

HOW 'BOUT THEM APPLES?: THE POWER OF STORIES OF AGREEMENT IN CONSUMER CONTRACTS

Tal Kastner*

ABSTRACT

Contract scholars continue to grapple, perhaps today more than ever, with the challenge posed by proliferating standard terms in consumer contracts. None, however, has sufficiently explored the role of narratives of agreement in furthering inequity or exacerbating existing disparities in power. This Article reveals the ways that stories of agreement themselves can be a form of power to be leveraged by firms at the expense of consumers – especially in connection with procedural contract terms. In addition, this Article shows how the stories told by courts reveal shared norms of fairness that purport to enable the possibility of agreement. The Article thereby identifies an aspirational approach to contract that, by its own terms, seeks to further an ideal of agreement involving knowledge and deliberation. This approach is particularly manifest in courts' insistence upon notice of terms as a baseline for enforcement. In addition, the doctrine of the duty to read, as a response to the possibility of misunderstanding the meaning of signs, makes salient the inherent function of contract law in establishing conventions of agreement and thus allocating power. This Article argues that we cannot assess proposed interventions in the area of consumer contracting unless we consider the aspirational narrative of agreement underlying contract doctrine, as well as the substantive way and the context of power in which this narrative operates. Thus, we must also examine the ways in which stories of agreement can be leveraged by powerful parties in conversation with courts to subvert this aspiration in practice. The Article thereby lends further support for the presumptive unenforceability of predispute-arbitration, forum selection, and unilateral-modification provisions in certain consumer contexts. More broadly, it highlights contract as the site at which the definitions of freedom and agency continue to be negotiated in America today.

* Postdoctoral Fellow of Law and Interdisciplinary Studies, Benjamin N. Cardozo School of Law; Princeton University, Ph.D.; Yale Law School, J.D. The author is grateful to Zev Eigen, Dirk Hartog, Beth Johnston, Rebecca Kobrin, Ethan Leib, Jeff Lipshaw, and Stewart Macaulay for comments on versions of this Article. Faults are attributable to the author.

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INTRODUCTION

In the twenty-first century, a number of competing narratives variously inform understandings by courts, lawyers, firms, and individuals of what it means to contract. A contractual relationship typically presupposes a market, but might or might not contemplate an ongoing relationship. At times, firms marshal “contract” as a shorthand for a burdensome ongoing obligation – as in the marketing of prepaid, or pay-as-you-go, “no-contract phones.”¹ In contrast, a nar-

1. See, e.g., *No Contract Plans*, VIRGINMOBILEUSA.COM, http://www.virginmobileusa.com/cell-phone-plans/?cid=ppc_google_p_desktop_nb_-_plans_nonbrand_no_contract_exact_no_contract_phones_exact (last visited Sept. 18, 2014) (advertising Virgin Mobile’s “no contract plans” for its mobile phones). Stewart Macaulay pointed my attention to the idea of contract implicitly invoked by the claim of a “no contract” deal; see also Oren Bar-Gill & Omri Ben-Shahar, *No Contract?* 2-7 (N.Y.U. Sch. of Law Ctr. for Law, Econ. and Org., Working Paper No. 13-06, 2013) (noting the increasing prevalence of the “no contract” promise in consumer markets). Ultimately, Bar-Gill and Ben Shahar view favorably the prevalence of consumer contracts that do not impose a long-term commitment. As they note, however, “no contract” contracts include

plenty of fine print, notwithstanding the oft-used image in the No Contract promotions suggesting no pre-printed forms. This fine print binds consumers to many of the standard legal artifacts of present day consumer transactions, such as mandatory

rative of contract as involving real choice, deliberation, and perhaps even some sort of “meeting of minds” persists in scholarly thinking about contract.² Indeed, this narrative also operates in the market, and at times it serves to draw consumers in—generating and/or allowing firms to capitalize on a story of agreement. Notions of autonomy, freedom, and choice color this narrative of agreement and lend it persuasive force.

The practice and law of contract have long been caught up in the dynamics of power and the power of naming.³ Thus, the way in which more powerful parties marshal a narrative of agreement to their benefit in transactions with less powerful counterparts also complements and compounds contract law’s potential to reinforce existing power to the detriment of less powerful parties. Even in the furtherance of ideals of agreement and the demands of the law, corporations can, and in significant circumstances do, ultimately leverage their existing advantage over consumers through contract. Thus, contract language and its enforcement become the site of the re-inscription and exacerbation of power disparities as a result of a commitment to a narrative of agency and agreement.

Scholars have long been and are still grappling with the challenge posed by proliferating standard terms,⁴ considering the issue from

arbitration, disclaimers of warranties, subtle fees, and the seller’s right to modify terms at any time.

Id. at 2.

2. For a discussion of the hold a framework of agreement retains on the imagination in boilerplate contract scholarship, see Tal Kastner, *The Persisting Ideal of Agreement in an Age of Boilerplate*, 35 LAW & SOC. INQUIRY 793, 796–802 (2010).

3. See AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* 60–97, 134–37 (1998); see also Tal Kastner, “*Bartleby*”: *A Story of Boilerplate*, 23 LAW & LITERATURE 365, 369–70, 388–90 (2011) (discussing the potential for contract to naturalize inequality as well as the potential of contract language to impact power dynamics). With respect to consumer contracts in particular, Arthur Leff famously explored the implications of naming “those pieces of paper which pass between [seller and buyer in a consumer contract] as ‘contracts,’” suggesting the advantages of recognizing the “unitary, purchased bundle” of terms and product as a product itself to be regulated over regulation of process. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132, 147 (1970). The classification of contract and its attendant metaphors endure, notwithstanding alternative perspectives suggested by Leff and others. See, e.g., Jeffrey M. Lipshaw, *Metaphors, Models and Meaning in Contract Law*, 116 PENN ST. L. REV. 987, 1007–11, 1023–39 (2012). Yet the insights of Leff’s piece, as discussion below will demonstrate, continue to resonate strongly in the current consumer law context in which courts stress process even when it fails substantively to enable “joint creative effort” in producing terms of the deal. See Leff, *supra*, at 138.

4. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19, 19–51 (2012) [hereinafter RADIN, *BOILERPLATE*] (addressing “normative” and “democratic degradation” resulting from current boilerplate enforcement); see also Ian Ayres & Alan Schwartz, *The No Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 579–

perspectives of economic efficiency, political theory, and cognitive science, to name a few. This Article draws on these lines of thought; it also reveals the role narratives of agreement play in furthering inequity or facilitating the leveraging of existing power against a less powerful party. The Article does this by examining this dynamic in consumer contracts in the context of contract as a delegation of power.⁵

This Article reveals the ways in which stories of agreement themselves can serve as a form of power manipulated by firms at the expense of consumers. In addition, it shows how the stories told by courts invoke norms of fairness that depend on presumptions about how individuals experience the world. When told in a context in which certain baseline presumptions do not apply, these stories undermine the possibility of agreement and lose their conceptual integrity.

87 (2014) (proposing an intervention jettisoning the duty to read in favor of a burden on firms to highlight unknown terms); Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 630–31 (2002); Omri Ben-Shahar, *Foreword, "Boilerplate": Foundations of Market Contracts Symposium*, 104 *MICH. L. REV.* 821, 821–26 (2006); John D. Calamari, *Duty to Read – A Changing Concept*, 43 *FORDHAM L. REV.* 341, 351–60 (1974); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211, 246–48 (1995); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 *N.Y.U. L. REV.* 429, 435–45 (2002); Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629, 631–32 (1943); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203, 1205–09 (2003); Leff, *supra* note 3, at 141–42; Stewart Macaulay, *Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 *VAND. L. REV.* 1051, 1052–60 (1966); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1173, 1176–80 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 *U. PITT. L. REV.* 21, 40 (1984); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 *HARV. L. REV.* 529, 552 (1971).

5. The fact that contract in general is about allocating power is not explicitly addressed in current scholarship on boilerplate. Thus, for example, Margaret Radin challenges the justness of enforcing fine print through the application of notions of agreement, consent, and freedom in contexts that are not in line with the notion of consent “in any normal sense.” This leads to what she terms “normative degradation.” Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 *CAP. U. L. REV.* 617, 633 (2012). Radin highlights the distinction between “positive” reasonable expectations, or what in fact an average consumer expects, and “normative” reasonable expectations, or what she is justified in expecting. RADIN, *BOILERPLATE*, *supra* note 4, at 151. Yet, the mythic “Once upon a time” that Radin points to as the paradigm of contract, involving consent and voluntary agreement is, as her language suggests, belied by history. RADIN, *BOILERPLATE*, *supra* note 4, at 3; *see also*, STANLEY, *supra* note 3, at 42–43, 45. Instead, by marking the bounds of normality within which we feel we can freely exchange, along with the signs we accept as indications of freedom and consent, contract is always involved in allocating power in a normative, as well as a positive, way. This also potentially impacts a normative notion of freedom. This is not to say that I disagree with the upshot of Radin’s critique, but that to appreciate proposed interventions, we must acknowledge this dynamic role of contract in allocating power as fundamental.

At times these stories reflect an aspirational approach to contract that pursues, even if it does not achieve, an ideal of agreement involving knowledge and deliberation. This is particularly manifest in courts' insistence that consumers be notified of terms as a baseline for enforcement. In addition, the doctrine of the "duty to read" imposed on consumers as a response to the possibility of misunderstanding the meaning of signs makes salient the inherent function of contract law in establishing conventions of agreement and thus allocating power. While the tendency of courts to enforce fine print is now a commonplace, this Article highlights the significance of the bright line drawn around firms' obligation to give consumers notice of terms. In addition, though scholarship addresses problems with the duty to read,⁶ the discussion below exposes the aspirational aspect of contract doctrine immanent in the doctrine around notice, and, in theory if more than in practice, even in the duty to read.

In Part I, I analyze the way that agreement figures in contemporary contract as a marketing tool (in a conversation between corporations and consumers) as well as an act of compliance with law (in a conversation between corporations and courts). Through illustrative examples, I highlight the dual role of corporate materials aimed in different ways at courts and at consumers. In doing so, I show how narratives of agreement threaten to thwart the possibility of a consumer's experience of agreement in practice. I then turn, in Part II, to online transactions as a case study of the way in which courts police the line between a valid contract reflecting assent and what they do not deem an enforceable agreement, terms that have not been "reasonably communicated" by the firm to the consumer.⁷ This Article thereby demonstrates the ongoing conceptual hold of a narrative of agreement, even as it is undermined in practice. In addition, this Article examines one particular story of agreement told by courts. In doing so, it uncovers not only a commitment to the possibility of agreement, or an aspirational view of contract, but also the significance of particular contextual parameters on which the coherence of this narrative depends.

6. See, e.g., Ayres & Schwartz, *supra* note 4, at 552 (suggesting jettisoning the duty to read in consumer contracts).

7. See, e.g., *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012) (considering whether online "terms [have] been reasonably communicated" to consumers in assessing enforceability).

Courts insist rhetorically on the significance of agreement. In doing so, they enforce the doctrine of a consumer's duty to read. Courts also impose on firms the related requirement of providing notice with respect to terms that—as in the case of procedural contract terms⁸—cannot reasonably be decoded or assessed by an individual consumer, even if read. Courts thereby divest the contract ideal of its substance for some parties, even as they insist on its possibility. However, the duty-to-read doctrine implicitly recognizes dynamics of power and knowledge. It offers a mechanism to protect reasonable reliance, thereby encouraging certain conventions and empowering parties that act on them: a party signing a contract document is estopped by the doctrine from claiming that she is not bound by terms in the document of which she was unaware.⁹ Thus, as argued in Part III, in contract law, the duty to read reflects the need to negotiate the meaning of signs in a broader social context and the way in which this negotiation implicates existing social and power dynamics.

The duty-to-read doctrine can thus be understood as one way that contract law mediates signs and power. As such, this Article shows that a convention rendering unenforceable terms that fail to communicate meaning to some parties comports with the conceptual approach of contract doctrine as reflected in the duty to read itself.

In cases involving procedural contract terms that are nearly impossible for an individual, as compared to the drafting corporate counterpart, to assess, many question the existing balance of power as facilitated and bolstered by the law. For those concerned, as I am, about the current distribution of power reflected in these cases, the discussion that follows supports certain interventions. Thus, an acknowledgement that contract law necessarily draws a line be-

8. I draw on David Horton's analysis of "contract procedure" and identification of "procedural terms"—"predispute agreements modifying the rules of litigation" such as forum selection and arbitration provisions—as a category of contract terms. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607-08 (2010). Such procedural terms differ from "performance terms," or terms that serve to define the principal benefits the parties intended to enjoy from the contract ("what they 'really wanted'"). Steven J. Burton & Eric G. Andersen, *The World of a Contract*, 75 IOWA L. REV. 861, 873 (1990). Instead, procedural terms constitute a subset of "enforcement terms," or those terms that, rather than define primary benefits and responsibilities, create incentives for proper completion of performance or provide alternatives in the event performance is not properly completed. See *id.* Burton and Andersen suggest that even explicit enforcement terms should only be enforced by courts in light of the fact that "[e]nforcement is in the service of, and therefore secondary to, performance." *Id.* at 874 n.52, 875.

9. See Calamari, *supra* note 4, at 359.

tween acceptable and unacceptable grants of power suggests to those uneasy with the current allocation of power a need to render procedural contract terms, such as arbitration and forum selection provisions in particular, presumptively unenforceable in the consumer context.

At the same time, because contract functions as a marker of agreement, it will remain a site at which parties will seek to innovate and leverage their power. As demonstrated in the section that follows, even a story about contract as interpersonal dealing can serve as a vehicle of manipulation. As such, this discussion intervenes broadly in the current thinking about consumer boilerplate to make a point crucial to an understanding of contract policy: contract—in law and culture, as a narrative and a practice—remains a critical site at which American corporations, individuals, courts, policy-makers, and advocates negotiate the parameters and definitions of freedom and agency.

I. STORIES OF AGREEMENT IN CONSUMER CONTRACTING, AS TOLD TO CONSUMERS AND TO COURTS

A. Virtually Shaking Hands with Louis CK and the Unilateral-Modification Provision

One recent online transaction illustrates, in perhaps unusually stark terms, the resonance of a narrative of individual agency and interpersonal dealing accompanying, or even facilitating, an economic exchange. This example, not unprecedented,¹⁰ offers an almost stylized rendering of the traditional notion of contract—two individuals meeting in agreement on mutually beneficial terms—and the bond of trust that enables or is cemented in the process of transaction. In doing so, this transaction demonstrates the value that can accrue to one party, typically the seller, not only from seeking to replicate the structure of a traditional (or ideal) notion of contract in the form of the deal, but also in invoking the narrative of a classic bi-

10. Although Louis CK, discussed below, garnered attention for his innovative approach, this type of transaction is not unprecedented and might be a sign of an emerging phenomenon. The English band Radiohead has similarly drawn attention for its experiments with self-released albums and letting fans set the price. See Eduardo Porter, *Radiohead's Warm Glow*, N.Y. TIMES (Oct. 14, 2007), <http://www.nytimes.com/2007/10/14/opinion/14sun3.html>.

lateral agreement involving choice and agency.¹¹ Indeed, the presentation or marketing of the deal taps into and rebuts the counter-narrative of contract reflected in the “no contract” campaigns: onerous terms imposed by a powerful counterpart at odds with the will of the consumer. In this context, then, the inclusion of certain procedural contract terms—in this example, a unilateral-modification provision that enables the changing of terms by one party at any time—functions all the more incongruously.

Ancillary procedural contract terms, such as a unilateral-modification provision, point to a wholly different conversation; this conversation exists between the drafting party and courts.¹² In doing so, this dialogue also calls upon a narrative of agreement between freely participating parties even as it fails to address the inability of consumers to meaningfully decode the language in play.¹³ As such, in transactions like the one discussed next, a narrative of agreement in an idealized sense operates as a means for a party to redouble its relative power as a knowledgeable drafter.¹⁴ Consumers become bound by law to terms that operate at the limits of consumers’ abilities, as a cognitive matter, to assess their significance.¹⁵ In this case,

11. Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CINN. L. REV. 1327, 1328 (2011).

12. See Horton, *supra* note 8, at 609–10 (drawing on the framework identified in Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105 (2006)).

13. As Tess Wilkinson-Ryan describes them, fine-print disclosures “are functionally unreadable (or at least indigestible) for consumers with bounded cognitive capacity—i.e., everyone.” Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1749 (2014). Advocating for the treatment of consumer transactions as product rather than as contract, the meaning of which is evident to the consumer, Leff pointed in this direction. He suggested that, as with certain contract terms, “[t]here are, in fact, things about things which are opaque to the senses under all circumstances.” Leff, *supra* note 3, at 152.

