

# “SALE” OF LAW AND FORUM AND THE WIDENING GULF BETWEEN “CONSUMER” AND “NONCONSUMER” CONTRACTS IN THE UCC

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## I. INTRODUCTION

Consumers are the engines that drive our “consumer economy.” Their shopping and buying are what make the free market go. Their millions of individual choices of goods and services are thought, in theory, to eventually cause producers to produce some kinds of goods and to stop producing others. Consumer spending creates markets, affects supply and demand, and makes prices for given things move upwards or downwards. All of this is basic economics.<sup>1</sup>

Integral to this free-market economic theory is the proposition that persons are free to choose what they will buy and how much they will pay for it. Such freedom helps guarantee that the producers produce what is wanted and do not produce what will not sell.<sup>2</sup> It has long been conventional wisdom that state regulation of either prices or production decisions is bad because it artificially separates what is produced from what buyers in the market want.<sup>3</sup> At the level of classical contract doctrine—which mirrors *laissez faire* economics<sup>4</sup>—this proposition appears with the emergence of the bargain theory of consideration<sup>5</sup> and the often-repeated rule that courts will not inquire into the adequacy of consideration.<sup>6</sup> The bargain theory of

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1. This is basic to an understanding of conventional economics and is found early on in economics texts. *See, e.g.*, EDWIN MANSFIELD & NARIMAN BEHRAVESH, *ECONOMICS USA* 31-45 (1986).

2. There are ideological “freedom” connotations to the free-market idea as well. *See* Jay Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 378 (2d ed. 1994).

3. *Cf.* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 *GA. L. REV.* 583, 585-87 (1990).

4. *See* LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965).

5. *See* E. ALLAN FARNSWORTH, *CONTRACTS* § 2.2 (1982).

6. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (1979); 3 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 7:21, at 383 (4th ed. 1992). The

consideration is part of the larger development of the freedom of contract ideology that animates classical contract doctrine.

Classical contract doctrine purported to apply this freedom of contract view across the board to all contracts; consumer contracts were conceptually no different from other contracts. Taken to its extreme, classical contract theory yielded a contract law with little or no explicit judicial or agency regulation.<sup>7</sup> But, since at least the 1930s, policymakers have recognized that not all contracts neatly fit the fully negotiated, full-knowledge paradigm of classical contract doctrine.<sup>8</sup> This recognition accelerated in the 1960s with the rise of the consumer protection movement. The result has been expanded regulation of the contracting process<sup>9</sup> and, increasingly, the rise of “consumer law” and “consumer protection” as discrete subjects for study and analysis.

Nobody doubts any longer that “consumer contracts” are different from fully negotiated contracts of the classical model. Consumers are seldom represented by lawyers in their contractual dealings, and we tend to think that, as a group, they have a lower level of legal sophistication than those with whom they typically make contracts. We offer law school courses in consumer law and consumer protection, and both federal<sup>10</sup> and state<sup>11</sup> law often single out consumer contracts for special treatment.

This perception that consumer contracts are different from others has worked its way into the Uniform Commercial Code (“UCC”) revision process. In fact, one might even see consumer protection as a central focal point in that process. This development is a natural by-product both of our

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statement of the proposition has nearly become a ritual. *See, e.g.*, *Carroll v. Lee*, 712 P.2d 923, 926-27 (Ariz. 1986) (en banc); *White v. Village of Homewood*, 628 N.E.2d 616, 619 (Ill. App. Ct. 1993); *Hubbard Milling Co. v. Citizens State Bank*, 385 N.W.2d 255, 258 (Iowa 1986); *Rogers v. Runfola & Assocs., Inc.*, 565 N.E.2d 540, 542 (Ohio 1991). How much one will pay for given goods or services is a peculiarly personal decision to which courts are said to have limited and inadequate access.

7. *See generally* GRANT GILMORE, *THE DEATH OF CONTRACT* (1974) (containing one of the best descriptions of the classical *laissez faire* conception of contract).

8. Karl Llewellyn early on observed the rift between contract doctrine and the form contract. He gathers relevant authorities and offers his observations in K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 700-05 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

9. *See generally* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990).

10. *See, e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, §§ 101-112, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301, 2312 (1994)).

11. *See, e.g.*, UNIF. CONSUMER CREDIT CODE (1974), 7A U.L.A. 17 (1985 & Supp. 1996). This statute has been enacted in 5 states. 7A U.L.A. 1 (Supp. 1996). Lemon laws are well-known, pervasive examples of consumer protection statutes at the state level.

evolving perception of consumer contracting and of political reality.

The different dynamics of consumer contracts have come center stage, in part, because the UCC revision process has come under attack from many quarters for its lack of attention to the concerns of consumers and its excessive attention to the interests of organized business groups.<sup>12</sup> The failure to take consumer interests into account has, according to some critics, created unbalanced statutes<sup>13</sup> and, more practically, created enactment difficulties in state legislatures.<sup>14</sup> Those with a consumer law perspective and experience in consumer representation are increasingly seen as necessary to counterbalance or enrich the views of business lawyers who, some argue, tend to dominate the UCC revision process.<sup>15</sup>

The widespread institutional response is to be applauded. The American Bar Association ("ABA") has begun supporting "consumer fellows" in its work on UCC law reform.<sup>16</sup> Similarly, the American Law Institute ("ALI") has been providing limited travel reimbursement to permit a consumer representative to attend the drafting committee meetings of Articles 2, 2B, and 9.<sup>17</sup> The drafting committees for both Articles 2 and 9 of the UCC created subcommittees charged with addressing consumer issues. It is fair to say that within the revision process widened recognition exists that the interests of consumers need to be considered both for balance and for political reasons.

A countermovement seems also to have worked its way into the revision process. Since the late 1970s, a reaction to the consumer protection

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12. See generally Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827 (1992); Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC?*, 26 LOY. L.A. L. REV. 563 (1993); Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191 (1994); Donald B. King, *Major Problems with Article 2A: Unfairness, "Cutting Off" Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869 (1992); Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565 (1994); Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593 (1994); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994).

13. See *supra* note 12 (citing critics).

14. See, e.g., Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 784 (1993).

15. Cf. Scott, *supra* note 12, at 1807-10.

16. "Consumer fellows" are lawyers who are chosen for their expertise in representing low-income and other consumers in consumer law matters. They receive limited travel expense reimbursement from the ABA's Business Law Section to enable them to participate in its law reform initiatives and other activities.

17. Telephone conversation with Elena Cappella, Deputy Director, American Law Institute, March 13, 1997.

movement has been building. The rise of law and economics in the late 1970s has presaged a political and ideological reaction to the governmental intervention of the 1960s and early 1970s. Freedom *from* governmental intervention has been the rage since the 1980s.<sup>18</sup> A belief in the unlimited power of individuals to chart their own destinies despite racism, lack of education, or poverty has underpinned various proposals in the areas of public education,<sup>19</sup> affirmative action,<sup>20</sup> and welfare reform.<sup>21</sup> In the UCC revision process, this countermovement takes the name “party autonomy,” and this ideology drives many of the UCC reform proposals.

As with classical contract doctrine, party autonomy ideology maintains that individuals are in the best position to evaluate their own needs and ought to be able to arrange their affairs with others without governmental or judicial intrusion. As with many forms of economic analysis, this ideology assumes relatively equal bargaining power, relatively equal access to information, and relatively perfect markets. If these assumptions are true, the resulting free market will produce the goods and services that people want.<sup>22</sup>

The rise of the consumer protection movement, the party autonomy countermovement, and the new involvement of “consumer representatives” has brought into the UCC revision process a bipolar view of contracting. Reflecting both the bipolar ideology and the predominantly bipolar backgrounds of the participants, a division of contracts into “consumer” and “nonconsumer” contracts is often followed by special rules for consumer contracts and party autonomy rules for all the rest. This approach makes a

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18. See 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 22 (1995).

19. So-called “school choice” would give parents some money to send their children to the school of “their choice.” Unfortunately, no proposal has sufficient funding to provide the ghetto-dweller with an adequate allowance to truly gain access to a chosen school, much less to help the relatively uneducated parent make an intelligent, informed choice.

20. The backlash against affirmative action as “racial preferences” sometimes expresses a belief that racism has been largely eradicated; that all persons, minority or otherwise, are in fact judged on their true merits; and that discrimination suits are an effective remedy for those rare instances where race enters the picture. For an empirically supported contrasting view, see JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* (1995).

21. Recent welfare reform legislation requires that welfare recipients work, but makes no provision for ensuring that work is available or that the recipients are adequately trained to do it. See Dana Milbank, *Welfare Law's Work Rules Worry States*, WALL ST. J., Aug. 5, 1996, at A2. These deficiencies will present obstacles to welfare recipients in search of work no matter what their motivations. Cf. Jon Nordheimer, *Welfare-to-Work Plans Show Success Is Difficult to Achieve*, N.Y. TIMES, Sept. 1, 1996, § 1, at 1.

22. An extreme proponent of a free market approach to all contracting is Richard Epstein. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954 (1984).

contract either a consumer contract or a nonconsumer contract, with nothing in between.

But sound policy—whether based on economic considerations or otherwise—may require a different division of contracts. It may be more sensible in some instances to divide contracts into “merchant” and “non-merchant” contracts<sup>23</sup> or “big” and “little” contracts,<sup>24</sup> rather than “consumer” and “nonconsumer” contracts. If our competing consumer protection and party autonomy movements within the revision process blind us to other, more appropriate dividing lines, the resulting revisions will be less than optimal. In particular, we might find consumer protection in a given instance, while appropriate, far too narrow to correct the perceived problem with the rule in question.

My main purpose here is to showcase instances of this phenomenon and to suggest caution in the ready embrace of consumer protection as an appropriate cure to all the ills of the contracting process. This suggestion may seem an obvious point, but as indicated previously, there is evidence that a consumer/nonconsumer dichotomy is being advanced to address problems for which a different division may be more appropriate.

To make the point that there are substantive provisions for which a division between consumer protection and party autonomy is inappropriate, I have chosen to discuss the UCC’s provisions governing contractual choice of law and choice of forum. These are provisions stating under what circumstances the parties may choose the law to govern their contract or the forum to resolve their disputes and defining the implications of their choice.

Recent choice-of-law proposals have advanced a party autonomy approach to these provisions, usually with explicit or implicit exceptions for consumer contracts. In this context, the party autonomy idea would permit the parties to choose law and forum in the same way they choose other contractual terms or decide what they will exchange and for how much. In examining these developments, I will specifically argue that the consumer/non-consumer division, while understandable in political terms, is inappropriate for choice of law and forum. In discussing the specifics of choice of law and forum, I hope to make the larger point that we must exercise caution, at least in some instances, in too readily embracing

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23. *Cf.* U.C.C. § 2-207(2) (1995).

24. *Cf. id.* § 2-201; Draft, Uniform Commercial Code Article 2B Licenses § 2B-201(e)(1) alt.B (Nat’l. Conference of Comm’rs on Unif. State Laws, Sept. 4, 1996) [hereinafter Sept. 1996 Draft, Art. 2B], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 20, 1997).

consumer protection as the optimal solution to a given problem, particularly when a consumer carve-out comes with a rule that subjects all other contracts to a party autonomy paradigm.

I will begin in Part II with an overview of choice of law and forum in the UCC and of the reform proposals. In the process, the Article will examine the assumptions underlying an economics-based model that has been advanced to support near-complete party freedom to choose law and forum. This theoretical support is based on what I will call a “shoppers’ model,” the idea being that parties should be able to select (i.e., *buy*) law in the same way that they select dog food, corn flakes, or beer. In Part III, I will apply to this transactional situation the “repeat-player/one-shotter” analysis first developed in a litigation context by Professor Marc Galanter.<sup>25</sup> The analysis will show that the problems raised by the party autonomy provisions pervade much more than consumer contracts and that consumer protection in this context is therefore likely to be far too narrow to advance sound economic policy. Indeed, I hope to show that, except in very large transactions, the economic support for the party autonomy model must fail because of uncorrectable asymmetry in party information. In Part IV, I will suggest some alternative approaches that the UCC might take in partially correcting the market failures that will accompany these particular contract provisions. Finally, in Part V, I will return to the consumer/nonconsumer dichotomy and consider whether our penchant for consumer protection and party autonomy is blinding us to broader problems elsewhere in the UCC.

## II. BACKGROUND: CHOICE OF LAW AND FORUM IN THE UCC

### A. UCC Section 1-105: *The Old Regime*

Section 1-105 of the UCC is the main provision governing choice of law and the parties’ ability to affect choice of law through their contracting. Currently, the provision permits the parties to choose the law that governs their contract as follows:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or

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25. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.<sup>26</sup>

The provision pointedly requires that there be some relationship between the law that the parties choose and their transaction; they may not choose the law of a place wholly unrelated to them or their transaction to govern their contract. The UCC provision is consistent with the *Restatement (Second) of Conflict of Laws*, which will not enforce a clause selecting law that “has no substantial relationship to the parties or the transaction and . . . no other reasonable basis for the parties’ choice.”<sup>27</sup> Both articulate the notion that law can supersede the joint will of parties to a contract. Nothing in either provision differentiates consumer contracts from other contracts.

