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Consumer Assent to Standard Form Contracts and the Voting Analogy

Wayne Barnes

Texas A&M University School of Law, wbarnes@law.tamu.edu

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CONSUMER ASSENT TO STANDARD FORM CONTRACTS AND THE VOTING ANALOGY

Wayne Barnes*

I.	INTRODUCTION	839
II.	STANDARD FORM CONTRACTS AND GOVERNING DOCTRINE	843
III.	ELECTIONS IN REPRESENTATIVE DEMOCRACY	850
IV.	THE ANALOGY BETWEEN FORM CONTRACT AND VOTING.....	860
	A. <i>The Nature of the Assent Granted</i>	860
	B. <i>The Binding Duration of the Assent</i>	866
	C. <i>Periodic Opportunities for New Manifestations of Assent</i>	869
V.	CONCLUSION	871

I. INTRODUCTION

Standard form contracts are part of the reality of modern commercial existence.¹ Businesses and merchants use these contracts as a matter of efficiency and risk-reduction, utilizing their superior bargaining power to impose the terms contained within on a “take it or leave it” basis to their customers.² Consumers accept these contracts for a number of reasons. They don’t want to take the time to read the form contract language because: they don’t think it will impact their individual circumstances, they don’t really understand the meaning of the contract clauses, they don’t think they could bargain with the merchant and successfully change the terms even if they did understand them, and they

* Professor, Texas Wesleyan University School of Law. I would like to thank Texas Wesleyan University School of Law for its generous research assistance provided for this Article. I would also like to thank my Texas Wesleyan colleagues for their input on this paper at an informal works-in-progress presentation on September 23, 2009, including Brian Holland, Wade Savoy, Maxine Harrington, Malinda Seymore, Huyen Pham, Michael Green, James McGrath, Mark Burge, Meg Penrose, Stephen Alton, and Tim Mulvaney. Thanks to Kate Echols for student research assistance. Finally, special thanks to Sheldon Stanton, University of Texas at Arlington, for his invaluable insights into principles of constitutional and republican democracy.

¹ W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971); see, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002) (citing John J.A. Burke, *Contracts as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000)); see also Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1188–89 (1983) (“Today, very likely the majority of signed documents are adhesive.”).

² See Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943); Rakoff, *supra* note 1, at 1177; Slawson, *supra* note 1, at 530.

trust (or simply hope) that the merchant will behave in a manner favorable to the consumer when circumstances arise to give the merchant an opportunity to enforce one-sided contract terms, because the merchant wishes to maintain a favorable reputation in the marketplace among current and future prospective customers.³

Whatever the reasons, the fact is that consumers regularly sign or otherwise manifest assent to standard form contracts. When they do so, however, they are usually only cognizant of a few of the terms of the contract — things like price, subject matter, and quantity.⁴ The remainder of the contract terms, buried in the “fine print” or “boilerplate” language, remain unknown to the consumer because he has not read those terms.⁵ This has caused concern and consternation among contracts scholars because the quintessential aspect of contractual obligations is supposed to be that they are bargained for, fully negotiated, and voluntarily undertaken through the process of mutual assent.⁶ Standard

³ Rakoff, *supra* note 1, at 1225–28; Slawson, *supra* note 1, at 530–31. As Hillman and Rachlinski point out:

Consumers also have good reason to believe that the standard terms are not something to worry about. Consumers recognize that boilerplate language is usually a matter of customary practice within an industry, rather than an attempt by a single business to exploit them. . . . Consumers may sign standard-form contracts without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.

Hillman & Rachlinski, *supra* note 1, at 446–47 (citing Burke, *supra* note 1, at 286–90).

⁴ Rakoff, *supra* note 1, at 1225–28.

⁵ *Id.*

⁶ The articles addressing standard form contracts are legion. See Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 228 n.1 (2007) (citing Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917)); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); John D. Calamari, *Duty to Read — A Changing Concept*, 43 FORDHAM L. REV. 341 (1974); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); Hillman & Rachlinski, *supra* note 1; Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Karl Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939); Arthur Allen Leff, *Unconscionability and the Code — The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263 (1993); John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1981); John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) [hereinafter *Standard Form Contracts*]; James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997);

form contracting cuts against this paradigmatic conception of the contracting process, since the consumer will not have negotiated, nor even typically be aware of, many of the contract terms which he assents to by signing the contract (or clicking his assent online when prompted to do so).⁷ Because many of the terms were not actually known to the consumer at the time he gave his assent to the contract, it may be a surprise to him later when such an unknown term is enforced. An arbitration clause,⁸ or a clause limiting the merchant's liability in damages,⁹ are two recurring examples. Nevertheless, contract doctrine posits that the consumer had a theoretical duty to read the contract that he signed, and therefore it is not an excuse that he did not realize the contract he signed contained the unfavorable term. He is bound.¹⁰

The plight of the consumer being surprised by such unknown terms in form contracts has caused a great deal of academic discourse, much of which argues for some type of ameliorative relief to the consumer in this scenario.¹¹ And, in fact, consumers do have some limited protections from particularly egregious contract terms, the prime example of which is the doctrine of unconscionability.¹² But, for the most part, there is much angst caused by the consumer's required adherence to such terms which were completely unknown to him at the time the form contract was signed.¹³ There is among many a sense in which justice and principles of autonomy are not quite served by completely binding consumers to unexpected terms in the fine print of the standard form contracts that they sign or assent to, since they did not exactly "agree" to those terms in a classic, contractual sense. But, the perfect solution does not yet appear to have emerged from the academic debate. If it has, it does not appear to have been adopted by any courts or legislatures in any meaningful manner.

The point of this Article is not formulation of another proposal for a fairer means of binding consumers to the terms in the standard form contracts that they sign.¹⁴ For purposes of this Article, I will assume (as I must) that the

⁷ Rakoff, *supra* note 1, at 1180.

⁸ Agreements to arbitrate are generally enforceable under either the federal or applicable state statutory provisions. See Eleanor L. Grossman et. al., 4 AM. JUR. 2D, *Alternative Dispute Resolution* § 88 (2009) (citing *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. of America, Division 85 v. Pittsburgh Rys. Co.*, 142 A.2d 734 (Pa. 1958)).

⁹ See, e.g., U.C.C. § 2-719 (2004).

¹⁰ Rakoff, *supra* note 1, at 1185.

¹¹ See *supra* note 6.

¹² See U.C.C. § 2-302 (2004); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979); see generally Leff, *supra* note 6.

¹³ Barnett, *supra* note 6, at 627. ("[C]ontract theorists are nothing if not suspicious of [form contracts], having long ago dubbed them pejoratively 'contracts of adhesion.' Indeed, I would wager that a plurality of contracts teachers would favor a judicial refusal to enforce form contracts altogether — or could not explain exactly why they would reject such a suggestion.")

¹⁴ I have already joined that chorus once before. See Barnes, *supra* note 6.

duty to read is alive and well, and that its death is not imminent.¹⁵ Rather, what I seek to do in this Article is compare the process of a consumer signing a standard form contract to another type of familiar decision-making process, one that is very paramount to our society and yet one in which we permit and sanction somewhat similar types of unexpected outcomes not contemplated by the decision-maker at the time of the decision.

The process I am referring to is a citizen voting for a candidate for political office in our system of constitutional representative democracy. There are many parallels to be drawn and many of the same types of concerns that are addressed and vindicated in these two processes — of assenting to a standard form contract on the one hand, and voting for a political candidate for office on the other hand. Both are acts of consent, based on limited information and limited ability to accurately predict the future.¹⁶ Both could result in things happening which were unexpected at the time of the initial grant of consent.¹⁷ Nevertheless, with some notable exceptions — e.g., unconscionability in the contracts context, impeachment or recall in the voting context — both acts of consent are binding and not reversible for the duration of the commitment.¹⁸ This is because, in both contexts, there is a need for stability and continuity — in the contracts context, such stability is needed in order to ensure a reliable marketplace; whereas in the voting context, such stability is needed in order to ensure the continuity and ongoing orderly operation of the government.¹⁹ In both cases, the primary means by which the original consenting party may make his concerns felt and validated is by selecting a different person or company to consent with next time — in the case of contracting, this means the consumer choosing to buy goods or services from someone else in the market; whereas in the voting context, this means the voter voting the incumbent official out of office and instead voting a new candidate into office.²⁰

The thesis of the Article is that assenting to unknown forms in standard form contracts is legitimate and bears significant similarities to voting for a political candidate to office in a representative democratic assembly. Since we countenance unanticipated occurrences and outcomes in the aftermath of a voter selecting a candidate for office in an election, in the context of the foundational act of utmost importance to the ongoing survival and operation of our constitutional democracy, it is perhaps of no greater concern that we countenance unanticipated occurrences and outcomes in the aftermath of a consumer selecting a

¹⁵ I will thus avoid, tempting as it may be, making this another “The Death of . . .” article. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); Val D. Ricks, *The Death of Offers*, 79 *IND. L.J.* 667 (2004); Robert E. Scott, *The Death of Contract Law*, 54 *U. TORONTO L.J.* 369 (2004).

¹⁶ See *infra* Part IV.A.

¹⁷ See *id.*

¹⁸ See *infra* Part IV.B.

