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# BOILERPLATE, FREEDOM OF CONTRACT, AND “DEMOCRATIC DEGRADATION”

Brian H. Bix \*

MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2012). Pp. 360. Hardcover \$35.00.

## INTRODUCTION

In Margaret Jane Radin’s provocative new book, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*,<sup>1</sup> the author offers scathing observations regarding the motivation and effects of the terms placed in consumer and employee form contracts and on-line agreements. She argues that the current contracting practices make a mockery of consent, and undermine the rule of law.<sup>2</sup> *Boilerplate’s* essential claim is that for many contracting parties, freedom of contract is less an ideal than a sham.<sup>3</sup> The book properly criticizes theories of contract law (and courses in contract law) that largely ignore boilerplate and its problems despite the pervasiveness of such terms in modern contracting practice.<sup>4</sup> In the process of making her argument, Radin offers an impressive tour across modern contracting practices, Contract Law doctrine, Contract Law theory, political theory, and populist advocacy. *Boilerplate* is a book from which all readers could benefit, whether or not they ultimately agree with every one of the author’s analyses and conclusions.

As is the norm in these sorts of reviews, I will treat most of the important positive aspects of the book as given, summarizing and discussing them only briefly, while focusing on some doubts and criticisms, even if these are minor relative to the

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\* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota. A short portion of this review appeared, in modified form, as part of a May 2013 Symposium on *Boilerplate* at Contract Profs Blog, [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-vi-brian-bix-on-democratic-degradation.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-vi-brian-bix-on-democratic-degradation.html). I am grateful for the author’s response to my posting that occurred as part of the Symposium: [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-x-b-professor-radin-responds-to-week-ii.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-x-b-professor-radin-responds-to-week-ii.html), and also for the excellent work of the editors of the *Tulsa Law Review*.

1. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

2. As part of her sharp critique of the complete or relative absence of consent by those receiving these standard and on-line terms, Radin urges that such terms and the legal ties that arise from them not be called “contractual.” *See id.* at 242. While I understand and appreciate the analytical and rhetorical motivation for that move, I will not be following it in this review.

3. RADIN, *supra* note 1, at 7-9.

4. I raise a similar objection in BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* 128-46 (2012) [hereinafter BIX, *CONTRACT LAW*]. For an excellent discussion of Radin’s point regarding the connection between contracting practices and contract theory, see Robin Kar, *The Challenge of Boilerplate*, JURISPRUDENCE JOTWELL, Sept. 3, 2013, <http://juris.jotwell.com/the-challenge-of-boilerplate/>.

overall merits of the work. In particular, this review will raise questions regarding whether some of *Boilerplate's* accusations are overstated in ways that distort the analysis offered.

Part I looks at the issue of “boilerplate” (a term Radin and others<sup>5</sup> use as a broad term to refer to provisions placed by vendors into standard form contracts and provided through various forms of contracting; I will follow this usage) and how it affects issues of freedom of contract and consent. Part II briefly considers Radin’s accusation that boilerplate undermines the rule of law and democratic legitimacy. Part III considers some possible responses to the problem of boilerplate, including tort remedies and administrative regulation.

#### I. BOILERPLATE, CONSENT, AND FREEDOM OF CONTRACT

What does it mean to have freedom of contract, and its corollary, “freedom from contract?”<sup>6</sup> The general notion of the idea (or ideal) is well-enough understood: that in contract law, unlike most other areas of law, the rights and duties we have derive from our own choices rather than being imposed upon us. This aspect of contract law ties that social practice (and the related practice of promising)<sup>7</sup> to the ideal of autonomy; that is, self-governance. The ability to enter enforceable contracts, and to choose the terms, also enhances autonomy and liberty by encouraging cooperation that will help parties achieve individual and shared objectives. There are well-known limits to the extent to which freedom of contract should be, or is, reflected in contract law: e.g., the need for objective standards of formation (and modified objective standards of interpretation for contractual terms) entails that there will be occasions when parties will be bound by contracts and contractual terms that vary from those to which the parties subjectively thought they were committing.<sup>8</sup>

The question is whether current contracting practices raise additional and more central challenges to the idea of freedom of contract.<sup>9</sup> Today, for most people, most of the time, contracting practice is a matter of standard form contracts, small print terms, terms provided on websites (where, commonly, one must click a box to express assent, though sometimes the terms are simply posted without any expression of assent being requested or required), and terms inserted in the containers of goods, which cannot be seen until after the purchase. And it has been widely acknowledged that almost no one reads these terms (neither the parties that receive the terms, nor the parties that supply them), and that even if one were to read

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5. See, e.g., *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* (Omri Ben-Shahar ed., 2007).

