDAP statutes with an eye towards bringing them into the 21st century. The Maryland legislature, for instance, amended its UDAP statute in 2018 to add “abusive” to its list of prohibited commercial practices, mirroring the statutory

their reliance on enumerated prohibited practices). This Note will refer to all of these statutes as “UDAP statutes” for simplicity’s sake and because their differences are not very important for the purpose of this Note; see Silverman & Wilson, supra note 91, at 211.

93. See Silverman & Wilson, supra note 91, at 211. However, some states utilize their UDAP statutes more than others. See Cox, Widman & Totten, supra note 73, at 84–85 (categorizing states based on the quantity and nature of their UDAP enforcement, including nine state enforcers that “made little or no use of their UDAP authority”).

94. See Cooper & Shepherd, supra note 60, at 956 (discussing how later UDAP statutes greatly expanded consumer private rights of action).

95. See id. (discussing the divergent paths of state UDAP statutes, which were expanding consumer enforcement, and the FTC, which was restricting its consumer protection focus).


97. See Dammann, supra note 33, at 205–06 (describing state UDAP statutes’ inadequacy to address form contract abuses). But see N.J. Rev. Stat. § 56:12-15 (2018) (“No seller . . . shall in the course of his business . . . enter into any written consumer contract . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller . . .”). However, some state courts have made UDAP statutes protect consumers against oppressive terms anyway. See People v. Network Associates, Inc., 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003) (finding a prohibition on consumer reviews of a product to be a violation of state UDAP law).


grant of power from Congress to the CFPB.\textsuperscript{100} It would not be surprising for additional states to similarly adopt this language in their own UDAP statutes. In creating consumer protection laws to meet the needs of today, states seem likely to once again be laboratories of innovation\textsuperscript{101} for the next leap forward in consumer protection legislation.

Along with the simple regulation of an industry or type of service, increasing consumers' awareness of their rights is one of the most basic forms of consumer protection.\textsuperscript{102} When sellers or manufacturers fail to make consumers aware of their rights, consumers may receive additional damages,\textsuperscript{103} void the offending contract provision,\textsuperscript{104} void the contract in its entirety,\textsuperscript{105} or even attach criminal liability.\textsuperscript{106} New Jersey’s “Truth in Consumer Contract Warranty and Notice Act” (TCCWNA) is an example other states should strive to replicate in passing notice laws that encompass consumer form contracts.\textsuperscript{107} The TCCWNA’s original goal was to prohibit form contract clauses that mislead consumers as to their rights (so called “void where prohibited” or “to the extent

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\item \textsuperscript{100} See 12 U.S.C. § 5531(a) (2018).
\item \textsuperscript{101} Paraphrased from New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
\item \textsuperscript{102} Talia B. Gillis, Putting Disclosure to the Test: Toward Better Evidence-Based Policy, 28 Loy. Consumer L. Rev. 31 at Part II.B. (2015) (discussing the various types of and reasons for disclosure requirements).
\item \textsuperscript{103} See, e.g., Truth In Lending Act (TILA), 15 U.S.C. § 1640(a)(2)(A) (2018) (allowing for various methods of calculating recovery above simple damages); N.J. STAT. ANN. § 56:12-17 (West 2018) (“Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both . . . .”).
\item \textsuperscript{104} See, e.g., Leardi v. Brown, 474 N.E.2d 1094, 1099–1100 (Mass. 1985) (voiding lease provision ostensibly disclaiming implied warranty of habitability, which cannot be disclaimed in the state of Massachusetts).
\item \textsuperscript{105} See, e.g., N.J. STAT. ANN. § 56:12-17 (West 2018) (“A consumer also shall have the right to petition the court to terminate a contract which violates the provisions of [N.J. STAT. ANN. § 56:12-15] and the court in its discretion may void the contract.”). Cf. Reg. Z, 12 C.F.R. § 226.15 (2018) (allowing for the rescission of home loans in several circumstances, including lender failure to make correct or adequate disclosures).
\item \textsuperscript{106} See, e.g., Truth in Lending Act, 15 U.S.C. § 1611 (2018) (willful or knowing TILA violations come with up to one year in prison).
\item \textsuperscript{107} Contra Catherine B. Derenze, Dormant No Longer: New Jersey’s Truth in Consumer Contract, Warranty, and Notice Act Violates the Dormant Commerce Clause, 42 Seton Hall Legis. J. 377 (2018) (arguing the TCCWNA unconstitutionally impinges on the dormant commerce clause).
\end{itemize}
permissible by law” clauses). Recent lawsuits have expanded the reach of this law to apply to class actions. Challenges to the TCCWNA’s constitutionality rest outside the scope of this Note, but other states should consider similar provisions, regardless.

