Article

Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance

Orly Lobel†

† Warren Distinguished Professor of Law and Director of the Employment and Labor Law Program, University of San Diego. For thoughtful comments and conversations, I thank On Amir, Rachel Arnow-Richman, Jordan Barry, Laurence Claus, Stephen Ferruolo, Meirav Furth-Matzkin, Bert Lazerow, Jeff Lipshaw, Michael Lipshitz, Todd Rakoff, Evan Starr, Alex Tsesis and Spencer Waller as well as the participants at workshops at the Federal Trade Commission, the Class Action Law Forum, University of San Diego, Yale, Santa Clara, UCSD, Maryland, Loyola-Chicago, Tel-Aviv, and Hebrew University. For excellent research assistance, I thank Julia Drury, Krishna Hammond, Alexander Kat, Elaine Kong, Anna Kukharenok, Austin Trickey, Justin Wynne, Jackson Zeman, Elizabeth Buckle, and Salma Zinabidine. Sasha Nuñez and Elizabeth Parker provided superb library support and smart suggestions.

INTRODUCTION

> "The whole, though larger than any of its parts, does not necessarily obscure their separate identities." — United States v. Powers[1]

Contract clauses should be assessed in relation to each other when examining their meaning, validity, and enforcement. In contemporary markets and in a myriad of policy fields, drafters create an impenetrable bundle of clauses and sets of interrelated contracts operating together. This Article argues that a contract is larger than the sum of its separate clauses and a set of interrelated contracts is more than the aggregation of each contract on its own. The Article further shows that contract adjudication embeds these insights intuitively, but contract law and antitrust law have yet to develop a principled and consistent analysis of how contract clauses collude in action. These understandings have implications for nearly every contract doctrine. Understanding how contractual clauses produce a different effect than a simple summation of each clause enriches a myriad of regulatory fields ranging from employment law to consumer law, insurance law to intellectual property law, and speech law to arbitration law.

Consider the example of a typical employment contract that regularly includes multiple restrictive clauses—a boilerplate bundle that restricts postemployment competition through noncompete, nondisclosure, nonsolicit, nonpoaching, nondealing, innovation assignment, and nondisparagement clauses.[2] New empirical research shows that this type of bundling of restrictive provisions in employment contracts is exceedingly common, covering over eighty percent of workers and seventy percent of firms.[3] What if some of these clauses are unenforceable under the common law or a state's public policy on job mobility, while others, standing alone, are enforceable? The lens of contractual aggregation reveals how each clause operates alongside

1. 307 U.S. 214, 218 (1939).

2. Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 557 (2020) [hereinafter Lobel, *Knowledge Pays*] (noting the rise in noncompete agreements in recent years); Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 666–85 (2020) [hereinafter Lobel, *Gentlemen Prefer Bonds*] (explaining the restrictive covenants that employers routinely place on employees).

3. Natarajan Balasubramanian, Evan Starr & Shotaro Yamaguchi, *Bundling Postemployment Restrictive Covenants: New Evidence from Firm and Worker Surveys* (July 2021) (unpublished manuscript) (on file with author).

its counterparts to convey an ironclad restriction preventing employees from leaving their jobs. Now consider a contract in which each clause is enforceable on its own. Could the inclusion of *all* clauses together amount to a contract that is unconscionable, contradicting the rule of reason or contract law's public policy against restraints on competition and trade? This Article answers this question affirmatively: the whole is greater than the sum of its parts, and therefore, together, clauses can form an unreasonable restriction on mobility even if each clause on its own would be reasonable. Similarly, the effects of contracts that require predispute arbitration, restrict speech, or waive certain liabilities should be evaluated with this understanding of clause collusion—that is, the ways in which contractual clauses aggregate to form stronger restrictions together. Although largely overlooked, the examples of these collusive effects are pervasive. This Article shows that the common law already captures the logic of examining a contract as a whole that is larger than the parts of its sum. However, it does so implicitly and sporadically. Moreover, the multiplicity of clauses in boilerplate contracts has a psychological effect that should be integrated into the analysis. This Article presents contemporary behavioral research on bundling and unpacking information to inform the jurisprudence of contract aggregation. Behavioral studies on the human tendency to judge probabilities and risks differently when events are compiled versus when they are unpacked are critical to understanding the effects generated by contract thickets.

A related way that clause collusion happens is when numerous identical contracts are signed by multiple parties. Although the literature on boilerplate and adhesion has been robust and contract scholars have announced a contract theory crisis, these debates still center around the single party who has signed the contract.[4] At the same time, collusion of boilerplate clauses within and across firms has been a blind spot of antitrust law. Continuing the example of employment contracts that restrict postemployment mobility, should it make a difference to contract theory that a significant portion of the workforce has signed clauses that prevent former coworkers from recruiting one another or that all workers have signed secrecy clauses preventing them from sharing information about their salaries or harassment claims? New economic research shows that the frequency of noncompete clauses in an industry will affect wages industry-wide, lowering

4. *See generally* Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 13 (1981) (discussing bargaining weakness between companies and individual consumers).

the salaries even of those employees who have not signed such contracts.[5] Similarly, secrecy clauses not only affect those who are a party to the restriction but also shape the flow of information—including regarding salaries and ethical conduct—in organizations and markets more broadly.

In June 2020, a class action was filed against the Trump Campaign for requiring all of its staffers, volunteers, and freelancers to sign contracts prohibiting them from ever—not just during the duration of the campaign—disparaging or demeaning President Trump, any member of his family, or any of his or his family's companies.[6] (I served as a consultant, pro bono, to the class plaintiffs.) These uniform contracts also prohibit staffers from ever disclosing any information that Trump "unilaterally deems private."[7] The class action claims that these clauses are used to "threaten to impose and actually to impose significant retaliatory financial penalties on individuals for asserting their statutory rights and disclosing wrongdoing."[8] Secrecy contracts that prevent employees from revealing corporate wrongdoing, such as sexual harassment incidents, abound. This kind of deep contractual secrecy pervasively demanded from entire workforces has become common in every industry, resulting in far less transparency and information flow in both our economic and civic lives. When we examine the speech and knowledge that circulates in an industry, a thicket forms to suppress instances of harassment and insulate an industry from external scrutiny. Similarly, class action waiver clauses, which waive a consumer's or employee's right to resolve disputes on a class basis, have, like secrecy and noncompete clauses, been an issue of heated debate and the subject of several recent Supreme Court decisions.[9]

The same question then applies: Does it make a difference what portion of the workforce has signed such clauses? The perspective of

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5. Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 60 (2021) (noting "the overall effect of a noncompete is averaged across those who are and who are not aware of their noncompete status" in their computation of effects of NDAs on wages).