6. See Omri Ben-Shahar, *Foreword: Freedom From Contract*, 2004 WISC. L. REV. 261 (2004).

7. The connection between a contract and a promise remains a controversial area. See, e.g., Michael G. Pratt, *Promises, Contracts and Voluntary Obligations*, 26 L. & PHIL. 531 (2007); see also Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 719-29 (2007).

8. Cf. GRANT GILMORE, *THE DEATH OF CONTRACT* 45-49 (Ronald K. L. Collins ed., 1995) (describing the rise of the objective approach); see also Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

9. Radin would reject reference to “freedom of contract” in reference to regulating boilerplate, for much the same reason that she prefers not to call such terms “contractual.” See RADIN, *supra* note 1, at 242. Once again, I will not be following her example in this review.

the terms, one would be unlikely to understand their significance (especially if one lacked legal training, but even lawyers might be hard-pressed to fully understand many of these terms).<sup>10</sup> There is little sense of the autonomy ideal here: parties are frequently ignorant that there are in fact terms, and almost always uncertain as to their meaning and significance. One can hardly speak of such parties as having *chosen* their contractual rights and duties.

The concerns relating to modern contracting practices extend far beyond issues of formation (many parties being unaware that there even is a contract, or aware that there are terms that apply beyond the simple exchange of money for the good or service). The substance of the terms found in these standard forms, click-through agreements, browse-wrap agreements, terms in the box, etc., include significant limitations of liability, waivers of warranties, assent to mandatory arbitration, waivers of the right to bring claims in class actions, indemnification clauses, hold-harmless clauses, and waivers of other substantive and procedural rights. One need not search all that hard to find outrageously one-sided provisions—so outrageous that courts refuse enforcement when the provisions come to their attention.<sup>11</sup> Companies that provide such provisions may know well in advance that their provisions are unenforceable, but assume that they have little to lose in such overreaching, and much to gain, if consumers, employees, or other contracting parties are persuaded or intimidated by such terms into not pressing valid claims.

At the same time, it should be noted that freedom of contract seems perfectly consistent with the use of different kinds of forms or other ways for presenting terms, and it has always been viewed as consistent with some substantive limits on the enforceability of terms. In a sense, freedom of contract is as alive as it has ever been. In regard to the problems Radin indicates, someone might argue that if people do not want to be bound by the terms on the “click-through” screen, or the insurance policy, or the many pages of the apartment lease or cell phone user agreement, they need only refrain from entering agreements with those vendors in the first place. Individuals are subject to those obligations because, and only because, they chose to accept them. On the other hand, for most of us it is neither easy nor prudent to go without cell phone service, insurance, up-to-date software, an apartment, and so on. Once one chooses to have the goods or services in question, one often

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10. See, e.g., Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 757-58 (2004) (summarizing the substantive and procedural fairness problems with boilerplate terms). As Omri Ben-Shahar points out regarding the individual party's knowledge and consent, the alternative to boilerplate may be no better: without express contractual terms on the subjects, questions about performance, breach, remedies, and so on, would be covered by the default doctrinal rules, which are likely no better known to the contracting parties and equally difficult to understand (especially, though not exclusively, for those not legally trained). Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia* (book review) [hereinafter, Ben-Shahar, *Regulation*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2255161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255161); see also Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 644 (2002) (“[i]n assessing the enforceability of form contracts, we must never forget that contract law is itself one big form contract that goes unread by most parties most of the time”).

11. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (refusing to enforce extremely one-sided arbitration provision). Radin also recites some examples of egregious language. RADIN, *supra* note 1, at xiv-xvi, 12-15, 29-30, 111-19.

discovers that there is no effective choice regarding the terms.<sup>12</sup>

Freedom of contract is connected with the ideas of consent and choice. We consent in the fullest sense of that term when we choose among reasonable alternatives; have full knowledge of those alternatives; and our choice is not distorted by coercion, manipulation, or misrepresentation. For the reasons already alluded to, there is little doubt that with the vast majority of contracts entered into today (especially when considering consumers and employees), one would not speak of the parties as having consented to the terms of the agreement in the fullest sense of "consent."<sup>13</sup> Parties may not know that their actions have subjected them to (further) terms, they have not read or do not understand the contractual provisions, and the uniformity of terms across an industry that supplies important goods or services means that parties may have no reasonable means to avoid being subjected to particular terms.