Many form contracts contain clauses forcing a consumer to seek judicial remedies in a specific jurisdiction, often one that is convenient for the business and inconvenient for the consumer. This practice can have the effect of preventing the use of pro-consumer laws without the contract ever discussing such a waiver. At least one court has found state statutes that void consumer waiver of protections also void forum selection clauses that would defeat the statute’s purpose. It is unclear whether the statutes intended to have this effect. In other instances, ambiguous legislation arguably preventing forum selection has been ignored in favor of abiding by the contract terms. However, per an important principle of conflict-of-law jurisprudence, the state

108. See id. at 378–79.
110. See generally Derenzo, supra note 107.
112. See Kim, supra note 12 (discussing over a dozen consumer contracts containing forum selection clauses that benefited the seller over the consumer).
113. See William J. Woodyard, Jr., Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses, 40 LOY. L.A. L. REV. 9, 23–24 (2006) (“Widespread, insensitive enforcement of choice of law clauses in adhesion contracts can undercut the state law to which residents and taxpayers are entitled under our political system.”). But see id. at 23 (“Many modern courts have sensibly concluded that protection that is not waivable through an explicit waiver does not magically become waivable through a choice of law clause.”).
115. See 815 ILL. COMP. STAT. 615/35 (voiding prohibited provisions and giving courts the discretion to refuse the enforcement of a contract to avoid unconscionability; inconvenient forum selection clauses are not a prohibited provision). But see Marty Gould, The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got it Right in Jane Doe v. Match.com, 90 CHI.-KENT L. REV. 671, 674–75 (2015) (arguably saying that the anti-waiver provision cited above was intended to prevent forum limitations).
116. See Luv2Bfit, Inc. v. Curves Int'l, Inc., No. 06-CV-15415 (CSH), 2008 WL 4443961 at *3 (S.D.N.Y. Sept. 29, 2008) (“Plaintiffs interpret this anti-waiver provision to mean that they cannot be required to contractually consent to litigating this case in a forum other than New York. However, this is too broad a reading . . . .”); see also N.Y. GEN. BUS. LAW §§ 687(4)–(5) (prohibiting the waiver of New York law in the relevant business context).
with the “most significant relationship” to the formation of the contract should have its laws apply.\textsuperscript{117} Several state legislatures have begun efforts to explicitly limit form contract provisions that purport to bind consumers to bring claims in “inconvenient venues,” though these bills have not yet successfully passed.\textsuperscript{118}

Like the federal government, several states have also taken up the cause of protecting consumers’ rights to review products.\textsuperscript{119} Two of these states beat the federal government to the punch on consumer review protection,\textsuperscript{120} and at least two states have followed them.\textsuperscript{121} Multiple other states have worked on creating their own versions as well.\textsuperscript{122} It is still too early to know the full effects of these state laws. Only one class action lawsuit on behalf of California consumers has been filed on the basis of violations of California’s “Right to Yelp” law.\textsuperscript{123} Interestingly, in addition to voiding provisions that limit consumer ability to leave reviews, the Nevada consumer review protection law introduces punitive measures, including the creation of criminal liability for anyone who violates such provisions.\textsuperscript{124} These robust remedies bring hope that companies utilizing form contracts will change their practices.\textsuperscript{125}

\textsuperscript{117}. See Woodyard, supra note 113 at 19 (discussing the “most significant relationship” approach and its effects).


\textsuperscript{119}. See Calvert, supra note 75, at 225–28.

\textsuperscript{120}. The states that enacted “Right to Yelp” bills were California, codified at CAL. CIV. CODE § 1670.8 (2018), and Maryland, codified at Md. CODE ANN., COM. LAW § 14-1325 (2019). The California law targets prohibitions on consumers’ rights to review generally, not just as it relates to form contracts.

\textsuperscript{121}. Nev. REV. STAT. § 597.996 (2018); 815 ILL. COMP. STAT. 505/2UU (2018).

\textsuperscript{122}. S. 1722, 2019 S., Reg. Sess. (N.Y. 2019) (passed the New York Assembly multiple times, in Senate committee as of this writing); The ‘Right to Yelp’ Is Now Maryland Law, NFIB (July 19, 2016), https://www.nfib.com/content/news/legal/the-right-to-yelp-is-now-maryland-law-74679/ [https://perma.cc/8GE3-7K8R] (“Several other states—Massachusetts, New Jersey, Oklahoma, and South Carolina—have considered similar legislation that hasn’t passed.”)

\textsuperscript{123}. See Class Action Complaint for Violations of Civil Code § 1670.8, Constantines v. Ourian, (No. BC649377), 2017 WL 510290 (Cal. Super. 2017). No cases have been filed under either the Right to Yelp statutes in Maryland or Nevada.

\textsuperscript{124}. Nev. REV. STAT. § 597.996(3). Civil penalties of up to $10,000, as well as attorney’s fees, are also imposed.