14. I discuss the consumer’s position relative to a more powerful counterpart, which typically takes the form of a firm. In his influential analysis of the way that the advantages enjoyed by so-called “repeat players” reinforce one another to exacerbate the disparity in power between them and their “one shot” counterparts, Marc Galanter notes that these groups do not necessarily divide along the same line distinguishing the “haves” from the “have nots.” These distinctions nonetheless illuminate the ways in which power can be leveraged in the legal system to the further advantage of the already empowered party. See Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 103–04 (1974). Below I discuss the firm-consumer relationship with an eye to how existing power can be reinforced through the law. Although the corporation versus natural person structure facilitates this power dynamic in the examples discussed, I do not take the power differential as inevitably linked to the organizational structure of the parties. Instead, my focus is on how advantages enjoyed by one party can reinforce advantages over another in the context of contract. I am grateful to Ethan Leib for leading me to articulate this distinction.

15. See *infra* notes 73–86 and accompanying text.

by using the framework of an authentic—if virtual—handshake, a selling company seeks to establish trust with an individual (to the company's benefit) and signal enforceable agreement to courts. The company does so while simultaneously binding individuals to terms that remain in the company's unilateral power to change.¹⁶ The company thereby uses a narrative of genuine agreement to mobilize compliance and render enforceable an open-ended cipher, to which an individual consumer has little capacity to agree substantively.¹⁷

In December 2011, the comedian Louis CK made news with his choice to structure the sales of his concert video in a relatively unusual way.¹⁸ Rather than involve a distributor, Louis CK opted to bypass the typical middleman and made a recording of his live comedy show available on the Internet for purchase directly from his company as a five-dollar download.¹⁹ Within a week, Louis CK netted \$750,000 on a \$250,000 investment despite some acts of piracy.²⁰

Louis CK received press coverage for the financial success of this endeavor.²¹ However, one aspect of this transaction has not been ex-

16. David Horton traces the “twisted” nature of the law of unilateral modification and suggests that courts that follow the precedent of *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273 (Ct. App. 1999), as New York courts have, might reject certain additions to contracts that are not mentioned in the initial deal. Horton, *supra* note 8, at 628, 635.

17. I discuss below whether the notion of agreeing to terms in a general sense—as in Randy Barnett's analogy of the sealed envelope containing contract terms—offers a conceptually coherent way to reconcile the tensions between the expressed commitment to agreement in the law and the necessary disparity in knowledge between the parties, and I conclude that it does not. See Barnett, *supra* note 4.

18. See Tom Cheredar, *Louis CK's Digital Distribution Experiment Clears \$1M in 12 Days*, VB MEDIA (Dec. 22, 2011, 12:01 PM), <http://venturebeat.com/2011/12/22/louis-cks-special-1-million/>.

19. *Id.* The show was titled “Louis CK: Live at the Beacon Theater.” *Id.* In Louis CK's account, by pursuing this model, he was able to offer the video to consumers at a much lower price than the twenty dollars an intermediary distributor would have charged for the same material. See Louis CK, *A Statement from Louis CK*, LOUIS CK (Dec. 13, 2011), <http://buy.louisck.net/news/a-statement-from-louis-c-k>. The video was also presented without any digital rights management, which meant it could be easily pirated. See *id.*; David Carr, *A Comic Distributes Himself*, N.Y. TIMES (Dec. 19, 2011), <http://www.nytimes.com/2011/12/19/business/media/louis-ck-plays-a-serious-joke-on-tv-the-media-equation.html?pagewanted=all>.

20. Carr, *supra* note 20. The comedian also retained the rights to the production in perpetuity. *Id.*

21. See, e.g., Seth Abramovitch, *Emmys 2012: Louis CK's Digital Download Experiment Pays Off*, THE HOLLYWOOD REPORTER (Sept. 23, 2014, 7:42 PM), <http://www.hollywoodreporter.com/news/emmys-2012-louis-ck-digital-beacon-theatre-373237>; Amanda Holpuch, *Louis CK Emmy Win Vindicates Independent Distribution Model*, THE GUARDIAN (Sept. 24, 2012, 1:39 PM), <http://www.theguardian.com/culture/us-news-blog/2012/sep/24/louis-ck-emmy-independent-distribution>; Ross Luippold, *Louis C.K. Makes \$500,000 from 'Live at the Beacon Theatre': How Did He Do It?*, THE HUFFINGTON POST (Dec. 15, 2011, 7:52 PM),

ploded: the way in which the streamlined form of this transaction tapped into a narrative of traditional contract, both in its structure and in its marketing. The positive outcome in this instance reflects savvy pricing—that is, an offer that strikes consumers as a good deal. As the comedian noted, “I’ve gotten so many tweets and emails from people who say, ‘I torrent everything and I’m not torrenting this’²². . . . Because the gap from stealing and buying with these things—for \$5, you’re almost stealing it. So it tips the scales more easily.”²³ Yet, in addition to a shrewd price point, the framing of the transaction as an interpersonal agreement also played a significant role in facilitating the favorable outcome for the comedian.²⁴

Described as a “scabrous and successful champion of the everyman,”²⁵ Louis CK tapped into this persona in his presentation of the deal online. On his web page offering the opportunity to download the video of his live show in exchange for five dollars, he appealed directly to people considering pirating practices, asking them not to do so. His language implicitly underscores the ideal of contract, and arguably the morality of promise that contract is believed by some to reflect or reinforce.²⁶ In addition, the site draws on the specter of contract as coercion, downplaying any corporate presence in the

http://www.huffingtonpost.com/2011/12/15/louis-ck-500000-profit-live-at-beacon-theatre-special_n_1152506.html.

22. “Torrenting” refers to a way to download and share files, which would enable users to circumvent the fee.

23. *Louis CK Reflects On ‘Louie,’ Loss, Love and Life*, NPR (Dec. 13, 2011, 11:39 AM), <http://www.npr.org/2011/12/13/143581710/louis-c-k-reflects-on-louie-loss-love-and-life>.

24. This transaction seems also to have had a favorable outcome for consumers who were able to purchase the product they wanted at a lower price than would have been possible with a distributor. The discussion that follows explores the ways in which all aspects of the deal, some of which might have operated to their detriment, could not have been known to or valued by consumers.

25. Carr, *supra* note 20.

26. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 1, 4–5 (1981); Seanna Valentine Shiffrin, *Are Contracts Promises?* in *ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 241, 255 (Andrei Marmor ed., 2012). The comedian’s own assessment supports this view. As Louis CK asserted in an online question-and-answer session:

I think it is really interesting that I brought the price so close to stealing and made the movie so easy to get and made it so clear that it’s a human offering that it sparked a debate about pirating. . . . To steal from someone and not feel bad, you either have to be a sociopath or view the act differently.

Carr, *supra* note 20.

transaction.²⁷ Instead, the deal as presented conjures a traditional contract exchange between individuals agreeing over a handshake.

The webpage for purchase on Louis CK's site lays out the transaction simply, reinforcing the straightforwardness of the deal. Under a heading for the show, "Live at the Beacon Theater," and a short note about the availability of both video and audio formats, the page states:

The cost is \$5.00. . . . To buy this thing, do this: Enter your email (We will NOT bother you) then choose below to pay with Amazon, PayPal or Dwolla. Then you can watch the show, download the show, ignore the show. Whatever you want. After that, you never, ever have to hear from me again. Unless you want to.²⁸

The site thereby presents consumers with the "performance terms," the terms of the deal foremost on each party's mind:²⁹ the price, product, and little else. Notably, the bare-bones deal, as it is presented, underscores the agency and will of the consumer. Indeed, it expresses respect for the consumer's autonomy. By giving the consumer an opportunity to "watch . . . download . . . ignore the show," the ability to exercise agency unmolested (e.g., "We will NOT bother you") becomes a feature of the product and the deal.³⁰

The bottom of the video purchase webpage contains a note from the comedian to potential viewers of the show that marshals the agency of the seller as well as the consumer to induce compliance with the terms. In a box labeled "To those who might wish to 'torrent' these shows" directly above the sign-off "Sincerely, Louis C.K.," the comedian, himself, reaches out virtually to the consumer.³¹ The text states, "I made these files extremely easy to use against

27. Although the power relation in a contractual transaction is not necessarily determined by a party's status as a natural person or organization, the site nonetheless invokes the stereotypical power dynamic of a transaction between an individual and a corporation.

28. *Purchase Live at the Beacon Theater*, LOUIS CK, <https://buy.louisck.net/purchase/live-at-the-beacon-theater> (last visited Sept. 7, 2014).

29. As Burton and Andersen explain:

Performance terms are included in an agreement for the purpose of defining the primary benefits the parties intended to flow to one of them as a result of the contract. The most obvious performance terms are promises, express or implied-in-fact, that a certain action, such as the delivery of goods or the rendering of services, will be taken.

Burton & Andersen, *supra* note 8, at 873.

30. *Purchase Live at the Beacon Theater*, *supra* note 29.

31. *Id.*

well-informed advice . . . because I want it to be easy for people to watch and enjoy this video in any way they want without ‘corporate’ restrictions.”³² The short paragraph that follows this assertion reinforces the semblance of a personal interaction:

Please bear in mind that I am not a company or a corporation. I’m just some guy. I paid for the production and posting of this video with my own money. I would like to be able to post more material to the fans in this way, which makes it cheaper for the buyer and more pleasant for me. So, please help me keep this being a good idea. I can’t stop you from torrenting; all I can do is politely ask you to pay your five little dollars, enjoy the show, and let other people find it in the same way.³³

In this manner, the seller presents the transaction in terms of an ideal contract involving genuine mutual understanding and trust. Both parties are figured as individuals making unconstrained choices. Adherence to the terms offers the prospect of the ideal rewards of contract: both parties are better off by virtue of the transaction. As such, the seller uses this narrative of agreement, of the ideal contract involving knowledge and free will, to bolster trust and thus, if he succeeds, compliance with terms. This approach demonstrates the resonance of a narrative of agreement in the contemporary cultural imagination. It also suggests the possible generative value of a narrative of agreement—the narrative potentially serves to further understanding and an informed, experienced agreement, or at least a willful act of compliance on the part of the consumer.³⁴

In this context, another aspect of the transaction demands examination. Notwithstanding the seller’s disavowal of corporate power to impose onerous terms, this transaction taps into the legal framework of the fine print of procedural terms governing the parties’ rights and responsibilities under the deal. The deal presented is governed by additional terms to form a so-called contract of adhesion—a take-it-or-leave-it arrangement in which the terms are dic-

32. *Id.*

33. *Id.*

34. In different circumstances, empirical studies seem to suggest the power of a sense of investment to further consumers’ compliance with terms. Zev Eigen has demonstrated how the process of negotiating a seemingly inconsequential term can impact a party’s sense of commitment to the deal in certain contexts. Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 87–88 (2012).

tated by a stronger party and the consequences of which are at best vaguely understood by the weaker actor.³⁵ As such, the relation, as construed and facilitated by marketing a narrative of agency and contemplative exchange between two “guys” or equals, remains situated in another framework—that of the terms by which the more powerful party seeks to mobilize the power of the state behind the contract in its favor.

Thus, in this particular instance, notwithstanding the pared-down transaction structure, the legal framework of fine print remains fairly conventional, following the norm of online consumer transactions. The website presents not much more than the text discussed above, two opportunities to enter an email address,³⁶ and a few explicitly presented terms reinforcing the feeling of a sensible, streamlined transaction between two individuals.³⁷ The webpage, however, also requires a purchaser to check a box next to the words “I agree with the Terms & Conditions” in order to proceed to purchase.³⁸

The words “Terms & Conditions” next to the topmost mandatory check-box are presented in a bolded font and serve as a hyperlink to another webpage.³⁹ This other website presents additional terms governing the transaction.⁴⁰ Plainly written, the terms of use nonetheless comprise over two thousand words, which when printed out in double-spaced 12-point Times New Roman font span over seven pages.⁴¹ Notwithstanding the site’s rhetorical disavowal of any “company” involvement, the terms establish that a corporate entity, Pig Newton, Inc., grants “you” — the consumer — a license to download and access the content for noncommercial personal use, re-

35. This notion follows Friedrich Kessler’s formulation in the first half of the twentieth century. Kessler pointed to the weaker party’s inability to shop around as a function of a monopoly or because of standardization of terms in the market. Kessler, *supra* note 4, at 632. In the contemporary environment of online contracting, the ability to shop for terms is compromised in a more subtle manner by the cognitive biases and limitations of the consumer. See discussion *infra* Part II.

36. One is labeled “Seriously — get the email address RIGHT.” *Purchase Live at the Beacon Theater*, *supra* note 29.

37. The terms are: “I agree with the Terms & Conditions”; “This is a gift”; “Yes, I’d like to receive further emails about Louis CK things”; or “No, leave me alone forever, you fat idiot” in response to the question, “I’m going to be offering other things through this site. Would you like to hear about them?” *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See *id.*

stricting any public presentation of the materials.⁴² The terms reserve all rights to the content for Pig Newton, Inc.⁴³ The presentation of the terms reflects the paradox of the role of fine print in consumer transactions. The minimal and plainly worded terms on the “Purchase” webpage correspond to consumers’ expectation of a streamlined transaction involving the essential terms—price and product of interest—and reflect the conventional wisdom that consumers will not read the fine-print terms of use. Indeed, legal scholars and even courts acknowledge the likelihood that certain, if not all, terms go unread.⁴⁴

At the same time, the “Terms & Conditions” page necessarily speaks to another audience, and operates in another framework of agreement, which is also intended to implicate the consumer. This framework of legal doctrine situates a contract as an act of free will that can be manifested through particular signs established as reflections of agency. Terms presented to the parties in the course of a contractual transaction will usually be considered presumptively enforceable, reflecting a legal conception of contract as involving an ex-ante intention that both precipitates the transaction and justifies a contract’s enforcement as such.⁴⁵ The “Terms” as presented in this

42. *Terms and Conditions*, LOUIS CK, <http://buy.louisck.net/terms-and-conditions> (last visited Nov. 14, 2014).

43. *Id.* The terms grant the purchaser a “Viewing Period” of “Indefinite” duration. *Id.* The terms also contain other common provisions, including a forum selection clause limiting suits to the State of New York, disclaimers of warranties, limitations of liability, indemnification of Pig Newton, Inc., and an integration provision that incorporates “policies and guidelines” posted on the site, and a privacy policy. *Id.* The terms also reserve for Pig Newton, Inc. the right to make unilateral changes to the policy at any time, with continued use of the site signaling acceptance. *Id.* The terms provide that any “substantive changes” to the privacy policies will be posted in bulletins on the site or sent to users by email and that use of the site following these updates also constitutes agreement according to the terms. *Id.*

44. Thus for example, one district court, remanding a challenge to a forum selection clause to determine whether a consumer clicked assent, noted, “[w]ith regard to forum selection clauses in clickwrap agreements—despite the fact that probably less than one person in 10,000 ever reads them, or has the slightest idea what they say—courts routinely hold that they are valid and enforceable.” *Bagg v. Highbeam Research, Inc.*, 862 F. Supp. 2d 41, 45 (D. Mass. 2012). As Wayne Barnes asserted, “[t]he fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma within the contracts literature.” Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 237 (2007); see also Robert A. Hillman, *Online Boilerplate: Would Mandatory Disclosure Backfire?*, 104 MICH. L. REV. 837, 849–852 (2006).

45. Contract defenses of lack of capacity, infancy, mental incompetence, or defects in the bargaining process due to duress, undue influence, or fraud, for example, suggest the presumptive role of autonomy and agency in the construction of contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981); IAN AYRES & RICHARD SPEIDEL, *STUDIES IN CONTRACT*

example conform to drafting conventions that aim to harness the presumption that the manifestation of agreement will be deemed a contract. Drafters thereby enlist the power of the state to enforce terms or, at the very least, to persuade compliance.⁴⁶

Thus, the “Disclaimer of Warranties and Limitations or Liability” appears in all capital letters, reflecting the requirement that disclaimers of any implied warranty of merchantability in writing must be conspicuous.⁴⁷ In addition, the integration provision establishing these terms, “together with the Policies posted on the Site,” as the “entire agreement” regarding use of the site, appears in bolded font.⁴⁸ As with the visual presentation of terms, the language used reflects the drafter’s awareness of the doctrinal investment in agreement involving a consumer’s access to terms as a formal matter, which underpins enforceability. Thus, the terms outline rights

LAW 464, 522–54 (7th ed. 2008). These defenses underscore this presumption by identifying instances in which these factors are compromised and, in such cases, call into question whether a party’s actions ought to be treated as contractually binding.

46. Courts favor monetary damages and are unlikely to mandate specific performance, other than in the unusual case in which the subject of the contract is unique or monetary compensation is deemed inadequate. In determining damages, courts seek to place the aggrieved party in the position in which it would have been had its counterpart performed under the contract, looking for expectation interests plus uncompensated losses precipitated by a breach. However, a party may also claim damages based on restitution or reliance. AYRES & SPEIDEL, *supra* note 46, at 198–99; *see generally* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009) (highlighting the negative implications of unenforceable terms for unknowing employees to the benefit of sophisticated employers); RADIN, *BOILERPLATE*, *supra* note 4, at 216 (proposing tort remedies for rights deletion schemes through fine print).

