A Critique of Consumer Advocacy Against the *Restatement of the Law of Consumer Contracts*

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In May 2019, the American Law Institute proposed adopting a Restatement of the Law of Consumer Contracts. *In it, the* Restatement*'s Reporters suggested a "grand bargain," which removed the requirement that consumers meaningfully assent to contractual terms and compensated for this by adding teeth to ex post remedies already available to consumers. The proposed Restatement drew immense criticism from consumer advocates, who argued both that meaningful assent was not disappearing in the common law, and that the ex post remedies did not go far enough to cure consumer harms. In the wake of this critique, the draft was shelved for further consideration.*

This Note argues that consumer advocates' approach to critiquing the Restatement *is misguided. Contrary to the position of consumer advocates, the Reporters were fundamentally correct in identifying the gradual demise of assent as a reality in consumer contracts. However, this Note acknowledges that ex post review procedures, such as the application of the unconscionability doctrine, are inadequate mechanisms for redressing consumer harm.*

Instead, this Note argues that consumer groups are better served by focusing on ex ante regulation of contract design, which would ensure that consumers are presented with fair contracts. This Note suggests that consumer advocates should focus their attention on the adoption of more rigorous Unfair and Deceptive Acts & Practices statutes on the state level. Provided that the right combination of prohibited terms, administrative updating mechanisms, and enforcement provisions are included, such state-

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level regulation would better protect consumers from unfair adhesive contracts.

I. INTRODUCTION

In May 2019, the American Law Institute (ALI) considered a proposal to adopt a tentative draft *Restatement of the Law of Consumer Contracts* (the *Restatement*).[1] Following immense criticism from consumer advocacy groups,[2] state Attorneys General,[3] and even presidential candidates,[4] the ALI shelved the draft for further consideration.[5]

Much of this criticism focused on the draft's substantive proposals, both in terms of their support in case law and their

1. Steven O. Weise, *The Draft Restatement of the Law, Consumer Contracts Follows the Law*, 41 ALI REPORTER, Spring 2019, at 7, https://www.ali.org/media/filer_public/40/98/40987ebd-e369-4e79-aa7b-03767c1d3243/ali_spring_reporter-3149_web.pdf [https://perma.cc/3JDT-9XQZ].

2. *See* Letter from Suzanne Martindale, Senior Att'y, Consumers Union, to Council Members, A.L.I. (Oct. 10, 2018), https://advocacy.consumerreports.org/wp-content/uploads/2019/02/CU-letter-to-ALI-consumer-contracts-project-10-10-18-FINAL.pdf [https://perma.cc/L4Q6-6M43]; Letter from Advocates for Basic Legal Equality, Inc. et al., to Council Members, A.L.I. (Jan. 10, 2018), https://www.nclc.org/images/pdf/udap/26-ali-comments-council-draft-4.pdf [https://perma.cc/VJN5-ZB2C].

3. *See* Letter from Eric T. Schneiderman, Att'y Gen. for the State of N.Y., to Richard L. Revesz, Director, A.L.I., & Stephanie A. Middleton, Deputy Director, A.L.I. (Jan. 12, 2018), https://www.creditslips.org/files/multi_state_attys_general_-_consumer_contracts_-_pd_3_-_011218-3.pdf [https://perma.cc/Z9H8-V8HH]; Letter from Barbara D. Underwood, Att'y Gen. for the State of N.Y., to Richard L. Revesz, Director, A.L.I., & Stephanie A. Middleton, Deputy Director, A.L.I. (Oct. 15, 2018), https://www.creditslips.org/files/multi_state_attys_general_-_consumer_contracts_-_cd_5_-_101518.pdf [https://perma.cc/JKP8-BEEX]; Letter from Letitia James, Att'y Gen. for the State of N.Y., to Members of the A.L.I. (May 14, 2019), https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf [https://perma.cc/DJ6R-NXAV].

4. *See* Letter from Elizabeth Warren, U.S. Sen., to David Levi, President, A.L.I. (Dec. 11, 2017), https://www.creditslips.org/files/warren_-_consumer_contracts_-_dec_11_2017.pdf [https://perma.cc/WMQ4-LG4V].

5. Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to Be Bound by Its Terms*, PROPUBLICA (May 20, 2019, 1:17 PM), https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click [https://perma.cc/N8DG-GBR4]. It is worth noting that merchants opposed the *Restatement* as well, arguing that the rules represent "wild swings" in the common law, expanding a novel "deceptive" contract, and expanding the unconscionability doctrine. *See, e.g.*, Alan S. Kaplinsky, *ALI's Restatement of the Law of Consumer Contracts: An Ill-conceived and Poorly Implemented Project*, BALLARD SPAHR LLP CONSUMER FIN. MONITOR (May 16, 2019), https://www.consumerfinancemonitor.com/2019/05/16/alis-restatement-of-the-law-consumer-contracts-an-ill-conceived-and-poorly-implemented-project/ [https://perma.cc/SE9G-P5VL]. Because this Note concerns the arguments of consumer protection advocates, it does not explore this other perspective.

potential impact on consumers and merchants. Consumer groups[6] were concerned with the proposed *Restatement*'s removal of the requirement for meaningful assent — the idea that merchants must be able to infer a consumer's intent to accept all the terms of a contract from his words or conduct.[7] They also expressed concerns about the high bar set for proving unconscionability,[8] a defense that allows consumers to claim that their contract or a clause within it is "so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract[,]" and thus unenforceable.[9] Consumer advocates further questioned whether the *Restatement*'s Reporters' (the "Reporters") methodological approach was empirically sound.[10]

This Note argues that consumer advocates' substantive critiques of the *Restatement* are misguided. First, it shows that the Reporters were fundamentally correct in identifying the gradual demise of assent in consumer transactions. Because consumers face cognitive constraints to their decision-making capabilities, they rarely read or understand the complex set of terms presented

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6. A wide variety of institutions and academics submitted commentary in support of consumers throughout the scuffle over the *Restatement*. This Note uses the terms "consumer advocates" and "consumer groups" to refer broadly to the state Attorneys General, non-profit legal advocacy groups, consumer-focused organizations, and academics that did so.

7. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (AM. LAW. INST. 1981) ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct[.] . . . A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct.").

8. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 3–4 (expressing concerns about the narrowness of the *Restatement*'s view of both substantive and procedural unconscionability).

9. U.C.C. § 2-302 (AM. LAW. INST. & UNIF. LAW COMM'N 2002). *See infra* Part III.B.1. for greater depth on this vaguely-defined doctrine.

10. One aspect of the Reporters' approach to the *Restatement* was a series of empirical studies to survey existing case law on the vast trove of consumer cases in both state and federal courts and to code their results to best capture the majority position. *See* Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 9 (2017). However, some academics have criticized the Reporters' empirical methodology because their approach could not be reproduced using the same datasets in subsequent empirical studies. *See* Gregory Klass, Abstract, *Empiricism and Privacy Policies in the Restatement* of Consumer Contract Law, 36 YALE J. ON REG. 45, 45 (2019); Adam J. Levitin et al., *The Replication Crisis of the Draft Restatement of Consumer Contracts*, YALE J. ON REG. NOTICE & COMMENT BLOG (Mar. 20, 2019), https://www.yalejreg.com/nc/the-replication-crisis-of-the-draft-restatement-of-consumer-contracts-by-adam-j-levitin-nancy-s-kim-christina-l-kunz-peter-linzer-patricia-a-mccoy-juliet-m-moringiello-elizabeth-a-renuart/ [https://perma.cc/4V2B-J4M2]. While it intends to address the parties' substantive arguments, this Note does not evaluate the Reporters' empirical methodology for assessing caselaw.

in a standard-form contract.[11] This Note argues that in such a commercial context, courts accept the reality that merchants cannot infer assent to consumer contractual terms.[12] This Note further argues that ex post review procedures, such as the unconscionability doctrine, are inadequate mechanisms for redressing consumer harm, as variable development across states leads to judicial confusion and uneven justice. Additionally, because systemic roadblocks often prevent consumers from reaching the courthouse and proving their case, ex post review does not provide a meaningful avenue for redress.

This Note argues that consumer protection advocates would be better served by focusing on changing state-level regulation of contract design. It argues that consumer groups stand on firmer ground when advocating for the statutory prohibition of specific unfair contractual terms, rather than changing the common law. To this end, this Note suggests the adoption of more rigorous Unfair and Deceptive Acts & Practices (UDAP) statutes on the state level. If the right combination of prohibited terms, administrative updating mechanisms, and enforcement provisions are included, UDAP statutes can possess greater power to protect consumers from unfair adhesive contracts[13] than a consumer-friendly *Restatement* could.

This Note proceeds in three parts. Part II explores the controversy over the *Restatement*'s proposals, and why consumer groups oppose it so adamantly. Part III explores the shortcomings of consumer groups' strategy. It concludes that the common law is disadvantageous terrain for consumer legal advocacy. Finally, Part IV proposes an alternative solution, which builds on existing state-level UDAP statutes to incorporate blacklists of unfair terms as well as a means of updating the list to respond to changes in the consumer marketplace.

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11. *See infra* Parts III.A.1, III.A.2.

12. *See infra* Part III.A.3.

13. Adhesive contracts are "standard-form contract[s] prepared by one party, to be signed by another party in a weaker position[.]" *Contracts*, BLACK'S LAW DICTIONARY (11th ed. 2019). Adhesive contracts have traditionally proliferated in insurance markets, *see* Ronald J. Gilson et al., *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 81 (2014), and credit card markets, *see* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 903 (2006), but are now increasingly associated with internet commerce. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002). The proliferation of and problems with such contracts are discussed at greater length in Part III.A.2.

II. THE DRAFT *RESTATEMENT*: A CONTROVERSY UNFOLDS

The *Restatement* generated so much controversy that the ALI temporarily abandoned it for reconsideration at a later date.[14] This Part attempts to frame that controversy. First, it explains the intent and structure of the *Restatement*, focusing on the trade-off between ex ante assent and ex post review.[15] Then, it explains consumer advocates' major critiques — that the movement away from assent is unfaithful to existing case law, and that the unconscionability defense is insufficient to protect consumers from injustice.[16] The collective pressures of these criticisms led to the *Restatement*'s eventual pause.[17]

A. THE *RESTATEMENT* ITSELF: GOAL AND APPROACH

The *Restatement* is one of the ALI's latest attempts to clarify the tangled development of the common law of consumer contracts. Founded in the 1920s, the ALI represents the collective effort of members of the federal and state judiciary, law schools, state bar associations, and the National Conference of Commissioners on Uniform State Laws "to promote the clarification and simplification of the law. . . ."[18] In furtherance of this goal, the ALI produces Restatements, which are intended to present "an orderly statement of the general common law"[19] on a wide variety of topics.[20] Because Restatements are meant to explain the way courts typically rule, they are an important reference for judges and lawyers

14. *MacDougall*, *supra* note 5.
15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. *MacDougall*, *supra* note 5.
18. RESTATEMENT (FIRST) OF CONTS. intro. (AM. LAW INST. 1932) (internal quotation marks omitted).
19. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part) (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS intro. (AM. LAW INST. 1934) (internal quotation marks omitted).
20. There are *Restatements* in either draft or published form on at least 28 different topics, including Family Law, Employment Law, Insurance Law, and Torts. *See Restatements of the Law*, AM. LAW INST. (June 17, 2020), https://www.ali.org/publications/#publication-type-restatements [https://perma.cc/ZC99-N3A2].

alike,[21] and are frequently cited as authorities in state court decisions.[22]

However, this deference from the legal profession also gives a Restatement's drafters immense power to "set forth their aspirations for what the law ought to be."[23] For example, the *Restatement (Second) of Torts* "restated" a rule for strict product liability in 1965, when in fact, only California had previously adopted it.[24] Many state courts subsequently followed the novel rule of the *Restatement (Second) of Torts* in adopting strict product liability.[25] Consequently, some of the ALI's recent Restatement projects devolved towards controversy as critics claim that drafters approach the project intent on reforming the law rather than merely restating it.[26] This issue — whether a Restatement reflects the existing common law or the Reporters' policy preferences — burdened the *Restatement of the Law of Consumer Contracts* from its origin.