¹⁹ See *id.*

²⁰ See *infra* Part IV.C.

merchant to transact with by way of standard form contract. That is to say, if we tolerate the uncertainty of outcomes in the voting context, even though such uncertainty means, in retrospect, that the voter's consent was not as fully meaningful as it might otherwise have been had all the future outcomes been known and able to have been included in the calculus of the voter's decision, it is acceptable to tolerate it in the (arguably) less significant context of the individual consumer's assent to a transaction in the form of a standard form contract, which may nevertheless result in unexpected outcomes. Seen in this light, the contract doctrine of duty to read and binding nature of consent to form contracts becomes more palatable. Part II of this Article will discuss the background of use of standard form contracts in practice, and the contract doctrine applicable to their use. Part III will discuss the basic principles of representative democracy in a republican form of government based on constitutionalism, with specific focus on the duration of the elected representative's term of office and the reasons therefore. Part IV will compare the processes of a consumer transacting by standard form contract and a citizen voting for a political candidate in an election and show the similarities between these two processes as it relates to the meaningfulness of consent given and the enforceability of such consent notwithstanding unanticipated outcomes in the aftermath of the decision. Part V will offer a brief conclusion.

II. STANDARD FORM CONTRACTS AND GOVERNING DOCTRINE

The use of standard form contracts is ubiquitous and ever-present:

Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.²¹

²¹ Slawson, *supra* note 1, at 529. One of the first scholarly discussions of the use of form contracts described the phenomenon this way:

No longer do individuals bargain for this or that provision in the contract The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.

Meyerson, *supra* note 6, at 1264 (quoting OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND COMMERCIAL LAW* 18 (1937), reviewed in Karl Llewellyn, Book Review, 52 *HARV. L. REV.* 700 (1939)).

Nothing has changed since David Slawson made these observations nearly forty years ago. Instead, the use of boilerplate form contract language has proliferated even further,²² especially with the advent of online terms of use and license agreements, assented to by the web user simply “clicking” their consent or merely browsing the website.²³ In fact, Robert Hillman and Jeffrey Rachlinski have aptly observed that “[t]he Internet is turning the process of contracting on its head.”²⁴ Consumers are agreeing to form contracts in unprecedented numbers, all with a few easy clicks of the mouse.²⁵

Form contracts generally share certain attributes, whether they are entered into online or “offline.” In his seminal article on form contracts, Todd Rakoff identified seven essential attributes about form contracts and their use in transactions:

- (1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
- (2) The form has been drafted by, or on behalf of, one party to the transaction.
- (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
- (4) The form is presented to the adhering party [i.e., the consumer] with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
- (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
- (6) The adhering party enters into few transactions of the type represented by the form — few, at least, in comparison with the drafting party.

²² Korobkin, *supra* note 6, at 1203.

²³ Hillman & Rachlinski, *supra* note 1, at 431.

²⁴ *Id.* at 429.

²⁵ Barnes, *supra* note 6, at 229.

(7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.²⁶

Merchants use standard form contracts for a number of reasons, including the reduction of risk and the increase in efficiency and reduction in costs achieved by not having to individually negotiate each individual contract.²⁷ Moreover, merchants are well aware that they will probably not lose many customers by using such forms, both because the typical consumer won't appreciate the risk of agreeing to the term (if they even read it), and also because the typical consumer will assume (likely with a high degree of accuracy) that other merchants in the marketplace will impose similar terms in their form contracts.²⁸ Consumers thus perceive the following about form contracts: (1) they can't negotiate for different terms, (2) the contingencies addressed by the terms will probably not occur, (3) consumers don't typically do any shopping or comparisons of any terms other than key terms like price, (4) they can ignore the technical terms and simply rely instead on the goodwill and reputation of the merchant to "do the right thing," notwithstanding a formal legal right to later enforce a one-sided term.²⁹ Thus, that consumers do not typically even bother reading form contracts is almost regarded as an axiom.³⁰

The use of standard form contracts represents a departure from the paradigmatic contracting process between two parties actively negotiating and bargaining over all terms and aspects of the agreement.³¹ That is, "[d]eeply embedded within the law of contracts, viewed as private law, lies the image of individuals meeting in the marketplace"³² The usage of form contracts has therefore challenged the law of contracts and mutual assent, since this active negotiation doesn't occur. This is reflected in the comments to Restatement section 211 regarding form contracts:

²⁶ Rakoff, *supra* note 1, at 1177 (footnote omitted).

²⁷ See Kessler, *supra* note 2, at 631–32; Slawson, *supra* note 1, at 530–31.

²⁸ Slawson, *supra* note 1, at 531.

²⁹ Rakoff, *supra* note 1, at 1225–28.

³⁰ See *id.* at 1179 (citing P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 731 (1979); K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 n.338 (1960); I. MACNEIL, *CONTRACTS* 445 (2d ed. 1978); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 *CORNELL L. REV.* 1, 13 (1981); Arthur Allen Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition*, 31 *U. PITT. L. REV.* 349, 349 (1970); K.N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 *AM. ECON. REV.* 665, 673 (1925); Arnold Louis Rotkin, *Standard Forms: Legal Documents in Search of an Appropriate Body of Law*, 1977 *ARIZ. ST. L.J.* 599, 603 (1977); *Standard Form Contracts*, *supra* note 6; Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 *WIS. L. REV.* 400, 425–26 (1973).

³¹ Slawson, *supra* note 1, at 529 ("The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.").

³² Rakoff, *supra* note 1, at 1216.

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms.³³

Thus, most of the terms are contained in boilerplate language which is not discussed or read by the consumer, let alone actively negotiated.

Nevertheless, standard form contracts *are* contracts, and contracts are supposed to be formed by assent.³⁴ As Michael Meyerson has observed, "Standard form contracts have been in use for over two centuries, and the question of the proper construction of these contracts has haunted contract law ever since."³⁵ One of the first scholarly attempts to articulate a theory of consumer assent to standard form contracts was posited by Karl Llewellyn:

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.³⁶

This formulation recognizes the commercial reality that, by signing the form contract, the consumer is essentially trusting the merchant as to the non-

³³ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979).

³⁴ *See id.* § 17(1) ("...[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

³⁵ Meyerson, *supra* note 6, at 1263. Meyerson notes that the first standard form contracts were used in the late 1700s for marine insurance contracts. *Id.* at 1263-64 (citing OTTO PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW 11 (1937), reviewed in Karl Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939)).

³⁶ KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

negotiated provisions of the contract.³⁷ As was colorfully described by Robert Braucher: “We all know that if you have a page of print, whether it’s large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion’s mouth and hope it will be a friendly lion”³⁸

Llewellyn’s description of the law of assent to standard form contracts is a fairly accurate articulation of the state of the law today. Under the “duty to read” rule, the consumer who signs a standard form contract is taken to have assented to it and become bound by its terms.³⁹ That is, “[O]ne having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature.”⁴⁰ And further, as Rakoff correctly noted, “[I]t is legally irrelevant whether the [consumer] actually read the contents of the document, or understood them, or subjectively assented to them.”⁴¹

There are few exceptions to the rule that a consumer is bound to the terms of a form contract that he signs.⁴² Llewellyn’s formulation recognized that the consumer should not be bound by any “unreasonable” or “indecent” terms.⁴³ The primary doctrine which has come to be utilized to vindicate Llewellyn’s concern for such terms is the unconscionability doctrine. Unconscionability has been defined as “that which ‘affronts the sense of decency;’” another definition provides that it is that which lies “outside the limits of what is reasonable or acceptable: shockingly unfair, harsh, or unjust.”⁴⁴ Under various formulations of the doctrine, the rule is that upon a showing of unconscionability of the contract, the court may simply deny enforcement — effectively discharging the consumer from his contractual obligations arising from the form

³⁷ Barnes, *supra* note 6, at 240–41 (citing Rakoff, *supra* note 1, at 1200).

³⁸ Robert Braucher, *The American Law Institute Forty-Seventh Annual Meeting*, 47 A.L.I. PROC. 525 (1970).

³⁹ JOSEPH PERILLO, 7 CORBIN ON CONTRACTS § 29.8, at 402 (rev. ed. 2002).

⁴⁰ *Id.* at 402–03 (quoting *Rossi v. Douglas*, 100 A.2d 3, 7 (Md. 1953)); see also Rakoff, *supra* note 1, at 1185 (“The adherent’s signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract.”).

⁴¹ Rakoff, *supra* note 1, at 1185. Rakoff also stated, consistent with Llewellyn’s formulation, that “the adherent’s assent covers all the terms of the document, and not just the custom-tailored ones’ or the ones that have been discussed.” *Id.*

⁴² *Id.* (“Exceptions to the foregoing principles are narrow. In particular, failure of the drafting party to point out or explain the form terms does not constitute an excuse. Instead, in the absence of extraordinary circumstances, the adherent can establish an excuse only by showing affirmative participation by the drafting party in causing misunderstanding.”).

⁴³ LLEWELLYN, *supra* note 36, at 370.

⁴⁴ PERILLO, *supra* note 39, at § 9.40, p. 372–73 (quoting *Gimbel Bros. v. Swift*, 62 Misc. 2d 156, 307 N.Y.S.2d 952 (N.Y. Civ. Ct. 1970); WEBSTER’S DICTIONARY UNABRIDGED (3d ed. 1996)).

contract.⁴⁵ Unconscionability, however, is rarely successful as a remedy,⁴⁶ and is only applicable when the contract is “extraordinarily unfair.”⁴⁷

Therefore, the vast majority of the time, the consumer will be bound by the terms of the standard form contract, with no legal means to avoid its obligations. This is obviously true even if, as will often be the case, the consumer is later disappointed by the revelation of an unfavorable term and its application to the parties to the contract. So, for instance, suppose the typical scenario of a consumer’s purchase of a good from a seller. The sale is consummated by, among other things, the consumer’s signature (or clicking online) indicating assent to the terms of the seller’s standard form contract. The consumer assumed at the time that the seller stood behind the good, as of course on some level the seller presumably does. The consumer did not read the form, besides noting that it contained the correct description of the good purchased, and the correct price agreed to be paid. The consumer was unaware, therefore, that the contract contained an arbitration clause, requiring the consumer to arbitrate any claims arising from problems with the good. When a problem arises and the consumer wishes to sue, he is disappointed when confronted with the unexpected reality — the arbitration clause. However, he is bound nevertheless, notwithstanding his disappointed expectations.