47. *See* U.C.C. § 2-316(2) (2012); *see also* MacDonal v. Mobley, 555 S.W.2d. 916, 919 (Tex. Civ. App. 1977) (“A term is ‘conspicuous’ when it is written so that a reasonable person against whom it is to operate should notice it.”). While the Uniform Commercial Code leaves the determination whether a term is conspicuous to a court, it includes as conspicuous:

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

U.C.C. § 1-201(10). Thus, notwithstanding the empirical and experiential claims about the difficulty of reading all-capital text, *see* MILES A. TINKER, *LEGIBILITY OF PRINT* 65 (1963), because of the suggestion in the Code of “all caps” as a standard of conspicuousness in the law, such a text marks itself as conspicuous to a court.

48. The presentation of an integration provision in a “conspicuous” font reflects the rule in most states (including New York, where, according to its terms, this agreement would be litigated) that a merger provision creates a strong presumption that the parties intended the written document to be a complete integration of their agreement. *See, e.g.*, Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 679 (S.D.N.Y. 1979); *see also* TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE* 567 (2003).

and responsibilities in relatively simple sentences constructed in clear language.⁴⁹

These forms of presentation and the legal force of the terms themselves are conceptually related to the contractual doctrine of the “duty to read,” which denies parties the opportunity to avoid terms by way of claimed ignorance. As discussed below, the duty to read applies even in an Internet consumer transaction, such as this, in which consumers expect a streamlined transaction and are neither likely nor expected to read or deliberate over fine-print terms.⁵⁰

In this particular transaction with Louis CK’s company, Pig Newton, Inc., the consumer, who likely failed to read the terms, might nonetheless not be surprised by most of them. For the most part, the terms arguably comport with a purchaser’s reasonable expectations of the transaction. According to the terms, Louis CK’s company grants the purchaser a license to the content posted for personal, non-commercial private use—that is, for private viewing (the terms specify that the license would not include presentation in a dorm lounge or restaurant) and for which no fee is charged.⁵¹ The company reserves rights to the content on the site and protects the materials under trademark and copyright laws.⁵² The terms also grant the purchaser a “Viewing Period” of “Indefinite” duration, and disclaim liability resulting from viruses and links to the site, providing the product on an “as-is” basis.⁵³

49. For example, the site states, under the heading “Accuracy”:

We cannot and do not guarantee or warrant the accuracy of any information found on the Site. Although we have attempted to make such information accurate at the time it was posted, any action taken or not taken by you as the result of reviewing information on the Site is solely at your risk.

Terms and Conditions, *supra* note 43.

50. See *supra* note 45. As such, the conspicuousness requirement applied by courts, and typically complied with by drafters, fails to reflect the experience of the consumer who is unlikely to see or understand the import of the terms. Nearly half a century ago, Arthur Leff pointed out the unsuitability of such rules, which mistakenly treat words in an inclusive product package as self-evident bearers of meaning. Leff, *supra* note 4, at 152-53. Nancy S. Kim points to the incongruity of applying a conspicuousness requirement developed in relation to physical documents versus terms available electronically. See Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 274-75 (2014).

51. *Terms and Conditions*, *supra* note 43.

52. *Id.*

53. *Id.* “As is” is typically understood to be comprehensible to consumers. See RADIN, *BOILERPLATE*, *supra* note 4, at 184; John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 320 (2000). A “drafting note” in Tina Stark’s handbook, *Negotiating and Drafting Contract Boilerplate*, suggests “the warranty names mean something to lawyers and judges, but ‘as-is, where is’ is likely to communicate the meaning of this section

At the same time, however, the fine print also contains terms that potentially undermine the very nature of this transaction as a handshake agreement reflecting mutually understood terms. Terms that are not reasonably expected or easily understood by consumers exacerbate the gap between the streamlined exchange experienced by the seller and consumer and the interpretation of that exchange offered by the seller to the court.⁵⁴ Certain ubiquitous and seemingly innocuous terms thwart, rather than facilitate, the possibility of experienced agreement for the consumer. Most notably, in this case, Pig Newton reserves the right to change the terms unilaterally.⁵⁵ Such an open-ended ancillary term not only poses challenges to a consumer's ability to weigh the term's potential impact,⁵⁶ but also operates at odds with the notion and mode of facilitating agreement upon which the deal capitalizes.⁵⁷

In addition to opening up the deal to include terms unknown to the consumer, the inclusion of the unilateral-modification provision—which states that terms can change and, when the change is posted on the site, the consumer is bound by them—leverages the notion of agreement as the basis of contract enforcement in the seller's conversation with courts. As one court recently explained:

“Unilateral modification terms” . . . are not necessarily effective But the inclusion of such terms at least helps to bolster the offeror's argument that the offeree is on inquiry notice of later arriving terms, particularly where the modification (or amendment) is itself submitted in such a manner that a reasonable offeree would be likely to see it.⁵⁸

The court's assessment reflects the presumptive enforceability of unilateral-modification terms, which facilitate the alteration of important terms such as forum selection and choice-of-law clauses

[disclaiming warranties] more immediately to the contracting parties.” STARK, *supra* note 49, at 234.

54. Here, “exchange” means both the transaction in its nuts and bolts (price, quantity, liabilities, etc.) as well as the conversation that serves as the medium through which these terms are communicated.

55. *Terms and Conditions*, *supra* note 43 (containing language denying the consumer any right to alter them through negotiation); see Peter A. Alces & Michael M. Greenfield, *They Can Do What?! Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1101 (2010) (discussing the prevalence of such terms in consumer contracts).

56. See discussion *infra* Part I.B.

57. Horton, *supra* note 8, at 649–53 (outlining the ways a unilateral-modification provision frustrates consumer efforts to shop for the best terms).

58. *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 125–26 (2d Cir. 2012) (citations omitted).

(terms which are confusing to the average consumer when known, but beyond contemplation when subject to change).⁵⁹

Louis CK and his production company, Pig Newton, Inc., do not represent the typical paradigm of corporate power, which is perhaps more accurately exemplified by American Express in the discussion that follows. Indeed, Louis CK acknowledges his vulnerability to the possibility of illegal exploitation.⁶⁰ And yet, in the way it is presented by the seller, the transaction incorporates this very vulnerability as an element of a narrative that aims to bolster trust, and thus compliance. The transaction described above deploys a narrative of genuine agreement that underscores the comedian's persona as an accessible, fair, well-meaning everyman. In the framing of a sale as a virtual handshake, this narrative of agreement serves as a marketing strategy, both for the specific product (i.e., video sales) as well as for the comedian's brand. Thus, the idea of a contract experienced as agreement—a meaningful understanding between freely-acting parties—endures and exerts its power to facilitate the maximization of value.

At the same time, the seller draws upon the power of the legal enforceability of open-ended terms inaccessible to the consumer. The framework of agreement governing the parties from behind the purchase screen thereby complicates the transparency upon which the transaction capitalizes. Paradoxically, this framework also demonstrates an investment in the possibility of experienced agreement. The legal treatment of fine print relies on a bright-line rule as to the manifestation of agreement. However, because this rule tends to diverge from agreement as experienced by the consumer, it serves as a vehicle for a seller to leverage its power. The drafter leverages both the formal legal indications of "agreement" as well as the persuasive power of the narrative of genuine agreement marshaled on the purchase page. These two notional agreements (as pitched to consumer, and as pitched to courts) map imperfectly onto one another. In addition to accruing any benefit from the narrative of agreement as pitched to the consumer, the drafter also mobilizes

59. See Horton, *supra* note 8, at 638-39; see also *supra* note 17 and accompanying text. As Horton notes, a valid choice-of-law clause depends, among other things, on the existence of a "substantial relationship" between parties and the state specified. Horton, *supra* note 8, at 637 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971)). By its terms, the privacy policy, along with the "Terms & Conditions," may be unilaterally modified by Pig Newton, Inc. See *Terms and Conditions*, *supra* note 43.

60. *Purchase Live at the Beacon Theater*, *supra* note 29.

a narrative agreement with the consumer (of which the consumer is likely only partially aware) in a conversation that takes place between only the drafting party and the courts. In this conversation, terms that resist a consumer's rational scrutiny become enforceable through these posited signs of agreement.

B. The "Choice" of "More Options": American Express's Notice of Changes to Its Arbitration Provision

Louis CK is an entertainer selling a product that capitalizes on his idiosyncratic persona and ability to connect with the consumer as an individual. In contrast, American Express might be considered a paradigm of corporate power, a global corporate presence inhabiting the other end of the spectrum of sellers from Louis CK. Even in transactions involving a corporate prototype, however, a narrative of agreement that draws on individual agency and participation can be seen to shape the transaction. In the example that follows, the framework of fine print marshals a notion of agreement in a somewhat different way than the "handshake" approximation of Louis CK's marketing strategy. Nonetheless, in this case the drafting firm similarly leverages a narrative of agreement as between the parties to bolster its power vis-à-vis a consumer in the conversation between the firm and courts to which the consumer is unlikely to be privy.

In the following example, the company mobilizes a narrative of agreement to establish enforceability in accordance with contract doctrine. It does so not only in a way unlikely to be experienced by the consumer, but, perhaps more fundamentally, involving terms unlikely to be meaningfully comprehended and thus assessed by a consumer. Thus the firm's advantage over the consumer in terms of knowledge is redoubled by virtue of the distance and difference between the firm's conversation with courts and the conversation with the firm experienced by the consumer. This example thereby illustrates yet another way in which the practice of contract reflects both the ongoing resonance of narratives of actual, genuine understanding as well as the potential of a narrative of agreement to reinforce existing structures of power. In doing so, it reflects the way in which the rhetoric and notion of agreement can be used to subvert the aspirational goals of contract—that is, contract's potential to promote experienced agreement.

In October 2012, American Express sent cardholders a notification of changes to the terms of the card, which included an arbitration provision.⁶¹ The easy-to-read summary of terms and fairly simple language of the notice reflect the doctrinal investment in a paradigm of agreement involving contemplative choice. Indeed, rather than unilaterally enforcing the arbitration provision, the notice underscores the idea of agreement as a participatory and deliberative process by including a mechanism for consumers to reject the predispute-arbitration term (cardholders were invited to send a rejection notice by a specified date to American Express).⁶² However, the language of the notice of terms does not—and cannot, at least in the present context—bridge the gap of knowledge and practice between the drafting firm and the consumer. As such, the model of agreement as interactive and contemplative serves to bolster the legal validity of procedural terms that in practice are not likely to be read nor, more fundamentally, meaningfully assessed or understood by consumers. The notice thereby furthers a process by which an individual is bound by functionally illegible terms to which she therefore could not meaningfully agree. The notice does so by leveraging a narrative of participatory agreement to further the existing advantage of the drafting party, who uses it in a conversation generally accessible only to the drafter and the courts.

The plain language of American Express's notice reflects best practices of contract drafting and thus the principle embedded in contract law of a document to be read and contemplated by parties.⁶³ At the same time, the notice elides the stakes and rationale for the arbitration term, telling a different story. Binding by default in the absence of action on the part of the cardholder, the predispute-arbitration provision grants the power to American Express to restrict the cardholder's legal remedies (enabling the company to resolve a claim through the process of binding arbitration and thus precluding the possibility of litigation in a court of law, a jury trial, and class action claims).⁶⁴ Nonetheless, the notice sent to consumers

61. Memorandum from American Express to Cardholders (October 24, 2012) (on file with author).

62. *Id.*

63. *See, e.g., Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012) (assessing whether "terms [have] been reasonably communicated" to nondrafting party).

64. On the third printed page of the summarized and then enumerated amended American Express terms (which was actually the seventh page of an eight-page bill), a paragraph in bolded print states, "If arbitration is chosen by any party, neither you nor we will have the

frames the provision in terms of choice. Its first sentence states, “We are making changes to the process for resolving legal claims to provide more options. See the summary of our new process below and the detailed language on the following pages for more on these changes.”⁶⁵

The aim of enabling contract to better reflect the wills of the parties opened the door in contract law to the presumptive enforceability of arbitration provisions.⁶⁶ However, the current application of arbitration provisions to parties with disparate access to information concerning the value and implications of this term enables firms to leverage their power in a manner potentially at odds with the possibility of facilitating deliberative agreement by the consumer.

The implications of an arbitration term can be significant in ways not immediately apparent to a consumer. In addition to restricting the possibility of a jury trial or class action, which can itself preclude a remedy in practice,⁶⁷ arbitration provisions can enable a firm to

right to litigate that claim in court or have a jury trial. Further, you and we will not have the right to participate in a representative capacity.” See Memorandum from American Express to Cardholders, *supra* note 62, at 7; see also Chris Moran, *American Express Tries to Sneak Forced Arbitration Clauses on Users, Gives Until Feb. 15 to Opt Out*, CONSUMERIST (Oct. 19, 2012), <http://consumerist.com/2012/10/19/american-express-tries-to-sneak-forced-arbitration-clause-on-users-gives-until-feb-15-to-opt-out/>.

65. Memorandum from American Express to Cardholders, *supra* note 62, at 5.

66. As an alternative to litigation, arbitration could be viewed, and is often presented as, an attempt to better reflect the will and values of the parties, thus facilitating the goals of agency and autonomy that legitimize contract. The emergence of predispute-arbitration provisions as a ubiquitous challenge to the exercise of individual agency can be traced to the contractual ideal of agency and its inherent tensions. See RADIN, *BOILERPLATE*, *supra* note 4, at 5–9. Prior to the enactment of the Federal Arbitration Act (“FAA”) in 1925, arbitration provisions had limited impact in practice. See 9 U.S.C. § 1 (1925); S. REP. NO. 68-536, at 2 (1924). At the time of enactment, the effective unenforceability of arbitration provisions under the common law was considered anachronistic. See S. REP. NO. 68-536, at 1. Thus, in the spirit of facilitating contractual freedom, Congress enacted the FAA, establishing the enforceability of arbitration provisions and resisting their distinction from other contractual terms. See H.R. REP. NO. 68-96, at 1 (1924) (“Arbitration agreements are purely matters of contract.”). The Supreme Court recently reaffirmed this principle in contexts beyond the merchant-to-merchant arena that precipitated the enactment of the FAA. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding a state law deeming class-action waivers in arbitration agreements unenforceable in consumer suit preempted by FAA); see also *Rent-a-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67–70 (2010) (challenge to validity of employment agreement with arbitration provision governing challenges to arbitrability to be determined by arbitrator). For a discussion of the expansion of the FAA, see also Horton, *supra* note 8, at 619–23. Applied in the consumer context, the original rationale, however, elides the knowledge differential between the parties to a consumer transaction, as discussed below.

67. Procedural contract terms, such as forum selection or arbitration provisions, can foreclose possibility of redress. RADIN, *BOILERPLATE*, *supra* note 4, at 5–8, 33–34. As Justice Stephen Breyer noted, the upshot of barring class actions (which he asserted is not inconsistent with

capitalize on its power through its designation of an arbitrator that might be biased in favor of the firm as a repeat player.⁶⁸ Arbitrators are not necessarily bound by legal precedent, nor are the process and result subject to public scrutiny or judicial review.⁶⁹ Challenges to the enforceability of the provisions themselves have also become increasingly difficult to mount as a result of the trend in case law toward a privileging of arbitration terms.⁷⁰ Even if a consumer were to read the terms, because of the challenges ancillary procedural contract terms, such as arbitration provisions, pose to the processes of rational assessment, she might not draw the conclusion that her rights were being limited in a significant way, nor could she rationally value the infringement were she made aware.⁷¹

Consumers lack much of the information about the meaning and implications of procedural contract terms—such as an arbitration, forum selection, or unilateral-modification provision—available to the drafting firms.⁷² The cognitive limitations that impact consum-

the FAA's "saving clause" of Section 2) is the preclusion of the pursuit of meritorious claims. *AT&T Mobility LLC*, 131 S. Ct. at 1759 (Breyer, J., dissenting).

68. See Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1172 (2010) (noting that many "arbitration services are biased in favor of companies").

69. See *id.* at 1172-73; Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 25-31 (2001) (discussing the drafting of arbitration standards and concerns about judicial review); *but cf.* *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) (upholding arbitrator's authorization of class arbitration in physicians' suit for prompt payment from health plan).

70. See *Rent-a-Center*, 561 U.S. at 69-70 (holding that the "gateway" question of arbitration agreement enforceability must be determined by an arbitrator when designated by contract); *id.* at 71-73 (acknowledging the unlikelihood of success of an unconscionability challenge to particular provision delegating issue of enforceability to arbitration); see generally *AT&T Mobility LLC*, 131 S. Ct. 1740 (holding that FAA preempts state law holding arbitration clauses unconscionable if they preclude class-wide remedies). More recently, the Supreme Court held arbitration provisions containing class-action waivers enforceable, even in antitrust cases in which the cost to arbitrate would exceed the value of an individual's claim. See *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). In doing so, the Court overruled the Second Circuit, which pointed to the class action waiver clause's preclusion of plaintiffs' ability to "vindicate[] [their] federal statutory rights" as the determining factor in invalidating the provision. *Id.* at 2311 (quoting *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

71. The act of reading itself is, as firms know, unusual and might not be deemed reasonable as an empirical matter. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 671, 705-08 (2011) (asserting, and supporting with factual evidence, that people do not read the fine print of contracts, and providing a colorful description of what would happen to an individual's life if he tried to read all the disclosed terms he encountered).