The notion that someone might choose the law that will apply to her actions under *any* circumstances seems at odds with the nature of law itself.<sup>28</sup> Choosing to be governed by the law of one place is also choosing *not* to be governed by the law of another place. The latter choice has sometimes taken the name “civil disobedience” if done openly and “crime” if done surreptitiously.

The situation has, however, been perceived differently. Where several jurisdictions arguably could impose their law, conflict of laws rules ultimately decide which of those jurisdictions will control. Those rules do not point inescapably in any direction; until the adjudication, uncertainty about which law will be applicable can permeate performance of the agreement and any litigation that might follow. By permitting the parties to control the governing law, some measure of certainty accrues. The restrictions on party choice to a jurisdiction to which their transaction “bears a reasonable relation” seems to be a natural corollary based on underlying notions of sovereignty: if the law of more than one place governs the transactions, we will permit the parties to choose one of the otherwise governing jurisdictions; we will not, however, permit the parties by agreement to select an unrelated place and thereby escape the jurisdiction of *all* the places that arguably could govern.<sup>29</sup>

Until the promulgation of Article 2A in 1987, choice of forum was not addressed at all in the UCC. Beginning with Article 2A, one finds choice of

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26. U.C.C. § 1-105(1) (1995).

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

28. Perhaps significantly, the first *Restatement of Conflict of Laws* did not provide for contractual choice of law at all. Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 269 (1993).

29. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 329 (1990).

forum and choice of law addressed in an Article other than Article 1. Significantly, there and elsewhere one begins to find a division of contracts into consumer and nonconsumer contracts for purposes of the applicable rules.

### *B. Recent Developments*

The developments that are most radical are those which attempt to “disconnect” the parties’ choice of law or forum from a jurisdiction that has some relationship with either the parties or their transaction. Broadly conceived, the animating idea is that parties to a contract should be given the authority to choose the law that will govern their transaction and matters related to it without any statutory restrictions at all. Similarly, they should be given authority to choose for the purpose of litigating their disputes a forum that has nothing to do with them or their transaction. “Party autonomy” is the banner under which these proposals march.

Lest one underestimate the breadth of the challenge these developments represent to more traditional ideas of the proper spheres of individual and collective (i.e., legislative) authority, I will summarize below the extent to which this form of party autonomy ideology has made its way into the UCC.

The most recent of the developments is a Task Force Report from the ABA that has focused on section 1-105.<sup>30</sup> Some participants advanced party autonomy proposals similar to other provisions now increasingly found in the UCC. The ABA Task Force arrived at no conclusions on the issue but the Report makes clear the extent to which the party autonomy idea was present. The Report reads in part:<sup>31</sup>

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30. The Task Force developments have been eclipsed by recent events. A Drafting Committee was appointed to redraft Article 1 and in March 1997 the Committee decided to embrace a full party-autonomy model for Article 1. With an exception for consumers and other exceptions not here relevant, the draft provision provides in part that

“[A]n agreement by the parties to a transaction governed in whole or part by this Act that any or all of their rights and obligations with respect to each other are to be determined by the law of this state or another state or country is effective, *whether or not the transaction bears a reasonable relation to that state or country* . . . .

Draft, For Discussion Only, Uniform Commercial Code, Revised Article 1 General Provisions (199\_) § 1-302 (Am. Law Inst. & Nat’l Conference of Comm’rs on Unif. State Laws, Apr. 1997), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 14, 1997).

31. Final Report of UCC Article 1 Review Task Force, pt. 2 (July 1, 1996) [hereinafter Article 1 Task Force Report].

Very briefly, the proposals for change considered by the ABA Task Force include:

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2. Deleting, or at least relaxing, the existing limitation that there be a reasonable relationship between the transaction and the jurisdiction whose law is selected. . . .

There was strong sentiment for deleting the relationship limitation altogether, in line with the approach taken in the Rome and recent OAS Conventions. The UCC has already commenced using this approach in the new and recently revised Articles. See sections 4A-507, 5-116, and 8-110.<sup>32</sup>

No consensus developed around this or any other Task Force proposal. Nevertheless, consistent with the polar draws of party autonomy and consumer protection, the Task Force did develop a consensus that whatever power the parties had to choose law or forum, the rule had to be different in consumer cases.<sup>33</sup>

As the ABA Task Force Report points out, disconnecting the parties' choice of law and forum from a related jurisdiction has some precedent

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32. *Id.* at 3. The Report continued:

This proposal would maximize flexibility, consistent with both the theory underlying party autonomy and the freedom of contract principle generally applicable under the UCC. It would also shorten the statute and eliminate one item of potential litigation. It would also eliminate the need for the not uncommon practice of manufacturing contacts with a particular jurisdiction in order to create the required relationship. While the proposal expands the range of choice legally available to the parties beyond that presently provided, the actual frequency of selection of an unrelated choice is unpredictable. Situations can certainly be envisaged where the added flexibility would prove useful. Reliance can be placed in experienced commercial parties to make a sensible and practical choice. The knowledge, bargaining position and self-interest of commercial parties can be seen as adequate to regulate possible abuse in the choice of law.

*Id.*

33. The Task Force Report listed a number of proposals, none of which developed a consensus as to specifics. The first reads as follows:

1. Making special provision for consumer protection. Existing section 1-105(1) has since the adoption of the code made no special provisions for consumers. While the Code generally provides broadly for party autonomy, certain provisions of the UCC restrict that autonomy or refer expressly to consumer protection statutes and subordinate the Code provision to some of these statutes, of which § 9-203(4) is an example. A very substantial sentiment, both in numbers of proponents and in the forcefulness of advocacy, was expressed that any change, particularly any change broadening party autonomy (or explicitly authorizing party autonomy in the choice of forum context—see paragraph 8 below), should be accompanied by an explicit consumer protection provision.

*Id.* at 2.

within the UCC. Article 4A, the statute governing funds transfers, was the first provision to disconnect the chosen law from the parties or their transaction. The statute permits banks to choose law to govern a funds transfer "whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction."<sup>34</sup> This party autonomy section was followed by a somewhat comparable provision in Article 8, which governs investment securities,<sup>35</sup> and most recently by a provision in Article 5, the newly promulgated Article governing letters of credit. The Article 5 provision addresses choice of law and choice of forum and disconnects both from the parties and their transaction.<sup>36</sup>

All three provisions broadly elevate the parties' choice above the law that might otherwise apply to them. There are no explicit exceptions: if the parties choose some law or other for their relationship, the enacting legislature has directed its courts to apply that chosen law to resolve the parties' disputes. More to the point, consumer protection is missing from these three provisions. Of course, one can easily see the kinds of transactions governed by these provisions as implicitly excluding the unsophisticated and, particularly, consumers. It is difficult, for example, to conceive of an unsophisticated consumer engaging in a letter-of-credit transaction.<sup>37</sup>

Before party autonomy had permeated choice of law and forum in the

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34. The full provision reads:

If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

U.C.C. § 4A-507(b) (1995) (promulgated in 1989).

35. That statute provides in relevant part:

"Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this State may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5).

*Id.* § 8-110(d) (promulgated 1994).

36. *See id.* § 5-116(a) (promulgated 1995) ("The jurisdiction whose law is chosen need not bear any relation to the transaction.") This provision was challenged at the 1995 annual meeting of the American Law Institute. *See Discussion of the Uniform Commercial Code, Revised Article 5*, 72 A.L.I. PROC. 329, 356 (1996) (remarks by Professor Jay L. Westbrook); *id.* at 354, 359 (remarks by Judge Robert E. Keeton).

37. Some comments made at the 1995 annual meeting of the American Law Institute suggested that letter-of-credit transactions were not such that one would worry about "consumer protection." *See id.* at 356-357 (remarks by Professor James J. White); *cf. id.* at 357 (remarks by Professor Fredrich K. Juenger). An "individual who makes an engagement for personal, family, or household purposes" cannot be an "issuer" in a letter of credit transaction. U.C.C. § 5-102(a)(9) (1995).

UCC revision process, a consumer protection provision had found its way into Article 2A. This first appearance of a choice-of-law or forum provision outside of Article 1 is not as expansive as the later provisions that followed. Rather, it constrains what parties otherwise might do under UCC section 1-105. It provides:

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.<sup>38</sup>

This early provision is a simple limitation on whatever power parties might otherwise have to choose governing law and forum; it simply states a special limiting rule for consumer leases. Section 1-105 continues to limit the parties' choice in all cases to a jurisdiction to which "[the parties'] transaction bears a reasonable relation."<sup>39</sup>

### *C. Party Autonomy and Choice of Law and Forum*

The recent developments in the revision process fundamentally challenge some common understandings about law. Law is enacted by legislatures or developed by courts, and most people probably think that they are stuck with what they get. More generally, grade school civics posited a democratically elected legislature making rules for the general good of those under its jurisdiction. Law was either a gift or a burden to those who happened to be subject to it. There was not much that one could do about it. The new party autonomy proposals assert that persons should be able to choose freely whatever law they wish to control their contractual relationship.<sup>40</sup> The more

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38. U.C.C. § 2A-106 (1995).

39. *Id.* § 1-105(1).

40. Parties have long been able to define terms in their contracts by reference to other, disconnected, bodies of law. Thus, just as one could define the color "red" within a contract by reference to an independent standard, one could define *frying chicken* in a New York contract by reference to "unrelated" federal regulations. *Cf.* *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 121 (S.D.N.Y. 1960) (contractual definition of "chicken" coincides with agency regulations "to which the contract [at issue] made at least oblique reference").

radical of the proposals would allow the parties to choose the contract law and the law that governs all matters related to the contract.<sup>41</sup> At the extremes of the party autonomy model, the new provisions essentially authorize one to *buy* one's way out of the law that would otherwise apply.

Similarly, "forum shopping" used to be a pejorative term, at least when only one party did the shopping. Indeed, an antipathy to forum (and law) shopping was an animating force in Justice Brandeis' opinion in *Erie Railroad Co. v. Tompkins*.<sup>42</sup> In contrast, the new choice-of-forum provisions validate forum shopping and perhaps will encourage it.<sup>43</sup> Presumably, the difference is a belief that, unlike the situation in *Erie*, both parties will have "chosen" a different law or forum under the new provisions.<sup>44</sup> *Erie* underscores the seriousness with which we ought to examine the nature of the shopping agreement.<sup>45</sup>

The sources for these fundamental challenges to democratically imposed rules are diverse. First, and perhaps most understandable, is the insatiable desire for certainty and predictability in contracting.<sup>46</sup> The requirement of a relationship between the chosen law and the parties may be believed by some to produce unnecessary uncertainty, a by-product of judicial decision making in hard cases.<sup>47</sup> But the ease with which the certainty problem could be solved

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The recent developments in the UCC revision process are different in that they go beyond definitional uses of unrelated state law to actual controlling principles. Traditional conflicts rules have limited the parties' selection efforts to the law of "related" states in these instances.

41. See Article 1 Task Force Report, *supra* note 31, at 4.

42. 304 U.S. 64 (1938); see also *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965).

43. Forum shopping by contract seems to have become all the rage. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992); David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785 (1993). My colleague David Skeel has brought forum shopping into the bankruptcy context by arguing for state control over corporate bankruptcy law. See David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994).

44. The proposition that both consumer and business agreed to the choice of forum found in the latter's boilerplate form contract underlies the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). The case has been widely criticized. See *infra* note 98.

45. There may also be Full Faith and Credit Clause implications in the choice-of-law context. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

46. See Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 437 (1995).

47. There is little empirical or case law evidence that section 1-105 of the UCC has caused problems.

by creating a safe harbor within section 1-105<sup>48</sup> of the UCC suggests a need for other reasons to explain these challenges.

A desire for certainty is nearly matched in the hearts of business lawyers by a desire for flexibility. The business lawyers who are involved in the UCC revision process *use* contracts and revel in the flexibility that contract offers in structuring transactions. These lawyers often conduct their creative work in the conference room across the table from a counterpart, and negotiate the obtuse legal terms of a deal. They might negotiate over *exactly* the extent of an express warranty offered, over *exactly* what remedies will be available if the deal goes sour, and over *exactly* what mechanisms the parties will have for resolving their differences. For lawyers who do this work, the more flexibility they have with the law, and the more predictability they can give their clients about outcomes, the better and more creative their representation. The fewer substantive restrictions the law imposes, the more flexible and creative the lawyers can be in structuring deals. The ability to select *any* law to govern a transaction would inject a new level of transactional flexibility and creativity into their work.<sup>49</sup>

A third source for expanded party autonomy is the influence of international contracting practice; the needs of international business contracting are said to demand more party autonomy in choice of law.<sup>50</sup> Briefly, the argument is that businesses from different countries may so distrust one another's national law that an inability to choose the law of a "neutral" and unconnected state could be a deal-breaker.<sup>51</sup> United States law, it is argued, ought to be changed lest our businesses suffer an international competitive disadvantage with foreign businesses that are free to choose

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48. The UCC drafters could simply add a subsection specifying, for example, that a court will find a "reasonable relationship" between the law chosen and the principle place of business or residence of either party to the contract.

