

ARTICLES

Boilerplate’s False Dichotomy

JAMES GIBSON*

The argument against enforcing boilerplate contracts (contracts that no one reads) seems clear. Indeed, if this were a court case we would say that the jury is in; the evidence against boilerplate is overwhelming. Yet the judge has yet to render judgment. Courts continue to enforce boilerplate terms, and even those scholars who have exposed boilerplate as an emperor with no clothes are reluctant to gaze upon its nakedness and condemn its use.

This reluctance originates in an assumption that pervades the boilerplate debate—namely, that courts and commentators alike view boilerplate as necessary to the modern transaction. When asked to set boilerplate aside, then, they confront a dichotomy: either enforce boilerplate terms or wreak havoc on the consumer economy. When the choice is so presented, it is no choice at all. Living with boilerplate is better than living without mass-market commerce. We would rather be naked than dead.

This Article shows that the dichotomy is false. First, the Article establishes that it is possible doctrinally to sever boilerplate from other terms of the consumer transaction, such that the transaction can still proceed. Second, it demonstrates that the resulting transaction is theoretically feasible. When default rules take boilerplate’s place, the result is either no significant economic disruption or economic disruption that shakes things up in a positive way. Finally, it shows that this approach is empirically viable. I use a case study of boilerplate contracts from a real-world consumer purchase to prove that there is a realistic third option: the boilerplate-free transaction.

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INTRODUCTION

Slowly but surely, the case against enforcing boilerplate has become overwhelming. In theory, consumers read all their contract terms and sellers respond by competing over those terms, just as they compete over price. That is why we enforce contracts; we assume the market will discipline their contents. In practice, however, most consumer contracts go unread. The promised competition never emerges, and sellers insert terms unrestrained by market forces—confident that consumers will never even see them, let alone decide whether to accept them.

Despite the case against enforcing the unread terms, the law has shown no inclination to treat them as unenforceable. Instead, courts continue to view boilerplate contracts (contracts consisting of unread terms) as little different from the sort of bespoke, negotiated, arms-length agreements on which contract law is historically predicated. As long as the consumer is theoretically aware of the boilerplate at some point in the transaction and has a notional opportunity to read it, courts usually enforce it.

Many commentators have lamented this lack of judicial initiative, but few have examined why it exists. It may simply be that old habits die hard. After all, the common law of contracts developed over the course of hundreds of years, and it was based entirely on bespoke agreements. Courts may accordingly have trouble recognizing that modern mass-market boilerplate is an entirely new and different genus.

When one reads judicial and scholarly commentary on boilerplate, however, one detects a more persuasive and pernicious explanation for the enduring enforcement of boilerplate: the worry that invalidating boilerplate terms would have devastating economic effects. Boilerplate is present in a vast range of everyday transactions, from purchasing a computer to renting a car to ordering just about anything online. Surely, getting rid of boilerplate would cause those worthy transactions to disappear, and thus grind the consumer economy to a halt.¹ If this is what judges believe—if boilerplate is an inevitable part of modern commerce—then the reluctance to interfere makes some sense. Boilerplate may have its faults, but preserving it, warts and all, is better than the alternative.

In this Article, I argue that courts and commentators have almost universally bought into this dichotomy. They reduce the issue to a choice between enforcing boilerplate on the one hand, and destroying the myriad transactions in which it appears on the other. When presented in that way, the answer seems clear.

I then show that the dichotomy is false. Boilerplate is not inevitable. It's evitable. Longstanding, uncontroversial contract doctrine allows us to separate boilerplate from other, necessary terms of the transaction, in such a way as to do away with the former while preserving the latter. Default rules will fill any resulting gaps, and if a default rule happens to be a bad fit, the law can and will adjust.² Indeed, I use an empirical case study to demonstrate that this approach not only makes sense in the abstract, but also works well at a practical level.

The Article proceeds as follows. Part I asks why courts and commentators continue to support boilerplate's enforcement, despite the compelling case

1. As Peggy Radin puts it, "If all [boilerplate contracts] were declared invalid tomorrow, it is feared that there would be significant economic disruption." Margaret Jane Radin, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 143 (2013).

2. As this Article will later show, whether a contract term or default rule is a "bad fit" is not about its content per se; it is about whether the term or rule is the result of a process grounded in overall social welfare. See *infra* Section II.B. A desirable contract term is one that emerges from a functioning market process. See *infra* Section I.A. A desirable default rule is one that emerges from a functioning political process. See *infra* Section II.B.2. Both processes, if functioning well, enhance overall social welfare.

against it. After reviewing and rejecting alternative explanations, the answer emerges: support for enforcement arises from a deep-seated fear that invalidating boilerplate terms will have widespread, devastating economic consequences. Part II demonstrates that this fear is based on a false dichotomy. Contract doctrine makes it possible to sever boilerplate terms without endangering the entire transaction. The result will be an increased reliance on default rules, which in turn generates a beneficial dynamic for the formulation and revision of public law. Part III shows empirically that the proposed option is viable. I analyze a real-life transaction involving twenty-nine different boilerplate contracts and show that one can invalidate boilerplate without invalidating other, more salient contractual terms or endangering the overall transaction. In the end, then, contracts may be essential to the modern economy, but boilerplate is not.

I. THE BOILERPLATE DEBATE

We begin with an examination of two contradictory premises that underlie this Article. First, the case against enforcing boilerplate is compelling. Second, courts and commentators nevertheless continue to support its enforcement. Why this disconnect? After showing that the disconnect exists, I review and reject various possible explanations. Ultimately, the solution to the mystery is found in an assumption—a false assumption, as it turns out—about the economic consequences of getting rid of boilerplate.

A. WHAT'S WRONG WITH BOILERPLATE?

To understand the case against boilerplate, one must first understand the case in favor of contracts generally. Once we know why we enforce contracts at all, we can explore why we should treat boilerplate differently.

The rationale for contract enforcement goes back to Adam Smith's observation that when individuals can freely exchange goods, those goods will migrate to those who value them the most, creating new wealth along the way.³ Enforcing contracts merely broadens the field of possible wealth-creating opportunities by making it possible for individuals to confidently enter into a transaction even when part of the exchange takes place in the future.⁴ The collective result of this individual freedom to transact is a marketplace that offers an array of choices responsive to, and disciplined by, aggregate demand.

3. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 351–52 (C.J. Bullock ed., P.F. Collier & Sons 1909) (1776) (employing the “invisible hand” metaphor); accord ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1–2 (1979) (“The fundamental economic principle with which we begin is that if voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate toward their most valuable uses.”). Of course, there are other arguable rationales for contract enforcement, such as the moral obligation to keep promises, but this Article focuses only on the economic rationale.

4. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 116 (8th ed. 2011) (“If contractual exchanges were simultaneous, the need for legal protection of contract rights would be less urgent.”).

In practice, that demand exerts its discipline in one of two ways: through negotiation or shopping. If a seller asks too high a price for its product, the buyer can either negotiate it down or shop for another seller with a lower price.⁵ Sellers who insist on prices that are too high will consequently see insufficient demand from buyers, and competition from other sellers will drive them out of the market.⁶

What is true for price is true for contract terms. Buyers can renegotiate or reject an offering because they dislike the dispute resolution clauses or privacy policies that accompany it, just as they can renegotiate or reject an offering because the price is too high or the quality is too low.⁷ Therefore, as long as the *process* of contract formation is responsive to parties' preferences (as long as parties have the chance to say no), the law can take a hands-off approach to the actual *content* of contracts. Particular contract terms are simply presumed to represent the informed, private ordering of a universe of disparate individuals.⁸

So what's different about boilerplate? One answer is that the first outlet for aggregate demand—namely, negotiation—disappears. A boilerplate contract is the result of a take-it-or-leave-it proposition, an offer in which a seller insists that a buyer adhere to its terms.⁹ That means that the only realistic option for buyers who do not like those terms is to use the other outlet: shop around for a better deal. Removing the negotiation option may seem unfair, particularly to lawyers whose law school Contracts courses were full of references to offers, counteroffers, and related contracts concepts. But in fact there is no reason to condemn contracts of adhesion *qua* contracts of adhesion. We do not insist that sellers bargain over price or quality, and likewise we should not insist that they bargain over contract terms.¹⁰ Instead, as long as the buyer retains the power to reject the deal and seek a better alternative from the seller's competitors, a

5. Indeed, even when negotiation is possible, a buyer's ability to walk away from the bargaining table and seek out a competing seller is of paramount importance. One cannot negotiate effectively if the other party knows that it is the only game in town.

6. In the words of one of the first scholars to study boilerplate, "Oppressive bargains can be avoided by careful shopping around." Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

7. Of course, price might itself be a contractual term, but the point is that that distinction should make no difference; all aspects of the transaction should respond to market pressure. See James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 168 & n.10 (2013) (discussing contract terms as product features).

8. Arthur Leff called this "the process aura of contract," under which "the parties combine their impulses and desires into a resulting product which is a harmonization of their initial positions." Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 138 (1970).

9. This insistence that the buyer adhere to the offered terms gave rise to the label "contract of adhesion," which originated in Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919), but probably became popular because of Kessler. See Kessler, *supra* note 6.

10. Here, even more clearly than above, we see the absence of a meaningful distinction between contractual terms and other features of the transaction. As Arthur Leff puts it, "If . . . a particular contract is a mass-produced inalterable thing, then the words that make it up are just elements of the thing, like wheels and carburetors." Leff, *supra* note 8, at 153.

take-it-or-leave-it contract is unobjectionable.¹¹ Sellers who insist on onerous contract terms will see insufficient demand from buyers, and competition from other sellers will drive them out of the market.

Seen in this light, a refusal to enforce adhesive terms is just as bad as imposing price controls on products. Both actions substitute the top-down, paternalistic judgment of lawmakers for the bottom-up, nuanced judgment of the marketplace—preventing consumers from acting on their own individualized preferences and myopically privileging contract *content* over contracting *process*.

What, then, is objectionable about enforcing boilerplate? The answer lies in the difference between adhesive terms generally and boilerplate specifically. Boilerplate (at least as the term is used here) does not comprise all contracts of adhesion, but only those that are presented to the consumer in theory but go unseen and unread in practice. After all, lots of adhesive terms garner attention from consumers and are therefore salient to their decisions; no one rents a car without counting the wheels or buys an airplane ticket without knowing the fare.¹² But other adhesive terms never enter consumers' consciousness. As we will see in Part III, a host of terms—such as warranty disclaimers, intellectual property licenses, and choice-of-law clauses—are nonsalient terms; they are buried in the fine print, arrive long after money has changed hands, or otherwise escape the notice of the party to whom they supposedly apply.¹³ That is boilerplate, and the marketplace discipline that regulates other terms fails to regulate these.

To be more specific, the market fails boilerplate in two ways. First, the cost of acquiring information about boilerplate's content is often prohibitively high. In many cases, its terms are first made available to consumers late in the game after they have already made significant, unrecoverable investments in the transaction. Consider, for example, the much-discussed *Hill v. Gateway 2000*,

11. See, e.g., POSNER, *supra* note 4, at 144 (“[W]hat is important is not whether there is haggling in every transaction but whether competition forces sellers to incorporate in their standard contracts terms that protect the purchasers.”); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 442 (2002) (“[T]he aggregate decisions of many consumers can pressure businesses into providing an efficient set of contract terms in their standard forms.”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1209 (2003) (describing “the market discipline established by the ability of buyers to shop among sellers for the most desirable package of product attributes, including contract terms”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1251 (1983) (“[B]argaining is not essential . . . as long as shopping concerning the particular term takes place.”).

12. Unless someone else is paying. See A.W., *What Would It Take to Persuade Business Travellers to Take Cheaper Flights?*, ECONOMIST (July 1, 2016), <https://www.economist.com/blogs/gulliver/2016/07/no-pain-no-gain> [<https://perma.cc/8F85-FUHF>] (discussing how business travelers often do not consider fare for an airplane ticket when their company is paying).

13. For a more detailed discussion of the difference between salient and nonsalient terms, see *infra* Section III.A.

Inc. case,¹⁴ in which the standard terms (including the arbitration clause in dispute) were not provided to the buyers of a mail-order computer until they had already ordered, paid for, and received the product.¹⁵ Unless the buyers were prepared to send such products back and absorb the accompanying reliance costs, their acceptance of late-arriving boilerplate was a *fait accompli* rather than a measured decision, and they consequently never signaled to the marketplace whether they liked or disliked the terms. In other words, the market exerts discipline on adhesive terms through comparison-shopping. But how can consumers realistically comparison shop if they cannot discover the terms of the deal until they buy each product, take it home, and (in the case of a computer) start it up?

Those who study contract law have accordingly formed a near-universal consensus that consumers simply do not voluntarily agree to late-arriving boilerplate (even if they click “I agree” once its terms are presented) and that the necessary market discipline is therefore lacking.¹⁶ Empirical analysis also supports the conclusion that consumers’ so-called acceptance of such terms occurs only after considerable investment in the transaction, rendering their assent wholly perfunctory and not reflective of actual preferences.¹⁷

However, even when boilerplate arrives early in the transaction, there is a second market failure that precludes competition over its terms: the cost to consumers of processing boilerplate—reading and assessing it—is too high. Scholars agree that information-processing costs routinely prohibit the reading of boilerplate no matter when consumers encounter it.¹⁸ Empirical inquiries bear this out. For example, one study of online software purchases found that only one in every two hundred consumers reads boilerplate, even when forced to click “I agree” and given a direct link to its terms (and that’s using a liberal definition of “read,” including spending as little as one second on the page

14. 105 F.3d 1147 (7th Cir. 1997). Although not as famous as *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), *Hill* had 1,913 citations on Westlaw as of September 28, 2017, and is a staple of contract law casebooks.

15. *Hill*, 105 F.3d at 1148. Conveniently absent from the court’s opinion enforcing the boilerplate was any mention that one of the terms required the buyers to travel to Chicago to arbitrate any dispute—and pay a \$4,000 arbitration fee, only half of which was recoverable even if they prevailed. See Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1185 (2010).

16. 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, 755; Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 110–11 (1997); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 681; Korobkin, *supra* note 11, at 1264–65; James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 747–48.

17. See Gibson, *supra* note 7, at 192–94 (finding that approximately 90% of contractual content in computer purchase arrived after computer was ordered and paid for).