Contract law, and the duty to read, arguably compel this result. The reason, at bottom, is the need for stability in the marketplace and enforceability of such contracts. The rationale is that if the duty to read law was not applicable, merchants could not count on the enforceability of the form contracts signed by their customers, because they could too easily complain that they hadn’t read

⁴⁵ See, e.g., U.C.C. § 2-302 (2004); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”). Technically, unconscionability has been conceptualized as two distinct inquiries: (1) procedural unconscionability and (2) substantive unconscionability. Leff, *supra* note 6, at 487. Procedural unconscionability is concerned with fairness of the bargaining process — i.e., the unequal bargaining power between the parties and the fact that the contract contains boilerplate and is thus hard to access during the contracting process. Hillman & Rachlinski, *supra* note 1, at 456–57. Substantive unconscionability is concerned not with the process, but rather the content of the deal. *Id.* Thus, excludable terms include those which “are immoral, conflict with public policy, deny a party substantially what she bargained for, or have no reasonable purpose in the trade.” *Id.* (citing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 138 (1997)).

⁴⁶ See generally Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006) (providing empirical data on rates of success of unconscionability claims).

⁴⁷ Meyerson, *supra* note 6, at 1286 (citing Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1337 (1982)); see also Barnes, *supra* note 6, at 248 (“... [S]hort of outright oppression or conscience-shocking terms, courts have been much less predictable in using unconscionability as a tool for policing terms to which consumers did not clearly assent and which are otherwise unfair or extremely unfavorable.” (citing Hillman & Rachlinski, *supra* note 1, at 457–58)).

or understood the fine print in the contract; and the resultant effect would be that commercial activity in the marketplace would effectively be paralyzed.⁴⁸ Therefore, reasons of stability and predictability dictate that the consumer is bound to the contract for its terms and duration.

Of course, the same marketplace that demands that consumers' standard form contracts remain enforceable notwithstanding disappointed expectations, also gives consumers a remedy of a different sort — namely, the marketplace itself. That is, a consumer who is not happy with the outcome of his dealings with a particular merchant can always exercise his autonomous ability to choose to transact with a different merchant — perhaps a competitor — the next time the consumer has need for the same or similar goods or services.⁴⁹ This ability, though short of a legal means to avoid obligations under the unfavorable contract, nevertheless gives the consumer options to vindicate his expectations and demands in the marketplace.

Notwithstanding this legal paradigm for the enforceability of standard form contracts, there have been scores of protests within the scholarly debate.⁵⁰ For purposes of the present analysis, three examples will suffice. Arthur Leff suggested that a legitimate possibility in the development of form contract doctrine was that all terms that are not read should simply not be enforced, since they were neither bargained for nor consented to.⁵¹ Todd Rakoff referred to such unread terms which had not been separately negotiated as “invisible terms” (as opposed to the actively negotiated terms which he coined “visible terms”). Rakoff proposed that all such “invisible terms” be presumptively unenforceable, with default rules filling in the gaps left.⁵² David Slawson cleverly proposed to treat form contracts similarly to legal regulations promulgated under principles of administrative law. That is, Slawson proposed that the actual negotiated terms of a form contract (likely to be things like price, quantity, etc.) be treated as the “law” or “statute” of the contract, so that the remaining unread terms “be scrutinized for consistency with the negotiated terms, in the fashion of administrative regulations which must be consistent with their enabling legislation.”⁵³

The debate therefore continues to rage in the contracts scholarship, and it is a commonplace among academics in this area that the doctrine governing

⁴⁸ PERILLO, *supra* note 39, at 403–04 (citing Stewart Macaulay, *Private Legislation and the Duty to Read — Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966)).

⁴⁹ See Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1237 (2006) (“Viewed now as part of a working social system, contracts are assumed to be the products of competition in the marketplace.”).

⁵⁰ See *supra* note 6.

⁵¹ Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 144 (1970); Leff, *supra* note 6, at 508; Rakoff, *supra* note 1, at 1207 (citing Arthur Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349 (1970)).

⁵² Meyerson, *supra* note 6, at 1278 (citing Rakoff, *supra* note 1, at 1220–48).

⁵³ Barnes, *supra* note 6, at 242 (citing Slawson, *supra* note 1, at 541–42).

form contracts leaves much to be desired, insofar as it fails to vindicate the consumer's concerns. To reiterate, the primary issue which troubles many in the contracts scholarship is the reality that courts are enforcing terms in contracts which the consumer never read, and to which the consumer did not even realize (at least subjectively) he was agreeing. This results in the imposition upon the consumer of unexpected results, such as an arbitration clause which he didn't realize would be imposed upon him. The contract, absent unconscionability, is nevertheless enforceable for the duration of its term. The consumer may, of course, decide to transact with a different merchant the next time around. However, the binding nature of the term which was unread and unknown to the consumer at the time of contracting remains persistently troubling to many.

III. ELECTIONS IN REPRESENTATIVE DEMOCRACY

The purpose of this Article is to compare the process of assenting to standard form contracts, which has been described above, to the process of a citizen's vote for political candidates in a system of representative democracy. Therefore, this part will briefly address the basic tenets and philosophies behind such an electoral system, insofar as is applicable and helpful for present purposes, so as to set up the direct analogy between the two processes which will follow in the next part.

The United States, as well as the individual states, and most democracies in the world, are representative, rather than direct, democracies.⁵⁴ Though the term "democracy," "republic," and "representative democracy" are often now thought of as relatively synonymous, in fact they mean different things entirely.⁵⁵ A "pure" or "direct" democracy is one in which the assembled citizens of the state have a direct voice in shaping legislation or public policy.⁵⁶ The most famous historical example of a type of government which approximated direct democracy was the Athenian government of ancient Greece.⁵⁷ However, the founding fathers of the American constitution rejected the concept of direct democracy as unworkable and undesirable.⁵⁸

⁵⁴ Among modern nations, Switzerland appears to be somewhat of an exception. See Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 363 (2009) ("Direct democracy is not the regular mode in most of the EU Member States, nor is it common, at least at the national level, in the American or any other constitutional system in the world — with the famous exception of Switzerland.").

⁵⁵ THOMAS E. PATTERSON, *THE AMERICAN DEMOCRACY* 50 (5th ed. 2001).

⁵⁶ *Id.*

⁵⁷ See BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 8 (1997).

⁵⁸ See THE FEDERALIST NO. 10, at 133 (James Madison) (Benjamin Fletcher Wright ed. 1961). The most pertinent passage is as follows:

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be

Instead of direct democracy, the founders of the American constitution⁵⁹ created a republic — a system of representative government — whereby the general population would exercise their sovereignty by electing representatives to enact public policies and promulgate legislation in their stead.⁶⁰ As stated in *The Federalist* No. 39, “[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”⁶¹ The reasons for preferring representative democracy — i.e., a republican government — over direct democracy were twofold. First, the founders believed that interposing a representative body would prevent the temporary passions of the majority of the populace from resulting in the passage of improvident legislation.⁶² Specifically, they posited that representation’s effect was “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”⁶³ Second, they believed that the larger territory of the United States not only lent itself better to republican government from a sheer logistical perspective, but that the inclusion of representatives from a wide variety of geographic areas would also have a moderating influence on the policies enacted by the deliberative assembly.⁶⁴ Therefore, though representative

felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

Id.

⁵⁹ Though the principles of representative democracy are by no means limited to illustration by looking to the United States as an example, I will largely restrict myself to using the United States as a basis for illustration. The reasons are, of course, that that this is the system with which I expect most of the readers of this Article to be familiar (as I am), and also that it is perhaps the prominent example of constitutional democracy in the world at this time.

⁶⁰ See PATTERSON, *supra* note 55, at 50; THE FEDERALIST NO. 10 (James Madison).

⁶¹ THE FEDERALIST NO. 39, at 280–81 (James Madison) (Benjamin Fletcher Wright ed. 1961).

⁶² THE FEDERALIST NO. 10 (James Madison).

⁶³ MANIN, *supra* note 57, at 2 (quoting THE FEDERALIST NO. 10).

⁶⁴ THE FEDERALIST NO. 10 (James Madison).

democracy was not without its critics,⁶⁵ the Constitution created a representative form of government.

Though the founders created a representative form of government, they very much agreed with the idea that no government was legitimate except that which was based on the consent of the people. Therefore, the famous statement from the Declaration of Independence provides the following foundational philosophies:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, *deriving their just Powers from the Consent of the Governed.*⁶⁶

With these statements, the founding fathers established their embrace of social contract theory.⁶⁷ That is, the philosophy of the founders — borrowed from Rousseau, Montesquieu, Hobbes and Locke — was that the people possessed certain inalienable, or natural, rights, which they willingly surrendered to a certain extent in favor of the creation of a government, the purpose of which is to ensure order and safety so that the natural rights of man may be meaningfully enjoyed.⁶⁸ Therefore, the formation of government in an original sense is seen as legitimized because of the original consent of the people involved in its founding.

In a representative democracy, however, there is an additional, recurring element of citizen consent on which the continuing operation of the government

⁶⁵ Rousseau famously declared: “The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them.” JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 95 (G.D.H. Cole trans., 1988) (1762).