49. One proposal that appears within the Article 1 Task Force Report was a proposal that parties be able to select the law of different jurisdictions to govern different parts of their contract. See Article 1 Task Force Report, *supra* note 31, at 4. Christened the "Mr. Potato Head Proposal" by the irreverent, this would exponentially expand choice of law flexibility and make it virtually impossible for a novice to understand the implications of agreeing to a "Mr. Potato Head" provision. *Id.* To the criticism that a business might pick and choose the favorable law from a variety of jurisdictions to create a law more favorable than that available anywhere, the response was "The knowledge, bargaining position and self-interest of commercial parties, particularly in view of the costs that would be involved, can be seen as adequate to regulate possible abuse in the choice of law." *Id.*

50. See Borchers, *supra* note 46, at 437-38; Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 491-94 (1995).

51. See Borchers, *supra* note 46, at 438 (developing this argument).

whatever law they like.<sup>52</sup> Buttressing this position are international conventions that permit a disconnected choice.<sup>53</sup>

Finally, one might imagine more political reasons for party autonomy. One such reason is simply a distrust of government intrusion in the form of judicial decisionmaking.<sup>54</sup> A second is an animosity towards varying state regulation that confronts interstate businesses and will likely increase as more decentralized authority is sent from the federal government to the states. With local control comes a patchwork of regulation with which an interstate business has to cope. One can imagine the interstate business's dream of freeing itself of federal regulation and then substituting the regulatory regime of a single state for the resulting patchwork of multiple state regulation. All the better if the interstate business could actually select the regulatory regime to which it would be subject.<sup>55</sup> The party autonomy ideology opens to interstate businesses the possibility of both making that selection and of conducting much of the litigation arising from their interstate businesses in one place. Recent Reporter's notes to Article 2B suggest that this is among the reasons for the draft of its broad choice-of-law provision.<sup>56</sup>

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52. *Id.*

53. See Article 1 Task Force Report, *supra* note 31, at 3.

54. The related, abstract idea of giving one's citizens more "freedom" is far more theoretical than real. As this Article will argue, the only "citizens" who will "choose" law in any meaningful sense are businesses that draft form contracts or negotiate very large contracts. A legislature that gives its citizens the right to "choose" unrelated foreign law in their contracts will, if my argument is valid, be delegating to unknown businesses the right to subject the legislature's electorate to the unknown law of other jurisdictions in the future. Because most of the electorate subjected to this regime will have neither a real choice nor a real understanding of choice of law or forum in the contracts, their "choosing" of foreign law cannot be counted as an exercise in "freedom."

55. Better still if it could select rules that it wanted from several different states. See *supra* note 49.

56. See Sept. 1996 Draft, Art. 2B, *supra* note 24, § 2B-106(a) alt.A. In setting forth reasons for the broad choice-of-law provision in Article 2B, the Reporter noted:

It conforms to the basic commercial law concept that contractual relationships should govern.

It provides a potentially important base for operation in the context of the national information infrastructure, while an alternative rule would significantly impinge on that base, *essentially forcing an on-line system to comply with and learn the law of all fifty states.*

*Id.* § 2B-106 rpt.'s note 1 (emphasis added).

In asserting that Article 2A's consumer protection provision, U.C.C. § 2A-106 (1995) (giving consumers the protection of the state law where they live), is inappropriate, the Reporter's Notes state, "That rule is inappropriate for the highly mobile, intangible property involved in the subject matter of this article. It would create, for example, a situation in which an on-line provider *would be subject to the law in all fifty states and unable to resolve this by contract.*" *Id.* § 2B-106 rpt.'s note 5 (emphasis added). The Reporter's Notes also state, "The licensor interest, especially in on-line transactions, is in uniformity and *being able to control the number of divergent laws with which it must comply.*" *Id.* (emphasis added).

These developments have not been subjected to systematic analysis. Many of the arguments supporting the party autonomy model in choice of law and forum ultimately rest on one's opinion of how serious a problem the requirement of a connection to the parties or transaction really is. There is little in the case law to suggest that the requirement has spawned unnecessary litigation, and no one has performed any empirical study that identifies the requirement of a connection as an impediment to making contracts or to contractual certainty. To make matters worse, the legislative developments have largely escaped scholarly attention. Apart from a published exchange of letters in connection with the ABA Task Force's work on Article 1,<sup>57</sup> conflicts scholars have not addressed the implications of disconnected party choice for conventional conflicts theory. Similarly, contracts scholars have not focused on the *contractual* implications of authorizing the parties to choose law or forum within their contracts.

One source of support for the party autonomy model in this context purports to be far more neutral and analytical and is by far the most provocative support for unlimited party ability to choose law and forum. This source of support is an economic analysis that likens the selection of law to the selection of other goods and services within the economy.<sup>58</sup> I will call this the "shoppers' model" for choice of law and forum. While the model itself seems remarkably inappropriate,<sup>59</sup> it does shed a little light on the *contractual*

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A commonly understood implication of our federal system is that, without federal legislation, businesses are subject to a patchwork of state legislation. If a business wants one set of rules to comply with, federal legislation is preferred because all citizens subject to the rule can affect the applicable rules through the ballot box, as distinguished from the form contract.

The obvious solution to some aspects of the 50-state problem is to enact a safe harbor into Article 2B permitting the parties to select the law of the supplier's business to control their relationship. *Cf.* Sept. 1996 Draft, Art. 2B, *supra* note 24, § 2B-106(b)(1) alt.B. Unfortunately, that safe harbor will not prevent the individual states from enacting legislation designed to protect their own citizens in software transactions. The solution to *that* problem has usually been preemptive federal legislation. As currently developed, the Article 2B alternatives attempt to state effectively preemptive rules without the need for federal legislation, without subjecting those rules to a political process of developing national norms. The licensors' hands are clearly evident in this effort.

57. This exchange of letters was between Professor Larry Kramer and Professor Friedrich Juenger. *See* Borchers, *supra* note 46, apps. at 445-86. For Professor Kramer's response to the party autonomy position advocated by Professor Juenger, see *id.* app. at 458-61.

58. This idea in the choice-of-law context is developed in Ribstein, *supra* note 28. The analysis proceeds on the assumption that businesses ought to be able to contract out of "inefficient mandatory rules" that states enact to protect their citizens, such as limitation on franchise termination. For an additional example of Professor Ribstein's analysis, see Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999 (1994).

59. The very idea that people do—or should—go shopping for law and forum has a surreal character to it. The vision that comes to my mind is our consumer (or, perhaps, CEO or her lawyer)

underpinnings for enforcing choice-of-law and choice-of-forum clauses.<sup>60</sup> Moreover, the shoppers' model is largely a consumer model and therefore peculiarly suitable for a Symposium dealing with consumers. I will therefore take it seriously and use its power for my own analysis.<sup>61</sup>

After explaining the shoppers' model, I will explore the extent to which the model works for choice of law or forum in the realm of real-world contracting. The analysis will show that unlimited choice of law or forum cannot work in consumer contracts. The shoppers' model will also reveal that information asymmetry is endemic in many nonconsumer choice-of-law or choice-of-forum provisions and that a consumer exception to a party autonomy provision in these areas is therefore not broad enough to make the shoppers' model work. We need something other than a consumer/nonconsumer division of contracts if we are to derive the supposed economic benefits of disconnecting choice of law or forum from the parties and their transaction.

My focus here is the *contractual* implications of the party autonomy idea in choice-of-law and choice-of-forum settings. When forum and law are forced on the other party, the questions can become constitutional. We, therefore, should pay particular attention to what we call "choice" in this

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with a shopping cart ambling down one aisle with products liability "products," another with disclaimer "products," and perhaps a third with unconscionability "products." These laws would be brightly packaged and the selling legislatures would compete with one another for eye-level shelf space. The tune playing in the Muzak background might be Tom Waits' *Step Right Up* (Asylum 1976). Instead of chewing gum and eyeglass repair kits by the cash registers, one would find racks of "whereas's," "wherefore's," and law French for the impulse buyer. I am unsure how to fit unit pricing into this vision of the legal supermarket.

60. While an economic analysis is traditionally appropriate in shedding light on contractual *choice* questions, it has only partial (and potentially distorting) power where the choices involved implicate access to justice (forum) and legislative authority (law). Other normative values besides efficiency ought to be part of the mix. Cf. Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 *CARDOZO L. REV.* 431 (1996).

61. Economic analysis, while powerful and informative in many contexts, is often deployed by legal scholars in a normative, rather than descriptive, fashion. In other contexts, I have argued that the overly simplified economic analysis used by legal scholars and others yields distorted normative recommendations. See William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 *MINN. L. REV.* 1103 (1996); William J. Woodward, Jr., *Exemptions, Opting Out, and Bankruptcy Reform*, 43 *OHIO ST. L.J.* 335 (1982); William J. Woodward, Jr., *New Judgment Liens on Personal Property: Does "Efficient" Mean "Better?"*, 27 *HARV. J. ON LEGIS.* 1 (1990). The shoppers' model, of course, suffers from the same infirmities that plague law and economics analysis more generally, and those defects will not be rehashed here. As a nonbeliever, I will use economic analysis in this context because (for whatever it's worth) the analysis appeals to some people and, if used correctly, can add to the reasons that one might advance for seriously limiting the instances in which courts should recognize contractual choice of law and forum.

context. The jurisprudential implications of statutorily authorized, unrestrained choice of law and forum are ripe for conflicts scholars.<sup>62</sup>

#### D. The "Shoppers' Model"

The shoppers' model is basic economics<sup>63</sup> applied to choice of law and forum. It posits individuals and their lawyers buying various "law products" either by the tried-and-true method of forum shopping or through contractual choice of law. By shopping around for a jurisdiction in which to litigate, for example, these pinstriped shoppers give "law-producers" (i.e., state governments) a reason to compete in the production of law and courts that the shoppers will "buy." Viewed from the law and economics perspective, the formerly pejorative "forum shopping" can become a positive development as is shopping and spending more generally.<sup>64</sup>

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62. The slippery slope of the shoppers' model for choosing law is but one striking implication. If the parties can, through contract, regulate their transaction *and matters related to it*, could they use a sham transaction or straw man to confer on them a legal regime more to their liking than what they currently had in place? Could they accomplish the same thing without a contract by simply writing down, and perhaps filing somewhere, that the law of Alaska will govern them even though they live in Pennsylvania? Why not go international and pick the law of Croatia, England, New Guinea, or China to govern one's affairs? Might not some enterprising group gather together to buy an island and form a jurisdiction which will base its entire economic system upon serving the needs of law-buyers? Could a corporation go into such a business? Without the island? Consider the following contract:

1. In exchange for this peppercorn and other good and valuable consideration, the parties agree that they will do business with one another in whatever way each, in its sole good faith discretion, decides.

2. The law of Exxon Law Products, Inc. governs this relationship, the parties, and all matters connected to either of them.

Few scholars other than Professor Ribstein have advocated unlimited party autonomy in choosing law and forum. Professor Kramer would constrain party choice. *See Kramer, supra* note 29, at 329-30; *see also* Borchers, *supra* note 46, app. at 458-61 (letter from Professor Kramer).

63. *See supra* text accompanying note 1.

64. The notion that forum and law shopping can result in the production of better law products seems to have begun with the widespread phenomenon of corporate shopping for law under which to incorporate. *See generally* Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442-43 (1992); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Mary E. Kostel, Note, *A Public Choice Perspective on the Debate over Federal Versus State Corporate Law*, 79 VA. L. REV. 2129, 2130-31 (1993). Delaware's friendly corporation law and the reputation of its courts accounts for its dominance in the corporate law arena. *See* Bebchuk, *supra*, at 1443-44; Romano, *supra*, at 226-27. This fact was not lost on other states like Pennsylvania, which designed its corporate law to attract corporate charters and fees into the state. Expanding from the corporate law arena, Delaware has recently enacted a choice-of-law statute designed, apparently, to bring litigation into its courts to be managed, of course, by its lawyers. DEL. CODE ANN. tit. 6, § 2708 (1995); *see infra* note 131 and accompanying text. The statute is analyzed in Ribstein, *supra* note 58.