6. Class-Action Complaint at 2, 17–18, Denson v. Donald J. Trump for President, Inc., No. 20-cv-4737 (S.D.N.Y. June 1, 2020) [hereinafter Class-Action Complaint].

7. *Id.* at 20.

8. *Id.* at 21.

9. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding that arbitration agreements between employers and employees calling for individualized proceedings were to be enforced as written); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempted California's rule under which class arbitration waivers were held unconscionable).

clause collusion allows policymakers to examine these contract developments as they shape markets and institutions. The validity of boilerplate clauses should be judged differently when many have signed them. This Article demonstrates that a market-wide perspective reveals that collusion of identical contracts in a single industry makes a significant difference. As this Article shows, surprisingly little thought has been given to the pervasiveness of identical contract clauses from the perspective of contract theory and, in turn, antitrust law is only now beginning to grapple with these realities as anticompetitive issues. The moment is ripe and regulatory solutions are needed.

First, recognizing that boilerplate clauses collude *within* a contract and *among* the many contracts that are circulated in the market has profound implications. Contract law is currently experiencing a crisis of consent. In 1974, after centuries of consent holding steady as the basis of contract, Grant Gilmore famously announced the *death of contract*.[10] Since then, contract theory has continued to shift away from the lens of consent toward an understanding of contracts as "a system of private obligations with expanding contents that are created unilaterally by one party."[11] Contracts today are mostly "volume-based, cookie-cutter transactions."[12] In this reality, where most contracts are not the subject of bargaining, negotiation, or consent, aggregation is key to understanding longstanding doctrines. Rather than attempting to salvage, renounce, or fictionalize consent, this Article presents a novel, realistic analysis of the social and economic implications of our contemporary contract regime.

Second, the boundaries of contract law increasingly flow into other fields, such as tort and property law. Indeed, the decline in the view of contracts as wholly consensual has led to significant overlap of contract law and torts. In John Witt's terms, tort analysis has "swallowed up" contract law.[13] In turn, administrative regimes have "swallowed up" aspects of tort law by establishing rules such as worker

10. GRANT GILMORE, THE DEATH OF CONTRACT 87–103 (1974).

11. Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019). For responses to *Pseudo-Contract*, see also Jeffrey M. Lipshaw, *Conversation, Cooperation, or Convention? A Response to Kar and Radin*, 43 AUSTRALASIAN J. LEGAL PHIL. 90 (2018) and Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23 (2019).

12. MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 6 (John M. Conley & Lynn Mather eds., 2013).

13. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 17 (2004).

compensation outside-of-tort regimes.[14] At the same time, in the contract world, contractual doctrines like public policy and unconscionability are quasi-tort doctrines because they relate to third-party effects. Aggregation helps explain the significance of such external analyses and distinguishes between cases in which a clause or contract stands alone, and those which operate in conjunction with other clauses or contracts.

Third, regulation is frequently undermined by contractual clauses. Policy areas including employment, property, consumer health, insurance, and intellectual property cannot be assessed without examining the web of contracts that underlie these market relations. For example, intellectual property is destabilized by contractual clauses that restrict competitive ventures, assign innovation, and fence information in ways that expand beyond the reach that statutory law has deemed patentable, copyrightable, or confidential.[15] This means that the policy concerns at the basis of legislation often bleed into contract adjudication. For example, a nondisclosure agreement clause (NDA) coupled with a nondisparagement clause will be analyzed in relation to constitutional speech rights and statutory speech protections, such as the right, under the National Labor Relations Act and the Defend Trade Secrets Act, to blow the whistle and share information about corporate improprieties.[16] Aggregation can more consistently and directly guide courts in understanding the legal limits of certain market arrangements.

Fourth, contracts today often contain unenforceable clauses, in large part due to the prevalence of contracts of adhesion.[17] Attorneys employ an overkill strategy—the inclusion of clauses that are clearly void, but that chill behavior, increase perceived risk, and increase uncertainty about potential breach. Parties to a contract, particularly unsophisticated parties, tend to view the document as an accurate source of information about the law.[18] An understanding of aggregation, including cutting edge behavioral research on how individuals

14. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1553–54 (2006) (noting administrative agencies' and state laws' approaches to employment and worker compensation law).

15. Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 803 (2015).

16. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935); Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376.

17. *See infra* Part III.

18. Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 882–84 (2016) (noting that a study showed some employees who signed noncompete contracts, unaware of their enforceability, took a professional detour to avoid the industry).

perceive the sum of a multiplicity of restrictions, is key to addressing unenforceable clauses. In turn, rather than simply analyzing the enforceability of each clause by itself, remedies should include an analysis of the effects of unenforceable clauses on misled parties.

Fifth, antitrust law is entering new frontiers. Markets are increasingly shaped not directly by the currency of dollars but by the control of data, information, and opportunity. The Federal Trade Commission (FTC) recognized this reality in 2019 when it announced the creation of a new task force to monitor competition in technology markets,[19] and again in 2020 when it invited a group of experts (including myself) to assist the agency in considering a rule against uniform employment clauses that restrict competition.[20] In 2021, President Joe Biden is expected to turn more of the administration's attention to ensuring competitive markets, and Biden himself has raised concerns about the rising use of contracts such as noncompetes.[21] For years, boilerplate contracts that aggregate restrictions and create thickets have been a blind spot of antitrust law.[22] Understanding the aggregate effects of contractual arrangements between dominant market actors and individuals—consumers, employees, licensees, and tenants—is key to revamping antitrust policy and competition laws for the twenty-first century. This Article contributes to these new frontiers of competition, developing an original framework for the implications of multiplicity and the pervasiveness of restrictive contract clauses in the market. The goal is to address the objective concerns of how such

19. Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), https://ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology [https://perma.cc/S2TY-JW3U].

20. Press Release, Fed. Trade Comm'n, FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts (Dec. 5, 2019), https://ftc.gov/news-events/press-releases/2019/12/ftc-hold-workshop-non-compete-clauses-used-employment-contracts [https://perma.cc/59VT-5H2T].

21. Brooke Razor & Jill A. Zender, *Biden Proposes Nationwide Non-Compete Ban*, NAT'L L. REV. (2020) https://www.natlawreview.com/article/biden-proposes-nationwide-non-compete-ban [https://perma.cc/9RLR-4BY3]. On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy which calls on the FTC to use its rulemaking power to curtail the unfair use of noncompetes. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021); *see also* Mark Lemley & Orly Lobel, *Supporting Talent Mobility and Enhancing Human Capital: Banning Noncompete Agreements to Create Competitive Job Markets*, DAY ONE PROJECT (January 2021), https://9381c384-0c59-41d7-bbdf-62bbf54449a6.filesusr.com/ugd/14d834_5a463eb009844f37a1e952025642c748.pdf [https://perma.cc/H22Z-UTAW].

