A DEMOCRATIC CONCEPTION OF CONSUMER CONTRACTS

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I sketch and briefly evaluate two standard ways of conceptualizing the problem that is posed by consumer contracts and defend a third view, which is based on my democratic conception of contract. According to the first, the power asymmetry between sellers and consumers means that we should not view consumer contracts as genuine contracts but rather as illegitimate exercises of private law-making by sellers for their consumers. According to the second, which broadly aligns with the approach of the Restatement of Consumer Contracts, consumer contracts are genuine contracts but of a procedurally defective kind. On the view I defend, the essence of the problem is not the compromised assent of consumers, but rather the tendency of sellers to set terms without regard for consumers' interests. Individual consumers have little interest in acquiring the knowledge they would need to be more involved in the setting of the terms of their relationships with sellers, though they have an interest in doing so collectively. Sellers, by contrast, are well-positioned to take on that responsibility because they deal with multiple consumers on the same terms at the same time. According to my democratic conception of contract, sellers are under robust duties of good faith to set terms with an eye to articulating a vision of justice for their relationships with consumers, rather than seeking their own advantage or undermining the mechanisms via which consumers can collectively assert themselves. Legal regulation of consumer contracts should accordingly be directed towards ensuring sellers discharge those duties of good faith when they set the terms of their agreements with consumers.

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Introduction

Though they may satisfy the doctrinal requisites of a valid contract, consumer contracts are far from the egalitarian picture of contracting that the doctrine often encourages us to imagine—an agreement arising from joint deliberations between two roughly equally situated parties. Sellers of consumer goods and services typically make take-it-or-leave-it offers using long, complex forms containing difficult-to-understand boilerplate terms often written in legalese having been drafted by the seller's lawyers. While consumers can vote with their feet by declining to enter into the proposed agreement, they have little power to influence the agreement's content. And reading and understanding the terms would take up considerable time and energy such that it will not be worthwhile for most consumers to attempt to make sense of them given the large number of such contracts they enter into, the low significance of any one of them to the course of their lives, and their limited ability to influence their content even if they were to successfully read and understand them. When it comes to salient terms like price and product characteristics that consumers do attend to, market pressure may give sellers incentives to make them consumer friendly. But sellers likely will not feel the pull of market pressure when it comes to standard terms that consumers do not focus on when they assent to the transaction. On the flipside, given the economies they realize by dealing on identical terms with many consumers at once, sellers have strong incentives to put time and resources into designing their standard forms and, in the absence of market pressure to set consumer-friendly terms, to do so exclusively with their own interests in mind.

What exactly is the nature of the problem here? And what is the solution? I will describe two standard ways of understanding the problem before sketching and defending a third way—that offered by my "democratic conception" of morally valid agreements.[1] According to the first approach, the asymmetry of power between sellers and consumers means that we should not view consumer contracts as contracts at all, but rather as an illegitimate exercise of private law-making by sellers. The second approach, which broadly aligns with that of the Restatement of Consumer Contracts, by contrast, adopts a contractual lens on the problem. The problem is not that consumer contracts are not contracts; rather, it is that they are contracts of a procedurally defective kind. The third approach agrees with the second that the typical consumer contract is a defective contract, but it rejects the characterization of the defects as purely procedural. The essence of the problem, according to the democratic conception, is not the compromised assent of consumers, but rather the tendency of sellers to set terms without regard for the interests of consumers.

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[1] For a more comprehensive statement of the democratic conception, *see generally* Rebecca Stone, *Putting Freedom of Contract in its Place*, 16 J. Legal Analysis 94 (2024).

There is nothing necessarily pernicious about sellers setting terms for consumers in a take-it-or-leave-it fashion and consumers' limited knowledge of the details. Individual consumers have little interest in acquiring the knowledge they would need to set justly the terms of their relationships with sellers. Sellers, by contrast, are well-positioned to take on that responsibility because they deal with multiple consumers on the same terms at the same time. This also means that consumers can sometimes exert influence on terms collectively. Problems arise when sellers exploit their position as term-setters for their own advantage rather than articulating a vision of justice for their relationships with consumers or seek to undermine the mechanisms via which consumers can collectively assert themselves. This is problematic according to the democratic conception because sellers are under robust duties of good faith not to set terms in either of these pernicious ways. Legal regulation of consumer contracts should accordingly be directed towards ensuring sellers discharge those duties when they set the terms of their agreements with consumers.