\textsuperscript{125}. Cf. Friedman, supra note 3, at 365 (arguing that awarding attorney’s fees for challenges to unconscionable form contract terms will be a sufficient disincentive to inserting such terms, though Friedman goes on to say that punitive damages are too strong a remedy).
A bill in the New York State Assembly represents one of the better attempts at remedying form contract abuses. NY AB 2855, if passed into law, would create a “rebuttable presumption” that certain contractual terms—forcing the resolution of claims in an “inconvenient venue”; waivers of the ability to seek punitive damages; requiring a consumer to pay fees and costs “substantially in excess” of those of state courts; among others—are unconscionable, unenforceable, and inseverable. This bill attempts to strike a balance between the generality needed to effectively prohibit future ‘innovations’ to oppressive terms in form contracts, and the specificity needed to place contract drafters on notice of what is prohibited, just as the FTC did at its inception.

States are rapidly discovering that consumers need additional protections against abuses inserted into form contracts. Some measures, like the various “Right to Yelp” acts, provide some minor protections that are much needed in certain circumstances, but do little to combat unfair and deceptive contracting, generally. Others, like NY AB 2855, could represent the next great wave of consumer protection legislation, following in the footsteps of the FTC Act and state UDAP statutes, updating consumer law to meet the challenges of a new era.

127. NY AB 2855 has passed the State Assembly twice by votes of 100-43 and 97-38, but has not made it through the state senate. See New York State Assembly, AO2855 Floor Votes, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02855&term=2017&Summary=Y&Actions=Y [https://perma.cc/8Q5Y-ZGG4].
128. This provision seems to be aimed at forced arbitration clauses, which tend to be more expensive than filing with a court. See Ramona L. Lampley, The Price of Justice: An Analysis of the Costs that Are Appropriately Considered in a Cost-Based Vindication of Statutory Rights Defense to an Arbitration Agreement, 2013 BYU L. REV. 825, 848–50 (2013) (discussing the cost difference between court filing fees and arbitration costs in Bradford v. Rockwell Semiconductor Sys., 238 F.3d 549 (4th Cir. 2001), which amounted to $4,470.88 for arbitration against roughly $250 in court filing fees). However, the U.S. has repeatedly struck down such attempts to limit the reach of arbitration agreements. See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (reversing a judgment in favor of plaintiffs on the grounds that it “interfered with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the [Federal Arbitration Act].”). The chances of a federal court striking down this portion of NY AB 2855, if it is ever challenged, is high.
Part III: Further Efforts Legislatures Should Make to Limit Oppressive Terms

While state legislatures—and, to a lesser degree, Congress—have started addressing the abuses of form contracts, more work needs to be done to stem the tide of oppressive terms in consumer form contracts. The remainder of this Note will discuss what should be done to limit oppressive terms in form contracts, starting with a principles-based enforcement scheme modeled after the successes of the FTC, CFPB, and state UDAP statutes. The second part of this section will discuss other potential legislative efforts that do not rely on a principles-based scheme, both at the federal and state levels.

A. Principles-Based Enforcement Scheme

As discussed above, much of the efficacy of both state consumer protection efforts and the FTC and CFPB came in large part from principles-based mandates to combat unlawful practices. Additionally, countries such as the United Kingdom and Canada have experienced great success in utilizing principles-based enforcement in their financial sectors.130 Before discussing why such a statutory scheme is necessary in this instance, a quick discussion on what is meant by “principles-based enforcement scheme” is necessary. Principles, unlike rulemakings, are defined ex post.131 Principles are broad standards tied to norms, instead of specifically enumerated prohibited acts.132 But what principles gain in flexibility,133 they lack in predictability134 and to some extent, clarity.135 The predictable nature of rulemakings help regulated


131. See James J. Park, The Competing Paradigms of Securities Regulation, 57 Duke L.J. 625, 640 (2007) (“The law has long recognized the difference between rules, which are promulgated ex ante, and principles, which are defined ex post.”); see also SEC v. Chenery Corp., 332 U.S. 194 (1947) (holding that the SEC could engage in principles-based enforcement actions in addition to rulemakings).

132. See Cox, Widman & Totten, supra note 73, at 54 (noting that principles-based enforcement involved broad standards and adherence to societal norms).

133. See Park, supra note 131, at 667–68 (discussing the public’s preference for quick-moving regulation over the slow-moving pace of rulemaking and the better ability of principles to prevent new types of violations of norms).

134. See id. at 634–36 (discussing these pros and cons of principles).

135. See Ford, supra note 130, at 6–7 (contrasting the clarity of a hard-and-fast
parties influence the rules during their formative period. What is prohibited by a principle, on the other hand, is determined by societal norms and seeing what regulators and courts determine to be prohibited action. This determination by regulators and courts cuts regulated parties out of the decision-making stage of regulation. It also allows regulated parties to determine how best to comply with regulations instead of adhering to a stringent system imposed by regulators. Federal securities regulation—in addition to state UDAP statutes and the FTC Act—provides a classic example of principles-based regulation in action.