Like the weather, boilerplate seems to be something consumers and academics like to talk about, but no one does anything about. In earlier articles—widely read by academics, but seemingly having little effect on judges and lawmakers—Friedrich Kessler,<sup>14</sup> W. David Slawson,<sup>15</sup> and Todd Rakoff,<sup>16</sup> among others, argued for a radical doctrinal response to the problem of standard forms and boilerplate, involving the non-enforcement or significant regulation of those sorts of provisions. Arthur Allen Leff argued that contracts should be treated like things: that the combination of the goods being sold or the services being offered, combined with the contractual terms modifying rights, should collectively be seen as products to be governed by product liability or similar regulation.<sup>17</sup> Leff's suggestions have had as little effect outside the academy as have those of Kessler, Slawson, and Rakoff. By contrast, Karl Llewellyn<sup>18</sup> and Randy Barnett<sup>19</sup> argued that boilerplate provisions should be largely enforceable, on the basis that the other party has given "blanket" or general assent to all "not unreasonable" terms in form contracts. The Llewellyn and Barnett positions more closely describe what courts have done for decades, and what they continue to do, when faced with standard forms and other types of boilerplate provisions.

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12. Examples include all the insurance company policies and all the cell phone service agreements including the same waivers of rights. Radin makes similar points. RADIN, *supra* note 1, at 39-41.

13. I discuss the matter at greater length in Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 251-67 (Franklin G. Miller & Alan Wertheimer eds., 2010). Radin discusses that article briefly. RADIN, *supra* note 1, at 96-97. I do not agree with the way *Boilerplate* characterizes my views in that article, but I will spare readers the details of this exegetical squabble.

14. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

15. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

16. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

17. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970).

18. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (arguing that while there is not true assent to boilerplate clauses and only true assent to a few dickered terms to the broad type of transaction, there is "blanket assent" to all not unreasonable terms); *see also* RADIN, *supra* note 1, at 82-83 (discussing Llewellyn's views).

19. Barnett, *supra* note 10. Barnett's analogy is to a person assenting to whatever is written on a piece of paper in a closed envelope. *See id.* at 637-43; *see also* RADIN, *supra* note 1, at 84-85 (discussing Barnett's views).

Radin, in *Boilerplate*, returns to this battlefield, taking up the radical cause for substantial regulation or significant non-enforcement. She argues against the *status quo*: the general presumption of enforcement, and the (often unstated) assumption among judges, lawmakers, and many academics that some combination of market forces and reputational sanctions will work to deter oppressively one-sided terms.<sup>20</sup> Radin doubts the effects of markets and social norms, and questions the apologists who state that one-sided terms are equated with a greater supply or cheaper cost for the goods and services with which boilerplate terms are associated.<sup>21</sup> Radin also adopts something like Leff's suggestion that contracts be treated like products, where there would be remedies for "defective" contracts that cause harm.<sup>22</sup> Additionally, she offers an argument similar to Slawson's that form contracts are like private legislation—an improper delegation of public power that raises rule of law concerns.<sup>23</sup>

Radin expresses concern about the lack of substantial consent by consumers to boilerplate terms created by large businesses, and she is outraged by the use of boilerplate provisions to circumvent the substantive rights and remedies consumers, employees, and other contracting parties would otherwise have.<sup>24</sup> Radin's ultimate conclusions are harsh: boilerplate provisions are contrary to the basic principles of contract law, contrary to basic principles of the rule of law, and destructive of the public-private distinction needed to legitimate private ordering.<sup>25</sup>

When thinking about contract law, consent, freedom of contract, etc., it is important to distinguish three separate concerns that Radin discusses: (1) contracts which contain terms in which one party waives substantive or procedural rights that the party would otherwise have; (2) the presentation of those waivers in difficult legal language, often in small print, as part of a long legal document full of similar provisions; and (3) such terms being presented within packaging that is received after the product is paid for, or on a web site that the party seeking the goods or services may reasonably fail to notice.<sup>26</sup>

As for the waiver of rights, it should be remembered that one aspect of freedom of contract, or at least a central aspect of contract law that is analogous to freedom of contract, is the idea that parties should be able, at the time a contract is entered, to choose to limit or otherwise alter their liability for breach of contract.<sup>27</sup> Parties need this power in order to determine whether to enter an agreement at all, or the terms (especially the price terms) on which they will enter an agreement.

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20. RADIN, *supra* note 1, at 189.

21. *Id.* at 31-32.

22. *See id.* at 23, 197-215; Leff, *supra* note 17.

23. *See* RADIN, *supra* note 1, at 33-51; Slawson, *supra* note 15, at 530.

24. The ability of vendors to remove consumers' rights has been enhanced substantially by the United States Supreme Court's robust reading in recent years of the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1-14 (2008). *See, e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). The topic of the FAA will be considered in greater detail in Part II.