The *Restatement* arose out of recognition that the legal context of consumer contracts is distinct from other areas of contract law.[27] Defining "consumer contracts" as those between "a business and a consumer other than an employment contract[,]"[28] the Reporters explain that consumers are at an inherent disadvantage when

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21. Adi Robertson, *A Contentious Legal Debate Over User Agreements Has Been Delayed After Elizabeth Warren Called It 'Dangerous,'* VERGE (May 22, 2019, 4:11 PM), https://www.theverge.com/2019/5/22/18634183/consumer-contracts-ali-restatement-law-elizabeth-warren-attorney-general-opposition [https://perma.cc/YHC3-D8BH] (quoting Deepak Gupta, a leading consumer-focused appellate advocate).

22. David Dayen, *The Secret Vote That Could Wipe Away Consumer Rights*, AM. PROSPECT (May 20, 2019), https://prospect.org/culture/secret-vote-wipe-away-consumer-rights/ [https://perma.cc/C8W8-774G].

23. *Kansas*, 574 U.S. at 475 (Scalia, J., concurring in part and dissenting in part).

24. Glen G. Lammi, *Is It Time to Reconsider Judges' Role as Members of the American Law Institute?*, FORBES (May 27, 2020, 8:49 AM), https://www.forbes.com/sites/wlf/2020/05/27/is-it-time-to-reconsider-judges-role-as-members-of-the-american-law-institute/#e6bdcd4260de [https://perma.cc/92N7-DQPM]. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

25. Lammi, *supra* note 24.

26. Lammi, *supra* note 24 (noting that these objections embroiled draft a draft *Restatement of the Law of Copyright* and the formally-adopted *Restatement of the Law of Liability Insurance*).

27. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017) ("Consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts — the business and the consumers.").

28. RESTATEMENT OF CONSUMER CONTS. § 1(a)(4) (AM. LAW INST., Discussion Draft 2017). Citations throughout the draft *Restatement* suggest that this definition covers a broad variety of contracts — including application user agreements, privacy agreements, and standard contracts between consumers and sophisticated businesses.

contracting with merchants.[29] Because consumers enter a significant number of contracts on a regular basis — from online shopping purchases, to credit contracts, to website privacy agreements — the Reporters assert that "[i]t is both irrational and infeasible for most consumers to keep up with the increasingly complex terms provided by businesses in the multitude of transactions, large and small, entered into daily."[30]

Recognizing this, a group of contracts scholars sought to clarify the way courts have applied traditional contract law doctrine in the consumer context. Three scholars of contract law served as the Reporters,[31] and a battery of consumer- and business-oriented practitioners acted as advisors.[32] Their goal in drafting the *Restatement* was to:

> clarify how the courts have applied the principles embodied in the Restatement Second of Contracts and the Uniform Commercial Code to transactions that either were not contemplated at the time those projects were completed (and therefore not addressed), like the purchase of software licenses and all online transactions, or that became a more significant part of the economy since that time.[33]

The Reporters attempted to balance the interests of consumers and businesses by striking what they called a "grand bargain."[34] In essence, they sought to embody in the *Restatement* a developing tradeoff they saw in the common law: consumers giving up the façade of ex ante assent in return for stronger ex post enforcement

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29. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017) ("On one side stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals. On the other side stand consumers who are informed only about some aspects of the transaction, but rarely about the list of standard terms.").

30. *Id.*

31. *MacDougall*, *supra* note 5. These scholars are Professors Oren Bar-Gil, Omri Ben-Shahar, and Florencia Marotta-Wurgler, each of whom are cited frequently in this Note and elsewhere in scholarly contracts literature.

32. Alison Frankel, *State AGs Protest ALI Consumer Contract Restatement Ahead of May 21 Vote*, REUTERS (May 21, 2019, 9:13 AM), https://www.reuters.com/article/us-otc-ali/state-ags-protest-ali-consumer-contract-restatement-ahead-of-may-22-vote-idUSKCN1SL2VB [https://perma.cc/A2J5-MSB4].

33. RESTATEMENT OF CONSUMER CONTS., Foreword (AM. LAW INST., Discussion Draft 2017).

34. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017).

measures.[35] The Reporters viewed this tradeoff as two components working together in a "unified hydraulic framework," in which "shifts within one doctrine [would] inform the scope of the other."[36]

The first part of the "grand bargain" was a recognition of the demise of ex ante assent. Black letter doctrine requires that for two parties to enter into a contract, there must be an offer and an acceptance, where acceptance is manifested by mutual assent.[37] The manifestation must be objective: conduct is not sufficient to demonstrate mutual assent unless each party knows or has reason to know that the other party may infer assent.[38] In other words, a merchant must believe, based on their customer's words and action, that the customer accepts each and every contractual term.

However, the Reporters argued that, as shopping has shifted away from traditional goods in physical stores, the nature of consumer transactions has changed.[39] Consumers are often asked to agree to lengthy contracts prior to completing routine transactions, and are seldom aware of or familiar with the complex constellation of terms.[40] It is unrealistic, they argued, to infer assent when a consumer signs a contract agreeing to such terms sight-unseen.[41] Reflecting the Reporters' view, Section 2 of the *Restatement* provided that when consumers execute a contract, they are not agreeing to the merchant's terms; instead, consumers acknowledge that the merchant has terms, and that the consumer had a reasonable opportunity to review them.[42] Because it no longer required an

35. RESTATEMENT OF CONSUMER CONTS. § 2(a) cmt. 12 (AM. LAW INST., Discussion Draft 2017).

36. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017). In essence, the Reporters hope that, as the importance of meaningful assent wanes, jurisdictions adopt more muscular ex post review to maintain balance between the rights of consumers and the merchants with which they contract.

37. RESTATEMENT (SECOND) OF CONTS. §§ 17, 18 (AM. LAW. INST. 1981).

38. RESTATEMENT (SECOND) OF CONTS. § 19(2) (AM. LAW INST. 1981). *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) (holding that because the defendant's words and acts, judged by a reasonable standard, manifest an intention to agree, the contract is enforceable, even if the defendant claims to be joking).

39. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017) ("Although shopping at a grocery store in the brick and mortar world entailed very few (if any) standard contract terms, shopping at the online outlet of that store now entails a lengthy list of standard terms.").

40. *Id.*

41. RESTATEMENT OF CONSUMER CONTS. § 2 cmt. 12 (AM. LAW INST., Discussion Draft 2017) ("The adoption rules in this Section represent a reality in which consent to the standard contract terms is rarely informed.").

42. RESTATEMENT OF CONSUMER CONTS. § 2(a) (AM. LAW INST., Discussion Draft 2017) ("A standard contract term is adopted as part of a consumer contract if, after receiving

inference that the consumer intends to accept all contractual terms, Section 2 of the *Restatement* proposed to effectively abolish the requirement for objective assent.

The Reporters compensated for the demise of assent by identifying another trend in the law of consumer contracts — courts' increasingly prominent role in policing abusive or predatory terms. They argued that because meaningful assent is absent in standard-form consumer contracting, ex post review becomes all the more important.[43] Consequently, the *Restatement* included sections addressing the courts' ability to police unconscionable and deceptive contracts.[44]

Collectively, these rules represented the tradeoff upon which the *Restatement* delicately rested. Merchants were given "fairly unrestricted freedom" to draft terms for consumer contracts.[45] After the transaction, the *Restatement* posited, ex post scrutiny would "uproot terms that are so extreme that they would be unlikely to survive in an environment of meaningful free choice, or that deceptively peel off the value that consumers bargained for."[46] The Reporters hoped that a shift away from the assent requirement would lead to increased ex post judicial scrutiny, wrapping the two trends together in a "hydraulic framework."[47]

B. THE *RESTATEMENT* UNDER FIRE

The *Restatement*'s early drafts quickly drew fire from consumer advocates, who argued that this "grand bargain" was fundamentally imbalanced and did not accurately reflect the current state of the common law.[48] Their argument attacked both prongs of the

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reasonable notice of the standard contract term and a reasonable opportunity to review it, the consumer signifies assent to the transaction.").

43. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017) ("The increasing necessity for and presence of highly permissive adoption rules punctuate the importance of the remaining regulatory safeguard in consumer contracts — mandatory restrictions over permissible contracting.").

44. *See* RESTATEMENT OF CONSUMER CONTS. §§ 5, 6 (AM. LAW INST., Discussion Draft 2017).

45. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW INST., Discussion Draft 2017).

46. *Id.*

47. *Id.*

48. Letter from Eric T. Schneiderman to Richard L. Revesz *supra* note 3, at 2–4. While a collection of state Attorneys General wrote a number of letters opposing the *Restatement*, this section cites most frequently to the first letter, written in opposition to the Discussion Draft of the *Restatement*. *See supra* Part II.A.

"grand bargain," claiming that courts have not eliminated the assent requirement and that unconscionability alone is not enough to protect consumers from unfair terms.[49]

1. *Assent*

Consumer advocates argued that the *Restatement*'s dismissal of assent was unfaithful to black letter contract law and hurtful to consumers.[50] They claimed that the Reporters' attempt to modify existing doctrine betrayed caselaw as well as the *Restatement (Second) of Contracts*, and reflected fundamentally poor policy judgment.[51]

First, consumer advocates argued that the need for meaningful assent has not changed with the evolution of new technology.[52] In a letter to the ALI, a coalition of thirteen state Attorneys General identified several types of cases brought on the grounds that consumers did not meaningfully assent to contract terms.[53] They claimed that rolling back the requirement of mutual assent would inhibit their ability to enforce the law on behalf of consumers.[54] Moreover, they argued that even if the reality of consumer contracting has changed, there has been no movement in the legal treatment of consumer contracts.[55] Advocates pointed to caselaw and black letter doctrine that appear to contradict the *Restatement* draft in this respect.[56]

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49. Some consumer advocates also protested the Reporters' ability to properly capture the current state of the law through caselaw analysis. *See, e.g.*, Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 2–4; Klass, Abstract, *supra* note 10, at 45; Levitin et al., *supra* note 10. While it intends to address the parties' substantive arguments, this Note does not evaluate the Reporters' empirical methodology for assessing caselaw.

50. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 5–6.

51. *Id.*

52. *Id.*

53. *Id.* Note that by May 2019, twenty-three state Attorneys General plus the Attorney General for the District of Columbia agreed with this analysis. Letter from Letitia James to Members of the A.L.I., *supra* note 3, at 9–11.

54. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 5.

55. *Id.* ("While the mutual assent doctrine may not be applied by courts as often and as robustly as we believe warranted, it is no dead letter, as courts regularly find contracts unenforceable where they fail to clearly or reasonably communicate their terms and to which consumers did not agree.").

56. *See* Letter from Letitia James to Members of the A.L.I., *supra* note 3, at 4 (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28–29 (2d Cir. 2002) (underscoring the importance of assent)); Melvin Eisenberg, *The Proposed* Restatement of Consumer Contracts*, if Adopted, Would Drive a Dagger Through Consumers' Rights*, 36 YALE J. ON REG. NOTICE & COMMENT BLOG (Mar. 20, 2019), http://yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-

Second, consumer advocates argued that the draft *Restatement*'s elimination of assent would perversely affect incentives for merchants creating form contracts.[57] It is already easy for businesses to limit their liability by loading favorable language into consumer contracts.[58] Consumer advocates argued that this would encourage businesses to include increasingly coercive terms — in what the Attorneys General called a "race to the bottom."[59] The Attorneys General further charged that the Reporters' apparent surrender to businesses on this front could inhibit consumer confidence in the fairness of the agreements they enter.[60] In sum, consumer advocates claimed that the first plank of the "grand bargain" misstated the law in a manner that would distort merchant incentives and harm consumers.

2. *Unconscionability and Ex Post Enforcement*

Consumer advocates were similarly dissatisfied with the way the proposed *Restatement* treated ex post enforcement. They claimed that the *Restatement* weakened the unconscionability doctrine and that ex post review alone does not provide sufficient protection for consumers.

First, they argued that the *Restatement* enfeebled the doctrine of unconscionability. In their view, the *Restatement* created a higher standard of proof than is actually required in many state courts.[61] For example, Section 5 of the *Restatement* drew a distinction between substantive unconscionability — whether the contract is unreasonably one-sided — and procedural unconscionability — whether the contract deprived the consumer of meaningful

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by-melvin-eisenberg/ [https://perma.cc/C8KJ-TL2P] (arguing that Section 2 of the Restatement directly contradicts the *Restatement (Second) of Contracts*, § 211(3), which requires that "[w]here [a party who has prepared a writing] has reason to believe that the party manifesting . . . assent [to the writing] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.") (quoting RESTATEMENT (SECOND) OF CONTS. § 211(3) (AM. LAW INST. 1981)) (internal quotation marks omitted).

57. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 3.

58. Letter from Suzanne Martindale to Council Members of the A.L.I., *supra* note 2, at 1.

59. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 7.