I. Privatized Law-Making

On the first way of understanding the problem, the "blanket assent to unknown terms"[2] that consumers give when they enter consumer contracts is too bare to count as assent of a morally significant kind. Thus, we should give up on the idea that consumer contracts are genuine contracts and see them for what they really are: a form of private lawmaking whereby sellers, through their boilerplate terms, set rules to regulate their relationships with all who enter transactions with them. Because sellers set terms with an eye to their own interests rather than those of consumers, this is a defective form of law-making. Laws ought to be made by representatives of all of us, pursuant to procedures that ensure that those representatives act on everyone's behalf, not by entities pursuing their own advantage through contract. As Margaret Jane Radin puts it:

> Mass-market boilerplate schemes can delete large swaths of legal rights that are granted through democratic processes and instead substitute the system of rights that the firm wishes to impose. Just as we are required to obey the law if we want to live where that law holds sway, firms that promulgate boilerplate terms require us to be bound by their terms if we want to engage in the transaction.[3]

The result, Radin argues, is a regime that, when unchallenged, results in the replacement of "the law of the state with the 'law' of the firm."[4]

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[2] Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 Cap. U. L. Rev. 617, 626 (2012).

[3] *Id.* at 633.

[4] *Id.*

On this view of the problem, reforming the law of contract is unlikely to solve it. This is because the law of contract does not treat sellers as fiduciaries of the public, but rather permits, some would say encourages, parties to pursue their own private ends. Indeed, many argue that advancing the equal procedural freedom of each to pursue our private ends is exactly what contract law is and ought to be about. For some this is because freely made agreements are intrinsically worthy of respect.[5] For others that freedom is an instrument for realizing other objectives, such as welfare maximization.[6] While the government lacks the information needed to reliably determine the presence of unrealized gains from trade, private parties know crucial information about their own preferences and production possibilities. Because they will rationally only agree to transactions that are likely to make them better off, contract law enables self-interested parties to act on this information to identify and implement mutually beneficial exchanges.[7] Thus, while the intrinsic and instrumental values of freedom of contract may not be realized when it comes to consumer contracts, strengthening the doctrines that police contracting procedure is not a solution to the problem of privatized law-making that consumer contracts facilitate.[8] This is because even if consumers' assent was rendered more meaningful, sellers would not be required to set terms in the manner of fiduciaries for their clientele, requiring sellers to set terms in this way would run counter to the principle of freedom of contract.

Legal regulation of consumer contracts therefore ought to be directed at remedying the ways in which consumer contracts fail to live up to an ideal of lawmaking, not an ideal of contract, by shifting to forms of governance that ensure that their terms serve the interests of the public at large. Thus, for example, Radin suggests that products liability doctrines might be used to regulate boilerplate terms that render the products they accompany "defective."[9]

The downside of non-contractual solutions, of course, is that judges and state officials may not have easy access to information about preferences and production possibilities to do this effectively. Something is lost in removing or dampening the effect of the seller's judgment from the picture, even if it is, all-things-considered, warranted. The seller has much at stake in the design of the terms because it contracts with consumers on a mass basis and so will generally have expertise about the transaction that lawmakers lack.

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[5] *E.g.* Arthur Ripstein, Force and Freedom 108–16 (2009).

[6] *See generally* Robert E. Scott, *The Law and Economics of Incomplete Contracts*, 2 Ann. Rev. L. Soc. Sci. 279 (2006).

[7] Jennifer H. Arlen, *Reconsidering Efficient Tort Rules for Personal Injury*, 32 Wm. & Mary L. Rev. 41, 51–52 (1990).

[8] Radin is pessimistic that such reform can take care of the problem. *See* Radin, *supra* note 2, at 643 & n.118.

[9] *Id.* at 642–46. *See also* Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 Wm. & Mary L. Rev. 1389 (2007) (arguing for a similar approach to the regulation of insurance contracts).

II. Procedurally Defective Contracts

On the second view of the problem, which aligns with the approach of the Restatement, consumer contracts are contracts, but because consumers' assent is insufficiently meaningful they are contracts of a procedurally defective kind. In the background of this view is faith in the principle of equal procedural freedom and a vision of contract law as ideally vindicating that principle: transactions that are freely assented to are worthy of legal recognition and enforcement.