25. *See, e.g.*, RADIN, *supra* note 1, at 35-39, 173-74.

26. *See id.* at 10-12 (giving examples of different kinds of contracts raising these concerns).

27. *See* Barbara Fried, *What's Morality Got to Do With It?*, 120 HARV. L. REV. F. 53, 54 (2007).

Thus, in the famous case of *Hadley v. Baxendale*,<sup>28</sup> the court held that if a contracting party was not informed, at the time the contract was entered, about damages potentially much higher than that party would reasonably expect, then those higher levels of damages would not be recoverable.<sup>29</sup> Freedom of contract—or just “contract”—is at its essence about the ability of parties to set the terms of their interactions, at least within broad boundaries.

Vendors will argue that their clauses limiting consequential damages, preferring arbitration (and no class action arbitration) to a right to litigate, and selecting a forum convenient to the vendor, etc., are all about reducing costs or potential costs to the vendor, allowing vendors to offer lower prices on goods, or, for employers, more hiring, or hiring on better terms. Radin responds that, at best, there is no evidence that the limitation and waiver of terms in fact results in lower costs for goods or higher wages for employees; the suspicion is that the result is merely more money for large corporations.<sup>30</sup> In any event, Radin argues, it is both unseemly and contrary to democratic principles for consumers and employees to be cornered into selling off all their substantive and procedural rights for a handful of nickels.<sup>31</sup>

I think Radin is basically correct on the essence of the charge in *Boilerplate*: that it is a sham to speak about consumers and employees (and franchisees and others) “consenting”—in any robust sense of that term—to the provisions which strip them of their rights and impose one-sided provisions on them.<sup>32</sup> Radin correctly states that transactions involving boilerplate terms “are very far from the traditional notion of a contract, the idea of bargained exchange by free choice.”<sup>33</sup> It is likely, however, an overstatement (though perhaps not a vast overstatement) when Radin reports that modern contracting has led to:

[A] process of devolution or decay of the concept of voluntariness. . . [where] consent is degraded to assent, then to fictional or constructive or hypothetical assent, and then further to mere notice . . . until finally we are left with only a fictional or constructive notice of terms.<sup>34</sup>

When Radin argues that boilerplate provisions should not “be considered contractual,”<sup>35</sup> it has the rhetorical and paradoxical force of “property is theft”<sup>36</sup> or “an unjust law is not a law.”<sup>37</sup> As to the latter, the argument is that an unjust law is not

28. *Hadley v. Baxendale*, 9 Ex. 341 (1854).

29. This has become known as the test of “*Hadley* foreseeability”—whether damages were “reasonably foreseeable” at the time the contract was entered into.

30. RADIN, *supra* note 1, at 31.

31. *See id.* at 32.

32. *See id.* at 31.

33. *See id.* at 12.

34. *Id.* at 30.

35. *Id.* at 14.

36. This quotation is associated with anarchism in general and the writer Pierre-Joseph Proudhon in particular. *See, e.g.*, PIERRE-JOSEPH PROUDHON, PROPERTY IS THEFT!: A PIERRE-JOSEPH PROUDHON READER (Iain McKay ed., 2011).

37. *See* Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33

“law” in its fullest sense (creating moral obligations to obey). Similarly, one might argue, a transaction in which one side may not know that there are terms, does not understand the terms, and is in no position to find or negotiate for different terms, is not a “contract” in the fullest sense of the word.

In *Boilerplate*, Radin quotes some extreme one-sided provisions and notes that some of these provisions, and claims of tacit agreement, would not hold up in court, but comments that this just shows the brazen over-reaching of the businesses that provide these terms.<sup>38</sup> As earlier noted, these businesses risk little—at best (from the businesses’ perspective), consumers and employees will be convinced by the one-sided terms; at worst, the unenforceable terms will not be enforced, but the companies will otherwise face no sanction for their overreaching.<sup>39</sup> At the same time, it may be authorial overreaching to indict businesses generally on the basis of the most extreme language used by only a handful of companies, especially when it is conceded that such language is not enforceable.

Whatever the concerns regarding boilerplate provisions—and they are many—the question that must be kept in mind is: What are the alternatives? Would greater efforts to bring terms to the attentions of consumers create frustrating delays?<sup>40</sup> or, for that matter, would there be even minimal discernible effect?<sup>41</sup> Maybe we are all in such a hurry to purchase or download from the Internet that prior disclosure of terms (even in clearer language) would not deter us from acting in haste, and then regretting in leisure.