60. Letter from Suzanne Martindale to Council Members of the A.L.I., *supra* note 2, at 1.

61. *Id.* at 2; Eisenberg *supra* note 56 (arguing that substantive unconscionability is not a requirement in many states.).

choice.[62] According to the Reporters, a court must find that a contract term is both substantively *and* procedurally unconscionable for it to be unenforceable.[63] Consumer advocates argued that this approach clashes with some state courts, which have found clauses unconscionable without a finding of *procedural* unconscionability.[64]

The Reporters also claimed that for a contract term to be procedurally unconscionable, it must be *salient*, or capable of affecting the contracting decision of a substantial number of consumers.[65] Consumer advocates responded that no court has ever used salience to decide a question of procedural unconscionability.[66] Furthermore, they maintained that a salience requirement would unreasonably restrict consumers' ability to recover from mistreatment by narrowing the types of contract terms that courts could find unconscionable.[67] Because these terms would conflict with existing caselaw, consumer advocates argued the *Restatement* could interfere with state-level efforts to reinvigorate the unconscionability doctrine.[68]

Second, advocates argued that even if the *Restatement* faithfully represented the legal doctrines governing ex post enforcement, these doctrines alone are insufficient to provide consumers

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62. RESTATEMENT OF CONSUMER CONTS. § 5(b) (AM. LAW INST., Discussion Draft 2017). *See also* Arthur Allen Leff, *Unconscionability and the Code — the Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

63. RESTATEMENT OF CONSUMER CONTS. § 5 cmt. 2 (AM. LAW INST., Discussion Draft 2017).

64. Eisenberg, *supra* note 56 (citing *In re* Poly-America L.P., 262 S.W.3d 337, 348 (Tex. 2008); Maxwell v. Fidelity Servs., Inc., 907 P.2d 51, 58–59 (Ariz. 1995)).

65. RESTATEMENT OF CONSUMER CONTS. § 5 (AM. LAW INST., Discussion Draft 2017).

66. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 3.

67. *Id.* at 3–4.

68. *See, e.g.*, Letter from Suzanne Martindale to Council Members of the A.L.I., *supra* note 2, at 2 (citing De La Torre v. CashCall, Inc., 422 P.3d 1004 (Cal. 2018) (allowing the use of the unconscionability doctrine offensively in combination with the state's Unfair Competition Law)). Many states already recognize unconscionability as an affirmative cause of action. *See, e.g.*, Eva v. Midwest Nat'l Mortg. Banc, Inc., 143 F. Supp. 2d 862, 896 (N.D. Ohio 2001); *In re* Checking Acct. Overdraft Litig., 694 F. Supp. 2d 1302, 1318–19 (S.D. Fla. 2010); Hughes v. TD Bank, N.A., 856 F. Supp. 2d 673, 681 (D.N.J. 2012); Davis v. Cash for Payday, Inc., 193 F.R.D. 518, 522 (N.D. Ill. 2000); Dienese v. McKenzie Check Advance of Wis., LLC, No. 99-C-50, 2000 WL 34511333, at *5–7 (E.D. Wis. Dec. 11, 2000). Just earlier this year a Tennessee court recognized the use of unconscionability as an affirmative cause of action. Elmy v. W. Express, Inc., No. 3:17-cv-01199, 2020 WL 1820100, at *4 (M.D. Tenn. Apr. 10, 2020). While Consumer Advocates conceded that the *Restatement* did not take a position on the affirmative use of unconscionability, Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 3 n.11, their concerns about the *Restatement*'s potential ossification of the status quo remained.

adequate relief.[69] This is because consumers lack the substantial resources necessary to litigate cases in court, especially when related to the small dollar amounts in merchant transactions.[70] Because of these barriers, any "grand bargain" becomes "illusory" where consumers lack access to the legal system.[71]

Collectively, consumer advocates argued, these hurdles stripped away the protections provided by traditional contract law doctrine, while simultaneously weakening consumers' ability to pursue ex post remedies. Put another way, consumer advocates argued that the "hydraulic framework" could sink efforts at legal relief both before and after the transaction.

C. THE *RESTATEMENT* IS SHELVED

The Reporters' attempted to respond to the criticism by modifying the *Restatement* and defending their work. A subsequent draft of the *Restatement* removed references to the "grand bargain" and "the hydraulic framework."[72] Furthermore, the Reporters disputed many of the criticisms leveled by consumer advocates, claiming that a careful reading of their draft reflected advocates' existing views on the issues.[73] Nevertheless, the draft could not withstand the intense and focused criticism. In the wake of significant media attention,[74] the membership of the ALI voted to adopt only

69. Letter from Eric T. Schneiderman to Richard L. Revesz, *supra* note 3, at 7.

70. *Id.*; Letter from Elizabeth Warren to David Levi, *supra* note 4.

71. Letter from Elizabeth Warren to David Levi, *supra* note 4.

72. RESTATEMENT OF CONSUMER CONTRACTS Reporters' Introduction (AM. LAW INST., Tentative Draft 2019). Note that, even though the words "grand bargain" were removed from the *Restatement*, consumer advocates argued that it continued to serve as the animating conceptual framework. Letter from Barbara D. Underwood to Richard L. Revesz, *supra* note 3, at 2 ("Although it no longer uses the term 'grand bargain,' the Revised Draft continues to advocate for the same radical re-balancing of mutual assent and unconscionability as the Prior Draft.").

73. *See* Oren Bar-Gil, Omri Ben-Shahar, & Florencia Marotta-Wurgler, *Re: State AG's Letter re the Tentative Draft of Restatement of the Law, Consumer Contracts*, ALI ADVISOR (May 16, 2019), http://www.thealiadviser.org/consumer-contracts/re-state-ags-letter-re-the-tentative-draft-of-restatement-of-the-law-consumer-contracts/ [https://perma.cc/G5YG-4AR7].

74. *See, e.g.*, Frankel, *supra* note 32; MacDougall, *supra* note 5; Robertson, *supra* note 21; Karl Bode, *New Proposal Would Let Companies Further Screw You Over with Terms of Service*, MOTHERBOARD TECH BY VICE (May 21, 2019, 3:06 PM), https://www.vice.com/en_us/article/a3x79a/new-proposal-would-let-companies-further-screw-you-over-with-terms-of-service [https://perma.cc/7CRJ-5JHM]; Nicholas Malfitano, *Criticism Follows Powerful Law Group To Next Project — A 'Troubling' Take On Consumer Contracts*, FORBES (June 25, 2018, 5:15 AM), https://www.forbes.com/sites/legalnewsline/2018/06/25/criticism-follows-

the definition section of the proposed *Restatement*, shelving the rest for further discussion.[75] Although consumer advocates won this battle, questions still linger about whether common law provides the best vehicle for consumer advocacy. The next Part explores this issue.

III. TAKING STOCK: ARE CONSUMER-FRIENDLY ARGUMENTS EFFECTIVE?

While consumer advocates' arguments against the *Restatement* were ultimately successful, this Part shows that these arguments are fundamentally weak. An assessment of these arguments is critical because there will likely be another battle — the *Restatement* was merely shelved for further consideration, not rejected entirely. Further, unless the Reporters agree to make significant changes, remnants of the "grand bargain" still pervade the bones of the *Restatement*.

This Part argues that a realistic assessment of the commercial environment shows that consumers are losing ground on both sides of the Reporters' "hydraulic framework." First, this Part argues that the Reporters are correct in their assessment of the assent doctrine: cognitive constraints, in combination with lengthy form contracts, deter consumers from meaningfully assenting in practice.[76] That said, this Part echoes consumer advocates' concerns about unconscionability as a means of ex post redress. It argues that the doctrine of unconscionability has proven unwieldy for the judiciary, resulting in uneven justice across the states. Furthermore, this Part explores the ways that ex post solutions rely on access to the legal system, which cannot be guaranteed given the variety of practical barriers facing consumers attempting to vindicate their rights through legal action. In short, the practical

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powerful-law-group-to-next-project-a-troubling-take-on-consumer-contracts/#7b6f191a2f60 [https://perma.cc/4TCN-WS2U].

75. *MacDougall*, *supra* note 5.

76. Much of the debate on this issue revolves around empirical assessment of the *Restatement*'s faithfulness to case law. This Part does not wade into this question. For an evaluation of the Reporters' accuracy in capturing the existing law, *see generally* Klass, *supra* note 10; Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REG. 447 (2019). For a contrasting view, contending that the Reporters' caselaw analysis was fundamentally correct, *see* David McGowan, *Consumer Contracts and the Restatement Project* (San Diego Legal Studs. Paper No. 19-424, 2019). Rather, this Note evaluates the reality of the consumer contracting landscape, assessing the doctrine of contract formation in light of psychological evidence.

realities of contracting undermine consumer advocates' attempts to secure meaningful assent and ex post remedies to unfair agreements.

A. ASSENT IN CONSUMER CONTRACTS

Cognitive constraints, in combination with the modern proliferation of form contracts, contribute to and fundamentally validate the Reporters' position on the decline of meaningful assent.[77] The crux of the consumer advocates' argument is that modern technology has not changed the law surrounding the contracting relationship between merchants and consumers. Black letter contract law requires a manifestation of mutual assent in order to enter a contract.[78] This manifestation must show that the party "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."[79] Consumer advocates argue that courts have not changed this paradigm, and thus the *Restatement* should not either.

But at almost every turn, the relationship reflected in the historical tenets of contract law is beset by the practical problems of modern consumer transactions. These fall into two interlocking categories. First, consumers face cognitive limits, as reading contracts is both intellectually taxing and time-consuming.[80] Even when consumers read and understand the contract, they often fundamentally overestimate their ability to comply with contractual terms.[81] Second, consumers generally enter contracts of adhesion that are given on a take-it-or-leave-it basis.[82] Taken individually, these problems hinder assent, but taken together, they undermine the argument that consumer assent is possible in the modern commercial context. In fact, this Part observes that many courts

77. *See infra* Parts III.A.1, III.A.2.

78. RESTATEMENT (SECOND) OF CONTS. § 18 (AM. LAW INST. 1981) ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.").

79. RESTATEMENT (SECOND) OF CONTS. § 19 (AM. LAW INST. 1981); *see also* U.C.C. § 2-204(1) (AM. LAW. INST. & UNIF. LAW COMM'N 2002) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

80. *See infra* Part III.A.1.

81. *See id.*

82. *See infra* Part III.A.2.

already recognize this problem, enforcing agreements based upon consumer access to contractual terms rather than true assent.[83]

1. *Cognition Constraints Limit Consumers' Ability to Consent*

The constraints on human cognition act as a fundamental barrier to consumers' ability to read and understand the contracts with which they are presented. The first of these cognitive constraints is "bounded rationality," which arises from natural limits in time and human processing power. As Professor Eisenberg explains:

> If the costs of searching for and processing (evaluating and deliberating on) information were zero, and human information-processing capabilities were perfect, then an actor contemplating a decision would make a comprehensive search for relevant information, would process perfectly all the information he acquired, and would then make the best possible substantive decision. . . .[84]

Because humans are bound by constraints on time, comprehension, and memory capacity, their actions often diverge from expected behavior if it was unfettered and in rational pursuit of individual interests.[85]

These limits on human decision-making capacity apply in a variety of contexts,[86] but have particular consequences for consumer

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83. *See infra* Part III.A.3 (discussing decisions by the Supreme Court as well as the Second, Seventh, Ninth, and Tenth Circuits that adhere to a model of enforcing contracts provided consumers are given the opportunity to review terms, rather than where they have meaningfully assented to them).

84. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995).

85. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) ("But even with [remedies to bounded rationality], and in some cases because of these remedies, human behavior differs in systematic ways from that predicted by the standard economic model of unbounded rationality."). Richard Thaler, one of the coauthors of this paper, won the 2017 Nobel Prize in Economic Sciences for "his contributions to behavioural economics." *Richard H. Thaler — Facts*, THE NOBEL PRIZE (last visited Oct. 8, 2020), https://www.nobelprize.org/prizes/economic-sciences/2017/thaler/facts/ [https://perma.cc/M6AT-SGSR].