18. See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 850 (2006); Korobkin, *supra* note 11, at 1217; Rakoff, *supra* note 11, at 1226.

where the boilerplate is provided).¹⁹

Reduced to its essence, then, the problem is the limited resources that consumers possess. The failure to find and read boilerplate is not proof of laziness or moral failing. It is a reflection of individuals' bounded rationality. Consumers simply do not have the time or expertise to absorb all of the boilerplate they encounter and factor it into their purchasing decisions.²⁰ (That's why more disclosure is not the answer; more information doesn't help when consumers are already short on time.²¹) This all adds up to a failure of consumers—a justifiable, rational failure—to read and understand boilerplate. And if they don't read it, they aren't comparison shopping. And if they aren't shopping or negotiating, the longstanding market-based rationale for enforcement disappears.

B. BOILERPLATE'S PUZZLING PERSISTENCE

The case against boilerplate may be clear, yet enforcement of boilerplate continues unabated.²² A handful of courts have expressed reservations when the terms arrive late in the transaction, but even then the weight of authority strongly favors enforcement.²³ With few exceptions, courts view boilerplate as no different from the market-disciplined deals on which contract law is tradition-

19. Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 94, 108 (2012). Other studies bolster these findings. *See, e.g.*, Gibson, *supra* note 7, at 195–99 (finding that it would take over seven hours to read the boilerplate that accompanied a typical computer purchase and more than twice that time to comparison shop among different boilerplate offerings); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 451 (2008) (finding a lack of correlation between competitive market conditions and the content of software boilerplate terms, which suggests that competition does not reach those terms); *see also* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 671–72 (2011) (reviewing studies).

20. *See* Gillette, *supra* note 16, at 680 (“[F]ailure to read may be perfectly rational, especially given the inability to negotiate around terms, if the buyer accurately predicts that the costs of review exceed its benefits.”). For a general overview of how consumers make purchasing decisions in the face of complexity (in boilerplate and otherwise), *see* Gibson, *supra* note 7, at 169–80.

21. Increased disclosure merely gives legislators and courts the undeserved feeling that they have done something about the problem. *See* Ben-Shahar & Schneider, *supra* note 19, at 705–09 (demonstrating absurdity of disclosure as a solution to boilerplate's information-cost problem); *cf.* Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 333 (2009) (showing empirically that boilerplate that is available early in the transaction is no more pro-consumer than boilerplate that arrives later, which suggests that lowering the cost of information acquisition does not necessarily lead to different contract terms).

22. *See* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 93–109 (2013) (summarizing cases).

23. For example, Westlaw reports that the case most associated with enforcement of late-arriving boilerplate, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), has been cited by courts 260 times—and only thirty of those citations were negative. In contrast, the case most associated with resisting such enforcement, *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), has been cited by courts only forty-seven times, five of which were negative. Even *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), the muscular follow-up to *ProCD*, has one hundred more non-negative court citations than *Klocek*. All citations are as of September 28, 2017.

ally based. Scholars are more critical of boilerplate, but when push comes to shove they tend to share courts' reluctance to question its enforcement.²⁴ The following discussion asks why this is the case, exploring various possible explanations for boilerplate's puzzling persistence. In the end, we will see that none of them is compelling and that a better answer is found in boilerplate's false dichotomy.

1. The Original Safeguards

Boilerplate originated in the early 1900s, when mass-market transactions became increasingly common and complex.²⁵ Standardized sales began to replace one-on-one bartering, which meant the end of individual negotiation and the rise of adhesive terms. And the goods being sold were often expensive (for example, cars and sewing machines), which meant the transactions necessarily involved extensions of credit, delays between order and delivery, and other future-regarding provisions that called for the use of contracts.²⁶

Judges and commentators who encountered this new form of contracting were not blind to its unique features or to consumers not reading its terms. But they were steeped in an orthodoxy under which contracts inherently represented

24. The most obvious recent exception is Peggy Radin's excoriation of boilerplate in her 2014 book. See RADIN, *supra* note 1, at 213 (proposing that "a purported contract containing offending boilerplate should be declared invalid in toto, and recipients should instead be governed by the background legal default rules"). Some thirty years earlier, Todd Rakoff argued that boilerplate should be presumed unenforceable. See Rakoff, *supra* note 11, at 1176; cf. Gibson, *supra* note 7, at 222–24 (suggesting a burden-shifting approach to judging boilerplate). Other than that, commentators have been much more modest in their suggested solutions. See, e.g., Kim, *supra* note 22, at 176–210 (offering a menu of options of varying degrees of intrusiveness into existing doctrine); Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1860 (2000) ("Perhaps a short form of disclosure notice could be designed for placement on the outside of the box for software sold in stores, with a longer form required for online transactions."); Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 104 (2011) (viewing mandatory disclosure as the solution); Korobkin, *supra* note 11, at 1285 (presuming enforceability even as he criticizes its basis); Leff, *supra* note 8, at 155–57 (considering various levels of regulation before settling on encouraging disclosure); K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939) (relying on the reasonable expectations doctrine to solve the boilerplate problem); Patterson, *supra* note 9, at 215–16 (concluding that enforcing late-arriving boilerplate promotes both certainty and flexibility even though its doctrinal justification is uncertain); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 559–60 (1971) (seeing need for oversight but deferring—like Llewellyn—to industry standards). Even Fritz Kessler, who was perhaps the harshest early critic of boilerplate, condoned its enforcement with only modest concessions to monopoly concerns and to "the social importance of the type of contract." See Kessler, *supra* note 6, at 642.

25. See LENDOL CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* 166–73 (1999) (discussing the increased use and social acceptability of installment contracts for purchase of consumer goods); Leah Chan Grinvald, *Contracting Trademark Fame?*, 47 LOY. U. CHI. L.J. 1291, 1300–01 (2016) (tracing form contracts to the rise of mass production of consumer goods in the 1920s).

26. See CALDER, *supra* note 25, at 162–65, 191–92; Kim, *supra* note 22, at 22–24; cf. Llewellyn, *supra* note 24, at 701 (analogizing the standardization of contracts to the standardization of other Industrial Age goods and processes).

the will of the parties and, as a result, they never seriously questioned contract enforcement. After all, boilerplate looked like a contract, so to treat it as anything else went against instincts honed by hundreds of years of common law tradition. Indeed, scholars recognized this problem at the time. Fritz Kessler called it an “emotional” reaction that bypassed rationality to produce only “rationalizations.”²⁷ Karl Llewellyn, one of the first scholars to analyze boilerplate, decried it as well: “[Courts] read the document for what it says, drop a word about freedom of contract, or about opportunity to read or improvident use of the pen, or about powerlessness of the court to do more than regret, or the like, and proceed to spit the victim for the barbecue.”²⁸

Boilerplate’s arrival on the scene accordingly produced only two meager safeguards. The first came from Llewellyn himself, who suggested that the law could address a buyer’s failure to read by “striking out utterly unreasonable clauses.”²⁹ Over time, this suggestion morphed into the approach found in section 211 of the Second Restatement of Contracts, which presupposes the enforceability of unread boilerplate, but excludes any term that the seller has reason to believe would have been a deal breaker for the buyer.³⁰ The accompanying commentary calls to mind Llewellyn’s view, suggesting that an unread term would qualify for exclusion if it were “beyond the range of reasonable expectation.”³¹

Llewellyn’s approach seems to hold promise as a means of justifying boilerplate’s enforcement, but it is ultimately unavailing for two reasons. First, despite the seeming breadth of its provisions, courts have applied it almost exclusively to insurance contracts.³² Second, and more importantly, Llewellyn’s standard is so broad that it can only police the most extreme instances of advantage-taking; the Restatement itself provides examples of a term that is “bizarre or oppressive,” “eviscerates the non-standard terms explicitly agreed to,” or “eliminates the dominant purpose of the transaction.”³³ There remains available to sellers a wide range of terms that may not appear unreasonable on

27. Kessler, *supra* note 6, at 639.

28. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 364 (1960); *see also* Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 *J.L. & ECON.* 461, 487 (1974) (calling this attitude “the economist’s faulty idealization of the contracting process”).

29. Llewellyn, *supra* note 24, at 704. As in so much of Llewellyn’s work, reasonableness would derive its meaning in the first instance from practices in the relevant industry, *see id.*, an approach that holds almost no promise when consumers do not read or respond to any of the boilerplate in the industry. *See* Korobkin, *supra* note 11, at 1271 (noting that “reasonable expectations” based on “prevailing custom” will “entrench and perpetuate inefficient low-quality terms that become commonplace because they are non-salient to most buyers”).

30. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981) (“Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”).

31. *Id.* cmt. f.

32. *See* KIM, *supra* note 22, at 201; Korobkin, *supra* note 11, at 1271; *see also* Estate of Shockley v. Alyeska Pipeline Serv. Co., 130 F.3d 403, 407 (9th Cir. 1997) (“There is no reason to extend this doctrine beyond insurance contracts.”).

33. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

their face, but that in small and subtle ways shift risks and costs to consumers—death by a thousand cuts.³⁴

The other original safeguard against overreaching boilerplate, namely unconscionability doctrine, suffers from similar limitations. Unconscionability takes two forms: procedural unconscionability, which deals with defects in the contracting process, and substantive unconscionability, which examines the specific term being challenged.³⁵ The substantive inquiry shares the same flaws as Restatement section 211 and the reasonable expectations doctrine, in that it polices only the most egregious terms.³⁶ As for procedural unconscionability, it focuses on such issues as the power imbalance between seller and buyer.³⁷ We have seen, however, that the problem with boilerplate is not that its terms are imposed by firms with too much market power. The problem is that the market, even if competitive, exerts no discipline on those terms. And procedural unconscionability's other factors, such as whether the term at issue was hidden in the fine print, do not appreciate that even a "prominent" boilerplate term will almost certainly escape the buyer's attention.³⁸

In the end, the original safeguards against boilerplate fail to justify its continued enforcement because they try to solve boilerplate's process problem by regulating its content.³⁹ This mismatch of means and ends prevents the safeguards from ever coming to grips with the underlying problem: the absence of a reason to enforce any boilerplate at all.⁴⁰ As Arthur Leff said, "such approaches are beside the point most of the time; it's like bandaging a cut on a broken leg."⁴¹

2. The Recent Defenses

Three more recent defenses of boilerplate have directly engaged with—rather than ignored—the absence of a market-based rationale for enforcement, and have offered up alternative justifications in its place. Ultimately, however, none

34. See Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 939 (2006) ("Advantage-taking through fine print is still advantage-taking, even if the stakes are small."); Gibson, *supra* note 7, at 221 ("[A] term that appears reasonable on its face may in fact be oppressive if one party unilaterally imposed it on the other with no concomitant benefit."); Korobkin, *supra* note 11, at 1270 (noting that section 211 "protects buyers only from the most outrageously inefficient of terms").

35. See Gibson, *supra* note 7, at 218. Some courts require both kinds of unconscionability to invalidate a contract, whereas others require only one of the two. *Id.* at 218–19.

36. For example, courts apply substantive unconscionability to terms that are "overly harsh," are "oppressive," or "shock[] the conscience." Korobkin, *supra* note 11, at 1273 & nn.276–79 (collecting cases).

37. See *id.* at 1260–68 (reviewing forms of alleged power imbalance and citing sources).

38. See *id.* at 1272–73 ("[Procedural unconscionability] is substantially underinclusive, because it focuses on one symptom of the problem rather than on the problem itself.").

39. The only exception is procedural unconscionability, which (as explained above) takes aim at the wrong part of the process.

40. See Rakoff, *supra* note 11, at 1195 ("[T]he present judicial doctrines . . . still ask why an adherent should be allowed to avoid a term of his contract, rather than why the term should be thought obligatory in the first place.").

41. Leff, *supra* note 8, at 148.

succeeds in rehabilitating boilerplate as an enforceable form of contract, and so none serves as a compelling explanation for why it persists.

The first of these defenses does not entirely reject the market as a means of disciplining boilerplate's content. Instead, it posits that the market responds to an "informed minority" of consumers who do read boilerplate, and that this minority adequately represents the less-informed majority of consumers.⁴² In a market in which sellers compete vigorously for the marginal consumer, the notion of an informed minority is intriguing. But on closer inspection, it fails to justify the enforcement of boilerplate.

There are at least two reasons for this failure. First, the originators of the informed-minority theory estimate that the minority would have to comprise more than a third of all consumers for the theory to work.⁴³ Empirical studies, however, have revealed that only about three in every one thousand consumers actually read even the most accessible boilerplate.⁴⁴ Second, the informed minority would have to share the preferences of the uninformed majority; otherwise, the former could not adequately represent the latter. But the minority has already shown itself to be idiosyncratic by reading the boilerplate in the first place. Why would we think they are idiosyncratic only in that respect?⁴⁵ In short, an informed minority of the needed size is unlikely to exist, and if it does exist, it is unlikely to represent the interests of other consumers.

The second recent defense of boilerplate relies not on the market for goods and services, but on the market for reputation. The idea is that, although a seller may initially promulgate onerous terms, it is unlikely to enforce them due to the negative reputational consequences that would follow; consumers would complain and would voice their displeasure to others. When a disagreement arises, then, sellers will be inclined to handle the interaction as a customer service issue rather than as a legal matter.⁴⁶

Reputational concerns undoubtedly play a role in how sellers deal with consumers. That said, as a justification for enforcing boilerplate, reputational

42. This idea originated in Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 659–62 (1979). Others have subsequently adopted this idea as well. See Gibson, *supra* note 7, at 200–01 n.98 (collecting sources).

43. See Schwartz & Wilde, *supra* note 42, at 661.

44. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 23–24 (2014) (finding empirically that only 0.30% of potential buyers read boilerplate and noting that "[o]ur estimates here are imperfect, but they are two orders of magnitude smaller" than what Schwartz and Wilde say would be necessary for informed-minority theory to work).