Critics may note the uncertainties of principles-based enforcement, but bedrocks of the law, such as “eliminating fraud,” are essentially principles. Further, criticisms that principles-based enforcement encourages attorney general grandstanding have been weakened by empirical data.

To combat oppressive terms in form contracts, a principles-based method of declaring oppressive terms unlawful is necessary. NY AB 2855 in the New York State Assembly takes steps in the right direction towards implementing a principles-based enforcement scheme to limit oppressive terms in form contracts. It enumerates and declares presumptively conscionable specific enumerated terms and instructs courts to use traditional unconscionability doctrines to determine whether to enforce such terms.

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136. See Park, supra note 131, at 666 (“The regulated prefer an approach that allows them to mitigate rules that they perceive as unwise and unduly burdensome.”).

137. See id. at 636 (providing the law around insider trading, which has never been precisely defined by Congress or the SEC, as an example of an area of the law where norms and previous enforcement action has informed regulated parties as to what is and is not insider trading).

138. See id. at 670 (naming a lack of regulated party interference as a benefit of principles-based enforcement).

139. See Ford, supra note 130, at 29–30 (arguing that compliance is better and more efficient and that company management is less able to escape legal scrutiny for wrongdoing under a principles-based scheme).

140. See generally Park, supra note 131 (discussing the advantages and disadvantages of principles- and rules-based enforcement schemes in the securities regulation sphere and generally advocating for more principles-based enforcement).

141. Id. at 629 (discussing fraud as an important and open-ended enforcement mechanism in securities regulation).

142. See Cox, Widman & Totten, supra note 73, at 100–01 (arguing that their empirical data undermines narratives that principles-based enforcement relies on motivations for political gain or to supply the state with additional funds).

An improved NY AB 2855 or other state law could prohibit unfair or oppressive contract terms generally and maintain a list of enumerated presumptively unconscionable terms. Certain state UDAP statutes have taken this exact approach. Instead, NY AB 2855 only protects consumers against the specific terms prohibited; it does not protect them from oppressive form contract terms generally, nor from the innovations of crooked form contract drafters.

States interested in protecting consumers from rights-limiting provisions in form contracts must enact a statute that does three specific things. First, the statute must clearly and decisively declare contractual provisions that unconscionably or severely limit the rights of consumers to be unenforceable. This statutory provision must be broad enough to encompass onerous terms that are currently incomprehensible to the drafters, or else the principles underlying the provision may soon be rendered moot by any enterprising and morally deficient general counsel. Second, the legislators must trust the relevant state regulatory enforcer, such as the state attorney general or a separate state agency, to adequately enforce the principles within the statute. Alternatively, perhaps even preferably, the statute could provide for a private right of action to allow for individual consumers to enforce their rights. Finally, the statute should attach penalties beyond simply severing the offending provision. Attorney’s fees must be

144. Id.
145. A hybrid enforcement scheme relying on both rules and principles may be beneficial in certain circumstances, including as a way of protecting small businesses from the potential added costs of compliance. See Ford, supra note 130, at 51–54 (discussing the potential benefits of such a hybrid regulatory scheme in the securities sphere).
146. See, e.g., Minn. Stat. § 325D.44 (2019) (enumerating specific prohibited trade practices and imposing a general catchall prohibition on “conduct which similarly creates a likelihood of confusion or of misunderstanding”).
150. Potentially, a savvy legislation drafter could impose liability not on the contract drafting party, but on the contract drafter—in other words shifting the liability to the legal or business professional that placed the offending provision in
Inequality Inquiry

included in any consumer recovery, as most good consumer protection statutes provide.\textsuperscript{151} Adding a simple per-violation penalty would also provide consumers with another potential remedy.\textsuperscript{152} With this kind of robust consumer protection legislation, a vindication of consumer rights is possible.

B. Pro-Consumer Legislation That Does Not Rely on Principles-Based Enforcement

Protections against form contract overreach that do not rely on principles-based enforcement schemes are arguably less effective. Nonetheless, the following pieces of potential legislation at the federal and state level could continue to stem the tide of oppressive form contract terms, especially in states or political environments where there is more skepticism towards government oversight of business.

1. Non-Principles-Based Legislation at the Federal Level

The single best piece of legislation to protect the rights of consumers would be an amendment to, or repeal of, the Federal Arbitration Act (FAA).\textsuperscript{153} This Note has thus far has avoided in-depth discussion of arbitration-focused legislation because at the state level anything even remotely seeking to limit arbitration is preempted\textsuperscript{154} and defenses against arbitration are generally and categorically found to be invalid.\textsuperscript{155} Legislators at the federal level

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\textsuperscript{152} See, e.g., Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693m(a)(2)(A) (2018) (allowing for the recovery of an amount between $100 and $1,000 per violation, in addition to other damages).