22. Lobel, *Gentlemen Prefer Bonds*, *supra* note 2, at 668 (calling for policymakers to turn their attention toward the range of restrictive covenants in use and their effects on the labor market).

contracts shape market relations alongside the subjective perspectives of the parties. Put differently, this Article is about contracts as a social institution[23]—under a governance framework—with the aim of evaluating the comparative advantages of contract doctrine and other regulatory fields.[24] This Article thus provides courts and policymakers with a fuller box of legal tools that serve the public policy goals of fairness, welfare, and competition.

This Article proceeds as follows. Part I presents the concept of aggregation of contractual clauses. I analyze two contexts that demonstrate how restrictive clauses must often be judged in relation to each other: clauses that substantively restrict rights of exit (such as attempting to leave to a competitor) and restrict voice (such as speaking out against illegality) and clauses that procedurally restrict rights and access to litigation (including predispute arbitration clauses and waivers of class action). Each of these contexts has been adjudicated through different contract doctrines, primarily public policy and unconscionability. Part I further presents the rich behavioral studies about bundling and listing multiple detailed risks in a single document and shows that people's assessment of such risks is affected by the aggregation of such details. I show how courts have intuitively employed notions of aggregation in their decisions, albeit without consistent analysis and without this wealth of contemporary behavioral research on the psychological effects of intracontract collusion.

Part II introduces interboilerplate collusion that emerges from the numerosity of signees. The substantive and procedural restrictions of noncompetes, secrecy, and arbitration clauses illuminate the failures of conventional private law theory, including blind spots of antitrust law. Each of these examples demonstrates how the existence of multiple contracts in a market creates collusive anticompetitive effects. I term the phenomenon of a large number of boilerplate contracts in the market adopting the same restrictions a *contract thicket*. Like the aggregation of multiple clauses in a single contract, the aggregation of multiple contracts in a single market has a collusive effect. This Article explains the externalities and collusive effects of restrictions, such as noncompetes, which reduce mobility in an industry. Similarly, the prevalence of nondisclosure clauses creates a pris-

23. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985) (exploring the relationship between economic contracting and social sciences).

24. On the governance perspective, see generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (describing a shift in the legal field from a regulatory to a governance model).

oner's dilemma for those who wish to reveal information about corporate wrongdoing, and reduces the flow of information circulating in entire industries affecting not just the employees who sign them. Even those who have not signed away their mobility and speech rights will be subject to more harmful terms and conditions of employment and fewer opportunities for mobility. Analyzing arbitration clauses, and in particular, anti-aggregation clauses—which have become typical in arbitration agreements and waive the right to bring claims alongside other claimants—the lens of the contract thicket again helps explain why the multiplicity of identical clauses creates a market failure and negative externalities on regulatory compliance and enforcement.

Part III argues that a better conceptualization of boilerplate collusion has implications for both contract adjudication and regulatory policy. First, at the breach and remedy stage, the analysis helps courts in deciding whether contracts are enforceable, entirely void, misleading, or should be reformed through blue-penciling. I argue that recognizing intracontract collusion supports changes in adjudicative defaults, including the rejection of reformation and blue-penciling. Furthermore, while the canon of contract interpretation rests on notions of anti-redundancy or anti-surplusage, aggregation offers a contravening argument that redundancy is a feature rather than a bug, designed to benefit its drafters and harm nondrafting parties. Second, a better understanding of the phenomenon of boilerplate collusion reveals the need for a more proactive approach to contract policy. Waiting for each individual clause to be the subject of litigation hardly ever addresses the full extent of boilerplate collusions, nor does it prevent its central harms. The Article shows how government agencies at both the state and federal levels can develop tools of contract law governance to disincentivize in advance the drafters, including attorneys, from unlawful use of aggregation. Third, antitrust law is at a watershed moment when it must expand to a richer understanding of market power and collusion. I argue that antitrust law should recognize the realities of boilerplate collusion, thereby challenging its historical sharp doctrinal divides between horizontal and vertical restraints. These legal solutions are multilayered and require the participation of both courts and regulators. Boilerplate collusion analysis allows us to tackle the forest beyond the trees.

I. INTRABOILERPLATE COLLUSIONS

A. BEYOND CONSENT: JUDGING THE TREES FOR THE FOREST

> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained." — Upton v. Tribilcock[25]
>
> "What is this 'law of contracts' about which treatises and restatements are written? It almost seems to be the law of left-overs, of miscellaneous transactions, the rag-tag and bob-tail which do not get treated elsewhere." — Clyde Summers, 1969[26]

Contract law has gradually accepted that consent no longer exists in a large number of contracts. An article in the *Onion*, *Nation Shudders At Large Block of Uninterrupted Text*, captures our shared experience in its reporting of "the never-ending flood of sentences [which] may be . . . even a binding contract of some kind."[27] For much of human history, contracts have been rooted in consent. As Plato wrote in *The Laws*:

> As regards cases in which someone agrees to cooperate in doing something and fails to act according to what he agreed, except when laws or a decree stands in the way, or where he was forced by unjust compulsion to agree, or where he's involuntarily prevented by unforeseen chance, trials for unfulfilled agreements in the other situations are to be held in the tribal courts, if the parties weren't able to resolve their differences earlier in the courts of the arbitrators or neighbors.[28]

Today, however, many of the contracts we regularly sign are contracts of adhesion: long boilerplate bundles that are unilaterally written and nonnegotiable. Even among equal parties in negotiated deals, uniform boilerplate clauses are frequent. Mitu Gulati and Robert Scott tell a remarkable, but all too common, story about how contractual provisions can remain standard for over a hundred years, "absorbed into the lumpish boilerplate of such contracts, and then . . . replicated, thousands upon thousands of times, even while the knowledge of [their] origin and purpose insensibly faded from the minds of [their] remote drafters."[29] Gulati and Scott argue that clauses have an organic life form, "much like a seed can pass unharmed through the intestinal tract of a bird."[30] They ask, "[H]ow many other boilerplate clauses

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25. 91 U.S. 45, 50 (1875).

26. Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 565 (1969).

