

Contract Creep

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Scholars and judges think they can address the multiple purposes and values of contract law by developing different doctrinal regimes for different transaction types. They think if we develop one track of contract doctrine for sophisticated parties and another for consumers, we can build a better world of contract: protecting private ordering for sophisticated parties and protecting consumers' needs all at once. Given the growing enthusiasm for laying down these separate tracks and developing their infrastructures, this Article brings a necessary reality check to this endeavor by highlighting for scholars and judges how doctrine in contract law functions in fact: it creeps back and forth from track to track. Bespoke contract law ends up as general contract law, and law designed for one contract ecosystem will almost invariably migrate to a different transactional environment. Thus, contract doctrine will be applied in a context for which it is not suited, where it may actually undermine stated doctrinal goals.

This Article identifies “creep” from sophisticated party doctrine into consumer contract law and from consumer contexts into sophisticated party transactions through a few case studies. It then elaborates the mechanisms by which creep occurs: porous definitions of transaction types; contract drafting practices of standardization with portable provisions that confuse courts; and good old common law analogical reasoning that involves law jumping from track to track. We conclude by instructing judges to be more mindful of the process of contract creep, warning contract drafters to better appreciate the risks and costs of their drafting practices, and exhorting contract theorists to include the risks and costs of creep as they develop their doctrinal edifices, which are likely to be applied off-track.

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INTRODUCTION

Courts hearing contract cases sometimes act like they can have at least two different contract law regimes: one for “sophisticated parties” and one for “consumer contracts.”¹ Much scholarship, reflecting a variety of methodological approaches, embraces the idea of a fragmented or otherwise tracked system of contract law to facilitate its multiple purposes and values.² Different types of transactions

1. See, e.g., Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 501–18 (2010) [hereinafter Miller, *Formalism*] (discussing this dichotomy in contract law disputes); Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 TOURO L. REV. 659, 671–72 (2013) [hereinafter Miller, *Value Pluralism*] (same); Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap “Sophisticated Parties” Too*, 2010 J. DISP. RESOL. 235, 251–57 (2010) (same); see also Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 660 N.E.2d 415, 421 (N.Y. 1995); Reilly v. Richards, 632 N.E.2d 507, 509 (Ohio 1994); Crane, A.G. v. 206 W. 41st St. Hotel Assocs., 87 A.D. 3d 174, 180 (N.Y. App. Div. 2011); Interpharm, Inc. v. Wells Fargo Bank, N.A., No. 08 Civ. 11365(RJH), 2010 WL 1257300, at *7 (S.D.N.Y. Mar. 31, 2010); Davis & Assocs. v. Health Mgmt. Servs., Inc., 168 F. Supp. 2d 109, 113–14 (S.D.N.Y. 2001).

2. See, e.g., HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 8 (2017); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419–20 (2004); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 618 (2003); see also ERIN A. O’HARA & LARRY E. RIBSTEIN, THE LAW MARKET 8 (2009) (noting the need to “distinguish business-to-business from business-to-consumer contracts” in analyzing choice-of-law policy); Robert E. Scott, *The Promise and the Peril of Relational Contract Theory*, in REVISITING THE

privilege distinct contractual goals, such as collaboration, relationship building, personal autonomy, community, or efficiency. And these different goals—or sets of goals with different priorities—should prompt distinct doctrinal approaches. Thus, a tracked or fragmented contract law system that offers a different doctrinal regime for each transaction type ideally enables sophisticated parties to engage in private ordering, on the one hand, and might protect consumers subject to power imbalances that implicate their free choice, on the other. The wisdom of having different doctrinal tracks for different transaction types has become widely accepted in current scholarship and by judges.³

However, we argue here that judges and scholars tend to overlook how contract doctrines that are developed in one track creep into another and, in doing so, threaten to undermine the goals of distinctive tracks. Courts and scholars too often fail to address the tendency for contract rules developed for sophisticated party transactions to migrate into contract law for consumer transactions, and for consumer contract regimes to bleed into the contract law for sophisticated transactions. Along the same lines, even within broad transaction types, bespoke principles developed in light of specialized areas are susceptible to creeping beyond the particular transaction type for which they were designed, potentially compromising the integrity and goals of the tracked system. This blurring of the boundaries between contract regimes cuts at the heart of a premise of a broad swath of contract theory. Unstable boundaries threaten the viability of developing distinct packages of contract law to pursue different objectives for different kinds of parties with the aim of facilitating efficiency⁴ and autonomy⁵ in varied transactional contexts.⁶

This Article traces a few examples of what we call “creep,” to draw more attention to the porous boundaries of the contract law for “sophisticated parties” and

CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 107 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 42 (2014) (critiquing the “presumption of the unitary nature of contract law” in light of the variegated nature of contract practice); Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QLR 1 (2005).

3. See, e.g., 29 Holding Corp. v. Diaz, 775 N.Y.S.2d 807, 814 (N.Y. Sup. Ct. 2004) (“It is almost axiomatic that commercial leases may and should be governed by a different rule than residential leases.”); DAGAN & HELLER, *supra* note 2, at xii (“[E]xisting contract law still offers types that vary widely in their normative structures”); Gilson et al., *supra* note 2, at 76 (advocating distinct interpretive approaches for different transaction types); Schwartz & Scott, *supra* note 2, at 543 (referencing the “heterogeneity of contractual contexts” prompting a range of normative approaches).

4. See Schwartz & Scott, *supra* note 2, at 544–45 (offering a normative theory of “business contracts” to “facilitate the efforts of contracting parties to maximize the joint gains (the ‘contractual surplus’) from transactions”).

5. This agenda is most apparent in Dagan and Heller’s so-called “choice theory” in DAGAN & HELLER, *supra* note 2, at 6–7. Dagan and Heller not only base their goal of facilitating autonomy on the possibility of identifying distinct contractual types in practice, but also consider the cultivation of distinct types an essential means to enable parties to exercise autonomy.

6. Doctrinal boundary-drawing has also been identified as a challenge with respect to contract generally. See Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989) (analyzing the question of doctrinal classification on the boundaries of contract and tort law).

the contract law for “consumers.” In doing so, we examine the even-more-unstable distinctions within those classifications and on the spectrum between them. We also aim to identify some of the mechanisms by which creep occurs both in our case studies and more generally. We argue that judges, lawmakers, drafters, and contract theorists need to be more sensitive to the way creep works so that their approaches do not rely on naïve hopes about the containment of doctrinal elaborations or on misplaced confidence that boilerplate terms will not be cut and pasted across transaction types. As we will show, doctrine that looks bespoke for one contractual context often ends up as general contract law—and terms built for specialized transaction types can also jump off track and into less appropriate transactional environments. As we outline, there are various factors that challenge the project of doctrinal containment, including intentional doctrinal expansion by courts and lawmakers (to say nothing of possible ideological manipulations), and accidental or incidental application of particularized doctrine to a different transactional context.

Part of the trouble—at least with respect to the most basic two-track model between sophisticated parties and consumers—certainly is that judges and contract theorists need to do a better job of fashioning ways to identify “sophisticated parties” and “consumers,” for these are not self-defining categories: When a contract law professor signs up for a gym membership, is the professor a consumer or a sophisticated party?⁷ When someone uses social media to promote her work with a great deal of computer savvy, is the individual a sophisticated party or a mere consumer?⁸ We are not the first to notice the difficulty that the project of defining these categories poses, but we intervene to identify the significance of creep as a fundamental challenge to much of contract practice and theory. If these categories are used to trigger distinctive interpretive and doctrinal regimes, we will need to find better tools to map their boundaries and signal on-ramps onto the varied tracks.⁹

7. Some courts strongly enforce a “duty to read” against attorneys. *See* *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 241 (E.D. Pa. 2007) (enforcing Google’s form contract against an attorney, in part because attorneys can be deemed sophisticated, even though there was no evidence that the attorney had any expertise about the kind of contract at issue). Others take a more case-by-case approach, evaluating whether the lawyer has relevant expertise to qualify as “sophisticated.” *See* *Reilley v. Richards*, 632 N.E.2d 507, 509 (Ohio 1994) (finding that an attorney with no knowledge of real estate law could not be treated as a sophisticated party).

8. A recent case disposed of this question by noting the degree of sophistication of the consumer parties and accordingly holding them bound to the terms and conditions. *See* *Salameno v. Gogo Inc.*, No. 16-CV-0487, 2016 WL 4005783, at *6 (E.D.N.Y. July 25, 2016) (suggesting a frequent flier’s “apparent need for internet access” reasonably qualifies her as sophisticated “internet user” for purposes of determining her ability to access terms of use to establish notice and consent); *see also* *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012) (“But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase ‘Terms of Use’ is really a sign that says ‘Click Here for Terms of Use.’”).

9. *See, e.g.*, Miller, *Formalism*, *supra* note 1, at 518–35 (arguing that courts need to try harder to determine sophistication as a matter of fact to trigger special rules for sophisticated parties);

But as we show here, blurry specification of party type and transaction type by courts and scholars is only one structural cause or mechanism of creep. Another traces to drafting realities that gravitate toward standardization and portability of clauses.¹⁰ The migrating nature of contractual terms from one contract type to another creates some difficulty for regime integrity. With migration of terms comes messiness about whether interpretations developed in one transaction type deserve to be implemented in new transactions in which parties or drafters think they can pluck modules off the rack. Moreover, technological and transactional innovation also has the potential to make more difficult the identification of doctrinal boundaries. Not only do technologies of contract drafting—such as the ability to cut and paste and to share models widely blur the bounds of context—but parties innovate in creating new deal structures and documentation that may include models from various sources. Yet, whether parties and drafters always intend to incorporate the doctrinal gloss that the words provoke in a different transactional context can be difficult to assess. As a result, innovation on various dimensions of contract practice can disturb doctrinal boundaries based on transaction type. Technologies of legal research can exacerbate the problem: whereas treatises, key numbers, or a library’s physical layout once may have helped lawyers, clerks, and judges focus on important context, the current availability of models ripped from context makes it harder to keep doctrinal regimes on track.

Analogical reasoning in the common law of contract is no doubt also a culprit, creating mistaken off-ramps from track to track and continuing to push toward uniformity among contract law regimes. Of course, analogical reasoning can also be a generative source of innovation within contract law development—so we do not come to devalue the cross-fertilization of different tracks, which can lead to overall improvements in doctrine.¹¹ But those who promote distinct tracks need

RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. e (AM. LAW. INST. 1981) (acknowledging that the rules for standardized contracts do not perfectly work for the class of “sophisticated consumers” who will get the benefit of restrictive readings of form contracts that they may not really deserve under the Restatement’s rule); Schwartz & Scott, *supra* note 2, at 545 (confronting the doctrinal “boundary issue” between sophisticated and consumer party contract law); Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 312–13 (2005) (arguing that the category of “small businesses” renders the boundaries imperfectly drawn between consumers and merchants in contract and commercial law). In another context, Melvin Eisenberg argues that relational contract law never fully developed as a separate contract regime largely because it has never been clear how to divide the world of relational contracts from the world of discrete transactions. See Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. UNIV. L. REV. 805, 813 (2000) (“[I]t is impossible to locate . . . a definition that adequately distinguishes relational and nonrelational contracts in a legally operational way—that is, in a way that carves out a set of special and well-specified relational contracts for treatment under a body of special and well-specified rules.”).

10. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, in BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 163, 165 (Omri Ben-Shahar ed., 2007) (highlighting the portability of provisions related to recurring contractual issues).

11. Two examples come to mind. First, consider the way the Uniform Commercial Code’s (UCC) Articles 1 and 2—governing specialized contract law for the sale of goods—have gravitational pull on the common law of contract applicable to contracts outside of the coverage of the UCC, see Peter A. Alces & Chris Byrne, *Is it Time for the Restatement of Contracts, Fourth?*, 11 DUQ. BUS. L.J. 195, 195 (2009); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. UNIV. L. REV. 737, 738–39

more critical awareness of the risks of creep so they can understand the interaction effects among the different laws of contract.

Judges, legislatures, lawyers, and scholars must confront creep because failing to do so means they are overlooking a powerful dynamic that can create unintended consequences in purportedly different domains of contract law. They must account not only for a potential blurring of lines between contract regimes, but also for the migration of doctrine from one regime to another, to which it might not be well-suited. Because of the damage that creeping doctrine can wreak on the goals and effective functioning of different doctrinal ecosystems, the risk of invasive species within delineated areas of contract must be taken more seriously as a meaningful cost associated with a fragmented contract law. This cost must be considered even if there are also countervailing benefits that can accrue from the experimentation of trying old clauses and interpretations and rules in new environments.¹² Creep is not always bad, nor is it always good, but we need to acknowledge it is happening in order to sharpen our cost-benefit analysis, limit its impact when it is inappropriate, and celebrate it when it is usefully innovative in the way the common law can be at its best.

The Article proceeds as follows: In Part I, we explore how several theorists and judges have embraced the idea of a tracked and fragmented contract law. In Part II, we develop a few case studies of the phenomenon of “creep,” demonstrating that creep goes both ways. In our case study of the enforceability of arbitrations clauses, for example, we are able to show how creep from “sophisticated party” transactions ended up as general contract law applied to consumers. By contrast, in our case study of *contra proferentem*—the rule that requires construction of ambiguous contracts against the drafter—we show how creep can work in the other direction, too: seemingly tailored rules for one transactional context to help consumers end up applied to sophisticated parties in very different contractual environments.¹³ In Part III, we explore three mechanisms, or features, of contract law and its practice that enable creep: category instability concerning both

(2000), and vice-versa. Courts and scholars acknowledge that different contract law applies to sales of goods and sales of services, but there is clearly mutual learning back and forth among the regimes. One might say creep here is more or less expected of the common law method, even with the statutory character of the UCC, and that this creep might be a productive source of illumination and innovation. Similarly, some of the innovations of “relational contract law” have been largely incorporated into the general law of contract in part because boundaries between “relational” contracts and “general” contracts are hard to spot and in part because the innovations for relational contracts—good faith and the relaxation of offer-and-acceptance rules, for example—are thought to be good for contract law more generally. See Eisenberg, *supra* note 9, at 818–19.

12. Our discussion of creep and the UCC might be said to be examples of when cross-fertilization can lead to net benefits. See *supra* note 11. Yet there is no excuse for failing to acknowledge and evaluate the costs of widespread cross-fertilization as well. And although further work might usefully spell out when someone might be able to know in advance when the benefits will outweigh the costs, we aim here to draw attention mostly to the costs, so they are not overlooked in the relevant calculus.

13. Although *contra proferentem* historically operated as a kind of general contract law before becoming more focused as a specialized rule for insurance law, its modern valence and justification are most clearly explicated in consumer cases. See generally Joanna McCunn, *Contra Proferentem: The Chameleon of Contract Law* (forthcoming 2019) (tracing the history of the doctrine in the common law).

party type and transaction type; the modular design of contract documents and the portability of terms; and analogical reasoning as a mainstay of the common law. We also show how this non-exhaustive collection of features of contract that precipitate creep often operate in tandem with one another to exacerbate the blurring of doctrinal regimes. Finally, Part IV is our effort to draw some lessons from contract creep. In short, we think lawmakers, lawyers, and scholars need to be mindful of the way creep works, so that if they want to continue to have a fragmented contract law, they will need clearer criteria for entry into each track and better cost–benefit analysis to evaluate how law built for one environment can undermine the goals of others. One cannot just will away creep—and lawmakers and scholars need to better consider the kinds of downstream unintended costs and risks specialized rule design might cause once it creeps off track.