45. See Gibson, *supra* note 7, at 201–02.

46. Several commentators have explored this reputational theory, but the two most thorough accounts are Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829–31 (2006), and Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006). See also Gibson, *supra* note 7, at 205 n.114 (citing other sources).

theory proves too much. If sellers handle consumer interactions by reference to reputation rather than by reference to formal contractual obligations, why do we need boilerplate at all?⁴⁷ The response from the theory's adherents is that boilerplate provides a backstop against opportunistic customers who would abuse the customer-service approach, but there is no evidence that sellers could make such distinctions or, if they could, that they would limit their enforcement to opportunistic customers alone.⁴⁸

The third and most recent defense, which I will call “private paternalism,” is simultaneously the most interesting and the least convincing. Best articulated by Omri Ben-Shahar, it returns to the process–content distinction and asserts that, regardless of the process by which boilerplate is created, its content is good for the majority of consumers.⁴⁹ Under this view, consumers are happy to contract away full expectation damages, access to the court system, high-quality products, privacy of personal information, preservation of copyright entitlements, and more, as long as they get a lower price in return.⁵⁰ These assertions then justify the conclusion that the content of boilerplate maps onto consumers' preferences. Refusing to enforce it would therefore deny the majority of consumers the terms that they want.⁵¹

Let us pause for a moment and consider the radical nature of the move that the private paternalism defense makes. As explained above, the entire field of contract law is built on the proposition (usually quite defensible) that society is better off when we allow parties to actualize their own individual values through voluntary, legally binding transactions. This form of lawmaking produces bespoke rules generated from the bottom up, as opposed to the comparatively clunky, top-down, one-size-fits-all regulation that legislation represents.⁵²

47. See Gibson, *supra* note 7, at 206; Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 12 (2009).

48. See Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1236 (2006) (“There is no reason to think [that the reputational dynamic] will in any way lead firms to recognize voluntarily the supposed legitimate claims of decent consumers at a volume or a value that is congruent with, or even regularly near to, any known measure of a proper number—resembling, that is, either any known legal measure of harm or any known economic measure of an incentive for efficient behavior.”); cf. Gibson, *supra* note 7, at 207–11 (critiquing the reputational justification for boilerplate); Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1225–26 (2017) (defending reputational argument but recognizing that some boilerplate terms—e.g., liability limitations—are likely to be enforced despite reputational consequences).

49. See Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014) (reviewing RADIN, *supra* note 1). Others who have at least flirted with this approach include Clay Gillette, see Gillette, *supra* note 16, at 697–98 (exploring whether sellers can serve as surrogates for non-reading buyers), and James White, see White, *supra* note 16, at 749 (“I have wondered whether the outcome in *Hill* and *ProCD* is not the best one even if it disregards conventional contract doctrine.”).

50. See Ben-Shahar, *supra* note 49, at 895–96 (listing anecdotal examples of consumer tradeoffs and assuming *inter alia* that one view of the price–quality tradeoff is held by “a small minority” that wishes to “impose its preferences on the majority of consumers”).

51. See *id.* at 900.

52. As long as the parties to a contract enter into the agreement freely and internalize its costs, there is no reason for the law not to enforce it. As David Slawson puts it, “Unless a contract is co-

Again, the law scrutinizes the *process* of contracting (for instance, to make sure that transactions are truly voluntary and internalize costs) but usually leaves contractual *content* alone, confident that a robust process cannot help but produce terms that accord with the heterogeneous values of the parties. Some parties will undoubtedly choose contractual terms that you or I (or a legislator) might dislike, but their choice simply reflects that contracts tailor themselves to disparate, individualized preferences. Private ordering is a feature, not a bug, of the system.

How odd, then, that this last defense of boilerplate engages in the top-down regulatory judgments that contract law is supposed to render irrelevant. It is one thing when courts and legislatures issue judgments about contract terms; the results might be imperfect, but at least they are constrained by the rule of law and the political process. But why would we ever defer to such judgments when made by self-interested companies, unconstrained by market forces or the political process? Why would we assume that terms unilaterally imposed by sellers would happen to accord with customer preferences? The world has gone topsy-turvy when those who favor enforcement of contracts paternalistically purport to know what is best for individuals without consulting them, whereas those who oppose enforcement are labeled “autonomists” and make arguments based on individual agency.⁵³

3. The Dichotomy

The foregoing discussion revealed no adequate explanation for boilerplate’s continued enforcement. Everyone agrees that consumers do not read boilerplate terms, which means the traditional justification (market discipline) is absent. The original safeguards make marginal adjustments that amount to little more than window dressing. The more modern defenses are interesting but fundamentally flawed; indeed, they essentially give up on the traditional market model—and, in the case of private paternalism, stand the model completely on its head. In sum, all that these safeguards and defenses share is their collective endpoint: deference to boilerplate.

I now offer another explanation for this deference: even when courts and commentators recognize boilerplate’s fundamental problems, they hesitate to follow those problems to their logical conclusion for fear that they will destroy millions of everyday transactions. Without the assurance that boilerplate terms provide, sellers will refuse to provide goods or services to consumers, or will provide them only at an exorbitant cost. In other words, the conventional wisdom envisions a dichotomy: we either hold our noses and enforce boiler-

erced, . . . the ‘government’ it creates is by its nature ‘government by and with the consent of the governed.’” Slawson, *supra* note 24, at 530.

53. “Autonomists” is Ben-Shahar’s term for those who assert that enforcing boilerplate unfairly reduces individual autonomy by imposing terms on individuals without their consent. *See* Ben-Shahar, *supra* note 49, at 884. He borrowed the term from Carl Schneider. *See generally* CARL E. SCHNEIDER, *THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS* (1998).

plate, or we invalidate it and grind the modern economy to a halt.

One does not have to scour the case law to see this dichotomy working on the minds of judges. To the contrary, court opinions are replete with the assumption that a complex mass of unread terms is essential to consumer transactions. Start with the granddaddy of boilerplate cases, the Seventh Circuit's *ProCD, Inc. v. Zeidenberg*, in which Judge Frank Easterbrook muses about a concert ticket that consumers pay for before they are told its terms of use:

One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.⁵⁴

Note the two assumptions at work here. First, the court assumes that presenting the terms in a form other than late-arriving boilerplate would have a negative effect on the transaction, making it more expensive and less efficient. Second, the court assumes that those terms *must* be part of the deal; when they cannot be easily presented ahead of time (such as when the transaction takes place over the phone or electronically), the sale cannot take place. Here we see the seemingly inescapable dichotomy: you can either choose to proceed with the transaction or you can choose to forgo boilerplate. You can't have it both ways.

The supposed inevitability of boilerplate resurfaced in the Seventh Circuit's next significant pronouncement on the subject, *Hill v. Gateway 2000, Inc.*, the case involving the mail-order computer that arrived with boilerplate terms in the box.⁵⁵ The court begins with a question that reveals the same old assumptions: "Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?"⁵⁶ Again we see the dichotomy: enforce boilerplate or render the transaction "term-free"—an outcome that would destroy the sale entirely, because a business cannot consummate mail-order sales without contracting on such matters as price, quantity, shipping, and payment. Nor is this dichotomy limited to these two cases; both *ProCD* and *Hill* are staples of contract law casebooks and treatises, and courts all over the country have cited their boilerplate holdings hundreds of times, usually quite favorably.⁵⁷

54. 86 F.3d 1447, 1451 (7th Cir. 1996).

55. 105 F.3d 1147, 1148 (7th Cir. 1997).

56. *Id.*

57. The first, fourth, and fifth headnotes in Westlaw's version of *ProCD* capture the relevant holding; other cases have cited them 89 times (109 if one includes negative citations). For *Hill*, it's the first two headnotes, and the equivalent figures are 114 and 139. Another measure of the cases' influence is that a majority of citations to the relevant headnotes come from outside the Seventh Circuit: seventy non-negative cites for *ProCD*, sixty-four for *Hill*. (All citations are as of September 28, 2017). A number of cases have adopted the same reasoning. *See, e.g.*, *James v. McDonald's Corp.*, 417 F.3d 672, 678 (7th Cir. 2005) ("To require McDonald's cashiers to recite to each and every customer the fourteen pages of the Official Rules, and then have each customer sign an agreement to be bound by the rules,

Scholars likewise frequently speak as if boilerplate were essential. Robert Hillman declares that “because of the efficiencies and benefits of standard forms, it is not a reach to predict that the economy would come to a screeching halt without them.”⁵⁸ Arthur Leff states that living entirely without boilerplate is “commercially absurd” due to “the economics of the mass distribution of goods.”⁵⁹ Nancy Kim hypothesizes that “failure to recognize contracts of adhesion would mean slowing down and perhaps even stifling the growth of a valuable industry.”⁶⁰ Eric Posner asserts that “[c]ontracts are long and detailed by necessity.”⁶¹ And David Slawson sums up the consensus:

The predominance of standard forms is the best evidence of their necessity. They are characteristic of a mass production society and an integral part of it. . . . These services are essential, and if they are to be provided at reasonable cost, they must be standardized and mass-produced like other goods and services in an industrial economy.⁶²

Of the foregoing scholars, only Posner is an unapologetic advocate for enforcing boilerplate. Nevertheless, they all seem to share the courts’ belief in the essential boilerplate dichotomy: preserve the boilerplate or kill the deal. Goods and services are standardized, so contracts need to be standardized. The modern economy is complex, so the contracts that facilitate that economy must be complex. Small wonder, then, that the proposed cures for boilerplate’s obvious shortcomings—such as unconscionability, reasonable expectations, and reputational constraints⁶³—are quite modest and fail to question whether we can simply live without it.

In short, after almost a century of dealing with boilerplate,⁶⁴ courts and commentators alike have failed to meaningfully confront, let alone overcome, the field’s central challenge. As Llewellyn presciently observed, that challenge

would be unreasonable and unworkable.”); *Lima v. Gateway, Inc.*, 886 F. Supp. 2d 1170, 1178 (C.D. Cal. 2012) (“[I]n many consumer transactions it would be impractical if not impossible for a telephone sales representative to disclose to a customer all of the terms and conditions of the sale.”); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) (“Practical business realities make it unrealistic to expect DirecTV, or any television programming service provider for that matter, to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service.”); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (favorably citing *ProCD*’s concertgoer example in a case actually involving boilerplate on a concert website).

58. Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 747 (2002).

59. Leff, *supra* note 8, at 144; *see also id.* at 131 (taking for granted—in his first paragraph—that “[m]any of these pieces of paper say extremely important things”).

60. Kim, *supra* note 22, at 27.

61. Posner, *supra* note 15, at 1183.

62. Slawson, *supra* note 24, at 530. That said, consider an alternative hypothesis: the predominance of standard forms is the best evidence that lawyers exist.

63. *See supra* Sections I.B.1 & I.B.2.

64. Scholarly commentary on the boilerplate phenomenon dates back almost a century, if not longer. *See Patterson, supra* note 9 (published in 1919).

is to find a way “to justify . . . [the] remodeling of the agreement” that the lack of assent calls for, without having to “strike down the whole deal.”⁶⁵ No one has seriously risen to that challenge because everyone assumes that boilerplate cannot be remodeled without striking down the deals that it accompanies. Convinced of boilerplate’s inevitability, we have resigned ourselves to living with it.

As it turns out, however, boilerplate is not inevitable. We have been laboring under a false dichotomy, assuming only two possibilities when in fact there is a third—and better—option. Explaining that option is the task of Part II.

II. DEBUNKING THE DICHOTOMY

In Part I, we saw that boilerplate enforcement persists because of a perceived dichotomy: live with boilerplate or live without mass-market transactions. Under this view, getting rid of boilerplate is not a third option but a third rail.

The following discussion calls upon contract doctrine and contract theory to prove this dichotomy false. The proof comprises two steps. First, doing without boilerplate is possible. In other words, when boilerplate disappears from a transaction, it does not inevitably take the rest of the transaction’s terms with it. The key insight here comes from contract’s severability doctrine, which shows us that the typical consumer transaction can have its boilerplate severed while leaving the remaining terms intact.

Second, doing without boilerplate is feasible. Contract theory tells us that the gaps left by departed boilerplate would find themselves filled by default rules. As it turns out, in most cases those default rules would make little difference to the outcome of disputes or the governance of transactions. In a few rare instances, applying the default rule would admittedly cause a significant disruption to the conduct of business, but that disruption would generate beneficial, compensatory dynamics. In the end, substituting defaults for boilerplate would not make mass-market transactions impossible. To the contrary, boilerplate’s departure would have salutary effects on commerce and on the evolution of public law.

A. SEVERABILITY

To evaluate whether a transaction can survive when shorn of its boilerplate, we must return to a point discussed above—namely, that transactions that include boilerplate usually include other, more salient terms as well.⁶⁶ The salient terms are not necessarily negotiated; the mass-market economy tends to

65. LLEWELLYN, *supra* note 28, at 367; *see also id.* at 368 (identifying this challenge as “the scholar’s proper field,” criticizing them for “sticking in the bark of the job,” and opining that courts have been similarly “irregular[], but somewhat less so”). Llewellyn’s contemporary, Fritz Kessler, deserves credit for his prescience as well, having called courts’ reluctance to confront this issue as the “main obstacle to progress” in resolving the boilerplate issue. *See* Kessler, *supra* note 6, at 637.

66. *See supra* note 13 and accompanying text.

operate on a take-it-or-leave-it basis, or at most gives consumers a short menu of options. The important distinction for purposes of enforceability is not between a take-it-or-leave-it term and a negotiated term. No, the important distinction is between a term to which consumers pay attention and a term to which they do not.⁶⁷ Only the latter terms meet our definition of boilerplate, so those are the only terms whose removal we are contemplating.

Consider, for example, ordering a book from Amazon. Like most online sellers, Amazon purports to impose terms on shoppers merely by virtue of their visiting its website.⁶⁸ Those “browse-wrap” terms constitute classic nonsalient boilerplate.⁶⁹ But when one proceeds to the point of buying a book, Amazon presents other terms as well, in a manner that garners consumers’ attention. Some of these are adhesive terms, such as the description of the item and the price. Others allow a degree of consumer choice, such as hardback versus paperback, shipping options, and whether to gift-wrap the item. Choice or no choice, however, these sorts of terms are salient; we consciously “shop” for them when we buy books online, and the market responds accordingly.⁷⁰ The terms for which consumers shop will vary by transaction, of course, but in all but the most simple exchanges, consumers will focus on certain terms (price) and not on others (boilerplate)—a process known as “satisficing.”⁷¹

The first step in proving the dichotomy false is to show that it is possible to remove boilerplate from a transaction while leaving the salient terms intact. Fortunately, contract law has a longstanding doctrine that tells us how to proceed when public policy precludes the enforcement of some contract terms but has no objection to others.⁷² That doctrine is called severability, and its

67. See Gibson, *supra* note 7, at 216 (giving examples of essential terms that customers are likely to read); Korobkin, *supra* note 11, at 1225–34 (discussing salient versus nonsalient terms).

68. See *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000> [<https://perma.cc/W523-7VRG>] (“By using Amazon Services, you agree to these conditions.”).