\textsuperscript{154} See generally Thomas J. Stipanowich, The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration, 22 AM. REV. INT’L Arb. 323 (2011) (discussing the preemptive effect of arbitration jurisprudence). Even with Stipanowich’s near-fatalistic tone, his article does not even cover the current nadir of American arbitration jurisprudence. See Am. Express v. Italian Colors Rest., 570 U.S. 228, 239 (2013) (finding class action arbitration waivers enforceable, even when they would preclude the ability to recover at all), which had not been decided at the time his article was published.

\textsuperscript{155} See, e.g., Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (“But an argument that a contract is unenforceable just because it requires bilateral
have had little desire to fix the ills that have resulted from forced consumer arbitration. This failure remains true even as courts have expanded arbitration practices to the point that many consumers, including small businesses defrauded by large credit card companies, are in essence precluded from remedy entirely.

Thus, this Note has largely avoided—and will continue to avoid—discussion of currently existing state legislation that explicitly aims to discuss whether arbitration can be appealed, tries to limit the more oppressive abuses of forced arbitration agreements, and especially those that outright void certain arbitration clauses. While arbitration certainly has some advantages over traditional litigation, those are outweighed by severe negative effects, particularly on consumers. The CFPB nearly made serious headway on this matter, but its proposed regulations were eliminated by Congress and President Trump. The FAA also recently ran afoul of union advocates after the Supreme Court held that the National Labor Relations Act (NLRA) did not protect workers from contract provisions restricting their rights to collective litigation. Through a counterintuitive reading of what the NLRA protects, the Court held that workers are not protected by the NLRA from class-action waivers in arbitration clauses. Perhaps this result will create the impetus for legislative action for certain elected officials. Through federal legislation or future CFPB

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 arbitral is a different creature. A defense of that kind...is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability.” (second emphasis added).

156. For a discussion on the few victories and many failures of federal legislation to limit the reach of the FAA, see Stipanowich, supra note 154, at Part IV.


162. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347–50 (2011) (describing arbitrators as “not generally knowledgeable” in procedure and arbitration as “poorly suited to the higher stakes of class litigation” thus limiting the ability to arbitrate as a class).


165. See id. at 1646 (Ginsburg, J., dissenting).
rulemaking, limiting the reach of the FAA would provide consumers with a greater ability to assert their rights. A federal level anti-SLAPP (“strategic lawsuit against public participation”) measure would provide consumers with a way to combat potential defamation suits based on reviews of products or services. A federal anti-SLAPP statute would ensure the recovery of attorney’s fees from businesses that bring lawsuits against consumers who leave negative reviews, or engage in other forms of beneficial speech. It would also provide consumers with an easy and legally-defensible response to demand letters from angry businesses. The disparity in state anti-SLAPP measures and the interstate nature of form contracts make a federal version a particularly salient need for protecting consumer rights. States with weak anti-SLAPP laws or no anti-SLAPP laws at all could also consider expanding the protections of those statutes to include this important consumer function. A federal anti-SLAPP statute, or strengthened state anti-SLAPP statutes, could combat form


167. See Goldman, supra note 52, at 14 (discussing the need for a federal anti-SLAPP law to protect consumers).

168. Whether consumer reviews are protected under anti-SLAPP statutes depends on the jurisdiction and strength of that jurisdiction’s statute. See id. Anti-SLAPP statutes vary widely in their definitions of protected speech. Compare MINN. STAT. § 554.01, subd. 6 (2019) (“Public participation’ means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action . . . .”) (receiving a “D” grade from anti-slapp.org), with TEX. CIV. PRAC. & REM. CODE ANN § 27.001 (2019) (extending the definition of what is protected to include “matter[s] of public concern,” which include reviews of “a good, product, or service in the marketplace”) (receiving an “A” grade from anti-slapp.org). Interestingly, the partisanship of the state seems to correlate very little with the strength of the state’s anti-SLAPP statute. For example, California, Oregon, Texas, Nevada, and Oklahoma all have “A” ratings from anti-slapp.org, while New York, Pennsylvania, Washington, Tennessee, West Virginia, and Maryland have “D” ratings. See State Anti-SLAPP Laws, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection/#scorecard [https://perma.cc/7TH8-H9VW].

169. See Goldman, supra note 52, at 14.

170. Id.

contract abuses by explicitly enumerating consumer review as a form of protected speech within the purview of the statute.\textsuperscript{172}

Much of consumer legislation revolves around the procurement and accuracy of product disclosures. For example, the Truth in Lending Act (TILA) contains strict disclosure requirements for consumer loans.\textsuperscript{173} For another more tangible example, consider the Food and Drug Administration’s mandate for disclosures on food producers.\textsuperscript{174} A federal disclosure requirement for form contracts would go a long way towards making consumers more aware of what rights they sign away in such contracts. The conspicuous disclosure of more business-friendly terms is required to effectuate such terms in several other consumer contexts, notably in the case of warranty disclaimers.\textsuperscript{175} TILA disclosures force loaning corporations to perfect disclosures as a consumer may have a long period to rescind a loan if they find a technical error.\textsuperscript{176} Mandating detailed and specific requirements for disclosure of certain terms that courts favor could be the next method to get at least some consumers off the hook from onerous and anti-consumer provisions.\textsuperscript{177}