86. James G. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, 9 BELL J. ECON. 578, 589 (1987) ("[B]ounded rationality has come to be recognized widely, though not universally, both as an accurate portrayal of much choice behavior and as a normatively sensible adjustment to the costs and character of information gathering and processing by human beings. . . .") (citations omitted).

transactions.[87] Contracts between business parties with significant financial stakes have every incentive to scrutinize contracts carefully, contemplating contingencies, negotiating small details, and employing sophisticated counsel to maximize their financial return. Consumers who enter routine contracts over low-value household goods lack these same incentives. Rather, when consumers make product choices, they are forced to balance their desire to purchase the right product with the desire to minimize effort in the process.[88] Consumers will act in a state of rational ignorance: even if they look at the contract, consumers will search for the terms and conditions most relevant to their interests, but will look no further.[89] As Nobel Prize-winning behavioral economist Richard Thaler explains, they "[spend] a couple of hours a week shopping and [devote] a rational amount of (scarce) mental energy to that task."[90]

Bounded rationality has significant implications for consumers presented with long, complex contracts. In the modern commercial setting, consumer contracts present a "search cost," the time necessary to read the document.[91] The Amazon.com Conditions of Use runs over 3,000 words, and is one of several distinct webpages outlining Amazon's comprehensive legal policies.[92] This is not unusual: the terms of service for Google, Apple, and Walmart run even longer.[93] The presentation matters too; consumers often encounter these contracts in contexts where they are encouraged to take minimal time to understand the pre-printed terms of the agreement.[94]

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87. Eisenberg, *supra* note 84, at 213 (arguing that form contracts are systematically affected by limits to consumer cognition).

88. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1222 (2003).

89. Eisenberg, *supra* note 84, at 214–15; Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 595 (1990).

90. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 59 (1980).

91. Meyerson, *supra* note 89, at 598.

92. *Help & Customer Service: Conditions of Use*, AMAZON https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088 [https://perma.cc/5WCF-JWYQ].

93. *Privacy & Terms: Terms of Service*, GOOGLE, https://policies.google.com/u/1/terms?utm_source=tos-email&utm_medium=email&pli=1 [https://perma.cc/2M4J-JMQ7] (just shy of 4,000 words); *Apple Media Services Terms and Conditions*, APPLE, https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/6HQR-4JJV] (over 7,000 words); *Walmart.com Terms of Use*, WALMART, https://help.walmart.com/app/answers/detail/a_id/8 [https://perma.cc/CR9X-YFQB] (over 14,000 words).

94. Eisenberg, *supra* note 84, at 242 (citing the example of a hurried traveler renting a car).

Faced with this cost, empirical evidence suggests that a large number of consumers do not to actually read the contracts they sign.[95] Rather, consumers account for a limited number of product attributes, and ignore the rest in making their decision.[96]

Another cognitive limitation, optimism bias, further undermines the likelihood that consumers read the contracts they are presented. Consumers often form unrealistic expectations of their own abilities or of the future.[97] Optimism bias is one form of this problem: consumers tend to think bad events are less likely to happen to them than to others.[98] When they read the contract and find relevant terms, consumers' natural biases color their assessment of the contract.[99] Overconfidence is especially endemic where, as with contracts, it is difficult to assess the probability of an outcome.[100] As a result, consumers can overestimate their ability to comply with the terms of a contract or underestimate the existence of unfavorable terms.[101] For example, a recent study found that forty percent of payday loan borrowers do not accurately assess their ability to pay back loans on time.[102] In the context of form contracts, underestimating the existence of unfavorable terms is a further disincentive to read the contract in the first place.[103] Why read a lengthy form contract, consumers may ask, if it is unlikely to cause any problems?

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95. *See* Omri Ben-Shahar, *The Myth of the Opportunity to Read in Contract Law*, 1 EUR. REV. CONTEMP. L. 1, 2 (2009) ("Real people don't read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract."); Yannis Bakos et al., Abstract, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUDS. 1, 1 (2014) (finding that only one or two of every thousand consumers of retail software actually access licensing agreements, and most do not read more than a small portion).

96. Korobkin, *supra* note 88, at 1203–04 ("While a few terms — price often being one — might be negotiated on a deal-by-deal basis, the boilerplate 'fine print' usually specifies the breadth of the parties' obligations to one another[.]")

97. Eisenberg, *supra* note 84, at 216.

98. Jolls et al., *supra* note 85 at 1524.

99. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Bias*, 185 SCI. 1124, 1124 (1974) (explaining the use of heuristics — rules of thumb — in decision-making and how they can lead to systematic and predictable errors).

100. Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 239 (1986).

101. Eisenberg, *supra* note 84, at 243 (observing that form contracts "involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing[.]").

102. *See* Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105, 118 (2014).

103. Arthur Allen Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition*, 31 PITT. L. REV. 349, 351 (1970).

Even if consumers did take the time to read standard form contracts comprehensively, it is unclear whether they would be any better off. Recent empirical research found that consumer contracts are not readable for the average member of the American public.[104] Because contracts modify common law default rules, consumers' comprehension of a contract will be inherently limited without a baseline understanding of their legal rights.[105] This cannot be fixed by allowing for legal guidance, as it is not rational for the average consumer to seek legal advice on the meaning of a term in a typical consumer contract, given the small amount of money at stake.[106]

As a result, consumers have a limited capacity to read and understand the contracts they are given. The problems presented by bounded rationality are an inherent part of contract law. Contract law exists, after all, to fill gaps between the problems that parties contemplate and those they do not.[107] However, such constraints take new significance when accompanied by adhesive contracts, as discussed in the next Part.

2. *Contracts of Adhesion Dominate the Consumer Market*

Adhesive contracts increasingly dominate modern commercial transactions. Because consumers do not have the ability to negotiate such contracts, and cognitive constraints impair reading and comprehension, it is hard to envision meaningful assent to such contracts.

Adhesive contracts are "standard-form contract[s] prepared by one party, to be signed by another party in a weaker position."[108] One of the key characteristics of such contracts is that they are

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104. *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2282–84 (2019). The authors conducted an empirical study of commonly-used sign-in-wrap agreements, which require a website's user to accept its terms and conditions before accessing the website's services. *Id.* at 2264. They find that "the vast majority of Americans face unreadable contracts on a regular basis." *Id.* at 2284. They also assert that this increases the transaction cost for consumers who wish to understand the terms of their contract. *Id.* at 2282. *See also* Mann, *supra* note 13, at 903.

105. Eisenberg, *supra* note 84, at 241.

106. Meyerson, *supra* note 89, at 598–99.

107. Globe Refin. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903) (Holmes, J.) ("[T]he common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter.").

108. *Contracts*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1983) (defining and modeling the adhesive contract).

usually not negotiable by consumers.[109] Adhesive contracts play a useful role in modern commerce because consumers and merchants do not have to expend energy negotiating each and every aspect of a complex transaction on an individual basis.[110] The advantage is so significant that some contract scholars believe that the vast majority of contracts are now adhesive.[111]

While adhesive contracts standing alone may not be problematic,[112] when combined with the reality of bounded rationality, they place consumers at a structural disadvantage. The drafter of form language is entering into the same contract with many customers, and consequently possesses a strong incentive to carefully draft contract terms to their advantage.[113] In contrast, consumers entering a single contract with a merchant in a small-dollar transaction lack a similar incentive to bargain over terms. This, coupled with the likelihood that consumers are not reading all of the terms of a contract, as well as potential gaps in consumers' comprehension of contract terms,[114] gives merchants a significant upper hand when entering into consumer contracts.

If it is true that standard form contracts have proliferated, and it is also true that cognitive constraints limit consumers' ability to read and understand these contracts, then how is it possible for a merchant to infer from a consumer's conduct that they assent to contractual terms? The simple answer is that the merchant cannot.

Indeed, if courts were to require strict adherence to the ideal of objective manifestation of mutual assent, they would encounter significant practical problems in the modern commercial

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109. Rakoff, *supra* note 108, at 1179; *Contracts*, BLACK'S LAW DICTIONARY (11th ed. 2019).

110. Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 936 (2006); Hillman & Rachlinski, *supra* note 13, at 437–38; *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) (identifying lower costs to the consumer as one benefit of a forum selection clause in a form contract).

111. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). Slawson's claim has subsequently been reiterated by Meyerson, *supra* note 89, at 594, and Korobkin, *supra* note 88, at 1203.

112. *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28 (2006) (postulating that sellers entering one-sided contracts will not include unfair terms for fear of facing a reputational cost). *But see* Oren Bar-Gil, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1376 (2004) (asserting that competition among sellers leads to even greater imbalance between contracting parties, as merchants in the credit card market must exploit consumer cognitive biases through contract to remain competitive).

113. Eisenberg, *supra* note 84, at 243.

114. *See supra* Part III.A.1.

environment.[115] As contracts scholar W. David Slawson explains, "[i]t would be unrealistic to try to make the law of contract fair and legitimate by insisting that a standard form, to be enforceable, must be an uncoerced, informed agreement."[116] As the next Part describes, courts recognize this practical limitation, and resolve the problem of adhesive contracts by enforcing them as written.

3. *Judicial Enforcement Without Meaningful Assent*

It is hard to square consumer advocates' argument that courts still require evidence of meaningful consumer assent with the strict enforcement of standard form contract terms. Many courts now bind consumers to form contractual terms, whether or not they have seen such terms, provided they were given the opportunity to review the contract.[117] This approach aligns with the Reporters' description of the demise of ex ante assent. However, it also foists the cost of contract non-compliance onto consumers and does not sufficiently encourage fair contractual terms.[118]

The view that contracts should be enforced as-written was articulated by Professor Randy Barnett, whose work focuses on consumer "consent" (as opposed to consumer *assent*) — which he defines as a manifestation of intent to alienate one's rights.[119] In this view, when one clicks "I agree" on an online contract without scrolling through and reading it, for example, enforceability is not dependent upon an objective manifestation of assent, but rather the consent given at the time of purchase.[120] Barnett argues that these contracts are enforceable, provided that none of the unread terms

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115. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 629–30 (2002).

116. Slawson, *supra* note 111, at 532.

117. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–94 (1991); Meyer v. Uber Techs., Inc., 868 F.3d 66, 74–75 (2d Cir. 2017); Sgouros v. TransUnion Corp., 817 F.3d 1029, 1033–34 (7th Cir. 2016); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014); Schnabel v. Trilegiant Corp., 697 F.3d 110, 127 (2d Cir. 2012); Hancock v. Am. Tel. & Tel. Co., Inc., 701 F.3d 1248, 1257 (10th Cir. 2012); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002). This Part does not intend to assess whether the Reporters correctly restated the law; it only serves to contextualize the judicial response to bounded rationality and adhesive contracts. *See supra* Parts III.A.1, III.A.2.

118. *See* Andrew Tutt, Note, *On the Invalidation of Terms in Contracts of Adhesion*, 30 YALE J. ON REG. 439, 450 (2013).

119. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986).

120. Barnett, *supra* note 115, at 636. Note that, while Barnett uses the example of a "clickwrap" contract, the same reasoning applies to a broader subset of consumer contracts, where the consumer is presented the opportunity, though not the obligation, to read their contract before it is executed. *See id.*

are "radically unexpected" by the consumer.[121] The *Restatement (Second) of Contracts* also seems to embrace this modern view of assent, allowing a "general" assent, where clicking "I agree" to a standard form contract signals an acceptance of all reasonable terms in such a contract.[122]

Many courts facing questions about consumer assent have adopted Barnett's approach. Barnett's concept of consumer consent aligns with the Supreme Court's holding in *Carnival Cruise Lines, Inc. v. Shute*,[123] the Second Circuit's recent holding in *Meyer v. Uber Technologies, Inc.*,[124] the Seventh Circuit's holding in *Sgouros v. TransUnion Corporation*,[125] the Ninth Circuit's holding in *Nguyen v. Barnes & Noble Inc.*,[126] and the Tenth Circuit's holding in *Hancock v. American Telephone & Telegraph Company, Inc.*[127] Even where courts find for consumer plaintiffs, their reasoning is not predicated on specific agreement to each contractual term, but rather on the ability of consumers to know about and access the terms.[128] This rationale dovetails with Barnett's argument: provided that consumers are not radically surprised by the existence of a contract or its terms, courts can enforce them. As such, modern contract law generally provides for enforcement of terms in a standard form contract even if the consumer did not read them.[129]

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121. *Id.* at 637.

122. RESTATEMENT (SECOND) OF CONTS. § 211(1) (AM. LAW INST. 1981) ("[W]here a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.").

123. 499 U.S. 585, 595 (1991) (holding that a forum selection clause printed on the back of a ticket, and visible only after purchase is enforceable due to its fundamental fairness).

124. 868 F. 3d 66, 74–75 (2d Cir. 2017) ("Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms.").

125. 817 F.3d 1029, 1033–34 (7th Cir. 2016) ("There is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.").