72. RADIN, *BOILERPLATE*, *supra* note 4, at 24-25. If a consumer can understand the literal meaning of a term, he will not be likely to discern the extent to which it overreaches legally,

ers' ability to assess terms effectively or adequately are exacerbated by the nature of procedural terms.⁷³ As much scholarship indicates, the implications of an arbitration provision for a consumer are particularly hard for an individual to assess in a meaningful way; due to the "boundedly rational" nature of cognition,⁷⁴ individuals cannot typically accurately weigh and assess more than a handful of terms in accordance with their preferences.⁷⁵ In addition, high-stake, low-salience provisions, such as those governing dispute resolution, implicate inaccurate risk or probability calculation.⁷⁶ The resulting differential between a consumer's understanding of terms and that of the consumer's counterpart to a transaction is compounded by the fact that consumers are less likely to be aware of the substantive stakes of procedural provisions in the event of a dispute, such as the potential of these terms to negate the possibility of a remedy or access to a court.⁷⁷ To the extent that a consumer might understand the import and implications of an arbitration provision,⁷⁸ for example,

thereby potentially leading individuals to concede rights under contract terms not enforceable at law. *Id.* See also Leff, *supra* note 3, at 148-49 ("[M]ost 'objectionable' clauses of a consumer contract have only contingent, often highly contingent, importance, and no buyer not represented by a lawyer . . . is going to think much about them; and . . . even if the unrepresented consumer were interested, it is unlikely that he would have the necessary sophistication for such consideration.").

73. See Eisenberg, *supra* note 4, at 258; Korobkin, *supra* note 4, at 1225-27.

74. See Korobkin, *supra* note 4, at 1217.

75. See *id.* at 1229.

76. See RADIN, BOILERPLATE, *supra* note 4, at 624-25, 625 n.39. In general, human beings discount risks to themselves and make choices based on salient, but not necessarily pertinent, information. *Id.* at 26-27. Radin speculates that a consumer's typical lack of interest in the content of the fine print

could be a classic case of heuristic bias or bounded rationality. Recipients do not know what their risks are and do not think they need to know, until it is too late. Most people do not believe that an unexpected loss will befall them, or that they will have to sue someone.

Id. at 654-55.

77. While the lawyer drafting terms actively confronts worst-case scenarios, an individual actor tends, by nature, to be unrealistically optimistic, discounting the chances of a negative future event (such as a dispute in which one might want recourse to a court of law or a class-wide remedy). See Eisenberg, *supra* note 4, at 227; Korobkin, *supra* note 4, at 1230. Radin points to this noncommodifiable aspect of certain rights, such as the right to recourse for harm and access to a court of law, in her conception of the "democratic degradation" that results from allowing the law of the firm to supersede the law of the state protecting such fundamental rights. RADIN, BOILERPLATE, *supra* note 4, at 106.

78. This is unlikely; the specialized nature of the knowledge is borne out by the articulated interventions of drafting firms' legal advisors. Thus, for example, an advisory memo issued by the law firm of Arnold & Porter, LLP outlining the Supreme Court's holding in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), cautions clients drafting consumer agreements "to consider carefully the omission of a class action waiver from its standard

she cannot easily value it in price terms. This challenge and that of the tradeoff between remedies and price place additional stress on an individual's deliberative process.⁷⁹ Faced with choices, neither of which an individual feels should be given up, individuals tend to focus their attention and evaluation elsewhere, undermining the effectiveness of a notification.⁸⁰

Notwithstanding these contextual constraints on the consumer, the notice sent by American Express frames the default position of a predispute-arbitration provision as involving choice, agency, and knowledge. In doing so, it further hinders a consumer's ability to override an already sticky default. It states: "our Claims Resolution provision includes an arbitration provision. This means that either you or we may choose to have an arbitrator decide any claim instead of having the claim decided by a court."⁸¹ In this context, the bolded assertion that "**you may reject the arbitration provision**" as long as (in ordinary font) "you notify us in writing prior to" an assigned date,⁸² is most likely to resonate with courts rather than consumers. The very features derived from a notion of meaningful agreement—plain language, bolded terms, notice, and even, in this case, some degree of choice (unlike many other terms, a consumer can indeed opt out, but on the whole consumers are unlikely to do so)—function paradoxically.⁸³ These features reinscribe and attest to a narrative of agreement sought by courts, supporting a legal claim that the contract terms are enforceable on the basis of a formality the

terms" in light of the Court's statement that arbitration and class action waiver agreements will be rigorously enforced. Arnold & Porter, LLP, *Supreme Court Finds Arbitration Agreements Waiving Class Actions Preclude Antitrust Class Actions Even Where Individual Claims Are Small*, 3 (June 2013), http://www.arnoldporter.com/resources/documents/ADVItalian_Colors.pdf. In doing so, this memo demonstrates the substantive power granted firms by the current judicial treatment of arbitration and other procedural provisions under the FAA, as well as the extent to which this power is embedded in and amplified by a framework of asymmetrical access to information.

79. Korobkin, *supra* note 4, at 1230–31.

80. *Id.* at 1231–32.

81. See Memorandum from American Express to Cardholders, *supra* note 62, at 5.

82. *Id.*

83. Leff, *supra* note 3, at 148–49 (noting the absurdity of regulating the process of contract formation by facilitating more bargaining when meaning eludes the consumer). In addition, the tendency of consumers to ignore this notice will impact the power of those who indeed opt out by reducing the potential class. This further undermines the legal innovation of the class action, which acknowledges and seeks to address the differential between the diffused and limited power of individual consumers facing the consolidated power of a repeat-player counterpart.

law deems objectively manifested assent.⁸⁴ In practice, the nature of the provision in the real-life experience of contracting will pose significant challenges to a consumer's faculties of rational assessment, a reality of which firms are no doubt aware. Thus, in light of the gaps between the realities of consumer contracting practices and the demands of the law, the very gestures toward meaningful considered agreement that the language expresses (rather than actually facilitates due to the nature of the terms) will serve to bolster a legal claim for the binding nature of these cognitively-challenging terms, which a consumer is unlikely to have meaningfully considered or acceded to.⁸⁵

Below, this Article discusses the way the issue of bright-line drawing in the current doctrinal approach of a notice requirement demonstrates the role of contract doctrine in naturalizing the reinforcement or allocation of power. This Article outlines the way courts apply the notice requirement in contract law to consumer contracts, especially those online—so-called contracts of adhesion—in which the presumptions regarding context and meaning follow traditional contract principles in a particularly regularized fashion. In doing so, this Article highlights the way this formal approach draws on a narrative of agreement, or an aspiration thereto, even as courts tell a story of reading signs that starts to lose its coherence outside the bounds of doctrine. This Article shows how in certain contexts the story of agreement reflects a subversion of contract's goals, even as it reinforces this framework as an ideal.

II. THE NOTICE REQUIREMENT AND THE RHETORIC OF CASE LAW

In the twentieth century, Friedrich Kessler famously outlined the benefits of contract as a reliable medium of communication. He highlighted contract's function as an "indispensable instrument of

84. See Korobkin, *supra* note 4, at 1226–28.

85. A case involving a similar opt-out provision demonstrates the legal effectiveness of this tactic and of arbitration provisions in general. In *Damato v. Time Warner Cable, Inc.*, in light of an arbitration provision included in a cable services subscriber agreement (and from which customers were given an opportunity to opt-out), a federal district court enjoined a class action suit brought by cable subscribers for breach of the subscriber agreement and various states' consumer protection laws. 13-V-994 (AAR)(RML), 2013 WL 3968765, at *8 (E.D.N.Y. July 31, 2013). Plaintiffs alleged that Time Warner Cable sent a notification of a new Subscriber Agreement on the second page of a bill that referenced the possibility of opting out—a scenario not unlike that described above. *Id.* at *2. Drawing on precedent privileging arbitration, the court rejected plaintiffs' challenges to the arbitration provision as illusory and unconscionable. *Id.* (citing *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010)).

the enterpriser, enabling him to go about his affairs in a rational way."⁸⁶ Rational behavior, he asserted, depends on agreements being respected, and thus "requires that reasonable expectations created by promises receive the protection of law"⁸⁷ Suggesting that contract marks our baselines of freedom and the distribution of power, Kessler explained that freedom of contract is both a moral and practical principle: "[t]here is no contract without assent, but once the objective manifestations of assent are present, their author is bound."⁸⁸ And this is the case, as Kessler noted, even when the terms are in the fine print, absent fraud or misrepresentation.⁸⁹ Social benefits potentially accrue from standardized contracts in particular.⁹⁰ He also famously identified, however, one form of transaction as subverting the premise of the informed, voluntary actor: contracts of adhesion in which the terms are dictated by a stronger party and the consequences of which are at best vaguely understood by the weaker party.⁹¹

86. Kessler, *supra* note 4, at 629.

87. *Id.*

88. *Id.* at 630.

89. *Id.* at 630 n.3.

90. *Id.* at 632. Kessler identified reduced prices resulting from reduced costs of production and distribution as a benefit generated by standard contracts. *Id.*

91. *Id.* Kessler pointed to the weaker party's inability to shop around as a function of a monopoly or because of standardization of terms in the market. *Id.* As suggested above, the contemporary environment of online contracting compromises the ability to shop for terms in a more subtle manner. In some circumstances, it may be beyond the rational skills of a consumer to weigh the implications of a variety of choices of terms and combinations, even if they are available. See Korobkin, *supra* note 4, at 1225. In addition, certain terms may not seem sufficiently onerous *ex ante* to justify forgoing a transaction due to cognitive biases or heuristics, especially due to individuals' "faulty telescopic faculty," or the tendency to give too little weight to future risks or benefits. See Eisenberg, *supra* note 4, at 222. This also highlights the limitations of interventions modeled after Restatement § 233(3). *Id.* (quoting Martin Feldstein, *The Optimal Level of Social Security Benefits*, 100 Q.J. ECON. 303, 307 (1985) (limiting enforcement of standardized agreements: "[w]here 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")). In addition, the current mode of online contracting, in which consumers are expected to forgo reading non-negotiable fine print, reflects the collective goal of streamlining market processes, which might very well be undermined by plodding, deliberatively reading consumers. See generally Ben-Shahar & Schneider, *supra* note 72 (discussing boilerplate in contracts). John Calamari's description of "mass marketing" in the mid-1970's resonates more strongly today; he described how "a party may reasonably believe that he is not expected to read a standardized document and would be met with impatience if he did." Calamari, *supra* note 4, at 361. Nancy Kim highlights the way online consumers' assent is currently "preordained by the coercive contracting environment so they proceed through the contracting process as quickly as they can," thereby suggesting a feedback loop of disempowerment. Kim, *supra* note 51, at 284.

Todd Rakoff subsequently defined contracts of adhesion more precisely,⁹² situating the issue as one of baselines of power; Rakoff bracketed the failure of the adhering party to read or understand the terms of the contract as peripheral to his argument that “invisible” terms should be presumptively unenforceable.⁹³ Indeed, ignorance of the specifics of terms has long been posited as a feature of standard-form contracting.⁹⁴ However, the common law approach of demarcating the line of assent at formal notice and a posited sign of agency perpetuates the story of knowing, participatory agreement that underpins the doctrine. The common law thus continues to tap into what Arthur Leff identified as the “process aura” of contract: terms are seen to reflect a process of harmonizing interests through dealing.⁹⁵ In doing so, the common law perpetuates a doctrinal focus

92. Rakoff, *supra* note 4, at 1177. Rakoff identified seven characteristics of a contract of adhesion: The document in question (1) “is a printed form that contains many terms and clearly purports to be a contract,” which was (2) drafted by the party (3) that is a so-called “repeat player” in such transactions. *Id.* In addition, (4) the form is presented (other than pricing) as a take-or-leave proposition; (5) following any “dickering” about price, the document is signed by the adherent; (6) who, in contrast to the drafter, enters into relatively fewer such transactions; and (7) the primary obligation that the transaction precipitates for the “adhering party” is a “payment of money.” *Id.* See also Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. & SOC’Y. REV. 95, 98 (1974) (giving the definition of a “repeat player” in contractual transactions).

93. Rakoff, *supra* note 4, at 1179–80, 1251. As Rakoff asserted, “considered by themselves . . . the visible terms of a contract of adhesion are most often those that would constitute the entire explicit contents of a very simple ordinary contract, with the price term (dickered or not) being the paradigmatic example. The invisible terms are, quite simply, all the rest.” *Id.* On the one hand, the replacement of “invisible” or ancillary terms with default rules under law might strike the contemporary reader as an inconceivable intervention in the current environment in which landmark holdings such as *Carnival Cruise* and *Hill v. Gateway 2000* have become entrenched in the common law. Some view this approach as over inclusive. See, e.g., RADIN, *BOILERPLATE*, *supra* note 4, at 213. From another perspective, however, though presumptive invalidation may be a necessary intervention, it is only a start. A firm can exploit the relative ignorance of its counterpart and point to a term even when it might not ultimately be legally binding. See generally Sullivan, *supra* note 47 (highlighting the negative implications of unenforceable terms for unknowing employees to the benefit of sophisticated counterpart employers); RADIN, *BOILERPLATE*, *supra* note 4, at 209–16 (proposing tort remedies for rights deletion schemes through fine print).

94. As Karl Llewellyn pointed out, “as far as concerns the specific [of boiler-plate clauses], there is no assent at all,” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (William S. Hein & Co. 1996) (1960) (articulating distinction between consent to dickered terms and “blanket assent” to “any not unreasonable or indecent term the seller may have on his form . . . [that does] not alter or eviscerate the reasonable meaning of the dickered terms”).

95. Leff, *supra* note 3, at 138.

on the formal bargaining process⁹⁶ inapposite when terms are not only dictated by one party but fail to convey their meaning.⁹⁷

Thus, notwithstanding the conceptual inapplicability of the classical contract framework to consumer transactions, online consumer contract cases tell a story of contract aspiring toward agreement: courts pay close attention, at least in theory, to the *possibility* of reading. In doing so, they reflect the way that contract law both relies on and establishes conventions of meaning or shared signs, which can also, at times, serve to subvert the goal of facilitating agreement. Thus, the section that follows offers a view of a doctrinal story of aspiration toward agreement, which by eliding the particular dynamics of power upends its own narrative in an especially dramatic way.

Notwithstanding the structure of an adhesive transaction, courts take pains to apply “traditional” contract principles and to police the bounds of enforceable and unenforceable agreements on the basis of the quality of notice.⁹⁸ In the twentieth century, courts’ treatment of certain adhesive contracts as special may have reflected a heightened sensitivity to context, parties’ relative degree of knowledge, and expectations.⁹⁹ Today, however, consumer contracts—whether or not considered exceptional by contract scholars—are at the heart of individuals’ contractual experience and enjoy the application of traditional principles of contract law.¹⁰⁰ With respect to disputes involving online transactions, courts repeatedly state that the electronic environment does not change the principles

96. Thus, for example, clicking “I agree” in a situation in which a consumer is “provided notice and an opportunity to review terms . . . prior to acceptance” suffices to bind a party to these terms. See *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911–12 (N.D. Cal. 2011) (holding arbitration provision valid in terms of use made available for examination through hyperlink along with “I accept” button that must be clicked to proceed). Discussing landmark cases *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002), and *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004), the federal district court in *Swift* noted that “there is no admission here that Plaintiff was aware of what the terms of service were (though she admittedly could have clicked on a hyperlink to review them and does not deny that she did not do so) . . .” 805 F. Supp. 2d at 912.

97. See Leff, *supra* note 3, at 148, 152–53.

98. *Major v. McCallister*, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009).

99. See, e.g., *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 135–36 (4th Cir. 1967); *College Mobile Home Park & Sales, Inc. v. Hoffmann*, 241 N.W.2d 174, 176–78 (Wis. 1976).

100. See *Major*, 302 S.W.3d at 229.

of contract applied,¹⁰¹ including the duty to read.¹⁰² While the language of cases acknowledges the potential for a contract to be performed in the absence of specific knowledge,¹⁰³ judges tend to demand a modicum of possibility that the terms can be accessed in the online consumer context.¹⁰⁴ Moreover, a persistent investment in facilitating deliberative action comes to light in the notion of “reasonable communicat[ion]” as courts insist on the possibility of access to terms.¹⁰⁵ To the extent that case law has shifted from a focus on the “special” nature of adhesion contracts to the applicability of traditional contract principles, consumer contracts offer a stylized example of how contract doctrine must necessarily mediate between conversations, or between the lived experience and legally posited notion of reasonableness.¹⁰⁶

101. See, e.g., *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) (citing *Register.com, Inc.*, 356 F.3d at 403 (“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”)).