⁶⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

⁶⁷ See, e.g., Susan Henderson-Utis, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOWARD L.J. 459, 465–66 (2009) (citing Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914 (1991) (“Social contract thinking played an important role . . . in the origins of the American Constitution . . .”); Greg Sergienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution*, 57 OHIO ST. L.J. 1263, 1268 (1996) (“The common understanding of the Framers, ratifiers, and the public at the time of the adoption of the Constitution and the Bill of Rights was that these documents embodied a social contract theory of government.”)).

⁶⁸ Henderson-Utis, *supra* note 67, at 465 (citing Honorable Douglas H. Ginsburg, *On Constitutionalism*, 2003 CATO SUP. CT. REV. 7, 9 (“In these Enlightenment conceptions of the social contract, Rousseau and Montesquieu, Hobbes and Locke, imagine each citizen voluntarily ceding to all others, or to the polity, or to a particular leader, the unrestrained liberty of a state of nature in exchange for the security necessary to the tranquil enjoyment of life, especially security in ones property.”)).

is derived — election. The citizen's act of voting in a representative democracy is his indication of consent — consent to allow the representative voted on to act in his stead in matters of policy and legislation and governance.⁶⁹ It has therefore been observed that “[t]he central institution of representative government is election.”⁷⁰ This refers, of course, to the ongoing requirement that candidates for representative office stand for election by their constituents in the general population. In the United States Constitution, the framers debated and decided upon periodic elections for both the executive and legislative branches. The members of House of Representatives are elected every second year — i.e., for two-year terms.⁷¹ Senators are elected every six years.⁷² The President is selected by the electoral college every four years, with a limit as to the number of terms that may be served.⁷³

What, however, is the citizen “consenting” to when he votes for a particular candidate for office? That is, what are the expectations of the voter in regards to the term in office of the voter's elected representative? Must the representative always act in accordance with the desires of his constituency? “An old and familiar debate sets a characterization of democratically elected representatives as the agents of their constituents against a view of politicians as autonomous actors who are inhibited only by periodic reviews reserved to the electorate.”⁷⁴ The former view — that a representative is bound by mandate to act in accordance with his constituents' precise wishes — has the benefit of corresponding to the idea of the sovereignty of the people.⁷⁵ However, the latter view appears to conform more to the realities of modern representation. Under this view, sometimes called the “trusteeship” position and famously championed by Edmund Burke, an elected representative is free to make his own decisions about what policy choices would best further the interests of his constituents.⁷⁶ Of course, come election day, the representative will answer for the political

⁶⁹ Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 *HAMLINE J. PUB. L. & POL'Y* 255, 258 (2002) (noting that “[a] majority of Americans no longer register their consent to be governed by failing to vote in elections.”).

⁷⁰ MANIN, *supra* note 57, at 6.

⁷¹ U.S. CONST. art. I, § 2.

⁷² U.S. CONST. art. I, § 3.

⁷³ U.S. CONST. art. II, §1; U.S. CONST. amend. XII & amend. XXII. Though the framers did not originally intend that the general public would have a direct role in selecting the President, such a role was eventually brought about by President Andrew Jackson persuading the states to select their delegates to the electoral college based on the results of the popular vote. PATTERSON, *supra* note 55, at 53. Since then, only three presidents have been elected without also winning the popular vote — Rutherford B. Hayes (1876), Benjamin Harrison (1888), and George W. Bush (2000). *Id.*

⁷⁴ Saul Levmore, *Precommitment Politics*, 82 *VA. L. REV.* 567, 567 (1996).

⁷⁵ *Id.*

⁷⁶ *Id.* (citing Edmund Burke, *To the Electors of Bristol*, in 1 *THE WORKS OF THE RIGHT HON. EDMUND BURKE* 178–80 (1837)).

popularity of his actions.⁷⁷ But before that time he has relative independence.⁷⁸ As will be seen momentarily, this is reinforced by the fact of fixed terms in office.

This Article should here mention briefly, with a view towards advancing the analogy it wishes to make, the type of information and degree to which the voter has knowledge of the governance and decision-making which will be performed on his behalf in the aftermath of his vote consenting to representation by the candidate. Stated more simply, and with a view to the applicable data, what affects the voter's choice of candidate in an election? Making any definitive types of findings in this regard is extremely difficult, if not impossible.⁷⁹ However, certain recurring things appear to influence voters' choices.⁸⁰ First, voters are affected by their perceptions of a candidate's image generally.⁸¹ Second, voters are heavily influenced by party alignment — that is, a voter that identifies with the Democratic party is much more likely to vote for the Democratic candidate (vs. the Republican candidate) for any particular election, all things being equal (though the degree of a voter's affiliation with one party or the other is obviously a variable).⁸² Finally, of course, voters may make decisions on a candidate based on the candidate's stance on one or more political issues.⁸³ In fact, many blocks of voters have been labeled so-called "single issue" voters, because their voting decision is based on a candidate's adherence to the voter's point of view on the single issue of choice — in recent years, abortion has been such an issue for many voters.⁸⁴ Of course, there is always also the ancillary problem of voter apathy and ignorance — that is, voters do not educate themselves (through newspapers, television, the Internet or otherwise) about candidates' positions and political issues, and either do not vote at all, or vote in ignorance of all or almost all of the critical issues affecting the election.⁸⁵

⁷⁷ MANIN, *supra* note 57, at 237.

⁷⁸ *Id.* at 6 ("The decision-making of those who govern retains a degree of independence from the wishes of the electorate.").

⁷⁹ WILLIAM H. FLANIGAN & NANCY H. ZINGALE, *POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE* 209 (11th Ed. 2006).

⁸⁰ The factors mentioned herein tend to be mostly data gathered from presidential elections, as opposed to elections of other types of representatives. *Id.* at 197.

⁸¹ *Id.* at 198–202.

⁸² *Id.* at 202–04.

⁸³ *Id.* at 204–09.

⁸⁴ *Id.* at 204. "There is nothing new about this phenomenon [single-issue voting]. The classic example of single-issue voting in American politics was abolition, an issue of such intensity that it destroyed the Whig Party, launched several new parties including the Republican Party, and was a major contributing factor to the Civil War." *Id.*

⁸⁵ See, e.g., Christopher Shea, *Is Voter Ignorance Killing Democracy?*, SALON.COM, Nov. 22, 1999, <http://www.salon.com/books/it/1999/11/22/voter/> ("One of the dirty little secrets of public-opinion research is the jaw-dropping apathy and general boneheadedness of the electorate.").

A candidate is obviously only elected for the term of the office sought, but what if the voting public who elected the candidate becomes disappointed with the performance of the official before the end of the term? Voters become disappointed with the officials for whom they voted for any number of reasons. For instance, voters may come to believe (after having voted for him) that President Obama and his Democratic allies may be rushing too quickly into accepting some degree of governmental ownership of industry participants like motor vehicle manufacturers and banks.⁸⁶ Obviously, many voters for President George W. Bush disagreed with his decision to invade Iraq and topple Saddam Hussein — especially when considered in light of the fact of his 2000 campaign stance that he was opposed to “nation building.”⁸⁷ Another example of an unexpected disappointment to voters is a politician’s switch to a different political party after election — recent prominent examples of this are Senator Arlen Specter of Pennsylvania (switching from the Republican Party to the Democratic Party) and Senator James Jeffords of Vermont (switching from the Republican Party to Independent).⁸⁸ And, politicians can also switch their stance on the hot-button issues that are extremely important to “single-issue” voters, with abortion being perhaps the preeminent current example. After election as governor of Massachusetts in 2002, Mitt Romney changed his stance on abortion during his term as governor (from supporting abortion rights to opposing them).⁸⁹ Perhaps less significantly, in 1980 George H. W. Bush changed his stance on abortion rights, from supporting them to opposing them, (after having run his own presidential campaign against Reagan during the 1980 Republican presidential primary season) in order to become Ronald Reagan’s vice-presidential nominee.⁹⁰ Bush also famously broke his campaign pledge of “read my lips — no new taxes.”⁹¹

In all of the scenarios just described above, the voters who selected these candidates may become disappointed with the outcomes of the politician’s time in office. In some of the instances, the changed position may be regarding

⁸⁶ See, e.g., Jim Kuhnhehn & Ken Thomas, *Government Motors: U.S. Will Own Sixty Percent of GM*, THE HUFFINGTON POST, May 31, 2009, http://www.huffingtonpost.com/2009/05/31/government-motors-us-will_n_209578.html.

⁸⁷ See, e.g., Wayne Washington, *Once Against Nation-Building, Bush Now Involved*, BOSTON GLOBE, Mar. 2, 2004, at A11.

⁸⁸ See Janet Hook & James Oliphant, *Sen. Arlen Specter Switches Parties: Specter Tips the Scales to Democrats*, L.A. TIMES, Apr. 29, 2009, at 1. Interestingly, in 2001 Senator “Specter was especially vocal at the time about Jeffords’ defection, calling it disruptive and ‘not good’ for the governance of the country. Specter proposed a rule barring party switches that turned the minority into the majority. The proposal was never adopted.” *Id.*

⁸⁹ Scott Helman, *Romney’s Journey to the Right: Social Issue Stands Hardened Since ’02*, BOSTON GLOBE, Dec. 17, 2006, at A1.

⁹⁰ Richard V. Allen, *George Herbert Walker Bush: The Accidental Vice President*, N.Y. TIMES, July 30, 2000, § 6, at 636.