126. 763 F.3d 1171, 1177 (9th Cir. 2014) (finding that "the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract[ ]").

127. 701 F.3d 1248, 1257 (10th Cir. 2012) (upholding a clickwrap contract on the grounds that the plaintiff had adequate opportunity to review contractual terms before agreeing).

128. *See, e.g.*, *Sgouros*, 817 F.3d at 1036; *Nguyen*, 763 F.3d at 1177; Schnabel v. Trilegiant Corp., 697 F.3d 110, 127 (2d Cir. 2012); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002).

129. Korobkin, *supra* note 88, at 1205; Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 556 (2014).

Despite its widespread judicial acceptance, this modern interpretation of the doctrine of assent burdens consumers. First, it complicates the decision a court is asked to make in a consumer contract dispute. It transforms the question of whether the seller knew that the consumer was aware of the contract's terms into a question of whether a consumer might reasonably expect a contract term.[130] Thus, the court may address whether a term was *substantively* fair by analyzing the consumer's expectation for *procedural* fairness in the contracting process.[131] Because courts are generally unwilling to take this this step,[132] consumers are disadvantaged by the modern reinterpretation of assent.

This theory also burdens consumers with the cost of a contractual breach. If contract default rules allocate risk, then this rule empowers merchants to allocate significant risk to their customers.[133] When consumers bear the risks associated with a contract, they most often also bear the cost of its breach, which is antithetical to the notion that the best solution lies in allocating risk to those most able to bear it.[134]

It is difficult to apply the black letter law of meaningful and objective assent in a modern commercial marketplace, where merchants present consumers with lengthy form contracts which they cannot change and may neither read nor understand. Some courts recognize this challenge, and will enforce a contract so long as merchants present consumers an opportunity to review complex contractual terms.[135] Thus, both practical reality as well as significant shifts in the application of the assent doctrine undermine consumer advocates' claims that assent should continue to be strictly interpreted and enforced. While the modern approach to the assent doctrine better reflects the realities of modern commercial transactions, it nevertheless disadvantages consumers by saddling

130. Ayres & Schwartz, *supra* note 129 at 560.

131. *Id.* ("[S]ection 211 invites courts to engage in substantive fairness regulation under the guise of procedural fairness regulation.").

132. *Id.*

133. Rakoff, *supra* note 108, at 1229 ("The use of form documents, if legally enforceable, imparts to firms — even to those otherwise harnessed by the pressures of competition — a freedom from legal restraint and an ability to control relationships across a market.").

134. Tutt, *supra* note 118, at 451. *See also* Oren Bar-Gill, *The Behavioral Economics of Consumer Contract*, 92 MINN. L. REV. 749, 791 (2008) (arguing that in situations where merchants design contracts to induce systematic consumer mistakes, the merchant is the least-cost avoider).

135. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991); Meyer v. Uber Techs., Inc., 868 F.3d 66, 74–75 (2d Cir. 2017); Hancock v. Am. Tel. & Tel. Co., Inc., 701 F.3d 1248, 1257 (10th Cir. 2012).

them with the cost of unfair contracts to which they never affirmatively assented in the first place.

B. THE UNCONSCIONABILITY DOCTRINE IS WEAKER THAN REPRESENTED IN THE *RESTATEMENT*

As demonstrated above, consumer advocates' position that the assent requirement remains unchanged is a weak one. However, consumer advocates themselves rightly suggest that ex post enforcement alone is not enough.[136] This Part first observes that courts find unconscionability, a principal form of ex post review, difficult to apply. For this reason, state-by-state differences have made it a subjective and uneven standard. Furthermore, ex post enforcement is an incomplete solution because it is predicated on consumer access to the justice system. In reality, numerous hurdles, including cost, mandatory arbitration, and the burden of proof, impede consumers' ability to pursue remedies after being harmed by unfair contracts.

1. *Unconscionability Is Applied Unevenly Across the States, and Cannot be a Broad Solution*

Consumer advocates contend that the *Restatement* unnecessarily narrowed the definition of unconscionability, a limitation that will harm consumers.[137] Consumer advocates are partially correct in this assessment. The application of ex post enforcement doctrines across the states is so divergent that the *Restatement*'s struggle to capture the majority position highlights the variable nature of consumer justice. This variability means that ex post enforcement cannot provide reliable redress to consumers.

Unconscionability is a defensive doctrine that allows consumers to claim that their contract is so deeply unfair and one-sided as to be unenforceable. Historically, this common law doctrine was

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136. Letter from Letitia James to Members of the A.L.I., *supra* note 3, at 8 (citing the costs to consumers of pursuing legal remedies); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 74 (2008) (acknowledging that ex post enforcement alone is not sufficient to protect consumers in the credit market).

137. *See* Letter from Advocates for Basic Legal Equality, Inc. to Council Members of the A.L.I., *supra* note 2, at 2; Eisenberg, *supra* note 56 ("Section 5(2) is undesirable as a matter of morality and fairness, because a term that is fundamentally unfair or unreasonably one-sided under Section 5(1) is unconscionable without regard to whether it is also procedurally unconscionable.").

described in broad, normative terms. *Restatement (Second) of Contracts* provides that "[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract[.]"[138] The Uniform Commercial Code is no more illuminating, explaining that "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract[.]"[139] This broad language gives courts substantial discretion when applying the doctrine.

And given an inch, courts have taken a mile: application across the states has dramatically diverged. One significant area of divergence concerns the means of showing unconscionability. The majority of states, for example, require a showing of both substantive and procedural unconscionability.[140] This means that plaintiffs must demonstrate both (1) that their counterparty engaged in unfair bargaining practices, and (2) that the resulting contract was unfair.[141] Some states assess the two on a sliding scale, so that a significant degree of substantive unconscionability can compensate for a lesser showing of procedural unconscionability, or vice versa.[142] Others do not require a showing of procedural unconscionability at all.[143] Because states take such divergent approaches, it is hard to identify a single means of showing unconscionability with any precision.

The same difficulty arises in defining what constitutes an "unconscionable" contract term. Some states like Ohio and Michigan have a statutory list of unconscionable terms in their respective UDAP statutes.[144] Michigan's law is particularly specific, laying

138. RESTATEMENT (SECOND) OF CONTS. § 208 (AM. LAW. INST. 1981).

139. U.C.C. § 2-302 (AM. LAW. INST. & UNIF. LAW COMM'N 2002); *see also* Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 291 (2000) (discussing the intentional lack of specificity in the U.C.C.'s definition).

140. *See* Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 782 (2016); Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 767 (2014).

141. Leff, *supra* note 62, at 487.

142. McCullough, *supra* note 140, at 798. Note that the *Restatement* also takes this approach. *See* RESTATEMENT OF CONSUMER CONTS. § 5 cmt. 2 (AM. LAW. INST., Discussion Draft 2017).

143. *See* Eisenberg, *supra* note 56 (citing Arizona and Texas as two examples of states where a showing of both procedural and substantive unconscionability are not required).

144. MICH. COMP. LAWS ANN. § 445.903 (West 2018); OHIO REV. CODE ANN. § 445.903 (West 2017) (listing unconscionable practices in residential mortgage lending).

out thirty-seven different prohibited business practices, including misrepresenting the characteristics of a good, its quality, or the existence of a discount.[145] More commonly, descriptions focus on normative labels such as "harsh," "one-sided," and "oppressive."[146] High courts in multiple states have separately observed that the definition of unconscionability is broad and imprecise.[147] These vagaries in the law make it harder for courts to adjudicate claims of unconscionability and decrease the efficacy of unconscionability as a reliable form of redress for consumer harms.

This lack of definitional precision lends itself to variable outcomes. Each case is heavily dependent upon the factual circumstances of a particular transaction, as well as the judge's discretion.[148] Surveys indicate that certain state courts are more receptive to unconscionability arguments than others. States like Missouri, Nevada, New Mexico, and Illinois are more likely to find a consumer contract unconscionable in the presence of arbitration agreements, for example.[149] Empirical evidence also suggests a high volume of unconscionability cases are brought successfully in Ohio, whereas states like Maine, Colorado, and Rhode Island see hardly any cases, let alone successful ones.[150] Such variability in the frequency and success of cases in these jurisdictions means the depth and quality of case law differs by jurisdiction too, affecting its future application.

The same variability of application affects the other type of ex post review advocated by the *Restatement*: a prohibition on deceptive practices. Section 6 of the *Restatement* rendered contractual terms adopted as a result of deceptive acts and practices unenforceable.[151] While the commentary attempted to frame this section in terms of its common law roots,[152] the Reporters also explained that Section 6 "explicitly incorporates doctrines originally

145. MICH. COMP. LAWS ANN. § 445.903 (West 2018).

146. McCullough, *supra* note 140, at 797.

147. *Id.* at 796 (noting vague descriptions from the Supreme Courts of Montana, Texas, Wisconsin, and New Mexico).

148. ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE 191 (2018).

149. Landrum, *supra* note 140, at 802.

150. *Id.* at 805–07. According to Landrum, states like Ohio and Illinois adjudicated a high number of unconscionability claims over the course of the empirical study (208 and 43 respectively), whereas Maine saw no cases at all, and Rhode Island only had two. *Id.* This disparity inevitably impacts the depth and development of case law in these respective jurisdictions.

151. RESTATEMENT OF CONSUMER CONTS. § 6(a) (AM. LAW. INST., Tentative Draft 2019).

152. *See id.* § 6 cmts. 1, 5, 8(a), 8(c), 8(d) (referencing the Restatements of Contracts and Torts as well as Article 2 of the Uniform Commercial Code in explaining its scope).

developed under federal and state anti-deception law (specifically, Section 5 of the Federal Trade Commission Act and state unfair and deceptive acts and practices statutes)."[153] The fact that Section 6 was intended to reflect state UDAP statutes is notable because of the degree to which these statutes vary by state. The Colorado and Oregon UDAP statutes are relatively weak, failing even to outlaw deceptive practices.[154] Michigan and Rhode Island, in contrast, have facially strong UDAP statutes that have been hollowed out by judicial decisions limiting their applicability to consumer transactions.[155]

Because both the unconscionability doctrine and UDAP statutes (in their current state)[156] are highly variable in form and application, neither can be relied upon as a remedy to unfair adhesive contracts promulgated by merchants.

2. *Resource Constraints Prevent Consumers from Pursuing Their Claims*

Any discussion of how to secure consumer relief from unfair contracts is merely academic if it does not address one key element — access to the legal system. Consumer advocates correctly assessed the obstacles plaintiffs face in challenging unfairness after the fact.[157] Because consumers may never get their day in court, ex post remedies are an inherently incomplete means of protecting consumers from unfair contracts.

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153. *Id.* § 6 Reporters' Notes.

154. NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 13 (2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf [https://perma.cc/6EDW-Z826].

155. *Id.* at 1. *See also* Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514, 521 (Mich. 2007); Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 671 (R.I. 2004), both of which construe broadly exemptions to the State's UDAP statue, such that a variety of "regulated" or "controlled" industries are exempted.

156. It may be possible to overhaul UDAP statutes to respond more completely to these concerns. *See infra* Part IV.B.2.

157. *See, e.g.*, Letter from Advocates for Basic Legal Equality, Inc. to Council Members of the A.L.I., *supra* note 2, at 5 (identifying the burden of proof and lack of access to relevant evidence as a barrier to vindication of consumer rights); Letter from Letitia James to Members of the A.L.I., *supra* note 3, at 8 ("Most consumers lack the time and resources to litigate disputes[.] . . . The rare consumer who does attempt to vindicate her rights in litigation faces nearly insurmountable economic and procedural obstacles[.]"); Letter from Elizabeth Warren to David Levi, *supra* note 4 ("[T]he compromise proposed in the draft Restatement's 'bargain' is illusory in the millions of transactions in which a consumer will have no access to courts or class actions.").

Ex post remedies differ from ex ante regulations in a crucial, structural respect: they require consumers to affirmatively instigate a legal action. Recent scholarship suggests that consumers may never take that step — they may be discouraged from seeking legal advice at all due to a mistaken belief that the unfair terms of their contract are legally permissible.[158] But suppose that a consumer recognizes the harm and seeks to vindicate their rights. They still must overcome the financial cost of hiring counsel.[159] This may not be economically rational in cases where small dollar amounts are at issue.[160] This is especially true in light of the fact that unconscionability claims are expensive to litigate.[161]

Even if consumers are in a position to hire counsel, they may still encounter systemic barriers to their success. Typically, consumers are one-shot actors litigating against merchants with experience, specialized legal counsel, and a vested interest in crafting the law to their benefit.[162] There is also a resource mismatch between parties. Companies are willing and able to finance litigation in pursuit of their preferred outcome. In contrast, consumer plaintiffs often have access to less sophisticated counsel[163] who are unable to shape their litigation strategies in the same way companies can.[164] Factors that slow down the justice system also favor corporate defendants, as individual consumers lack the ability to hold out for their desired outcome when procedural delays increase costs.[165]

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158. *See* Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 508 (2020).