102. See, e.g., *DeJohn v. TV Corp. Int'l*, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003) (enforcing a choice of law and forum selection provision in a service agreement provided through a hyperlink directly above a box indicating the user had read, understood, and agreed to the terms of the contract, which the consumer had to click to obtain service). The court stated, “The fact that DeJohn claims that he did not read the contract is irrelevant because absent fraud (not alleged here), failure to read a contract is not a get out of jail free card This same rule applies to electronic contracts.” *Id.*; but cf. *Chandler*, 374 F.2d at 136 (noting in context of a transaction between an individual and a shipping company that “ordinarily, one who signs a contract cannot avoid it on the ground that he did not read it or that he took someone else’s word as to what it contained. But an agreement signed without negligence under the belief that it is an instrument of a different character is void, and the failure to read an instrument is not negligence per se but must be considered in light of all surrounding facts and circumstances.”) (citation omitted).

103. Thus for example, judges speak of “inquiry notice” and “constructive knowledge.” See, e.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012) (“[W]here the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue. In other words, where there is no actual notice of the term, an offeree is still bound by the provision if he or she is on *inquiry* notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent.”); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 30 n.14 (2d Cir. 2002) (“Inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry.” (internal quotation marks omitted)).

104. See, e.g., *Specht*, 306 F.3d at 17; *Hoffman v. Supplements ToGo Mgmt., LLC*, 18 A.3d 210, 219–20 (N.J. Super. Ct. App. Div. 2011) (holding forum selection clause on Internet seller’s website presumptively unenforceable when clause would not appear on buyer’s computer screen unless buyer scrolled down to display the submerged clause before adding product to his or her electronic shopping cart).

105. See, e.g., *Fteja*, 841 F. Supp. 2d at 838.

106. See *Rakoff*, *supra* note 4, at 1174–75.

As Kessler noted, the law is implicated in the determination of reasonableness and its corresponding grant of power.¹⁰⁷ Thus, online contracts and other standard consumer contracts serve as a vivid illustration of the inherent tension in contract law between the theoretical privileging of agreement and contract law's role in establishing conventions that enable the leveraging of the idea of agreement to reinforce parties' existing advantages. This tension is particularly salient in disputes involving online consumer transactions. In these cases, courts routinely confront threshold issues such as the validity of predispute-arbitration and forum selection provisions.¹⁰⁸ Such procedural provisions impact the relative distribution of power between the parties and thus affect possibility for redress.¹⁰⁹ At the same time—in addition to the fact that courts, firms, and consumers presume the terms will not be read—these provisions pose a signal challenge to a consumer's ability to rationally assimilate their substantive implications.¹¹⁰ They are functionally unreadable for consumers. In this context, a story of agreement is invoked expressing a rhetorical commitment to a notion of contract involving the possibility of reading and deliberation so as to facilitate meaningful agreement (including with respect to ancillary procedural terms). In practice, this approach serves to strengthen the enforceability against consumers of functionally illegible terms. The conventions of notice and assent function as a language shared by courts and firms, but to which consumers do not have meaningful access. The operation of these conventions exemplifies how contract can enable parties to capitalize upon one form of wealth to further extract wealth from a counterpart.¹¹¹ They reflect and exacerbate the existing disparity in information or wealth between the company and consumers, enabling a further allocation of resources in a company's favor.¹¹²

107. See Kessler, *supra* note 4, at 640.

108. See RADIN, *BOILERPLATE*, *supra* note 4, at 130–38.

109. See *id.* at 4–8, 33–34; see also *supra* Part I.

110. See, e.g., Eisenberg, *supra* note 4, at 243; Korobkin, *supra* note 4, at 1217 n.45.

111. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 496 (1980).

112. In response to the claim that the savings to a firm through the use of such provisions will be passed along in the price charged the consumer, Radin points to the need for empirical evidence in support of this position. RADIN, *BOILERPLATE*, *supra* note 4, at 80. The presumption that the benefit accrued through savings to a firm will be passed along to the consumer has come to undergird, if at times implicitly, the treatment of contract-procedure terms, growing out of the landmark case *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Articulating reasons for the inclusion of a nonnegotiable forum selection clause, the majority opinion in

Following a brief discussion of the bright-line doctrine that courts apply in policing the boundaries of enforceable terms, I examine a narrative of notice involving the legibility of signs, presented in *Register.com v. Verio*. This Second Circuit case concerns online transactions between firms, but the narrative it presents is invoked in consumer cases.¹¹³ This narrative indicates the commitment to a *possibility* of knowledge and deliberation that underpins the conceptual challenge facing courts considering contract-procedure terms in the consumer context. Indeed, this narrative of deliberative agreement exacerbates the leveraging of power inherent to contract. After this discussion, I turn to the duty to read as a doctrinal acknowledgment of the need to mediate signs, which points in principle away from the presumptive enforceability of such terms, notwithstanding its literal presumption of enforceability.

A. Policing of Assent in Online Transactions – The Bright Line of Reasonable Notice and Manifested Assent

Firms employ various modes of implementing online consumer transactions, and courts acknowledge the varied and dynamic landscape of website interfaces.¹¹⁴ Though courts refer to “clickwrap” and “browsewrap” agreements, suggesting different degrees of consumer action and manifested agency,¹¹⁵ the crucial question for

Carnival Cruise stated that, in addition to the special interest a firm may have in limiting the forum for a suit and the cost savings of determining that site *ex ante*, “it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.” *Id.* at 594. The majority’s speculative language reflects the hypothetical nature of its opinion, which, without empirical support, ultimately privileges the firm in an allocation of wealth. The fact that terms such as forum selection provisions implicate rights in ways that are not immediately apparent from their language puts pressure on an efficient market theory. See Korobkin, *supra* note 4, at 1206, 1217–18. If empirical evidence were to support this presumption, there is still a question as to whether a price ought to be placed on access to courts. See RADIN, BOILERPLATE, *supra* note 4, at 32, 36. Thus, the issue remains one of allocating power. I do not mean to suggest that the challenge to the contract ideal could be remedied through disclosure. Instead, I trace courts’ insistence on notice as an indication of a persisting doctrinal investment in something more than a fiction of agency. However, if we are to take agency seriously we should examine the structures in place that might make it possible.

113. *Register.com, Inc. v. Verio*, 356 F.3d 393 (2d Cir. 2004).

114. See, e.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 129–30 n.18 (2d Cir. 2012); see also *Swift v. Zynga Game Network, Inc.* 805 F. Supp. 2d 904, 910–12 (N.D. Cal. 2011).

115. So-called “clickwrap” agreements require a user to click prior to proceeding further in an order or service. See *Hoffman v. Supplements ToGo Mgmt., LLC*, 18 A.3d 210, 219 (N.J. Super. Ct. App. Div. 2011); see also Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps*,

courts is “whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.”¹¹⁶ Courts seek both “reasonable notice” of terms and a consumer’s “manifested assent” in enforcing the fine print of such transactions.¹¹⁷ Notice thereby figures conceptually as a necessary baseline to precipitate (or at least enable) agency and choice in contracting.

Notice and assent may be “constructed,” however, from the form and process required of the consumer absent particular action, such as a special click.¹¹⁸ For example, a highlighted hyperlink to the terms and conditions along with a notice—“By submitting you agree to the Terms of Use”—has been deemed “reasonable notice” and “manifested assent” to a forum selection clause contained in the terms, when a consumer continued with the transaction and submitted his information.¹¹⁹ Although courts, by their own account, “usually uphold browsewraps if the user ‘has actual or constructive knowledge of a site’s terms and conditions prior to using the site,’”¹²⁰ they will at times distinguish the presentation of contract terms described above from a situation in which there was no prompting by the site to scroll down and a user could not see the

Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse, 26 *BYU J. PUB. L.* 1, 17 (2012). Browsewrap agreements do not require a user to take any affirmative action concerning the terms of agreement, but rather purport by their terms to bind a user. *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009) (citing *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)), *aff’d*, 380 F. App’x 22 (2d Cir. 2010). See *Preston & McCann, supra*, at 19. These categories have been acknowledged as oversimplifications of the variety of website interfaces, but they are used by courts, if not dispositively, to construe the form of transaction. See, e.g., *Hoffman*, 18 A.3d at 219 (distinguishing between “internet transaction cases [that] involve mechanisms to create a ‘clickwrap’ agreement, in which the consumer manifests his or her assent by clicking an icon displayed on the screen” and those involving a “browsewrap” agreement, “in which the consumer does not click an icon to manifest acceptance but instead is presented with prominent language on his or her screen that the ‘use of the [web]site constitutes acceptance of its terms of service’”) (quoting *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009)); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 n.1 (E.D. Pa. 2007) (distinguishing “clickwrap” and “browsewrap” agreements).

116. *Hines*, 668 F. Supp. 2d at 367. The distinction between “clickwrap” and “browsewrap” does not render browsewrap agreements unenforceable per se. See *Swift*, 805 F. Supp. 2d at 915.

117. See, e.g., *Major v. McCallister*, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009) (citing *Burcham v. Expedia, Inc.*, 4:07CV1963 CDP, 2009 WL 586513, at *2 (E.D. Mo. Mar. 6, 2009)).

118. *Id.* at 230 (quoting *Southwest Airlines Co. v. Boardfirst, LLC*, No. 3:06-CV-0891-B, 2007 WL 4823761, at *5 (N.D. Tex. Sept. 12, 2007)).

119. See *id.* at 229.

120. *Id.* at 230 (internal citations omitted).

terms without doing so.¹²¹ In cases in which a website does not direct a user to the existence of terms, courts have refused to enforce them.¹²²

This approach grows out of the seminal and oft-cited Second Circuit opinion in *Specht v. Netscape Communications Corp.*¹²³ In this case, Internet users brought a class action suit against software producer Netscape, alleging an invasion of privacy.¹²⁴ Seeking to stay proceedings and compel arbitration, Netscape pointed to software license terms mandating arbitration. These terms were available on a screen accessible only by scrolling down below the download button.¹²⁵ The Second Circuit Court of Appeals, in an opinion written by then-Circuit-Judge Sonia Sotomayor, held that “a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants’ invitation to download the free software . . . defendants therefore did not provide reasonable notice” of the terms.¹²⁶ Holding the arbitration provision unenforceable, the court found that without such notice, the act of downloading the software did not “unambiguously manifest assent” to the terms.¹²⁷

121. *See id.* Because the website in this case “*did* put immediately visible notice of the existence of license terms,” the court invoked the traditional contract law doctrine of the duty to read in enforcing the terms: “Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms.” *Id.* (internal quotations marks and citation omitted).

122. *See, e.g.,* *Nguyen v. Barnes & Noble, Inc.*, No. 8:12-CV-0812-JST (RNBx), 2012 WL 3711081, at *2 (C.D. Cal. Aug. 28, 2012) (denying a motion to stay for arbitration when arbitration provision was accessible through a Terms of Use hyperlink located at the bottom of the Barnes and Noble webpages from which a customer makes a purchase and site did not specifically direct users to the Terms prior to purchase); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (holding invalid arbitration clause accessible via hyperlink to online retailer’s Terms of Use because consumers had no actual or constructive notice of Terms of Use; the link to Terms could not be seen without scrolling down to the bottom of the screen, which was not required to effectuate a purchase, and notice that “Entering this Site will constitute [a consumer’s] acceptance of these Terms and Conditions” was only available within terms and conditions).

123. *Specht v. Netscape Comm’ns Corp.*, 306 F.3d 17, 17 (2d Cir. 2002). The case is also invoked by courts upholding ancillary terms. For example, in *Major v. McCallister*, the court refused to analogize the facts in this case to those in *Specht*, but asserted, “[e]ven *Specht* indicates that ‘unambiguous manifestation of assent to license terms’ may be unnecessary if there is ‘an immediately visible notice’ of their existence.” 302 S.W.3d at 230 (citing *Specht*, 306 F.3d at 31).

124. *Specht*, 306 F.3d at 21. Free software provided by Netscape had transmitted personal information unbeknownst to users of the Internet browser. *Id.*

125. *Id.* at 20.

126. *Id.*

127. *Id.* The Second Circuit contrasted these terms with a clickwrap license also offered to some plaintiffs in connection with installation of another program in which users are asked to

Requiring a manifestation of agreement for a transaction to be deemed a contract,¹²⁸ the court invoked the principle of “knowing consent” and noted the significance of “[c]larity and conspicuousness of arbitration terms . . . in securing informed assent.”¹²⁹ As it explained, “[i]f a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto.”¹³⁰ The court dismissed the defendant’s claim that, held to a standard of reasonable prudence, an offeree in this circumstance would have necessarily known or learned of the agreement before downloading so as to have had constructive notice of the particular terms.¹³¹ At the same time, the court acknowledged the “duty to read” doctrine.¹³² Recognizing that “receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms,” the

scroll through terms and click to proceed. The Court noted in contrast the absence in this case of any mention of the license agreement. *Id.* at 23.

128. *Id.* at 28–29.

129. *Id.* at 30. The Second Circuit opinion underscored the application of contract doctrine to arbitration provisions under California law, noting that “[t]his principle of knowing consent applies with particular force to provisions for arbitration.” *Id.* (citations omitted). The holding in *Specht* preceded the Supreme Court’s decision in *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1747–48 (2011), that the Federal Arbitration Act preempts state law, which in *Concepcion* involved California’s prohibition of contracts disallowing class-wide remedies in certain circumstances. The liberal federal policy favoring arbitration and the principle that arbitration is a matter of contract along with the duty to read leads courts to find “knowing consent” to arbitration as long as language purports to alert the consumer to the existence of terms and the possibility exists that a consumer could find the term were he to look. *See, e.g., Bar-Ayal v. Time Warner Cable Inc.*, No. 3-CV-9905KMW, 2006 WL 2990032, at *8 (S.D.N.Y. Oct. 16, 2006) (a position further strengthened by the Supreme Court’s holding in *Concepcion*).

130. *Specht*, 306 F.3d at 30 (citations omitted). As the court notes, California contract law applies an objective standard in determining assent, considering the acts of the offeree as well as the transactional context. *Id.* at 29–30.

131. *Id.* at 32.

132. *Id.* at 30. The court stated, “[i]t is true that a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.” *Id.* (citations omitted). It noted, though, that “courts are quick to add” that an exception exists to this rule “when the writing does not appear to be a contract and the terms are not called to the attention of the recipient.” *Id.* (citations omitted). The court invoked California case law which placed particular emphasis on conspicuousness of arbitration terms. *See, e.g., Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 350 (Ct. App. 1972). State law placing a heightened requirement of conspicuousness on arbitration provisions would run aground of the overriding federal policy favoring arbitration in light of *Concepcion*. The Second Circuit’s holding in this case did not rely on a heightened conspicuousness requirement for arbitration provisions, though it invoked it. *Id.* at 32.

court asserted that “these principles apply equally to the emergent world of online product delivery”¹³³ Nonetheless, the court drew a line in *Specht*, refusing to accept that a reasonably prudent offeree would have known of the existence of terms when offered a free download with no “immediately visible notice of the existence of license terms [and no requirement of an] unambiguous manifestation of assent”¹³⁴

Although it is possible that the position of the scroll bar could have indicated to an Internet user that a portion of the screen remained below the download button, the court rejected the argument that a reasonably prudent user would conclude “that this portion contained a notice of license terms.”¹³⁵ In this manner, the court posited a bright line as to the existence of notice of contract terms, taking both a normative and positive position on what would be reasonable for an individual to consider.¹³⁶ In the current world of online contracting as enforced, the obligation to scroll all the way down a page to check for terms might or might not be an unreasonable assumption from a normative perspective a decade after this decision (even if it has been posited unreasonable). However, subsequent cases have built on *Specht*’s normative and positive line drawing, as discussed below. *Specht* and its progeny thereby demonstrate the way that contracts—and the line drawing around reasonable expectations and behavior—necessarily mediate between various experiences and accounts of transacting.

Specht set the stage for a relatively bright-line standard of enforceability,¹³⁷ which on its face accounts for some of the actual experience of a reasonable individual—at least in terms of the question of the terms’ existence.¹³⁸ This approach emphasizes the significance of

133. *Specht*, 306 F.3d at 30. As the court explains, under California law “‘inquiry notice’ is ‘actual notice of circumstances sufficient to put a prudent man upon inquiry.’” *Id.* at 30 n.14 (citations omitted).

134. *Id.* at 31.

135. *Id.* at 31–32.

136. *Id.* at 32; *see supra* note 5.