⁹¹ Leo P. Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOY. U. CHI. L.J. 297, 306 (2009).

something that the voter contemplated at the time of his decision to vote for the candidate (with party affiliation being an obvious example). But, of course, sometimes the disappointment will arise in the context of an issue that was not even in the voter's contemplation at the time of the election — for instance, with the decision to go to war unexpectedly, or the response to an unexpected economic or other domestic crisis. And, as has been mentioned already, sometimes an issue will have been contemplated by a voter, but without the benefit of accurate information.

Do voters have any recourse, before the end of the elected term, after the election of such candidates who go on to disappoint them? The answer tends to be no. With respect to the U.S. Constitution, the founders recognized that problems could occur once candidates were elected into office: “Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people.”⁹² Nevertheless, the founders arrived at fixed terms of various durations for the elected officials under the U.S. Constitution (two years for the House,⁹³ six years for the Senate,⁹⁴ and four years for the President).⁹⁵ The balance involved in setting terms for office was addressed by the framers in *The Federalist No. 37*:

The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands. Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men⁹⁶

This statement establishes a couple of counterbalancing concerns in setting the duration of terms in office for elected officials. As John Stuart Mill noted in his seminal work *Considerations on Representative Government*, “[t]he principles involved are here very obvious; the difficulty lies in their application.”⁹⁷ The duration of the representative's term should be brief enough to vindicate the ability of the constituent population to exercise their sovereignty and vote on

⁹² THE FEDERALIST NO. 10, at 134 (James Madison) (Benjamin Fletcher Wright ed. 1961).

⁹³ U.S. CONST. art. I, § 2, cl. 1.

⁹⁴ *Id.* art. I, § 3, cl. 1.

⁹⁵ *Id.* art. II, § 1, cl. 1.

⁹⁶ THE FEDERALIST NO. 37, at 268 (James Madison) (Benjamin Fletcher Wright ed. 1961).

⁹⁷ JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 227 (1962).

whether to keep the candidate in office. On the other hand, however, the elected officials must be allowed to remain in office long enough so that some stability and continuity of government is achieved.⁹⁸ Obviously, if elected terms were too brief, there would tend to be too much instability and even chaos in government, or at the very least an inability to accomplish much. Therefore, considerations of stability require that the terms of elected officials be of sufficient duration to allow the smooth operation of government functions.

The framers contemplated very few exceptions to the principle that elected officials should hold office for the duration of their terms, believing that to allow otherwise would undermine the republican character of the government created by the new Constitution.⁹⁹ In fact, in keeping with the republican character of the new government, no ability was given to the voting public to prematurely end a federal official's elected term in office. The one mechanism initially considered — recall — was withdrawn from consideration at the constitutional convention.¹⁰⁰ Some states have recall provisions for state officials, but such provisions have been infrequently used or successful.¹⁰¹ The only constitu-

⁹⁸ *Id.* Mill observed:

On the one hand, the member ought not to have so long a tenure of his seat as to make him forget his responsibility, take his duties easily, conduct them with a view to his own personal advantage, or neglect those free and public conferences with his constituents, which, whether he agrees or differs with them, are one of the benefits of representative government. On the other hand, he should have such a term of office to look forward to, as will enable him to be judged not by a single act, but by his course of action It is impossible to fix, by any universal rule, the boundary between these principles.

Id. at 227–28.

⁹⁹ THE FEDERALIST NO. 39 (James Madison) (Benjamin Fletcher Wright ed. 1961).

It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.

Id. at 281.

¹⁰⁰ THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 129 (Harvard University Press 1999).

The Constitutional Convention of 1787 considered but eventually rejected resolutions calling for this same type of recall [of Senators by the state legislatures as provided in the Articles of Confederation] In the end, the idea of placing a recall provision in the Constitution died for lack of support — at least from those participating in the ratifying conventions. The framers and the ratifiers were consciously seeking to remedy what they viewed as the defects of the Articles of Confederation and some of their state constitutions, and for many of them this meant retreating from an excess of democracy.

Id.

¹⁰¹ National Conference of State Legislatures, Recall of State Officials (Mar. 21, 2006), <http://www.ncsl.org/default.aspx?tabid=16581>. Such recall provisions began to be popular in the

tional means for a member of the U.S. Congress to be removed prior to his elected term in office is to be expelled by a two-thirds vote of the members of the chamber in which the representative sits.¹⁰² No grounds are specified for removal, but in the rare historical instances in which members were expelled, the grounds have “generally concerned cases of perceived disloyalty to the United States, or the conviction of a criminal statutory offense which involved abuse of one’s official position.”¹⁰³ Finally, of course, the framers included provisions for impeachment of the President, Vice President and all civil officers of the federal government.¹⁰⁴ Aside from being rarely invoked,¹⁰⁵ the impeachment process is more akin to a legal or criminal device in that it is for “Treason, Bribery, or other high Crimes and Misdemeanors,” than a political device in the nature of recall or perhaps expulsion.¹⁰⁶ And further, of course, like expulsion, it is not directly exercisable by the constituent voters themselves, but rather must be effectuated by the voters’ representatives in the Senate.¹⁰⁷ The overarching conclusion to be drawn, for purposes of the present discussion, is that elected officials in a representative democracy generally serve for the entire duration of their terms, in spite of actions which may disappoint their voters; exceptions to this are relatively rare or non-existent.¹⁰⁸ And even the rare instances for early removal generally concern quite serious or grave matters. General disappointment with unexpected policy choices, even if based on

early twentieth century as part of the “Progressive Movement.” Cong. Research Service, Jack Maskell, *Recall of Legislators and the Removal of Members of Congress from Office*, Mar. 20, 2003 (citing G. THEODORE MITAU, *STATE AND LOCAL GOVERNMENT, POLITICS AND PROCESSES* 90–93 (Charles Scribner’s Sons 1966); Elizabeth E. Mack, Comment, *The Use and Abuse of Recall: A Proposal for Legislative Recall Reform*, 67 NEB. L. REV. 617, 621–25 (1988)).

¹⁰² U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”).

¹⁰³ Maskell, *supra* note 101, at Summary.

¹⁰⁴ U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

¹⁰⁵ Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 86 (2008) (“The House has initiated sixty-two impeachment proceedings since 1789, resulting in the impeachment of two Presidents (President Andrew Johnson and President Clinton, both acquitted), one cabinet officer (William Belknap, Secretary of War, resigned and later acquitted), one Senator (Senator William Blount, expelled, charges dismissed), one Supreme Court Justice (Justice Samuel Chase, acquitted), and twelve other federal judges (most recently Judge Walter Nixon, convicted on November 3, 1989).” (citing U.S. Senate, Impeachment, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm (last visited Feb. 26, 2010))).

¹⁰⁶ National Conference of State Legislatures, *supra* note 101.

¹⁰⁷ U.S. CONST. art. I, § 3, cl. 6.

¹⁰⁸ MANIN, *supra* note 57, at 237 (“[T]he absence of imperative mandates, legally binding pledges, and discretionary recall, gives representatives a degree of independence from their electors.”).

direct campaign promises to the contrary, give no basis for relief during the elected term because the promises are not binding in any legal manner.¹⁰⁹ Questions of stability dictate the binding nature of elected terms in office.¹¹⁰

However, the voters do get to exercise their sovereignty over their representatives at election time. This is the key component of our system of representative government, which retains elements of democracy, and it is thus correct that “[t]he central institution of representative government is election”¹¹¹ That voters get to decide whether to re-elect their representatives based on their assessment of the representative’s performance is obvious and of paramount interest to the continuing legitimate operation of the constitutional democracy, which is to be based on consent by the governed:

[S]ince representatives are subject to reelection, they know that they will be held to account, and that, at that time, words will no longer suffice. They know that their positions will be on the line when, come election day, the electorate delivers its verdict on their past actions. Prudence dictates, therefore, that they act now in preparation for that day of popular judgment. The prospective will of voters is no more than a wish, but when they are not satisfied by the incumbents’ performance, their verdict is a command. At each election, voters make up their minds on the basis both of what they would like for the future and what they think of the past.¹¹²

Voters who are disappointed by the actions of a representative during the representative’s term thus may, on election day, discipline the unresponsive official by voting him out of office and selecting a successor in the incumbent’s place.¹¹³ This sovereignty exercised by the voters is evidence of the elements of democracy in our system of republican government, and is of utmost importance to retaining the legitimacy of our system of governance which must always be derived “from the consent of the governed.”¹¹⁴ Therefore, though voters are basically powerless to intervene during the term of their elected representatives that have disappointed them while in office, they will eventually have the last say by choosing whether to retain or displace the representatives on election day. Such is the hallmark of our constitutional democracy.

¹⁰⁹ See MANIN, *supra* note 57, at 237 (“[E]lected representatives are not bound by promises made to voters. If people vote for a candidate because they favor the policy he proposes, their will is no more than a wish.”). For an interesting proposal to make campaign promises possibly enforceable, see Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996).

¹¹⁰ THE FEDERALIST NO. 37 (James Madison).

¹¹¹ MANIN, *supra* note 57, at 6–7.

¹¹² *Id.* at 237.

¹¹³ See Levmore, *supra* note 109, at 569–70.

¹¹⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

IV. THE ANALOGY BETWEEN FORM CONTRACT AND VOTING

In the previous parts, I have set forth the basic doctrines and principles regarding consumer assent to standard form contracts, and citizens voting for representatives in a constitutional democracy, respectively. As was stated previously, binding consumers to unknown and unexpected terms in form contracts has been criticized as violative of consumers' rights of autonomy in regard to their freedom of contract. The purpose of this part is to compare the two processes, and see if the comparison sheds any light on whether the duty to read is nevertheless sanctionable. In this part, I will compare the two processes in terms of the nature of the assent given, the generally binding nature of the assent notwithstanding potential disappointed expectations, and the ultimate vindication of autonomy and sovereignty effectuated by facilitating the periodic opportunity for new manifestations of assent.