159. *See* Letter from Letitia James to Members of the A.L.I., *supra* note 3, at 8.

160. *See* Leff, *supra* note 103, at 356 (observing that consumers seeking to vindicate their rights using an unconscionability approach need free legal advice); *see also* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("[O]nly a lunatic or a fanatic sues for $30.").

161. *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1301 (2002).

162. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–100 (1974). For this reason, merchants have greater interest in strategically trading losses for the opportunity to shape the law to their own benefit. *See id.*

163. *Id.* at 116. Galanter is careful to note that this is not true of all lawyers representing "one-shot" clients, but "on the whole the difference in professional standing is massive." *Id.*

164. *Id.* at 117 ("What might be good strategy for an insurance company lawyer or prosecutor — trading off some cases for gains on others — is branded as unethical when done by a criminal defense or personal injury plaintiff lawyer.").

165. *Id.* at 121.

Even assuming that consumers can hire counsel and overcome these systematic imbalances, they may encounter yet another hurdle to adjudicating their claims in court: mandatory arbitration clauses. Arbitration is an out-of-court process wherein parties agree to settle disputes before a neutral third party.[166] An increasing number of major corporations now include contract clauses that compel arbitration, forcing consumers to adjudicate contract disputes outside of court.[167] A recent study shows that eighty-one of the largest American companies now include arbitration clauses in their consumer contracts.[168] For example, virtually every cellphone service provider mandates that its customers settle disputes in arbitration.[169] In principle, the venue need not make a difference to the proceeding's outcome. Arbitration advocates claim that it provides consumers a low-cost means of resolving the same disputes in a different forum.[170] However, evidence suggests that consumers rarely succeed in arbitration.[171] Consequently, the existence of a mandatory arbitration clause in an adhesion contract may preclude vindication of a consumer's rights.

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166. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 235 (2019).

167. Robert Gebeloff & Karl Russell, *Removing the Ability to Sue*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/interactive/2015/10/30/business/dealbook/arbitration-trends.html [https://perma.cc/Q6TC-LNHS] (showing a 125% increase in the number of class actions dismissed for compelled arbitration, including a 47% increase in "contract" cases and a 91% increase in "fraud" cases).

168. Szalai, *supra* note 166, at 234.

169. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2872 (2015).

170. *See The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses? Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 87 (2013) (statement of Archis A. Parasharami, Partner, Mayer Brown LLP). Parasharami contends that arbitration is actually a more equitable solution to low-value consumer claims by presenting them with a venue to pursue claims that normally would not attract legal representation.

171. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 12 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/TA56-MSXH] (finding that over a two-year period, only 32 of 341 disputes resolved by an arbitrator were decided in favor of consumers — a nine percent success rate); *see also* Jessica Silver-Greenberg & Michael Corkey, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/SN88-M3L6] (discussing arbitration findings in favor of business interests in cases with overwhelming contrary evidence); Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/ [https://perma.cc/N79C-837P] (noting procedural unfairness in arbitration).

It could be argued that aggregating claims as part of a class action overcomes this access issue.[172] But this too is an incomplete solution because of the hurdles to successfully bringing a class action. Beginning in the 1990s, Congress enacted a raft of legislation hostile to class actions, including the Class Action Fairness Act of 2005 that mandated the use of a federal forum in multistate class actions.[173] This timeframe also corresponded with courts taking an increasingly skeptical and exacting view towards the certification requirements under Federal Rule of Civil Procedure 23.[174] Because a greater swath of class actions were subjected to federal class certification requirements just as they were becoming more onerous, it became harder to bring class actions.[175]

The curtailment of consumer class actions culminated in the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.[176] There, AT&T Mobility challenged a Ninth Circuit ruling that found class action waivers unconscionable on the basis of California state contract law.[177] The U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted California state contract law because the state law interfered with Congress's objective of enacting a "liberal federal policy favoring arbitration."[178] Practically speaking, this means that arbitration clauses render a class action waiver presumptively enforceable, regardless of what state law says.[179] The response to this incentive is clear: seventy-eight

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172. *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/XF66-Y2L4] ("A class action, [consumer advocates] argued, allowed people who lost small amounts of money to join together to seek relief. Others exposed wrongdoing[.]").

173. JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 125–27 (2015).

174. *See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (holding that the plaintiff class could not be certified under Rule 23(b)(3) because it could not show the predominance of a question of law or fact); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359–60 (2011) (likewise rejecting certification under Rules 23(a) and 23(b)(2)).

175. COFFEE, *supra* note 173, at 127.

176. 563 U.S. 333 (2011).

177. *See id.* at 338.

178. *Id.* at 346 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (internal quotation marks omitted). The FAA was passed by Congress in 1925 to compel federal courts to enforce contractual arbitration agreements. R. LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 749 (7th ed. 2015). While arbitration agreements were initially viewed with suspicion, the Supreme Court has gradually expanded the FAA's reach to encompass any contract Congress could regulate under the Commerce Clause. *See id.* at 750–52.

179. COFFEE, *supra* note 173, at 129.

of the largest American companies now include a class action waivers in their consumer contracts alongside an arbitration clause.[180] Thus, so long as arbitration clauses are included alongside class action waivers, class actions cannot effectively overcome consumers' knowledge or resource constraints.

Even if plaintiffs can overcome binding arbitration clauses, they still shoulder the burden of proof in unconscionability and deceptive practices suits. The *Restatement* places the burden of proof on the consumer alleging unfairness.[181] In some circumstances, for example, where a salesperson makes an oral representation directly to a consumer, it becomes much harder for a consumer to meet this burden.[182] This also makes it easier for merchants to fend off unconscionability claims based on the alleged commercial necessity of exorbitant price terms, forcing lay consumers to prove that an excessive interest rate was unconscionable.[183]

For their part, the Reporters accept the existence of these barriers, but reject the implication that the *Restatement* makes it more difficult for consumers to recover.[184] The *Restatement*, they claim, is not meant to replace statutory consumer protection law, nor is it intended to supplant enforcement actions from state Attorneys General.[185] Furthermore, they acknowledge that consumers may be disadvantaged by arbitration clauses, but argue that because the FAA preempts state contract law, it is outside the scope of the *Restatement*.[186]

Consumers cannot rely on ex post redress for justice. Not only is it an ambiguous and variable area of law, it is also practically inaccessible to many of the individuals who are wronged in consumer transactions. Because of the systemic disadvantages that consumers must overcome — knowledge of one's legal rights, access to attorneys, avoidance of binding arbitration, and shouldering the burden of proof — a reliance on ex post remedies inevitably provides incomplete relief to injured consumers.

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180. Szalai, *supra* note 166, at 234.

181. RESTATEMENT OF CONSUMER CONTS. § 6 cmt. 2 (AM. LAW. INST., Tentative Draft 2019).

182. *Id.*

183. *See* Engel & McCoy, *supra* note 161, at 1301.

184. *See* Bar-Gil et al., *supra* note 73.

185. *See id.*

186. RESTATEMENT OF CONSUMER CONTS., Reporters' Memorandum (AM. LAW. INST., Discussion Draft 2017).

C. A BROKEN FRAMEWORK AND A MUDDLED PATH FORWARD

This Part cuts against both vindication of consumer advocates' strategy and acceptance of the *Restatement*. A reliance on preexisting common law principles does not offer the most effective means of reform for consumer advocates, as meaningful assent to form contracts has been hollowed out by the realities of consumer behavior and the nature of the present commercial market. Thus, consumer advocates arguing against the demise of assent are fighting an uphill battle. However, the Reporters' vision for reform is also imperfect, as ex post judicial scrutiny offers little opportunity to consumers seeking to vindicate their rights — both a muddled law and systemic disadvantages harm consumers' chance of recovery. This Part shows that the "grand bargain" framework cannot serve as an all-encompassing solution to consumer contracting problems.

In light of this analysis, consumer advocates should seek a new solution. In Part IV, this Note contemplates what such a solution might look like, settling on a response rooted in the ex ante regulation of consumer contracts.

IV. A PROPOSED SOLUTION

Consumer groups could improve their advocacy strategy by taking an approach focused on regulating unfair contracts through state law, rather than fixate on common law modifications to the *Restatement*. This Part proposes such an approach.

First this Part rules out alternative approaches to reform. It starts by explaining why the use of new interpretive rules, which would shift the way that courts construe contractual ambiguity, is unlikely to successfully resolve the problems described in Part III, *supra*. While interpretive changes in the unconscionability doctrine would benefit consumers, and are the favored approach by some influential contract scholars, they would not change any of the fundamental issues explored in the preceding Part.[187] Instead, this Part proposes a solution building on existing state UDAP statutes. Because they are already in place and can be updated with relative ease, UDAP statutes present a viable regulatory mechanism as well as a strong ex post remedy.

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187. *See supra* Part III.B.

A. INTERPRETIVE SOLUTIONS ARE RELIANT ON EX POST ENFORCEMENT, AND SUBJECT TO DISTORTION

One relatively subtle approach to consumer contract reform is the use of new interpretive principles for applying the unconscionability doctrine, which would assist courts in settling disputes over adhesive contracts. Contract law scholars such as Karl Llewellyn, Todd Rakoff, and Russell Korobkin each propose a variant of this solution to police form contracts.[188] While each suggestion would make contract law more favorable to consumers, they all suffer from the deficiencies of an ex post-focused solution.[189] Thus, they are not stand-alone solutions to the problems presented by the modern commercial landscape.

Professors Llewellyn and Rakoff approach the problem by vesting courts with broad discretion to invalidate terms at odds with the intent of the contract.[190] Professor Llewellyn suggests that courts look at form contracts and decide what terms the consumer has assented to in a merchant's contract.[191] To Llewellyn, this means that the courts should set aside the fine-print that would negate the meaning of the terms that induced the consumer to enter the transaction.[192] Professor Rakoff's proposed solution is not so different: he would place the burden of justifying a suspect contract term on the merchant that drafted it.[193] In both cases, an interpretive approach would vest substantial authority in judges to analyze a contract and decide whether a particular term is unfair to consumers.

Professor Korobkin proposes a variant on this analysis, focused on contract term salience. He argues that courts should begin a procedural unconscionability analysis with the question of a particular term's salience — whether it would have mattered to the

188. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960); Rakoff, *supra* note 108, at 1245; Korobkin, *supra* note 88, at 1278–81.

189. *See supra* Part III.B (discussing the unevenness of unconscionability as a remedy, as well as the problems ex post-focused solutions present for consumers lacking access to the legal system).

190. LLEWELLYN, *supra* note 188, at 370; Rakoff, *supra* note 108, at 1245.

191. LLEWELLYN, *supra* note 188, at 370.

192. *Id.* Llewellyn analogizes the unread fine print to a blank check: courts, he argues, have no trouble discerning when a party fills in an unreasonable amount. *Id.* If courts can assess these situations for fairness, then surely, he argues, they can determine when boilerplate language destroys the meaning of dickered terms. *Id.* at 371.

193. Rakoff, *supra* note 108, at 1245.

consumer when pricing and entering the contract.[194] Korobkin theorizes that if the term is non-salient, merchants have an extra incentive to make it socially inefficient, so they can extract extra profit from the unwitting consumer in the process.[195] If the court determines that the term is both non-salient and inefficient, the term should be invalidated as unconscionable.[196] This approach realistically incorporates bounded rationality into contract doctrine and adds more defined parameters to the unconscionability doctrine, potentially increasing its administrability.

While these potential solutions improve upon the status quo, they suffer from many of the same ailments that afflict the unconscionability doctrine in its current form. They remain vague standards, an issue that may affect the long-term sustainability of this solution. This is because interpretive solutions can revert to their least controversial form, as judges struggle to apply them. For example, Professors Ronald Gilson, Charles Sabel, and Robert Scott document how consumer-friendly interpretive principles in the insurance context have proven difficult for generalist courts.[197] Consumers have limited ability to bargain over insurance contract terms, so courts traditionally construed contractual terms against their drafter to preserve the "objectively reasonable" expectations of the average policy holder.[198] But because this interpretive principle resulted in unpredictable and erroneous decisions, courts have been hesitant to apply it, using the rule only as a last resort.[199] The potential difficulty in applying interpretive principles render them an uncertain vehicle for long-term change.