Rather than rescinding a loan under TILA, legislation could simply declare the form contract void. This would avoid some of the shortcomings of TILA rescission\textsuperscript{178} by allowing the consumer to

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\item 172. A good example of this is the Texas anti-SLAPP statute, which is one of the strongest versions in the country. See TEX. CIV. PRAC. & REM. CODE ANN § 27.001 (2019).
\item 173. 15 U.S.C. §§ 1601–1667e (2018). TILA contains strict requirements regarding a variety of disclosures from financial institutions that are attempting to loan to consumers, including the annual percentage rate (also known as the “APR”) of the loan.
\item 176. See Lea Krivinskas Shepard, It’s All About the Principle: Preserving Consumers’ Right to Rescission Under the Truth in Lending Act, 89 N.C. L. REV. 171, 188–93 (2010) (discussing the liberalization of loan rescission under TILA); see also 15 U.S.C. § 1635(f) (extending the consumer’s right of rescission to three years after the date of purchase if disclosures are not properly made).
\item 177. See Assemb. B. 2855, 2017-2018 Assemb., Reg. Sess. (N.Y. 2017) (requiring forced arbitration clauses to be written clearly, legibly, and in “print no less than eight points in depth or five and one-half points in depth for upper case type”).
\item 178. See Krivinskas Shepard, supra note 176, at 173–79 (discussing a family that attempted to rescind their mortgage, only to find that they would not have the assets
\end{itemize}}
continue using the purchased product or service without being bound by the oppressive terms therein. Most consumer form contracts—especially consumer contracts of adhesion—present more acceptable circumstances for not returning both parties to the status quo ante.\textsuperscript{179} Legislation that does not return both parties to the status quo ante must be thoroughly researched and vetted. This vetting includes determining what other provisions remain enforceable.\textsuperscript{180} Further, one of the primary purposes of TILA when it was passed in 1968 was to increase the ability of consumers to “comparison shop” for credit.\textsuperscript{181} Consumers at the time could not comparison shop due to a complete lack of uniformity in calculating interest rates.\textsuperscript{182} These problems were addressed by standardizing what and how creditors could tell consumers about the line of credit the consumer was attempting to take out.\textsuperscript{183} Like the chaotic and complicated credit market of the 1960s, consumer form contract terms confuse consumers and are mostly incomprehensible to them. Creating the ability for consumers to comparison shop over contract terms, à la TILA, may be worth pursuing as it would allow consumers to avoid companies that subjected them to unfavorable contract terms.

to tender what they had received from the mortgage to date—the family was forced to vacate their home).

179. Courts generally interpret TILA to require the consumer to tender net loan proceeds received to the creditor before rescission is possible. See id. at 191 (“[C]ourts in most cases revert to the common law unwinding process, requiring the borrower to restore the lender to the status quo ante before the lender must cancel its security interest in the borrower’s home.”). Most other consumer contracts are much lower stakes than home loans, and a failure to return all parties to the status quo ante is much less onerous to the drafter of the contract.

180. Dismissing a consumer’s compliance with a social media company’s terms of service (obviously a consumer form contract) could result in the consumer not being bound to post only appropriate images or text on the site, for example. It does not take long to imagine other ways in which not binding the parties to return to the status quo ante would be harmful. Thus, clearly delineating what kinds of breaches—as well as what kinds of contracts—do and do not return parties to the status quo ante is incredibly important. Equally important is determining to what extent non-oppressive terms (community standards again come to mind) remain enforceable.

181. See Krivinskas Shepard, \textit{supra} note 176, at 184–85 (describing the circumstances that led Congress to pass TILA).

182. See id.

183. See id. at 185. However, other scholars assert that the TILA disclosure requirements have been ineffectual in the modern era because they fail to account for the current imbalance of bargaining power between consumer and lender. See Arnold S. Rosenberg, \textit{Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy}, 44 \textit{COLUM. J. TRANSNAT’L L.} 520, 563–64 (2006) (paraphrasing Ronald J. Mann) (arguing that disclosure is insufficient as a remedy and asserting the reversibility of debit charges would provide relief for consumers).
New Jersey implemented an idea similar in the form of the TCCWNA, which allows for consumers to petition to void a contract that fails to make certain disclosures in its entirety.\(^{184}\) This law applies even to consumer form contracts on websites and browsewraps.\(^{185}\) Implementing a version of the TCCWNA at the federal level would be somewhat limited by standing concerns in federal courts, which require that the plaintiff has suffered particularized harm.\(^{186}\) However, giving agencies like the FTC or CFPB enforcement authority over a federal TCCWNA would both avoid these concerns and limit the concerns of those who think consumers would overuse such a broad consumer protection statute.