137. For example, a New Jersey appellate court found a forum selection clause in an online agreement presumptively unenforceable based on the unrebutted contention by website users that the forum selection clause would not be visible on a user’s screen unless he or she scrolled down to a submerged portion of the webpage where the disclaimer containing the clause appeared. *See generally*, *Hoffman v. Supplements ToGo Mgmt., LLC*, 18 A.3d 210, 210 (N.J. Super. Ct. App. Div. 2011) (invalidating online forum selection clause because the defendant’s website was structured in an unfair manner).

138. The court rejected the defendant company’s argument that users could have been aware that “an unexplored portion of the . . . webpage remained below the download button,”

alerting consumers to the bounds of the transaction, even if they actually fail to read the precise terms.

From this perspective, then, the treatment of online contracting might, at first blush, appear to correspond in practice with Randy Barnett's characterization of the form contract as a "sealed envelope" to which a consumer can choose to agree.¹³⁹ However, the line drawing by courts around the—albeit highly attenuated—possibility of knowledge as an empirical matter, puts pressure on Barnett's simile and its justification for terms resistant to meaningful understanding by a consumer. One case in federal district court demonstrates the common law significance of the possibility of specific knowledge or understanding—the possibility of opening the envelope and reading the contents—that is implicit in *Specht*.

In *Harris v. ComScore, Inc.*, a district court in the Northern District of Illinois drew on Judge Sotomayor's opinion in *Specht* and the significance it placed on the existence of terms being reasonably apparent to a user.¹⁴⁰ In *Harris*, the court invalidated a forum selection clause in an online transaction.¹⁴¹ While notice of the existence of terms was presented, the court found that the forum selection provision in particular could not be reasonably located.¹⁴²

Countering a class-action suit regarding the use of personal information,¹⁴³ ComScore filed a motion to dismiss or transfer venue in light of a forum selection provision that was included in the user license agreement available on the site.¹⁴⁴ The company pointed to the fact that before installing the software, a user was required to "click a box acknowledging that he or she had 'read [and] agree[d] to . . . the terms and conditions of the Privacy Statement and User License Agreement.'"¹⁴⁵ The court sought an indication that the pro-

asserting that this "does not mean that they reasonably should have concluded that this [unexplored] portion contained a notice of license terms." *Specht*, 306 F.3d at 32. The opinion's conflation of paper and online transactions eschews the real world distinctions between the experience of clicking and transacting with paper as outlined by Preston & McCann, *supra* note 116, at 27–28. See also, Kim, *supra* note 51, at 273.

139. See Barnett, *supra* note 4, at 636.

140. See *Harris v. ComScore, Inc.*, 825 F. Supp. 2d 924, 927 (N.D. Ill. 2011).

141. *Id.*

142. *Id.*

143. ComScore gathered data of consumer Internet use to be sold for marketing research by inducing Internet use through offers of access to free programs and prizes for each download. *Id.* at 926.

144. *Id.* at 925.

145. *Id.* at 926 (internal quotation marks omitted).

vision “was reasonably communicated to the plaintiff.”¹⁴⁶ The users claimed, however, that they remained unaware of the forum selection provision, and, in particular, that the forum selection provision was not apparent when the free software downloaded.¹⁴⁷ Thus, the federal district court distinguished this case from precedents holding clickwrap agreements enforceable.¹⁴⁸ Because the terms of service were obscured during the software’s installation “in such a way that the average, non-expert consumer would not notice the hyperlink to them”¹⁴⁹ and the “agreement was not readily available to the user,” the court declined “to infer that clicking a box acknowledging that a user has read an agreement indicates that the agreement was reasonably available to the user. . . .”¹⁵⁰

The invalidation of clickwrap agreements by courts is rare, and even an affirmative act of assent, such as clicking a box, is typically treated by courts as unnecessary in circumstances involving notice and an ostensible opportunity to read.¹⁵¹ However, as *Harris v. Comscore, Inc.* and the approach in *Specht* indicate—along with the close reading of another instructive case, which follows—the formalistic approach of courts remains undergirded by an investment in the possibility (if not the reality) of an intentional act of measured choice. Courts continue to draw on a narrative of reading, thereby gesturing toward the *possibility* of meaningful or experienced agreement.¹⁵²

146. *Id.* As the court explained, a reasonableness standard informs a forum selection clause’s prima facie validity; the reasonable communication of the existence of the provision is one factor in this reasonableness standard. *Id.*

147. This claim was not rebutted by the company. *Id.*

148. The plaintiffs asserted that they did not agree to the User License Agreement and that they did not know that they were installing the company’s “Surveillance Software” when installing the free downloads. *Id.* at 926–27.

149. *Id.* at 926.

150. *Id.* at 927. The court took this position in denying the defendant’s motion to dismiss or transfer venue, but noted that “further factual development may indicate that the plaintiff’s allegations are incorrect, that the terms of the license agreement were reasonably available during the installation process, and that the plaintiffs therefore must have manifested assent to the contract and the forum selection clause.” *Id.* This approach continues to underscore the significance of a party’s actual reasonable access to terms in the legal standard of manifesting assent.

151. Preston & McCann, *supra* note 116, at 30 (noting the trend for courts in clickwrap and browsewrap cases from 2009–2011 to hold that people should generally be aware that terms of use exist and thus that people have constructive notice of terms).

152. To the extent it can be seen as such, this kind of striving to bridge the gap between legally posited truth and empirical fact emerges in other areas of law, creating its own particular tensions in each. For example, evidence discourse has been described “as a relentless effort

One particular narrative, presented in the case of *Register.com v. Verio*, distills the implicit doctrinal investment in the possibility of conventionally legible terms. Paradoxically, this case has served as a precedent for enforcement on the basis of “constructive knowledge” of asymmetrically illegible terms. Notwithstanding the need to posit signs, in this context, the case points to a doctrinal commitment to strive for a possibility of experienced, shared understanding.¹⁵³

*B. How 'Bout Them Apples: A Story of Reading Signs in
Register.com v. Verio*

The transactions involving Louis CK and American Express, along with the case law discussed above, reflect the conceptual significance of an idea—or ideal—of agreement in practice and in doctrine. At the very least, a notion of agreement is marshaled in one way by firms in dialogue with courts, and in other ways, in relation to consumers. Doctrinal approaches such as “constructive knowledge” and “manifested assent” reflect the unavoidable challenge of fixing meaning and markers of agency (as does the duty to read, which is addressed next). Notwithstanding the acknowledgment of the necessarily constructed, or posited, nature of agreement that is always an element of contract, the bright-line rules around notice demonstrate the ways that legal treatment of contract continues to seek at least the possibility of connection, knowledge, and experienced consent by both parties.

By examining the stories told by courts, along with those told by firms, we can judge the extent to which the narrative of agreement turns from an aspiration, if not an entirely realizable ideal, to a story of subversion that unjustly benefits the already powerful. In contemporary life, the operation of procedural contract terms in consumer transactions—specifically because of the issue of legibility as a value and quality of contract—tips the balance in favor of presumptive unenforceability. As the narratives being invoked by courts (and firms) both attest to legal signs of agreement and subvert even the possibility of such signs being experienced by both parties, these stories become incoherent on their own terms.

either to close or to justify and hence rationalize, as best it can, an epistemological gap [between legal and empirical fact].” See Anat Rosenberg, *The History of Genres: Reaching for Reality in Law and Literature*, 39 LAW & SOC. INQUIRY 1057, 1068 n.14 (2014).

153. See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–04 (2d Cir. 2004).

One particular analogy presented by Judge Pierre Leval in another landmark online contract case illuminates the framework and the significance of distinguishing between the primary terms of the deal and procedural terms in the context of consumer transactions.¹⁵⁴ The analogy illustrates the conceptual commitment in contract doctrine to signs that adhere to a convention of readability. This convention hews to common-sense standards or the possibility of an actual shared reality (rather than pure legal fiction). A common-sense narrative reflects shared internalized norms of fairness and possibility. To the extent that a story defies common sense it can serve as a valuable cultural marker in testing the limits of the allocation of power through the law.

The story Judge Leval tells in his opinion in *Register.com, Inc. v. Verio, Inc.* underscores the way in which potentially decodable terms—in his story, literally, self-evident signs—are at the heart of contract discourse.¹⁵⁵ This story also makes salient the ways in which courts' bright-line determinations of notice and reasonable communication function to leverage a narrative of agreement, and thus existing power, at the consumer's expense when applied to terms that remain legible only to drafters and courts.

Unlike the cases discussed above, *Register.com* involved a merchant-to-merchant transaction.¹⁵⁶ The question in this case arose as to whether Verio, a website development firm, was bound by terms presented to it via email after the transaction by Register.com, an Internet domain name registrar.¹⁵⁷ Verio repeatedly submitted service requests to Register.com, and each time following the request and resulting transaction, Register.com provided Verio a notice of certain terms.¹⁵⁸ Judge Leval's discussion of why Verio was on notice

154. Terms that assert the primary benefits and responsibilities enjoyed by the parties have been termed "performance terms" and are distinguished from "enforcement terms," which incentivize performance or govern circumstances of non-performance. Burton & Andersen, *supra* note 8, at 873. Contract-procedure terms can be viewed as a subset in the category of enforcement terms, which Burton and Andersen argue should be understood by courts as secondary to performance terms when weighing their enforcement. *Id.* at 874–75.

155. 356 F.3d at 401.

156. *Id.* at 395. As noted, the parties' organizational structure does not on its own determine the power dynamic between them. In *Register.com*, however, the relationship between the merchant-parties can be distinguished from a seller-consumer relationship in that both parties were engaged in repeat commercial transactions with each other and had the reason to consider and the ability to assess the impact of the fine-print terms. *Id.* at 395–96.

157. *Id.* at 401.

158. *Id.* at 396.

and thus bound by terms with respect to any transactions that followed the initial notification from Register.com distills the narrative of agreement underpinning the doctrine and mobilized by firms.¹⁵⁹ In doing so, it not only suggests an aspirational view of contract as precipitating meaningful (perhaps even probable) deliberation, but makes salient the particular contextual parameters on which the coherence of the narrative depends.

Concerning this aspect of the case, Judge Leval offered a story by way of analogy, the accessibility of which speaks to the significance of a common sense analysis of contract. He described a situation in which:

[P]laintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples—50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.¹⁶⁰

If "P sues D in contract for the price of the apples taken," Judge Leval explained, D's defense "that on no occasion did he see P's price notice until after he had bitten into the apples. . . . may well prevail as to the first apple taken."¹⁶¹ Nonetheless, the opinion asserts:

D cannot continue on a daily basis to take apples for free, *knowing full well* that P is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.¹⁶²

Judge Leval likened this scenario to the case before him. In this case, Verio continued drawing data from Register.com, "with *full knowledge* that Register offered access subject to these restrictions."¹⁶³ The opinion then extends this analysis to the online transacting con-

159. *See id.* at 401-03.

160. *Id.* at 401.

161. *Id.*

162. *Id.* (emphasis added).

163. *Id.* at 402 (emphasis added).

text and applies “standard contract doctrine.”¹⁶⁴ Judge Leval returns to the fruit stand example, explaining:

the visitor, who sees apples offered for 50 cents apiece and takes an apple, owes 50 cents, regardless whether he did or did not say, “I agree.” The choice offered in such circumstances is to take the apple on the *known terms* of the offer or not to take the apple.¹⁶⁵

As the court in *Register.com* “s[aw] it,” the case involved:

a similar choice. Each [purchaser] was offered access to information subject to terms of which they were *well aware*. Their choice was either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits.¹⁶⁶

As the language of Judge Leval’s *Register.com* opinion suggests, potential knowledge and the meaningful choice it engenders undergird the analysis and implicitly provide a rationale for the doctrine.¹⁶⁷ The option to decline the deal, as Judge Leval presents it, implies the possibility of deliberation (“if the terms were not acceptable”).¹⁶⁸ In addition, the story’s persuasive power depends on the context of the transaction. This context is implicit in the narrative: this case involved sophisticated, and thus relatively similarly positioned, parties on both sides, rather than a repeat-player firm and an individual consumer.¹⁶⁹ Thus Judge Leval’s analogy reflects this parity of the parties, paring¹⁷⁰ the scene down to an individual seller and consumer having equal access to information—much along the lines of Louis CK’s virtual handshake.

In addition, the story’s persuasive force depends as well on the presentation of and nature of the terms discussed. A buyer, in Judge Leval’s telling, is confronted with a clear sign that effectively com-

164. *Id.* at 403.

165. *Id.* (emphasis added).

166. *Id.* (emphasis added).

167. *See id.*

168. *See id.*

169. It also bears noting that the scenario and transaction involving an ongoing series of exchanges is closer on a continuum to an embedded relational contract paradigm than a more discrete, one-off consumer transaction. *See* Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 894–96 (2000). Judge Leval’s analysis underscores the relevance of an existing or ongoing relationship.

170. No pun intended.

municates price and quantity in the context of no other terms.¹⁷¹ Judge Leval's description emphasizes the choice at hand—"to take the apple on the *known terms* of the offer or not to take the apple."¹⁷² Thus the persuasive force of the story and of the role of notice, which serves as the key to enforcement of terms in this case, operates in a particular framework of symmetrical access to readily assessable information—the price—presented in isolation from competing or ancillary terms.¹⁷³ In this way, the narrative distills the implicit presumptions—or as I argue, preconditions—for agreement.

This case serves as another important precedent for the practice of Internet contracting and is invoked in cases involving circumstances distinct from those presented or imagined in *Register.com*. In such cases involving consumer transactions, courts recognize the relevance of the context and narrative elements in *Register.com* to varying degrees.¹⁷⁴ With respect to a motion by a defendant online company to block a class action and compel arbitration on the basis of terms included in an email to consumers, the Second Circuit, in *Schnabel v. Trilegiant Corp.*, invoked *Register.com* for the principle that acceptance of a benefit can constitute assent "but only where the 'offeree makes a decision to take the benefit with knowledge [actual or constructive] of the terms of the offer. . . .'"¹⁷⁵ In doing so, the court

171. This takes place before, not after, the fact for contract enforcement purposes. As such, on its face, this analogy as understood by Judge Leval does not provide support for the enforcement of "pay-now-terms-later" or "rolling" contracts in the consumer context; instead it might be best understood through a relational contract lens.

172. *Register.com*, 356 F.3d at 403 (emphasis added).

173. Rather than information concerning price and quantity, in the case before Judge Leval, the notice posted by Register.com concerned a restriction on the use of data provided for mass solicitations. However, in the context of a sophisticated-party transaction in which Verio ostensibly sought to obtain a product for its own business purposes, a limit on use of the product can be seen as a salient product feature, and thus a performance term. In fact, Verio conceded that it knew of restrictions imposed by Register.com on the use of the data provided but argued that it was not contractually bound by the terms sent subsequent to each of the repeated transactions. *Id.* at 401–02.

174. See, e.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012).

175. *Id.* (quoting *Register.com*, 356 F.3d at 403). In this case, consumers sought to bring a class action against a business of online discounts on goods and services. *Id.* at 113. The discount company failed to raise and thus forfeited a claim that parties were bound to an arbitration provision available via hyperlink on the enrollment screen. *Id.* at 130. Instead, the company asserted that it provided notice of an arbitration provision through an email following the consumers' enrollment in the contract. *Id.* at 113. The court rejected the contention that an email following the transaction provided sufficient notice. *Id.* However, the opinion noted, had the presence of the hyperlink been raised at the district court level, it "might have created a substantial question" concerning the applicability of the term. *Id.* at 129–30. As the court described it:

explicitly imported the notion of constructive notice, and asserted that where “purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue.”¹⁷⁶

In light of the Supreme Court’s current position favoring arbitration,¹⁷⁷ this case did not discuss the salience in a consumer context of an arbitration provision as opposed to a price term—or an arbitration provision in a sophisticated-party transaction, for that matter.¹⁷⁸ Nonetheless, the court’s strained invocation of Judge Leval’s scenario demonstrates the conceptual challenge in treating ancillary, asymmetrically hard-to-assess terms as provisions to which even the principle of constructive notice might apply. The court seeks to explain Judge Leval’s scenario by referencing an online transaction: “It is elementary that in such circumstances, a reasonable browser becomes aware of the existence of additional terms—in Judge Leval’s example, that the apples must be paid for—even if he or she is not then familiar with their precise contours—*i.e.*, the then-current price of each apple.”¹⁷⁹

This explanation highlights the tension created in the application of the apple-stand story to a scenario involving contract-procedure

[t]he presentation of terms on the screens in the case before us falls outside both the clickwrap and browsewrap categories. Unlike the paradigmatic browsewrap agreement, in this case there is some indication near the button that a user must “click” in order to subscribe to the service, that the service includes additional terms and that the user assents to these terms by clicking the button. In contrast to the typical clickwrap agreement, however, the button itself does not make explicit reference to these terms in asking the end-user whether he or she assents to them. It only suggests that a user can sign up for the benefits of the membership by clicking “Yes.”

Id. at 130 n.18. In line with the policing of notice, a court considering this situation would likely focus on whether the existence of the terms via hyperlink was reasonably communicated and might posit that a user would understand that these terms would be part of the deal.