Interpretive principles also fail to resolve many of the problems associated with the ex post-oriented solution described in Part III, *supra*. None break the access barriers for consumers attempting to bring claims against merchants. Repairing perceived deficiencies in the unconscionability doctrine only tinkers with the ex post remedies and does not resolve any of the systemic issues surrounding consumer access to justice.[200] While rethinking the

194. Korobkin, *supra* note 88, at 1279–80.
195. *Id.* at 1234.
196. *Id.* at 1284.
197. Gilson et al., *supra* note 13, at 81–82.
198. *Id.* at 82 (citation and internal quotation marks omitted).
199. *Id.* at 83.
200. *See supra* Part III.B.2 (describing the cost of hiring counsel, mandatory arbitration clauses, and barriers to class actions as hurdles plaintiffs must clear before they can take advantage of favorable interpretive rules).

interpretive tools used by courts in reading adhesive consumer contracts may be helpful, it does not present the most feasible solution for consumer advocates seeking reform.

B. FIXING CONSUMER CONTRACTS THROUGH REGULATION

Having ruled out a reinvigorated approach to the common law, one potential solution remains: regulation of contract terms. Legislatures historically curbed the proliferation of unfair contract terms and continue to possess this regulatory power to this day.[201] First, this Part reviews the elements of a successful regulation strategy. It argues that, to avoid the pitfalls of an ex post-focused remedy, reform should prevent consumers from facing adverse contractual terms in the first place. Next, it argues that the best means of regulation is at the state-level through UDAP statutes. Finally, it concludes with a discussion of why state-level solutions are superior to federal regulation.

1. *The Contours of an Optimal Remedy*

Recall the problem presented by a lack of assent to form contracts: consumers are unaware of the imbalanced terms to which they agree. This information asymmetry incentivizes merchants to draft contracts in their own favor, potentially subjecting consumers to unfairness after the fact.[202] Consequently, this Note argues that a successful regulatory approach should focus on preventing consumers from facing unexpected, unfavorable terms from the outset.[203]

One regulatory path would require merchants to make important terms more visible to consumers. Scholars propose standardized boxes outlining the key terms to customers.[204] This, they claim, lowers the cost of reading by making the most important terms visible to the consumer.[205] The Consumer Financial Protection Bureau (CFPB), for example, has taken this approach with

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201. Leff, *supra* note 62, at 524.
202. Eisenberg, *supra* note 84, at 243; Korobkin, *supra* note 88, at 1234.
203. *See* Ayres & Schwartz, *supra* note 129, at 562.
204. *See, e.g.*, *id.* at 580.
205. *Id.* at 583; *see also* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 156 (1970) (suggesting that the quantity and quality of the information available to consumers can be improved through regulation).

respect to certain consumer credit products.[206] CFPB regulations require that certain mortgage terms are published clearly, conspicuously, and in plain language.[207] These terms must be grouped together and set aside, such that they are uniformly available for the consumer's review in the same part of the contract.[208] The CFPB has also published several form agreements for a variety of credit products,[209] the use of which constitutes compliance with the Regulation.[210] By publishing a standardized credit disclosure form and incentivizing issuers to use it, the CFPB effectively controls the baseline level of transparency around key terms in credit contracts.[211]

However, this type of regulation would be difficult to effectively implement in an era of proliferating contracts covering a wide variety of goods and commercial contexts. The CFPB's regulatory structure demonstrates the impracticality of widely adopting such an approach. For each type of loan, the CFPB identifies with great specificity the salient contractual features that must be segregated and made visible to the consumer.[212] Slight variations in the product type lead to a proliferation of form disclosure documents.[213] While it is true that credit products are uniquely complex, posing special, unanticipated costs on the consumer,[214] they provide insight into how the broader heterogeneity of consumer products renders this approach to contract regulation impractical. Even so, the CFPB's form disclosure documents demonstrate the way that contract regulation can successfully lower consumer search costs.

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206. *See* 12 C.F.R. § 1026.37(o) (2020).

207. *Id.* § 1026.37(o)(1)(i) (2020). These CFPB mortgage disclosure rules were published in compliance with the Dodd-Frank Act, requiring that model disclosure forms "use plain language comprehensible to consumers." 12 U.S.C. § 5532. *See* Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,756 (final Dec. 31, 2013).

208. 12 C.F.R. § 1026.37(o)(1)(i) (2020).

209. *See id.* § 1026 app. H (2020) (model forms).

210. *See* 15 U.S.C. § 1604(b) ("A creditor or lessor shall be deemed to be in compliance with the disclosure provisions . . . if the creditor or lessor . . . uses any appropriate model form or clause as published by the Bureau[.]").

211. Gilson et al., *supra* note 13, at 85.

212. *See generally* 12 C.F.R. § 1026.37 (2020). Sections (a) through (n) describe in detail each of the terms that must be visible and readable to consumers with respect to home mortgage loans.

213. There are 30 different model forms for closed-ended credit agreements, and variants of several forms among these broad categories. 12 C.F.R. § 1026 app. H (2020).

214. Bar-Gill & Warren, *supra* note 136, at 10 n.13 (discussing why the special complexity of credit products makes it more difficult for consumers to understand the terms of a contract than a complicated physical product).

A more fruitful regulatory approach adopts broad prohibitions on unfair terms, providing certainty to both consumers and merchants about the types of contract clauses considered unfair or deceptive. Europe's regulatory scheme presents a live example of this approach. In 1993, the Counsel of the European Communities adopted Council Directive 93/13/EEC on unfair terms in consumer contracts.[215] The Directive prohibits unfair terms, explaining that "[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[216] Broad prohibitions of this kind are useful to consumers because they can cover a variety of conduct. However, when stated so generally, they risk the interpretive ambiguity and variability problems that make unconscionability an inconsistent remedy.[217] The Directive overcomes these potential obstacles by including a non-exclusive list of prohibited terms, effectively a blacklist for unfair contract clauses.[218] This tethers the Directive to specific forbidden behaviors, while allowing courts to interpret it more broadly as necessary. The Directive also encourages member states to go further in prohibiting unfair contractual terms.[219]

This approach is advantageous because it addresses the problems consumers face when entering a contract, as well as the harms they may seek to redress ex post. Such regulations create reasonable expectations that consumers will not be unfairly surprised. Maintaining a list of unfair practices disincentivizes the inclusion of prohibited terms and sets expectations for consumers and merchants alike. This has the ancillary benefit of managing consumer search costs: a publicly-accessible list of unfair contract terms alerting consumers as to what is prohibited. Therefore, as with the CFPB's regulatory approach, consumers need not scour a contract in fear of an unfair term buried deep in the agreement.

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215. Council Directive 93/13/EEC, 1993 O.J. (L 95) 29.

216. *Id.* at 31.

217. *See infra* Part III.B.1.

218. *See* Council Directive 93/13/EEC, *supra* note 215, at 31, 33. The blacklisted terms include, among others, outsized damages clauses in the event that the consumer is unable to perform their duties under the contract, allowing the seller to unilaterally alter the contract, disclaiming responsibility for the actions of the merchants' agents, and excluding or hindering a consumer's ability to pursue a legal remedy "particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions[.]" *Id.* at 33.

219. *Id.* at 31.

Maintaining consumer and merchant expectations also offers the possibility of decreased ex post enforcement costs. One of the key problems with overreliance on ex post remedies is the uncertainty they introduce into form contracting.[220] Uncertainty about legal treatment may lead merchants to raise their prices in anticipation of the costs of litigation, negating one of the key benefits of form contracts in the first place. A comprehensive regulatory system should, in theory, negate some of the need for ex post review. Because consumers face a variety of hurdles in seeking legal remedies to unfair contracts ex post,[221] the law must address unfair contract terms before consumers assent to reduce the need for legal redress.

Europe's solution is far from perfect. It lacks an updating mechanism, which would allow the European Council to prohibit additional unfair terms as they arise.[222] Improving on this model requires the incorporation of an updating mechanism to ensure that consumers remain protected, even as the nature of unfair contracts evolve.

In sum, a successful remedy will build upon the existing European system by identifying specific prohibited terms and creating an updating mechanism such that new terms can be identified and prohibited as they appear. As the next Part explains, the European system already has a dormant analog in the United States: UDAP statutes.

2. *UDAP Statutes: Applying a State Regulatory Strategy*

Updating UDAP statutes is the most viable strategy for consumer advocates seeking to regulate unfair contracts. Using the Federal Trade Commission Act as a model,[223] states enacted UDAP statutes to expand enforcement of consumer rights beyond the scope of federal law and provide consumers direct access to remedies.[224] Every state plus the District of Columbia now has a UDAP statute banning deceptive, and in some cases unfair, practices by statute.[225] While the statutes vary in terms of their strength and

220. *See supra* Part III.B.1.
221. *See supra* Part III.B.2.
222. Gilson et al., *supra* note 13, at 79.
223. 15 U.S.C. § 45(a)(1).
224. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 915 (2017).
225. *See* NAT'L CONSUMER L. CTR., *supra* note 154, at 9.

enforceability,[226] all states provide consumers a cause of action.[227] UDAP statutes allow consumers to seek legal remedies for a broader variety of harms than their common law alternatives.[228] They also provide causes of action for either state Attorneys General or state agencies, which monitor the consumer marketplace for complaints and can bring cases if consumers lack the means to contest an unfair contract.[229]

Some state UDAP statutes already follow the European model by allowing state agencies to outlaw specific unfair or deceptive contractual terms, demonstrating the viability of such an approach here.[230] These state UDAP statutes give consumers the baseline protection they need. Moreover, twenty-eight states, including Ohio, Pennsylvania, and New Jersey (populous homes of activist Attorneys General), delegate rulemaking authority to state agencies.[231] This allows states to update the list of prohibited terms as they appear in practice, giving them the nimbleness that Europe's Directive lacks.[232]

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226. For example, states differ on the strength of their respective substantive prohibitions, the scope of conduct covered, the stringency of the penalties allowed, and the hurdles to effective enforcement. *See id.* at 5–8.

227. *Id.* at 33.

228. Prior to the widespread passage of state UDAP statutes, only the FTC could pursue a case under the Federal Trade Commission Act's "unfair and deceptive" standard. 15 U.S.C. § 15. Instead, consumers were forced to rely on the common law doctrines of fraud and unconscionability, which proved ineffective vehicles to vindicating consumer rights. Pridgen, *supra* note 224, at 917–18.

229. NAT'L CONSUMER L. CTR., *supra* note 154, at 28. For example, in 2019 the New York Attorney General brought suit under N.Y. GEN. BUS. LAW § 349 (McKinney 2014) (its UDAP statute) for misrepresenting the safety of electronic cigarette products, *see* Complaint at 29–30, People v. JUUL Labs Inc., No. 452168/2019 (N.Y. Sup. Ct. Nov. 19, 2019), concealing a data breach in violation of data privacy contract terms, *see* Complaint at 21–22, People v. Dunkin' Brands, Inc., No. 451787/2019 (N.Y. Sup. Ct. Sept. 26, 2019), and entering predatory rent-to-own real estate contracts, *see* Complaint at 58–59, People v. Vision Prop. Mgmt., No. 1:19-CV-07191 (S.D.N.Y. Aug. 1, 2019).

230. These states give state agencies the authority to issue regulations "to target emerging or persistent unfair and deceptive acts and practices and develop state-based solutions." NAT'L CONSUMER L. CTR., *supra* note 154, at 16.

231. *Id.* at 7, 17. Many states have yet to realize the full potential of this administrative approach, as some with delegated rulemaking authority (Mississippi and North Dakota for example) have never adopted any rules. *See id.* at 17.