69. See, e.g., *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513, at *3 & n.5, *4 (E.D. Mo. Mar. 6, 2009) (holding defendant to browse-wrap terms because “[a] link to the full text of the user agreement is found at the bottom of the very web page that [defendant used]” and “[t]he user agreement specifically states that users consent to be bound to the agreement by accessing and using the website”); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (refusing to dismiss contract law claim based on browse-wrap terms); see also Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 *BYU J. PUB. L.* 1, 19–22 (2011) (surveying assent mechanisms for popular online services).

70. See Rakoff, *supra* note 11, at 1227 (distinguishing between the “shopped terms” over which sellers compete and the “defensive form terms” that are relegated to boilerplate). Note that both the boilerplate terms and the salient terms are terms of a contract; Amazon and the customer are making promises about something they will do in the future—ship a certain book, pay a certain price, and so forth. Whether all of the contract terms are enforceable is another question.

71. See Gibson, *supra* note 7, at 177–79 (discussing satisficing in the boilerplate context).

72. The “public policy” label is broad enough to include the market-based enforceability concern. The label originated in contracts that contained overly restrictive covenants not to compete, see *RESTATEMENT (FIRST) OF CONTRACTS* § 518 (AM. LAW INST. 1932) (stating that agreements in which full performance would constitute an unreasonable restraint on trade are unenforceable), but it has since

approach can be simply stated: when a term is held invalid, one must determine whether it is an essential part of the agreed-upon exchange based on its “relative importance in the light of the entire agreement between the parties.”⁷³ If so, then the entire agreement is unenforceable. If, on the other hand, the stricken term is not essential, then it is considered severable⁷⁴ and the transaction can proceed under the surviving terms alone.⁷⁵ As the Third Circuit puts it, “You don’t cut down the trunk of a tree because some of its branches are sickly.”⁷⁶

How does this standard apply to the removal of boilerplate from a typical consumer transaction? Consider again the Amazon scenario. If Amazon’s boilerplate were held invalid, the remaining salient terms would still tell us what book was purchased, for how much, using what form of payment, whether it was hardcover or paperback, what shipping method would be used, and where it was

been used to challenge enforcement of terms in a myriad of other scenarios. *See, e.g.*, *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 580–81 (2d Cir. 2006) (payment schemes in hospital management contracts); *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (punitive-damage bars in arbitration agreements); *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 291–92 (3d Cir. 2003) (waivers of civil rights in dispute settlements); *Nat’l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987) (choice of venue in crude oil supply contracts); *Bancroft Life & Cas., ICC, Ltd. v. Lo*, 978 F. Supp. 2d 500, 513–14 (W.D. Pa. 2013) (commission-sharing in loan guaranties); *People v. McNett*, 837 N.E.2d 461, 465–66 (Ill. Ct. App. 2005) (illegal penalties in criminal plea deals); *Baltrosky v. Kugler*, 910 A.2d 1089, 1096–97 (Md. 2006) (abated interest in foreclosure sales). Public policy has also been invoked to challenge contracts on unconscionability grounds. *See, e.g.*, *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 270–71 (3d Cir. 2003) (using severability rules from case law and the Restatement to determine whether unconscionable provisions were severable); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000) (“The basic principles of severability that emerge from [state statute] and the case law of illegal contracts appear fully applicable to the doctrine of unconscionability.”).

73. RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. a (AM. LAW INST. 1981).

74. The term “divisible” is sometimes used to describe this concept, but “severable” is the preferred term when discussing, as Williston puts it, “the effect of an invalid covenant on the remaining valid covenants in a contract.” 15 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 45:1, at 314 (Richard A. Lord, ed., 4th ed. 2014); *accord* 15 GRACE McLANE GIESEL, CORBIN ON CONTRACTS § 89.4, at 626–27 (Joseph M. Perillo ed., rev. ed. 2003) [hereinafter CORBIN ON CONTRACTS] (describing the historical usage of the terms “divisibility” and “severability” and how the courts have applied these concepts).

75. *See Plaskett v. Bechtel Int’l, Inc.*, 243 F. Supp. 2d 334, 345 (D.V.I. 2003) (“[T]he Court finds that except for the [unconscionable] arbitration provisions . . . the Agreement is enforceable.”); *Ting v. AT&T*, 182 F. Supp. 2d 902, 936 (N.D. Cal. 2002) (severing unconscionable “Legal Remedies Provisions” from rest of customer service agreement), *aff’d in relevant part, rev’d in irrelevant part*, 319 F.3d 1126 (9th Cir. 2003); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 277 (Ill. 2006) (“[A]n entire contract or a clause therein fails if the stricken portion constitutes an essential term of the contract or clause, but the remainder stands if the stricken portion is not essential to the bargain.”); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (finding venue provision in arbitration clause unconscionable but inessential and thus enforcing remaining terms of contract); *BDO Seidman v. Hirschberg*, 712 N.E.2d 1220, 1226 (N.Y. 1999) (rejecting “per se rule that invalidates entirely” the challenged contract in favor of enforcing remaining terms when “the unenforceable portion is not an essential part of the agreed exchange”); RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (AM. LAW INST. 1981). The Restatement also bars enforcement of the surviving terms if the party seeking enforcement engages in serious misconduct, a factor not relevant here. *See id.*

76. *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 214 (3d Cir. 2003) (invalidating provision in employment contract requiring employee’s payment of arbitration costs and attorney fees but preserving remainder of arbitration agreement).

to be delivered. Such terms certainly seem to capture the essence of the transaction—the sale and delivery of a book. What’s missing? No arbitration clause, no choice-of-law provision, no terms governing use of Amazon’s intellectual property and software service—those are all found in the boilerplate.⁷⁷ Could anyone claim with a straight face that the latter terms are essential to the sale of the book? Could we not easily sever these boilerplate terms and still have a serviceable transaction that could proceed without them?

Of course, this is just one example, and it suggests that severability is going to be a case-specific inquiry. Yet it suffices to show that the widespread assumption that boilerplate is essential to all transactions is provably false. In at least some instances, we do not have to choose between transactions with boilerplate and no transactions at all. We can instead choose transactions without boilerplate.

Indeed, the specific Amazon example establishes a strong case for a more general presumption that boilerplate terms are always severable, for a simple reason: terms that only one party has ever seen can hardly be said to capture the essence of the agreement. After all, sellers know how to make a term salient.⁷⁸ When they choose instead to bury it in unread boilerplate, one can reasonably infer that they view it as a minor detail rather than an essential part of the deal.⁷⁹

What would sellers say about this presumption? Presumably, they would first argue that transactions without boilerplate cannot proceed because severing boilerplate is equivalent to unfairly rewriting the bargain in the consumer’s favor.⁸⁰ After all, if boilerplate favors the firm that drafts it (a reasonable assumption, with some empirical evidence to support it),⁸¹ then its removal will mean that the transaction becomes less valuable for the firm. Severability’s

77. See *AMAZON*, *supra* note 68.

78. For example, in Part III we will see that sellers relegated several warranty provisions to boilerplate, but explicitly presented one such provision to the consumer as a menu of options that preceded purchase. See *infra* Figure 1 and accompanying text. Or consider the efforts of firms like Tumblr, Kickstarter, and Etsy, whose business model requires trusting relationships with users; they pare down their terms, make them much more readable, alter their substantive content—and see increased readership as a result. See David A. Hoffman, *Relational Contracts of Adhesion* 27-43 (Univ. Pa. Law Sch., Public Law Research Paper No. 17-37, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008687 [<https://perma.cc/F2EZ-UZVN>]. Such terms are not really boilerplate under our definition, since the whole idea is that they are made salient to consumers.

79. The inverse is equally true: salient terms should be presumed essential because those are the terms over which firms actually choose to compete. See *AMB Prop., L.P. v. MTS, Inc.*, 551 S.E.2d 102, 105 (Ga. Ct. App. 2001) (finding that price was an essential term that could not be severed); Gillette, *supra* note 16, at 679 (noting that “the basic terms of quantity, price, and delivery” are usually the result of a “meeting of the minds”).

80. That said, it would be refreshing to hear a seller admit that boilerplate shifts costs to consumers—an admission that is necessary to this argument.

81. See generally Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677 (2007) (using empirical evidence to show bias toward sellers in boilerplate software contracts); see also Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 244 (2013) (finding that boilerplate software contracts become more pro-seller over time).

response to this argument is, basically, “too bad.” The doctrine contemplates the severing of offending terms even when no compensatory adjustment is made to other terms, presumably because the party who drafts an unenforceable clause hardly has cause to complain when the clause is judged invalid.⁸²

The “too bad” response, however, leads to a second and more valid objection to removing boilerplate: the disruption of settled expectations. Today’s courts typically enforce boilerplate, and sellers know it. So what would actually happen if boilerplate were not enforced? Severability doctrine only shows us that such a change is possible—that the law provides a means to accomplish boilerplate’s removal. It does not tell us, however, whether the change is feasible. In other words, to answer the ultimate question of the impact of boilerplate’s departure on the mass-market economy, we must consider the secondary effects of severing boilerplate. How would the law fill the gaps left by the departed boilerplate? What marketplace dynamics would emerge if boilerplate were truly gone? To those questions we now turn.

B. DEFAULT RULE DYNAMICS

We have now established that contract law can cope with boilerplate’s disappearance, using severability doctrine. What remains to be seen is whether the economy can cope. What would be the practical effect of severing boilerplate from the rest of the modern mass-market transaction? What terms would take its place? How would sellers react, accustomed as they are to the enforcement of their boilerplate? In short, what would a world without boilerplate look like?

1. Completing the Incomplete Contract

To visualize a world without boilerplate, we must first appreciate that the absence of a term in a transaction is, in and of itself, no obstacle to enforcement of the terms that are present. All contracts are incomplete; even the most detailed agreement leaves various contingencies unaddressed.⁸³ When such a contingency arises, what do the parties and the courts do? They look to default rules.

Suppose, for example, that two parties negotiate a contract but include nothing about what will happen if one of them fails to perform. The law provides default rules to fill in that blank. Contract law’s default rules tell us

82. See RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. a (AM. LAW INST. 1981) (“If it is not possible to apportion the parties’ performances . . . so that corresponding concessions are made on both sides, a refusal to enforce only [the unconscionable] part of the agreement will necessarily result in some inequality.”); *id.* § 208 cmt. g (“In such cases as that of an exculpatory term, the effect [of severability] may be to enlarge the liability of the offending party.”). This reasoning reflects the modern movement away from the old view that every modification in a contract requires some corresponding modification in consideration. See U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977); RESTATEMENT (SECOND) OF CONTRACTS § 89; CORBIN ON CONTRACTS, *supra* note 74, at 628–29.

83. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 299–301 (2004).

that a failure to perform that rises to the level of material breach justifies a suspension of performance by the other party.⁸⁴ A failure to perform that is not material does not justify a suspension of performance, but it might justify a request for reassurance of future performance and a suspension of the contract if such reassurance is not forthcoming.⁸⁵ And if the parties disagree on whether a breach has occurred, or whether it's material, civil procedure's default rules tell the parties that they can resolve their disagreement in any court with personal and subject matter jurisdiction.⁸⁶ Of course, the parties are free to use their contract to mutually define what is material⁸⁷ or to specify a particular court or set of laws for dispute resolution. But if they do not, the transaction does not descend into chaos. Instead, the applicable default rules emerge from the background law to help the parties navigate their relationship and resolve any disputes that arise.⁸⁸

Therefore, removing boilerplate from a transaction simply increases its incompleteness, calling for more reliance on terms that originate in the default rules rather than in boilerplate. As long as the boilerplate terms are severable, however, the transaction will proceed, governed by a combination of salient terms (on which the parties consciously agreed) and default rules (which emerge to fill in any gaps). In other words, one practical effect of boilerplate's departure is that default rules will play a bigger role in resolving disputes between sellers and consumers.

Now that we understand the role that default rules will play when boilerplate is removed, we can do away with two widely held assumptions that fuel the false dichotomy. First, there is the assumption that boilerplate reduces negotiation costs because it seamlessly provides terms that would otherwise have to be hammered out by the parties. Proponents argue that removing boilerplate would have the harmful effect of increasing such costs, perhaps to a level that would make the exchange prohibitively expensive.⁸⁹ If negotiation were the only alternative to boilerplate, the argument might be persuasive. But once we

84. See RESTATEMENT (SECOND) OF CONTRACTS § 237 (AM. LAW INST. 1981).

85. *Id.* § 251 & cmt. c (“[M]inor breaches may give reasonable grounds for a belief that there will be more serious breaches, and the mere failure of the obligee to press a claim for damages for those minor breaches will not preclude him from basing a demand for assurances on them.”).

86. See, e.g., 28 U.S.C. §§ 1330–1369 (2012) (subject-matter jurisdiction); FED. R. CIV. P. 4(e) (personal jurisdiction).

87. A common example is the inclusion of a “time is of the essence” clause, which makes late performance a material breach and thus entitles the aggrieved party to cancel its own performance. See, e.g., *Garcia v. Alfonso*, 490 So. 2d 130, 131 (Fla. Dist. Ct. App. 1986) (finding that “time is of the essence” gave sellers immediate right to cancel the contract when buyers were unable to perform).

88. For some of the foundational literature on default rules, see generally Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

89. See, e.g., KIM, *supra* note 22, at 20–22; Hillman, *supra* note 58, at 747; Rakoff, *supra* note 11, at 1224.

recognize that the replacement terms can instead come from the background law's default rules, the argument falls apart. Both with and without boilerplate, terms appear without negotiation. The only difference is their source.

Second, there is the assumption that the complexity of the modern consumer economy requires boilerplate because complex transactions require complex contracts.⁹⁰ But even if complex transactions do require complex contracts, there is no basis for assuming that boilerplate has to be the source of that complexity. The applicable default rules are just as capable of filling in the blanks.⁹¹ Indeed, as Omri Ben-Shahar has noted, a transaction in which default rules replace boilerplate can be even more complex than a transaction in which boilerplate is enforced.⁹²

This is not to say that removing boilerplate would be cost-free. As we will soon see, relying on default rules can reduce standardization of terms and thus increase a seller's uncertainty. Alternatively, a default rule might not be a great fit for the parties' needs—not because it's less complicated than the boilerplate, but because it's simply bad law. The following discussion will weigh those costs against the benefits of removing boilerplate.