Solutions accordingly take the form of doctrines directed at making consumers' assent more robust. At a minimum, consumers must be adequately notified of the existence of terms and afforded a meaningful opportunity to review them for those terms to become part of the contract.[10] But such notice, while necessary, is far from sufficient. Consumers who are aware of the existence of terms remain (rationally) ignorant of their content, given the limited time and cognitive resources they have to devote to figuring out their content: "standard terms are not salient, even if they meet technical criteria of disclosure, . . . because it is cognitively impossible to process and comprehend dense quantities of information packaged in standard forms."[11] Thus, non-salient standard terms—as distinct from terms like the price and product description that consumers focus on when deciding whether to enter the contract—ought also to be regarded as presumptively procedurally unconscionable and subjected to substantive ex post review of their content under the unconscionability doctrine.[12] By contrast, sellers face market pressure to make salient terms more consumer friendly, and so such terms are not presumptively suspect.[13] Finally, sellers ought not to be able to deceive consumers using non-salient standard terms. Salient affirmations and promises that sellers make to consumers through advertisements, representations by sales agents and the like ought to supersede standard terms with which they conflict. And sellers may not obscure or deprioritize important information by, for example, only highlighting consumer-friendly features of the transaction or failing to highlight features that will depart from most consumers' reasonable expectations.[14]

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[10] Restatement of the L., Consumer Conts. § 2 (Am. L. Inst. 2024) (original terms); *id.*§ 3 (modifications).

[11] *Id.* § 6 Reporters' Note c.

[12] *See id.* § 6 & cmt. 6(d).

[13] *See id.* § 6 Reporters' Note b ("When prices are salient . . . egregiously high prices ought not to be held unconscionable by courts, unless they are specifically prohibited by statute, or unless special circumstances of the case justify a finding of procedural unconscionability.").

[14] *See, e.g.*, *id.* § 6 Reporters' Note b ("when [a risk of death or personal injury] is known to the consumer, the consumer understands and accepts the contractual allocation of that risk, and the shifting of the risk does not lead to the delivery of unreasonably dangerous goods and services by the business, the limit on liability is not unreasonable.").

These procedural solutions are coupled with a wariness of policing the substance of the terms for its own sake.[15] Substantive review is endorsed as a means of ensuring that the contracts resemble the contracts that the parties would have assented to in the absence of the problematic asymmetries that make consumers' assent defective. Perfectly informed assent is thus the ideal the Restatement strives towards. If consumers knew exactly what they were getting into, the ideal of freedom of contract would be restored notwithstanding sellers' power to dictate terms in a take-it-or-leave-it fashion.[16] This is an unrealizable ideal—hence the need for substantive review of terms. But that substantive review is a second-best substitute for consumers' lack of knowledge and understanding.

The Reporters' focus on harnessing the effects of market forces points us in the direction of an instrumental justification of their approach. The rules seek to ensure that market competition leads to more consumer-friendly terms notwithstanding the fact that consumers do not read and understand the fine print. Consumers' "assent" to the terms is procedurally adequate when it will tend to produce consumer contracts with the right kind of content.

The Restatement's rules might also be non-instrumentally grounded by rendering meaningful each consumer's take-it-or-leave-it assent. Even though consumers will inevitably remain ignorant of the details, their assent might be thought robust enough to count as genuine assent so long as the rules ensure that the transaction is close enough to the transaction the consumer understood themselves to be agreeing to. In this way, the law may vindicate something close enough to an ideal of pure procedural justice according to which contracts are worthy of our respect insofar as they arise from the freely given assent of the parties.

We might, of course, question whether a consumer's assent to terms that merely approximate the transaction that a consumer had in mind is enough to vindicate this procedural ideal, especially given the heterogeneity of consumers' preferences and circumstances. At best, it seems that we can say that consumers assume the risk that the transaction may not perfectly correspond to the transaction they had in mind. But it is not at all clear that the assumption of this type of risk—that is, *normative* risk about the rules that regulate the relationship between the seller and consumer—is subject to the same principles as the assumption of ordinary risk arising from a party's imperfect knowledge of relevant empirical facts. Why should a consumer, a party with minimal bargaining power, be taken to have freely assented to the risk that the seller, the party with most of the bargaining power, set the rules in a way that is adverse to the consumer's interests, or at least more adverse to their interests than they reasonably expected given their understanding of the transaction when they assented to it?

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[15] *See supra* note 13.
[16] *See id.* § 6 Reporters Note b.