What if consumers and employees had a choice: for a consumer, where the goods either came with waivers of rights but a lower price, or with no waivers and a higher price; for an employee, where waivers of rights might come with a lower salary? The limited evidence indicates that much more often than not, consumers and employees would take the economic benefit now rather than the greater rights later.<sup>42</sup>

Radin points out that some of these choices might be explicable through the now well-known observations about our “bounded rationality.”<sup>43</sup> Human beings tend to under-estimate the likelihood of some types of events and over-estimate the likelihood of other types—to value more highly an object or entitlement when we

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AM. J. JURIS. 99, 101 (1988).

38. See RADIN, *supra* note 1, at 29-30.

39. See *id.* at 13.

40. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (requiring disclosure prior to purchase would be impractical and serve little purpose); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (suggesting that a requirement for prior disclosure of terms “would drive prices through the ceiling or return transactions to the horse-and-buggy age.”).

41. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 649-51 (2011) (discussing problems with mandated disclosures across many areas); but cf. Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, in *BOILERPLATE*, *supra* note 5, at 94 (admitting that disclosure can have minimal or even counter-productive effects in the short term, but can nonetheless have positive effects over the long run).

42. See Ben-Shahar, *Regulation*, *supra* note 10, at 15.

43. See RADIN, *supra* note 1, at 26-29. On bounded rationality and related ideas, see generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); and *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).



have it, and to have our reactions to options strongly influenced by the way those options are framed. In many ways, we are far from the “rational actors” that populate the models of economists, as well as the models of many legal scholars. Those who sell us products and services systematically take advantage of our weaknesses and irrationalities in these areas.<sup>44</sup> Most of us do not worry as much as we should about post-employment restrictive covenants, choices of forum for dispute resolution, or waivers of rights to bring class actions. We assume that nothing will go wrong, that the vendors or employers would not put in unfair terms, and at least that we will be treated fairly if anything goes wrong. For a large portion of transactions, those assumptions turn out to be true.<sup>45</sup> However, when those assumptions turn out to be false, the outcome can seem deeply unfair and troubling.

## II. BOILERPLATE AND “DEMOCRATIC DEGRADATION”

Radin is also concerned about “democratic degradation,” by which she means the way in which important legislatively-created rights can be (enforceably) diminished or waived through contractual agreement.<sup>46</sup> Her argument is that businesses should not be able to undo, through simple contractual provisions (especially provisions that are hidden, hard to understand, and hard to avoid), rights which have been created through popular, democratic law-making processes.<sup>47</sup> The problem with this argument is that the ability to modify or waive these rights is itself also the direct or indirect product of legislation. The most obvious example is the Federal Arbitration Act (“FAA”),<sup>48</sup> which is the basis for enforcing the arbitration agreements that Radin complains about that waive consumers’ and employees’ rights to litigate claims in court and to bring class action claims.<sup>49</sup> (Of course, one might disagree with the reading of the FAA that the majority of the Supreme Court has given, but that is a separate issue). Similarly, Congress and state legislatures clearly have the ability to make the right to litigate certain claims or to bring class actions non-waivable, and have occasionally done so. For example, Congress has forbidden mandatory arbitration provisions in consumer credit agreements with members of the United States military.<sup>50</sup> One can also find state laws that expressly restrict the

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44. See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 7-8 (2012).

45. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE*, *supra* note 5, at 6.

46. See RADIN, *supra* note 1, at 33-51. She also argues that some of these waivers of rights “erase the legal rights that form the infrastructure that makes contractual private ordering possible,” and that firms using such waivers “are using contract to destroy the underlying basis of contract.” *Id.* at 36 (emphasis omitted).

47. See *id.* at 39-40.

48. 9 U.S.C. §§ 1-14 (2008).

49. Radin discusses some of the history of the FAA and some recent case law. RADIN, *supra* note 1, at 130-35.

50. See John Warner National Defense Authorization Act of 2007, 10 U.S.C.A. §§ 987(e)(3), (f)(4) (West 2010 & Supp. 2013). Federal law elsewhere also limits other sorts of provisions that might modify rights. See, e.g., 46 U.S.C.A. § 30509 (West 2008 & Supp. 2013) (invalidating provisions limiting liability for personal injury or death relating to transportation of persons between ports in the U.S., or between a U.S. port and a non-U.S. destination). Recently enacted federal legislation and administrative agency action prohibiting mandatory arbitration provisions in mortgage and home equity loans are cited in RADIN,

ability of parties to waive procedural and substantive rights, at least for certain categories of transactions.<sup>51</sup>

Someone might object that the argument here is putting too much argumentative weight on the fact that federal or state legislatures have not acted to restrict the effect of contractual boilerplate, and that one should not make too much of legislative inaction. Lawmakers fail to act for many different reasons (including the partisan gridlock one sees at the national level at the moment, preventing almost any legislation of even moderate controversy). Discounting failure to act is a fair point, and one not to be brushed aside lightly. At the same time, the fact that state and federal legislatures have shown the ability and willingness to restrict the use of certain kinds of boilerplate language<sup>52</sup> means that the failure to do so in other circumstances is at least noteworthy.