A. *The Nature of the Assent Granted*

Standard form contracts are contracts. When a consumer transacts with a merchant by form contract, in order to buy a good or service, he is contracting with the merchant. And the consumer is explicitly and consciously entering into knowing agreement about certain terms — price, subject matter, and quantity, at least.¹¹⁵ I will call these simply the “known” terms. But there are a host of other terms — the “fine print” — which the consumer typically does not read and thus the substantive content of which the consumer does not knowingly and consciously discover.¹¹⁶ I will call these simply the “unknown” terms. Because contracts are supposed to be based on assent, and because theoretically the consumer could have read and discovered the nature of the terms contained in the standard form if he had wanted to, contract law concludes that by signing or clicking the consumer is bound to the entire contract — known and unknown terms.¹¹⁷ Binding the consumer to the known terms is obviously not usually problematic, but there has been much academic concern registered over the binding nature of the unknown terms, since they were not in reality substantively known about at the time of contractual assent.¹¹⁸

Let me shift, for a moment, to the type of assent registered by voters when they participate by voting in an election for representatives in a republican form of government. Election is the “central institution of representative government,”¹¹⁹ because it fosters the continued legitimacy of the government as

¹¹⁵ Rakoff, *supra* note 1, at 1225–28.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1185.

¹¹⁸ *See supra* note 6.

¹¹⁹ MANIN, *supra* note 57, at 6.

being based on “the consent of the governed.”¹²⁰ As discussed previously, voters base their election decisions — if based on any particular knowledge or information at all¹²¹ — on numerous factors, including party affiliation, candidate image, and the candidate’s position on one or more issues.¹²² Taking this information and these cognitive processes into account, voters may be said to “assent” to their representation by a particular candidate when they vote for him — that is, the voter casts his vote for a candidate and thereby registers his assent to that candidate acting on his behalf in the deliberative assembly to which he is elected.

But, it is equally clear that the citizen-voter’s assent to have the representative act in his stead has limits, and the voter’s expectations will not always be perfectly satisfied or vindicated as the representative’s performance in office unfolds over time. The wishes and expectations of the voter — that, for instance, the representative will enact policy consistent with the voter’s preferences, or the representative will remain in the same party he was in at the time of election — are no more than wishes and expectations.¹²³ Moreover, there will inevitably be many decisions and actions the representative is called upon to make that were not even contemplated or considered by the voter at the time of his decision. Who, for instance, considered in the 2000 Presidential election how Al Gore or George W. Bush would potentially respond in the face of an unforeseeable horror like the terrorist acts of September 11, 2001? This calls to mind the accuracy and wisdom of the position on representation held by Edmund Burke, that ultimately — though there is of course room for the representative to listen to the expressed wishes of his constituency and to take into account any mandate which may be perceived as accompanying his election¹²⁴ — the voters have chosen to entrust their elected representatives with the independence and discretion to make the decisions of policy that are perceived to be in

¹²⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹²¹ See Shea, *supra* note 85 (“One of the dirty little secrets of public-opinion research is the jaw-dropping apathy and general boneheadedness of the electorate.”). This brings to mind the quote attributed to Gore Vidal: “Fifty percent of people won’t vote, and fifty percent don’t read newspapers. I hope it’s the same fifty percent.” Gore Vidal Infosite, <http://gorevidal.net/more.html> (last visited on Mar. 1, 2010).

¹²² See FLANIGAN & ZINGALE, *supra* note 79, at 197–204.

¹²³ See MANIN, *supra* note 57, at 237 (“[E]lected representatives are not bound by promises made to voters. If people vote for a candidate because they favor the policy he proposes, their will is no more than a wish.”).

¹²⁴ J. Roland Pennock, *Political Representation: An Overview*, in J. ROLAND PENNOCK & JOHN W. CHAPMAN, REPRESENTATION 15 (1968) (“Even Burke did not contend that it was the proper function of a representative to act without any consideration of the desires of those whom he represented.” (citing 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 164 (1906) (Burke is said to have said about a representative’s constituents: “their wishes ought to have great weight with [their representative]; their opinion high respect; their business unremitting attention.”))).

the best interests of the constituents.¹²⁵ That is, the voters assent to put the governance of their affairs into the trusteeship of the elected representative — they are, in a very real sense, bound by the representative's decisions on matters of policy after the point of election, whether the voters agree with such subsequent policy decisions or not.¹²⁶ And this is true, obviously as it must be, even for matters which were not even contemplated by the voter at the time of the election.

Consumer assent to the “unknown terms” in standard form contracts can reasonably be viewed, I believe, through the lens of Burkean trusteeship in representative democracy. We know that consumers do not read the terms in the fine print. Therefore the terms are unknown to them. However, the consumer obviously knows there is language in the fine print, and they must know somehow that there is at least some theoretical possibility that that language could at some point have legal consequences on their affairs insofar as the transaction with the merchant is concerned. The consumer has obviously not “assented” to the unknown terms in a subjective, conscious sense.¹²⁷ How else to characterize the actions of the consumer? He has entrusted these additional aspects of the transaction to the fairness and goodwill of the merchant. That is, he has chosen to transact with this merchant, out of all of the other competing merchants in the marketplace. He has made this decision for any number of specific reasons, like desirable price, type of item or service purchased, and even the perceived reputation of the merchant. For the rest of the potential attributes of the legally binding transaction, such as what will happen in the event of a problem with the product or a dispute with the merchant, the consumer is simply trusting the merchant. He is, if you will, “voting” for this merchant by choosing to transact with it via the standard form, and entrusting to the merchant the fair handling and resolution of any disputes that may arise. We can say the consumer is simply trusting the merchant, because the consumer has chosen not to avail himself of

¹²⁵ See PATTERSON, *supra* note 55, at 50. This, of course, is also more complicated than it would first appear. In fact, there are a number of perspectives which may animate the representative's actions and at least four different theories have been stated regarding how a representative should act:

1. The representative should act in support of what he believes an effective majority of his constituency desires.
2. The representative should act in support of what he believes is in the constituency's interest.
3. The representative should act in support of what he believes the nation (or an effective majority of it) desires.
4. The representative should act in support of what he believes is in the nation's interest.

Pennock, *supra* note 124, at 12–13.

¹²⁶ See MANIN, *supra* note 57, at 237.

¹²⁷ Rakoff, *supra* note 1, at 1225–28. Though, of course, contract law says he has assented under the duty to read and in a legalistic sense. *Id.* at 1185.

the opportunity to actually learn in advance all of the legally enforceable terms of the contract, such as by reading it in full or seeking legal counsel. Rather, the consumer chooses to remain ignorant of the unknown terms, and instead simply trusts the merchant that these terms will be fairly chosen and enforced should they be implicated in the future. In reality, the consumer is no more aware of what future enforcement of the unanticipated and unknown terms will look like, than is a voter aware of what future policy enactments of a representative will look like. In both cases, however, we may say that the assenting individual has assented to the state of affairs which follows. In both instances, the assenting individual has entrusted the administration or governance of the subsequent state of affairs to another — the voter has so entrusted the representative insofar as it relates to the administration of the governmental affairs, and the consumer has so entrusted the merchant insofar as it relates to the administration and performance of the contract.

And this concept of Burkean trusteeship in consumer assent to standard form contracts accords perfectly with some of the early academic thought on consumer assent to such contracts. Karl Llewellyn's theory of such assent bears repeating:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a *blanket assent* (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form¹²⁸

This “blanket assent” of the consumer to the unread and unknown terms on the merchant's form is similar to the assent given by voters to the future policy enactments by their elected representatives. The assent is given in advance, and it covers and binds the assenter to the subsequent state of affairs, even though such subsequent occurrences were not consciously contemplated at the time the assent was given.¹²⁹ As Robert Braucher stated, “We all know that if you have a page of print, whether it's large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion's mouth and hope it will be a friendly lion”¹³⁰

At least one contracts scholar has articulated a theory somewhat similar to the one presented here, insofar as assent to form contracts is concerned. In

¹²⁸ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (Little, Brown, and Comp. 1960) (emphasis added).

¹²⁹ See MANIN, *supra* note 57, at 237.

¹³⁰ Robert Braucher, *The American Law Institute Forty-Seventh Annual Meeting*, 47 A.L.I. PROC. 485, 525 (1970).

Randy Barnett's article *Consenting to Form Contracts*,¹³¹ he states that form contracts are supportable based on adoption of "a consent theory of contract based not on promise but on the manifested intention to be legally bound."¹³² To illustrate his point, Barnett proffered the following hypothetical:

Suppose I say to my dearest friend, "Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you." Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later? . . . Hardly. Are these promises *real*? I would say so and cannot think of any reason to conclude otherwise. What is true of the promises in these examples is true also of contractual consent in the case of form contracts.¹³³

Barnett cogently notes that, in such a formulation of blanket "consent" to a form contract, "[t]he particular duty consented to — the promise or commitment — is nested within an overall consent to be legally bound. The consent that legitimates enforcement is the latter consent to be legally bound."¹³⁴ He goes on to compare his envelope hypothetical to the act of clicking "I agree" on a computer screen, when the terms in the scroll box remain unread. Either way, the consumer is consenting to be bound, even though he knows in a sense he is consenting in advance to terms he isn't actually cognizant of at the moment of consent.¹³⁵

When viewed from the standpoint of an overarching consent which encompasses consent to all the consequences that may flow therefrom, the concept discussed herein is greatly clarified. In Barnett's concluding remarks about the inherent nature of such consent to unknown future possibilities, he says the following:

True, when consenting in this manner one is running the risk of binding oneself to a promise [or other manifestation of assent] one may regret when later learning its content. But the law does not, and should not, bar all assumptions of risk. Hard as this may be to believe, I know of people who attach waxed boards to their feet and propel themselves down slippery snow and tree covered mountains, an activity that kills or injures many people every year. Others for fun freely jump out of air-

¹³¹ Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002).