27. *Nation Shudders at Large Block of Uninterrupted Text*, ONION (Mar. 9, 2010), https://theonion.com/nation-shudders-at-large-block-of-uninterrupted-text-1819571366 [https://perma.cc/86AV-SWBZ].

28. PLATO, THE LAWS 321 (Thomas L. Pangle trans., 1980).

29. GULATI & SCOTT, *supra* note 12, at 2.

30. *Id.* at 3.

might similarly have outlived the memory of their origins and purpose, making them prime candidates for creative interpretations by highly motivated litigants?"[31] The answer is that a great number of these boilerplate clauses are regularly inserted in standard form contracts. The aggregate effects of clauses have been largely overlooked in legal scholarship.

While much of the existing literature about boilerplate clauses and contracts of adhesion has focused on the ethical implications of the erosion of consent on contract theory, far less has been written about the substantive implications of boilerplate clauses in shaping market deals. Regarding consent, commentators raise the concern that parties "must agree to an explicit lie every time they consent online (affirming that you have read the contract's terms)."[32] Scholars decry the decline of consent, at least in part, because it leads to systematic unfairness. Research, moreover, shows that people view contracts signed with companies, as opposed to individuals, as less morally binding.[33] Still, little attention has been devoted to the patterns and substance of such unfairness and monolithic terms.

In 1943, Friedrich Kessler famously asked, "[C]an the unity of the law of contracts be maintained in the face of the increasing use of contracts of adhesion?"[34] Since then, although legal scholars have reached a general consensus that contracts of adhesion should be considered differently than other contracts, "there is little agreement on what principles should control. The currently applicable law is characterized by a lack of intelligible doctrine and a lack of consistent results."[35] Todd Rakoff warns that "[t]he law currently governing contracts of

31. *Id.*

32. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 211 (2019); *see also* Morales v. Sun Constructors, Inc., 541 F.3d 218 (3d Cir. 2008) (enforcing an arbitration clause in an employment contract in English against an employee who spoke only Spanish); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) ("A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.").

33. Uriel Haran, *A Person-Organization Discontinuity in Contract Perception: Why Corporations Can Get Away with Breaking Contracts but Individuals Cannot*, 59 MGMT. SCI. 2837, 2837 (2013).

34. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629, 636 (1943).

35. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1175 (1983) (arguing for a contract doctrine that renders contracts of adhesion presumptively unenforceable).

adhesion is a jumble of different lines of analysis, contradictory outcomes, and convoluted expressions."[36] An understanding of boilerplate collusion principles helps reject this inconsistent treatment and expand the inquiry of contracts of adhesion.

Moving beyond the notion of consent to a law of contracts that considers the realities and effects of contemporary contracts, the focal point becomes how the law should ensure that market agreements are reasonable and welfare-enhancing. Ahead of his time, Karl Llewellyn pointed to this insight when he attempted to salvage consent by broadening it conceptually. Llewellyn acknowledged that consent to terms is not actually present in adhesion deals: "Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more."[37] Llewellyn, however, urged that terms will be reasonable and fair:

> That one thing more is a blanket assent (not a specific assent) to any *not unreasonable or indecent terms* the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.[38]

Contract law is abundant with doctrines that aim to protect Llewellyn's intuition about reasonable and decent agreements. As one contracts scholar reveled about the field, "[w]hat makes contract law so wonderful, what makes it such a marvelous course to be taught, and also so challenging to both law students and theorists is that contracts have lots of doctrine, and it's hard to get a handle on it all."[39] Analyzing the ways contract doctrines have, mostly implicitly, grappled with aggregation reveals a fuller picture of the normative underpinnings of contemporary contract law. Despite doctrinal variation, these doctrines all relate to the central question: What are the limits of contractual agreements?

A contract of adhesion is the uniform and unilateral adoption of multiple standard clauses, all of which will then be signed by multiple

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36. *Id.* at 1197.

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

38. *Id.* (emphasis added).

39. Larry Garvin, Peter Linzer, Hila Keren, Randy Barnett, Joseph Perillo & David Campbell, *Theory and Anti-Theory in the Work of Allan Farnsworth*, 13 TEX. WESLEYAN L. REV. 1, 20 (2006) (comment of Randy Barnett).

individuals.[40] Indeed, the very way that we define contracts of adhesion implicitly rests on both aspects of aggregation—the bundles of clauses in a single contract—and the uniformity of contracts signed by many signees. Contract scholars agree that what makes a contract one of adhesion is a *combination* of circumstances. For example, a leading article by Todd Rakoff deems several elements to be necessarily present for a contract to be a contract of adhesion:

> (1) The document is a printed form that contains *many* terms and clearly purports to be a contract;
>
> (2) It was drafted by, or on behalf of, one party to the transaction;
>
> (3) The drafting party participates in *numerous* such transactions as a matter of routine;
>
> (4) The form is presented as a take it or leave it contract;
>
> (5) The document is signed by the adherent;
>
> (6) And the signing party enters *few* of such contracts compared to the drafting side.[41]

Boilerplate contracts, which are unilaterally drafted documents with numerous terms, often include overlapping restrictions. Lawyers like "belts and suspenders."[42] So should overlapping restrictions be enforced as though each stands alone? How does aggregation relate to limitations on contract validity or enforceability, including the doctrines of unconscionability, public policy, duress, incapacity, and undue influence? How do clauses operate together to convey a certain legal reality? Should this signaling play a role in contract adjudication? Attorneys drafting boilerplate contracts frequently operate under a "more is more" mindset. The more clauses that are included to restrict certain behaviors or rights, such as exit, voice, or liability, the more protections a corporation has. However, little attention has been given in contract theory to how such long iterations of protective clauses

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40. *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN L. REV. 545, 555–56 (2014) (surveying literature on how courts deal with contracts of adhesion and boilerplate language); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 246–48 (1995) (explaining that consumers are "rationally ignorant" of preprinted terms); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–45 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203–09 (2003); Rakoff, *supra* note 35, at 1173–77, 1197.

41. Rakoff, *supra* note 35, at 1177 (emphasis added). Rakoff adds a seventh element: "The principal obligation of the adhering party in the transaction considered as a whole is the payment of money." *Id.* This element indicates the focus that contract scholars have had on consumer contracts rather than on other kinds of relationships, such as employment and tenancy.

42. *Belts and Braces*, FROM THE HORSE'S MOUTH: OXFORD DICTIONARY OF ENGLISH IDIOMS (3d ed. 2009) (meaning "providing double security by using two means to achieve the same end.").

operate together to create lock-in effects. Is there a tipping point after which the inclusion of a restriction is no longer acceptable?