176. *Schnabel*, 697 F.3d at 120. The Second Circuit marked the significance of context in terms of the temporal framework of the parties’ relations. Dismissing the claim that by sending an email following a transaction the parties were on notice of terms, the Second Circuit distinguished this case from *Register.com*, noting that in this case “there was no prior relationship between the parties that would have suggested that terms sent by email after the initial enrollment were to become part of the contract.” *Id.* at 126 (citation omitted).

177. *See supra* notes 67, 71, 130 and accompanying text. Citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Second Circuit Court of Appeals Judge Robert Sack began the legal discussion in *Schnabel* by acknowledging that “[t]he Supreme Court has repeatedly instructed that the Federal Arbitration Act (‘FAA’), 9 U.S.C. § 1 *et seq.*, first enacted in 1925, ‘embod[ies] a national policy favoring arbitration’ The Act places arbitration agreements ‘upon the same footing as other contracts.’ But it ‘does not require parties to arbitrate when they have not agreed to do so.’” *Schnabel*, 697 F.3d at 118 (citations omitted).

178. *See Schnabel*, 697 F.3d 110.

179. *Id.* at 125.

terms in a consumer context. In doing so, the court transforms the idea of notice of the existence of price and thus the very nature of the transaction—a sale as opposed to a gift, perhaps—into notice of “the existence of *additional* terms.”¹⁸⁰ As such, this discussion reconceptualizes an isolated sign of conventionally accessible information—the price, a crucial contract term—as an ancillary term. It thereby blurs the distinction between an individual’s potential ability to assimilate the significance of each type of term, especially as it functions in the context of other terms.¹⁸¹

Further complicating the analogy between self-evident price terms and arbitration clauses, the opinion in *Schnabel* includes a comment suggesting the consumer’s knowledge *ex-ante* of a pricing term as commonplace.¹⁸² As the court states by way of footnote: “The argument may be made that a reasonable purchaser would know, even before biting into the first apple, that it is likely that the store owner expects to be paid for the piece of fruit. ‘There ain’t no such thing as free lunch.’”¹⁸³ In this manner, the opinion implicitly underscores the difference in expectations and function between ancillary contract-procedure terms, on one hand, and pricing, which functions to constitute the deal, on the other hand. More importantly, it points to the significance of a world of conventions (*i.e.*, we each have to pay for our own lunch) that is shared by the consumer as an appropriate and existing norm.

Put another way, just as Louis CK’s straight-talking marketing strategy resonates with consumers, the story of the apple stand resonates with respect to its own terms. The apple stand story tells of a purchaser confronted after the fact with an accessible notification of price, who is therefore bound in future purchases to the price listed.¹⁸⁴ This narrative reads as simple and intuitive because it reflects a reader’s expectations about each party’s responsibility. An

180. *Id.* at 126 (emphasis added).

181. The language in *Schnabel* also suggests that the customer would owe whatever amount was on the sign he saw after eating the apple. *See id.* at 125 n.15. This is not entirely clear from the example in *Register.com*, as Judge Leval concedes that the person taking the apple might not be bound in the first instance prior to viewing of the sign. 356 F.3d at 401. The enforceability of a price other than the one previously viewed would hinge, in part, on whether there was an agreement to modify provisions unilaterally, whether it was considered a single ongoing transaction, and whether knowledge of a price is sufficient notice that there may be a different price in the future. *But cf. Schnabel*, 697 F.3d at 125–26.

182. *Schnabel*, 697 F.3d at 125 n.15.

183. *Id.*

184. *Register.com*, 356 F.3d at 401.

obscured sign would not necessarily bind a party.¹⁸⁵ The act of taking possession, however, in a context that typically signals a sale (rather than a freebie) to a consumer along with a legible indication of this in the form of a “50¢ an apple” sign create a situation that reasonably signals to the seller to rely on the signs of a deal. This reasonableness stems from the court’s (and presumably a reader’s) sense of the fairness of the transaction—and thus a collective acceptance of the balance of power—presented in a stylized level playing field.¹⁸⁶ Courts draw on this narrative to explain the presumptive validity of contract-procedure terms that are particularly hard for a consumer, in inverse relation to the drafting firm to assess.¹⁸⁷ In the process, the narrative—undergirded by presuppositions of real-life legibility and the possibility of reasonable assessment—becomes tautological. The narrative thereby loses its justificatory power, even as an aspirational mode, and simply describes the way a firm is granted the power to leverage its knowledge in its transaction with a consumer. As the opening discussion of American Express and Louis CK suggests, because of the cultural centrality of the narrative of agreement, this power redoubles the firm’s benefits at the unwitting expense of a consumer.

In *Fteja v. Facebook, Inc.*, a federal district court in New York engaged the challenge of applying the apple-stand scenario to ancillary procedural terms in consumer transactions even more explicitly.¹⁸⁸ In this case, the court enforced a forum selection clause in Facebook’s Terms of Service.¹⁸⁹ The site featured a hyperlink and a reference to the terms of use immediately below a sign-up button stating: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.”¹⁹⁰ The court drew on Judge Leval’s “rather simple analogy,” asserting:

The situation might be compared to one in which Facebook maintains a roadside fruit stand displaying bins of apples.

185. See *supra* Sections II.A. and II.B.

186. See generally *Schnabel*, 697 F.3d at 125. The very idea of contract posits a baseline of freedom and agency that naturalizes the necessary dynamics of power inherent in all contractual transactions. By examining this story, I hope to underscore the extent to which the story’s coherence rests on a collective sense of appropriate line drawing marking the difference between freedom and coercion.

187. See *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012).

188. See *id.*

189. *Id.* at 841.

190. *Id.* at 835.

For purposes of this case, suppose that above the bins of apples are signs that say, “By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign.”¹⁹¹

The analogy as reconfigured by the district court loses its persuasive force because of the collective understanding and shared experience of individuals with respect to the accessibility of such terms; instead, it simply describes the current reality confronted by purchasers and accepts the imposition of terms that are cognitively inaccessible or functionally illegible to the consumer alone.¹⁹² In other words, *Fteja*'s story resonates with courts and drafters seeking direction from the law but falls apart as an account that could resonate with a contracting individual.

This then brings the discussion back to the paradoxical treatment of certain terms under the current doctrine. Notice—the presence of a potentially legible sign—is crucial to contract enforcement.¹⁹³ As such, the approach suggests the possibility of an aspirational view of contract, which can approximate or perhaps even promote knowledge, choice, and thus agreement.¹⁹⁴ At the same time, this approach reflects the way the necessary positing of norms in contract serves as an allocation of power.

To the extent that a norm or formality is necessary to mediate the vagaries and challenges of expression, this reflects an inherent aspect of contract. Yet, as the model of the sign suggests, enforcing terms that cannot be potentially assessed in a meaningful way by only one of two parties reduces the contract down to an arbitrary distribution of wealth in favor of repeat-player corporations.¹⁹⁵ Thus,

191. *Id.* at 839 (citations omitted).

192. *Id.* The real-world analogue to the “apple stand” invoked in *Fteja* might be the Apple Store. Challenging the premise that consumers are coerced or victims of fraud, Omri Ben-Shahar presents an image of a “line of eager consumers outside one of Apple’s stores, on the rainy day that the iPhone 5 was launched.” Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 897 (2013). Yet, the fact that consumers are not able to—indeed, they are not actually expected to—meaningfully assess the value of the terms by which they are bound calls into question the rationale of consent and notice. The photograph indicates that consumers want to buy an iPhone but not that they have weighed the implications of ceding certain rights which Apple values.

193. See 2 WILLISTON ON CONTRACTS § 6:47 (4th ed. 2014).

194. See Rosenberg, *supra* note 153, for analogous striving in other areas of law, such as evidence law.

195. A term not read by any consumer compromises the efficient operation of the market. In addition it remains unclear as to whether savings to a firm through the use of such provi-

with respect to a procedural contract term, such as a forum selection, arbitration, or unilateral-modification provision available via hyperlink, for example, perhaps another analogous storyline is more apt: One could tell of an individual presented with a cipher or code on the back of a sign crafted by one party, the key to which is shared only between the crafting party and the court. Or, perhaps the storyline would involve terms written in an invisible ink, which becomes readable with tools available only to the sign creator and the court. When a sign offers little to no possibility of being deciphered in terms of what it means for the drafting party and courts,¹⁹⁶ as *Fjeta's* anecdote illustrates, the policing of the need to notify a consumer of its existence subverts the narrative of promoting or aspiring to agreement.¹⁹⁷

III. THE DUTY TO READ

A. Contract Doctrine Necessarily Negotiates Conventions of Communication and Power

The duty to read, as invoked in opinions such as *Fteja*,¹⁹⁸ serves at the first instance to reinforce drafting firms' superior knowledge

sions will be passed along in the price charged to the consumer. See RADIN, *BOILERPLATE*, *supra* note 4, at 80.

196. Michelle Boardman discusses the problem of the self-reinforcing loop that results from courts' clarifying the significance of terms when this clarification is asymmetrically available to the parties. Boardman, *supra* note 13, at 1105. This underscores the difference between the dynamics of notice and shared meaning in transactions whose structure reflects the likelihood that only one party understands the language read by courts, on one hand, and the dynamics in cases involving transaction structures allowing parties similar access to the legal language and its implications, on the other.

197. *Fteja* invokes *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), noting that the deal in *Carnival Cruise* functioned as a rolling, or pay-now, terms-later contract because the consumer did not receive the ticket until after the terms became binding. *Fteja*, 841 F. Supp. 2d at 839. The presumptive enforceability of the rolling contract begs the question of the allocation of resources, posing a further challenge even to an aspirational contract model. Since it is hard to imagine a rolling contract that poses no transaction costs to the consumer (e.g., a cost-free return process) and marshals no cognitive biases that hinder ex-post action (such as a status-quo bias), the model only puts more pressure on the possibility of facilitating deliberative agreement and thus an efficient term in the market.

198. *Fteja*, 841 F. Supp. 2d at 839 ("But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase 'Terms of Use' is really a sign that says 'Click Here for Terms of Use.' . . . Whether or not the consumer bothers to look is irrelevant. Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.").

and thus their power as compared to that of consumers.¹⁹⁹ The ways in which contract law addresses circumstances where power is wielded unfairly has been identified on the margins of doctrine. Thus, for example, the Restatement (Second) of Contracts carves out terms the drafting party has reason to believe would have prevented the assenting party from manifesting assent had the party known of them from the presumptive enforceability of standardized agreements.²⁰⁰ Similarly, the Restatement's treatment of unilateral mistake as a reason to void the contract, when, among other things "the other party had reason to know of the mistake or his fault caused the mistake," places the burden of knowledge and thus risk on the more knowledgeable party.²⁰¹ These interventions call attention to the line-drawing function of contract—as it establishes the signs of agreement and thus the distinction between freedom and coercion—and the need for adjustment where the signs no longer correspond with the possibility of agreement or of facilitating it.

However, contract law's implicit acknowledgement of the challenge of determining, and in doing so establishing, the meaning of signs in a social context is not only evident in the exceptions. Perhaps counterintuitively, we can also see this role of the law expressed in the duty-to-read doctrine—binding parties to terms that they could have, but did not necessarily, read. The duty to read operates as an implicit marker of the process inherent in contract law by which the meaning of reasonableness is negotiated and the power of line drawing is mobilized. By allocating risk, the doctrine itself

199. As discussed earlier, it is not clear that the wealth is necessarily passed along to consumers in the form of a reduced price. See *supra* note 113. In any event, the questions remain as to whether a price can be placed on certain rights and whether individuals ought to be divested of certain rights in return for a payment (assuming that a lower price results). Radin challenges the current "liability rule" framework, which grants power to firms to determine the price at which individuals should be divested of such rights. RADIN, *BOILERPLATE*, *supra* note 4, at 72. In addition to the fact that this power is granted to private corporate actors rather than the state, Radin calls into question the very premise of whether certain fundamental rights, such as the right to a jury, ought ever be treated as alienable in a market. *Id.* at 160.

200. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981). Subparagraph (3) of § 211 provides: "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." *Id.* Other than with respect to insurance contracts, this approach, however, has not been followed on the whole by courts. Jeffrey T. Ferriell, *Introduction to 2011 Sullivan Lecture Symposium: Boilerplate Terms in Context*, 40 *CAP. U. L. REV.* 605, 614 (2011). This approach, even if applied, would arguably also fall short of protecting consumers who cannot rationally weigh the impact of a procedural contract term and thus might not walk away even if they had knowledge of the existence of the term.

201. RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981).

establishes baselines of power. Thus, the doctrine could serve to protect parties, such as a fruit-stand vendor who relies on a reasonable collective understanding of a sign in the circumstances. In this light, the doctrine can be understood as a function of the way contract law must necessarily mediate the inherent challenge of manifesting agency, while aspiring to agreement, equity, and efficiency. In an ideal application of the duty to read, the doctrine could facilitate information sharing, and thus meaningful agreement along with efficient allocation of responsibility and risk—an aspiration resonating in the courts' bright-line approach to notice and assent in consumer contracts.

Language in a century-old “duty-to-read” case indicates this function of the doctrine to place responsibility for assimilating terms on the reader so that the counterparty can rely on a form of contract as a manifestation of assent.²⁰² Thus, in the classic 1906 case of *Smith v. Humphreys*, a Maryland court implicitly invoked the cautionary function of contract in connection with the presumptive validity of a contract document:

Any person who comes into a court of equity admitting that he can read, and showing that he has average intelligence, but asking the aid of the court because he did not read a paper involved in the controversy, and was thereby imposed on, should be required to establish a very clear case before receiving the assistance of the court in getting rid of such document. It is getting to be too common to have parties ask courts to do what they could have done themselves if they had exercised ordinary prudence, or, to state it in another way, to ask courts to undo what they have done by reason of their own negligence or carelessness.²⁰³

In current contract doctrine, courts enforce contracts against contracting parties unable to read or understand the terms due to a lack of intellectual or other resources.²⁰⁴ The duty-to-read doctrine serves to place the burden on the contracting party who is unusually challenged—in a manner not likely to be immediately apparent to his counterpart—and whose actions carry conventional meaning of assent to adjust his behavior in light of information available only to him.

202. *Smith v. Humphreys*, 65 A. 57, 59 (Md. 1906).

203. *Id.*

204. Ferriell, *supra* note 201, at 609.

The invocation in early cases of the duty to read points to the problem of the party to a contract who reasonably relies on what is considered an objective manifestation of assent. In *Smith v. Humphreys*, for example, the court weighed the parties' reasonable understanding of the other's behavior in light of the information available to each, and considered the possibility of advantage-taking.²⁰⁵ As a result, the court was convinced by the evidence that Mr. Humphreys, the party presenting the terms, "had the right to suppose that [the Smiths, his counterparts to the contract] understood what was done" by virtue of their signing the contract.²⁰⁶ This approach continues to resonate in the twenty-first century to a certain extent, though the strengthened presumption of enforceability shifts the balance of power further in favor of the drafting party. Thus, for example, an Alabama court enforced the terms of an agreement between a mobile home dealer and an illiterate purchaser, who failed to identify himself as illiterate to the seller.²⁰⁷ Unlike *Smith v. Humphreys*, no evidence was presented to convince the court of actual understanding by the consumers in this case.²⁰⁸ Yet, even as it reflects the way in which power is allocated through the determination of a reasonable sign of agreement, the application of the doctrine retains the rhetorical premise upon which it might function in facilitating efficient and meaningful agreement. As the court notes, the dealer and selling firm could not have known of this particular

205. 65 A. at 60.

206. *Id.* Mrs. Smith asserted that neither she nor her husband, the other signatory to the release, ever read it nor had it read to them. *Id.* at 57.

207. *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 957, 965 (Ala. 2001). The court states:

Melvin never asked anyone to read the contract to him, and he admitted in his deposition that he would have been embarrassed to admit to Smith that he could not read or understand what was contained in the contract; therefore, he said, he and [his wife] believed Smith's representations about the contract. Melvin testified that his wife never expressed any concern about the terms of the contract, including the arbitration provision. However, [his wife] stated that she merely looked at the contract, that she did not read it.

Id. at 957. Implicit in the court's analysis is the problem of a party's reliance on objective signs of consent: The court notes that the parties never informed the salesperson or the company that "their reading ability was limited, and neither Smith[, the dealer,] nor Johnnie's Homes [, the selling firm,] had independent knowledge that would have led them to believe they needed to point out the arbitration provision or to explain it." *Id.* at 961. The sellers' ability to leverage the buyer's embarrassment and the way that creates a power dynamic is eschewed by the court. *Id.* This case also attests to the power and danger of a narrative of agreement leveraged in marketing, as in the discussion in Part I.