I. THE FRAGMENTED MODEL

Explicitly or implicitly, contract scholarship and caselaw reflect a conventional understanding that not all transactions are the same nor should they be treated that way. It is not news that consumer transactions do not look like “fully negotiated contracts of the classical model.”¹⁴ And it is not exactly a new recognition or development in contract law that consumer protection has been somewhat parceled off from general contract law to better calibrate rules and standards to those who, “as a group, . . . have a lower level of sophistication than those with whom they typically make contracts.”¹⁵ Although there has long been a countermovement toward reviving benchmarks of “party autonomy” even within consumer transactions, reinforcing the need for consumers to take responsibility for their choices in the market,¹⁶ a more recent and concerted effort by law-and-economics-influenced contract theorists seeks to concede the distinctiveness of consumer transactions and focus their energy instead on purifying contract law to make it safe and efficient primarily for “sophisticated parties.”

The work of Alan Schwartz and Robert Scott is an exemplar of this focus on building and reinforcing a law for sophisticated firms. From the very start of their project of orienting contract law and theory toward facilitating parties’ ability to maximize joint gains from transactions, they explicitly limit their framework to circumstances in which “a firm sells to another firm,” where firms are “sophisticated economic actors.”¹⁷ Although they do not deny that individual–individual and individual–firm contracts are controlled in part by contract law, they emphasize family law, real property law, consumer protection law, employment law,

14. William J. Woodward, Jr., “Sale” of Law and Forum and the Widening Gulf Between “Consumer” and “Nonconsumer” Contracts in the UCC, 75 WASH. U. L.Q. 243, 244 (1997).

15. *Id.* Woodward dates these developments to the 1930s, and the acceleration of consumer protection law to the 1960s. *Id.*

16. *See id.* at 245–46.

17. Schwartz & Scott, *supra* note 2, at 544–45. Schwartz and Scott define sophisticated parties relatively broadly to include corporate entities with at least five employees, limited partnerships, and professional partnerships “such as a law or accounting firm.” *Id.* at 545.

and securities law as the primary sources of regulation for these kinds of transactions.¹⁸ If pressed, it is hard to believe they would not call the relevant transactions that are not between firms “contracts.” Still, they want “the main subject of what is commonly called contract law” to be focused on a law for sophisticated parties.¹⁹ Indeed, they reinforce the importance of their goal for contract law by emphasizing that their doctrinal reform proposals and normative assessments are limited only to the “contract type” they put at the center of their work: contracts between sophisticated parties, who can “minimize the likelihood of systematic cognitive error.”²⁰ They want a “law merchant for our time,” worrying that “rules that are appropriate for contracts involving individuals . . . are too frequently applied to sophisticated parties.”²¹ Vic Goldberg’s recent book on contract law also focuses especially on a law for sophisticated parties.²²

Even scholars who resist a narrow perspective on contract law limited to sophisticated party transactions also implicitly acknowledge the importance of differentiating doctrinal tracks. In a recently published book, Hanoch Dagan and Michael Heller criticize what they see as an effort to “radically shrink[] the scope of contract law” to focus principally on sophisticated parties.²³ They aim for a “general theory of contract” that can incorporate both the relevance of utility to sophisticated parties²⁴—and the relevance of what they call “community” in other contract types.²⁵ To their credit, they want the theory and law of contract to be more capacious and accommodate more contract types: the ambition of the theory is to do a little more “lumping.” Yet their efforts are similar enough to other “splitters” because at the center of their perspective on contract is the need to have differentiated types that parties can select among: they are eager to furnish “the ability to choose from among a sufficient range of off-the-shelf, normatively attractive contract types,”²⁶ and some quantum of “intra-sphere multiplicity.”²⁷

For Dagan and Heller, this leads to a fragmented set of tracks for contract law itself, while simultaneously being more ambitious about the scope of contract: “the application of familiar contract concepts . . . should vary depending on the normative concerns driving different contract types.”²⁸ Thus, by bringing, for example, employment relations and consumer transactions back into the frame of

18. *See id.* at 544.

19. *See id.*

20. *Id.* at 545–46.

21. *Id.* at 550.

22. *See* VICTOR P. GOLDBERG, *RETHINKING CONTRACT LAW AND CONTRACT DESIGN 1* (2015) (“My concern, I must emphasize, is with the contracts of sophisticated parties.”). Goldberg defines sophisticated party transactions as “agreements for which both parties could be expected to have access to counsel.” *Id.*

23. *See* DAGAN & HELLER, *supra* note 2, at 56.

24. *Id.* at 57.

25. *See id.* at 58–64.

26. *Id.* at 3.

27. *Id.* at 6.

28. *Id.* at 7.

contract law, Dagan and Heller at the same time emphasize that separate rules within contract law are necessary to pay respect to context.²⁹ They are not only interested in a “two-track model” per se,³⁰ but they return often to a distinction between “consumer transactions” and “commercial contracts,”³¹ with the categories of “relative sophistication” and “consumer” still doing some meaningful work in marking contract types and the legal regimes that ought to apply to them.³² Indeed, their conceptual framework depends on distinguishing among contractual contexts, and the line between consumer and commercial is ostensibly among the easiest to discern.

Not only does this fragmented approach make sense in terms of theorizing contract law—as contract law theories have often struggled to reconcile the plural values at stake within contract such as autonomy, efficiency, community, reciprocity, and fairness—but it also resonates in terms of how judges at times approach doctrinal rules. There are subtle hints within several doctrinal developments indicating that courts are edging closer to developing separate bodies of law—or at least separate applications to the body of rules—for sophisticated parties on the one hand and consumers on the other, as well as between or within these categories. The lack of consistency here causes plenty of confusion,³³ and scholars are right to remind courts that they probably should be sensitive to different values in different contractual contexts. But the law already implicitly acknowledges a fragmented model in some respects.

Consider, for example, the parol evidence rule, which works to exclude certain forms of extrinsic evidence when interpreting the text of a final written agreement.³⁴ There is a lot of debate about how best to implement the rule—and how to understand courts’ seeming inability to apply the rule consistently and coherently.³⁵ On the one hand, there is an approach that uses the rule aggressively to hew to the text of the agreement. It seeks to exclude as much as possible, with the hope that a strong rule incentivizes better drafted final agreements and helps

29. *Id.* at 70–72.

30. For various ways of divvying up the different tracks, see DAGAN & HELLER, *supra* note 2, at 96, 99.

31. *Id.* at 73. Dagan and Heller make a mistake here in calling consumer transactions a “no-community” type. See generally Ethan J. Leib, *What Is the Relational Theory of Consumer Form Contract?*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 259 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013) (describing ways consumers have significant ongoing relationships with form contract providers).

32. DAGAN & HELLER, *supra* note 2, at 98–99.

33. See Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead*, 2017 UNIV. ILL. L. REV. 65, 67–68.

34. See generally John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parole Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967).

35. See Scott J. Burnham, *The Parol Evidence Rule: Don’t Be Afraid of the Dark*, 55 MONT. L. REV. 93, 95, 98 (1994); David R. Dow, *The Confused State of the Parol Evidence Rule in Texas*, 35 S. TEX. L. REV. 457 (1994); Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQ. L. (forthcoming 2019), <https://ssrn.com/abstract=3150616>; Marie Adornetto Monahan, *The Disagreement over Agreements: The Conflict in Illinois Regarding the Parol Evidence Rule and Contract Interpretation*, 27 S. ILL. U. L.J. 687 (2003).

courts avoid motivated testimony.³⁶ On the other, there is a more intentionalist approach that pursues what the parties really intended given the context. This approach admits more extrinsic evidence, with the hope that a less strict rule will reduce errors and work against the potential power imbalances that could bias the language in the final text of the agreement and bias courts toward presuming the final writing is actually integrated.³⁷ Most courts, however, appear somewhat inconsistent as to whether they apply a “Willistonian” hard rule or a “Corbinite” softer rule.³⁸

Yet taking account of the status of the parties—specifically whether they are sophisticated parties—makes this “dark” rule “full[] of subtle difficulties”³⁹ take slightly more coherent shape. There is evidence that courts are more likely to adopt a harder parol evidence rule when they have sophisticated parties before them and a more liberal parol evidence rule when they do not.⁴⁰ Although courts are not necessarily always explicit or intentional about this two-track parol evidence rule, a fragmented doctrine helps to explain case results that are otherwise practically inconsistent.⁴¹

At times, however, courts make more deliberate efforts to pick a doctrinal rule to privilege a certain transaction type. For instance, New York⁴² explicitly adopted a strict parol evidence rule, precisely because it sought to orient its law to “promote and preserve New York’s status as a commercial center and to maintain predictability for” sophisticated parties in their contract and commercial law.⁴³ In some ways, New York tries—imperfectly but self-consciously at times—to create the very “law merchant for our time” for which Schwartz and Scott advocate.⁴⁴ This is at least some evidence that contract law sometimes takes itself to provide specialized legal regimes for sophisticated parties. Moreover, the American Law Institute’s effort to create a new Restatement for consumer

36. 4 WILLISTON ON CONTRACTS § 633 (Walter H. E. Jaeger ed., 3d ed. 1961).

37. 3 CORBIN ON CONTRACTS §§ 573–95 (rev. ed. 1960).

38. See Calamari & Perillo, *supra* note 34, at 343–44. Some states are more consistent than others—but even within relatively consistent states there is variation.

39. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 390 (1898).

40. See Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 7–8, 17 (1972); Michael A. Lawrence, *The Parol Evidence Rule in Wisconsin: Status in the Law of Contract, Revisited*, 1991 WIS. L. REV. 1071, 1072.

41. See Childres & Spitz, *supra* note 40, at 7–8, 17; Lawrence, *supra* note 40, at 1072.

42. See *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (N.Y. 1990).

43. *IRB-Brasil Resseguros v. Inepar Invs.*, 20 N.Y.3d 310, 315–16 (N.Y. 2012). For some of the historical evidence that New York has been pursuing this goal, see WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980*, at 80–92 (2001). See also Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1046–48 (2009) (identifying formal doctrines of contract interpretation such as the parol evidence rule and the plain meaning rule as a way to give parties control of the court’s process of interpretation and meaning of terms, respectively).

44. See Schwartz & Scott, *supra* note 2, at 550. See generally Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475 (2009); Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475 (2010); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009).

contracts⁴⁵ involves the articulation of a specialized legal regime for consumer transactions. Notably, that draft highlights that a softer parol evidence rule should apply when a court is evaluating whether a consumer form contract is integrated and thus whether to bar supplemental terms.⁴⁶

* * *

This Part sought to introduce the idea of a fragmented or tracked framework of contract law, showing how courts and scholars have tried to parcel the doctrinal regimes of contract into, at least, a contract law for sophisticated parties and a contract law for consumers. But what if the multi-track model routinely breaks down in practice? What if regimes set up for one contract type routinely “creep” into other contract types? With porous boundaries, is there any real hope for clean, severable contract regimes which we can select among? If regimes are hard to differentiate, these tracking projects might be more challenging than often presumed, notwithstanding their intuitive appeal. Part II below offers a few case studies of what we are calling “contract creep.”

II. CREEP STUDIES

Against the backdrop of the attempted fragmentation of contract law in theory and in practice outlined in Part I, this Part presents a few examples of creep between transaction types. As the examples demonstrate, doctrinal creep happens as courts allow rules contoured for one transactional context to migrate to another context for which they are ill-suited.

In our first example (section II.A), ancillary terms such as arbitration and forum selection provisions proliferate across transaction types, with courts treating them more or less uniformly, notwithstanding that such provisions impact the value of transactions for different parties differently.⁴⁷ Courts take a relatively uniform approach notwithstanding empirical evidence and judicial and scholarly recognition of the distinctive ways that these types of ancillary terms operate in different transactional contexts.⁴⁸ Moving in the opposite direction, in our second example (section II.B), the widespread application of the interpretive principle of *contra proferentem*—the principle of construing contracts against their drafter—demonstrates creep from insurance law to general contract law. As such, a principle that emerged from a recognition of a distinct transaction type involving qualitatively differently situated parties has crept into courts’ approaches to contract interpretation in general. What these case studies have in common is that

45. RESTATEMENT OF THE LAW CONSUMER CONTRACTS (AM. LAW INST., Discussion Draft 2017).

46. *Id.* § 8 reporters’ notes, at 93–96 (discussing case law supporting a “probative and not conclusive” rebuttable presumption of integration in consumer contracts with a merger clause).

47. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004); *Fteja v. Facebook, Inc.*, 841 F. Supp. 829, 835 (S.D.N.Y. 2012).

48. *See Gilson et al.*, *supra* note 2, at 76 (“acknowledging that commercial and consumer contracts are different and should be interpreted differently”).

specialized and fragmented contract law veers off-track into general contract law. The urge to harmonize in the face of fragmentary design seems remarkably powerful.

A. CREEPING FROM THE LAW OF SOPHISTICATED PARTIES INTO GENERAL CONTRACT LAW

Ancillary contract terms typically govern secondary aspects of a deal rather than the primary transactional details such as product, service, quantity, and price. Often, ancillary terms are relegated to the margins of a contract and can be embedded as boilerplate or standardized provisions. Notwithstanding their secondary role and their relative inconspicuousness for some, ancillary terms can impact transactions in significant ways. Indeed, they can serve as valuable tools for sophisticated parties to shape their agreements. At the same time, they may prove particularly challenging for individual consumers to assess. Below, we offer case studies of two types of ancillary terms: arbitration provisions, which establish that parties agree to submit all or certain disputes to arbitration rather than judicial review,⁴⁹ and forum selection provisions, which designate the court and location in which disputes arising out of the agreement must be litigated.⁵⁰

As these terms proliferate across transaction types, courts tend to treat them uniformly, notwithstanding the distinctive ways in which they reflect parties' goals and intentions in different transactional contexts. The discussion that follows traces the doctrinal treatment of these provisions to illustrate the ways in which the doctrine creeps from sophisticated party and commercial contexts into consumer contexts in which the rationale and treatment in the commercial context proves inapposite.

1. Arbitration Clauses

The proliferation of arbitration provisions in recent years has been well documented.⁵¹ The prevalence of arbitration provisions has in turn prompted concern from scholars and journalists because of the risk that the enforcement of these terms might derogate from average consumers' ability to hold companies

49. *Domke on Commercial Arbitration* describes arbitration as “a process by which parties voluntarily refer their disputes to an impartial third person (an arbitrator) selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal.” 1 *DOMKE ON COMMERCIAL ARBITRATION* § 1:1 (Larry E. Edmonson ed., 3d ed. 2009).

50. See 17A AM. JUR. 2D CONTRACTS § 253 (2018) (“A ‘forum selection’ provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.”).

51. See, e.g., Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES: DEALBOOK (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://nyti.ms/1kkstih] (identifying arbitration in the consumer context as prone to the leveraging of power by repeat players); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [https://nyti.ms/1KMvBJg].

accountable for misbehavior.⁵² Below, we briefly recount the trajectory of the enforceability of these provisions from a presumption against enforceability in the early twentieth century to legislative intervention establishing enforceability to the increasingly expansive presumption of enforceability in jurisprudence of late.

Prior to the enactment in 1925 of what is now known as the Federal Arbitration Act (FAA),⁵³ arbitration provisions had limited impact in practice.⁵⁴ A reaction to federal courts' resistance to arbitration provisions,⁵⁵ the FAA altered what was viewed as an anachronistic presumption against enforceability.⁵⁶ It did so by providing that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁵⁷ The legislative history of the FAA indicates an intent to intervene in merchant-to-merchant transactions,⁵⁸ a transaction-type perspective that

52. See Silver-Greenberg & Gebeloff, *supra* note 51; see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 393–95 (2005); J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1740–42 (2006); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1136–37 (2006) (tracing the rise of binding pre-dispute arbitration clauses in private contracts). A rich collection of scholarship has identified the harms and offers critiques of the presumptive enforceability of proliferating arbitration terms across transaction type. See, e.g., NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 121–22 (2013); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2870–71 (2015). The scholarship has not, however, identified the enforceability of arbitration provisions as a piece of a larger story about the phenomenon of doctrinal creep.