As we will see below, the jurisprudence on public policy and unconscionability already provides some answers to these questions. Yet, in legal scholarship, few have considered aggregation of contract provisions. Surprisingly little has been written about the adjudicative process of adding up facts and concepts. Saul Levmore has written about tort law and factual aggregation of elements for the same cause of action.[43] Others have written about aggregating probabilities in standards of proof in civil and criminal law,[44] and aggregating claims in mass litigation and class actions.[45] At the same time, the common law has intuitively understood aggregation as central to contract analysis itself. For example, when assessing breach, courts regularly view several breaches as cumulating into a substantial breach, even if each breach would not in itself justify rescission.[46] As one court explained,

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43. Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723 (2001) (discussing, inter alia, the conjunctive nature of jury instructions for multiple elements of one cause of action).

44. Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27 (1996) (discussing the merits of cumulating low-probability charges outside the criminal legal system); Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 MINN. L. REV. 261 (2009) (arguing that courts could aggregate probabilities to convict a criminal defendant of an unspecified offense).

45. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (discussing the problem of nonclass aggregations); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) (arguing that the capacity to resolve mass harms through class actions and aggregation is a step toward providing justice under law); David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949 (2008) (addressing criticism of mass tort claims); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809 (2006) (proposing a new state statute to facilitate mass tort settlements); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105 (2010) (arguing for a broadening of approaches to mass civil litigation); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008) (surveying the suitability of multidistrict litigation for aggregate or global settlement for civil claims); Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301 (2003) (focusing on the conflicting roles lawyers assume when settling mass litigation suits); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010) (proposing a new approach to managing aggregated claims in multidistrict litigation); Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2 (2012) (exploring the exceptions to the rule that courts do not allow aggregation of claims in public and private law).

46. *See, e.g.*, Seven-Up Bottling Co. (Bangkok) v. PepsiCo Inc., 686 F. Supp. 1015, 1024 (S.D.N.Y. 1988) ("[W]ith respect to minimum sales and distribution requirements" together constituted "a breach of its further obligation . . . to adequately promote and develop the market . . . ."). When considering the covenants of good faith and

"precedent shows that, in assessing the materiality of multiple breaches, as the Court must do here, it is appropriate to consider the combined—or 'cumulative'—effect of the breaches."[47] Beyond breach, across many contract law doctrines, judges regularly consider the sum of the circumstances. For example, as we will further explore below, the doctrine of unconscionability considers both procedural and substantive impropriety, aggregating together to an unconscionable contract.[48] Similarly, the doctrine of duress considers the combination of circumstances surrounding assent to the contract along with the contract terms themselves—which one side may have inserted without proper introduction and consent.[49]

Legal scholar Clyde Summers was skeptical about any principled unifying analysis of contract law: "It would seem a reasonable guess, in fact, that the principles common to the whole range of contractual transactions are relatively few and of such generality and competing character that they should not be stated as legal rules at all."[50] In a wide range of case law, courts have employed calculations of aggregation when considering contract enforcement, doctrine application, and allegations of contractual breach, but without a formalized approach or detailed way to explain the results.[51] Aggregation, long overlooked, helps fill this void of unifying principles, explaining a range of long-standing contract law doctrines in action.[52] At its core, contract law is a set of frameworks employed to draw lines between freedom of contract and social control. From a socio-legal perspective, contract law is a toolkit for attorneys to solve their clients' problems.[53] Across these sets of tools and practices, the concept of aggregation provides a fresh way to consider long-standing doctrines and contract principles.

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fair dealing, courts will often look at several small breaches of the contract together as forming a violation of the covenant. *See, e.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 727–30 (7th Cir. 1979).

47. SunTrust Mortg., Inc. v. United Guar. Residential Ins. Co., 806 F. Supp. 2d 872, 902 n.64 (E.D. Va. 2011), *vacated on other grounds*, 508 F. App'x 243 (4th Cir. 2013).

48. Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 228 (1998); John Phillips, *Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine*, 45 WAKE FOREST L. REV. 837, 848 (2010).

49. Lincoln Benefit Life Co. v. Edwards, 45 F. Supp. 2d 722, 750–51 (D. Neb. 1999).

50. Summers, *supra* note 26, at 568.

51. *See infra* Part I.B.2.

52. *See infra* Part I.C.

53. STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION 18 (3d ed. 2010).

B. DOCTRINAL WINDOWS TO AGGREGATION

1. Public Policy & Postemployment Restrictions

> "[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you."—Richardson v. Mellish[54]

Public policy is a commonly used claim in contract litigation but, at the same time, is "a vast, confusing and rather mysterious area of the law."[55] It has developed in contract jurisprudence as a tort-like mechanism to override an agreement struck between two private individuals.[56] At the basis of public policy is the notion that there are values in contractual relations that go beyond what the two sides agreed upon.[57] In contrast with most other contract doctrines, public policy is not about challenging true consent: "Unlike unconscionability, public policy does not require courts to make explicit findings about the party's bargaining deficits before ruling for her claims."[58] Rather, the doctrine challenges the very existence of the deal that was struck, taking a broader view of what the deal, and similar deals, would mean for society.[59]

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54. Richardson v. Mellish (1824), 130 Eng. Rep. 294, 303(Burrough, J.).

55. George A. Strong, *The Enforceability of Illegal Contracts*, 12 HASTINGS L.J. 347, 347 (1961).

56. FARSHAD GHODOOSI, INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION 54 (2017).

57. *See id.* at 6; *see also* Hoffman & Lampmann, *supra* note 32, at 170; Adam Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 484 (2010); Aditi Bagchi, *Other People's Contracts*, 32 YALE J. REG. 211, 243 (2015); Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445 (2006) (exploring the validity of refusal to enforce contracts against public policy as a deterrent mechanism); F.H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 143 (2005); James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly*, 55 S.C. L. REV. 859, 860 (2004); Ryan M. Philip, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 848 (2003); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 672 (1999); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 122 (1988).