The economics-based idea behind this development is the notion that a market in laws and forums will eventually generate “better” laws and forums. Most fundamental to this free market model is the proposition that buyers are best situated to decide what is in their best interests. It is uniquely for them to say what is “best” or “most valuable,” and they can communicate their message through the “buy” that reflects their choice. In the context of choice of law and forum, this communication requires that parties be free to choose their law and forum without artificial regulatory limits such as a relationship between the chosen law and their transaction.<sup>65</sup> Free choice is essential in signaling to the producers of law the *real* choices of those in the market for law. The law producers will ultimately respond by producing law that is more to the liking of those who are the buyers.<sup>66</sup> Presumably, choices of law will be accompanied with some form of incentive for the states in order to give them a reason to produce “better” law.<sup>67</sup>

If the economic notion is that better law will be “produced” by permitting a free market for law to develop, the ability of the “buyers” to choose intelligently the most desirable law is essential. By the same token, if buyer choices either cannot or will not be informed choices, then the economic

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65. See generally Ribstein, *supra* note 28, at 261-66 (arguing that legal constraints on choice of law do not make sense). It is unclear why choosing law with a relation to the parties’ transaction does not adequately generate the production of good law or, at the other extreme, why the market should be as narrow as law in the United States.

66. Consider the bizarre political implications of the shoppers’ model. In the traditional democratic model, voters elect representatives who then enact laws that presumably are in the citizens’ interest. In the economics-based shoppers’ model, the legislature permits its voters to select whatever law they wish to govern their contracts. Voters’ contract choices then tell a *different legislature* what provisions to enact. That different legislature is sensitive not to its own voters—because, presumably, it has given its own voters the right to subject their own contracts to any *other* law—but to the choices of local and foreign contract makers, who pick the different legislature’s law. Do those contract makers, who are now “voting” in the foreign jurisdiction by making contracts elsewhere, have the protections given to real voters? Is it “one person, one vote,” or is it “one dollar, one vote”?

67. Isolated from choice of forum, mere choice of law provides states with limited incentives to produce desirable law because buyers might simply choose their law without paying for it in any tangible way. In some situations—e.g., incorporation and franchising—the use of a state’s law can generate fees. In the context of the UCC and in most other contexts, however, law to date has been free. States do not yet license buyers to choose their law by contract. This fact presents a problem for the shoppers’ model.

Delaware and other states have solved the more general incentive problem by combining choice of law with choice of forum. See *infra* notes 132-34 and accompanying text. Choice of law is combined with choice of forum so that if one chooses to litigate in the chosen state, one can be assured that those courts will apply that state’s law. The new litigation business generated by choice of law *and* forum is what in theory, will motivate the legislatures to produce better law. “Payment” and legislative “incentive” will come via the improved welfare of the state’s lawyers and the fees they spend in the local economy.

model suggests market intervention to prevent “producers” from receiving the wrong signals about what to “produce.”<sup>68</sup>

It is thus appropriate to examine critically the buyer choice that is central to an economic justification for the party autonomy model in this context. That buyer choice comes in the form of a contract governing the parties’ relationship and that contract can be subjected to an analysis we bring to contracts more generally. I hope to show that when one focuses on this critical buyer choice, one finds that, in this area at least, a wide range of contracts must be excluded from the party autonomy rule.

### III. THE REPEAT-PLAYER AND ONE-SHOTTER DICHOTOMY

In looking at the contracting process, it is useful to develop an analysis first used over twenty years ago in a litigation context by Professor Marc Galanter.<sup>69</sup> Professor Galanter observed that repeat-players in the litigation game had inevitable advantages over litigants who were one-shotters. Among the things that Professor Galanter noted as distortions of the assumed “level playing field” in litigation were that repeat-players had experience on which to build, economies of scale, the ability to play the odds over a long series of cases, and the ability to play for rules rather than immediate gains.<sup>70</sup> Professor Galanter was writing about litigation, where the quality of the justice dispensed depends, at least to some extent, upon the resources that one brings to bear on the system.

A different version of the same phenomenon occurs at the outset when people make contracts.<sup>71</sup> It is at this point that they make the choices that ultimately create our supply of goods and services. If buyer choices are

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68. *But see* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979). The Schwartz and Wilde argument is that competition among contract form producers will, in effect, police against predatory terms within standard form contracts. Professor Melvin Eisenberg, on the other hand, asserts that not enough people read form contracts to generate the needed competition and that their selective reading of form contracts may well combine with competition to yield perverse effects. *See* Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243-44 (1995).

Whoever has the better of this debate, it clearly seems beside the point in the context of choice of law where most form readers will not understand the implications of a disconnected choice of law term even if they were to read the contract (which, if Professor Eisenberg is right, they will not). I would argue that the same would hold true for choice of forum. *See infra* Part III.B.

69. *See* Galanter, *supra* note 25.

70. *Id.* at 98-101.

71. *See* Eisenberg, *supra* note 68, at 243 (using “repeat-player”/“one-shooter” dichotomy in discussing form contracts).

distorted at this point, distorted production is the end result. Professor Galanter's insights demand, in the interests of economic efficiency, that we exercise caution when dividing by statute those contracts that should rest on a party autonomy model from those which should not.

The classical law of contracts reflects a general orientation towards the free market. Within the law of contracts, the encrusted rule that courts will not inquire into consideration<sup>72</sup> is based upon the notion that the parties are in the best position to evaluate the pricing within their bargain.<sup>73</sup> The assumption underlying this "don't inquire" rule is that the parties do, in fact, evaluate what they are offered or at least have an opportunity to do so. Accordingly, when they agree to the price of their exchange, the agreement presumably reflects each party's desire to go forward and implicitly each party's internal decision that this transaction has more value to them than their other options.<sup>74</sup>

In the 1930s, with the rise of Legal Realism, this hypothetical free-market transaction began to unravel. Many scholars recognized that this free market paradigm did not match the mass-produced, form transaction through which consumer goods were increasingly marketed.<sup>75</sup> Labeled "contracts of adhesion" by Friedrich Kessler,<sup>76</sup> these form transactions led to the current tendency to separate consumer transactions from commercial transactions. Consumer transactions are thought to be different because of the take-it-or-leave-it nature of the contracts<sup>77</sup> and because of consumers' supposed lack of sophistication relative to the businesses that draft the contracts.<sup>78</sup>

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72. See *supra* note 6 and accompanying text.

73. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

74. "Rational individuals make exchanges when each perceives that he will gain from the transaction. Thus a successful exchange between two parties occurs when each believes that he has received more than he has given up." Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 85 (1984).

75. See, e.g., Llewellyn, *supra* note 8, at 700-01 (noting the distinction between boilerplate and dickered terms).

76. See Kessler, *supra* note 73, at 636. The term "contract of adhesion" was introduced into our vocabulary by Edwin Patterson many years earlier. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

77. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 84-85 (4th ed. 1992); Rosmarin, *supra* note 12, at 1596.

78. See, e.g., Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 359-60 (1988) (discussing lack of consumer understanding regarding contracts in the context of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

But separating consumer contracts for special treatment might prompt us to leave all other contracts in the commercial or business category, where the paradigm is free agreement. While most know that many business contracts are nonnegotiated contracts that seem to fall more easily into the adhesion contract paradigm than into the free market paradigm, it seems overly easy to miss that fact when our vision of contracting divides contracts into consumer and commercial categories.

Indeed, when it focused on choice of law and forum, the ABA Task Force on Article 1 seemed to have just such a tendency to put both negotiated and nonnegotiated business contracts into one big category for unitary treatment.<sup>79</sup> This tendency assumes that in all business contracts, both parties are able to assess the risks that the transaction represents and unlike consumers either are, or could be, informed about what the contract means. Business people are thought to have access to lawyers and, presumably, would hire a lawyer if they thought a better understanding of the contract were necessary. Their decision not to do so, we often assume, reflects a conscious assumption of the risk of not knowing what some part of the contract means and the taking into account of that risk when deciding whether to go forward with the transaction. We can justify separating the consumer adhesion contract from the commercial adhesion contract because we believe the business person either is sophisticated about assessing the risk implicit in her contract or *could become sophisticated* by the simple expedient of hiring a lawyer.

It is to this assumption that I wish to bring Professor Galanter's perceptions and then bring economic analysis to bear on the question of whether risk assessment in this context is a plausible assumption.

While Professor Galanter was writing about situations that had potentially ripened into litigation,<sup>80</sup> application of his insights to the basic contract model requires that we reconsider it in a transactional sense. Professor Galanter's repeat-players, who benefit from the economies of scale in litigation, also benefit from economies of scale in developing their contracts.<sup>81</sup> When a business delivers a contract drafted on a take-it-or-leave-it basis, it is

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79. See *supra* note 32. The Report acknowledged that "small businesses" might require a different analysis, but went no further than that observation. Article 1 Task Force Report, *supra* note 31, at 3.

80. Professor Galanter, *supra* note 25, at 95.

81. Cf. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 328 (1992) (stating that "mail order merchants can amortize the cost of learning sister-state law over many transactions").

inevitable that the drafter understands the contract in a way that is unapproachable by a first-time user of the form.<sup>82</sup> The drafter developed the form, tested it through a series of transactions, likely revised it in light of its experience, and tested it some more, again and again. The drafter knows which provisions have caused trouble in the contract and which ones have not.<sup>83</sup> The drafter can even play the odds, inserting unenforceable terms on the theory that some of them will not be contested by parties who are convinced that "if they signed it, they agreed to it."<sup>84</sup> Together, these factors tremendously tilt the balance against the non-drafter in *any* transaction in which a mass-produced form is used on a take-it-or-leave-it basis.

When a repeat player and one-shotter are engaged in a small transaction, the chances are overwhelming that, while it is hypothetically possible for the nondrafter to correctly value the transaction, the economic factors implicit in the transaction will prevent all rational non-drafters from knowing some of what the contract means.<sup>85</sup> If we treat the finding-out process as a simple decision about spending or investing, it will be obvious that no rational person would invest many resources into the discovery of meaning in a small form contract. Recognition of this fact, and of the injustice of assuming the opposite, partly supports much of the law designed to protect consumers.

Consumer protection also rests on an additional set of assumptions: consumers are generally unsophisticated relative to businesses; consumers in fact do not pay much attention to the small print they find in boilerplate

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82. Cf. Eisenberg, *supra* note 68, at 243 (explaining why a rational first-time user of a form contract "will typically decide to remain ignorant of the preprinted terms").

83. One might imagine that a drafter would either excise or revise a contract provision that was overturned by a court. Those with experience in consumer matters know that this is not necessarily the case. We often find in contracts terms that no court would enforce, left there either through inadvertence or for their in terrorem value. For example, the first paragraph of the contract at issue in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), provided that the cruise line would not be liable for any personal injury arising out of its own negligence. *Id.* app. Such a provision would be unenforceable in court. Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 68 (1995). Unfortunately, MODEL RULE OF PROFESSIONAL CONDUCT RULE 1.2(D) (1995), which prohibits lawyers from participating in conduct that they know to be fraudulent, has not been extended to such apparent attempts to trick plaintiffs out of their legitimate, enforceable claims.

84. *E.g.*, Braucher, *supra* note 83, at 68 (citing example of a nondrafter assuming "all risk" in accordance with the written terms of a form contract).

85. Cf. Eisenberg, *supra* note 68, at 243. I am indebted to a former student, Craig Kurland, for a paper that developed an analysis similar to Professor Eisenberg's but was based to a greater extent on economic rationality. Professor Ronald Mann develops an analogous point and supports it with empirical observation in Ronald J. Mann, *The First Shall Be Last: A Contextual Argument for Abandoning Temporal Rules of Lien Property*, 75 TEX. L. REV. 11, 29 (1996).

contracts; and consumers have relatively limited access to legal resources.<sup>86</sup> But running through these reasons is the proposition that it is unreasonable to expect consumers to bring sophisticated resources to bear in their routine spending decisions. Unfortunately, we too often assume a corollary—that it is reasonable to assume that nonconsumers can bring sophisticated resources to bear in any of their dealings with one another. This corollary would exclude from protection many that require it. Professor Galanter's analysis suggests that it is unreasonable to expect *any* one-shotter to bring sophisticated legal resources to bear on a relatively small transaction.

Because of their potential complexity, both unlimited choice of law and unlimited choice of forum offer a useful framework for considering the decisionmaking process of the rational business person. The analysis will show that one-shotter businesses, including big businesses, are not very different from one-shotter consumers and that a different division of contracts is necessary to make the shoppers' model work. Whether the analysis ought to be applied outside choice of law and choice of forum settings will be considered later.