53. Federal Arbitration Act, 9 U.S.C. § 1 (2012) (originally enacted as the United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925)).

54. See S. REP. NO. 68-536, at 2 (1924) (describing written arbitration agreements as "in large part ineffectual" as of 1924); see also David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 377–99 (2018) (relaying the initially modest ambitions, structure, and increasingly broad interpretation of the FAA, including with respect to "arbitration about arbitration").

55. See Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 215 & n.14 (2000) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

56. See H.R. REP. NO. 96, at 1 (1924) ("Arbitration agreements are purely matters of contract . . .").

57. 9 U.S.C. § 2 (2012).

58. See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of Mr. W.H.H. Piatt, attorney, Piatt & Marks) (asserting that the FAA was not intended to "be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it"); see also J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3060 (2015) (explaining that FAA's legislative history "indicates that the bill's supporters likely . . . intend[ed] for it to cover . . . negotiated agreements between merchants"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 38 (asserting that in light of the legislative text and history, FAA was "not intended to apply to adhesive pre-dispute agreements"); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 310–13 (1999) [hereinafter Sternlight, *Compelling*] (outlining FAA's legislative history to indicate Congress's focus on allowing "business entities to agree voluntarily to arbitrate . . . commercial disputes between them" with a concern that arbitration not be imposed via non-

can be seen in the Supreme Court's approach to the FAA for a time. In the decades following the enactment of the FAA, the Supreme Court viewed the statute with an eye to the distinctions between types of parties. The Court noted parties' relative bargaining positions⁵⁹ and suggested that arbitration provisions would not be enforced in adhesive consumer or employment contracts.⁶⁰

More recent Supreme Court jurisprudence, however, has erased this doctrinal distinction.⁶¹ This, in turn, has encouraged the proliferation of arbitration provisions across transaction types, which implicate bargaining power in markedly distinctive ways depending on the relative sophistication of parties.⁶² A rich literature has illuminated the failure of contract doctrine to account for ways in which individual parties to contract fall prey to cognitive errors.⁶³ As many scholars have observed, ancillary terms such as arbitration provisions present especially significant cognitive challenges for individual consumers, straining consumers' ability to meaningfully assess the terms' values and implications.⁶⁴ One assessment of rampant arbitration provisions put it this way: "under most reasonable definitions mandatory arbitration is nonconsensual, given that consumers and employees don't typically read or understand the clauses."⁶⁵ Arbitration provisions, unbeknownst to most consumers, threaten to deprive individuals of opportunities for redress from harm under the contract (whether it sounds in breach of contract or tort),⁶⁶ as well as protections of federal statutory

negotiable insurance or employment contracts of adhesion); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636 (2005) [hereinafter Sternlight, *Creeping*] (noting concern in legislative history that arbitration would be "offered on a take-it-or-leave-it basis to captive customers or employees," and reassurances by supporters of the legislation that it was not intended to apply in such cases).

59. See *Wilko v. Swan*, 346 U.S. 427, 435 (1953) ("While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor.").

60. See Glover, *supra* note 58, at 3060 & nn.31–33 (citing *Wilko*, 346 U.S. at 433–35, 437–38). As Glover notes, the Supreme Court was reluctant to enforce arbitration agreements that impacted federal statutory rights. *Id.* at 3060.

61. See Sternlight, *Creeping*, *supra* note 58, at 1637–38 (outlining Supreme Court's post-*Wilko* course reversal beginning in the last decades of the twentieth century).

62. See *id.* at 1631 (noting increasing use of arbitration provisions by U.S. companies in light of approval by the Supreme Court).

63. See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

64. See Eisenberg, *supra* note 63, at 258; Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217, 1225–27 (2003). For a summary of the challenges posed by arbitration provisions for individual consumers, see Tal Kastner, "I'm Just Some Guy": *Positing and Leveraging Legal Subjectivities in Consumer Contracts and the Global Market*, 23 IND. J. GLOBAL LEGAL STUD. 531, 537–38 (2016). See also Sternlight, *Creeping*, *supra* note 58, at 1648–52 (summarizing evidence of consumers' limited contractual literacy and noting design tactics by companies to shift consumers' focus, as well as repeat player and more subtle advantages that accrue to companies through mandating arbitration with consumers and employees).

65. Sternlight, *Creeping*, *supra* note 58, at 1649.

66. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 352 (2011) (holding FAA preempts state law prohibiting contractual restriction of class-wide arbitration); see also *id.* at 365 (Breyer, J., dissenting) (indicating the potential implications of enforcement terms by outlining how a contractual

rights.⁶⁷ More generally, the inability of consumers to weigh such provisions suggests a market failure in the consumer context.⁶⁸ In this light, many scholars argue for distinctive interpretive approaches to such terms rather than allowing the presumption of enforceability to bleed from the law of sophisticated parties into other contexts.⁶⁹

Yet, notwithstanding the difference in parties' abilities to assess meaningfully and negotiate arbitration provisions and in the related differential impact of arbitration provisions across contractual contexts, Supreme Court jurisprudence has moved away from distinguishing on the basis of transaction type. In this case, creep has been driven from the top down, beginning with the Court upholding a "liberal federal policy favoring arbitration agreements" in the form of the FAA.⁷⁰ Thereafter, the Court enforced arbitration provisions against consumers bringing antitrust claims,⁷¹ investors making securities laws claims,⁷² and employees claiming violations of federal anti-discrimination statutes.⁷³ It then expanded the FAA to presume all claims arbitrable unless Congress expressly provides otherwise.⁷⁴ These developments have contributed to the proliferation of arbitration provisions in transactions across contract types.⁷⁵

Recently, one judge marveled at the incongruous application of the FAA to online consumer contracts, not least because of the nature of the transaction. Here

restriction on class actions precludes the pursuit of meritorious claims); RADIN, *supra* note 52, at 5–8, 33–34 (describing firms' "mass-market boilerplate" as "withdraw[ing] a number of important recipients' rights—such as rights of redress granted by the state, or user rights that are free of owner control under intellectual property regimes").

67. Glover, *supra* note 58, at 3061.

68. Behavioral economics scholarship has identified the "imperfectly rational" response of consumers to contracts and the ways drafters of consumer contracts mobilize contract design to capitalize on consumer psychology. *See, e.g.*, OREN BAR-GILL, *SEDUCTION BY CONTRACT 2* (2012) (identifying a market failure that results from contract design); *see also* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (identifying a systemic failure of consumers to read end-user license agreement terms resulting from high reading and comprehension costs); David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1640–42 (2016) (discussing how firms can shape individuals' understanding of the meaning of their contracts contrary to their legal import).

69. *See, e.g.*, Gilson et. al. *supra* note 2, at 76 ("[W]e propose separating consumer contracts from the standard common law rules of interpretation designed for commercial parties by first acknowledging that commercial and consumer contracts are different and should be interpreted differently.")

70. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

71. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628–29 (1985).

72. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 486 (1989).

73. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29, 35 (1991).

74. *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98–101 (2012).

75. Glover, *supra* note 58, at 3061; Sternlight, *Creeping*, *supra* note 58, at 1631. As Glover notes, arbitration agreements need not be signed to be enforceable, enabling the proliferation of terms through a range of written forms. Glover, *supra* note 58, at 3061 n.39. Parties may become bound to arbitration provisions by smartphone software applications (apps) that provide notice of agreement generally along with access to terms. *See Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79–80 (2d Cir. 2017).

is Judge Jed Rakoff on a mandatory arbitration provision linked via an app in a case involving a putative class action against Uber alleging illegal price fixing by the platform:

Since the late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts “indulg[ing] every reasonable presumption against waiver.” . . . But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy “terms and conditions” that they had no realistic power to negotiate or contest and often were not even aware of.

This legal fiction is . . . justified . . . by reference to the “liberal federal policy favoring arbitration” Application of this policy to the Internet is said to inhere in the Federal Arbitration Act, as if the Congress that enacted that Act in 1925 remotely contemplated the vicissitudes of the World Wide Web. Nevertheless, in this brave new world, consumers are routinely forced to . . . submit . . . to arbitration, on the theory that they have voluntarily agreed to do so in response to endless, turgid, often impenetrable sets of terms and conditions, to which, by pressing a button, they have indicated their agreement.⁷⁶

Judge Rakoff here identifies the distinct landscape of consumer contracting in which the presumptive enforceability of such provisions operates differently than the paradigmatic “voluntary agreement” of sophisticated parties, upon which the pre-internet FAA focused.

76. *Meyer v. Kalanick*, 200 F. Supp. 3d 408, 410–11 (S.D.N.Y. 2016), *vacated sub nom. Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (alteration in original) (citations omitted). Granting a motion by Airbnb to compel arbitration of a claim of racial discrimination on behalf of a class, district Judge Cooper acknowledged the distinct consumer context and its impact on parties formally agreeing to such terms:

All of us who have signed up for an online service recently will recall the experience. After entering the service provider’s website, we were presented with a “sign up” or “create account” button prominently displayed on the screen. Next to the button—less prominent, no doubt—was the ubiquitous advisory that, by signing up, we would be accepting the provider’s “terms of service.” Perhaps there was a separate check-box prompting us to indicate our agreement to those terms. Regardless, eager to begin using the service and realizing that the provider’s contractual terms are non-negotiable, most of us signed up without bothering to click the accompanying link to reveal the contractual terms. Those who did undoubtedly found numerous pages of legalese. The intrepid few who actually read all the terms almost certainly learned that one of them requires users to relinquish their right to have a jury resolve any dispute with the provider. And that another bars class actions. This experience [is] shared by countless people each day.

Selden v. Airbnb, Inc., No. 16-CV-00933 (CRC), 2016 WL 6476934, at *1 (D.D.C. Nov. 1, 2016).

2. Forum Selection Clauses

Forum selection clauses—contractual provisions that designate the court and location in which disputes arising out of an agreement will be litigated⁷⁷—aim to establish personal jurisdiction and venue to minimize costs and uncertainty.⁷⁸ In particular, by including a forum selection provision, parties may limit costs by contractually protecting against litigation in a distant forum, as well as limit the costs of uncertainty about where claims will be brought.⁷⁹ Contractual designation of forum also enables parties to anticipate litigation costs and negotiate terms accordingly.⁸⁰ In this way, a forum selection provision operates as a discrete but sophisticated tool to choose favorable legal regimes and allocate and mitigate future costs.⁸¹ Underlying current receptivity to the enforceability of forum selection clauses is a presumption of the parties' ability to choose. Thus, the nature of the implications of forum choice,⁸² and the trend toward its acceptance precipitated by the demands of international transactions, indicate its divergent operation across transactional contexts.

Enforceability of these clauses emerged historically in connection with the question of the rights of corporate entities. As courts appreciated the value to parties of voluntarily establishing personal jurisdiction and venue, they grew comfortable with this kind of forum shopping.⁸³ But this appreciation in the first

77. See *supra* note 50.

78. See David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 785 (1993) (describing the forum selection clause as a tool “allowing a party to limit its expenses of defending a lawsuit in a distant forum” by “determining in advance where litigation should take place”).

79. See *id.*

80. See *id.*

81. See O'HARA & RIBSTEIN, *supra* note 2, at 70 (describing some of the useful purposes of including a “choice-of-court” provision). For an analysis and critique of the interpretive rules applied to forum selection clauses framed in terms of data concerning “contracts between and among *business entities*,” see John F. Coyle, *Interpreting Forum Boilerplate Selection Clauses*, 104 IOWA L. REV. (forthcoming 2019).

82. The argument that a competitive market protects consumers from opportunistic behavior by the drafter–seller may be inapposite in the case of forum selection provisions. The current lack of salience of the terms for consumers and consumers' lack of understanding of the implications of forum selection provisions, in tandem with the operation of forum selection in limiting venues for redress, make it unlikely that competition and reputational concerns will limit sellers' enforcement of the term. See O'HARA & RIBSTEIN, *supra* note 2, at 136; see also Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 834 (2006) (demonstrating the incentives for businesses to waive enforcement for reputational ends with the example of a hotel check-out rule).

83. See *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451–53 (1874) (voiding an agreement by an out-of-state corporation to forgo removal to federal court in recognition of a corporation's rights as a citizen). The historical treatment of forum selection provisions as counter to public policy originally stemmed from the view that they inappropriately served to “close the access to” courts of their jurisdiction, “divest courts of their established jurisdictions,” and deprive a party of substantial rights. *Id.* at 451–53 (“A man may not barter away his life or his freedom, or his substantial rights [or] bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. . . . [T]he principles mentioned . . . show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”). By the 1970s, the Supreme Court dismissed the policy concern of “‘oust[ing]’ a court of

instance involved sophisticated parties; the potential impact on parties who lack the sophistication to assess the value, costs, and implications of such terms remained troubling to courts for a time.

Notwithstanding some state law exceptions to the prevailing rule of presumptive enforceability,⁸⁴ forum selection provisions have become commonplace. They appear in contracts such as asset purchase agreements,⁸⁵ credit agreements,⁸⁶ and Google's terms of service⁸⁷—and can have significant implications for parties, both in terms of cost savings as well as issues related to access to justice and redress.⁸⁸ They operate as sophisticated cost-mitigating provisions that also implicate significant substantive rights in ways that are difficult to assess, and which may not be evident to an untrained eye.⁸⁹ As with arbitration provisions, the extent to which forum selection provisions reflect the intentions of the parties depends on the type of contract in which the terms appear. Because of the potentially significant implications of a forum selection provision, some argue for different default rules and interpretations in differing transactional contexts.⁹⁰

The history of the doctrinal acceptance of forum selection offers one more example of the phenomenon of creep from similarly situated negotiating parties to general contract law. Against the backdrop of a long-held presumption against

jurisdiction" as a "vestigial legal fiction" that predates the operation of businesses in world markets. The *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

84. Some states statutorily void certain forum selection provisions. See *Nat'l Auto Lenders, Inc. v. SysLOCATE, Inc.*, 686 F. Supp. 2d 1318, 1322–23 (S.D. Fla. 2010), *aff'd*, 433 Fed. Appx. 842 (11th Cir. 2011); *Digital Envoy, Inc. v. Google, Inc.*, 319 F. Supp. 2d 1377, 1381 (N.D. Ga. 2004). Others treat them as non-binding but consider them a factor in determining the exercise of jurisdiction. See *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 730 (Iowa 1995).

85. See, e.g., ASSET PURCHASE AGREEMENT - SUMMIT AMUSEMENT & DISTRIBUTING LTD, GAMETECH INTERNATIONAL INC - AUGUST 30, 2006 (2006); AMENDMENT NO. 2 TO ASSET PURCHASE AGREEMENT BETWEEN ADELPHIA COMMUNICATIONS CORPORATION AND COMCAST CORPORATION, EXHIBIT 2.1 (2005).

86. See, e.g., REVOLVING CREDIT AGREEMENT - ALTRIA GROUP INC, JPMORGAN CHASE BANK NA AND OTHERS APRIL 15, 2005 (2005).

87. *Google: Terms of Service*, GOOGLE, <https://www.google.com/policies/terms/> [<https://perma.cc/4H8E-GTTP>] (last modified Oct. 25, 2017).

88. See RADIN, *supra* note 52, at 4–6. For an analysis of the development of procedural term innovations, explaining the prevalence of some procedural terms and not others, see generally David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389.

89. See, e.g., Korobkin, *supra* note 64, at 1225–27 (identifying the cognitive limitations that hamper individuals from accurately assessing forum selection provisions among other ancillary contract terms). Some have questioned the distinction between access to local litigation and other contract terms. See, e.g., Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 7 (advocating presumptive enforceability of forum selection provisions across contract types when seeking a uniform approach to contract). In addition to seeking a rule that “performs . . . across the full range of cases,” this economic argument for presumptive enforceability presupposes parties’ abilities to value the term and a competitive market. See *id.* at 2, 7 (questioning why local litigation should be privileged “so long as price and other terms can vary to offset the risk in question”). For a discussion of the difficulties individual consumers face in assessing such risk in practice, see Korobkin, *supra* note 64.