When a contract allocates the risk of the occurrence of a fact that was unknown to both parties at the time of contracting, a party cannot complain to the other when the risk resolves itself in the other party's favor. (It is not unjust to have paid insurance premiums for a risk never materializes.) But the consumer who later discovers that the terms of a contract of adhesion were worse than they reasonably expected them to be may well have a complaint against the seller notwithstanding their understanding that there was a risk that this could be the case when they entered the contract. The seller cannot reasonably respond that the consumer assumed that risk, given that the seller was responsible for causing it to materialize.

Perhaps a different kind of response is available to the seller: it is not that in assenting to the transaction the consumer assumed the risk that the terms were worse for the consumer than they expected; rather, the consumer delegated term-setting power to the seller. But this is not a plausible interpretation of what consumers are doing in a legal regime that focuses only on ensuring that the terms of consumer contracts do not diverge too far from consumers' reasonable expectations. Nothing about such a legal regime should make a reasonable consumer believe that the seller will set terms with consumers' interests in mind. The rules, if they work well, may well deter sellers from opportunistically exploiting consumers' rational ignorance of boilerplate terms. But that is not enough to make a reasonable consumer inclined to delegate to the seller authority to unilaterally set the terms of their relationship.

III. Democratically Inadequate Contracts

On the alternative characterization suggested by my democratic conception, the problem is not primarily a lack of meaningful assent but rather the conduct of the parties, especially the term-setting party. The ideal contract is not necessarily one that is made in a procedurally impeccable manner in the sense of there being full information and understanding on both sides with both sides equally empowered to influence the agreement's contents; it is, rather, one that is directed towards substantive justice between the parties in the right way. Thus, while we should understand the problem as a contractual one as the second approach does, there is a sense in which the ideal of contract envisaged by the democratic conception aligns with the first approach. It entails that contracting parties operate under duties to set terms that realize a joint vision of justice between them that gives each fair representation in the deliberative process. In contrast to the first approach, however, it is the contracting parties not the public at large who must be fairly represented in the term-setting process.

The centerpiece of the democratic conception is a conception of a morally valid agreement as the product of a good faith attempt by the parties to articulate a joint vision of justice between them that successfully articulates a

substantively plausible joint vision. When and only when these conditions hold, an agreement articulates what the parties owe one another morally speaking, thus providing a justification for its legal recognition that is grounded in genuine rights and duties of the parties. Such agreements are thus not mere instruments of justice in the way that freely made agreements may be instruments for the promotion of social welfare. Rather, they articulate what justice between the parties requires.[17] These requisites of moral validity are demanding, considerably more so than those suggested by conceptions of contract that understand it as a site of mere procedural justice where moral validity rests only on the freely given informed assent of the parties. If conditions are not ripe to ensure that most parties enter into agreements that satisfy them, then we will need a different, instrumental, justification of contract law that shows how the enforcement of agreements contributes to justice even though most agreements do not express what the parties owe one another such that enforcing them is not a way of vindicating their rights and duties of justice directly.[18]

A crucial assumption is the existence of pervasive moral uncertainty about what justice between the contracting parties requires.[19] By "justice" I simply mean the set of moral considerations that regulate conflicts—ranging from the trivial to the profound—that inevitably arise even among perfect moral agents due to their clashing partial commitments, attachments, and projects.[20] These clashing standpoints generate conflicting prescriptions about what is to be done. Perfect moral agents will understand this and be motivated to conform to the resolutions of these conflicts that justice prescribes. The problem, even for such agents, is that figuring out what justice requires is an epistemically difficult problem and would remain so even in the unlikely event that we knew all the morally relevant facts. Thus, in a sufficiently diverse and complex society, even reasonable people will regularly disagree about justice. What justice requires might also be somewhat indeterminate, because morality might not determinately settle what justice between parties requires.[21]

This moral uncertainty about substantive justice gives rise to a second-order question of justice—the question who is authorized to resolve morally uncertain questions of justice. The democratic conception offers a liberal egalitarian answer: principles of equal respect for agency entail that moral authority to resolve a morally uncertain question of justice is allocated equally to those whose rights may be affected by the resolution of the uncertainty.[22] This is where agreements enter the picture: much like democratic institutions at the community level are the just mechanism for resolving morally uncertain

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[17] Stone, *supra* note 1, at 108.
[18] *Id.* at 108–09.
[19] *Id.* at 105–08.
[20] *Id.* at 103.
[21] *Id.* at 105–06.
[22] *Id.* at 106–08.

community-wide questions of justice, agreements are the just mechanism for resolving morally uncertain relationship-specific questions of justice between the parties.[23] Here we find space for freedom of contract: because the answers are morally uncertain, the parties have considerable latitude to articulate their own joint vision of justice for their relationship.[24] But this freedom is cabined: the parties must deliberate in good faith towards articulating such a joint vision, not jostle for advantage in the way that economists imagine that parties act during contractual negotiations.