58. Hoffman & Lampmann, *supra* note 32, at 201.

59. *Id.*

Postemployment restrictions are a particularly dynamic area of public policy adjudication. Every state limits the enforcement of noncompetes, and a handful of states prohibit them altogether.[60] A majority of jurisdictions adopt the standard of reasonableness.[61] Reasonableness requires an employer to show: (1) that the contractual agreement at issue was needed to protect a legitimate business interest, (2) that the enforcement of the clause does not impose undue hardship on the employee, and (3) that the restriction does not contravene public policy. However, a focus on the prototypal clause of a direct noncompete often misses the bigger picture. As I will elaborate in a moment, recent research shows that standard contracts regularly include: a classic noncompete; a nonsolicitation of customers clause; a nonpoaching of former coworkers clause; broad nondisclosure clauses; and innovation assignment clauses, all alongside choice of law and choice of forum clauses and a severability clause.[62] Together, they form an exit penalty that presents itself as ironclad.[63]

Another way to think of the aggregation effect which results in ironcladding the nondrafting party is to describe the path to intracontract collusion on a numerical scale. Let's assume that there are six clauses that restrict employee freedom by 10 percent each. Together, however, the clauses restrict freedom near 100 percent. How should the courts analyze the enforceability of such bundled restrictions? Recognizing supra-addition effects, clauses should be examined on how they operate *together* to lock in talent and prevent competition. The *effect* of multiple contractual clauses operating together is larger than their sum. A dispute between a company and an employee wanting to leave for a competitor helps illustrate the lock-in effects of multiple clauses. The contract clauses described below are representative of recent boilerplate employment agreements, though the exact combination and inclusion of each clause will vary from employer to employer and across different industries.[64] Typically, a nonexhaustive

60. *See, e.g.*, CAL. BUS. & PROF. CODE § 166600(a) ("[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); *see also* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 53, 64 (2013).

61. LOBEL, *supra* note 60, at 53.

62. *See generally* LOBEL, *supra* note 60 (outlining numerous clauses in standard contracts which, in addition to direct noncompete clauses, stifle competition).

63. Orly Lobel, *Exit, Voice and Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781, 792 (2020); Lobel, *supra* note 15, at 790–91.

64. Contracts on file with the author. *See also* Fifth Amended Complaint at Ex. 2, Doe v. Google, No. CGC-16-556034, 2017 WL 9477548 (Cal. Sup. Ct. Dec. 20, 2016) (attaching a confidentiality agreement presented by Google to new employees).

list of restrictions is inserted into standard employment contracts, compounding to create a lock-in effect:

(1) Noncompete

(2) Coworker nonpoaching

(3) Customer nonsolicitation

(4) Customer nondealing

(5) Nondisclosure, including customer lists and coworker salaries as proprietary information

(6) Nondisparagement clause

(7) Preinvention assignment clause

Alongside these clauses—a series of procedural clauses:

(8) Choice of forum

(9) Choice of law

(10) Arbitration clause

(11) Antiaggregation of claims clause

(12) Severability clause

(13) Reformation clause

(14) Liquidated damages

(15) Injunction clause

An employment contract regularly includes nonsolicitation clauses, including a coworker nonpoaching clause, prohibiting the employee posttermination from "directly or indirectly" soliciting any employee, former employee, consultant, or contractor of the employer or any of the employer's affiliated entities, and a customer nondealing clause, prohibiting dealing with any client or prospective client of the employer.[65] The contract continues with a nondisclosure clause that classifies a long nonexhaustive list of information, including "contacts," "personnel," and "ideas," as confidential information that the employee cannot ever disclose.[66] Such NDAs are often used to prevent postemployment competition.[67] Secrecy clauses that encompass terms and conditions of employment also purport to diminish employees' irrevocable rights to disclose their salaries and terms and conditions of their employment.[68] A nondisparagement clause that prohibits the employee from publicly discussing the employer's company may also extend to discussing any of its affiliates or any of its

65. Lobel, *supra* note 15, at 790.

66. Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/8D3C-Z7RN].

67. *Id.*

68. Lobel, *Knowledge Pays*, *supra* note 2, at 589–90.

officers or employees in a manner that tends to portray any such entity or person in an unfavorable light.[69]

The procedural clauses in a contract supplement and support the message of lock-in. For example, an arbitration clause, a forum selection clause, and a choice of law clause signal to the employee that her case will be arbitrated according to a jurisdiction that is more favorable to the enforcement of postemployment restrictions.[70] Again, each clause in itself is on shaky grounds as to its enforceability. Some clauses may be outright void, such as noncompete clauses in California.[71] Others will be judged on their reasonableness, for example whether the NDA is so broad that it unlawfully restricts speech and mobility.[72] The argument I make is that these clauses must be understood as operating together, and their adjudication must take into account their construction as a whole. For example, either a choice of law or forum selection clause is likely void in some contexts.[73] In 2016, California enacted a law that prohibits an employer from requiring a California employee (who primarily works and resides in California) to sign, as a condition of employment, a choice of law or choice of forum clause that would deprive the employee of the substantive protection of California law with respect to a controversy arising in California.[74] As we shall see below, a reformation clause, purporting to direct courts to trim any unenforceable version of other clauses down to precisely the clause that is enforceable, should also not be followed.[75] But it signals to an employee that even if some version of a restrictive clause is deemed unreasonable, the employer will have the power to salvage whatever is possible to restrict movement.[76] Thus, many of these clauses are likely to be deemed void by a court in a case of litigation.[77] However, taken together, each clause thickens the appearance of a lock-in. In other words, while each of these clauses may individually be subject to dispute, a bundle of restrictions on postemployment creates a contract that, in its entirety, purports to achieve

69. Lobel, *supra* note 66.

70. *See, e.g.*, Graham v. Scissor-Tail, Inc., 623 P.2d 165, 173–76 (Cal. 1981).

71. *See* CAL. BUS. & PROF. CODE § 16600.

72. *See* Class-Action Complaint, *supra* note 6.

73. *See, e.g.*, CAL. LAB. CODE § 925.

74. *Id.* (codifying the California courts' previous rulings); Barbara Borden, Jamie Leigh, Joshua Mates, Craig Menden, Steve Tonsfeldt, Mutya Harsch, Josh DuClos & Tim Lecher, *Non-Competes for California Employees in M&A Deals: Don't Fudge It*, COOLEY M&A (Sept. 13, 2017), https://cooleyma.com/2017/09/13/non-competes-for-california-employees-in-ma-deals-dont-fudge-it [https://perma.cc/YH5C-VF78].

75. *See infra* Part III.A.1.

76. *See infra* Part III.A.1.

77. *See infra* Part III.A.1.

an ironclad that surpasses the effects of any single clause. Regardless of the wording or the exact mix of clauses, the contract, in its entirety, says something simple and fundamental: an employee is prohibited from leaving and competing in any way, shape, or form with her previous employer. Even if voidable, the clauses together operate as a signal to the employee that she is cut off from any and all outside opportunities.