90. See KIM, *supra* note 52, at 121–22; RADIN, *supra* note 52, at 6; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 601–02 (1991) (Stevens, J., dissenting) (suggesting a distinction between the enforceability of a forum selection provision in a standardized passenger ticket and a “freely negotiated international agreement between two large corporations”).

the enforceability of forum selection clauses,⁹¹ in the latter half of the twentieth century, the Supreme Court shifted its position in light of the realities of sophisticated transacting.⁹² In doing so, the Court identified forum selection provisions as a potent tool for informed parties in transactions involving “arm’s-length negotiation by experienced and sophisticated businessmen.”⁹³ Yet both the portable nature of the term and the portability of doctrine have reinforced the blurring of contractual categories.

In *The Bremen v. Zapata*,⁹⁴ the Court held enforceable a forum selection clause in a heavily negotiated contract between corporate entities. The case involved an American corporate owner of an “ocean-going, self-elevating drilling rig” that contracted with a German corporation to tow the rig through international waters.⁹⁵ The rig, damaged in a storm, was towed to Florida, where the owner, Zapata, brought suit in contravention of the contractual provision requiring the parties to litigate in English courts.⁹⁶ The Court held the forum-selection clause presumptively enforceable in the absence of a showing that enforcement would be unreasonable, unfair, or unjust.⁹⁷ The Court did so with an eye to the specific nature of the transaction—a dispute arising out of an “American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans.”⁹⁸ Acknowledging “the expansion of overseas commercial activities by business enterprises,” the Court explained the negative impact the traditional doctrine would have upon “the future development of international commercial dealings by Americans,” not least its potential to hinder the “expansion of American business and industry.”⁹⁹ As such, the

91. See Leandra Lederman, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 426–32 (1991) (discussing “courts’ historical antipathy to forum-selection clauses”); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 293–94 (1988) (describing ability of parties to determine the forum as “a wholesale abandonment of a 100-year taboo against party autonomy”); Taylor, *supra* note 78, at 785–86; see also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (“[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”); *Carbon Black Exp., Inc. v. The Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 335 (W. Va. 2009) (“[F]orum-selection clauses historically were disfavored”); cf. *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 345 (3d Cir. 1966) (establishing deference to contractually-stipulated forum under Pennsylvania law in the absence of proof that it would unreasonably disadvantage one party thereby subverting interests of justice in case involving two corporate entities).

92. For a brief discussion of the shift toward judicial acceptance of forum selection provisions in light of growing dockets, acceptance of the doctrine of *forum non conveniens*, and forum shopping by parties, see Jennifer Dempsey, *Forum Selection Clauses in Attorney-Client Agreements: The Exploitation of Bargaining Power*, 114 W. VA. L. REV. 1195, 1199–1200 (2012).

93. See *Bremen*, 407 U.S. at 12.

94. See *id.*

95. *Id.* at 2.

96. See *id.* at 3–4.

97. See *id.* at 15.

98. *Id.* at 8–9.

99. *Id.*

Court identified the treatment of forum selection clauses as prima facie valid absent a showing they are unreasonable as “the correct doctrine to be followed by federal district courts sitting in admiralty.”¹⁰⁰

In *Bremen*, the Court grounded its rationale for presumptive enforcement of forum selection provisions in the context of a “freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power.”¹⁰¹ It noted, among other things, the “elimination of all . . . uncertainties [as to the jurisdiction in which a dispute could be litigated] by agreeing in advance on a forum acceptable to both parties [as] an indispensable element in international trade,” “strong evidence that the forum clause was a vital part of the agreement,” which likely figured into negotiations and pricing,¹⁰² as well as the sophistication of both parties and the negotiated nature of the deal.¹⁰³ Indeed, the Court explicitly distinguished this case from one in which “[t]he remoteness of the forum might suggest that the agreement was an adhesive one” and noted the lack of evidence that litigation in London would prove so costly as to deprive Zapata of its day in court.¹⁰⁴ Thus, the Court’s rationale and framing highlight the operation of the provision in the context of a transaction involving highly sophisticated parties, while revealing concerns about adhesion contracts that might adopt such terms.¹⁰⁵

Although scholars note that “later cases could have limited *Bremen* to its compelling commercial facts,”¹⁰⁶ the Supreme Court took less than two decades to move away from the transactional boundaries suggested in *Bremen* in a now-familiar textbook case: *Carnival Cruise Lines, Inc. v. Shute*.¹⁰⁷ It did so even as it highlighted transactional objectives as the basis of its rationale.¹⁰⁸ This case involved a cruise ticket provided to a passenger following payment that directed the passenger to contract terms, which included a forum-selection provision. Holding the provision enforceable, the Court rejected the appellate court’s effort to distinguish the case from *Bremen* based on the non-negotiable instrument at issue.¹⁰⁹ Instead, pointing to the cost savings to the drafter and the potential for savings to be passed along to the consumer as the relevant rationale for

100. *Id.* at 10.

101. *Id.* at 12.

102. *Id.* at 13–14 (“[I]t would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.”).

103. *See id.* at 14 (citing favorably the characterization of the agreement as “freely entered into between two competent parties”).

104. *Id.* at 17–18.

105. Indeed, the Court’s presentation of facts suggests the contract terms were part of a bidding process for the deal as a whole, pursuant to which terms were reviewed and revised. *See id.* at 2–3.

106. O’HARA & RIBSTEIN, *supra* note 2, at 71.

107. 499 U.S. 585 (1991).

108. *Id.* at 593.

109. *Id.* 591–93. Considering an appeal of the grant of summary judgment in favor of the defendants, the Ninth Circuit Court of Appeals invoked this distinction suggested by the circumstances in *Bremen. Shute v. Carnival Cruise Lines*, 897 F.2d 377, 388 (9th Cir. 1990).

enforcement,¹¹⁰ the Court crept away from the distinct-contract-type implications of the precedent on which it relied even as it invoked a transactional rationale.¹¹¹

In light of the Court's holding in *Carnival Cruise*, the burden on an unsophisticated plaintiff to overcome the presumption of enforceability remains high.¹¹² Notwithstanding the doctrine's intellectual foundation in *The Bremen*, and its basis in transaction-sensitive reasoning, courts have explicitly rejected the position that "unequal bargaining power is a ground to reject enforcement of a forum selection clause in an employment contract."¹¹³

The trends in prevailing doctrinal approaches to forum selection and arbitration clauses—resistance, then limited enforceability as a law of sophisticated parties, then presumptive enforcement by courts across transactional contexts—illustrate a prototypical way creep can function. Describing the modern approach taken by "most courts around the country" to ancillary terms in "online adhesion contracts," one district court judge pointed to the one-size-fits-all perspective: the "basic inquiry as to enforceability boils down to basic contract theory of notice and informed assent with respect to the terms in question."¹¹⁴ Courts insist on

110. *See id.* at 593–94.

111. Justice Stevens challenged this conceptual move in his dissenting opinion. *Id.* at 597–98 (Stevens, J., dissenting) ("The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable."). Justice Stevens also took issue with the Court's suggestion that the passenger was "fully and fairly notified about the existence of the choice of forum clause in the fine print on the back of the ticket," especially considering that the terms were not provided prior to purchase. *Id.* at 597.

112. The majority opinion in *Carnival* articulated exceptions to the presumptive reasonableness of a forum selection clause, which have been applied by courts to recognize fraud, deprivation of a day in court, fundamental unfairness, and the contravention of public policy of the forum state. *See id.* at 595; *Nat'l Enters., Inc. v. S.C. Ins. Co.*, No. 97-2185, 1998 WL 756893, at *2 (4th Cir. Oct. 29, 1998) (citing *Carnival Cruise Lines*, 499 U.S. at 595) ("A choice of forum provision may be found unreasonable if (1) its formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) its enforcement would contravene a strong public policy of the forum state." (citation omitted)). Nonetheless, the burden remains high and is met when cases involve circumstances beyond an imbalance of power. Dempsey, *supra* note 92, at 1203–04. For example, in the employment context, in *Sudduth v. Occidental Peruviana, Inc.*, 70 F. Supp. 2d 691 (E.D. Tex. 1999), the court acknowledged the distinction between a sophisticated party agreement as in *Bremen*, on one hand, and one involving an individual and corporation. The case involved a contract for work to be performed in Peru, which was written in Spanish and stipulated Peru as the forum for adjudication of any disputes. *Id.* at 694. The court pointed to the fact that the employee was forced to sign a contract in a foreign language as well as the asymmetrically burdensome requirement that the plaintiff travel to Peru in refusing to enforce the provision. *Id.* at 695.

113. *Marcotte v. Micros Sys., Inc.*, No. C 14-01372 LB, 2014 WL 4477349, at *7 (N.D. Cal. Sept. 11, 2014) ("[A] forum clause is not unreasonable merely because of the parties' unequal bargaining power . . .").

114. *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at *5 (D. Mass. July 11, 2016). Reversing the district court's granting of a motion to compel arbitration in light of the company's failure to establish that the term was conspicuous, the First Circuit Court of Appeals nonetheless reiterated the principle that there is "no reason to apply different legal principles [of contract enforcement] simply because a . . . clause . . . is contained in an online contract." *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61 (1st Cir. 2018) (quoting *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 612

constructive notice, and at times also require an indication of assent in online consumer contracts. As the adoption of formalities of assent in the consumer context demonstrates, the distinction between contract types no longer impacts the presumptive enforceability of such provisions.¹¹⁵

B. CREEPING FROM CONSUMER LAW TO GENERAL CONTRACT LAW: *CONTRA PROFERENTEM*

Contra proferentem is an admittedly old principle of contract construction that may have already been in the domain of “general contract law” since Roman times.¹¹⁶ Yet in its modern form, the doctrine seems to have migrated from a “first principle of insurance law”¹¹⁷ to modern general contract law. It requires construing ambiguous contracts against those who draft them. Here is a canonical statement of the rule and its rationale in the insurance law context from the Seventh Circuit Court of Appeals:

[T]he *contra proferentem* rule[] is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters’ expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.¹¹⁸

Or consider one more, from a state appellate court:

(Mass. App. Ct. 2013)); *Ajemian*, 987 N.E.2d at 611–12, *aff’d*, 84 N.E.3d 766 (Mass. 2017) (“[F]ollowing the modern rule of reasonableness articulated in *Bremen v. Zapata Off-Shore Co.*, we have held that such clauses will be enforced provided they have been reasonably communicated and accepted and if, considering all the circumstances, it is reasonable to enforce the provision at issue. . . . We see no reason to apply different legal principles simply because a forum selection or limitations clause is contained in an online contract.” (citation omitted)).

115. See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002); *Ajemian*, 987 N.E.2d at 611.

116. For some recent work on *contra proferentem* (including its long history), see Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006) [hereinafter Boardman, *Contra Proferentem*]; Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U. L. REV. 305 (2013) [Boardman, *Penalty Default Rules*]; David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431 (2009); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773 (2015); McCunn, *supra* note 13. For older treatments, see John T. Flynn, *The Rule Contra Proferentem in the Government Contract Interpretation Process*, 11 PUB. CONT. L.J. 379, 381 (1980); David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1849–53 (1988); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 254 (1995).

117. Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996); see also KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 37 (5th ed. 2010). *But see* Ed E. Duncan, *The Demise of Contra Proferentem as the Primary Rule of Insurance Contract Interpretation in Ohio and Elsewhere*, 41 TORT TRIAL & INS. PRAC. L.J. 1121 (2006).

118. *Phillips v. Lincoln Nat’l Life Ins. Co.*, 978 F.2d 302, 312 (7th Cir. 1992) (emphasis omitted) (quoting *Kunin v. Benefit Tr., Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir. 1990)).

Contra proferentem has a usual application. In the typical coverage contest between an insurer and its insured, ambiguous terms in the insurance policy are construed in favor of the insured. This rule of construction recognizes the disparity in bargaining power that typically exists between an insurer and an insured, particularly since insurance contracts are often contracts of adhesion.¹¹⁹

The rule has a long history in contract law,¹²⁰ but the conventional story of the doctrine as a core of insurance law which, in turn, gave courts further comfort with more applications of the doctrine outside insurance law, is widely accepted.¹²¹ Indeed, the most recent historical work on the doctrine seems to confirm that the doctrine as a matter of general contract law was essentially moribund until its revivification within the insurance contract context, where its justification made more sense to courts.¹²²

Courts and contract theorists have offered a variety of rationales for *contra proferentem* that extend beyond the narrow insurance context. For example, the dominant explanation of the rule is that it encourages clarity and discourages ambiguity: if drafters can reliably expect contracts to be construed against them, they will draft clearer contracts.¹²³ Although the benefit anyone could reasonably expect in a consumer context for clearer contracts is probably overstated (because no one reads their contracts anyway),¹²⁴ this rationale is not targeted to explain the doctrine within any particularized transactional context, as it could apply to sophisticated parties as well. Ostensibly, everyone could benefit from clearer contracts (though many sophisticated parties probably draft ambiguously to give themselves room to adjust over time as they see how things play out). Yet this dominant explanation seems secondary to a more directly pro-consumer rationale in the insurance context: the doctrine serves to protect the public against institutions that are inclined to draft obscure contracts to entrap consumers. Unlike the

119. *Econ. Premier Assurance Co. v. W. Nat'l Mut. Ins. Co.*, 839 N.W.2d 749, 754 (Minn. Ct. App. 2013) (citations omitted).

120. The lengthy version of the narrative is told by Horton, *supra* note 116, at 438–46. But Horton confirms its cohesiveness principally as an insurance contract doctrine in the common law by the “last half of the nineteenth century.” *Id.* at 440.

121. See Leib & Thel, *supra* note 116, at 780 n.50.

122. See McCunn, *supra* note 13.

123. See RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. A (1981); Abraham, *supra* note 117, at 533; cf. Horton, *supra* note 116, at 433 (discussing conventional explanations); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1608 (2005) (“The doctrine of *contra proferentem* may still be a sensible tiebreaker, on the ground that the party who drafted the contract was probably in the better position to avoid ambiguities. But this is not always the case.”); Rappaport, *supra* note 116, at 178–87 (discussing formulations of the ambiguity rule in insurance law).

124. See generally Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 19 (2014); Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. CONTRACT L. 1 (2009).

more basic generalized justification for clearer contracts, in the insurance context the most plausible justification is more particularized to consumer contracting.¹²⁵

And yet a recent study¹²⁶ of the doctrine by one of us found it applying to a wide-ranging set of contracts outside the insurance context, including in employment,¹²⁷ marriage settlements,¹²⁸ stock certificates;¹²⁹ money market documents;¹³⁰ co-op apartment agreements;¹³¹ property leases;¹³² landlord-tenant disputes;¹³³ property sales using form agreements;¹³⁴ and lawyers' letters.¹³⁵

This caselaw—and many states' pattern jury instructions¹³⁶—underscore that *contra proferentem* is not a doctrine limited to insurance contracts, but has much wider application in the general law of contract. Courts sometimes find the rule especially important in the take-it-or-leave-it context of standard form contracting,¹³⁷ but the rule has crept back outward and is not a specialized interpretive

125. See RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. A (1981); Posner, *supra* note 123, at 1590 (“The second of these tie-breaking rules, *contra proferentem*, is conventionally defended on the ground that the drafting party may be able to pull a fast one on the other party, a defense that fails when the other party is commercially sophisticated.”). To be fair, the justification for *contra proferentem* that is now in vogue among the law-and-econ set is that insurance companies themselves want clarity and uniformity in the interpretation of their standardized provisions—and that clarity is especially important in insurance—so insurers benefit from this rule, which helps courts sustain such clarity and uniformity. See, e.g., Boardman, *Contra Proferentem*, *supra* note 116; Boardman, *Penalty Default Rules*, *supra* note 116; Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457 (2017). Still, we assume insurance companies would be delighted to do away with the rule—which is calibrated to work to their disadvantage—and because *contra proferentem* can be designed in many states to be applied by fact-finders rather than judges, see Leib & Thel, *supra* note 116, at 784, it is hard to see the doctrine as very likely to produce consistent and uniform interpretations in the courts in actual practice.