Judicially-created doctrines requiring clear and conspicuous notice have had some success in voiding oppressive browsewrap contracts.\(^ {187}\) In a similar vein, the Restatement (Second) of Contracts provides that contract signees are not bound to a term the contract drafter inserted despite knowledge that the term was unintended by the signing party.\(^ {188}\) Rarely is this provision successfully invoked, especially in the consumer form contract sphere.\(^ {189}\) Several problems face attempts to toughen up disclosure requirements. Primary among these issues remains getting consumers to read such disclosures—and it is unclear how many pages of disclosures the average consumer would read. “Layered

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187. See Kim supra note 12, at 93–94 (discussing the sufficiency of notice as an increasingly important factor in enforcing form contracts). See also RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2 reporters’ notes (Am. Law Inst., Discussion Draft 2017) (“Courts generally enforce browsewraps as long as reasonable notice is provided . . . .”).
188. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (Am. Law Inst. 1981) (“Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”).
189. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. REV. 429, 458–59 (2002) (noting that use of § 211(3) is almost exclusively limited to insurance contracts and that half of all § 211(3) cases come out of the state of Arizona); Saami Zain, Regulation of E-Commerce by Contract: Is It Fair to Consumers?, 31 UWLA L. REV. 163, 180 n.75 (2000) (noting that despite the Restatement’s claim, there is a strong presumption of enforceability for form contracts over § 211 objections).
Disclosure requirements do a poor job of making clear each of the rights-limiting provisions in a contract. Disclosure requirements do a poor job of making clear each of the rights-limiting provisions in a contract. It is unclear if the average consumer even cares about many of the onerous terms contained in form contracts—the price and date of delivery might be the only things people would consider, even if the limitation of their rights were made clear to them in disclosures. Further, in this technological age where many services have their own form contracts, determining what is worthy of a disclosure requirement is also murky. For instance, is the ability of a dating site to conduct sociological experiments on the user while they are on the site a provision worth disclosing? These problems clearly expose the limitations of layered disclosure, despite being a beneficial step in the right direction.

The New Jersey legislature recently considered a bill that prioritized providing guidance to determine the importance of contractual terms. NJ AB 3095 distinguishes between terms regarding price, financing, and product specifications—deemed “primary terms”—and all other terms, which are considered “secondary.” If a secondary term “would have caused a reasonable buyer to reject the sale,” such a term is unenforceable. This method, too, relies on principles-based enforcement and a somewhat loose and undefined standard. Both a layered-disclosure and a primary/secondary-term distinction system are imperfect in addressing issues with consumer knowledge of the content of contractual terms. However, either would significantly improve the

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190. See Rosenberg, supra note 183, at 592–94 (discussing layered disclosures and the “Schumer box,” wherein key terms are printed clearly and conspicuously while other terms and detailed descriptions of all terms are put in fine print).
191. See Gillis, supra note 102, at 32–33 (noting a growing criticism of disclosure requirements as ineffective and ignored by consumers). Cf. Dammann, supra note 33, at 190 (explaining that consumers expect oppressive terms in form contracts and make little effort to search for similar products with more consumer-friendly contracts).
192. Dammann, supra note 33, at 190.
193. See Barnhizer, supra note 2, at 223 (discussing dating site OKCupid admitting to using its users for sociological research and claiming “if you use the Internet, you’re the subject of hundreds of experiments at any given time, on every site. That’s how websites work.”).
194. See Rosenberg, supra note 183, at 595–96 (discussing these and other shortcomings of layered disclosure).
197. Id. at 9.
ability of consumers to know or defeat oppressive form contract terms.

2. Non-Principles-Based Legislation at the State Level

Prohibiting the ability of companies to force consumers to seek legal remedies in “inconvenient venue[s]” is a relatively easy method of leveling the playing field for consumers. Some states have already done so in specific instances (though whether those states intended to do so is unclear). Explicit limitations on forum selection have not found much success in state legislative bodies at this point, though several bills are in the works.

Equally—or perhaps more—damaging to consumers are choice of law clauses. Having the state declare consumer protection laws a “fundamental policy” of the state would also go a long way towards invalidating inconvenient forum selection clauses. It is important to note that the state which declares consumer protection statutes fundamental policy must have a materially greater interest in the determination of the issue than the jurisdiction and laws “selected” in the contract at issue. Without this interest, the “selected” jurisdiction’s laws will be used. Contracts with wider reaches affecting more consumers in more states are more likely to have their forum selection and choice of law provisions enforced.

Courts have found “fundamental policies” in a number of statutory

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199. The Illinois Dating Referral Services Act (IDRSA) was found to invalidate choice of forum provisions in dating services websites that forced consumers to litigate in inconvenient forums. See Gould, supra note 115, at 673. However, IDRSA only states that waivers of consumer rights are void; it does not explicitly state that inconvenient choice of forum clauses are void.