At times, *Boilerplate* seems to recognize the tension within the claim regarding “democratic degradation.” When analyzing the use of “technological protection measures” (“TPMs,” also known as “digital rights management” (“DRMs”)), Radin writes: “As they exist today, TPMs are inimical to the rule of law, and therefore a cause of democratic degradation. As they exist today, they are accorded stringent protection by treaty and by US legislation under the Digital Millennium Copyright Act.”<sup>53</sup> Thus, Radin notes that this practice has express or implicit support by federal legislation and national treaty obligations, but still claims that the practice undermines political rights.<sup>54</sup> These claims may be consistent, but only if one shifts the argument to the way our political system operates (such as the corrupting influence of campaign contributions and hyper-partisanship, etc.)<sup>55</sup> rather than claims about contractual provisions.

Radin does have a back-up argument here; however, it focuses less on campaign finance and political corruption and more on a controversial conception of

*supra* note 1, at 246. See also the Magnuson Moss Federal Warranty Act, 15 U.S.C.A. §§ 2301-12 (West 2009 & Supp. 2013) (as discussed by RADIN, *supra* note 1, at 185, 220), which places some constraints on how businesses present warranties to consumers.

51. One example is the Illinois Franchise Act, where Section 4 states: “Any provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void, provided that a franchise agreement may provide for arbitration in a forum outside of this State.” 815 ILL. COMP. STAT. 705/4 (West 2008 & Supp. 2013). Another example is the Wisconsin Consumer Act, which invalidates all choice of law, choice of forum, and choice of venue provisions for consumer contracts entered by Wisconsin residents. WISC. STAT. ANN. § 421.201(10) (West 2012 & Supp. 2012).

52. Additionally, Congress has sometimes offered express permission to have certain types of claims resolved by arbitration or other forms of alternative dispute resolution. For example, the Civil Rights Act of 1991 includes the following language: “Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter.” 42 U.S.C.A. § 12212 (West 2013).

53. RADIN, *supra* note 1, at 50.

54. *Id.*

55. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010) (holding that the First Amendment prohibits limits on corporate funding of independent political broadcasts). And the influence of corporate campaign contributions has been felt strongly in those states that elect their appellate court judges—exactly the judges Radin hopes might intervene to protect consumers and employees on boilerplate. See Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* 1 (2013), [http://www.acslaw.org/sites/default/files/ACS\\_Justice\\_at\\_Risk\\_6\\_24\\_13\\_0.pdf](http://www.acslaw.org/sites/default/files/ACS_Justice_at_Risk_6_24_13_0.pdf). At one point, Radin suggests, quite reasonably, that the ultimate culprit for the pervasiveness and enforcement of one-sided boilerplate might be the severe wealth disparity in this country. RADIN, *supra* note 1, at 152.

“the rule of law”<sup>56</sup> and what she asserts the rule of law, properly understood, requires for private law generally and the enforcement of contracts in particular.<sup>57</sup> However, those who do not accept Radin’s controversial views about the Rule of Law may find her argument here unpersuasive.

### III. POSSIBLE RESPONSES

What can be done and what should be done in response to the problems created by boilerplate provisions? Radin entertains the possibility of strengthening traditional forms of oversight—judicial application of existing doctrines, state legislative restrictions on some provisions, and agency review of provisions—but she considers these options to be unlikely or inadequate.<sup>58</sup> Radin briefly surveys other options: (1) market mechanisms, e.g., consumer watchdog groups, and the use of reputational sanctions;<sup>59</sup> (2) the use of tort law;<sup>60</sup> and (3) administrative regulation, e.g., creating lists of acceptable, unacceptable, or presumptively unacceptable boilerplate provisions;<sup>61</sup> she finds advantages and disadvantages in each.

The possibility of substantive regulation is not entirely fanciful or utopian. The European Union responds to form contracts with a series of directives creating mandatory terms, presumptively invalid terms, and prohibited terms, particularly for consumer transactions.<sup>62</sup> However, even putting aside the merits of that proposal, there are serious questions as to whether this alternative would be politically feasible in the United States in the short or medium term. Some version of federal regulation with the objective of consumer protection was to be one of the functions of the Consumer Financial Protection Bureau (“CFPB”),<sup>63</sup> but Republicans in Congress have (at the time of this writing, and for some years previous) made it a high priority to try to prevent this agency from gaining effective power or independence from Congress.<sup>64</sup> The CFPB is managing to produce some important regulations re-

56. See, e.g., BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004) (discussing the different understandings of “the rule of law”).