#### A. *Choice of Law*

Consider a business that must purchase a new set of office furniture for, say, \$5000. It approaches an office supply company, selects the furniture, and is handed a boilerplate contract with blanks for the dickered terms but with no other opportunities for negotiation. Suppose the form provides that the law of California applies to the transaction and to all matters related to it, while all parties and furniture are in Ohio.<sup>87</sup> What is the buyer to make of this term and how is the buyer to take the term into account in deciding the value of what it is getting? Would he engage a lawyer to consider what risks the odd choice-of-law term represented? If he would not hire a lawyer, how would the buyer value the contract with this term against another contract without the term?

It seems obvious that a buyer will only invest in the discovery necessary to actually assess the risks of complicated, boilerplate contract terms when (1) the transaction's size will, itself, support the cost of finding out<sup>88</sup> or (2) a

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86. See Rosmarin, *supra* note 12, at 1596-99.

87. Such a provision would be permissible under some of the proposed revisions of UCC section 1-105, and is advocated in Ribstein, *supra* note 28.

88. Cf. Laycock, *supra* note 81, at 328 (noting that "the cost of learning sister-state law in anticipation of a single consumer transaction is prohibitive"). While a business could conceivably treat the finding-out process for all contracts as overhead to be spread across the entire business, it seems

series of like transactions taken together will support the legal expense.<sup>89</sup> Both situations are, of course, precisely the kinds of transactions in which clients involve their lawyers all the time. In those situations, even though there may be a “repeat-player”/“first-timer” imbalance, it is at least plausible to assume from an economic perspective that the client realistically valued the transaction or had a realistic opportunity to do so.

What of the remaining and probably far more numerous situations such as the furniture example? In those situations, where the transaction will not “carry” the costs of determining the complex term’s meaning, there will inevitably be asymmetrical information and therefore distorted and inefficient economic choices. Only by chance will the nondrafter correctly assess the risk that the clause could represent and, therefore, only by chance will she correctly value the exchange.<sup>90</sup>

The size of the transaction or series of transactions necessary for the nondrafter to devote resources rationally to develop an understanding of a drafter’s choice of unrelated law would be large indeed. This prediction will be true for several reasons.

To begin with, a simple expression such as “the law of North Dakota controls this contract and all matters relating to it” is a terse statement that carries unexpressed and potentially complex legal implications. What “is” the law of North Dakota, and how might it differ from the legal regime that the non-drafter might ordinarily expect to be governing the contract? What is the scope of “relating to it”? If the transaction is a sale of goods, does North Dakota law govern the products liability aspects of the transaction? If it is a franchise contract and this choice is purportedly made through UCC section 1-105, does a broad grant of authority under a revised UCC provision apply in franchise contracts at all? If so, does North Dakota law now control the

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more sensible as an accounting matter to treat the cost of scrutinizing each contract as a direct cost of the deal, as would be a salesman’s commission, rather than as an indirect cost, such as electricity. *See infra* note 106.

89. *Cf.* Eisenberg, *supra* note 68, at 243.

90. While one might argue that the buyer does not have to buy the goods, walking away from the transaction is not an adequate solution. Consider two contracts for the same goods, one with an odd choice-of-law clause and one without one. The contract with the clause prices the goods at \$100 less than the contract without the clause. How will the buyer choose which contract is better from her unique perspective? If the cryptic answer is that she takes the risk, what exactly is the risk she’s taking? If she quantifies the risk as a loss of all value in the deal, how is she to “comparison shop” when one contract specifies the law of North Dakota and the other the law of South Dakota? *See infra* notes 111-12 and accompanying text.

required rules for terminating a franchise not located there?<sup>91</sup>

Second, one wonders whether the lawyer located where the non-drafter is located could determine the implications of the choice of North Dakota law. Are there factors in interpreting that body of law that are different from those in the “home” jurisdiction? If North Dakota were to be the forum for disputes, would there be procedural aspects to trials in North Dakota which would influence what the law actually *means*? Can one answer these questions in any definitive way without hiring a North Dakota lawyer or another lawyer experienced in North Dakota law?<sup>92</sup>

One might answer by asserting that the law of North Dakota would not be materially different from the law of New York. Alternatively, even if the law is materially different, the difference will not likely affect the actual performance of the contract at issue. The first answer is essentially a statement of fact, and the second is a *de minimus* argument.

Whether the law of North Dakota or some other “unusual” state would be materially different from that of New York depends partly on how broadly the agreed-upon law controls. If the choice-of-law clause were designed to control the regulatory aspects of otherwise controlling law that puts limitations on a business’s freedom to act—e.g., usury laws, laws limiting the termination of franchises, or laws setting the age of majority for signing contracts—the selection of an “unrelated” state’s law could be material indeed. States differ widely in their willingness to intervene into private contracting in order to protect their citizens.<sup>93</sup> If left unrestrained, businesses

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91. For an argument that the otherwise unrelated law of a party-chosen jurisdiction *should* control franchise termination, see Ribstein, *supra* note 28, at 248–49.

92. One might imagine a new law industry developing to assist persons more cheaply in deciphering the implications of choice-of-law clauses. One doubts whether such a development could possibly keep up with legal change in multiple jurisdictions or that generic advice about state legal differences would be specific enough to be of much help in understanding the implications of a clause in a particular contract. But if such a business were to develop to deliver advice more cheaply than individual local lawyers, such an industry would be an economic deadweight, an even more tangible embodiment of transaction cost than the individual legal advice it replaced. One ought to seriously question whether the gains in the quality of state legislation generated by the “shoppers’ model” would outweigh these transaction costs of producing them.

93. Two examples may suffice. The first is the simple observation that the Uniform Consumer Credit Code has been enacted in only 5 states. UNIF. CONSUMER CREDIT CODE (1974), 7A U.L.A. 1 (Supp. 1996). The second was an answer from an Alabama consumer advocate to my question why Alabama seemed to have all the action before the Supreme Court on punitive damages. According to him, because Alabama has nearly no business regulation, businesses more often get into trouble with plaintiffs—trouble that juries are willing to view as outrageous. According to this lawyer, the punitive damages can be seen as a substitute in Alabama for business regulation.

would have reasons to select the law of those places with the least regulation.<sup>94</sup>

Even if the intent were only to select the commercial law of the unusual state,<sup>95</sup> there could be aspects of the selected law that would materially affect the contract. A state's approach to penalty clauses is an obvious example. If the drafter wished to include a powerful penalty clause in a contract, it would also choose the law of a place that most willingly permitted such clauses to stand. There are many such aspects of commercial law that could be viewed as regulatory;<sup>96</sup> therefore, the careful selection of law could materially affect the value of what is being exchanged. Finding out the legal implications of specified foreign law in any one-shot contract requires professional legal services that do not come cheap.

It should be obvious that the variables in this dynamic are the size of the transaction or series of like transactions and the nature of the term(s) under scrutiny in the contract. It should also be obvious that while there may be a strong correlation between transaction size, repetitiveness, and consumer parties, the latter term is too narrow. In the context, at least, of choice of law, the repeat-player/one-shotter dichotomy is more sensible.

### *B. Choice of Forum*

In a consumer case<sup>97</sup> condemned by many commentators,<sup>98</sup> the Supreme Court enforced contract provisions that chose a forum distant from the residence of the nondrafting consumers.<sup>99</sup> When a form contract specifies a forum for disputes far distant from the residence of a consumer, it is particularly easy to see the contract as predatory. Certainly, that contract tilts an already unbalanced situation further against the consumer.<sup>100</sup> Beyond that, in the consumer case, it seems unlikely that the consumer reads the clause,

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94. *But cf.* Article 1 Task Force Report, *supra* note 31, at 3, 4 ("The knowledge, bargaining position, and self-interest of commercial parties can be seen as adequate to regulate possible abuse in the choice of law.").

Professor Ribstein recognizes this effect on those who select the law. *See* Ribstein, *supra* note 28, at 247-54. It is this selection process that makes the shoppers' model run. If the laws of the different states were not different, businesses would not be complaining about compliance. *See supra* note 56.

95. *See supra* note 62.

96. *See* Braucher, *supra* note 9, at 699-701.

97. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

98. *See, e.g.*, Braucher, *supra* note 83, at 65-68; Goldman, *supra* note 43; Purcell, *supra* note 43.

99. *See Carnival Cruise Lines*, 499 U.S. at 593-97.

100. *Cf.* Galanter, *supra* note 25, at 97-104.

understands its implications, or has the power to negotiate the clause if there were understanding by the consumer. This scenario has led to a broad condemnation of forum selection clauses in consumer contracts.

While the shoppers' model seems as out of place with choice of forum as it does with choice of law, it certainly supports treating consumer forum selection clauses differently. Because consumers are unable to quantify the value of such a clause in connection with the product or service being exchanged, they are unable to comparison shop for "better" deals.<sup>101</sup> The shoppers' model predicts the "production" of forums most frequently "chosen" by the parties. If choice-of-forum clauses were routinely enforced in consumer situations, drafters would select those jurisdictions whose courts and juries were less hospitable to consumer complaints. Applying the shoppers' model, one might therefore expect jurisdictions to compete with one another for inhospitality to consumer complaints. Whether one focuses on the consumer's ability to "price" the forum clause or her ability to "choose" it, the absence of consumer choice would be a market failure in this instance and would generate distorted "products."<sup>102</sup>

If one shifts one's focus to nonconsumers, understanding the implications of a particular choice of forum may be less complex than understanding the implications of choice of law. If a term of a Washington contract is that the buyer "consents to jurisdiction and agrees to bring all legal actions arising from or related to this contract in Florida," a somewhat savvy buyer could calculate the travel and local counsel expenses of Florida litigation, factor those risks into the contract, and bargain intelligently about the price or at least intelligently comparison shop for a better forum.

From the "foreigner's" perspective, risk assessment may not be this easy.<sup>103</sup> Will local counsel, in fact, be available for litigation in the chosen forum, or will the talented lawyers encounter client conflicts in representing the "foreigner" against the home team?<sup>104</sup> How does the foreign forum differ

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101. Cf. *Carnival Cruise Lines*, 499 U.S. at 597 (Stevens, J., dissenting).

102. This is true unless we believe that the only relevant choice is that of the drafter of a consumer contract. The Supreme Court said in *Carnival Cruise Lines* that consumers in fact would benefit from a clause selecting a distant forum through a lower price for the underlying services. *Id.* at 594. Whatever the validity of this empirical assertion, the shoppers' model at least requires a consumer choice adequate to evaluate whether the lower price or closer forum is preferable. Such a choice did not exist in *Carnival Cruise Lines*.

103. Cf. Purcell, *supra* note 43, at 445-49.

104. It is increasingly common for large clients to engage the more capable law firms in a particular locale so that antagonists will have fewer choices in legal counsel.

from the more familiar forum in procedure, time and delays, jury composition, and other factors? To what extent is the local jurisdiction “friendly” to the local party? At first blush, the foreign party might roughly assess the risks of travel to Florida in the event of a problem; however, that party cannot fully assess what difference it will make to litigate its claim in Florida without considerably more expense and expertise.

*C. The Option of Walking Away from Choice-of-Law or Forum Contracts*

In order to pursue this line of analysis, we must confront “choice” at a deeper level. Many would urge that the buyer of goods or services “chose” the choice-of-law or forum clause because the buyer could have simply walked away from the transaction with the offensive clause in it. That is, rather than place an actual value on the clause, as contemplated by the shoppers’ model, the buyer could simply assume that the clause is a “deal-breaker” and go elsewhere. Alternatively, the buyer could assume the worst risk—no practical legal recourse if a problem develops with the contract<sup>105</sup>—discount that risk by the probability of its occurrence, and adjust the price accordingly. At some level, these arguments permit us to assert that the buyer “chose” the clause and ought to be bound by it. But “choice” in this context has an unusually slippery character and is of little use in deciding whether the buyer *should* be bound by the clause. There are at least two related reasons which suggest that she should not be bound.

The first reason is grounded in a very simplified economic analysis of the matter. As I have constructed the situation, the buyer is faced with a severely limited power of risk assessment because we have assumed that the buyer is behaving in an economically rational way. As hypothesized, it is not economically rational for the buyer to assess the actual risks presented by the choice-of-law or forum clause because we have defined the transaction as too small to carry the costs of risk assessment.<sup>106</sup> Thus, if the one-shotter is

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105. For the sake of simplicity, I will exclude cases in which the risks associated with the contract might far exceed the value of the exchange. The sale of defective dynamite for \$100 could be such a case, where the disclaimer of liability provision might be disguised as a choice-of-law clause selecting a jurisdiction that has eliminated warranty, negligence, and products liability law.

106. *Cf.* Mann, *supra* note 85, at 29. As an accounting matter, I have assumed that a business will allocate the costs of determining meaning in a one-shot contract to that contract. Such an allocation is not inevitable, but it is probable.