2. Unconscionability & Arbitration Clauses

The doctrine of unconscionability recognizes that, as a matter of law, a court can void part or all of a contract if its terms are deemed unconscionable.[78] The doctrine of unconscionability inherently involves aggregation: to be void because of unconscionability, clauses must be both procedurally (parties hold unequal bargaining power) and substantively (harsh or one-sided) unconscionable.[79] In the well-known case *Williams v. Walker-Thomas Furniture Co.*, the court explained that unconscionability considers the bargaining power between the parties in conjunction with the terms of the contract itself.[80] As the court explained in *Williams*, "unconscionability has to have two foci, the negotiation which led to the contract and that contract's terms."[81] In other words, the way to reach a decision about unconscionability is to aggregate the substantive and procedural flaws.[82] If they are "so unfair" when enforced together, then "enforcement should be withheld."[83]

Substantive unconscionability analyzes whether the terms of the contract are "so one-sided as to 'shock the conscience.'"[84] If the terms fall outside the reasonable expectations of the nondrafting party, this

78. U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2010) ("If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.").

79. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011); Little v. Auto Stiegler, Inc., 63 P.3d 979, 983–84 (Cal. 2003); Murphy v. Check 'N Go of Cal., Inc., 67 Cal. Rptr. 3d 120, 125 (Cal. Ct. App. 2007), *abrogated by* Iskanian v. CLS Trans. L.A., LLC, 327 P.3d 129 (Cal. 2014); Higgins v. Superior Ct., 45 Cal. Rptr. 3d 293, 301 (Cal. Ct. App. 2006).

80. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

81. Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 552 (1967).

82. *Id.*

83. *Walker-Thomas Furniture Co.*, 350 F.2d at 450.

84. Am. Software v. Ali, 54 Cal. Rptr. 2d 477, 480 (Cal. Ct. App. 1996) (citing Cal. Grocers Ass'n v. Bank of Am., 27 Cal. Rptr. 2d 396, 402 (Cal. Ct. App. 1994)).

weighs towards substantive unconscionability.[85] Procedural unconscionability does not immediately invalidate an agreement; rather it requires that a court "scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided."[86] Substantive unconscionability is present when the terms are "overly harsh," "unduly oppressive," or "unreasonably favorable to the more powerful party."[87] The presence of both procedural and substantive unconscionability is considered by the courts on an implicit sliding scale.[88] Simply put, the two need not be present in equal parts, but rather each is weighed in and combined to tip the scale towards nonenforceability.[89] Courts adjudicate with the understanding that when there is more procedural unconscionability, less substantive unconscionability needs to be shown, and vice versa.[90] In other words, the unconscionability analysis intuitively examines the additive effects of terms. The ways courts have engaged in the unconscionability doctrine produces a spectrum of assessing procedural unconscionability in proportion to substantive unconscionability.[91] According to the Supreme Court of California, the "ultimate issue" in every unconscionability case is whether the terms of the contract are "sufficiently unfair, in view of all relevant circumstances."[92]

Critics of the unconscionability doctrine warn that the doctrine provides courts with a "wide latitude," allowing judges to "manipulate the unconscionability principle in order to reach the equitable results they desire."[93] At the same time, the Uniform Commercial Code explains unconscionability as a more direct way of policing against unfair contractual language which has been accomplished in past court interpretation "by adverse construction of language, by manipulation

85. Magno v. Coll. Network, Inc., 204 Cal. Rptr. 3d 829, 838 (Cal. Ct. App. 2016).

86. Baltazar v. Forever 21, Inc., 367 P.3d 6, 11 (Cal. 2016).

87. *Id.*

88. *See id.*

89. *See id.*

90. *See, e.g.*, Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1260 (9th Cir. 2017); Orcilla v. Big Sur, Inc., 198 Cal. Rptr. 3d 715, 727 (Cal. Ct. App. 2016); *Magno*, 204 Cal. Rptr. 3d at 835.

91. *See, e.g.*, *Magno*, 204 Cal. Rptr. 3d at 835.

92. *Baltazar*, 367 P.3d at 12.

93. Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 288 (2000); *see also* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1085 (2006); Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 HASTINGS L.J. 1065, 1082 n.109 (2011) (concluding that unconscionability is often unnecessary in the context of contracts of adhesion because the agreements in question can be invalidated for absence of acceptance).

of the rules of offer and acceptance[,] or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract."[94] This debate about the doctrine of unconscionability also reveals an insight about judging contracts as a whole. Arthur Leff warned that when the question is presented as to the "unconscionability" of a single contractual provision, "the vacuousness of the standard is apparent."[95] Leff recognized that a contract clause cannot be judged alone but should be considered in relation to the whole contract.[96] As an early, vocal critic of *Williams v. Walker-Thomas Furniture Co.*, Leff wrote that there were two possible reasons to find substantive unconscionability: the court objects to the entire transaction or just the one provision.[97] Leff argued that to "police contracts on a clause-by-clause basis" was too abstract and random for a judicial task.[98] Similarly, Hugh Collins, skeptical about the courts' use of the unconscionability doctrine, warned that unfairness cannot be located by a judge analyzing any one specific term and deeming it unfair because terms are concessions granted in exchange for other advantages.[99] The claim about such concessions derived from negotiations is of course moot when a contract is unilaterally drafted and presented as nonnegotiable. However, the argument itself holds an important insight: a contract should be analyzed as a whole rather than by each term separately.

Aggregation helps move toward a more principled and consistent analysis of the validity of certain contracts. A landmark case on unconscionability expresses the understanding that a contract is greater than the sum of its individual clauses:

> The plaintiff argues that the provisions of the contract are separable. We agree that they are, but do not think that decisions separating out certain provisions from illegal contracts are in point here. As already said, we do not suggest that this contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist.[100]

To examine how clauses are judged for harshness in relation to one another, the most heated contemporary battlegrounds—predispute arbitration contracts—offer significant insight. Unconscionability is a regular defense against arbitration because most other claims against an arbitration contract are preempted by the Federal Arbitration Act

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94. U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 1987).

95. Leff, *supra* note 81, at 541.

96. *Id.*

97. *Id.* at 509; Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349 (1970).

98. Leff, *supra* note 81, at 515.

99. HUGH COLLINS, REGULATING CONTRACTS 260–66 (1999).

100. Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3d Cir. 1948).