What does the democratic conception entail in the realm of consumer contracts? Given the structural asymmetries that characterize the relationship between sellers and consumers, it might seem unlikely that a consumer contract could ever be the result of good faith deliberations between the parties that successfully aim at articulating a plausible joint vision of justice between them. If so, then the democratic conception can offer, at most, an instrumental perspective on the law of consumer contracts: we should give up on the idea that enforcing consumer contracts is a way of directly vindicating what the parties owe one another as a matter of justice, and the rules should instead be designed with a view to realizing justice writ large. We would, in effect, be in the world imagined by the first approach: there would be no contracts worthy of recognition as such, only attempts by sellers to impose rules on consumers that must be subjected to democratic scrutiny at the community level.

Perhaps counterintuitively, however, consumer contracting is, at least in principle, compatible with the democratic conception's ideal of morally valid agreements, such that the democratic conception can offer a distinctive characterization of the problem of consumer contracting and its solutions. As we already noted, the asymmetry between sellers and consumers that results in sellers making complex, take-it-or-leave-it offers to consumers is not, fundamentally, reflective of a pernicious power imbalance. Given their limited time and attention and their limited expertise in the details of each consumer product and service contracted for, consumers have good reason to leave the determination of details of their transactions—including salient details like price—to sellers, if sellers can be trusted to set terms that reflect consumer interests as well as their own, rather than deliberating about the terms themselves. Sellers, for their part, have reason to invest deliberative resources into the design of the terms, given that they deal on such terms with many consumers simultaneously and have relevant expertise about the transactions that result. Economically minded scholars make such observations to emphasize the efficiency gains that are realized through standard-form contracting.[25] But on

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[23] *Id.* at 107.

[24] *Id.*

[25] Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203, 1246 (2003).

the democratic conception, they are significant less for their implications for efficiency and more for their implications for the proper allocation of term-setting responsibility. Sellers have the primary responsibility to do the work of devising terms of their relationships with their customers because of their ability to set terms for many at once, and they must do so with an eye to realizing justice in their relationships. It will not suffice for them to set them to maximize their own profits, even if some efficiency savings from the standardization of terms get passed along to consumers.

The danger, of course, is that sellers will exploit their positions as term-setters to try to maximize their profits without regard for the interests of consumers. But they might instead take their duties of justice seriously by setting terms with the interests of consumers in mind alongside their own. Then, even though it may appear that consumers are passively giving blanket assent to unknown terms, consumers are assenting on the reasonable understanding that the term-setting party has designed the terms with their interests in mind by constructing a plausible vision of justice for their relationship. We can think of the seller as having made an implied representation that it set the terms in good faith with an eye to realizing justice between it and its customers. In setting terms in this way, a seller not only articulates terms that reflect the interests of both parties reasonably justly; it also relieves consumers of their responsibility to figure out the contours of the relationship that justice plausibly requires. There is thus nothing inherently problematic about holding a consumer to terms that the seller sends to the consumer only after the moment of contract formation, as in the so-called "shrink-wrap" transactions involved in cases such as *ProCD, Inc. v. Zeidenberg*,[26] though not only for the reasons of efficiency Judge Easterbrook has in mind when he writes: "Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation and use instead a simple approve-or-return device."[27] What is crucial on the democratic conception is not that sellers reduce the overall costs of contracting by setting terms in a streamlined way, but rather that their term-setting power arises from an allocation of responsibility that enables the parties to solve the deliberative problem of figuring out just terms for their relationship.

While consumers have a less active role to play in the construction of their relationship with sellers, their role isn't entirely passive. Although predominantly term takers at the contract creation stage, they can sometimes influence how the contractual relationship develops once it has begun. A mortgage borrower facing foreclosure under their mortgage agreement might negotiate with their lender for a short-term forbearance period allowing them to

[26] 86 F.3d 1447 (7th Cir. 1996).
[27] Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

temporarily stop payments while they get back on their feet.[28] A purchaser of a consumer product might successfully return an item without a receipt, contrary to the store's standard policy.[29] An airline customer who just misses their flight might persuade the airline to put them on the next flight without facing the penalty set forth in the airline's standard terms.[30] In such ways the real terms of the relationship may end up diverging from the standard terms.