Businesses could allocate the legal costs of determining meaning in individual contracts across the entire business as they do more traditional items of overhead, such as electricity. Indeed, the existence of corporate legal departments might well suggest that this allocation does occur. Within the legal

behaving rationally, she will not, and rationally cannot, correct the asymmetry in information that is endemic in the economics of the situation. The efficient approach would *not* permit a term that would inevitably generate contracts based on asymmetrical information. It would be more inefficient to bind a buyer to the contents of a choice-of-law or forum clause that was economically irrational to understand. This simple economic analysis explains the more general *UNIDROIT Principles*<sup>107</sup> rule that “surprising terms” in standard form contracts do not bind the nondrafter.<sup>108</sup>

Moreover, the reasons that support a consumer exception to choice-of-law and forum clauses support such a rule where a business is a one-shotter engaged in a small transaction. There is no difference between the consumer that cannot understand a complex term in a form contract and the business that cannot rationally expend the resources to understand it. Neither will

department itself, however, a lawyer will have difficulty devoting a week’s time to determining the implications of a choice-of-law clause in a small contract. Unless some larger objective can be accomplished, such as developing a reputation for scrutinizing boilerplate, the lawyer will allocate the costs of determining meaning to the contract at issue or to the series of similar contracts at issue.

If one were to consider the costs of determining meaning in a specific, small contract as general overhead (which I think would be contrary to actual legal practice), then the analysis in the text would become different and far more complex. Treating these expenses as overhead would mean that large businesses that have more transactions across which to spread these finding-out costs should be regarded differently than small businesses that have fewer transactions. When the costs are treated as overhead, we could confidently say that “small” businesses *cannot* understand the complex term in the small contract, whereas “big” businesses *can*. It would be necessary to develop a line to separate small from big in this context. Because I believe that lawyers at most levels of sophistication sensibly assess how much legal cost a transaction or litigation effort will carry, and because drawing a line between big and small businesses would be impossible, I will not engage in that more complicated analysis here.

107. UNIDROIT is the French acronym for the International Institute for the Unification of Private Law, an independent governmental organization based in Rome and composed of fifty-six member states. MICHAEL JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW* 5 n.13 (1994). The *UNIDROIT Principles of International Commercial Contracts* (“*UNIDROIT Principles*”), provide “general rules for international contracts” that parties may agree to apply. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS preamble (1994) [hereinafter UNIDROIT PRINCIPLES], reprinted in BONELL, *supra*, at 157-78.

108. The *UNIDROIT Principles* state in relevant part: “No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.” UNIDROIT PRINCIPLES art. 2.20(1); *see also infra* text accompanying notes 142-43. Karl Llewellyn presaged the “surprising terms” analysis nearly 60 years ago:

[F]ree contract presupposes free bargain, and . . . free bargain presupposes free bargaining; and . . . where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.

Llewellyn, *supra* note 8, at 704.

understand the term. Both choose it, if they go forward, on the same basis. Choice does not validate binding the business any more than it would if the uninformed consumer chose it or if the business were to choose the term under duress.<sup>109</sup>

Arguably, the sophistication of the business ought to inform the business that it will be charged with performing the contract, whatever its contents, if the business goes forward with the transaction. Put differently, the business ought to know that its contracting partner threatens it with obscure terms and that it is up to the business to protect against being gouged. This version of caveat emptor is simply a restatement of the choice argument. It asserts a rule that conflicts with the economics of the situation. Businesses will not devote the resources necessary to correct the asymmetrical information endemic in a small contract involving the repeat-player and the one-shotter. We do not want to adopt a rule that predictably increases the number of contracts built on asymmetrical information.

An analysis based on the shoppers' model adds additional support to the proposition that unlimited choice-of-law and forum clauses must have very narrow play. It can help uncover the weakness in the argument that "the business should be bound to  $x$  because it assumed the risk of  $x$ ." The shoppers' model can help us predict the messages that will be sent to state legislatures if choice-of-law and forum clauses are enforced in situations where it is not economically rational for the one-shotter to assess meaning.

Choice functions in the shoppers' model to send appropriate signals to the law producers.<sup>110</sup> One-shotter choice becomes dysfunctional in small contracts because the one-shotter cannot compare one choice of law or forum with competing law products. Because it is economically irrational to learn their implications, all such clauses become the equivalents of one another. This situation means that in selecting or rejecting contracts that include these clauses, shoppers will treat all clauses whose meaning they cannot ascertain as functional equivalents. If the shopper cannot determine what difference it makes whether the law of Alaska or Alabama controls the contract, that shopper will not discriminate between those provisions, as contemplated by

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109. Professor Eisenberg arrives at a somewhat similar result using section 211 of the *Restatement (Second) of Contracts*. See Eisenberg, *supra* note 68, at 248.

110. Unfortunately, choice only functions in this way if the "signal" gets to the chosen state, and perhaps only if the signal is accompanied by some benefit to the state for enacting a law that is chosen. Under our present system, a choice of law divorced from a choice of the same forum will not generally send such a signal. See *supra* note 67.

the shoppers' model. Thus, while the production of the underlying goods or services will be unaffected,<sup>111</sup> the one-shotter's inability to discriminate among choice-of-law or forum clauses will mean that their choices will send no useful signals from the buyers to the law producers about the law being produced.<sup>112</sup> To the extent that this occurs, the clauses become dysfunctional in informing lawmakers about one-shotter preferences for the law being produced.<sup>113</sup> In other words, lawmakers will get no messages from law

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111. Production will be unaffected because different choice-of-law or forum clauses will not differentially influence the buying decision.

112. Professor Ribstein believes that there is no reason to exclude adhesion contracts from the shoppers' model. His argument is that the market will constrain form drafters' predatory behavior, and, to the extent it does not, courts can regulate through unconscionability holdings. *See* Ribstein, *supra* note 28, at 257-58; *see also supra* note 68. He adds that "[b]ecause there is no reason to believe that all choice-of-law clauses involve bargaining defects, there is no justification for a general rule invalidating choice-of-law clauses as per se unconscionable." *Id.* at 258.

Case-by-case unconscionability is a particularly ineffective weapon in these situations. Consider the Ohio one-shotter who chooses through a small boilerplate contract to litigate in Alaska and to have Alaska law apply to her contract. If she is the plaintiff and sues in Ohio, her response to the defendant's motion to dismiss might be unconscionability, and she might win. But what if she is the defendant? Suppose she refuses to pay part of the contract price for legitimate reasons, and the other party, repeat-player, files suit in Alaska. Where is unconscionability raised? The answer is Alaska, of course. If it is not raised there, then a default judgment is ordered against the one-shotter, followed by a transfer of the judgment to Ohio and its execution under the Full Faith and Credit Clause. Once the default judgment gets to Ohio, the legal complexity involved in defeating it—if indeed one can defeat it at all—would surely render such a collateral attack practically impossible. Unconscionability cannot be an effective policing mechanism here.

Except in law reform efforts where the plaintiff's stake in the controversy is unrelated to the legal effort to be expended or in very large contracts, unconscionability is not a useful device for protection against adhesion contracts, and we ought to quit pretending that it is. The legal expenses are simply too large in most cases to sustain such a difficult defense. To suggest that unconscionability might be useful as a challenge to a choice-of-law clause that will most likely be packaged with a choice-of-forum clause is to misconstrue the real dynamics of one-shotter/repeat-player litigation, which Professor Galanter forcefully brought home.

113. The same dynamic would hold if one-shotters discriminated among contracts based on the presence or absence of a choice-of-law or forum clause. In other words, if buyers simply bought in those cases where there was no clause and refused to buy in cases where there was a clause, the shoppers' model would again collapse. If including such a clause had a negative influence on a repeat-player's sales, the incentive would be to exclude such clauses altogether to attract more sales. But, that very act would deprive the law producers of the buyer choice information on which their production of law depended.

One might assert that one-shotters would choose "familiar" law and forum contracts over "unfamiliar" ones. The shoppers' theory collapses under this possibility as well. In theory, at least, choosing the familiar clause is the same as choosing a contract without a choice-of-law or forum clause over a contract with such a clause. The buyer will treat the familiar clause in the same way as she treats no clause, and the unfamiliar clauses she will treat all alike. This behavior will not result in legislatures creating better law so that people can choose it. Rather, the legislatures will simply do what they do, with the expectation that they will attract their citizens to the familiar or will govern their citizens without attempting to extend their reach to "outsiders." There is a difference, however: the

consumers.<sup>114</sup>

This is not to say that state lawmakers will receive no signals at all. That buyers will not discriminate among choice-of-law clauses does not mean that the repeat-players will not discriminate either. On the contrary, if buyers are indiscriminate among choice-of-law clauses, repeat-players will choose clauses that will best benefit them in their contracts with buyers. This behavior, in turn, will send the message to state legislatures to produce more repeat-player friendly law and to stop producing one-shotter friendly law, because repeat-players will choose the first and not the second.<sup>115</sup> Unless we are willing to suggest that the shoppers in the shoppers' model are the form drafters, enforcing the choice-of-law and forum clauses will yield a perverse effect in a UCC drafting process that purports to be even-handed and neutral.<sup>116</sup>

In summary, the shoppers' model depends critically upon *both* parties to a contract making intelligent choices about what is in their best interests with

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familiar will not be chosen because it is better or preferable; it will be chosen because it is familiar. In this instance, familiarity is chosen not because the producers have invested advertising or other means to generate "brand loyalty," but because the citizenry has a fear of the unknown. Once again the one-shooters send no signal to the law producers to do anything different or better. If the actual conduct of those who do the choosing sends no messages to the law producers, then the shoppers' model ceases to support disconnecting the chosen law from the parties or their transaction.

114. Professor Mann's analysis from the construction industry is analogous. The inability of small contractors to rationally assess risk results in blunt risk assessment and inefficiency. He concludes that priority rules should be altered to yield better risk assessment and better overall efficiency. Mann, *supra* note 85, at 36. Here, inefficiency results from the same inability to rationally assess risk. In this context, the inability of non-drafters to rationally assess foreign law or forum risk in small form contracts is inefficient under the shoppers' model because state legislatures will receive no useful messages from non-drafters about their choices, but will legislate as if they had.

115. This result assumes that neither the market nor the courts wielding the unconscionability club will police the form drafters. In this context, such policing seems extremely unlikely. *See supra* notes 68, 112.

116. If one pursues the analysis to the next step, the shoppers' model would suggest problems with a rule permitting unlimited choice of law or forum in *any* case. If legislators will in fact respond to choice with "better" legislation, and if we limit the choices to some subset of contracting parties, the legislatures will respond to *those parties'* choices, rather than the choices of a broader population of contract makers. In all likelihood, the responsive legislation will apply across the board to all contracts governed by the law. For example, suppose that large contracting parties seek the law of jurisdictions that will reliably enforce penalty clauses in their contracts. The shoppers' model predicts that jurisdictions will begin competing with one another to attract contracts and in this instance will be competing with one another at enforcing penalty clauses. It is at least probable, and perhaps likely, that the "desired" rules produced by this competitive activity will apply to a group of contracting parties broader than the subgroup to whose desires the jurisdictions originally responded.

Thus, the shoppers' model predicts inefficient results, if applied broadly, because of asymmetrical information and predicts anti-democratic results when the range of contracts is narrowed to eliminate the information problems.

respect to choice of law and choice of forum. In cases in which the transaction will not support the expense, one-shotters cannot send to the law producers the signals upon which the shoppers' model depends. This disparity in information will mean either that the form drafters' signals alone will influence law production or that law production will be uninfluenced by choice-of-law and forum clauses in many contracts. Both are cases of market failure. The only cases in which the shoppers' model can work are those in which the transaction or series of transactions will carry the costs of exploration. These cases happen to be the transactions where it is rational for one-shotters to assess risk and fair for us to regard them as having assumed it.<sup>117</sup>

#### IV. BETTER WAYS TO DIFFERENTIATE CONTRACTS

If the shoppers' model offers a reason to let contracting parties choose *unrelated* law to govern their affairs and *unrelated* forums to decide their disputes, thereby breaking with well-established jurisprudential notions of personal and territorial jurisdiction,<sup>118</sup> then dividing contracts into consumer and nonconsumer contracts will be a dysfunctional division. The argument thus far has been that it often makes more sense to divide contracts into one-shotter and repeat-player categories in choice of law and forum than it does to divide contracts into consumer and nonconsumer categories. While I do not believe that a need for party autonomy in this instance justifies radical changes to choice of law and forum, this Part will suggest some alternative divisions for a party autonomy model which are consistent with the underlying theoretical shoppers' model.

In theory, the shoppers' model will work for any contract in which it is

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117. *But see supra* note 112. A recurring final reason for enforcing these clauses in all nonconsumer cases might be the need for "certainty"—the notion that if the repeat-player's choice-of-law or forum clauses do not bind the one-shotter, the contract will be vague with respect to the relationship between the parties.