232. One might argue that delegating regulation to an expert state agency leaves those regulations at risk of "regulatory capture," meaning that the agency is at risk of succumbing to influence based on the interested party's identity rather than the merits of their argument. Scott Hempling, *"Regulatory Capture": Sources and Solutions*, 1 EMORY CORP. GOV. & ACCOUNTABILITY REV. 23, 25 (2014). This is a non-trivial concern, given that some now claim that the CFPB has been subject to regulatory capture by the consumer finance industry. *See* Complaint at 1–2, Nat'l Ass'n of Consumer Advocs. v. Kraninger, 1:20-cv-11141-JCB (D. Mass. June 21, 2020) (arguing that an appointed advisory taskforce "uniformly represent[ed] industry views"). However, state agencies are better positioned to police

Admittedly, where states attempt to emulate the European Directive, they presently do not provide the same level of protection for consumers.[233] Some state statutes restrict the scope of their protection, and discourage private attorneys from bringing state UDAP claims.[234] However, states can update their UDAP statutes to patch these deficiencies. Between 2009 and 2018, six states passed new laws to strengthen their existing UDAP statutes, more than the two states that unambiguously weakened their UDAP statutes over the same period.[235] Even now, New York's State Legislature is considering its first substantive update to the state's UDAP statue in decades.[236] Moreover, for UDAP statues to viably regulate form contracts, they need not be adopted by every state. Rather, a small number of large states need to adopt them so that it would be impractical for online retailers to design different contracts for a few states simply to comply with the respective laws' varying levels of stringency.[237]

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consumer contracts than state legislatures because they maintain expertise in the underlying subject matter. *See* Ariz. v. City of Tucson, 761 F.3d 1005, 1014 (9th Cir. 2014); City of Bangor v. Citizens Commc'ns Co., 532 F.3d 70, 94 (1st Cir. 2008). Additionally, by instilling a clear public interest mandate and constantly evaluating their success in regulation, state Attorneys General can maintain their mission-oriented focus. *See* Hempling, *supra* note 232, at 33–34.

233. Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 675 (2008).

234. Engel & McCoy, *supra* note 161, at 1304–05. For example, five states (Arizona, Delaware, Mississippi,
South Dakota, and Wyoming) have no provision allowing the court to order reimbursement of attorney fees for successful consumer plaintiffs. NAT'L CONSUMER L. CTR., *supra* note 154, at 35.

235. NAT'L CONSUMER L. CTR., *supra* note 154, at 46. In 2011, Tennessee narrowed the scope of its UDAP statute to withdraw its applicability to insurance transactions and to deny consumers the ability to bring cases alleging deception. *See* TENN. CODE ANN. § 47-18-104 (West 2019). Ohio also weakened its UDAP law by allowing an early settlement offer to undermine the opportunity to receive treble damages and attorney's fees after the litigation. NAT'L CONSUMER L. CTR., *supra* note 154, at 47. On the other hand, Iowa, Alaska, Arizona, Delaware, North Dakota, and Oregon strengthened their UDAP laws. *Id.* at 46–47.

236. The Consumer and Small Business Protection Act (A.679C/S.2407C) is presently pending in the New York State Assembly and Senate respectively. It would strengthen the protections provided under New York's UDAP statute by prohibiting a broader range of unfair conduct. Robert A. Martin, Opinion, *How N.Y. Consumers Get Shafted: Our State Has a Weak Law for Protecting Residents from Bad Corporate Behavior*, N.Y. DAILY NEWS (Feb. 12, 2020, 12:00 PM), https://www.nydailynews.com/opinion/ny-oped-how-ny-consumers-get-a-raw-deal-20200212-ar56mvf3i5daxih2gvsnvlfk6y-story.html [https://perma.cc/7YAC-TL8D].

237. *See, e.g.*, Geoffrey A. Fowler, *Don't Sell My Data! We Finally Have a Law for That*, WASH. POST (Feb. 19, 2020), https://www.washingtonpost.com/technology/2020/02/06/ccpa-faq/ [https://perma.cc/2LY6-2ZY7] (explaining that companies like Netflix, Starbucks, and

Revitalizing UDAP statutes would solve the problem of unfair surprise by vesting states with the power to regulate what kinds of terms consumers see. By weeding out the most egregious, unfair, and deceptive practices, it would limit consumers' exposure to unfair terms ex ante, thereby managing their search costs.

It would also play a dual role in ex post enforcement. While the optimal remedy would avoid the need for ex post causes of action wherever possible, muscular UDAP statutes strengthen consumers' statutory cause of action in cases where merchants still fail to draft fair contracts and ex post actions become necessary. It would also provide notice and certainty with respect to blacklisted terms, which merchants now know cannot be included in their contracts. In sum, UDAP statutes on the state level present the best means of regulating form contracts in the future.

3. *Why Not Federal Regulation?*

Some argue that consumer contracts should be regulated at the federal level rather than the state level.[238] There are, undoubtedly, advantages to this approach. It would create uniformity in the administration of consumer contracts that would be impossible to replicate on a state-by-state basis.[239] Moreover, legislating at the federal level mitigates the risk of preemption by the FAA.[240] Finally, federal agencies have a strong record of success when undertaking regulatory and enforcement actions on behalf of consumers.[241]

UPS will extend the rights granted by the California Consumer Privacy Act to all Americans, in part, to avoid "additional work for companies to try to confirm where people live[ ]"). While this could be true of unconscionability as well, this Part argues that UDAP statutes are better agents for change because they uniformly provide for affirmative claims and allow state agencies to bring claims rather than just private parties.

238. *See, e.g.*, Hilary Smith, Note, *The Federal Trade Commission and Online Consumer Contracts*, 2016 COLUM. BUS. L. REV. 512, 514 (2016) (arguing that the Federal Trade Commission could exercise its authority to intervene against unfair practices in the adoption of clickwrap contracts); Bar-Gill & Warren, *supra* note 136, at 98 (suggesting the creation of a Financial Products Safety Commission at the federal level to regulate credit contracting markets).

239. Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEG. 37, 87 fig.9 (2018) (noting the wide variability in the efficacy of enforcement across the 50 states); *see also supra* Part III.B.1.

240. *See supra* Part III.B.2 for a discussion of *AT&T Mobility*'s effect on federal preemption of state contract law.

241. Cox et al., *supra* note 239, at 78 tbl.11 (showing a relatively high average financial recovery through CFPB enforcement actions).

While this Note does not oppose federal legislation, it takes the position that state-level regulation is a better vehicle for addressing consumer harms because it treats the problem at its point of origin. States have a long-recognized police power to regulate economic relationships between their citizens.[242] From this, states developed deep experience in legislating consumer protection measures to prevent unfair contracting practices.[243] Take, for example, the regulation of retail installment sales. In the mid-twentieth century, salesmen traveled door-to-door selling consumer goods on credit.[244] They often engaged in predatory practices, targeting poor, minority neighborhoods with high rates of illiteracy for high-interest loans.[245] In response to complaints around these practices, state governments passed retail installment sales acts, which required a broad range of disclosures and limited consumer charges.[246] This legacy continued in the District of Columbia's legislative response to *Williams v. Walker-Thomas Furniture Company*,[247] a canonical, highly-publicized case invoking the unconscionability doctrine, which spurred the District's passage of a

242. *See* Munn v. Illinois, 94 U.S. 113, 125 (1876) ("Under [the police] powers, the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."); Knoxville Iron Co. v. Harbison, 183 U.S. 13, 20 (1901) (reformulating the police power as regulation "'not in plain conflict with some provision of the state or Federal Constitution as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people[ ]'" (internal citations omitted)).

243. States engaged in economic regulation of wage assignments as a part of small-dollar loans, *see* Mutual Loan Co. v. Martell, 222 U.S. 225, 234 (1911), and usury laws to regulate high interest rates, *see* Griffith v. Connecticut, 218 U.S. 563, 569 (1910). *See generally* FLEMING, *supra* note 148 (documenting attempts to regulate small-dollar lending in New York State originating in the late nineteenth century); Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1383, 1433 (2014) (documenting the legislative development of the unconscionability doctrine and similar consumer protection measures).

244. *See* FLEMING, *supra* note 148, at 143.

245. *Id.* at 144–45.

246. Joseph P. Jordan & James H. Yagla, Comment, *Retail Installment Sales — History and Development of Regulation*, 45 MARQ. L. REV. 555, 555 (1962). For a more comprehensive history of New York's effort to pass its Retail Installment Sales Act in 1957, *see also* FLEMING, *supra* note 148, at 139–75.

247. 350 F.2d 445 (D.C. Cir. 1965). Ora Lee Williams purchased over $1,800 of merchandise from Walker-Thomas Furniture. *Id.* at 447 n.1. Williams defaulted after making $1,400 of payments, but because of a cross-collateralized clause, Walker-Thomas maintained the ability to foreclose on and repossess all her purchases. *Id.* at 447. The court held that the district court had not properly considered whether the cross-collateralization clauses was unconscionable, explaining that "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms." *Id.* at 449.

retail installment sales act.[248] Local governments have long demonstrated an attentiveness to the concerns of their consumers, and a willingness to adapt to the changing nature of contractual relationships.

State-level reform has the ancillary benefit of working in conversation with existing common law doctrines. State courts interpret consumer protection statutes referring to "unfair bargains" or "unconscionability" in parallel with their jurisdiction's common law unconscionability doctrine.[249] Thus, improving state consumer protection regimes also strengthens state common law protections. Recent developments in California illustrate this connection. In *De La Torre v. CashCall, Inc.*,[250] the plaintiff brought a claim under the state's Unfair Competition Law, which prohibits "unlawful, unfair or fraudulent business act[s] or practice[s,]"[251] claiming that the high rate of interest charged on a loan was unlawful because it was unconscionable.[252] The California Supreme Court held for the plaintiff, explaining that the unconscionability doctrine can be applied affirmatively to attack a contract under the Unfair Competition Law rather than just defensively.[253] The Court's willingness in *De La Torre* to read its existing consumer protection statutes in light of California's unconscionability doctrine demonstrates the possibility that consumer protection statutes can be applied broadly to help consumers proactively.[254] Thus, the joint evolution of statutory and common law can act symbiotically to increase consumer protection.

Finally, it is uncertain, given the current political environment, that any federal regulatory development is forthcoming. The current administration threatens to weaken the CFPB and its corresponding statutory authority to bring UDAP claims.[255] Efforts to strengthen the federal consumer protection regulatory regime, like

248. *See* Fleming, *supra* note 243, at 1429.

249. Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 981–82 (2019).

250. 422 P.3d 1004 (Cal. 2018).

251. CAL BUS. & PROF CODE § 17200 (West 2019).

252. 422 P.3d at 1008.

253. *Id.* at 1012.

254. *See* Brady Williams, Note, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CAL. L. REV. 2015, 2048 (2019).

255. Cox et al., *supra* note 239, at 39. *See also* Brief of Respondent Supporting Vacatur at 7–8, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7) (arguing that the Supreme Court should find that the structure of the CFPB violates the Separation of Powers).

the Consumers First Act, languish in Congress, which is on track for one of the least productive sessions in the last half-century.[256] Thus, consumer advocates' energy may be more effectively directed towards state legislation.

While there are some advantages to a federal legislative approach, a state law fix offers greater opportunity for impact. State legislatures' long history of protecting consumers as well as their ability to affect local contract law demonstrate their potential as a source of protection for distressed consumers. When combined with the difficulty of passing any federal legislation, state legislation presents an achievable alternative.

V. CONCLUSION

Though successful in their lobbying efforts, consumer protection advocates should take shallow comfort in halting the *Restatement*. This is because the proposed *Restatement* reflected a fundamental reality about the present state of assent to adhesive contracts, even as it overestimated the power of ex post enforcement mechanisms to cure these wrongs. This Note proposes that consumer advocates should shift their focus to the ex ante regulation of unfair contract terms that would prevent consumers from being presented with such terms in the first place. This Note suggests that UDAP statutes may be a viable avenue for doing so. Providing state agencies with the ability to maintain a list of unfair and deceptive terms ensures that consumers are presented contracts in a manner most likely to lead to a fair outcome.

256. Elsa Nilsen, *House Democrats Have Passed Nearly 400 Bills. Trump and Republicans Are Ignoring Them*, VOX (Nov. 29, 2019, 7:00 AM), https://www.vox.com/2019/11/29/20977735/how-many-bills-passed-house-democrats-trump [https://perma.cc/43K8-HE8T]; *see also* S. ___, 116th Cong. (2020) (a recently-introduced bill that rejects the "consent model" of signing away consumer data privacy rights, and sharply limits the type of data companies can collect). Entitled the Data Accountability and Transparency Act, the Bill was released earlier this summer in discussion draft form and has not been assigned a bill number as of this writing. Geoffrey A. Fowler, *Nobody Reads Privacy Policies. This Senator Wants Lawmakers to Stop Pretending We Do.*, WASH. POST (Jun. 18, 2020, 5:00 AM), https://www.washingtonpost.com/technology/2020/06/18/data-privacy-law-sherrod-brown/ [https://perma.cc/3AYM-PS2K]. According to one observer, "[c]hances are slim to none that [the bill] could pass this year in a Republican-controlled Senate." *Id.*