126. The findings cited here are drawn from Leib & Thel, *supra* note 116, at 778–80.

127. Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091, 1097 (Alaska 2009); Abrams v. Horizon Corp., 669 P.2d 51, 57 (Ariz. 1983); Int'l Billing Servs., Inc. v. Emigh, 101 Cal. Rptr. 2d 532, 538 (Cal. Ct. App. 2000).

128. Hussein-Scott v. Scott, 298 P.3d 179, 183 (Alaska 2013) (holding that although Alaska law disfavors *contra proferentem* in marriage settlements, it is a tool of interpretation under Florida law); McMullin v. McMullin, 338 S.W.3d 315, 322 (Ky. Ct. App. 2001) (applying the rule to a marriage settlement agreement).

129. Kaiser Alum. Corp. v. Matheson, 681 A.2d 392, 399 (Del. 1996).

130. Craig v. Hastings State Bank, 380 N.W.2d 618, 621 (Neb. 1986).

131. 1901 Wyo. Ave. Coop. Ass'n v. Lee, 345 A.2d 456, 463 (D.C. 1975); see also Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 122, 892 A.2d 646, 660 (N.J. 2006) (Wallace, J., dissenting) (suggesting that ambiguities should be construed against drafters of bylaws of a country club).

132. Kutkowski v. Princeville Prince Golf Course, LLC, 300 P.3d 1009, 1019 (Haw. 2013); Berg v. Hudesman, 801 P.2d 222, 233–34 (Wash. 1990); Owens v. McDermott, Will & Emery, 736 N.E.2d 145, 154 (Ill. App. Ct. 2000).

133. Md. Arms Ltd. P'ship v. Connell, 786 N.W.2d 15, 25 (Wis. 2010).

134. DeWolfe v. Hingham Centre, Ltd., 985 N.E.2d 1187, 1195–96 (Mass. 2013).

135. Lai Ling Cheng v. Modansky Leasing Co., 539 N.E.2d 570, 573 (N.Y. 1989).

136. The pattern jury instructions in many states are cited and discussed in Leib & Thel, *supra* note 116, at 779–80.

137. See Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966) (“These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract.”); Anderson v. Baker, 641 P.2d 1035, 1039 (Mont. 1982) (same); Sears Roebuck & Co. v. Avery, 593 S.E. 2d 424, 433 (N.C. Ct. App. 2004) (“[A]mbiguous contracts (particularly contracts of adhesion) are construed against the drafter.”); Joyner v. Adams, 361 S.E.2d 902, 905–06 (N.C. Ct. App. 1987) (highlighting the rule's central importance in cases of adhesion contracts); Md. Arms Ltd. P'ship v.

regime only for unsophisticated consumers. Although some courts speculate whether it makes sense to give sophisticated parties the benefit of the rule at all,¹³⁸ the doctrine more or less will apply to any written agreement between any parties where there was no joint drafting effort.¹³⁹ This creep disables theorists and courts from providing a satisfying unitary account of the doctrine, which was revived from near-death for one purpose, but is put to others too.

This case study is useful both to illustrate creep that occurs from seemingly specialized interpretive regimes designed to help consumers back into the stream of general contract law—and to demonstrate how underlying policies, values, and doctrines can morph as the creep occurs. In the case of *contra proferentem*, the insurance law versions of the rule were much more aggressive efforts to construe contracts against issuers early in the interpretive process.¹⁴⁰ Parallel to the creep, however, the doctrine itself was thinned out to serve as a last resort tie-breaker,¹⁴¹ an instantiation of the doctrine that neither promotes clear policies nor helps consumers as often as it was probably designed to. This kind of patchwork is expected when interpretive regimes cannot sustain their boundaries—and

Connell, 786 N.W.2d at 25 (noting that the rule is particularly applicable in standardized contracts); see also Judicial Council of Cal. Civil Jury Instructions, CACI No. 320 *Interpretation—Construction Against Drafter* (2016) (“This . . . rule is applied with particular force in the case of adhesion contracts.” (quoting *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 287 (Cal. Ct. App. 1998))); 1 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., *CONSTRUCTION LAW* § 3:28 (2014) (“[T]he *contra proferentem* rule and adhesion contract analysis have historically been inextricably bound.”).

138. See *Joyner*, 361 S.E.2d at 905–06 (rejecting the application of the rule “where the parties were at arms length and were equally sophisticated”); see generally Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL & INS. PRAC. L.J. 85 (2003) (identifying a trend of sophisticated party insureds being excepted from *contra proferentem* in courts, but arguing that it still makes sense in many cases to apply the doctrine even to insured sophisticated parties).

139. See *Morgan Stanley v. New Eng. Ins. Co.*, 225 F.3d 270, 279–80 (2d Cir. 2000) (deciding that the linchpin was that the insured—Morgan Stanley—did not negotiate its terms and therefore it did not matter that Morgan Stanley is by all measures a sophisticated party); see also *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 521 (3d Cir. 1997) (“[T]he dispositive question is not merely whether the insured is a sophisticated corporate entity, but rather whether the insurance contract is negotiated, jointly drafted or drafted by the insured.”); *FabArc Steel Supply, Inc. v. Composite Constr. Sys., Inc.*, 914 So. 2d 344, 359–60 (Ala. 2005) (focusing on the “arm’s length negotiations” as the reason not to apply *contra proferentem*); *Owens-Ill., Inc. v. United Ins. Co.*, 625 A.2d 1, 15 (N.J. Super. Ct. App. Div. 1993) (focusing on whether the contract was jointly negotiated rather than focusing only on “sophistication”).

140. See, e.g., *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998); *Nationwide Mut. Ins. Co. v. Garriga*, 636 So.2d 658, 662 (Miss. 1994); *Williams v. Life Ins. Co. of Ga.*, 367 So. 2d 922, 925 (Miss. 1979); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 972 (1970) (suggesting that ambiguity may not be a seriously enforced threshold for applying the rule).

141. See *Hurd v. Ill. Bell Tel. Co.*, 136 F. Supp. 125, 134 (N.D. Ill. 1955) (“At best it is a secondary rule of interpretation, a ‘last resort’ which may be invoked after all of the ordinary interpretative guides have been exhausted.”); see also *Kaiser Alum. Corp. v. Matheson*, 681 A.2d 392, 399 (Del. 1996); *Moore v. Lomas Mortg. USA*, 796 F. Supp. 300, 305 (N.D. Ill. 1992); *Petersen v. Magna Corp.*, 773 N.W.2d 564, 570 (Mich. 2009); cf. *Fisher v. Cmty. Banks of Colo., Inc.*, 300 P.3d 565, 569 (Colo. App. 2010) (describing the doctrine as one of several “‘secondary’ guides” to resolve remaining ambiguities after the “primary” interpretive rules have been applied); *RESTATEMENT (SECOND) OF CONTRACTS* § 206 reporter’s note cmt. A (“[O]ne may doubt that the rule is ‘the last one to be resorted to, and never to be applied except when other rules of interpretation fail.’” (citation omitted)).

contra proferentem illustrates that dynamic well, even if it is not a perfect example of a purely specialized regime because of its early etiology as pervading more general contract law.¹⁴²

* * *

Our case studies here are only that: examples of a common phenomenon that implicate some costs and risks of the unintended consequences of setting up fragmented regimes for contract law. Nothing we say here requires that this impulse for harmonization of fragmented contract regimes always obtains—or that it is always inappropriate.¹⁴³ Indeed, this dynamic is just what one would expect of the common law, but heretofore few have trained their eyes on the risks creep can cause. A fuller inquiry would identify a few contexts in which creep has been perfectly well contained—where the law sustains its own fragmentation moderately successfully. Although there has been much harmonization between the Uniform Commercial Code’s treatment of sales of goods and the modern common law of contract, there remain a few specialized rules where fragmentation has been successful, if much criticized. For example, the common law of contract continues to impose the “preexisting duty rule,” whereas modifications under the UCC’s § 2-209(1) are permitted without consideration as long as they are made in good faith.¹⁴⁴ We could develop other examples, too.¹⁴⁵ But that fragmentation is

142. Gilson et al., *supra* note 2, at 81–86, tell a similar kind of story about the “reasonable expectations” doctrine, which also crept outward from insurance law. They find that as it crept, it lost its way—and courts had a hard time gerrymandering it to new purposes just as they failed to keep it focused on its old purpose. For more on the doctrine, see Leib, *supra* note 31.

143. We acknowledge this *supra* notes 11–12 and accompanying text.

144. See, e.g., Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 445–53 (1996).

145. Consider, for example, the well-entrenched fragmentation within insurance law between the interpretive principles that apply to first-party insurance contracts (when a policyholder buys a policy to protect her property against damage or accidents, say) and third-party insurance contracts (when a policyholder buys a policy to protect against her liability to a third party for her own conduct). See Port Auth. of N.Y. & N. J. v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir. 2002) (“[T]he parties to each form of insurance contract assume vastly different roles. In the third-party setting, the insurer and insured may generally be considered allies, but in the first-party context, the insured and carrier are placed in an adversarial position. We are persuaded that the time-honored distinction between the two types of insurance coverage is valid and should be maintained.”); Great N. Ins. Co. v. Mt. Vernon Fire Ins. Co., 708 N.E.2d 167, 170 (N.Y. 1999) (“[W]holly different interests are protected by first-party coverage and third-party coverage.”); Winding Hills Condo. Ass’n v. N. Am. Specialty Ins. Co., 752 A.2d 837, 840 (N.J. Super. Ct. App. Div. 2000) (sustaining the doctrinal distinction between the “continuous trigger rule” for third-party claims and the “manifest trigger rule” for first-party claims). Ultimately, courts tend to pursue “solicitousness for victims of mass toxic torts” in establishing readings of, and rules for, third-party coverage, but are willing to apply stricter rules that do not vindicate “public rights” when construing first-party coverage. *Id.*

Yet notwithstanding the “time-honored” separate tracks of first-party and third-party policies—which pursue different values—Chaim Saiman argues persuasively that the development of “bad faith” law in insurance (when an insurer fails to settle or pay a claim in bad faith) actually jumped from the third-party to the first-party context without much resistance. See Chaim Saiman, *The Restatement of Law of Liability Insurance and the Creation of Insurance Law* (forthcoming 2019) (manuscript at 11–13). Whether that is because both tracks of insurance law were just becoming harmonized with general contract law is hard to say without deeper study.

sometimes successful does not inspire confidence that it can always be,¹⁴⁶ such that we can forget its risks—and too often courts and theorists fail to understand the dynamics of fragmentation. In Part III below, we start to explore some of the determinants and causes of creep to help isolate how it happens. Only then can we get a handle on more easily stopping it in the contexts where we should be especially cautious about law falling off track.

III. WHAT'S CAUSING CREEP?

In the preceding Part we identified creep from commercial settings and highly negotiated contracts between sophisticated parties into the realm of consumer contract. We also demonstrated creep from a specialized interpretive regime of insurance doctrine back into wide application in the general law of contract, where it first appeared and then was revived. More generally, these examples underscore the difficulty at times of bracketing specialized areas of law, even in areas recognized as discrete transactional types, such as insurance. As the discussion above suggests, although these “creeping” doctrines may not have necessarily disavowed the possibility of broader application, each emerges with a rationale grounded in a particular transactional structure that creeps into applications in different transaction types. In this Part, we focus on some of the mechanisms and structural aspects of contract that contribute to creep.

We offer below three explanations of how the process of creep can occur. First, we explore how the instability of party-status designations (is someone a sophisticated party or a consumer or both?) pushes courts away from clean fragmentation of contract regimes. Second, we observe how modularity, portability, and innovation in contract design makes possible the migration of doctrine and terms, which themselves end up carrying doctrine with them. And finally, we

146. Another area of contract law that sustains doctrinal distinctions but, at times, nonetheless creeps back and forth is that of commercial and residential leases—and their fragmentation from general contract law and from each other. Although, as one court asserts, “[i]t is almost axiomatic that commercial leases may and should be governed by a different rule than residential leases,” 29 Holding Corp. v. Diaz, 775 N.Y.S.2d 807, 814 (N.Y. Sup. Ct. 2004), the migration of rationales and categories can be seen in the history of the doctrine. In the nineteenth century in New York, a landlord had no duty to mitigate damages by trying to re-rent a property abandoned by the original tenant. *Becar v. Flues*, 64 N.Y. 518 (1876); see also 29 Holding Corp. 775 N.Y. at 810 (identifying *Becar* as a “seminal case in this area”). In the telling of one court, the rule that landlords had no duty to mitigate in the context of commercial or residential leases reflected “common law principles . . . in recognition of property rules from feudal times.” *Rubin v. Dondysh*, 549 N.Y.S.2d 579, 581 (N.Y. Civ. Ct. 1989), *rev'd*, 588 N.Y. S.2d 504 (N.Y. App. Term 1991). More recently, some courts asserted that “there is no longer good reason—if there ever was—why leases should be governed by rules different from those applying to contracts in general,” including an obligation by the non-breaching party to mitigate any loss following a breach. *Parkwood Realty Co. v. Marciano*, 353 N.Y.S.2d 623, 624 (N.Y. Civ. Ct. 1974). And yet, other courts continue to find no duty to mitigate in commercial leases, whether as an invocation of the original principle or as a recognition of the nature of “business transactions.” *Holy Props. Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 661 N.E.2d 694 (N.Y. 1995). Moreover, still other courts have used the principle of the distinctiveness of lease agreements in the commercial lease context to reestablish the lack of a duty to mitigate in the residential context. See *Rios v. Carrillo*, 861 N.Y.S.2d 129, 130 (N.Y. App. Div. 2008) (finding that “[a]lthough *Holy Props.* involved a commercial lease . . . [t]here is simply no basis for limiting the broad language of *Holy Props.*” and thus applying its reasoning to a residential lease).

show how migrating metaphors and conventional analogical reasoning in the common law of contract can cause creep. This is not an exhaustive or mutually exclusive list of how creep happens; there may be other dynamics in play—and, as we show, interaction effects among our mechanisms. But viewed together, these mechanisms reflect competing tendencies in contract law: a tendency toward general principles of contract as a default position in the law as well as an enduring context sensitivity, which is not consistently circumscribed.

A. CATEGORY INSTABILITY

It is not a secret that the terms “sophisticated parties” and “consumers” are not self-defining. Schwartz and Scott define sophisticated parties to include corporate entities with at least five employees.¹⁴⁷ Goldberg defines sophisticated party transactions as “agreements for which both parties could be expected to have access to counsel.”¹⁴⁸ These definitions—which are not adopted as law by any jurisdiction that purports to have a law for sophisticated parties—are probably adequate for theorizing. They also show that some scholars grapple with the problem. They fall shy, however, of being a reliable basis for legal implementation. In a world of small businesses and multinational corporations, with a range of merchants and business entities in between, it is easy to conjure a host of transactions involving significant differentials in power or substantive sophistication that might fall within these very categories.