2. (Default) Rule of Law

The foregoing discussion exposed a core issue: What is the proper source of a transaction's terms? Terms must originate somewhere; when a dispute arises, the law must provide an answer. The best source would be the parties themselves, which is why everyone favors enforcing salient terms that result from a truly bargained-for (or at least shopped-for) exchange. But as we have seen, even the most thoroughly negotiated agreement is incomplete, which means that unilateral imposition of the unaddressed terms is the only option. The question, then, is whether that unilateral imposition of terms should originate in boilerplate or default rules.

When the question is so stated, the answer seems clear. Boilerplate, by definition, comprises terms that one party chooses, unconstrained by the market or by the other party's input. In contrast, default rules emerge from common law and legislation, both of which are disciplined by the rule of law and the political process.⁹³ Representative government may have its flaws, but it is hard to imagine why we would reject it as a source of a contract's terms in favor of a

90. See, e.g., Leff, *supra* note 8, at 144; Slawson, *supra* note 24, at 530.

91. See Leff, *supra* note 8, at 140 (noting that in both standardized and nonstandardized contracts "only some of the terms were discussed," but that in the latter "what was left out was covered by statute, custom or legal implication" rather than by boilerplate terms).

92. See Ben-Shahar, *supra* note 49, at 887–89. Amazon's choice-of-forum clause is one example. See *infra* notes 102–07 and accompanying text.

93. Consider a point from Judge Easterbrook himself, when he was commenting on the arbitration clause in *Hill*: "Whatever may be said pro and con about the cost and efficacy of arbitration . . . is for Congress and the contracting parties to consider." *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1151 (7th Cir. 1997). If the contracting parties do not consider it—and in boilerplate, they don't—then the rule must come from Congress.

single, self-interested party.⁹⁴

Yet the idea of replacing boilerplate with default rules provokes scornful reactions, filled with portents of doom. In *ProCD*, for example, Judge Easterbrook derides the idea of using default rules in a software sale, claiming they “would drive prices through the ceiling or return transactions to the horse-and-buggy age.”⁹⁵ Ben-Shahar likewise envisions a parade of horrors if default rules were to replace boilerplate, including “well-oiled” class action lawsuits focused on “microscopic” injuries.⁹⁶ Extreme as these reactions may be, they are simply examples of a general assumption that animates the dichotomy: replacing boilerplate with default rules, even if possible, would be infeasible.

The concern about infeasibility presents an empirical question, and in Part III I will provide an empirical answer based on a case study of actual boilerplate terms.⁹⁷ Here, however, I will address the doomsayers’ assumption at the level of theory by considering what dynamics would emerge if boilerplate were severed from consumer transactions and default rules replaced it. How would sellers and lawmakers react to the introduction of those default rules into consumer transactions?

a. *Nearby Defaults*

A seller’s reaction to being deprived of boilerplate would be a function of the substantive “distance” between the boilerplate term and the default rule that takes its place. If the default rule is not much different from the boilerplate term, we have what I call a “nearby default” and the seller would make adjustments (if any) at the margin.

The Amazon book purchase provides an example. Amazon’s boilerplate provides for the application of Washington law to any dispute between the company and the consumer. If we remove that term from the transaction, the

94. See KIM, *supra* note 22, at 5 (distinguishing between norms that change “through the desires of a population” and those that are “instigated by self-interested businesses without the approval or awareness of the masses”); RADIN, *supra* note 1, at 33 (discussing the “democratic degradation” that occurs when private firms use boilerplate to “displac[e] the legal regime enacted by the state”); LEFF, *supra* note 8, at 140 (“[T]he process of filling in and filling out a deal not by one party’s will, but by the legal and political process, tended to lessen the possibility of monolithic one-sidedness . . .”).

95. 86 F.3d 1447, 1452 (7th Cir. 1996). Easterbrook leaves unexplained his surprising assumption that contract law’s default rules have not changed since the days of horses and buggies. But he was correct in one respect: the case through which most Contracts students learn about consequential damages probably did involve a (tardy) horse and buggy. See *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145; 9 Ex. 341 (involving the delayed delivery of a mill’s crankshaft).

96. See Ben-Shahar, *supra* note 49, at 903 (citing consequential damages and class actions as two bad outcomes that would obtain in the absence of boilerplate enforcement). Llewellyn too mocks default rules as “the crude misfitting hand-me-down pattern of the ‘general law,’” LLEWELLYN, *supra* note 28, at 362, but earlier in his career he was even less enamored of boilerplate, and he ultimately rejected its enforcement in favor of something that looks like a default rule: “[W]here bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.” Llewellyn, *supra* note 24, at 704.

97. Spoiler alert: the doomsayers are wrong. See *infra* Part III (proving them wrong).

corresponding default rule would call for application of the law of the state with the most significant relationship to the issue being litigated.⁹⁸ For a products liability claim, for example, the state where the harm occurred would likely have the most significant relationship.⁹⁹ Or, for a breach of warranty claim, the law of the state to which the book was delivered would presumptively apply.¹⁰⁰ And so forth.

Using the default rule would therefore increase uncertainty for Amazon (although not for its customers, who never saw the boilerplate in the first place). That uncertainty would admittedly increase Amazon's costs; its business model would have to account for the possibility of being subject to the law of more than one jurisdiction. Those increased costs, however, would be spread across the company's millions of customers. It is accordingly hard to imagine that such costs would cause a measurable disruption to Amazon's sales. The economy would survive. Indeed, it would probably not even notice.

Moreover, moving an issue from boilerplate into price would increase its salience for consumers and thus increase competition. Suppose P is the salient sticker price that a seller charges for an exchange, and B represents the seller's additional gains from including a boilerplate term in the transaction, for a total value to seller of $P+B$. If the seller learns that the boilerplate will not be enforced, it can simply raise the sticker price to $P+B$. In this way, nonsalient terms become salient. When boilerplate was enforceable consumers were effectively paying $P+B$, but they thought they were only paying P . Now they know they are paying $P+B$, because they pay attention to price.¹⁰¹ As long as the efficiency effects of converting the written term into the price term are neutral, this move increases market competition.

Of course, it's possible that a term is more efficient as a written provision than as a component of price. For example, using price to spread a term's gains equally among all of one's customers might mean that low-cost consumers end up subsidizing high-cost consumers, whereas a boilerplate term might be able to differentiate between the two.¹⁰² It's also possible that a boilerplate term generates gains not just for the seller, but for both parties; if Washington law is

98. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (AM. LAW INST. 1971) (noting that the general principle underlying choice-of-law principles is "application of the local law 'of the state of most significant relationship'").

99. See *id.* § 147; see also *Commercial Union Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453, 457–59 (W.D. La. 1976) (applying Louisiana law to a products liability claim based on the injury occurring in Louisiana). I know it's hard to imagine a products liability claim based on a book, but please allow me some professorial license.

100. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 & cmt. b; see also *Sperry Rand Corp. v. Indus. Supply Corp.*, 337 F.2d 363, 369 (5th Cir. 1964) (applying Florida law to a breach of warranty claim when computer system was delivered to Florida).

101. For a similar explanation of the dynamics of read and unread terms, see Guy A. Rub, *Market Regulation of Contractual Terms: A Sceptical View*, 54 CAN. BUS. L.J. 258, 262–63 (2013).

102. See, e.g., Ben-Shahar, *supra* note 49, 900–01 (criticizing the cross-subsidies that can result from one-size-fits-all default rules); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and*

best not just for Amazon, but also for its customers, then moving to the less certain default rule imposes costs on everyone.¹⁰³ In both cases, relying on the default rule and folding the boilerplate term into price could occasion an efficiency loss.

The takeaway here, however, is that as long as the distance between the boilerplate term and its default-rule counterpart is not too great, replacing the latter with the former will produce no worrisome dynamic and cause no significant economic disruption. Sometimes there will be efficiency gains, such as when exploitative boilerplate gets folded into salient price. Sometimes there will be efficiency losses, such as when a term that was best expressed in written form is replaced by a less specific default rule.¹⁰⁴ But in neither case are the economic consequences so dire as to justify enforcing terms unilaterally drafted by a self-interested party, rather than deferring to defaults. The boilerplate-free transaction remains feasible.

b. Distant Defaults

We should expect most default rules to be nearby defaults. After all, the traditional formulation of default rules focuses on filling in the blank with what the parties would have wanted, as Judge Easterbrook himself has recognized (and applauded).¹⁰⁵ But when that's not the case—when a boilerplate term is vastly different from the default rule that would replace it—we have what I call a “distant default.”

Distant defaults are the poster children for enforcing boilerplate. For example, the targets of Easterbrook's derisive “horse-and-buggy” characterization were the default rules governing warranties and consequential damages, which sellers avoid by inserting limitations into their boilerplate.¹⁰⁶ Omri Ben-Shahar has a similar take on class actions, favoring the use of boilerplate waivers to

Anticompetitive Effects, 104 MICH. L. REV. 983, 988–1003 (2006) (discussing ways in which boilerplate can be used for purposes of customer segmentation).

103. See Gibson, *supra* note 7, at 213–14 (noting that a term is not necessarily inefficient just because it's buried in boilerplate).

104. Note, however, that in practice there are default *rules* and default *standards*, and the latter are more “transcontextual,” allowing courts to tailor the outcome to particular parties, industries, and transactions. See Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1527 (2016).

105. See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1433 (1989) (calling for gap-filling default rules that “duplicate the terms the parties would have selected”); see also Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (calling for gap-filling default rules that “mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction”). More recent scholarship has questioned whether that's the role default rules should play, but even those scholars recognize the dominance of the gap-filling paradigm among lawmakers. See Ayres & Gertner, *supra* note 88, at 733 (identifying a “growing consensus among contract scholars that default rules should not simply be the hypothetical contract that parties would choose in a world without transaction costs” but noting that there is “small hope” that lawmakers can determine those more efficient defaults).

106. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

preclude suits based on “as microscopic an injury as one could imagine.”¹⁰⁷ In other words, these default rules are not close substitutes for the corresponding boilerplate; instead, they are distant defaults, so miscalibrated or out-of-date that to rely on them would bring on economic calamity and thus make boilerplate’s removal infeasible.

Let us assume that the rules governing warranties, damages, and class actions are in fact distant defaults.¹⁰⁸ If so, refusing to enforce the boilerplate that displaces them would materially affect commerce; class action lawsuits based on broad warranties and seeking consequential damages would soon become the norm. What effect would that have on sellers? When we were dealing with nearby defaults, sellers could simply fold any added costs into the salient price with marginal effects. Not so with distant defaults. The whole idea here is that the costs from boilerplate’s deletion are so high that dispensing with the term makes it impossible for the transaction to proceed. Prices would skyrocket.

Sellers faced with the loss of boilerplate’s protection would therefore do whatever they could to reinstitute the invalidated term. The most obvious solution would be to take the term out of the boilerplate category and make it salient to consumers; for example, present it to the consumer in the same way that price, quantity, and shipping are presented. (We will see an example of this maneuver in Part III.¹⁰⁹) Consumers’ bounded rationality and limited time will act as a natural limitation on how often the maneuver would work, but boilerplate provisions that displace distant defaults should be rare enough to make the cut.¹¹⁰ Indeed, the knowledge that only a limited number of boilerplate terms can be made salient will cause sellers to take a hard look at which of their terms really matter (as opposed to the current practice of including everything their lawyers can possibly imagine).¹¹¹

There is, however, another way to reinstitute the invalidated private term, and that is to reform the public law. After all, the existence of a distant default is an indication that something is wrong. Why would the public law provide a default rule that, when applied, is so disruptive to an orderly economy? When we encounter a distant default, the sensible reaction is not to stick our heads in the sand and apply boilerplate. The sensible reaction is to change the default rule.

107. See Ben-Shahar, *supra* note 49, at 900–03 (citing consequential damages and class actions as two bad outcomes that would occur in the absence of boilerplate enforcement).

108. When it comes to consequential damages, at least, this is a debatable assumption; Ian Ayres and Robert Gertner seem to think that the consequential damages default favors the *seller*, not the buyer. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 101–04 (1989) (arguing that rule inefficiently favors the seller to force the buyer to reveal useful information).

109. See *infra* Figure 1 and accompanying text (discussing salient warranty options).

110. See Gibson, *supra* note 7, at 224–28 (discussing the benefits of the “forced salience” that would result from invalidating boilerplate). See generally Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 *STAN. L. REV.* 545 (2014) (suggesting a method for testing which boilerplate is important to consumers and making it salient).

111. See Rakoff, *supra* note 11, at 1205 (noting that “it is very often the lawyer’s expertise, not the businessman’s, that is revealed” in boilerplate’s content).

More specifically, there are two reasons that the law might provide a default rule so distant from what the parties would have wanted, and both call for reformation of the rule. First, lawmakers did it on purpose: the default rule is not meant to reflect the parties' desired outcome, but to incentivize the disclosure of welfare-enhancing information. This is what Ian Ayres and Robert Gertner have dubbed "penalty defaults."¹¹² Consider the consequential damages rule, which provides for draconian damages (in Easterbrook's view, anyway). The threat of those default damages forces sellers to insert their own, more limited damages provisions into consumer contracts. Those provisions in turn bring the damages issue to the attention of the consumer, who would otherwise be ignorant of the extent of seller liability. After seeing the provisions, the consumer can make a more informed judgment about how much to pay (or can negotiate for more fulsome seller liability).¹¹³ In this way, the default rule introduces welfare-enhancing information into the transaction.

For penalty defaults to work, however, the information they force sellers to disclose must be salient to consumers. After all, the theory is that consumers change their behavior in reaction to the information; they reassess whether the transaction's benefit is worth its cost, or they renegotiate terms. But we already know that boilerplate is not salient, and so disclosures in boilerplate will not affect the desired reaction. Penalty defaults may be a good idea in theory, but when the information disclosure takes place in boilerplate (and information costs are already prohibitively high), they fail in practice. In such circumstances, penalty defaults should be reformed in favor of traditional gap-filling defaults.¹¹⁴

The other explanation for the existence of distant defaults is the one that Easterbrook implies: default rules are simply bad law. Courts and legislatures make mistakes, and Pollyanna herself would have to admit that default rules could go seriously wrong. Indeed, one hundred years of deference to boilerplate has probably allowed many default rules to escape reexamination and thus grow old and outdated. Why would lawmakers waste time changing rules that everyone contracts around anyway?