200. See Woodyard, supra note 113, at 82 (“[I]t could be . . . that states have not heretofore limited such clauses in order to achieve the political compromise necessary to pass protective consumer legislation in the first place.”).


203. See id. at 37–41 (discussing the growing importance of “fundamental state policy” as a method of overriding forum selection clauses).

204. Restatement (Second) of Conflict of Laws § 187(2)(b) (AM. LAW INST. 1971).

205. Id.

206. Id. at cmt. g.
schemes, including noncompete clauses\textsuperscript{207} and statutory schemes protecting franchisees from their franchisors.\textsuperscript{208} What makes something a fundamental state policy is unclear,\textsuperscript{209} as is how to signal what is and is not fundamental policy to a court.\textsuperscript{210} This area of the law is rife with complexities and uncertainties,\textsuperscript{211} though allowing conduct to flourish in a jurisdiction where it would otherwise be prohibited makes a finding of fundamental policy more likely.\textsuperscript{212} It is also certainly possible that minor statutory additions could force courts to recognize certain policies as “fundamental.”\textsuperscript{213} Such declarations could prevent the enforcement of inconvenient forum selection clauses and increase the ability of consumers in
consumer-friendly states to assert the statutory rights of their home states. Drawing from proposals for the federal government, at least one proposal from above could easily be adopted widely by states: strong anti-SLAPP laws that protect consumers’ abilities to review products and services already exist in several states. However, many states lack versions that protect consumers. Strengthening weak anti-SLAPP statutes and creating them where they otherwise do not exist would provide consumers with another method of shielding themselves from oppressive form contracts.

Manufacturers and sellers can generally disclaim consequential and incidental damages for breaches of warranty and limit recovery to repairing or replacing the malfunctioning warranted item. Consumers may still pursue incidental and consequential damages under the “fails of its essential purpose doctrine.” However, years of chipping away at the UCC’s “failing of its essential purpose” provision have left it a husk of its former consumer-protecting self. To protect the “uniform” nature of the UCC, legislation is not ideal. A change in judicial attitude on the matter—and the adoption of the reasoning in cases like Luckey v. Alside, Inc., 245 F. Supp. 3d 1080, 1090–93 (D. Minn. 2017) (describing the above circumstances and failures of essential purpose).

214. For a discussion on anti-SLAPP protection of consumers, see supra note 168.
215. See U.C.C. § 2-719 (Am. Law Inst. & Unif. Law Comm’n 1977) (allowing the disclaimer of incidental and consequential damages, unless such remedy “fails in its purpose”).
216. Incidental and consequential damages are defined in U.C.C. § 2-715 (Am. Law Inst. & Unif. Law Comm’n 1977). They generally are secondary costs resulting from the breach of a warranty, including inspection costs, transportation costs, and other costs resulting from “general or particular requirements and needs” that “the seller . . . had reasons to know” upon entering the agreement.
217. If a company is unable to repair or replace the warranted item, fails to do so in a reasonable time, or if the foreseeable incidental and consequential damages “greatly surpass” the cost of goods, the warranty disclaimer has “failed of its essential purpose” and can be ignored. See Luckey v. Alside, Inc., 245 F. Supp. 3d 1080, 1090–93 (D. Minn. 2017) (describing the above circumstances and failures of essential purpose).
218. See, e.g., Brown v. Louisiana-Pacific Corp., 820 F.3d 339, 349–53 (8th Cir. 2016) (holding that despite an exterior building component not being water resistant and replacing the product would cost the consumer $30,000, there was no failure of essential purpose); Argabright v. Rheen Mfg., Co., 201 F. Supp. 3d 578, 593–95 (D.N.J. 2016) (finding that replacing a defective part with a part prone to the same defect is not a failure of essential purpose).
219. See Jeffrey T. Ferrell, Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 63 Am. Bankr. L.J. 109, 171 (1989) (“[A]lthough there are numerous deviations from the official text of the Uniform Commercial Code among the several states, the generally uniform nature of that statute has led to its general acceptance as something akin to federal law.”).
Action to strengthen this UCC provision would allow consumers greater ability to recover secondary costs to warranty breach cases—costs that the consumer must bear as a result of the warranty breach but might not otherwise be recoverable.

Conclusion

Historically, and currently, many of the most esteemed scholars of contract law are somewhat skeptical of form contracts, expressing concern that the law might fail to keep the abuses of this kind of contract in check. Contract law as a discipline has, indeed, failed to keep pace with the uses and abuses of form contracts. The states and federal government have begun addressing the oppressive and anti-consumer nature of some form contract provisions, but these efforts—with the exception of the creation of the CFPB—have primarily addressed problems at the margins. Aggressive legislative action must occur before consumers can fully assert their rights. To truly address oppressive form contract provisions, a principles-based enforcement scheme designed to allow consumers to litigate over contractual abuses that have not yet been designed is needed.