Such ex post tailoring of terms might be a way of distinguishing among consumers who are more or less costly to serve. If it would be prohibitively costly for a seller to verify observable consumer opportunism in seeking departures from standard terms ex post, for example, then offering concessions to good faith consumers (who honestly determine the product they are returning is not what they wanted) who cost less to serve on average than opportunistic consumers (who exploit a return policy in order to borrow for free) appears to be efficiency enhancing.[31] And such tailoring might not be problematic on the democratic conception, because tailoring terms to costs is just all things equal.

But profit-maximizing sellers have reasons to engage in such tailoring other than a desire to distinguish between the good and the bad. For example, they have reason to offer concessions to customers who are more economically powerful, hence, likely to purchase from them again in the future, or who may be "likely to be an especially influential source of negative word-of-mouth advertising."[32] Tailoring terms to consumers on these grounds is not plausibly implementing a conception of justice between the parties, even when it does not exacerbate historical patterns of disadvantage, as empirical evidence suggests that it does in practice.[33]

Consumers seeking adjustment of terms lack the perspective of sellers because they do not observe how sellers treat similarly situated consumers who also seek adjustment of the terms of their relationships. Thus, the primary responsibility for unjust ex post tailoring of terms lies with sellers. Sellers accordingly should be held to a further implied representation that ex post adjustments of their relationships with consumers distinguish among them in accordance with a vision of justice rather than an eye exclusively to their own profits.

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[28] Manisha Padi, *Contractual Inequality*, 120 Mich. L. Rev. 825, 829 (2022).

[29] Meirav Furth-Matzkin, *Discrimination in Contractual Performance: Evidence, and Preliminary Policy Prescriptions*, 99 Wash. L. Rev. 1165, 1168 (2024).

[30] *Id.* at 1171.

[31] Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 Mich. L. Rev. 857, 877–80 (2006).

[32] *Id.* at 881.

[33] *See* Furth-Matzkin, *supra* note 29 (documenting ways in which marginalized consumers are treated worse than more privileged counterparts in a variety of consumer contexts); Padi, *supra* note 28 (providing evidence that mortgage service providers offer more lenient treatment to borrowers living in affluent, predominantly white neighborhoods).

But a consumer who exploits a position of unusual influence to extract exceptional concessions from a seller interferes with the seller's ability to discharge its duty to treat like consumers alike. It may also involve a form of deliberative wrongdoing against the seller's other customers by undercutting their efforts to influence sellers collectively. While consumers have limited opportunities to organize to put collective pressure on sellers to change their standard terms, they can assert themselves collectively in a decentralized way through market pressure facilitated by consumer reviews and market intermediaries that collect and publish information relevant to consumers as well as information that is generated by litigation by aggrieved consumers. They may sometimes find ways of acting in a more coordinated fashion through consumer groups and class actions. These mechanisms of collective pressure are undermined when powerful members of the group extract concessions for themselves without attending to the interests of the larger group. Sellers also directly undermine those mechanisms through arbitration clauses, class action waivers, and terms precluding consumers from publishing critical reviews. All such actions are wrong on the democratic conception not only because they tend to tilt substantive outcomes against the interests of consumers, but also because they interfere with the primary mechanisms via which consumers have a say in their relationships with sellers, thus undermining the proper balance of term-setting authority between sellers and consumers. For similar reasons, sellers engage in deliberative forms of wrongdoing when they engage in anti-competitive conduct such as collusion with other sellers that limits the effectiveness of market pressure.

IV. Democratic Duties to Set Terms in Good Faith

As we have just seen, on the democratic conception a seller is under a duty to use their term-setting power in good faith to realize a joint vision of justice between it and its customers. Given the significant danger that sellers will instead exploit their position as term setters for their own advantage, the broader social and institutional environment has an important role to play in encouraging and facilitating term-setting in accordance with the democratic vision. For example, some mandatory regulation of the terms of consumer contracts is likely warranted. Clauses impeding consumers' ability to litigate disputes with sellers like arbitration clauses and class action waivers ought to be unenforceable to the extent that they undermine consumer efforts to put collective pressure on sellers by aggregating potential claims and shining a light on poor term-setting practices. For similar reasons, terms that impede competition between sellers or prohibit consumers from revealing information about sellers' products and services through reviews and litigation ought to be invalid, because they undermine the deliberative mechanisms consumers have for collectively influencing terms. And robust antitrust laws are important for

securing the background conditions for the democratic ideal of consumer contracting to be realized.