¹³² *Id.* at 627.

¹³³ *Id.* at 636.

¹³⁴ *Id.*

¹³⁵ *Id.*

planes expecting their fall to be slowed by a large piece of fabric that they carry in a sack. (I am not making this up). Or they ride bicycles on busy streets with automobiles whizzing past them. It seems to me that if people may legally choose to engage in such unnecessarily risky activities — and these choices are not fictions — they may legally choose to run what to me is the much lesser, and more necessary, risk of accepting a term in an unread agreement they may later come to regret.¹³⁶

So, a person consenting to engage in a risky recreational activity is consenting to the things which flow out of that — an enjoyable time, a day in the sun, or injuries or sore muscles. A person voting for a candidate is assenting to that candidate's term of office and all of the policy enactments and decisions which flow out of that — whether the voter later regrets, or is happy with, such decisions. The voter entrusted the representative to make such decisions which would affect his affairs as a citizen. And so it is for the consumer assenting to a standard form contract with a merchant in choosing to transact with such merchant in order to buy goods or services. The consumer is assenting to the deal and form generally (whether unread or unknown), and all of the implications and results that flow out of that initial consent — whether the results are ones that the consumer later regrets (e.g., an arbitration clause) or is happy with (e.g., a favorable return and exchange policy). Like the voter, the consumer entrusted the merchant to administer the unknown and unread terms in the form contract which would later affect his affairs as a consumer.

In sum, then, we can see that the assent granted by a citizen voting for an elected representative is comparable on some level to the assent granted by a consumer signing the standard form contract of a merchant with whom he is transacting. The voter is giving blanket entrustment, in a Burkean sense, to the representative to carry on his affairs in the administration of government and enactment of policy. This is so, even though the voter may not know — and in fact often cannot know — in advance all of the actions that the representative may take or even what situations will confront the representative during his time in office. Thus, the voter who voted for George W. Bush in 2000 gave valid consent to Bush to govern, even though it turned out that Bush took aggressive actions against Iraq, and even though the voter objects to these actions because he happens to be an absolute pacifist. The assent is blanket, and given in advance. And so it is true for the assent given by a consumer to a standard form contract. Such assent is legally enforceable, and is blanket, and is given in advance. The consumer is entrusting the fair administration and performance of the contract in many respects to the merchant. Thus, the consumer who purchased a good from a merchant by form contract is bound by all the terms of the contract, even, say, the limitation of remedies contained in the contract which

¹³⁶ *Id.*

limits the consumer to repair or replacement of the good and prevents any action for damages.¹³⁷ The assent to the form contract covers assent to this specific term, even though from the perspective of the consumer it was unknown and unanticipated at the time the contract was entered into. It is nevertheless nested within the blanket assent given to the contract generally, as described by Llewellyn.¹³⁸ This is the implication of the consumer's delegated trusteeship to the merchant — the merchant has exercised its discretion and imposed this term on the consumer. Consent to the term is therefore encompassed by the consumer's previous blanket assent to the form contract. And the consumer, like the voter, is bound by such advance consent. The consumer who "voted" for this merchant may be disappointed, but his prior assent is legally valid, just as is the voter's assent. The assent can be considered fully legitimate in both instances, though it was based on a trust which the consumer may later come to feel was violated.

B. *The Binding Duration of the Assent*

Once a consumer agrees to become bound to the terms of the standard form contract, he is so bound.¹³⁹ The law says that he has a duty to have read the contract, and even if he hasn't, he is nevertheless bound even in the face of disappointed expectations.¹⁴⁰ Thus, take for instance again the consumer who buys a good or service from a merchant. The consumer knows the price, he knows the thing being acquired, and he may know the general reputation of the merchant with whom he is choosing to contract. However, the consumer does not know that included in the unknown and unread terms is, say, an arbitration clause. The consumer signs (or clicks) the form contract and the good or service is delivered. If a dispute occurs later and the consumer wants to litigate after having attempted to resolve the matter amicably, the consumer is then confronted with the reality of the unknown and undesired (but nevertheless fully enforceable) arbitration clause. This is a disappointed expectation from the consumer's standpoint. But, the binding nature of the contract and the consumer's prior assent to the contract means that he cannot evade the contract's binding obligations, such as in this case the arbitration clause.

And the same is true for the binding nature of a voter's assent to the elected representative's time in office. Elected representatives serve for fixed and defined terms.¹⁴¹ As stated previously, there are two primary considerations at issue in making this so. First, there is the obvious need in a democratic sys-

¹³⁷ See U.C.C. § 2-719 (2004).

¹³⁸ See LLEWELLYN, *supra* note 128, at 370.

¹³⁹ Rakoff, *supra* note 1, at 1185.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., U.S. CONST. art I, § 5, cl. 2 (U.S. House of Representatives members serve for two-year terms).

tem to make the representatives periodically accountable to the sovereign rights of the people to decide whether to keep the representatives in office through reelection, based on the voters' appraisal of the representative's political performance.¹⁴² Second, however, is the countervailing consideration of stability. As stated in *The Federalist No. 37*: "Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men . . ." ¹⁴³ That is, the orderly operation of government would break down into at best, pointless inefficiency and at worst, chaos, if representatives could be removed from office upon the occurrence of any disappointed expectations of the voters who assented for them to serve in the first place. Elected officials need some time to learn the basics and nuances of the office, to climb the "learning curve" in order to gain some expertise, and at some point they can begin to govern competently.¹⁴⁴ If, on the other hand, voters could prematurely end a representative's term in office based on, for example, a reversal of a stance on an issue, or the change of a political party mid-term, stability of the government would be greatly undermined. Thus, recall was completely eliminated from the U.S. Constitution,¹⁴⁵ whereas expulsion¹⁴⁶ and impeachment¹⁴⁷ were implemented for very serious offenses, but the exercise of these remedies has been — almost certainly as originally contemplated — rare.¹⁴⁸ Thus, the drafters of the U.S. Constitution wisely ordained basically uninterruptible terms to effectuate meaningful stability in governmental functioning.

Very similar concerns of stability animate the contractual doctrine of the binding effect of consumer assent to standard form contracts.¹⁴⁹ If the consumer in the hypothetical described above could abandon the contract upon the at-

¹⁴² See THE FEDERALIST NO. 37, at 268 (James Madison) (Benjamin Fletcher Wright ed. 1961) ("The genius of republican liberty seems to demand on one side . . . that those entrusted with [political power] should be kept in dependence on the people, by a *short duration* of their appointments." (emphasis added)).

¹⁴³ *Id.*

¹⁴⁴ See MILL, *supra* note 97, at 227–28.

¹⁴⁵ See CRONIN, *supra* note 100, at 129. Of course, as was stated previously, some states have instituted recall of elected state officials. See National Conference of State Legislatures, *supra* note 101.

¹⁴⁶ U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.").

¹⁴⁷ U.S. CONST. art. II, § 4 ("The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

¹⁴⁸ Maskell, *supra* note 101, at Summary (regarding rarity of congressional expulsions); Lau, *supra* note 105, at 86 (regarding infrequency of impeachment proceedings).

¹⁴⁹ Of course, I recognize that the same considerations of stability discussed herein are equally applicable to non-standard contracts entered into between two sophisticated merchants.

tempted enforcement of the unknown and unread arbitration clause, the stability of the marketplace would be undermined. Commercial activity would be seriously affected, because merchants would no longer be able to safely predict that their contracts with consumers were enforceable by legal mechanisms.¹⁵⁰ In the words of one court:

[O]ur commercial system depends on the ability of parties to contract with certainty. Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains, and the stability of commercial relations would be jeopardized.¹⁵¹

There are some exceptions which would allow a consumer to prematurely escape the binding obligations of a form contract — unconscionability being the primary doctrine available for such a purpose.¹⁵² But unconscionability is only available for unusually egregious terms,¹⁵³ and is thus only rarely successfully invoked.¹⁵⁴ Therefore, contracts are generally binding for the duration of the contractual commitments.

Thus, a valid comparison seems to be made between voting for representatives and assenting to form contracts, based on the need for stability. In the context of voting for representatives, the stability needed is that of the orderly and competent operation of governmental functions. In the context of assenting to form contracts, the stability needed is that of the safe and predictable enforcement of contracts in the marketplace. In both instances, the assent is binding for the duration of the commitment — in elections, for the elected term of office; in contracts, for the assented duration of the contractual commitment. There is, in both instances, some provision made for the occasional, and rare,

¹⁵⁰ PERILLO, *supra* note 39, at 403–04 (citing Stewart Macaulay, *Private Legislation and the Duty to Read — Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966)).

¹⁵¹ *St. Paul Mercury Ins. Co. v. Duke Univ.*, 849 F.2d 133, 135 (4th Cir. 1988).

¹⁵² *See, e.g.*, U.C.C. § 2-302 (2004); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

¹⁵³ Meyerson, *supra* note 1, at 1286 (citing Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1337 (1982)); *see also* Barnes, *supra* note 6, at 248 (“Short of outright oppression or conscience-shocking terms, courts have been much less predictable in utilizing unconscionability as a tool for policing terms to which consumers did not clearly assent and which are otherwise unfair or extremely unfavorable.” (citing Hillman & Rachlinski, *supra* note 1, at 457)).