I differ with boilerplate's defenders, however, regarding what we should do about poorly calibrated default rules. Suppose class actions amount to nothing more than an avaricious tax on business. The solution is not to hide class action waivers in boilerplate; it is to confront the issue head-on and change the

112. See Ayres & Gertner, *supra* note 108, at 91.

113. See Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1603 (1999) (discussing penalty defaults that incentivize disclosure of "private information about the law"). Ayres and Gertner also discuss consequential damages and hypothesize (among other things) that a default rule favoring such damages may incentivize disclosure from parties who are unlikely to incur them, so that the parties could renegotiate a lower and more accurate insurance cost. See Ayres & Gertner, *supra* note 108, at 101–02; see also Ben-Shahar, *supra* note 49, at 900–01 (noting that "the value of warranties or of remedies is greater to those with larger consequential losses" and arguing that most consumers will not be among that group).

114. See Gibson, *supra* note 7, at 216–17.

governing law. Indeed, dragging the issue out of the shadow of boilerplate tees it up for a truly public vetting, which can solve the class action problem for all businesses, not just for those with the ability and foresight to promulgate boilerplate waivers.

Of course, it's debatable whether class actions, implied warranties, and the like really are distant defaults rather than worthy protectors of consumer welfare that are unfairly cast aside in boilerplate. But that's the point: the issues should be debated in courts and legislatures, not resolved through veiled, unilateral action by a self-interested party.¹¹⁵ If Judge Easterbook believes that applying a hoary common-law rule to a modern contract dispute would drive prices through the ceiling, he can explain the rule's infirmities and update it. Indeed, that's his job. And if other judges agree with him, the common law of contracts will evolve accordingly. Or, if the outdated default rule is statutory, the legislature can change it. That's how the rule of law works. It is difficult to understand why one would dismiss that process in favor of having one party dictate terms unilaterally.

In the end, then, getting rid of boilerplate is not only possible and feasible, but salutary. Ridding the typical consumer transaction of boilerplate will rarely have much impact because most default rules will not be so different from the corresponding boilerplate terms. And in those rare instances when removing boilerplate does cause significant disruption, the result is a beneficial dynamic: sellers make important terms salient, and judges and legislators recognize the need to reform the miscalibrated public law. Neither eventuality brings about a doomsday scenario or justifies tolerating a one-sided imposition of terms by private actors.

III. ANSWERING LLEWELLYN'S CHALLENGE: A CASE STUDY

We have now used contract doctrine and theory to expose the error in the false dichotomy. We do not have to choose between enforcing boilerplate and exploding consumer transactions. Rather, severability and default rules provide a third option.

Doctrine and theory, however, can only take us so far. What remains to be seen is how they would play out in practice. Severability doctrine suggests that boilerplate should consist mostly of inessential terms, and default-rule theory suggests that boilerplate's departure would usually result in little economic disruption (and that the rare, larger disruption would generate positive dynamics). However, when severability and default rules are actually implemented to reform a boilerplate transaction, is their promise realized? In short, we need an empirical answer to Llewellyn's challenge, in which he called for a way "to justify . . . that remodeling" of boilerplate without having to "strike down the

115. See Korobkin, *supra* note 11, at 1205 ("[I]f terms are not imposed on one party by the other, some terms will almost certainly be imposed on both parties by the government.").

whole deal.”¹¹⁶

No single case study can fully answer that challenge. But if there is a transaction that can put the third option to the test, it is the purchase of a computer and its accompanying software. Much of the argument about boilerplate concerns the computer and software industry. *ProCD* was a software case,¹¹⁷ *Hill* was about a computer purchase,¹¹⁸ and a host of other cases and commentaries focus on the industry as well.¹¹⁹ And for good reason; computer transactions are rife with boilerplate, which means they present a particularly challenging case for a theory that posits getting rid of it. In other words, if this type of transaction can survive boilerplate’s departure, then our approach is not only theoretically and doctrinally possible, but also viable.

The remainder of this Article will therefore apply doctrine and theory to my online purchase of a desktop computer from Dell Inc., one of the two leading personal computer sellers in the United States.¹²⁰ As detailed in a separate article, the purchase encompassed various salient terms, plus twenty-nine boilerplate contracts totaling 78,203 words, through which four different parties (Dell, Microsoft, Adobe, and McAfee) contracted with the purchaser.¹²¹ To avoid exaggerating the extent and volume of boilerplate, the study counted only those terms that, although both adhesive and unread, were nonetheless enforceable under current law, using conservative assumptions.¹²² As we will see, the boilerplate covered a wide array of topics: dispute resolution procedures, intellectual property licenses, privacy protections, warranties, liability limitations, return policies, and more.

Discussing every term in this transaction in the space available would be an impossible task. Rather than attempt the impossible, the following discussion

116. LLEWELLYN, *supra* note 28, at 367.

117. *See generally* *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

118. *See generally* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

119. For other foundational cases, see, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000); *Microsoft Corp. v. Harmony Compts. & Elecs., Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994). For commentary, see, e.g., RADIN, *supra* note 1, at 213; Braucher, *supra* note 16, at 755–56; Hillman & O’Rourke, *supra* note 24, at 103–09; White, *supra* note 16, at 738–50. Note also that even if this case study is not generalizable, it tells us something about the role of boilerplate in the sale of PCs, which generate around \$40 billion each year. *See* MARKETLINE, *PCs IN THE UNITED STATES 9 & tbl. 1* (2015).

120. At the time the computer was purchased, Dell was a close second to HP Inc. in domestic market share, Gibson, *supra* note 7, at 184 n.63, but it moved into the number one position in 2016. *See* Press Release, Gartner Inc., Gartner Says Worldwide PC Shipments Declined 9.6 Percent in First Quarter of 2016 (Apr. 11, 2016), <http://www.gartner.com/newsroom/id/3280626> [<https://perma.cc/33QH-MLFP>]. HP then took the top spot back later that year. *See* Press Release, Gartner Inc., Gartner Says Worldwide PC Shipments Declined 5.7 Percent in Third Quarter of 2016 (Oct. 11, 2016), <http://www.gartner.com/newsroom/id/3474218> [<https://perma.cc/ZK6X-Y5EJ>].

121. *See* Gibson, *supra* note 7, at 231–32. That separate article measured the sheer volume of boilerplate terms in the transaction to demonstrate the insuperable information costs that boilerplate imposes. Here, in contrast, the focus is on the substantive content, not the volume, of the boilerplate.

122. Those conservative assumptions meant that the 29 contracts were culled from a universe of 186 potential contracts. *See id.* at 185.

will summarize and categorize terms according to their role in the severability and default-rule analysis. After all, this Article envisions a world in which mass-market transactions are governed by a combination of salient terms, nearby defaults, and distant defaults. It therefore makes sense to look at our case study through the lens of those three categories and to classify terms accordingly. (Readers who would like more detail, or who would like to reconstruct my analysis and offer critiques and alternatives, can find the full contracts and the categorized terms online.)¹²³ As we will see, the terms of my computer purchase map nicely onto this doctrinal and theoretical framework, suggesting that the boilerplate-free transaction is indeed viable.

A. SALIENT TERMS

If we are to remove boilerplate from consumer transactions, leaving only salient terms and default rules behind, then a threshold question is how to differentiate between what is salient and what is not. There may admittedly be cases in which that distinction is difficult to draw. Even then, one suspects that the cost of errors would be low in comparison to the gains from ridding the transaction of one-sided terms, and that the law could err on the side of salience and enforcement while still nullifying a significant amount of boilerplate.

The current case study, however, does not require us to delve into that issue because the line between salient and nonsalient is clear. Dell's website all but forced me to make choices regarding a number of the transaction's aspects and presented me with the corresponding costs or savings that each choice would generate.¹²⁴ These aspects included hardware specifications, shipping terms, in-home service plans, accessory add-ons, software packages, and forms of payment, and each had a separate webpage dedicated to the available selections. These aspects of the transaction were salient to my purchasing decision—not because they presented me with choices (although that helped), but because they affirmatively prompted me to evaluate the feature in question. In contrast, terms available only through unobtrusive, optional links were classified as unread boilerplate.¹²⁵

In other words, a court could easily sever the boilerplate here and still be left with a perfectly viable transaction, comprising the remaining salient terms. Even without boilerplate, the parties would know important details such as the hardware specifications of the computer, the delivery terms, the price, and what software was included. To use the terminology of severability doctrine, those seem to be the terms essential to the consummation of the exchange.

123. See James Gibson, *Boilerplate Dataset* (Univ. Richmond Law Faculty Publ'ns, Working Paper No. 1418, 2018), <http://scholarship.richmond.edu/law-faculty-publications/1418> [<https://perma.cc/43B2-UGVL>].

124. It would have been possible to skip some of these options by clicking on a "Finished Personalizing" link, but even then I would have been forced to make conscious choices regarding terms such as shipping and payment. See Gibson, *supra* note 7, at 225 & n.178.

125. For more details regarding how boilerplate was identified and classified, see *id.* at 185–90.

One is tempted to stop here and declare victory. But as we saw above, severability analysis tells us more about possibility than feasibility. To ascertain whether the removal of boilerplate would prove so disruptive as to explode the entire transaction, we need to know not only what contract terms survive boilerplate's removal, but what default rules take its place. How distant are the applicable default rules from the departed boilerplate?

B. NEARBY DEFAULTS

As default-rule theory suggests, the vast majority of boilerplate terms in the case study were similar to the corresponding default rules. In other words, the default rules that would replace them are nearby defaults, not radical departures from sellers' settled expectations. The sheer volume of boilerplate prevents me from explaining every such term, but three prominent examples should suffice.

1. Choice of Law

Let's begin with an example that should be both accessible and easy, because we discussed it above: choice-of-law provisions. Each drafter of boilerplate in our case study included a term requiring disputes to be resolved under the law of a particular jurisdiction. Dell chose Texas,¹²⁶ Microsoft chose Washington,¹²⁷ Adobe chose California,¹²⁸ and McAfee chose New York.¹²⁹

As we have already seen, when contracting parties do not provide any enforceable choice-of-law provisions, the law fills in the blank with civil procedure principles under which courts routinely determine the applicable law. If those default principles were to replace the boilerplate terms here, the four firms would incur added costs due to the uncertainty of the outcome, the potential differences in the applicable law, and the possible need to hire different counsel, for instance. The effect on consumers and on overall social welfare is harder to know because it is unclear whether the firms chose a particular jurisdiction for reasons of overall efficiency or to secure an advantage through the one-sided nature of boilerplate. (It is no coincidence that three of the four jurisdictions represent the home turf of the drafter.¹³⁰) In any event, if forced to live under the default rules, the four companies would hardly flee the

126. See Dell, Terms and Conditions of Sale ¶ 11 (revised Nov. 1, 2009) (on file with author) [hereinafter Dell Terms and Conditions].

127. See Microsoft, Microsoft License Terms: Windows 7 Home Premium ¶ 22 (on file with author) [hereinafter Microsoft Windows 7 License].

128. See Adobe, Warranty Disclaimer and Software License Agreement ¶ 12 (on file with author) [hereinafter Adobe Warranty Disclaimer].

129. See McAfee, McAfee End User License Agreement ¶ 1(c) (on file with author) [hereinafter McAfee License Agreement].

130. According to their corporate websites, Dell is based in Texas, see *About Dell*, DELL, <http://www.dell.com/learn/us/en/uscorp1/corp-comm?ck=mn> [<https://perma.cc/UPU2-CPRW>], Microsoft is based in Washington, see *Facts About Microsoft*, MICROSOFT, <https://news.microsoft.com/facts-about-microsoft/> [<https://perma.cc/2H8C-EU88>], and Adobe is based in California, see *Adobe Fast Facts*, ADOBE, <http://www.adobe.com/about-adobe/fast-facts.html> [<https://perma.cc/DP6J-4L76>]. McAfee is based in

jurisdiction, so to speak; they could account for the added uncertainty through a marginal adjustment to a salient term (namely, price), and—given how infrequently seller–consumer lawsuits occur—the net economic effect would almost certainly be negligible.

2. Arbitration

Arbitration provisions play a prominent role in boilerplate case law,¹³¹ yet only three of the twenty-nine contracts here had a provision calling for arbitration or similar litigation alternatives: two from Dell and one from Adobe.¹³² That fact alone suggests that the deletion of arbitration clauses would not be particularly disruptive to commerce. The content of the provisions reinforces that conclusion. The first Dell provision, in its Terms and Conditions of Sale, makes arbitration optional for consumers, allowing them to choose small claims court instead.¹³³ The other Dell provision references the first but then specifies an entirely different forum, making the two provisions hard to reconcile.¹³⁴ The Adobe provision (which relates only to privacy issues) also appears to make arbitration optional by inviting consumers to use the TRUSTe dispute resolution process if a complaint to Adobe goes unaddressed.¹³⁵ When two of the three provisions make arbitration optional and the third is ambiguous and inconsistent, the overall impression is that business could be conducted without those terms.¹³⁶ These are not the hallmarks of provisions so important as to be deal breakers.

What default rule would replace arbitration clauses? The answer, of course, is that the parties would litigate rather than arbitrate. This is a nearby default; the oft-repeated claim that arbitration saves money is unproven at best and incorrect at worst, and in any event either form of dispute resolution will be rare, such that accounting for any increased expense would mean a marginal price increase

California, but as mentioned above, it applies New York law. *See* McAfee, [HTTPS://WWW.MCAFEE.COM/US/INDEX.HTML](https://www.mcafee.com/us/index.html) [<https://perma.cc/97QF-6WFB>].

131. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011) (holding that federal law preempted state law permitting class action waivers in arbitration agreements to be found unconscionable); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding that challenges to the validity of a contract as a whole, not specifically the arbitration provision, must be reviewed by the arbitrator); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 688 (1996) (holding that federal law preempted state law requiring that arbitration provisions appear on the first page of the contract, in underlined capital letters).

132. Adobe, Online Privacy Policy (last updated July 14, 2009) (on file with author) [hereinafter Adobe Privacy Policy]; Dell, Dell DataSafe Online: Terms and Conditions (on file with author) [hereinafter Dell DataSafe]; Dell Terms and Conditions, *supra* note 126, ¶ 12.

133. *See* Dell Terms and Conditions, *supra* note 126, ¶ 12.

134. *See* Dell DataSafe, *supra* note 132.

135. *See* Adobe Privacy Policy, *supra* note 132.

136. Neither the Dell Terms and Conditions nor the Adobe Online Privacy Policy can be read to require arbitration, and the Dell DataSafe provision explicitly references the Dell Terms and Conditions, which means it arguably incorporates the same limitation (making arbitration optional). *See* Dell DataSafe, *supra* note 132.

at most.¹³⁷ Moreover, to the extent that there are joint gains to be had from choosing arbitration, the parties could realize those gains by making that choice *ex post*—when the claim arises—rather than including it *ex ante* in the boilerplate. And the former choice would be a true choice made by both parties, in contrast to the illusory choice that boilerplate represents.