On the democratic conception, consumers' assent is meaningful because it is conditioned on sellers having set terms in a way that reflects the seller's joint vision of justice for the relationship rather than the seller's bottom line. There should therefore be robust judicial review of the substantive terms of consumer contracts to ensure that they reflect plausible, good faith determinations by sellers of what justice between them and their customers requires. While pure substantive review of terms ideally ought to be deferential to sellers given that the parties, not courts, have the moral authority to resolve moral uncertainty about what justice between them requires, deference is warranted only if the seller has set the terms in good faith by seeking to articulate a plausible vision of justice for their relationships with their consumers. Thus, while the democratic conception endorses the Restatement's injunction that any doctrine of pure substantive unconscionability "be used only when the one-sidedness of a term in the contract is extreme,"[34] an inquiry into the procedural unconscionability of an agreement should involve considerable substantive evaluation of sellers' term-setting practices to ensure that sellers are setting terms in good faith with an eye to justice between the parties. There is not a sharp distinction between procedure and substance on the democratic conception because the moral validity of agreements depends on the parties having engaged in good faith in a deliberative process that aims at articulating a joint vision of justice between them. Thus, an agreement is procedurally inadequate if the seller failed to give adequate heed to the interests of consumers when designing its terms, even if by chance it turns out that the terms are not especially disadvantageous to consumers. Given that the consumers' assent was premised on the seller having attempted in good faith to articulate a vision of justice for the relationship, such procedural inadequacy should be sufficient for invalidity even absent a showing of substantive unfairness.

Courts might go further than simply invalidating agreements that fall short of the democratic conception's requirements of moral validity by reading into every consumer contract a warranty that the terms are reasonably just or at least were determined by the seller in a good faith effort to realize justice between the seller and its consumers. This would include a warranty of non-discrimination—a warranty that any ex post tailoring of terms to the circumstances of particular consumers is an attempt to realize justice between the seller and those consumers rather than merely an attempt by the seller to preserve its reputation or otherwise protect its bottom line. Breach of these warranties would give consumers a cause of action for breach of contract. This proposal is close to Radin's suggestion that products liability law might

[34] Restatement of the L., Consumer Conts. § 6 cmt. 3 (Am. L. Inst. 2024).

fruitfully be applied to the problem of exploitative consumer contracts.[35] But unlike the first approach, it keeps regulation of terms squarely in the contractual domain insofar as those warranties pertain to terms that only affect the parties to consumer contracts.[36]

Conclusion

I have articulated a democratic ideal of consumer contracting, according to which the primary problem with consumer contracts is not consumers' "blanket assent to unknown terms,"[37] but rather the failure of sellers to set terms in good faith in a way that articulates a plausible joint vision of justice between them and their consumers. In assenting to a consumer contract, consumers should be understood as delegating to sellers authority to set terms in this way. Thus, consumer contracts are morally valid only insofar as they are the product of such an exercise of sellers' term-setting duties. It is accordingly incumbent on our legal institutions to recognize that sellers are under robust duties to set terms of their contracts with consumers in a way that is attentive to consumers' interests as well as their own and to police the contracting process accordingly.

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[35] *Supra* note 9.

[36] Some standard terms directly interfere with consumers' relationships with third parties and expose third parties to legal risk and so may require different treatment. Many end-user license agreements governing licenses to use digital products, for example, purport to prohibit the transfer of such products to third parties. Christina Mulligan argues that license agreements authorizing indefinite use of a copy should be treated as transferring title thus "allow[ing] the copy to be transferred to second-hand customers and provide a floor of rights that end users could be confident about exercising over copies of digital works." *Licenses and the Property/Contract Interface*, 93 Ind. L.J. 1073, 1099 (2018). Such a rule would make sense from the vantage point of the democratic conception. In engaging in mass consumer contracts, sellers evince their indifference towards the identities of those with whom they contract, and thus which purchaser ends up using the product. Insofar as they seek to determine who may use a copy, restrictions on transfer thus look prima facie unprincipled making it unclear how they could be part of a plausible conception of just relationships with consumers and end users.

[37] Radin, *supra* note 2, at 626.