57. RADIN, *supra* note 1, at 34-37, 55-56.

58. See *id.* at 144-53.

59. See generally *id.* at 189-96.

60. See generally *id.* at 197-216. As Radin nicely puts it, with perhaps some overstatement: “Receipt of boilerplate is often more like an accident than a bargain.” *Id.* at 197. Radin suggests that a “firm that imposes severe remedy deletions of rights that are at least partially market-inalienable, under circumstances of nonconsent and mass-market distribution, could be liable in tort for intentional deprivation of basic legal rights.” *Id.* at 211. For a similar suggestion of a tort approach to regulating contracts, this time in connection with insurance policies, see Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007) (mentioned by RADIN, *supra* note 1, at 199 n.7). See also Leff, *supra* note 17 (one of the first articles to suggest a product liability approach to standard form contracts).

61. See generally RADIN, *supra* note 1, at 217-42.

62. *Id.* at 233-39; see also Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and E.U.*, 54 CLEV. ST. L. REV. 175 (2006); see generally THE INVOLVEMENT OF EU LAW IN PRIVATE LAW RELATIONSHIPS (Dorota Leczykiewicz & Stephen Weatherill eds., 2013).

63. The Bureau is mentioned briefly in passing in *Boilerplate*. RADIN, *supra* note 1, at 221.

64. See Editorial, *Quietly Killing a Consumer Watchdog*, N.Y. TIMES, Feb. 10, 2013, [www.nytimes.com/2013/02/11/opinion/quietly-killing-a-consumer-watchdog.html](http://www.nytimes.com/2013/02/11/opinion/quietly-killing-a-consumer-watchdog.html). After years of the Republicans blocking the appointment of someone to head the Bureau, Richard Cordray was finally confirmed as its head on July 16, 2013, as part of a compromise meant to avert a change of the Senate’s filibuster rules. Danielle Douglas, *Senate Confirms Cordray to Head Consumer Financial Protection Bureau*,

lating to financial products,<sup>65</sup> but it is difficult in the current political climate to imagine its having the impact on consumer transactions generally that its European counterparts have.

To those who would complain—against regulation—that parties should be free to agree to (or at least assent to, if one finds transactions involving standard terms too far removed from full-blooded “agreement” or “consent”) whatever terms they want, one should point out that this is not the current state of the law and has not been for centuries, if ever.<sup>66</sup> There have always been limitations on the process of contract formation, and the terms that would be enforced, under the guise of various doctrines (e.g., duress, undue influence, unconscionability or *laesio enormis*, public policy or illegality, misrepresentation, and the various equitable defenses to the (full) enforcement of contractual terms).

It should be pointed out, in passing, that when terms are imposed by legislation, administrative regulation, or judicial rewriting, the outcome may be terms that are fairer, or at least less one-sided, than boilerplate terms, but the problem of lack of full consent has not disappeared.<sup>67</sup> Neither party to an agreement assents in any meaningful way to terms imposed by the State, however fair or reasonable the terms might otherwise be.<sup>68</sup>

Whether one responds to problematic contractual terms through doctrine, or legislative or administrative regulation, one option that should be considered is differential treatment of contracts depending on the parties involved. The European Union currently does this, as many of its protective rules apply only to consumer contracts.<sup>69</sup> One might go in the other direction as well, and for some, less vulnerable contracting parties, one might consider relaxing some doctrinal constraints we now have. One can be in favor of true freedom of contract for parties sophisticated enough (or sufficiently well-counseled) and powerful enough to recognize what the implications are of what they sign, and to obtain alternative terms if the present terms are not to their liking. These are parties who come close to fitting the ideal of “true” or “full” consent that was earlier noted as being so distant from the experience of most contracting parties. For sophisticated parties, courts might consider enforcing terms that they would otherwise refuse to enforce. For example, current contract law doctrine forbids the enforcement of “punishment clauses.” These are

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WASH. POST, July 16, 2013, [http://articles.washingtonpost.com/2013-07-16/business/40608755\\_1\\_senate-republicans-consumer-financial-protection-bureau-richard-cordrayPOST](http://articles.washingtonpost.com/2013-07-16/business/40608755_1_senate-republicans-consumer-financial-protection-bureau-richard-cordrayPOST).

65. Information on the agency's past and proposed regulations can be found on its website. See CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/> (last visited Aug. 20, 2013).