¹⁵⁴ *See generally* Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006) (providing empirical data on rates of success of unconscionability claims).

premature end to the assented commitment — in elections, there are some state recall provisions, expulsion, and impeachment provisions; in contracts, there is the availability of extraordinary remedies or defenses like the doctrine of unconscionability. However, in neither context are these remedies often used or successful, with the resultant effect that in both contexts the assent given is generally binding and thus not prematurely terminable, and this is the case for the entire duration of the originally contemplated commitment. Thus, once the consumer has “voted” to transact with the merchant of his choice, he is bound for the duration of the commitment, and reasons of stability dictate this result, just as they do in the election context. The consumer is bound by his delegation of Burkean trusteeship under the contract, for the “term in office” of the merchant. Stability dictates that this be so.

C. *Periodic Opportunities for New Manifestations of Assent*

As has just been discussed, neither the voter electing a representative nor the consumer assenting to a standard form contract can ordinarily terminate the binding nature of their previously given consent to either state of affairs. However, the individual autonomy and sovereignty of these individuals is vindicated at periodic intervals, where they are free to reevaluate and choose whether they wish to undertake further commitments to the same or similar state of affairs, or whether they will instead terminate the relationship and manifest assent to be bound with another person or entity.

In the case of voting, this opportunity for a periodic manifestation of assent is the election, which is “[t]he central institution of representative government”¹⁵⁵ Government’s ongoing legitimacy is only derived, under accepted social contract theory, by government being derived “from the consent of the governed.”¹⁵⁶ The constitutional framers obviously had this in mind, also, when they stated in *The Federalist No. 37* that the “genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments”¹⁵⁷ Tethering the terms in office of elected representatives to a periodic judgment and review by their constituency is obviously paramount to the ongoing democratic legitimacy of our form of constitutional government. Thus, “since representatives are subject to reelection, they know that they will be held to account They know that their positions will be on the line when, come election day, the electorate delivers its verdict on their past actions.”¹⁵⁸ Quite simply, if the constituents are not happy with the performance of their elected official, on election day they may

¹⁵⁵ MANIN, *supra* note 57, at 6.

¹⁵⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁵⁷ THE FEDERALIST NO. 37, at 268 (James Madison) (Benjamin Fletcher Wright ed. 1961) (emphasis added).

¹⁵⁸ MANIN, *supra* note 57, at 237.

vote him out of office and give their assent to someone else to govern their affairs for the next term.¹⁵⁹ At that point, the voters will get to exercise autonomy over their affairs, and give assent to another candidate who they hope will serve them better.

And, again, a similar process is evident in consumers' choices regarding assent to standard form contracts they enter into with merchants. Once the form is signed or otherwise assented to, the consumer is bound to the terms of that contract for however long the executory promises under it remain to be performed.¹⁶⁰ However, the merchant with whom the consumer contracted is operating in a marketplace, and hopes that this consumer (and many others) will choose to buy goods or services from it when the consumer has occasion to consider entering into future transactions.¹⁶¹ At that point, the consumer will get to once again exercise his autonomy in choosing the merchant with whom he will contract, and therefore what standard form to which he will choose to adhere. The consumer's prior experiences with his current merchant will obviously influence whether he will become a "repeat customer," or whether he will instead look elsewhere for additional goods or services. In this way, the consumer's freedom of contract and autonomy as an actor in the marketplace is vindicated, and merchants of course have incentive to perform well in the court of public opinion and the marketplace so as to garner such repeat customers.

These two processes of periodic assent can be directly compared. A voter who is disappointed with the performance of his elected representative "must generally hope that some distant election day will offer an opportunity to join with other disappointed 'customers' in order to discipline unresponsive politicians — and signal their replacements and other agents . . ." ¹⁶² The consumer who previously delegated his transactional rights, in the manner of a Burkean trusteeship, will ultimately decide whether or not that trust has been violated with disappointing contract terms buried in the fine print of the form contract, which the merchant knew the consumer did not read in advance, but which the merchant nevertheless knew that the consumer was hoping would be reasonably favorable.¹⁶³ To logically follow Braucher's "head of the lion" hypothetical,¹⁶⁴ the consumer will decide whether or not the lion got too violent with him or not. If the consumer emerges from the mouth of a friendly lion unscathed, then the consumer may place his head into the lion's mouth again. But if, as

¹⁵⁹ See Levmore, *supra* note 109, at 569–70.

¹⁶⁰ Rakoff, *supra* note 1, at 1185.

¹⁶¹ See Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1237 (2006) ("Viewed now as part of a working social system, contracts are assumed to be the products of competition in the marketplace.").

¹⁶² Levmore, *supra* note 109, at 569–70.

¹⁶³ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979).

¹⁶⁴ Braucher, *supra* note 130, at 525 ("We all know that if you have a page of print, whether it's large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion's mouth and hope it will be a friendly lion . . .").

could be expected on occasion, the lion instead partially mauls the consumer, the consumer is not likely to have any further contact. No one can deny that the consumer consented to the risks of putting his head into the lion the first time, but neither can anyone deny that the consumer has the right not to mess with that lion anymore.

V. CONCLUSION

Contract doctrine clearly provides that consumers are bound to all the terms in a standard form contract which they sign when they choose to acquire goods or services from a merchant who has authored the form, even as to all of the terms which the consumer does not read and therefore does not know about.¹⁶⁵ On one level, this is troubling because it seems to undermine the conception of contracting as a fully cognitive, knowingly voluntary activity. On this basis, it has been greatly criticized by a number of scholars.¹⁶⁶ However, when the process of consenting to be bound by unknown terms in a form contract is compared to a citizen voting for a representative in a constitutional democracy, the basis for binding the consumer to the unknown terms in the contract becomes more palatable and justifiable. This is because the consumer's consent to the standard form is valid, enforceable, and periodically reappraisable.

The consent to the standard form is valid. Like the voter, the consumer is delegating to the merchant a Burkean trusteeship of the ongoing administration of the terms and performance of the contract; that is to say, the consumer is entrusting the transactional state of affairs to the merchant. He is hoping for the best. There is, of course, a risk that the consumer will be disappointed by the revelation of some binding term later in the merchant's performance or enforcement of the contract, but that is a risk that the consumer knowingly takes. This is much like the risk that a voter takes that the elected representative, once elected and seated in office, will pass legislation or otherwise make policy enactments which are undesirable from the standpoint of the voter who placed him into office. But the initial grant of consent for the representative to stand and serve in the voter's stead is no less legitimate or valid. And neither is the consent of the contracting consumer any less valid, though the merchant's later invocation of one or more unfavorable terms is an unpalatable disappointment to him. Nevertheless, the consumer trusted the merchant as to the unknown terms, and took the risk, and the initial grant of consent to the transaction is no less valid or legitimate merely because some of the risks actually come to fruition.¹⁶⁷

The consent to the standard form is enforceable. The binding nature of the consumer's assent to the form contract cannot generally be ended premature-

¹⁶⁵ See Rakoff, *supra* note 1, at 1185.

¹⁶⁶ See *supra* note 6.

¹⁶⁷ See *supra* Part IV.A.

ly, before the complete performance of all executory promises under the contract. This is akin to the binding, uninterrupted nature of the candidate's elected term in office. Only in rare instances can a candidate's term in office be terminated before the expiration of the elected term — as in the limited devices, where available, of recall, expulsion and impeachment. Normally, the candidate will serve for the full elected term, as set forth in the constitution or other applicable governing law. And this is needed to ensure stability in the ongoing orderly operation of government. Similarly, a consumer's assent to contracts is generally not rescindable, absent extraordinary and rarely applicable doctrines like unconscionability. Stability also dictates this result, as the marketplace would break down into uncertainty if merchants did not have the assurances of enforceability of their contracts.¹⁶⁸

The consent to the standard form is periodically reappraisable. The consumer will ultimately be able to exercise some degree of sovereignty over the merchant, when the contract is at an end. At that point, as an actor in the marketplace, the consumer will decide whether to transact again with the merchant, or whether instead to voice his displeasure with the merchant (because of unfavorable terms in the form contract or otherwise) and choose to transact for goods or services with some other merchant. This, too, is comparable to the election cycle in the context of voting. On election day, the voters exercise their sovereign right to determine whether to allow their representative to serve them for another term, or to instead vote the incumbent out and replace him with a new representative. The same occurs in the marketplace with respect to consumers choosing whether to be “repeat customers” of the merchant with whom they have previously contracted, or whether instead to choose to transact by standard form with a new merchant. This decision will often be based on an unfavorable view of the terms in the form which were unknown at the time of contracting, but which became manifested later in the performance and enforcement of the contract.¹⁶⁹

Seen in this light, and with the benefit of this comparison to the process of voting for candidates in a representative democracy, the binding nature of consumer assent to standard form contracts seems much fairer, much more just, and thus much more palatable than it may otherwise initially appear. Consumers are ultimately exercising their autonomy and freedom of contract by choosing who they will transact with, and by what standard form. They have undertaken some risk, and have chosen to trust that their selected merchant will manage that risk appropriately. They are bound to their choice, which was legitimately given, and will of necessity remain enforceable. But the marketplace reigns supreme, and here the consumer has a very powerful voice indeed. Thus, the regime of consumer assent to unknown terms in standard form contracts is at least defensible, and as a practical matter is quite likely here to stay.

¹⁶⁸ See *supra* Part IV.B.

¹⁶⁹ See *supra* Part IV.C.