3. Intellectual Property Licensing

Every seller inserted into its boilerplate some restrictions on consumers' ability to make use of the seller's information goods. Examples include restrictions on allowing multiple users to install a program,¹³⁸ downstream selling software,¹³⁹ reproducing material from the seller's website,¹⁴⁰ and reverse engineering.¹⁴¹ At first glance, these terms appear to govern essential aspects of the transaction. Much of the value in a computer purchase derives from the intellectual property that comes with it, and the companies who own that intellectual property have a lot to lose if consumers are free to copy it or allow multiple users to access it.

Nevertheless, here too the relevant boilerplate provisions would be replaced by nearby defaults. If consumers were to purchase copyrighted software unaccompanied by boilerplate, the law would still prevent them from making and selling copies, installing it on friends' machines, and so forth because copyright law considers those acts of reproduction for which a license is required.¹⁴² And although section 117(a) of the Copyright Act grants such a license to the consumer who owns a copy of a program, that license is as restrictive as the licenses we see in boilerplate; only that particular buyer can exercise it, and only insofar as making a copy is “an essential step in the utilization of the computer program.”¹⁴³

137. See Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 Ky. L.J. 183, 203 (1999–2000) (“[D]ue to a lack of empirical data, it is unclear whether ADR is, in fact, cheaper than traditional litigation.”); Alan Dabdoub & Trey Cox, *Which Costs Less: Arbitration or Litigation?*, INSIDECOUNSEL (Dec. 6, 2012), <http://www.insidecounsel.com/2012/12/06/which-costs-less-arbitration-or-litigation> [https://perma.cc/TT78-7X5V] (studying nineteen similar cases and finding that “arbitration—on average—is more expensive and slower than litigation”). Any true savings to sellers more likely have to do with keeping their disputes with consumers from being aired in public. See Carr & Jencks, *supra*, at 208. And, of course, sellers include arbitration clauses as a means of avoiding class actions. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 & n.2 (2011); see also *infra* Section III.C.3 (discussing class action waivers).

138. See, e.g., Adobe Warranty Disclaimer, *supra* note 128, ¶ 4.

139. See, e.g., Microsoft Windows 7 License, *supra* note 127, ¶ 12.

140. See, e.g., Dell, Site Terms (on file with author) [hereinafter Dell Site Terms].

141. See, e.g., McAfee License Agreement, *supra* note 129, ¶ 8.

142. See 17 U.S.C. § 106(1) (2012).

143. *Id.* § 117(a)(1). The same can be said of the few trademark provisions found in boilerplate; their restriction on deceptive use of marks mimics the default trademark law. For example, the Microsoft Trademark Guidelines tell the consumer to “follow these Microsoft Trademark and Brand Guidelines,” which ban any use of a mark that would mislead consumers “in a way that implies affiliation with, or sponsorship, endorsement or approval by Microsoft of your products or services.” See *Microsoft*

Removing the intellectual property boilerplate and relying on the default intellectual property law would therefore have little impact on consumer licenses and seller rights, and the use of nearby defaults would not render the overall transaction infeasible. In practice, the only material effect would be an increase in consumers' ability to resell software, because firms use the artifice of boilerplate to limit the application of copyright's first sale doctrine.¹⁴⁴ Even here, any economic loss would be marginal at most.¹⁴⁵ If sellers of automobiles, houses, clothing, books, and other consumer goods can successfully operate in the modern economy despite seeing their products resold, the computer industry can too.

C. DISTANT DEFAULTS

We have now seen three examples of nearby defaults—replacement rules that differ from their boilerplate counterparts, but not in any way that would materially impact the economic viability of the overall transaction. The basis for the false dichotomy, however, is the conviction that there exist distant defaults—replacement rules that are so different from the corresponding boilerplate that relying on them would upend settled expectations and threaten the seller's ability to do business. I have consequently mined the case study for three examples of distant defaults as well, so we can evaluate whether using them would in fact have the devastating effects that boilerplate's defenders predict.

1. Damages Limitations

Again, let's start with an example that should be familiar from our earlier discussion of default-rule theory: limitations on damages. All four sellers used boilerplate to cap available damages at the amount paid for their products.¹⁴⁶

Trademark & Brand Guidelines, MICROSOFT, <https://www.microsoft.com/en-us/legal/intellectualproperty/trademarks/usage/general.aspx> [<https://perma.cc/XC9A-2EQF>]. This is similar to the default law of trademark. *See, e.g.*, 15 U.S.C. § 1125(a)(1) (2012).

144. *See, e.g.*, Microsoft Windows 7 License, *supra* note 127, ¶ 8 (“The software is licensed, not sold.”). Calling the transaction a license rather than a sale enables sellers (sorry, licensors) to prevent buyers (sorry, licensees) from exercising first sale rights—and, as it happens, section 117's use license—because those rights apply only to the “owner” of a copy of the software. *See* 17 U.S.C. §§ 109(a), 117(a) (2012); *see also* Microsoft Corp. v. Harmony Compts. & Elecs., Inc., 846 F. Supp. 208, 213 (E.D.N.Y. 1994) (buying into this license-versus-sale distinction). *But see* SoftMan Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1085–87 (C.D. Cal. 2001) (exploring and rejecting the distinction).

145. Indeed, there might be no loss at all if technological protection measures (so-called Digital Rights Management) prevented consumers from reselling the software, despite their legal right to do so. My thanks to Guy Rub for pointing this out.

146. *See* Adobe Warranty Disclaimer, *supra* note 128, ¶ 10 (“ADOBE'S AGGREGATE LIABILITY . . . SHALL BE LIMITED TO THE AMOUNT PAID FOR THE SOFTWARE, IF ANY.”); Dell, Software License Agreement (revised Nov. 1, 2009) (on file with author) [hereinafter Dell Software License] (referring to “return of the price paid”); Dell Terms and Conditions, *supra* note 126, ¶ 9 (capping damages at “THE AMOUNT INVOICED”); McAfee License Agreement, *supra* note 129, ¶ 9(b) (limiting damages to “return of the purchase price paid”); Microsoft Windows 7 License, *supra* note 127, ¶ 24 (limiting damages to “any refund the manufacturer or installer may provide”).

Indeed, Adobe's boilerplate first purported to cap damages at zero,¹⁴⁷ and only after it tacitly acknowledged that some jurisdictions might not allow so drastic a limitation did it provide for the recovery of the amount paid.¹⁴⁸

A world in which seller exposure is limited by these damage caps is different from a world governed by the applicable default rule—namely, full expectation damages.¹⁴⁹ The true extent of the added exposure depends on how often consumers would actually sue, but it is certainly plausible to view expectation damages as a distant default that would occasion a radical change if it replaced the boilerplate term. Sellers seem particularly wary of consequential damages, a subset of expectation damages that arises from the plaintiff's special circumstances and which are awarded only if the defendant had notice of those circumstances.¹⁵⁰ (The reader may recall that consequential damages were one of the default-rule boogiemens that Judge Easterbook claimed “would drive prices through the ceiling or return transactions to the horse-and-buggy age.”¹⁵¹) Every seller in our case study used boilerplate to disclaim such damages, explicitly emphasizing that notice of special circumstances would have no effect on the available relief.¹⁵²

If consequential damages are indeed a distant default, what does that tell us about the viability of using the default rule to govern recovery of damages?¹⁵³ It tells us that something is wrong. Perhaps sellers are taking advantage of boilerplate's unilateral nature to write rules that unfairly favor them. In that case, enforcing the distant default is the right answer. Perhaps lawmakers designed the default rule as a penalty default, unaware that its information-forcing function would falter in the face of boilerplate's information costs. In that case, courts and legislatures need to change the rule so that it instead

147. See Adobe Warranty Disclaimer, *supra* note 128, ¶ 10 (“IN NO EVENT WILL ADOBE, ITS SUPPLIERS, OR CERTIFICATE AUTHORITIES BE LIABLE TO YOU FOR ANY DAMAGES, CLAIMS OR COSTS WHATSOEVER . . .”).

148. See *id.* (“ADOBE'S AGGREGATE LIABILITY . . . SHALL BE LIMITED TO THE AMOUNT PAID FOR THE SOFTWARE, IF ANY.”).

149. See RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981) (establishing expectation damages as the default). The boilerplate limitations also render specific performance unavailable. See *id.* § 357 (describing when specific performance would otherwise be available).

150. See, e.g., *Hector Martinez & Co. v. S. Pac. Transp. Co.*, 606 F.2d 106, 109 (5th Cir. 1979); RESTATEMENT (SECOND) OF CONTRACTS § 351(2)(b). As *Hector Martinez & Co.* demonstrates, courts sometimes use the term “special damages” instead of “consequential damages.” See 606 F.2d at 109.

151. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

152. See, e.g., Adobe Warranty Disclaimer, *supra* note 128, ¶ 10; Dell Software License, *supra* note 146; McAfee License Agreement, *supra* note 129, ¶ 10; Microsoft Windows 7 License, *supra* note 127, ¶ 24.

153. This discussion assumes that the consequential damages rule is a distant default, but the point is certainly contestable. There was no point in the case study at which I could have given sellers notice of any special circumstances, which means that the sellers' default exposure would not have included consequential damages but only general damages, which are foreseeable by definition, see RESTATEMENT (SECOND) OF CONTRACTS § 351(2), and which could therefore be easily built into the salient sticker price. Even general damages are subject to judicial reduction when they are disproportionately high. See *id.* § 351(3).

represents the outcome most parties would want. Or perhaps lawmakers have already tried to formulate the rule that way, but failed; they made bad law, and they need to try again.

In none of these three scenarios, however, is the solution to enforce the boilerplate. Instead, lawmakers need to take a hard look at the default rule and decide whether reform is warranted. Invalidating the boilerplate terms may initially have a disruptive effect, but lawmaking is a dynamic process that can react to the disruption and render the effect a temporary one. The end product will be a system in which the rule of law, not the whim of private parties, forms the backdrop against which commerce operates.

2. Warranties

The same analysis applies to warranties, another candidate for distant defaults. Three of the four sellers warranted the software they provided, and the warranties were surprisingly similar—and unsurprisingly stingy. Microsoft and Dell warranted their programs for a mere ninety days, and McAfee for only thirty.¹⁵⁴ In Dell's case, the warranty was even more limited; it applied only to the physical medium on which the software was provided, not to the performance of the program itself.¹⁵⁵ Dell also provided a hardware warranty, which could last up to five years, depending on what product was purchased.¹⁵⁶ The fourth seller, Adobe, warranted nothing at all.¹⁵⁷ Having provided these express warranties (or not), all four sellers explicitly disclaimed the default-rule warranties that would otherwise apply.¹⁵⁸

It is not entirely clear that those disclaimed warranties are really distant defaults, despite their inclusion in Judge Easterbook's "horse-and-buggy" list.¹⁵⁹ One disclaimed warranty, the implied warranty of fitness for a particular purpose, only applies when the seller knows of the buyer's special circumstances, making it inapplicable here.¹⁶⁰ Another, the implied warranty of merchantability, warrants fitness for ordinary use rather than for a particular purpose

154. See Dell Software License, *supra* note 146; McAfee License Agreement, *supra* note 129, ¶ 9(a); Microsoft Windows 7 License, *supra* note 127, Warranty ¶ B; Microsoft, Microsoft Software License Terms: Microsoft Office 2010 Desktop Application Software (on file with author).

155. See Dell Software License, *supra* note 146 ("Dell warrants that the Software media will be free from defects in materials and workmanship . . .").

156. See Dell, Warranties (revised June 1, 2010) (on file with author) ("Dell-branded hardware products purchased in the U.S. or Canada come with either a 90-day, 1-year, 2-year, 3-year, 4-year or 5-year limited hardware warranty, depending on the product purchased.").

157. See Adobe Warranty Disclaimer, *supra* note 128, ¶ 10 ("The Software is being delivered to you 'AS IS' and with ALL FAULTS . . . ADOBE AND ITS SUPPLIERS AND CERTIFICATE AUTHORITIES MAKE NO WARRANTIES . . . AS TO ANY MATTER . . .").

158. See, e.g., *id.* ¶ 9; Dell Software License, *supra* note 146; McAfee License Agreement, *supra* note 129, ¶ 9(c); Microsoft Windows 7 License, *supra* note 127, Warranty ¶ G.

159. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

160. See U.C.C. § 2-315 & cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (noting that warranty pertains to the peculiar, non-ordinary nature of the buyer's business and is based on the seller's knowledge of the same).

and so applies more broadly¹⁶¹—but is unclear how much additional exposure merchantability imposes on merchants in the digital world. In one influential early merchantability case, for example, the court found that a computer system that was not compatible with the era’s most popular word processing program nevertheless satisfied the warranty’s standard.¹⁶² To put it another way, hardware and software of merchantable quality has bugs, and consumers know it. Generally, merchantability’s requirements are likely to capture the deal that would have been struck had both seller and buyer actually considered the issue: merchantable goods must be of “fair average quality” and must be “fit for the ordinary purposes for which such goods are used.”¹⁶³ If so, the warranty is not a distant default at all, but is the classic gap-filling default that the law usually provides.

Furthermore, warranties may differ from other boilerplate terms in that they can be the subject of true market competition. This does not mean that shoppers pour over boilerplate looking for the warranty provisions. Rather, sellers often make warranties salient by bringing them to consumers’ attention in other ways. For instance, when shopping for a new car—or just watching car commercials on television—one quickly learns how long the manufacturer’s basic warranty lasts, whether there is separate coverage for the drivetrain, and so forth. In our case study, Dell’s ordering process explicitly walked the buyer through four warranty and service options and asked for a decision without resorting to boilerplate.¹⁶⁴ These examples show that warranties can be salient, and that the later boilerplate terms may simply refer to something for which the consumer already consciously shopped.¹⁶⁵

Nevertheless, even if one assumes that there is considerable distance between nonsalient boilerplate warranties and the default warranties that would replace them, there is no more reason to defer to the boilerplate than there was in the consequential damages example. If the default warranties are poorly calibrated, or are misguided attempts to impose penalty defaults, then enforcing those distant defaults will motivate sellers to inform lawmakers of the problem and convince them to reform the rules. If, on the other hand, it is the disclaiming of default warranties that is misguided, the last thing that courts should do is defer to the boilerplate that makes such disclaimers possible. Again, the solution is not to let self-interested, private parties dictate the governing terms. It is to align the public law with the collective best interests of buyers and sellers.