Thus, for example, compare two contracts: (1) a transaction between a gift shop owned by a retired teacher who incorporates it as a limited liability company, employing herself and four others, and a provider of garbage pick-up services that operates on a statewide level, on one hand; and (2) a transaction between two multinational corporations, on the other hand. Should *contra proferentem* apply the same way in both transactions? Should we enforce non-negotiable boilerplate terms in both contexts? Should courts treat similarly the presence or absence of a term identifying both parties as drafters in both contexts? Although Schwartz and Scott’s “sophisticated party” categorization offers a neat bright line, it also presumes that courts will and ought to treat such potentially dissimilar transactions similarly across the board.¹⁴⁹ As these examples suggest,¹⁵⁰ however, there will be a significant range in the extent to which “[t]hese economic entities can be expected to understand how to make business contracts.”¹⁵¹ And this is the real substantive reason Schwartz and Scott want to have a sophisticated party category in the first place. Small businesses are likely to face challenges stemming from limits of resources and access to information to say nothing of cognitive

147. Schwartz & Scott, *supra* note 2, at 544–45.

148. GOLDBERG, *supra* note 22, at 1.

149. See Schwartz & Scott, *supra* note 2, at 544 (suggesting a category of sophisticated parties including “(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm”).

150. These examples involve slight changes to those offered by Schwartz and Scott to illustrate their proposed contract categories. See *id.*

151. *Id.*

biases, which more experienced or powerful firms might avoid.¹⁵² It is thus easy to see both why it makes substantive sense to have a tracked or fragmented contract law and also that the challenges for line-drawing are patent, making the tracks routinely unstable.

Access to counsel similarly proves a capacious category in a world in which lawyers range from sole practitioners, on one hand, to white-shoe global firms, on the other, with a host of legal practices and levels of sophistication and client service in between. As a result of its inclusiveness, Goldberg's access-to-counsel test, like the simple sophisticated party model outlined by Schwartz and Scott, risks oversimplifying the very transactional distinctions it aims to address. Moreover, highlighting the fuzziness of the boundaries these tests offer, the two approaches do not produce coterminous results. They would treat differently, for example, an individual employee who negotiated her employment contract terms and had a friend who was a lawyer review the agreement between her and the employer, a publicly traded software company.¹⁵³ For Goldberg, that is a sophisticated party transaction, but not for Scott and Schwartz.

In practice, courts do not prove insensitive to the dimensions of transactional context that these examples suggest. Instead, courts sometimes attempt the very context sensitivity demanded by a fragmented contract law. However, in doing so, they contend with the instability of the categories that ought to guide the tracking of contract type, leading to creep.

This dynamic is on display in our *contra proferentem* case study. Although the rule seemed largely to be a pro-consumer interpretive principle within the insurance context, eventually courts were faced with whether to give the "benefit" of the rule to sophisticated parties who did not have a hand in negotiating their form contracts with vendors, providers, and insurers. Although courts and commentators sometimes presume that there is a "sophisticated policyholder" exemption from *contra proferentem*,¹⁵⁴ the weight of the evidence points to co-drafting and joint negotiation, rather than "sophistication," however defined, as the central criteria for the non-application of *contra proferentem*.¹⁵⁵ Thus, even when the

152. Miller, *Formalism*, *supra* note 1, at 522 (citing Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 304–68 (2005)). Miller notes as well that this categorization implicitly relies on size and entity formation as determining factors of sophistication, an approach that caselaw does not follow. *Id.*

153. See *Am. Software v. Ali*, 54 Cal. Rptr. 2d 477, 482 (Cal. Ct. App. 1996) (holding contract enforceable as "the result of an arm's-length negotiation between two sophisticated and experienced parties").

154. See, e.g., Miller, *Formalism*, *supra* note 1, at 504; Jeffery W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807 (1993).

155. See Leib & Thel, *supra* note 116, at 781–82 ("But just having a sophisticated nondrafting party isn't enough to form a general exception to the rule. The crux seems to be actual negotiation, deliberation, and dickering over terms." (footnote omitted)). Because *contra proferentem* does not reflect the preference of at least some sophisticated parties, corporate transactional documents, such as credit, purchase, or merger agreements, can include a standardized term stating that the parties "have participated jointly in the negotiation and drafting" of the agreement, and:

consumer is a corporate entity rather than an unsophisticated individual, the rule holds against the drafter.¹⁵⁶

Perhaps seeing sophisticated parties as capable of being consumers in some transactions precipitated the process we call creep, enabling judges to again expand the application of *contra proferentem* outside the narrow insurance context to other transactions. Courts are still not completely indifferent to the bargaining power or status of the parties.¹⁵⁷ But they have largely given up sharply differentiated contract regimes for purposes of *contra proferentem*, at least in part because the categories that serve as the thresholds for a relevant track themselves prove porous.

The fluidity between sophisticated parties and consumers also gives rise to an example of creep within our forum selection clause case study. In a 2012 case involving an individual Facebook user’s challenge to the enforceability of a

In the event an ambiguity or question of intent or interpretation arises, [the] Agreement . . . shall be construed as if drafted jointly by the parties . . . and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of [the] Agreement

Exhibit 4.16: 364–Day Credit Agreement Among Harley–Davidson, Inc. et al., JPMorgan Chase Bank, N.A., et al., SEC (May 1, 2017), <https://www.sec.gov/Archives/edgar/data/793952/000079395218000012/hog-12312017xexhibit416.htm> [<https://perma.cc/322M-B6TJ>]. Considering the phenomenon of creep and the tendency for courts to impose *contra proferentem*, we can only speculate about the force of this provision in the face of evidence of drafting by one party and of the possibility of the provision migrating into transactions beyond those drafted by global corporate law firms. In any event, lots of searching on the central contract database Onecle does not suggest *contra proferentem* “opt-outs” are actually common for sophisticated parties and agreements.

156. See, e.g., *Minn. Sch. Bds. Ass’n Ins. Tr. v. Emps. Ins.*, 331 F.3d 579, 581 (8th Cir. 2003) (“[T]he Minnesota Supreme Court has applied the rule in disputes between parties apparently having equal bargaining power.”); *Morgan Stanley v. New Eng. Ins. Co.*, 225 F.3d 270, 279 (2d Cir. 2000) (“[T]here is no general rule in New York denying sophisticated businesses the benefit of *contra proferentem*.”); *St. Paul Fire & Marine Ins. Co. v. MetPath, Inc.*, 38 F.Supp.2d 1087, 1092 (D. Minn. 1998) (rejecting argument that *contra proferentem* “should not apply to the Defendants because they are large, sophisticated companies”); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1219 (Ill. 1992) (holding that “any insured, whether large and sophisticated or not, must enter into a contract with the insurer which is written according to the insurer’s pleasure by the insurer. Generally, since little or no negotiation occurs in this process, the insurer has total control of the terms and the drafting of the contract,” so *contra proferentem* should apply) (citations omitted); *CPS Chem. Co., v. Cont’l Ins. Co.*, 536 A.2d 311, 318 (N.J. Super. Ct. App. Div. 1988) (“These principles are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the ambiguity was caused by language selected by the insurer.”); 2 STEVEN PLITT ET AL., *COUCH ON INSURANCE* § 22:24 (3d ed. 2015) (“Avoidance of the rule . . . is not required merely because an insured party is a business rather than an individual.”).

157. See *Highland Lakes Country Club & Cmty. Ass’n v. Franzino*, 892 A.2d 646, 660 (N.J. 2006) (stating that the rule should be especially favored in case of parties with unequal “bargaining power”); *Md. Arms Ltd. P’ship v. Connell*, 786 N.W.2d 15, 25 (Wis. 2010) (suggesting that a “stronger bargaining position” by the drafting party is a reason to favor an interpretation against the drafter); *Joyner v. Adams*, 361 S.E.2d 902, 905–06 (N.C. Ct. App. 1987) (declining to apply the rule where “parties were at arms length” and “equally sophisticated” and stating it is “usually” reserved for those “where one party is in a stronger bargaining position”); *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 257 N.Y.S.2d 706, 713 (N.Y. App. Div. 1965) (considering it a strike against application of the rule where those “who participated in the making of the written agreement were sophisticated persons with extensive business, and some with legal, training”).

forum selection provision in a case alleging discrimination against him for his Muslim identity, a federal district court pointed to the user's internet sophistication as the basis for determining that the threshold issue of notice had been established.¹⁵⁸ Considering whether Facebook's "Terms of Use" were reasonably communicated to the user, the court distinguished the case from those involving "sophisticated commercial entities," and identified the user as a "consumer."¹⁵⁹ However, the court invoked the user's relative social networking sophistication in determining that the terms were reasonably communicated and therefore enforceable. The court asserted, "it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand" that a "Terms of Use" hyperlink allows access to terms.¹⁶⁰ Underscoring the relevance of the user's internet sophistication, the opinion in *Fteja* suggests particular considerations prompted by this transaction type. The court allowed that, "to many people," unlike for the user, "[t]he mechanics of the internet surely remain unfamiliar."¹⁶¹

The court thereby identifies a particular category, that of internet or social media sophistication. It emphasizes, "for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket," thereby referencing *Carnival Cruise*.¹⁶² The court essentially creates a hybrid category of sophisticated consumer. Whether this reflects a creep of sophisticated party categorization into the consumer context, or of consumer contracts toward the realm of sophisticated party contract doctrine, this example demonstrates the difficulty judges at times face in maintaining sharp boundaries between transaction types. Paradoxically, the cause of this difficulty appears to be judges' awareness of the implications of context. As much as they try to be sensitive to context, judges can, as in this case, find themselves participating in doctrinal creep as categories get hybridized.

Two more recent cases further complicate the hybrid category of sophisticated internet consumer. In doing so, they demonstrate the struggle courts face categorizing new developments in transactional practices—and how they foreseeably lead to creep.

In *Berkson v. Gogo LLC*, federal district Judge Jack B. Weinstein asserted that "internet consumers" "require clearer notice than do traditional retail buyers."¹⁶³ Holding the terms of use embedded in the webpage of in-flight wifi provider Gogo unenforceable in 2015, Judge Weinstein pointed to the consumer's

158. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 836 (S.D.N.Y. 2012).

159. *Id.* at 836 (distinguishing enforceability of online "browsewrap" terms of use based on whether they are being imposed on corporations or individual consumers).

160. *Id.* at 839.

161. *Id.*

162. *Id.*

163. 97 F. Supp. 3d 359, 365 (E.D.N.Y. 2015) (rejecting defendant's claim of adequate notice of automatic renewal term, mandatory arbitration provision, and waiver of venue in online terms of use).

“one shotter” status, as opposed to the offeror’s “repeat player” position.¹⁶⁴ In this light, he placed the burden of “the duty to explain the relevance of the critical terms” on the offeror.¹⁶⁵ Undertaking an extended “assess[ment]” of the “attributes of the average internet user,”¹⁶⁶ the doctrinal landscape,¹⁶⁷ as well as of forms of online notification and assent,¹⁶⁸ the opinion considers both the transaction type and the nature of the parties in the specific circumstance of online contracting.¹⁶⁹ In doing so, the opinion presents online contracting by a consumer for a product as a special type of transaction, which prompts a particular interpretive posture by the judge.¹⁷⁰

A subsequent case the next year, *Salameno v. Gogo Inc.*,¹⁷¹ complicates this analysis by presenting another hybrid category similar to the “sophisticated internet user” invoked in *Fteja*. In *Salameno*, airline passengers using the Gogo in-flight wifi service challenged the enforceability of terms, which were communicated, as they were in *Berkson*, in the form of a so-called “sign-in-wrap agreement.”¹⁷² Though the facts in *Salameno* hew closely to those in *Berkson*,¹⁷³ Judge Weinstein distinguished the cases, emphasizing that the users in *Salameno* were “not unsophisticated lay internet users.”¹⁷⁴ Instead, holding the terms enforceable, the opinion characterized the *Salameno* plaintiffs as “[s]ophisticated business travelers who repeatedly purchased and used Gogo’s product.”¹⁷⁵ According to the opinion, these individuals “can be assumed to have been aware of the

164. *Id.* at 382–83 (citing Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–104 (1974)).

165. *Id.*

166. *Id.* at 377–83. In a fifty-four page opinion containing an involved overview of current literature on internet use, the court identifies the “lack of empirical evidence concerning actual notice” of “the average internet user.” *Id.* at 380.

167. *Id.* at 383–94.

168. *Id.* at 394–402.

169. *See id.* at 403–04 (“Proof of special know-how based on the background of the potential buyer or adequate warning of adverse terms by the design of the agreement page or pages should be required before adverse terms, such as compelled arbitration or forced venue, are enforced.”). Focusing on the category of “sign-in-wraps,” in which notice of terms occurs via the sign-in process to a site, *id.* at 389, the court presents a four-part inquiry to determine enforceability. *Id.* at 402. Criticizing the approach in *Berkson*, a federal district court in Massachusetts declined to follow the likely “fact intensive analysis,” hewing instead to a formal test of reasonable notice. *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at *7 (D. Mass. July 11, 2016). In *Cullinane*, the court turned back to a general contract approach in which “enforceability turns more on customary and established principles of contract law,” *id.* at *6, defaulting to the undifferentiated take on arbitration discussed in Part II *supra*.

170. *See Berkson*, 97 F. Supp. 3d at 403–05 (contrasting the case with the “contract scenario in *Carnival Cruise*” and weighing the level of awareness of the terms of the deal of the particular consumer).

171. No. 16-CV-0487, 2016 WL 4005783, at *4 (E.D.N.Y. July 25, 2016).

172. *Id.*; *see also Berkson*, 97 F. Supp. 3d at 399–401.

173. *See* Erin Canino, Note, *The Electronic “Sign-in-Wrap” Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability*, 50 U.C. DAVIS L. REV. 535, 569 (2016) (“At first glance the *Salameno* case appears to mirror *Berkson* almost exactly . . .”).

174. *Salameno*, 2016 WL 4005783, at *6.

175. *Id.* at *1.

arbitration clause where they repeatedly ordered the service.”¹⁷⁶ Constructing a category of “practiced individuals,” the judge opined, “[i]n today’s technologically driven society, it is reasonable to charge experienced users . . . with knowledge of . . . how to access the terms of use.”¹⁷⁷

Salameno thus presents another fragmented categorization, a consumer deemed “sophisticated business traveler.” As with *Berkson*, this approach demonstrates the inclination by judges to account, at times, for subtleties of relational and transactional distinctions. A somewhat paradoxical result of this sensitivity to context, it proves hard for the court to maintain stable boundaries between party types in their doctrinal elaborations, pushing doctrine toward a generalizing tendency. The blurring of party and transaction types thereby complicates the project of recognizing distinct transactional spheres that a fragmented contract law approach envisions—and on which it is premised.

The common designation of attorneys as sophisticated parties serves as one more illustration of the hybridity and fluidity of categorization that threatens fragmented regimes because creep pushes towards generalization. Courts have deemed lawyers sophisticated parties even in cases in which they function as consumers acceding to non-negotiable online terms.¹⁷⁸ In other contexts, courts have taken a more granular view to consider a lawyer’s expertise when determining whether he qualifies as a “sophisticated” party.¹⁷⁹ Courts have also invoked the lawyer versus non-lawyer distinction as a benchmark to establish a non-sophisticated party transaction. Thus, for example, in *Meyer v. Kalanick* in 2016,¹⁸⁰ a federal district court drew on the distinction between lawyer and consumer to hold that a user of Uber’s smartphone application was not bound by terms embedded in a hyperlink under the registration button. In doing so, the court characterized the plaintiff as a “reasonable (non-lawyer) smartphone user” who could thus not be assumed to be “aware of the likely contents of ‘Terms of Service.’”¹⁸¹ Although the district court’s holding in *Meyer v. Kalanick* was vacated on appeal,¹⁸² the Second Circuit’s application of general contract principles reflects the impact of creep. Following “precedent and basic principles of contract law,” the Court of Appeals identified the need to “consider the perspective of a reasonably prudent smartphone user” in determining the conspicuousness of notice of terms of service.¹⁸³ Thus, reacting in part to the confusion hybrid party types can sow, the Court of Appeals embraced a generalizing doctrine.