66. See, e.g., BIX, CONTRACT LAW *supra* note 4, at 87-92 (giving an overview of historical and current substantive fairness restrictions on contract enforcement).

67. This observation has also been made by Richard Craswell. See, e.g., *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 34-44 (1993).

68. There is a weak sense of consent in parties going forward with a transaction knowing (or at least having reason to know of) the mandatory terms or the possibility of judicial rewriting of terms. However, this type of consent is hardly stronger than the consent to boilerplate terms that Radin properly complains about in her text.

69. See e.g., Commission of the European Communities, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions*, Oct 7, 2013, [http://ec.europa.eu/research/press/2013/pdf/jti/iip\\_communication.pdf](http://ec.europa.eu/research/press/2013/pdf/jti/iip_communication.pdf).

terms that impose higher than compensatory damages on a party that does not perform at all, or that performs below the standards demanded by the contract (even though terms of this sort actually have origins deep in the history of Anglo-American contract law and were enforced for centuries).<sup>70</sup> However, there is a good argument that in agreements between the kinds of parties discussed here, such provisions should be enforced.<sup>71</sup> For such parties, we no longer suspect that the terms were imposed upon them within a one-sided commercial relationship. These parties might reasonably accept penalty clauses as a way of proving their commitment to perform (which may be necessary to gain serious consideration if they are new or unproven in their area of business). For similar reasons, one can think of situations where sophisticated parties might have a reason to want “naked promises” or “illusory promises” enforced, or the power to modify agreements without new consideration.<sup>72</sup>

However, one difficulty with such a two-track approach to contracts is that it may not be easy to draw useful guidelines regarding which parties qualify for which set of rules. One suggestion that business-to-business (“B2B”) contracts receive separate treatments (a view strongly advocated by Alan Schwartz and Robert Scott, in their well-known article *Contract Theory and the Limits of Contract Law*)<sup>73</sup> runs into the problem that many small business owners may be as vulnerable and in as much need of regulatory protection as are most consumers and employees.<sup>74</sup>

#### CONCLUSION

The modern contracting practices that most consumers, employees, and others face are not ones of “freedom of contract” in anything like the full meaning of that ideal. As Margaret Radin reminds us in *Boilerplate*, the situation is often closer to the unilateral imposition of terms by the stronger or more sophisticated side. This does not mean, and should not mean, that such contracts or particular contractual provisions should never be enforced. It does mean that there are substantial (though perhaps far from conclusive) arguments for some regulatory limits—some mandatory terms or prohibited terms as in European Union Contract Law, or at least some presumptions for or against certain terms. At the same time, this sort of regulation brings its own problems—political, practical, and doctrinal—so it should

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70. See A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 88-135 (1975); DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 28-30 (1999).

71. Richard Posner takes a similar position. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 159-63 (8th ed. 2011).

72. Modifications are already enforceable without new consideration for sales of goods. See UCC § 2-209(1) (“[a]n agreement modifying a contract within this Article needs no consideration to be binding”). But the rule for non-sale of goods transactions is far less clear. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (general requirement of consideration); *id.* at § 89 (creating limited exceptions for enforcing modifications without consideration).

73. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 556 (2003). Part of Schwartz and Scott’s argument was that businesses do not have the same autonomy interests in their contracts that individuals do.

74. See Martijn W. Hesselink, *Unfair Terms in Contracts Between Businesses*, in TOWARDS A EUROPEAN CONTRACT LAW 131, 131-48 (Jules Stuyck & Reiner Schulze eds., 2011).

be approached cautiously.

It is important not to overstate the complaints against boilerplate provisions. For example, arguments that boilerplate language undermines the rule of law or the public-private distinction overlook the extent to which contractual waiver of rights has been expressly or implicitly authorized by state and federal legislation and case law. And the way that legislatures have been willing to encourage or at least condone boilerplate should make one cautious about the likelihood of legislative regulation of such terms.

Freedom of contract remains an important ideal, especially for those in the best position to enjoy all the benefits from contractual arrangements. At the same time that one might consider limitations on contractual freedom to protect more vulnerable parties in their contractual interactions, one might consider an expansion of “freedom of contract” for transactions among the more powerful and sophisticated parties. Perhaps some of the existing doctrinal rules meant to protect weaker parties might be lifted for contracting parties that do have real choices and are not regularly subject to exploitation or manipulation.

In *Boilerplate*, one finds an important warning on how far vendors and employers have gone to remove or disable legal protections through contract. And if one considers some of the book’s claims to be somewhat overstated, perhaps this is the inevitable and acceptable cost of an important call to arms.