208. *Johnnie's Homes*, 790 So. 2d at 960-61; *Smith*, 65 A. at 60. Indeed, for the reasons discussed above, the project of communicating the significance and stakes of an arbitration is a fraught one.

cognitive limitation that, had they known, would have impacted their understanding of what seemed a sign of consent.²⁰⁹

The traditional application of the duty to read underscores the doctrine's investment in the *possibility* of knowledge as it relates to the signs legible to each party. The doctrine creates a duty that the reader owes herself.²¹⁰ As one court stated in the well-known duty-to-read case of *Rossi v. Douglas*,²¹¹ "one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature."²¹² In this way, the duty to read hinges on this capacity to deliberate, as reflected by exceptions to the rule. As John Calamari pointed out, most of the traditional exceptions to the duty-to-read rule—illegibility of a document or provision; insufficient attention called to a provision; and fraud or mistake—are not truly exceptions because they are based upon the conclusion that there was in fact no intentional or apparent manifestation of assent to the document or the term or terms in question.²¹³ Indeed, the traditional application of the doctrine also takes account of superior knowledge by one party of another party's understanding such that "if one party is mistaken as to the contents of the document and the other has actual knowledge of this fact, the mistaken party may avoid the contract."²¹⁴ In this manner, the doctrine not only sets a baseline of power allocation, but also can be seen as a manifestation of an aspiration to facilitate the possibility of sharing knowledge, and thus power, optimally.

B. The Generative Possibilities and Contextual Contingency of the Duty to Read

The duty-to-read doctrine not only reflects the inherent operation of contract law as an arbiter of fair play, it also can be seen to reflect the aspirational aspect of contract to promote meaningful agreement. The duty-to-read doctrine emerges from the policy goal of enabling "a party to a written agreement [to] safely rely upon the writ-

209. *Johnnie's Homes*, 790 So. 2d at 960–61.

210. See Calamari, *supra* note 4, at 341 n.4.

211. 100 A.2d 3, 3 (Md. 1953).

212. *Id.* at 7.

213. Calamari, *supra* note 4, at 342.

214. *Id.* at 348 n.53 (citing 3 CORBIN § 607, at 663).

ten document.”²¹⁵ As such, it operates primarily to establish the reliability of conventional signs of agreement. Although terms might be chosen by the more informed and powerful party, in some circumstances the duty to read might nonetheless facilitate the assimilation of responsibility and frame action, including agreement, efficiently and beneficially for both parties. The extent to which it can serve a cautionary and even generative function, however, depends in part on whether the duty is consonant with commonly shared understandings of the world.

A look back on the circumstances evaluated by Stewart Macaulay in his 1966 article on the duty to read brings into relief the ways in which the doctrine necessarily implicates an allocation of power.²¹⁶ Depending on whether there is a shared understanding of the world, however, it can also function as a facilitator of information exchange. Macaulay’s case study makes salient the shifting contingent context, as well as the generative potential of notice.²¹⁷ As such, it prompts consideration of the specific social context of the notion of reasonable communication. By viewing the duty to read in this light, the conceptual underpinnings of the doctrine itself point to the presumptive unenforceability of procedural contract terms widely believed to be functionally illegible to consumers.²¹⁸

In 1966, Macaulay examined credit card terms that could facilitate loss avoidance if known by a cardholder.²¹⁹ Specifically, Macaulay

215. *Id.* at 360.

216. Macaulay, *supra* note 4, at 1055.

217. *See id.* at 1069–74.

218. While others have called for the “jettison[ing]” of the duty to read in practice in favor of placing the burden on firms to demonstrate consumer awareness of terms, *see* Ayres & Schwartz, *supra* note 4 at 545, this Article highlights the goals underpinning the duty to read as themselves justifying presumptive unenforceability. In addition, in light of the functional illegibility of procedural contract terms, this discussion suggests the dangers of allowing interventions regarding “term mistakes” to operate independently of “state-of-the-world mistakes” (to borrow Ayres and Schwartz’s terms). *Id.* at 564. The correction of term mistakes—or a consumer’s knowledge of the presence of a term—without correcting her misunderstanding of the significance and implications of the term (no simple matter with respect to a forum selection provision, for example) can further undermine the mistaken party. Such an intervention can enable a firm to leverage the power of the law—through notice—against the consumer when the implications of a term are beyond a consumer’s faculties of rational assessment. Indeed, Ayres and Schwartz premise their suggestion on consumers’ ability to rationally process the information disclosed through their framework of highlighting unexpected provisions. *Id.* at 553. Functionally illegible terms, on the other hand, create inefficiencies; when terms are non-salient or not readily assessable in the context presented, the application of the duty-to-read can create a “lemons problem” in the market, in which firms will be incentivized to provide low-quality inefficient terms. Korobkin, *supra* note 4, at 1269–70.

219. Macaulay, *supra* note 4, at 1070.

considered terms that placed the responsibility for all charges on the cardholder unless a cardholder notified the company that the card had been lost or stolen.²²⁰ The provisions printed on the cards of different companies varied in terms of the language used, their fonts, sizes, and styles, making for differing degrees of salience and legibility.²²¹ The phenomenon of notifying consumers by way of text on the back of a credit card precipitated the question of the likelihood and thus reasonableness of a cardholder becoming aware of the term so as to avoid the assumption of risk in the event of a lost or stolen card.²²²

In this context, before fine print became a ubiquitous presence in everyday life, Macaulay surveyed the visibility of these terms.²²³ In the circumstances Macaulay considered, if a cardholder did indeed become aware of the term, the knowledge granted her the power to take measures to limit her losses.²²⁴ Thus, while the notice in such a case might fail for insufficiently signaling its contractual nature, it could, once displayed as contractual, presumably be assimilated by a cardholder in a manner that would precipitate loss-avoiding action.²²⁵ On the other hand, to the extent that the existence of the term

220. *Id.*

221. *See id.* at 1088–98.

222. *Id.* at 1073–74.

223. *Id.* at 1088–98.

224. *Id.* at 1074. By today's standards, the terms Macaulay considered in 1966 might seem remarkably accessible to a lay reader. Provisions included on the back of a Shell credit card included, for example, the following language as the second of five points: "2. Customer agrees to pay for all purchases made by any person, whether authorized or not, using this card unless and until Shell Oil Company has received written notice that it has been lost or stolen." Macaulay, *supra* note 4, at 1092. Another card Macaulay reproduced by way of example uses more formal and arguably less accessible language:

This card confirms the authorization of credit, during the period shown, to the person, corporation, or firm whose name is embossed on the reverse side hereof. Such person, corporation or firm assumes full responsibility for all purchases made hereunder by anyone through the use of this card prior to surrendering it to the Company or to giving the company notice in writing that the card has been lost or stolen.

Id. Although the clarity of the directions and the action they seek to precipitate might be more readily contestable in the latter case, one could nonetheless argue that these terms have the potential to precipitate thoughtful action. As Ethan Leib notes, the process of repeated contracting can change expectations. Ethan J. Leib, *What Is the Relational Theory of Consumer Form Contract?*, in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL* 259, 284 (Jean Braucher et al. eds., 2013); *see also* Ayres & Schwartz, *supra* note 4. Indeed, the very process of contracting might impact a party's sense of commitment. *See* Eigen, *supra* note 35, at 84–88.

225. To be clear, I do not intend to apply a twenty-first century consumer sensibility to a 1966 credit card holder and thus diminish the potential challenge to that consumer of reasonably assimilating this information at that time and in that context. To the extent the situation

remained invisible, absent actions or social change to make it meaningfully known to the consumer, the duty to read establishes convention and distributes power in favor of the firm.

Macaulay's study identified, among other things, the questionable visibility of terms, an issue that continues to resonate in the treatment of fine print today.²²⁶ However, the potential benefit of reading terms and the opportunity to mitigate loss presented in Macaulay's case study make salient the particular challenge of current consumer contracting practices.²²⁷ Today, significant provisions—in the form of contract procedure terms, such as arbitration, forum selection, or unilateral-modification clauses—thwart even the possibility of facilitating beneficial action by the consumer. Instead, these terms resist rational assessment by an individual consumer and threaten to limit redress altogether. Today, we share an understanding of the presence, if not the significance, of terms—leading to the pitch for “no contracts!” even when fine print remains. High-stake procedural terms thus challenge the narrative of a legible sign (or even text on the back of a card) that is mobilized in the direction of experienced agreement and productive action that can be taken by a consumer. As such, the appeal for agreement, which resonates so strongly in both the consumer culture and with courts, is redirected from a facilitative or aspirational enterprise toward a leveraging of existing power.

Macaulay's mid-century exhortation to courts to discover the “bargain-in-fact” and, absent that possibility, to “seek to implement ‘the sense of the transaction,’ . . . solv[ing] the problem in the particular case in market terms—assumption of the risk, reasonable reliance, and so on,”²²⁸ resonates even more strongly today in circumstances in which certain terms could not be assimilated even if read. When one acknowledges the asymmetrical indecipherability of cer-

imposed risk of loss on people by capitalizing on the likelihood of their unawareness of terms, we see again the power contract law can grant an already more powerful party to leverage its superior knowledge of practice and law. Yet, consumer awareness is also dynamic, and in this case as awareness changes, the possibility that consumers could take affirmative action might materialize, along with something closer to deliberative agreement.

226. Macaulay, *supra* note 4, at 1088–98.

227. *Id.* at 1099. Even the opportunity to forgo a deal in its entirety in the current context is questionable given the difficulty consumers will face in assessing the risks presented by ancillary procedural terms such as an arbitration, forum selection, or unilateral-modification provision. See RADIN, *BOILERPLATE*, *supra* note 4, at 24–25.

228. Macaulay, *supra* note 4, at 1060. Macaulay thereby seeks to implement a consumer or buyer's “reasonable expectations.” *Id.* at 1060–61.

tain terms, the conceptual model of implicitly facilitative—or what I refer to as aspirational—agreement demands a presumption of such terms' invalidity.

Applied to a consumer transaction involving provisions that are, as an empirical matter, particularly hard to assess by only one party, the reliance rationale of the duty to read becomes incongruous and, rather, points to presumptive unenforceability. The very informational asymmetry that challenges the consumer suggests the absence of any reliance claim on the part of firms, to the extent that the contract is considered a facilitative—or an aspirational rather than a wholly degraded—vehicle of agreement.²²⁹ Instead, this informational asymmetry supports interventions placing the burden of knowledge on the more knowledgeable party.²³⁰ Understood properly, this approach is in sync rather than at odds with the basic theoretical underpinnings of the duty to read. In addition, an examination of the application of the duty to read in practice indicates the need to define knowledge with an eye to the dynamic of power entailed.²³¹

CONCLUSION: REFRAMING THE SIGNS AND REGENERATING THE LANGUAGE OF CONTRACT

A narrative of agreement as involving meaningful, deliberate action—as an aspiration if not a reality—continues to resonate in both contemporary marketing as well as legal doctrine. In examining the

229. I borrow Radin's language. RADIN, *BOILERPLATE*, *supra* note 4, at 24–26.

230. Thus, for example, the disproportionately greater knowledge base of firms as compared to consumers underpins David Slawson's notion of "contractual discretionary power," which grants discretionary power to the drafting party to perform as it chooses subject to limitations of law and the contract. See W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracts by Standard Form*, MICH. ST. L. REV. 853, 855 (2006). This approach would identify the contract as "the promises and representations by which the product was sold, supplemented by any knowledge of products of the kind that a reasonable person would possess," and would not include the standard form as typical to consumer transactions. *Id.*

231. Thus, for example Ayres and Schwartz's suggested intervention, in formulating an aspirational approach toward notice involving cautionary warnings would change in light of consumer expectations. Ayres & Schwartz, *supra* note 4. Yet, with respect to their suggested intervention, it is imperative to attend to the way the dynamics of power can enable expectations in the positive rather than normative sense and how positive expectations, absent an understanding of the implications of terms, can thwart the goal of approaching or furthering "real" agreement. See RADIN, *BOILERPLATE*, *supra* note 4, at 150–51. Specifically, concerning procedural terms, the significance of which can remain elusive to an individual, evolving knowledge of a term's existence could serve to further disempower rather than empower a consumer.

enduring force of this narrative, this Article seeks to intervene in the project of reclaiming the role of contract language to promote to the extent possible, rather than thwart, the possibility of agreement. Courts applying contract doctrine remain invested in the possibility of meaningfully experienced assent, as reflected in the policing of signs of contract. In addition, parties have not altogether abandoned agreement as an ideal. As the examples presented in Part I demonstrate, knowledgeable repeat-players at times seek to harness the power of the narrative of agreement, which resonates in the market. When the doctrine treats provisions, such as procedural contract terms, that resist rational assimilation by consumers as legible signs, contract law allows a narrative of agreement to undo its own possibility and redoubles the power it grants to more powerful parties.

Contract law always involves the possibility of leveraging power.²³² As such, we can rarely if ever identify a contract in which consent is utterly unconstrained. Instead, contract law must identify the boundary between acceptable and unacceptable “advantage-taking.”²³³ In order to define acceptable boundaries, contract law marks, and thus enables, so-called reasonable conventions of agreement.²³⁴ Thus, the duty-to-read doctrine can serve as a way to mediate conventions of understanding and allocate risk based on what is deemed reasonable behavior. The doctrine can serve to validate signs that typically seem to a reasonable counterpart like an indication of agreement. As such, the duty-to-read owed by a consumer to herself, and the related notice requirement on the drafter, reflect contract doctrine’s conceptual investment in the possibility of furthering or facilitating actual understanding. This view of the duty-to-read doctrine—itsself an expression of an aspiration toward agreement—reveals the incongruity of the current presumptive enforceability of procedural contract terms in consumer transactions, and remains incoherent in contract doctrine’s own terms.

232. Thus, Tony Kronman identified the way in which a disparity in wealth, understood as a transactional advantage, can be further leveraged by the wealthier party in the next transaction. Kronman, *supra* note 112, at 496–97.

233. *Id.* at 478–83.

234. Courts often use a two-pronged sliding scale of procedural and substantive unconscionability. Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. Rev. 359, 367 (2001). “Procedural unconscionability [deals with] the formalities of making the contract, while substantive unconscionability [deals with] the terms of the contract itself.” *Major v. McCallister, LLC*, 302 S.W.3d 227, 232 n.2 (Rahmeyer, J., concurring).

Presumptive unenforceability of procedural provisions that cannot be meaningfully assimilated by consumers could serve as a necessary first step to salvage the aspirational implications of the notice requirement and contract doctrine more generally.²³⁵ Statutes that articulate the value of existing rights as well as the facilitative framework of contract toward meaningful agreement could grant courts the language to police contract as an aspirational endeavor.²³⁶ By reframing the discourse for courts through statutory intervention that recognizes an aspirational approach to contract already immanent in the doctrine, lawmakers could reclaim the notion of reasonable communication and aim to enforce the intent of the parties at the time of the contract.

Contract law continues implicitly and explicitly to tell a story in which parties, though inevitably hampered, nonetheless aspire toward agreement and agency. We cannot confront current practices without explicitly engaging the ways in which the idea of contract posits a baseline of freedom and agency that naturalizes the dynamics of power inherent in all contractual transactions. Indeed, as this

235. See, for example, the European approach in which consideration is given to the bargaining positions of the parties. Thus, terms other than the main subject matter of the contract (such as price or quality) that are not negotiated and “cause[] a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” are deemed presumptively invalid. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Art. 3 Sec.1. Thanks to Jaakko Salminen, Jakob Schemmel, and all the participants at the lawinthelighthouse conference for input on the European perspective, among other things.

236. Thus, for example, by altering the default rule in light of the relevant framework of power and possibility, a statute resembling the proposed Arbitration Fairness Act, which would have invalidated predispute arbitration terms in employment, consumer, antitrust, or civil rights disputes, would facilitate the ideal of contract as well as the original goals of the FAA. Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 3 (2013). The proposed Arbitration Fairness Act expressed the Congressional view that the FAA “was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.” *Id.* at § 2. Similarly, a legislative presumption against the enforceability of a forum selection clause in a consumer context would reclaim the conceptual framework that preceded the Supreme Court’s holding in *Carnival Cruise*. In *Bremen v. Zapata*, the Supreme Court endorsed the position that forum selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” 401 U.S. 1, 10 (1972). In doing so, however, the majority explicitly considered the fact that in this case the “choice of that forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen.” *Id.* at 12. The adoption by courts of the same presumptions of enforceability in a context of predictably consistent asymmetrical access to information that thereby thwarts the possibility of deliberation for one party has precipitated the need to reframe the reading of signs of consent. The preceding discussion also points toward the challenge to aspirational agreement posed by unilateral-modification provisions that can enable changes to procedural contract terms in consumer transactions. See Horton, *supra* note 8, at 649.

Article shows, a more powerful party can leverage the very story of freedom, choice, and agency to its advantage, at the expense of the coherence of these very goals of contract. Thus, as standard forms permeate more and more areas of individuals' lives, contract remains a crucial site at which we re-inscribe, or at best, have the opportunity to negotiate the existing balance of power. To realize the ideals implicit in the stories of contract we tell, we must attend not only to their content, but to context, and the dynamics of power the stories reflect and facilitate in practice.