176. *Id.*

177. *Id.* at *6.

178. See Miller, *Formalism*, *supra* note 1, at 513–14 (discussing *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007)).

179. See *Reilley v. Richards*, 632 N.E.2d 507, 509 (Ohio 1994) (holding that a lawyer with no knowledge of real estate law could not be treated as a sophisticated party).

180. 200 F. Supp. 3d 408 (S.D.N.Y. 2016), *vacated sub nom.* *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

181. *Id.* at 421.

182. See *Meyer*, 868 F.3d at 66.

183. *Id.* at 77.

As we can see, both generalizing tendencies and the instinct to context sensitivity can move doctrine around among different transaction types, with an attendant risk that law gets applied in potentially ill-fitting ways. The harmonizer should already be considering the differential impact of one law on different kinds of transactions and contracts among those with different relative party statuses. But those who want clean, cordoned off, and fragmented law too often fail to see how hybrid categories of contract on the margins can be sluiceways of creep, allowing law designed for one context with one values matrix to drift into an area of law with another.

B. PORTABILITY

Scholars have long acknowledged that the significance of contract terms can depend in part on the transactional context in which the terms are read.¹⁸⁴ However, features of contract drafting and enabling technologies potentially liberate terms from their defining contexts, serving as another mechanism of creep. Indeed, scholars have begun to appreciate a feature of contract drafting that facilitates context independence of certain terms. To wit, the use of self-contained terms or sections that are portable among different transactional contexts—a process made even more common through the use of modern technologies—makes these provisions less susceptible to the complications of context-dependent meaning.¹⁸⁵ Technologies of both research and drafting—freed from the contextual trappings of physical documents, treatises, or libraries—enable judges, clerks, and lawyers to find, borrow, and import terms independent of contextual markers.

Modular design—by which a system is segmented into components “in which communications (or other interdependencies) are intense within the module but sparse and standardized across” them—enables the management of complexity.¹⁸⁶ It does so by reducing the degree to which a part interacts with the whole.¹⁸⁷ Typically, contract drafting reflects some degree of modularity. Contracts are often constituted by relatively self-contained sections that can be revised, cut, or pasted without necessitating the rewriting of the entire document. A high degree of modularity can promote efficient drafting, negotiation, and compliance and can reduce contracting and reading costs.¹⁸⁸ As a result, modular design has been identified as a promising technique for contract innovation.¹⁸⁹ At

184. See Gilson et al., *supra* note 2, at 23 (identifying appropriate interpretive regimes based on a “typology of transactional settings”).

185. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1207 (2006) (“As long as the interface conditions are obeyed, one need not worry further about the context.”).

186. *Id.* at 1176, 1180.

187. See *id.* at 1180–86.

188. See *id.* at 1184–85; see also Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403, 1420 (2016) (discussing the efficiencies of modular design through the use of ancillary contracts in complex deals).

189. See, e.g., George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177, 202–06 (2013) (advocating modularity as an innovative contract design).

the same time, the increased context independence and portability of terms among transaction types enabled by more modular design also operates as a mechanism for creep. Modularity seems to invite and enable courts to treat like terms alike even when different transaction types might be better served by differential interpretation and application.

In particular, Henry Smith identifies as modular those provisions “typically . . . found at the end of a contract” that address common issues “like assignment and delegation, successors and assigns, third-party beneficiaries, governing law and forum selection, waiver of jury trial, arbitration, remedies, indemnities, force majeure, transaction costs, confidentiality, announcements and notices, amendment and waiver, severability, merger, and captions.”¹⁹⁰ Encapsulated in separate sections, these conventional contractual provisions prove particularly portable across transaction types.¹⁹¹

The portability of these boilerplate provisions is apparent in their ubiquity.¹⁹² Yet, notwithstanding the way they can be incorporated easily into a range of transactions, as discussed in Part II, ancillary contract terms, such as forum selection and arbitration provisions, do not have the same valence across contract types. Instead, empirical and behavioral studies suggest that the extent to which these ancillary terms reflect parties’ understanding, or are at all visible to parties, differs depending on the party and transaction type.¹⁹³ Thus, for example, forum selection, arbitration, governing law, waiver of jury trial, and similar ancillary provisions that modify the framework for litigation and redress prove less salient for most individual consumers than they do for drafting companies or multinational corporate entities.¹⁹⁴ This suggests that, notwithstanding the efficiency of

190. Smith, *supra* note 185, at 1191. Smith views these “boilerplate” terms as operating between the poles of bespoke contract terms and standardized property rights, as relatively discrete context-independent communication. *See id.* at 1176.

191. *See id.* at 1197 (noting that commonplace recurring provisions are often “hived off into sections,” facilitating their portability and migration to different contexts). As Smith suggests using the example of a governing law provision:

A boilerplate provision about governing law can be developed by those versed in choice of law without their having to know in detail about where the boilerplate provision will wind up—and without users of the boilerplate provision having to think through all of the possible scenarios involving choice of law.

Id. at 1188.

192. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607 (2010) (“Studies find mandatory arbitration clauses and class arbitration waivers in over three-quarters of consumer agreements.”); Sternlight, *Creeping*, *supra* note 58, at 1639–41 (acknowledging the prevalence of mandatory arbitration provisions); *cf.* Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955 (2014) (explaining the slower-than-expected adoption of favorable-to-drafter arbitration provisions in standard consumer contracts in part as a result of the “stickiness” of standard form contracts).

193. *See, e.g.*, Eisenberg, *supra* note 63, at 258; Korobkin, *supra* note 64, at 1225–27; *see also* Sternlight, *Creeping*, *supra* note 58, at 1648 (“Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.”).

194. *See* Korobkin, *supra* note 64, at 1230–31; *see supra* notes 63–64 and accompanying text.

portability across different transactions, it would be too quick for interpreters to assume the provisions should mean the same thing across transaction type. Yet portability encourages this very effect.

A fractured theory of contracts acknowledges that arbitration provisions in a negotiated agreement between transnational corporations, for example, reflect qualitatively different processes of assessment and agreement than the same provision in a consumer contract.¹⁹⁵ However, lacking contextual markers, or specific “interfaces” that demonstrate a transaction-specific operation,¹⁹⁶ highly modular provisions are often deemed to operate consistently across transactional contexts.¹⁹⁷ The standardized treatment by courts of such ancillary provisions—once deemed presumptively unenforceable as against public policy in certain contexts¹⁹⁸—demonstrates the challenge they pose for a fragmented framework of contract. The presence of similar terms, such as a forum selection clause, in distinct transactional contexts enables the possibility of creep, or the application of the same interpretive or doctrinal framework across transaction types.

Thus, the relatively modular nature of contractual drafting and the related portability of terms—increasingly facilitated by new technologies that enable quick drafting without a subtle sense of context sensitivity—operate to create conditions for creep. Although a well-differentiated fragmented contract law would carefully train drafters to develop transaction-type-specific operation of terms, widespread modularity and portability will still create some difficulty for courts as they face identical terms in different transactional environments. Moreover, technologies of legal research, like those enabling a wide search for models, allow contextual frames to recede, further inviting courts, consciously or unknowingly, to appropriate doctrinal approaches from different transactional contexts. In short, contract drafting processes lend themselves to the implementation of modular design, and thus the creation of relatively context-independent provisions, which in turn enable creep.

195. See, e.g., Gilson et al., *supra* note 2, at 76 (noting that “commercial and consumer contracts . . . should be interpreted differently” when considering interpretive approaches to ancillary terms).

196. See Smith, *supra* note 185, at 1207 (“As long as the interface conditions are obeyed, one need not worry further about the context.”). These interfaces could take the form of doctrinal tracks but, as discussed above, in contract law, those tracks may prove unstable. Interfaces could also conceivably be manifested as a term. See Klass, *supra* note 35, at 17–18 (discussing the benefits of a “short canonical form” indicating the parties’ intent to form an integrated agreement, for example, along the lines of other canonical formulas such as “F.O.B.” or “as is”). Depending on the particularities of both the text and context, these terms might themselves be susceptible to migration across transaction types and thus creep, as discussed in this Part.

197. See *supra* Part II.

198. For the presumption against forum selection provisions, see *Carbon Black Exp., Inc. v. The Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959), which discusses the “universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.” Prior to the enactment of the Federal Arbitration Act (FAA) in 1925, arbitration provisions had limited impact in practice. See 9 U.S.C. § 1 (2012). At the time of enactment, the effective unenforceability of arbitration provisions in transactions between merchants under the common law was considered anachronistic. See S. REP. NO. 68-536, at 2 (1924).

C. ANALOGICAL REASONING

In addition to the difficulty of maintaining stable categories of transaction types and the relatively modular structure of contract drafting, the predominant mode of legal reasoning by courts—the use of analogical reasoning—operates as another technology of creep. Discussing the challenges of legal classification in a now canonical article, Arthur Leff noted that because “there is no such thing as a thoroughly homogenous class . . . [a]ll classification decisions are . . . choices among metaphors.”¹⁹⁹ As a fundamental feature of common law analysis, the process of reasoning by analogy and the mobilization of metaphor in classifying transactions also contributes to creep. As Leff identified, one danger of classification as an intellectual tool is the “problem of artificial class homogenization” in which certain functional differences are ignored.²⁰⁰ At the same time, the heterogeneity of any class demonstrates the potential porousness of boundaries. Indeed, the recognition that courts reason analogically across transaction types is at the heart of Scott and Schwartz’s line-drawing project and insight that different transaction types should precipitate distinct doctrinal regimes.

As an illustration, the requirement that a party be notified of the existence of a term has become a doctrinal threshold in the enforcement of common ancillary provisions, such as forum selection and arbitration clauses.²⁰¹ Yet this notice requirement can be understood to have crept from sophisticated party to consumer contexts not only through a mixing and hybridizing of transaction type as we saw above, but also through metaphor and analogical reasoning.

Consider a particularly developed explanatory metaphor that courts have been using to reinforce the importance of notice for ancillary terms.²⁰² The metaphor first arose in a case about a transaction involving two business entities engaged in repeated exchanges. Verio, a website development firm, submitted requests for domain name registrant data to Register.com, an internet domain name registrar.²⁰³ Each purchase of data was followed by a notice of “terms of use” relayed to the purchaser via email.²⁰⁴ Assessing the second transaction in the series of exchanges in light of a claim that Verio violated the terms, Second Circuit Court of Appeals Judge Pierre Leval rejected the contention that Verio had failed to receive notice of terms so as to be bound.²⁰⁵ To explain the point, he offered the following analogy:

199. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132–33 (1970).

200. *Id.* at 136.

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

202. For an analysis of the significance of party types in light of the party’s status as a “repeat player” or “one-shotter,” see Galanter, *supra* note 164, at 97–104.

203. *Register.com v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004).

204. *Id.* at 396.

205. *Id.* at 402. For a discussion of this case in connection with courts’ invocation of a narrative of agreement, which muddies the distinction between the operation of different types of terms in different contexts, see Tal Kastner, *How ‘Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts*, 7 DREXEL L. REV. 67, 104–10 (2014).

The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says “Apples—50 cents apiece.” D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D’s view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.²⁰⁶

Judge Leval explains the legal outcome in terms of “standard contract doctrine:”²⁰⁷ “when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms.”²⁰⁸ Thus, if “P sues D in contract for the price of the apples taken,” notwithstanding the possibility of prevailing on the initial apple, D’s defense that he did not see the notice of the price until after taking the apple the first time fails for the second apple.²⁰⁹

In the context of a merchant-to-merchant transaction, the Second Circuit asserted that “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”²¹⁰ The court rejected the purchaser’s argument that an online agreement must require an affirmative indication of assent to terms, recognizing the business-to-business context of the transaction.²¹¹

Yet this doctrinal pronouncement, along with the metaphor, creeps by way of analogy into the realm of consumer contracting. In contrast to the transaction addressed by Judge Leval involving two merchants, the metaphor of the sign above the apple stand grounds a later district court’s explanation of why a consumer had adequate notice of terms of use.²¹² Analogizing the apple stand to a case involving a forum selection clause embedded in Facebook’s Terms of Use,²¹³ a district court expanded the metaphor so as to blur the distinction in transaction type. Explaining its holding enforcing a forum selection clause, the district court compared “[t]he situation . . . to one in which Facebook maintains a roadside fruit stand displaying bins of apples. For purposes of this case, suppose that above the bins of apples are signs that say, ‘By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign.’”²¹⁴ Thus, the expanded analogy of the fruit stand erases the distinction

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

207. *Id.* at 403.

208. *Id.*

209. *Id.* at 401.

210. *Id.* at 403.

211. *Id.*

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

213. *Id.*

214. *Id.* (internal citations omitted).

between product terms in a merchant-to-merchant context and ancillary provisions in a consumer contract.²¹⁵ This case, *Fteja*, conjuring the category of sophisticated internet user, should be familiar by now: analogical reasoning works together with the fluidity of transaction types to facilitate creep there.

Indeed, the expanded analogy serves to underscore the doctrinal formality of the notice requirement in subsequent applications of the rule in the consumer context. In validating an arbitration clause in the Uber terms of use, one court reiterated the analogy, reinforcing the way creep works through analogical reasoning. The court explained in *Cullinane v. Uber Techs.*, “[i]n analyzing online agreements, the Second Circuit has used the analogy of a roadside fruit stand displaying bins of apples; these apples have a sign above them displaying the price of the apples for potential consumers.”²¹⁶ The court notes its agreement with the way this analogy has been “refined . . . further” to encompass the “terms of sales” on the back of the metaphoric sign.²¹⁷

Thus, as the metaphor evolves to include a back-of-the-sign notice of ancillary terms to a consumer in place of a pricing or product term in the context of a sophisticated party transaction, it demonstrates the problem of “artificial class homogenization” to which Leff referred.²¹⁸ As such, notwithstanding the contextual distinctions among the cases—*Verio* is business-to-business; *Fteja* is sophisticated-consumer-to-business; and *Cullinane* is a plain-vanilla consumer transaction—the doctrinal approach to notice resists cabining by transaction type in part because of the ineluctable appeal of the apple stand analogy. The tendency for creep to occur as a function of the migration of metaphor proves unsurprising, especially in a common law regime where reasoning by analogy is a foundational tool. But sometimes it is worth policing analogies—as Scott and Schwartz’s project in principle suggests we do—so deliberately fragmented regimes don’t get too quickly and inappropriately assimilated.

Creep happens through at least the three mechanisms we identify here: the fluidity of party status and transaction type; the portability of contract provisions; and the analogies that migrate among cases of different transaction types. Moreover, there are no doubt ways these mechanisms work not only alone but also in tandem with one another, colluding to make creep even more likely. We conclude in Part IV by drawing out a few lessons from contract creep. We do not think there are perfect solutions to some of the complexities of creep that fragmentation invites. However, more mindfulness and more deliberate effort to take stock of the dynamics of creep is warranted.

215. See *supra* Part II for scholars’ identification of the ways ancillary terms differ from price and product terms and ways in which the individual consumer’s ability to assess such terms may differ from that of a merchant.

216. *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at *7 (D. Mass. July 11, 2016) (emphasis added) (citing *Register.com*, 356 F.3d at 401).

217. *Id.* (citing *Fteja*, 841 F. Supp. at 839–40).

218. Leff, *supra* note 199, at 136.

IV. LESSONS FROM CREEP

Having now identified a phenomenon that many scholars who promote fragmentation avoid confronting—and having observed a few of the mechanisms in the common law of contract and contract drafting practices that contribute to creep—we conclude by summarizing our analysis and outlining its relevance for lawmakers, contract lawyers, and theorists.