161. *See id.* § 2-314(2)(c).

162. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 752 F. Supp. 181, 191 (E.D. Pa. 1990) (evaluating incompatibility with WordPerfect and other important programs), *rev’d in part on other grounds*, 939 F.2d 91 (3d Cir. 1991). WordPerfect was by far the dominant word processing program when the case was decided. *See* STAN J. LIEBOWITZ & STEPHEN MARGOLIS, WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY 180 (1999).

163. U.C.C. § 2-314(2)(b)–(c).

164. *See infra* Figure 1.

165. Under this approach, if the boilerplate warranty terms differ from the more salient warranty terms, the latter would have to prevail, and default rules would fill in any blanks.

Figure 1¹⁶⁶

3. Class Actions

Our final distant default relates to the availability of class actions. It should come as no surprise that class action waivers appeared in the boilerplate;¹⁶⁷ companies fight tooth and nail to enforce such waivers, and they presumably do so for a reason.¹⁶⁸ With such waivers in place, sellers can be confident that the transaction costs of individual suits will prove prohibitively high for almost all consumers—especially when the available remedies are limited by the damage caps discussed above.

What we do not know, however, is whether sellers fight so hard against class actions because such suits are merely the contrivance of an opportunistic plaintiffs' bar or because such suits are meritorious. Nullifying boilerplate would call the question. In other words, if class actions are wasteful, then their increased availability should prompt lawmakers to change the law of class

166. See generally *The Dell Online Store: Build Your System*, DELL, [http://www.dell.com/en-us/shop/\[https://perma.cc/2FHY-H6DV\]](http://www.dell.com/en-us/shop/[https://perma.cc/2FHY-H6DV]).

167. See, e.g., Dell Terms and Conditions, *supra* note 126, ¶ 12.

168. For example, companies litigate arbitration clauses all the way to the Supreme Court not because arbitration itself is so important—we have seen how weak arbitration clauses are—but because they can leverage the enforcement of an arbitration clause into the avoidance of class actions. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

actions. Alternatively, if class actions are welfare-enhancing, then nullifying boilerplate—however disruptive the impact—is not a poison, but an antidote.

D. SURPLUSAGE

We have now walked through the three components that would inform a world without boilerplate. Salient terms would express the parties' true preferences, subject to the market discipline that underlies contract law. Nearby defaults would replace most boilerplate with marginal impact on transactions. Finally, the enforcement of distant defaults would stimulate a much-needed examination of the proper balance between seller needs and consumer protections—an examination that deference to boilerplate has unwisely allowed us to avoid.

In reviewing the boilerplate in the case study, however, there emerged a fourth set of terms, an unexpectedly large category that did not fit into any of the three expected groupings. Although these terms are essentially surplusage in that they do not change the foregoing arguments or conclusions, they do reveal two particular things about the role of public law and the necessity *vel non* of boilerplate.

First, there was a surprising number of terms that seemed to favor consumers, which one would not expect from unread boilerplate drafted entirely by sellers. The most noticeable example was privacy provisions. Indeed, provisions governing consumer privacy and security were the most common and lengthy forms of boilerplate, featured in twenty of the twenty-nine contracts. For example, Dell's privacy policy constrained the company's ability to share information about its customers: "Except as described above, we will not disclose your personal information to third parties for their own marketing purposes unless you have provided consent."¹⁶⁹ Adobe included a similar limitation: "[Y]ou may receive communications and special offers from selected Providers (or from Adobe on behalf of such Providers), but only if you previously opted in to receive such communications."¹⁷⁰

Why would sellers, who are in total control of boilerplate's content, include provisions that appear to empower consumers? Perhaps sellers know that including these provisions is a low-risk proposition if damages are capped and class actions unavailable. However, the more compelling explanation is that sellers are responding not to bottom-up market pressure from customers, but to top-down pressure from legislatures and regulators. Although federal law lacks any omnibus data privacy regime, Congress has enacted statutes that govern certain discrete kinds of personal information (for example, health,¹⁷¹ financial,¹⁷² and educational¹⁷³ data) and has empowered regulators such as the

169. Dell, Privacy Policy: Privacy Statement Regarding Customer and Online User Information (effective July 12, 2009) (on file with author) [hereinafter Dell Privacy Policy].

170. Adobe Privacy Policy, *supra* note 132.

171. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

172. *See, e.g.*, Gramm–Leach–Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

173. *See, e.g.*, Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012).

Federal Trade Commission to enforce them.¹⁷⁴ State law may be even more influential. For example, California and Massachusetts have broad privacy statutes¹⁷⁵ which firms must comply with if they want uniform terms in their national marketing—a “highest common denominator” approach, so to speak. Companies with multinational aspirations also have to deal with the even more protective laws of trade partners like the European Union.¹⁷⁶ Some of these statutes give consumers private causes of action,¹⁷⁷ but enforcement actions can also be brought by regulators, which means that boilerplate cannot do away with these legal obligations.¹⁷⁸

Why would this top-down regulation be reflected in boilerplate? Because compliance with these regimes requires sellers to adopt and publicize certain privacy protections.¹⁷⁹ This is the source of the privacy disclosures familiar to any consumer: what information the seller collects, how the seller uses it, with whom the seller shares it, and how the consumer can opt out or correct it.¹⁸⁰ Indeed, one indication that this boilerplate has its origin in top-down disclosure obligations is that it usually uses the label “Policy” or “Statement.”¹⁸¹ In contrast, the kinds of boilerplate that favor sellers tend to use “Agreement” or “Terms and Conditions,” which suggests an origin (however illusory) in the bottom-up marketplace.¹⁸² In short, when it comes to privacy, the public law

174. *See, e.g.*, 15 U.S.C. § 45(a)(2) (2012) (empowering FTC to sue over any “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”); *see also* *Enforcing Privacy Promises*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises> [<https://perma.cc/M9QV-P385>].

175. *See, e.g.*, California Online Privacy Protection Act, CAL. BUS. & PROF. CODE §§ 22575–22579 (2004); 201 MASS. CODE REGS. §§ 17.01–17.05 (2010).

176. *See* 1995 O.J. (L281) arts. 31–50 [hereinafter EU Data Protection Directive] (establishing data protection principles); *see also* Adobe Privacy Policy, *supra* note 132 (“Adobe adheres to the European Union Safe Harbor principles as set forth by the United States Department of Commerce regarding the collection, use, and retention of personal information covered by the Privacy Policy from the European Union.”).

177. These sometimes include the right to file class actions or seek statutory damages in response to privacy or security breaches. *See, e.g.*, *Harris v. comScore, Inc.*, 292 F.R.D. 579, 589 (N.D. Ill. 2013) (certifying class in suit brought against software provider under federal Stored Communications Act and Electronic Communications Privacy Act and seeking statutory damages).

178. *See, e.g.*, 15 U.S.C. § 53(b) (2012) (granting FTC power to seek injunctions).

179. Legislators’ and regulators’ assumption that disclosure of privacy policies will allow consumers to make more informed choices is subject to the same market-failure criticism as boilerplate. Consumers are no more likely to read privacy disclosures than they are to read arbitration clauses or software licenses. *See* Ben-Shahar & Schneider, *supra* note 19, at 674–75 (noting that no one reads privacy disclosures regarding health care and that “[m]andated disclosure of privacy policies outside health care do no better”).

180. Several different regimes require these disclosures, or more. *See, e.g.*, CAL. BUS. & PROF. CODE § 22575(b) (2004); EU Data Protection Directive, *supra* note 176, arts. 6–12.

181. *See, e.g.*, Adobe Privacy Policy, *supra* note 132; Dell Privacy Policy, *supra* note 169; Microsoft, Privacy Statement for the Microsoft Error Reporting Service (last updated Oct. 10, 2005) (on file with author); Microsoft, Windows 7 Privacy Statement (last updated Jan. 2010) (on file with author).

182. *See, e.g.*, Adobe Warranty Disclaimer, *supra* note 128 (“Warranty Disclaimer and Software License Agreement”); Dell Software License, *supra* note 146 (“Dell Software License Agreement”);

has already triumphed over the private terms of contract law. Any severability or default-rule analysis is beside the point.¹⁸³

The other interesting kind of surplus boilerplate is what one might call metacontracting. Nineteen of the twenty-nine boilerplate contracts included terms pertaining to the contracting process. Examples include provisions that govern contract formation,¹⁸⁴ scope of coverage,¹⁸⁵ identities of the parties,¹⁸⁶ merger and integration,¹⁸⁷ commencement and termination,¹⁸⁸ and modification.¹⁸⁹

The irrelevance of these provisions is clear, because the whole point of this Article has been to underscore the invalidity of the process under which boilerplate terms purport to acquire contractual force. That said, there is one metacontracting provision that sheds light on the false dichotomy: the severability clause. Every seller included at least one such clause in its contracts.¹⁹⁰ These clauses cannot guide our severability analysis for the reason just given: the last place to look for an answer to the severability question is the boilerplate whose enforceability is at issue. But if any term gives us a glimpse into how

McAfee License Agreement, *supra* note 129 (“McAfee End User License Agreement”); Microsoft, Microsoft Service Agreement (last updated March 2010) (on file with author) [hereinafter Microsoft Service Agreement] (“Microsoft Service Agreement”). We know, of course, that such boilerplate is not actually subject to bottom-up market regulation, but sellers want to maintain the illusion that it is.

183. A similar explanation may lie behind return policies. Many states require sellers to accept returns for a full refund within a certain period of time—unless they conspicuously disclose an alternative returns policy. See *Customer Returns and Refund Laws by State*, FINDLAW, <http://consumer.findlaw.com/consumer-transactions/customer-returns-and-refund-laws-by-state.html> [https://perma.cc/MEF7-KVTR].

184. See, e.g., Microsoft Windows 7 License, *supra* note 127 (“By using the software, you accept these terms.”).

185. See, e.g., Dell Software License, *supra* note 146 (“This Agreement covers all software that is distributed with or for the Dell product (and upgrades and updates thereto), for which there is no separate license agreement between you and the manufacturer or owner of the software . . .”).

186. See, e.g., Dell Privacy Policy, *supra* note 169 (“The Privacy Statement Regarding Customer and Online User Information applies to Dell Inc. and its worldwide corporate affiliates (‘we’ or ‘our’), but not to those Dell corporate affiliates that have published their own privacy and security statements.”).

187. See, e.g., Adobe Warranty Disclaimer, *supra* note 128, ¶ 13 (“This is the entire agreement between Adobe and you relating to the Software and it supersedes any prior representations, discussions, undertakings, communications or advertising relating to the Software.”).

188. See, e.g., Dell DataSafe, *supra* note 132 (“The period of a free subscription to DataSafe Online begins upon initial activation of your DataSafe account.”).

189. See, e.g., Dell Site Terms, *supra* note 140 (“Dell may at any time revise these Terms of Use by updating this posting. By using this Site, you agree to be bound by any such revisions and should therefore periodically visit this page to determine the then current Terms of Use to which you are bound.”).

190. See, e.g., Adobe Warranty Disclaimer, *supra* note 128, ¶ 13 (“If any part of this agreement is found void and unenforceable, it will not affect the validity of the balance of this agreement, which shall remain valid and enforceable according to its terms.”); Dell DataSafe, *supra* note 132 (“If any provision of these Terms and Conditions is held to be invalid or unenforceable, such provision shall be struck, and the remaining provisions shall be enforced . . .”); Dell Software License, *supra* note 146 (“Each provision of this Agreement is severable.”); McAfee License Agreement, *supra* note 129, ¶ 21 (“If any provision of this Agreement is held invalid, the remainder of this Agreement shall continue in full force and effect.”); Microsoft Service Agreement, *supra* note 182, ¶ 16 (“A court may hold that we cannot enforce a part of this contract as written. If this happens, then you and we will replace that part with terms that most closely match the intent of the part that we cannot enforce. The rest of this contract will not change.”).

essential boilerplate is to the modern transaction, it would be the severability clause because such clauses are where boilerplate's drafters can tell us which terms they cannot live without—which terms that, if invalidated, will bring the entire transaction crashing down.

What do the severability clauses in the case study say? When courts invalidate a boilerplate term, sellers are happy to preserve the rest of the transaction. Not a single severability provision identified any boilerplate term as essential. Indeed, the only seller who contemplated anything less than full severability of all terms was Dell, which provided for the inseverability of its class action waivers. Even Dell's clause called not for the invalidation of the entire transaction, but merely for other dispute-resolution terms to fall away if the class action waiver were held invalid.¹⁹¹

These severability clauses do not constitute dispositive proof that sellers attach little importance to boilerplate. It may be that sellers consider boilerplate important as a whole but do not see any one term as a deal breaker. But it is surely significant that those who are in total control of boilerplate's content propagated twenty-nine contracts, comprising almost eighty thousand words—yet did not take the opportunity to label any term as essential. If the economy will come crashing down in the absence of boilerplate, would we not expect to find some hint of that calamity in boilerplate itself?

CONCLUSION

The longstanding assumption that boilerplate contracts are necessary to the modern economy is provably wrong. Contracts are necessary, but sellers and buyers routinely form contracts using salient, essential terms subject to robust market competition. In contrast, the nonsalient terms that constitute boilerplate can be severed from the transaction without doing serious harm to its viability, and default rules fill in the blanks that the boilerplate would otherwise occupy. Nothing about the complexity, content, or consequence of mass-market transactions justifies reliance on private terms drafted by self-interested parties and subject to no market discipline.

Indeed, severing boilerplate from commercial transactions would have salutary effects. Sellers would have an incentive to increase the salience of essential terms, fueling competition for the consumer dollar. Buyers would be able to make more informed decisions, leading to increased market efficiency. And lawmakers would have a reason to reexamine and recalibrate outdated default rules. In short, the boilerplate-free transaction is doctrinally possible, theoretically feasible, and empirically viable. It is time to embrace it.

191. Dell DataSafe, *supra* note 132 (“If any provision of these Terms and Conditions is held to be invalid or unenforceable, such provision shall be struck, and the remaining provisions shall be enforced; provided, however, that if the individual (non-class) nature of the arbitration provision is found unenforceable, the entire arbitration provision shall not be enforced.”); Dell Terms and Conditions, *supra* note 126, ¶ 12 (using similar language).