The solution to the certainty problem, if it exists, is statutory hard-edged rules or safe harbors. Instead of saying that "surprising" terms will not be enforced, we should say that "releases of personal injury liability" will not be enforced. In the choice-of-law or forum area, one would permit the parties to select the law of the residence, principal place of business, or site of incorporation of the one-shotter or either of the parties.

118. As suggested earlier, the shoppers' model may actually predict either inefficient results or anti-democratic results. *See supra* note 116. Neither is desirable. To the extent the shoppers' model makes any sense at all, it would seem to support no change to the preexisting law. *But see* Ribstein, *supra* note 28.

realistic to assume that both parties understood and priced the choice-of-law or forum clause. Their selection will then be informed and real, signaling to law producers that they are producing desired or undesired law. This result will probably occur in any contract in which such a clause is *actually* negotiated by the parties. It will also occur in any case where the contract is large enough that we expect both parties' lawyers to evaluate the impact of the clause on the transaction. Finally, the shoppers' model will work in those situations where both parties are sophisticated repeat-players and can spread the costs of quantifying the clause across many transactions. This would be the case, for example, if reasonably sophisticated parties embarked on a series of transactions with one another whose total value would support the expense of learning the implications of the choice-of-law or forum clause.

Examples of different divisions of contracts to address the problems of the adhesion contract abound.

*A. Uniform Commercial Code, State, and International Law Alternatives to a Consumer/Nonconsumer Division*

*1. UCC Article 2*

Article 2 of the Uniform Commercial Code currently divides contracts in some situations in a way that resembles Professor Galanter's one-shotter/repeat-player division. In Article 2, a "merchant" is in many respects a "repeat-player." The Code defines a "merchant" as follows:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.<sup>119</sup>

Merchants are expected to be sophisticated, at least about the subject matter of their contracts. They generally develop expertise and understanding of their trade through repeated encounters with transactions of the kind at issue.<sup>120</sup> Obviously, a "nonmerchant" can be a business person or consumer,

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119. U.C.C. § 2-104(1) (1995).

120. The UCC definition permits a newcomer to a trade to be treated as a "merchant" if "by his occupation [he] holds himself out as having [the pertinent] knowledge or skill." *Id.*

and Article 2 treats nearly all casual sellers and buyers as nonmerchants.

While the merchant/nonmerchant distinction in Article 2 sketches a division of contracts different from the consumer/nonconsumer distinction, that division is not the same as the one-shotter/repeat-player division in the context of choice of law or forum. Article 2's merchant is a repeat-player only with respect to the goods involved, not with respect to making or understanding contracts. Thus, a bicycle dealer and a bicycle wholesaler would be merchants in a bicycle deal. However, it would not be necessary for the dealer ever to have dealt with the wholesaler for the dealer to be classified as a merchant, nor would the buyer and seller's business with one another necessarily be large enough to support a lawyer's study of the nondrafter's contract.<sup>121</sup> We could thus expect merchants in many transactions to act in the same way as we expect consumers to act with respect to choice-of-law or forum clauses handed to them in relatively small transactions. The merchant/nonmerchant distinction would work better than a consumer/nonconsumer distinction, but would not be broad enough to permit the shoppers' model to function as theory requires.

## 2. UCC Article 2B

One finds a second kind of contract division in a draft of Article 2B, the Article to govern licensing. Article 2B defines a "mass-market license"<sup>122</sup> that is a broader concept than consumer and analogous to Professor Galanter's repeat-player. The mass-market licensor is the quintessential repeat-player that drafts the form license and permits no negotiation over its terms. Until

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121. The battle of the forms, of course, throws considerable complexity into an analysis that focuses on the proposition that people should *be able* to understand the terms of their deal. In the battle of the forms setting, the parties lack understanding of what the actual controlling terms are. That threshold understanding is a prerequisite to understanding the meaning of the terms that actually control their deal.

122. Draft UCC section 2B-102(25) provides:

"Mass-market license" means a standard form

(i) used in a transaction in a market setting that for the particular type of information is characterized primarily by transactions involving consumers as licensees and whose terms and quantity are characteristic of consumer contracts in that market;

(ii) used in a transaction with a consumer licensee; or

(iii) a contract for support or other services associated with a transaction in paragraph (i) or (ii).

Sept. 1996 Draft, Art. 2B, *supra* note 24, § 2B-102(25).

September 1996, the draft provision on both choice of law and forum discriminated between mass-market licenses and other licenses.<sup>123</sup> For choice of law, the September 1996 draft now has alternative provisions that would permit unlimited choice of law either in all cases<sup>124</sup> or in all but consumer cases.<sup>125</sup> For choice of forum, the draft retains a distinction between mass-market licenses and other licenses and restricts choice-of-forum clauses in mass-market licenses involving individuals.<sup>126</sup>

While the mass-market construct is an interesting addition to our tools for dealing with adhesion contracts, in this context the divisions are unsatisfactory. The implication of Article 2B is that in all nonconsumer cases dealing with choice of law and in all nonconsumer cases dealing with choice of forum but not involving individuals, the non-individual either understands, or is able to understand, the implications of the unrelated choice of law or forum and is fairly charged with the attendant risks. While companies that conduct business nationally would understandably want one predictable set of rules to govern their interstate affairs,<sup>127</sup> the draft's limitations on party autonomy seem far too narrow. Except in a very large transaction, no one-shotter is in fact going to find out the implications of unrelated choice of law or forum.

Characteristic of the prevalent bi-polar approach, another implication of the Article 2B draft provisions is to remove from courts their traditional job of

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123. *See id.* § 2B-106 rptr.'s note 3.

124. *Id.* § 2B-106(a) alt.A.

125. *Id.* alt.B.

126. Draft UCC section 2B-107(a) entitled "Contractual Choice of Forum" provides:

A clause in a contract that chooses an exclusive judicial, arbitration, or other dispute resolution forum is valid unless, in a [consumer license][mass market license involving an individual], the forum selected is a judicial forum that would not otherwise have jurisdiction over the licensee and the selection unfairly disadvantages the licensee.

*Id.* § 2B-107(a) (brackets in original).

127. *See supra* note 56. The fact that computer software can be sold and delivered to the user over the Internet does not compel a broad party autonomy model. Businesses have principle places of business and under the reasonable relationship requirement of UCC section 1-105, might well select the law of their "home" jurisdiction to govern the bulk of their business contracts. If "uncertainty" is the bogeyman, the drafters could give limited validation to a "principle place of business" choice within the UCC. Under the shoppers' model, states might compete in law production in order to physically attract corporations into the state. But neither the party autonomy model nor the principle place of business model solves the problem of multistate regulation. Whether a particular choice of law should succeed in escaping the regulatory regime of the unchosen state whose law would otherwise control is an issue that can have constitutional dimension that the UCC drafters would be wise to avoid.

reconciling the party autonomy ideal that underlies classical contract doctrine with the realities of today's contracting and of real contractual assent. The drafting style proclaiming, "A choice of law clause is enforceable"<sup>128</sup> even gives the choice-of-law clause a life of its own and separates it from the peoples' agreement that got us there.<sup>129</sup> The provision seems to suggest that if we simply locate a choice-of-law clause in a contract, *it* is enforceable regardless of how it got there, because the legislature has determined that a court is to have no other choice. The draft provision also seems to assume that the parameters of assent in the adhesion contract setting, a bone of contention since form contracts were invented, have been worked out; that because there are not many cases of business unconscionability, the party autonomy model is "the law" in that setting; that the party autonomy ideology makes for good policy; and that courts should be effectively frozen out of the process of scrutinizing assent in adhesion contract settings.<sup>130</sup> Perhaps not coincidentally, the Article 2B provisions arise from a process involving traditional big business and recent consumer participation—an arguably bi-polar constituency.

The shoppers' model suggests perverse results will follow from broad enforcement of these clauses pursuant to Article 2B. One-shotter licensees of all kinds will be unable to discriminate among different choices of law and, therefore, unable to send law producers the proper signals. If the UCC mandates enforcement in these instances, the repeat-players' unilateral choices in these contracts will, if legislatures behave as the shoppers' model predicts, result in jurisdictions competing with one another for licenser-favorable law and forums. This predicted result is antithetical to a drafting process that purports to be even-handed and fair.

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128. Sept. 1996 Draft, Art. 2B, *supra* note 24, § 2B-106(a) alt.A.

129. Different language, such as "An agreement choosing the law of a particular jurisdiction is enforceable," would more accurately focus attention on the parties and their agreement.

130. In choice of forum, the draft provision restricts enforceability of a choice-of-forum clause in a consumer or individual mass-market contract where "the forum selected is a judicial forum that would not otherwise have jurisdiction over the licensee *and* the selection unfairly disadvantages the licensee." Sept. 1996 Draft, Art. 2B, *supra* note 24, § 2B-107(a) (emphasis added). This restriction will give courts a role only where the one-shotter is a plaintiff.

In cases where the repeat-player brings the action, the "unfair disadvantage" claim will have to be raised in the "chosen" foreign forum. If that forum is far enough away to be a problem of "unfair disadvantage," it will also be far enough away to preclude an effective challenge on that basis. The default judgment will arrive in the home state dressed in the Full Faith and Credit Clause, and will be extraordinarily difficult and expensive to attack. *See also supra* note 112.

### 3. *Non-UCC State Law*

A third kind of division among contracts comes from several states that have enacted “unrelated” choice-of-law and forum provisions within their general statutes. Delaware’s is the newest and provides:

(a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.

(b) Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains the provision permitted by subsection (a) of this section.

(c) This section shall not apply to any contract, agreement or other undertaking, (i) to the extent provided to the contrary in § 1-105(2) of this title, or, (ii) involving less than \$100,000.<sup>131</sup>

Other states have enacted variations on this pattern.<sup>132</sup> These new statutes follow the shoppers’ model, or more properly, the “forum shoppers’ model,” by inviting litigation into their jurisdictions and holding out their courts and law as inducements. By linking choice of law to choice of forum, these statutes solve a difficult problem in the shoppers’ model: how to give state

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131. DEL. CODE ANN. tit. 6, § 2708 (1993).

132. See, e.g., CAL. CIV. PROC. CODE § 410.40 (West Supp. 1996); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989) (choice of law); TEX. BUS. & COMM. CODE ANN. § 35.51(b) (West Supp. 1996); cf. FLA. STAT. ANN. § 685.102 (West 1990) (choice of forum only).

legislatures incentives to respond to choices of state's law. Bringing litigation into a state may not directly put money into the state treasury, but the local legal fees from the new litigation will trickle through the local economy.<sup>133</sup> The shoppers' model would predict that in the competition for litigation, those states with the most desirable courts and law will win the law business, and those without desirable law or courts will not be selected by contracting parties.<sup>134</sup>

All these statutes address the repeat-player/one-shotter problem with size limitations on the transactions allowing unrelated choice of law and forum. The requirement in California and Texas is that the contract involve one million dollars or more.<sup>135</sup> One expects that these will be negotiated transactions whose values are large enough to support the legal expenses incident to understanding choice of law and forum. The threshold value will maximize the chances that the choices of law and forum are true choices, thereby sending to the chosen jurisdiction an appropriate signal about the quality of its law or courts. Delaware's minimum transaction size of \$100,000, while conveying an aggressive move into a new litigation market, seems much less likely to support fully the process of learning about the implications of choice of law and forum. Nonetheless, all of these approaches are far better than the various UCC approaches that address the repeat-player/one-shotter problem.<sup>136</sup>

Texas, interestingly, follows a similar approach in its Deceptive Trade Practices - Consumer Protection Act.<sup>137</sup> While nominally designed to protect "consumers," it defines "consumer" as "individual, partnership, corporation, this state, or a subdivision or agency of this state . . . except that the term does

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133. Delaware ensures that the financial benefits of the legal work go only to Delaware lawyers. Local Civil Rule 83.5(d) of the United States District Court for the District of Delaware requires Delaware counsel for all appearances in that court. *See* D. DEL. R. CIV. PRAC. PROC. 83.5(d). As implied by the text, the prudent outsider will engage local counsel whether or not there is a rule requiring it.

134. *Cf.* Ann Davis, *Too Much Bustle in Bankruptcy Court?*, WALL ST. J., Feb. 5, 1997, at B1 (describing changes to deal with increased caseload in Delaware Bankruptcy Court due to the speed of the court's docket and favorable decisions for corporate debtors).

135. CAL. CIV. PROC. CODE § 410.40 (West Supp. 1996); TEX. BUS. & COMM. CODE ANN. § 35.51(b) (West Supp. 1996); *see also* DEL. CODE ANN. tit. 6, § 2708 (1993) (threshold amount of \$100,000); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989) (threshold value of \$250,000).

136. The shoppers' model predicts that the competing jurisdictions will develop law that is attractive to the "big" shoppers to which they make their law available. Will the big-business law so developed apply only to those who do the choosing, or will it also apply to small businesses and consumers? *See supra* note 106.

137. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (West 1987 & Supp. 1996).

not include a business consumer that has assets of \$25 million or more."<sup>138</sup> By excluding claims on written contracts involving more than \$100,000 when the consumer has a lawyer<sup>139</sup> or other transactions which exceed \$500,000<sup>140</sup> the Texas law effectively delivers protection to everyone in relatively small transactions.

#### 4. *The UNIDROIT Principles*

The *UNIDROIT Principles of International Commercial Contracts*<sup>141</sup> draw yet another division among contracts for purposes of applying various rules. The *UNIDROIT Principles* provide that a nondrafter will not be bound to "surprising terms" in standard form contracts.<sup>142</sup> They can be seen as another clear division between the repeat-player and the one-shotter. They sensibly do not require the nondrafter to engage in economically inefficient boilerplate scrutiny in situations where the drafter has an understanding and advantage unobtainable by the nondrafter. Under the *UNIDROIT Principles*, one would not enforce a choice-of-law or forum clause in a form contract if one were to construe the law or forum to be "surprising."<sup>143</sup> One would guess that the choice of an "unrelated" law or forum in standard form business contracts would be construed as "surprising" to a nondrafter. In consumer cases, the choice of a distant forum by the drafter might well be held "surprising" as well. This approach would yield somewhat more enforcement than the transaction size limitations of the state statutes described above because it would permit the choice of "unrelated" law in *any* negotiated contract.<sup>144</sup>

#### B. *Different Line-Drawing for Choice of Law and Forum*

The UCC will presumably continue to be enacted uniformly by all states. Because the party autonomy proposals, if adopted, will permit parties to choose the law of *any* jurisdiction, not merely the law of the few that have

138. *Id.* § 17.45(4) (West 1987).

139. *Id.* § 17.49(f) (West Supp. 1996).

140. *Id.* § 17.49(g) (West Supp. 1996).

141. *See supra* note 107.

142. *See supra* note 108.

143. *See supra* note 108 (Prof. Eisenberg has used the *Restatement* to reach a comparable result.); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979).

144. The solution remains suboptimal because in the form contract setting, the nondrafter would still have to travel to the foreign jurisdiction to raise the "surprising term" issue.

currently enacted non-UCC party autonomy provisions discussed above, there is greater danger under a revised UCC section 1-105 that perverse signals about choices under conditions of asymmetrical information will reach legislatures in accordance with the shoppers' model.<sup>145</sup>

Several solutions, or a combination of them, ought to be considered by the drafters if they are intent on adopting a party autonomy model for choice of law and forum for some contracts covered by the UCC. First, if it is appropriate at all, the party autonomy model is most appropriate in large, fully negotiated contracts.<sup>146</sup> There are, for all intents and purposes, no repeat players in these transactions. These are the transactions that most lawyers involved in the UCC revision process are familiar with<sup>147</sup> and the transactions that they will likely think of when they consider choosing law and forum by contract.<sup>148</sup>

While there may be no established need to do so, if one wanted to expand the party autonomy model beyond the large, fully negotiated contract, we could expand it to situations where *all* parties were sophisticated repeat-players and could therefore spread the legal costs over a large series of transactions. The repeat-player notion need not require a series of transactions: if a large corporation were buying 1000 personal computers, it could be considered a repeat-player for purposes of such a one-time

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145. With only four or five states authorizing the selection of their law and forum for matters unrelated to their jurisdictions, it is possible that some nondrafters of such contracts could become repeat-players by studying this somewhat limited sampling of state law. Once there are 50 or more places from which to choose, however, the likelihood that a one-shotter could develop this expertise in sufficient time for it to be useful is very low. If true competition developed, advertising would not be far behind. While we might expect a truly industrious state bar to advertise the merits of its law and forum in order to attract more litigation, one would not expect that advertising to reveal fully the reasons why a *nondrafter* would *not* want to choose its law. Finding out those reasons will continue to be the work of the one-shotter's lawyer—work which the rational one-shotter will pay for only in very large transactions.

146. Of course, the party autonomy model is not appropriate. *See supra* note 116. Except for Professor Ribstein's economic analysis, *see Ribstein, supra* note 28, which seems to this author misplaced when discussing choice of law and forum, *see supra* note 112, the case for the party autonomy model has not been made. UCC section 1-105 has prompted very little litigation, and the uncertainty that comes with its "reasonable relationship" requirement can be solved by creating a safe harbor provision that permits the parties to select the law and forum of the principle place of business or residence of one of the parties. *See supra* note 48 and accompanying text. If the problem to be solved is overlapping and conflicting multistate regulation, the solution lies either with Congress or the Constitution. *Cf. Laycock, supra* note 81.

147. *See supra* text accompanying note 15.

148. Business lawyers, of course, are very familiar with form contracts. In my experience, there was no evidence that more power with form contracts was the motivating force behind the party autonomy model. *But cf. supra* note 56.

transaction regardless of whether it negotiated the terms of the transaction. Article 2's "between merchants" language could provide a model for such a notion. The UCC could define "legal sophisticates"<sup>149</sup> as persons or entities who, by repeated dealings with contract terms of the kind at issue, are fairly to be regarded as having legal expertise with respect to such terms. Party autonomy choice of law or forum could then be enforced "between legal sophisticates."

## V. BEYOND CHOICE OF LAW AND CHOICE OF FORUM

Protecting consumers from the consequences of rules designed according to classical contract doctrine makes sense in many places in the UCC. It is, of course, appropriate to treat consumers differently with respect to commitment of future property as collateral,<sup>150</sup> personal injury caused by defective goods,<sup>151</sup> or "hell or high water clauses" in leases.<sup>152</sup> It is also right to protect consumers from choice-of-law and forum clauses.<sup>153</sup> But the fact that consumers need different rules does not mean that others do not. It certainly does not mean that party autonomy rules should be frozen into a statutory form that will apply to everyone but consumers. A consumer/nonconsumer differentiation is not appropriate in all settings where it is possible to discriminate between negotiated contracts of the classical contract doctrine and modern, mass-produced contracts which are the grist of our modern economy. In many settings, I believe, the term *consumer* is too narrow to protect against the underlying problem. Professor Galanter's repeat-player/one-shotter distinction is often a more useful way to differentiate contracts in order to address the imbalances in power between parties, the non-negotiability of the contractual terms, and the information disparities that accompany the mass-produced contract. We find that division roughly captured in the merchant/nonmerchant distinction in Article 2 and in the mass-market contract construct in Article 2B.

While we may think of two businesses as being "equal" in their access to understanding in a given transaction, the repeat-player or drafter spreads its information costs across all its contracts, whereas the one-shotter cannot.

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149. "Legal sophisticates" is not a good term. Others can certainly fashion a better term.

150. See U.C.C. § 9-204(2) (1995).

151. See *id.* § 2-318.

152. See *id.* § 2A-407.

153. See *id.* § 2A-106.

Only the economically irrational buyer would spend \$1000 in lawyer fees to discover the real risks inherent in some term in a one-time, \$5000 contract. We may tell ourselves that the business has a lawyer and can hire her to assess risk, but if the transaction will not support the expense, the business will not, and should not, assess that risk. If it does so more than a few times, it will find itself in bankruptcy.

Behind all of contractual enforcement is the rationale that state enforcement power is appropriate because the party *agreed to be bound*. If we continue to predicate our contract policy on an "agreement" model where we suppose that each side freely agrees to what the other proposes, we must take consumer protection to the next step and recognize that many nonconsumers<sup>154</sup> ought to be grouped with consumers for purposes of applying various kinds of rules. This next step may require us to develop a new vocabulary or study some of the dividing lines developed in the original UCC. The evolving mass-market license construct in Article 2B shows much promise, provided that the definition is broad enough to encompass the realities of contracting (which, I believe, are roughly captured by the repeat-player/one-shotter dichotomy and the economic implications of those categories) or, if it is not, that strict party autonomy rules are not the only alternative. The broad definition of "consumer" in the Texas consumer protection law<sup>155</sup> offers another alternative.

I have focused on choice-of-law and forum clauses because they perhaps make the best case for a different grouping of contracts. These terse clauses carry implications that can be discovered only at considerable expense. Beyond choice of law and forum, however, there are other instances where a different division may be appropriate.

Perhaps the prime example of the need for such a different division appeared in the November 1996 draft of Article 2.<sup>156</sup> The draft included a new provision designed to address standard form contracts generally. The provision sharply differentiated consumers from all other contracting parties. Pointedly, the provision protected consumers (defined far more narrowly than in Texas) and *unprotected* nonconsumers by stating that nonconsumers are stuck with whatever happens to be on the form unless it is

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154. See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 111 (1989) (noting entrepreneurs made up 20% of the debtors in a very large study of *consumer* bankruptcy).

155. See *supra* notes 137-40 and accompanying text.

156. Thanks to Jean Braucher for pointing out this example.

“unconscionable.”<sup>157</sup>

This draft provision reiterates in a particularly stark way the tendency of the UCC revision process to polarize contracts into consumer and party autonomy categories and could even reflect a political trade-off between the consumer representatives newly-involved in the drafting effort and the business lawyers who are said to dominate it. The provision seems aimed at removing from the courts the job of scrutinizing party intent outside the consumer context. In the process, it removes opportunities to learn from specific cases the evolutionary idea of “agreement.” This polarized draft statute will prevent courts from forthrightly doing their traditional job of reconciling the hypothetical, assumed agreement of classical contract doctrine with the facts of modern business life. While courts will continue to police adhesion contracts, we will have returned to the 1920s, when judicial reasoning remained buried under layers of quintessentially malleable contract doctrine. “Covert tools [remain] unreliable tools.”<sup>158</sup>

## VI. CONCLUSION

The UCC revision process reflects a polarity in thinking that may echo the

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157. This is a fast-moving target. The March 21, 1997 draft has changed section 2-206 substantially. *See* Draft, Uniform Commercial Code Revised Article 2 Sales § 2-206 (Nat'l Conference of Comm'rs on Unif. State Laws, Mar. 21, 1997) [hereinafter Mar. 1997 Draft, Art. 2], *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 4, 1997). Now captioned “Consumer Contracts; Standard Form Contracts,” it appears now only to address and offer relief in “consumer contracts” (again, defined far more narrowly than in Texas). *Id.* Perhaps this is an improvement in that courts may more easily and imaginatively continue to develop ways of dealing with standard form contracts in the non-consumer context. Elsewhere, however, the newest draft appears to have accentuated the dichotomy between consumer contracts and all others. For example, the new draft of the parole evidence rule, section 2-202, contains the following:

(b) Except in a consumer contract, a contractual term indicating that the record is a complete and exclusive statement of the agreement of the parties is conclusive evidence of the intention of the parties. Otherwise, the court shall consider all evidence relevant to the intention of the parties to integrate the record.

Mar. 1997 Draft, Art. 2, *supra*, § 2-202(b). This is a change from the November 1996 Draft, *Compare id. with* Draft, Uniform Commercial Code Revised Article 2 Sales § 2-202(b) (Comm. on Style, Nat'l Conference of Comm'rs on Unif. State Laws, Nov. 1, 1996), *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 23, 1997). That draft would have authorized the court in all cases to hear evidence on the question of integration, even in merger clause cases, and characterized the effect of a merger clause in a nonconsumer contract as a “presumption” of integration. The new draft eliminates outside evidence on the integration question in merger clause cases, moving from a presumption of integration to “conclusive evidence” of integration. *See* Mar. 1997 Draft, Art. 2, *supra*, § 2-202 note 2.

158. Llewellyn, *supra* note 8, at 703.

polar ideologies about contracting which have developed since the 1960s and the backgrounds of those involved in the revision process. This polarity is evident in the developments regarding choice of law and forum in the UCC and elsewhere. There is, on the other hand, neither a well-developed conceptual framework for, nor a well-developed constituency to represent, those whose interests lie in the gulf between big business and consumers. Small businesses have the same lack of leverage, knowledge, sophistication, and power as many consumers, yet they are lumped with all other businesses for unitary treatment under a regime increasingly characterized by party autonomy. Even big businesses should be regarded as similarly limited in some circumstances. In the adhesion contract setting, the consumer/nonconsumer division seems bound in many cases to yield inefficient and unjust results.

There are other ways of dividing contracts that can better accomplish the goals of fairness, voluntariness, and efficiency, and we should continue searching creatively for better dividing lines. We will, however, never be able to reconcile by statute the realities of adhesion contracts with the ideals of party autonomy; politics and the inevitability of change will preclude us from doing so. Perhaps, finally, it is better to leave that job to the courts and invite them by statute to continue to add to our understanding of what it means to agree.<sup>159</sup>

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159. *Cf.* U.C.C. § 2-302 (1995); UNIDROIT PRINCIPLES, art. 2.20.