A. RECOGNIZING CREEP AND ITS COSTS

Appreciating the porousness of transaction types and the way doctrines creep among them enables us to intervene in a robust conversation among contract theorists who wish to sustain plural objectives with plural contract law regimes. Our caution here that these regimes do not necessarily stay cordoned off from one another commits us neither to advocate for a unitary contract theory nor to reject the project of fragmentation. Indeed, we cannot contest that terms are agreed to differently in different transactional contexts, which may justify distinct doctrinal approaches and default rules. The tracked application of the parol evidence rule implicitly demonstrates courts' intuitions concerning the need for a fragmented approach. More explicitly, scholars emphasize the need for a fragmented regime, whether in isolating a "sophisticated party" contract law or in a pursuit of proliferations of categories of contract types. Both legal thinkers and courts thereby recognize that distinctions among parties' sophistication, capacities, resources, and bargaining power impact and should impact the shaping of default rules and interpretive approaches.

Yet the likelihood of creep directly implicates the project of creating bespoke doctrine for different transaction types. A rich field of study is dedicated to the development of an optimal merchant law. For example, Schwartz and Scott, Goldberg, and others²¹⁹ embrace this project, grounded in the notion that an efficient framework—one attuned to the dynamic of transactions among "sophisticated economic actors"²²⁰—should apply to sophisticated parties. Our work here has shown, however, that this project at least must take more seriously the question of how to delineate the boundaries of the legal regime because there is a high likelihood that the optimal merchant law will bleed out and affect consumer transactions. To develop a program that defaults toward party preferences—a merchant law to "recover and then enforce the parties' apparent intentions"²²¹—scholars must give further thought to the ways in which transaction-type boundaries can be stabilized and better delimited.

Creep also poses a real challenge to the project of increasing the choices among distinct transactional realms. The goal of realizing autonomy through a proliferation of contract types that Dagan and Heller envision necessitates a

219. See GOLDBERG, *supra* note 22, at 1; Schwartz & Scott, *supra* note 2, at 544–45.

220. Schwartz & Scott, *supra* note 2, at 544–45.

221. See Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 3 (2017).

mitigation plan for creep. The cultivation of wide-ranging contract types to enable freedom of contract requires further study of the mechanisms that disrupt transaction-type boundaries. Most basically, creep introduces a cost that must be reckoned with in advancing a multiplicity of contract types. In addition, without addressing the operation of creep, projects such as Dagan and Heller's may be doomed to undermine their own agenda because of creep's power and robustness.

In connection with other areas of law, such as property, scholars have identified "a limited number of standardized forms" of ownership.²²² In doing so, scholars distinguish property law from the realm of contract in which "there is a potentially infinite range of promises that the law will honor."²²³ The phenomenon of creep suggests that further consideration is warranted as to whether there may be an "optimal standardization" of contract rights—and with it forms of contract.²²⁴ With a shorter list, it might be easier to manage creep within the contract system. At the very least, creep introduces a cost that must be weighed in the calculus.

Even if theory moves away from the proliferation of transaction type urged by the Dagan and Heller model, but tries instead to stick with just the sophisticated party category, there remains yet another challenge for theory. In defending the attention they give to a specialized regime for sophisticated parties, Schwartz and Scott assert that "as a descriptive matter, most commercial contracts affect only the parties to them."²²⁵ Yet in light of what we now know about creep, the doctrines we make for sophisticated parties may still creep away from them and affect consumers, too. As such, a tracked approach to contract doctrine may need to reconsider disregarding interests of fairness and distribution in the development of a sophisticated party contract regime that can leak elsewhere.²²⁶

The more recent work of Ronald Gilson, Charles Sabel, and Robert Scott acknowledges that "[t]he range of options for parties and generalist courts is much more diverse and variegated than the choice between *ex ante* party autonomy and *ex post* adjudication."²²⁷ This work appreciates that complexity rather than prefab tracking is likely essential to getting interpretive questions right. As their analysis suggests, and our case studies do not contradict, "generalist judges applying general, mandatory legal doctrine cannot effectively determine the environments in which context matters."²²⁸ Yet, to the extent that their analysis still requires bespoke legal doctrine to guide judges, our case studies

222. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L. J.* 1, 8 (2000).

223. *Id.* at 3.

224. *Cf. id.* at 38–40 (discussing an optimal level of standardization in property rights); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 *J. LEGAL STUD.* 373, 380 (2002) ("[T]he utility of standard contractual terms and forms is evidently not frustrated by the continuing availability of an infinite variety of nonstandard contractual rights with unconventional and perhaps hard-to-measure characteristics.").

225. Schwartz & Scott, *supra* note 2, at 555.

226. *Cf. id.* at 545 (noting that requiring the law to "promote fairness in contracting" would "be troublesome for an efficiency approach that covered all contract types").

227. Gilson et al., *supra* note 2, at 23.

228. *Id.* at 32.

suggest that they should not be so sanguine that such a goal is attainable without creep—and without the costs of creep resulting from the imposition of ill-fitting law to some transaction types.

In short, the now widely shared insight that it would be desirable to have separate contract regimes for sophisticated parties on the one hand and consumers on the other has an Achilles heel. Contract law and contract theory to date have failed to examine with sufficient care the ways that different tracks and fragmented regimes are susceptible to interaction effects. To design a tracked system properly, theorists and courts must first acknowledge the porous and unstable nature of the tracks themselves, focusing as we have here on just how the lines get crossed. Creep—the migration of transaction-specific doctrine across transaction types—is a counterforce that will challenge efforts at fragmentation.

B. RISKS AND COSTS OF STANDARDIZATION AND PORTABILITY

Creep also complicates the existing cost–benefit analysis of modes of contract drafting and design. It is, in the final analysis, not just doctrine and theory that will have to contend with the risks and costs associated with creep but contract drafters and lawyers as well.

Drafters routinely employ standardized terms and relatively modular design. The benefits of standardization and modularity for contract design have long been recognized. For example, standardized terms impart value through learning benefits and related network effects.²²⁹ The learning benefits that result from standardization or common usage of terms include drafting efficiency, lawyers' and other professionals' familiarity with the terms, and less uncertainty about a term's meaning in light of judicial precedent.²³⁰ Network benefits emerge as more parties use the same term or product.²³¹ Like the use of a term over time, the widespread use of a term raises the quality and lowers the costs of legal and professional services, aids in the pricing of securities, and aids in the development of interpretive precedent.²³² In addition, modular design is a promising technique for contract innovation because innovators can develop and improve a provision without having to modify other terms.²³³ Innovations, or significant improvements to contracts beyond customization, can also be imported to other documents and become standardized themselves.²³⁴

The portability of terms may, however, lead to costs because of creep. As we explained in Part III, the relatively modular design of contract documents and the process of drafting by pasting or modifying precedent, which facilitated and is

229. See generally Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) (analyzing benefits that accrue as a result of standardization of terms). A classic example of a product with network benefits is the telephone.

230. *Id.* at 719–20.

231. *Id.* at 726.

232. *Id.*

233. Triantis, *supra* note 189, at 182.

234. *Id.* at 184.

facilitated by standardization of terms, contribute to the problem of doctrinal regimes being applied to transaction types for which they were not designed.

Furthering this process, the current technological environment supports the dissemination of terms. Internet technology has not only enabled broad sharing of terms, but has also “encouraged the recent formation of broadly constituted groups dedicated to setting contracting standards across, as well as within, industries.”²³⁵ Innovative deal structures will also draw on existing forms of both transacting and documentation. Word-search based technologies further invite importation of terms and doctrine from one context to another. Conditions are thus ripe for the migration of terms across transaction types, which itself is likely to lead to ever more creep. An analysis of the benefits of standardization and of the design of portable terms must therefore also weigh the risks and costs of doctrinal creep that they enable and cause.

Scholars have acknowledged some of the potential costs of standardization. For one, theorists have noted the “stickiness,” or tendency of standardized terms to resist change, as a potential obstacle to efficiency in contract drafting and innovation.²³⁶ Standardization has also been shown to lead at times to “rote usage,” or the loss of shared meaning through overuse, as well as “encrustation,” or the erosion of the intelligibility of a standard term as a result of the addition of legal jargon over time.²³⁷ However, work has yet to be done on how creep, and the way standardization and modularity enable it, compounds the risks posed by the phenomena of stickiness, rote usage, and encrustation.

One set of legal developments that has prompted a wealth of scholarly discussion²³⁸ illustrates the costs of creep in a way that has not yet been acknowledged directly. Specifically, the idiosyncratic—and by all accounts, mistaken—interpretation by courts of the meaning of a boilerplate provision in the sovereign debt context demonstrates the interplay of creep, portability, and standardization. In the past few years, courts in Brussels and New York repeatedly interpreted a ubiquitous provision, the *pari passu* clause, to provide special

235. *Id.* at 188.

236. See Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 651–52 (2006). Scholars have also identified the phenomenon of “stickiness” of default rules as a function of the difficulty of contracting around a term. See, e.g., Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2086 (2012). This type of stickiness is at play in the case study of *contra proferentem* discussed in Part II, in which sophisticated parties cannot necessarily easily contract out of the default rule.

237. Choi, Gulati & Scott, *supra* note 221, at 5.

238. The developments concerning the *pari passu* clause in sovereign debt have prompted a host of theoretical, empirical, and practical scholarship on contract design. See, e.g., MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2013); Lee C. Buchheit & G. Mitu Gulati, *Restructuring Sovereign Debt After NML v. Argentina*, 12 CAP. MKTS. L.J. 224, 224–38 (2017); Choi, Gulati & Scott, *supra* note 221, at 6; Stephen J. Choi, Mitu Gulati & Robert E. Scott, *Variation in Boilerplate: Rational Design or Random Mutation*, 20 AM. L. & ECON. REV. 1, 2 (2018); Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72, 72 (2013).

rights to holdout creditors of sovereign debt.²³⁹ They did so despite the fact that it was widely accepted that the clause had no operative meaning for sophisticated sovereign creditors.²⁴⁰ Indeed, prior to the decisions, the conventional wisdom among sophisticated investors was that their contracts did not give them a holdout right (to say nothing of the debt purchasers in the distressed secondary market).²⁴¹ The resulting costs of the mistaken interpretation—most notably, the triggering of the Republic of Argentina’s default on \$29 billion of debt²⁴²—resulted, in part, from the interplay between creep and standardized terms that migrated across transaction type.

The *pari passu* provision, after all, entered the sovereign debt contract by “migrat[ing] from cross-border corporate documents” and being “copied by . . . lawyers . . . who had not realized that such a clause was meaningless in the sovereign context.”²⁴³ The “black hole” of meaning that resulted from the inclusion of a standard provision provided the opportunity for exploitation by a “contractual arbitrageur.”²⁴⁴ Specifically, a holdout creditor took “advantage of a long-standing canon of contract construction,” the general contract presumption that all clauses have meaning.²⁴⁵ The creditor thereby leveraged and weaponized the possibilities for creep—a generalist contract doctrine in a particular transaction type—to invite an unintended interpretation. Thus, in addition to the danger of portability in its own right, the possibility of doctrinal creep exacerbates the risks of the relocation of standard terms.

Standardized terms in homogeneously sophisticated markets invite a particular doctrinal approach that recognizes the efficiency of communicating fixed and reliable meaning.²⁴⁶ In the case of *pari passu* in the sovereign debt context, however, courts implemented a generalist interpretive approach. Specifically, the

239. See Joint Appendix at A-1356, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105(L)) for an English translation of the Brussels case first interpreting the *pari passu* clause in a Peruvian sovereign debt contract. See also Choi, Gulati & Scott, *supra* note 238, at 6 n.11 (citing Joint Appendix, *supra*, at A-1356). For decisions affirming the same interpretation in a case against the Republic of Argentina, see *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013); *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012); *NML Capital, Ltd. v. Republic of Argentina*, No. 08-Civ.-6978(TPG), 2011 WL 9522565 (S.D.N.Y. Dec. 7, 2011). See generally GULATI & SCOTT, *supra* note 238.

240. For a discussion of the recent interpretation of the *pari passu* provision in connection with first debt issued by the Republic of Peru and then by the Republic of Argentina, see Choi, Gulati & Scott, *supra* note 221, at 18–24. See also GULATI & SCOTT, *supra* note 238, at 3, 51–52, 109–18 (discussing a lack of understanding of the meaning of the term by sovereign bond market participants).

241. See *id.*

242. Kathy Gilsinan, *65 Words Just Caused Argentina’s \$29-Billion Default*, ATLANTIC (July 31, 2014), <https://www.theatlantic.com/international/archive/2014/07/65-words-just-caused-argentinas-29-billion-default/375368/> [https://perma.cc/P6BN-PSWN].

243. GULATI & SCOTT, *supra* note 238, at 14 (citing Lee C. Buchheit, *Negative Pledge Clauses: The Games People Play*, 9 INT’L FIN. L. REV. 10, 10 (1990)); see also Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 875 (2004).

244. Choi et al., *supra* note 221, at 72.

245. GULATI & SCOTT, *supra* note 238, at 14.

246. See *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983) (explaining interpretive approach to “[b]oilerplate provisions,” in

courts treated the contract language as indicative of the intent of the particular parties thereto. In doing so, they failed to apply the parties' ex ante preferred interpretive framework, in which boilerplate is read to reflect the shared understanding of the market as a whole—another example of creep. Whereas the creep in this case may be viewed as one within the broad realm of sophisticated party transactions, it nonetheless illustrates the challenge of maintaining discrete tracks and bespoke doctrine, even when there is a significant degree of consensus in the markets and among scholars.

As the *pari passu* cases illustrate, even in distinctive transaction markets, generalist courts and sophisticated parties remain vulnerable to creep. In addition, theoretical models of sophisticated party contracting have suggested that parties will revise terms to correct for mistaken interpretations.²⁴⁷ However, the case study of *pari passu* presents an example of the slow workings of the market to correct the court error—a “systemic problem that caused substantial costs.”²⁴⁸ Evidence that the market may be slow to correct the mistake by courts as well as the identification of “black hole” terms in various standard markets,²⁴⁹ demonstrates further potential costs of creep. The risk of creep must therefore also be included in evaluating the costs and benefits of the use of standardized terms in contract design.

CONCLUSION

In Duncan Kennedy's famous article *Form and Substance in Private Law Adjudication*, he identified two central dynamic forces that he thought would always make claims on contract law and shape it: individualism and altruism.²⁵⁰ Although he argued that these are opposed to one another and have contradictory implications for regime design in contract law, he argued that people tend to be unable to rid themselves fully of either tendency. This leads to instability, indeterminacy, occasional incoherence, and tension within the law of contract. It may be that the urges of fragmentation and harmonization—like individualism and altruism—also form an ineluctable dialectic. Both forces have pull on us when we are faced with complexity. We all hold both instincts at once: we want both more specific contract types and more generality in our contract law at the same time. Creep may be the way we mediate between them, as we lay down tracks for particularized contexts, only to see law developed in one track find itself relevant and harmonized for another.

light of view that they are “not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture”).

247. See GULATI & SCOTT, *supra* note 238, at 5.

248. Choi, Gulati & Scott, *supra* note 221, at 2.

249. See *id.* at 71 (pointing to the “number of recent papers exploring similar problems in other standard markets”).

250. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

Yet for those who advocate for different forms of fragmentation and particularity in contract law, it seems high time to pay more careful attention to the way creep tends to leave specialized law susceptible to affecting law well outside it—and susceptible to being made impure from outside. Something less than purity might need to be the goal considering the reality of creep. That means lawmakers, lawyers, and theorists have to account for the risks and the costs of creep as they design their modalities of fragmentation in our increasingly complex economy. Further study will hopefully reveal how best to design regimes of contract that both have structural integrity and develop through analogy only when appropriate.