(FAA).[101] Still, states apply the unconscionability lens to invalidate arbitration agreements that are so unfair they deprive the signee of their rights to a fair process and forum.[102]

To determine whether an arbitration contract is unconscionable, arbitration clauses are judged together by how they operate to waive procedural rights and forum selection.[103] The courts look for "'minimum levels of integrity' which are requisite to a contractual arrangement for the nonjudicial resolution of disputes."[104] Thus, courts have invalidated clauses that:

(1) grant the drafter unfettered discretion to select an arbitrator or when the arbitrator's interests are identical to one of the parties;[105]

(2) impose unreasonable costs on the consumer or employee;[106]

(3) mandatorily transfer the process to another state;[107]

(4) restrict basic procedural rights such as discovery;[108]

(5) restrict the availability of statutory or common law remedies;[109]

(6) limit communications with other employees;[110]

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101. *See, e.g.*, OTO, L.L.C. v. Kho, 447 P.3d 680, 698 (2019) (citations omitted) ("Generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA . . . ."). *But see, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (holding that the FAA preempted state unconscionability rule); DiMatteo & Rich, *supra* note 93, at 1079 n.58 (noting the heightened judicial scrutiny toward arbitration clauses in recent years); Ryan Miller, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After* Concepcion *and* American Express, 32 GEO. J. LEGAL ETHICS 793, 801 (2019) (noting that plaintiffs in *Concepcion* were arguing against the class arbitration waiver specifically, though the Court may have extended protection to the agreement as a whole). *See generally* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (examining California courts' frequent use of unconscionability doctrine to invalidate arbitration agreements despite the FAA).

102. *See, e.g.*, *Kho*, 447 P.3d at 699 (holding that arbitration agreement was unconscionable despite FAA).

103. *See, e.g.*, Graham v. Scissor-Tail, Inc., 623 P.2d 165, 173–78 (Cal. 1981).

104. *Id.* at 177.

105. *Id.* at 179–80.

106. Wherry v. Award, Inc., 123 Cal. Rptr. 3d 1, 6 (Cal. Ct. App. 2011); Penilla v. Westmont Corp., 207 Cal. Rptr. 3d 473, 483–84 (Cal. Ct. App. 2016).

107. *Graham*, 623 P.2d at 165; Mercuro v. Superior Ct., 116 Cal. Rptr. 2d 671, 678 (Cal. Ct. App. 2002) (relying on the "repeat player effect," the court explained that when "an employer repeatedly appears before the same group of arbitrators," as would be in this case, the arrangement "conveys distinct advantages [to the employer] over the individual employee.").

108. *Wherry*, 123 Cal. Rptr. 3d at 6.

109. *Id.*

110. Baxter v. Genworth N. Am. Corp., 224 Cal. Rptr. 3d 556, 568 (Cal. Ct. App. 2017).

(7) require the arbitration of claims prior to an administrative investigation, such as the EEOC in the context of discrimination;[111] and

(8) ban class arbitration.[112]

Similar to what we saw with the aggregation of postemployment restrictions,[113] while each of these arbitration clauses may be challenged on its validity and fairness, the bundling of such clauses in an arbitration contract sends a profound but simple message: it signals the forgone conclusion that an attempt to pursue a claim against the drafter will be a lost cause. The ironcladding effect of multiple restrictions on adjudicating one's rights is that these rights are left without meaningful remedy.

C. UNPACKING: THE PSYCHOLOGY OF AGGREGATION

"Like the measured length of a coastline, which increases as a map becomes more detailed, the perceived likelihood of an event increases as its description becomes more specific." — Tversky & Koehler[114]

"Any category or event can be described in more or less detail. Although these descriptions can reflect the same event objectively, they may not reflect the same event subjectively." —Van Boven & Epley[115]

Both unconscionability and public policy adjudication consider the circumstances of a contract. Context and impact are built-in features of these contract doctrines: "[C]ontract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another."[116] The numerosity of clauses in the current era requires courts to adjudicate the validity of contracts by considering the contemporary research on behavior and markets. Behavioral research offers important insight into how we cognitively process bundles of restrictive terms. Behavioral economists are finding that individuals view separately listed events as more likely to occur than when the same events are grouped and listed together.[117] In a series of experimental studies, researchers have established that probability is subjective and is impacted by different descriptions of the same event.[118]

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111. *Id.* at 574–75.

112. *Id.* at 565–66.

113. *See supra* Part I.B.1.

114. Amos Tversky & Derek J. Koehler, *Support Theory: A Nonextensional Representation of Subjective Probability*, 101 PSYCHOL. REV. 547, 565 (1994).

115. Leaf Van Boven & Nicholas Epley, *The Unpacking Effect in Evaluative Judgments: When the Whole Is* Less *than the Sum of Its Parts*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 263, 267 (2003).

116. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960).

117. *See, e.g.*, Tversky & Koehler, *supra* note 114, at 552.

118. *See, e.g.*, Eric J. Johnson John Hershey, Jacqueline Meszaros & Howard Kunreuther, *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY

For example, in one study, participants judged that the probability of death from cancer in the United States was 18 percent, the probability of death from heart disease was 22 percent, and the probability of death from "other natural causes" was 33 percent.[119] Another group of participants judged the probability of death from natural causes as 58 percent.[120] The sum of the three separately listed probabilities was 73 percent, while the estimated sum when described together was only 58 percent.[121] In other words, participants indicated that a person was more likely to die from "heart disease, cancer, or other natural causes" than simply from "natural causes."[122] When these events were unpacked and listed individually, they each had a stronger effect on the reader as more likely to occur.[123]

In another leading experiment, survey respondents were asked to judge the probability that a randomly selected death was a murder.[124] When the questions included both homicide by an acquaintance or stranger, respondents predicted a higher probability than when asked simply about the probability of a homicide.[125] This is despite that the two ways of phrasing—packed and unpacked—were substantively identical.[126] In yet another, less morbid study, participants were asked to estimate the probability that a particular team, division, or conference would win the NBA playoffs.[127] At the time of

35 (1993); Sarah Lichtenstein, Paul Slovic, Baruch Fischhoff, Mark Layman & Barbara Combs, *Judged Frequency of Lethal Events*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 551 (1978); Laura Macchi, Daniel Osherson & David H. Krantz, *A Note on Superadditive Probability Judgment*, 106 PSYCHOL. REV. 210 (1999); Matthew Mulford & Robin M. Dawes, *Subadditivity in Memory for Personal Events*, 10 PSYCHOL. SCI. 47 (1999); Donald A. Redelmeier, Derek J. Koehler, Varda Liberman & Amos Tversky, *Probability Judgment in Medicine: Discounting Unspecified Possibilities*, 15 MED. DECISION MAKING 227 (1995); Edward J. Russo & Karen J. Kolzow, *Where Is the Fault in Fault Trees?*, 20 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 17 (1994); Amos Tversky & Craig R. Fox, *Weighing Risk and Uncertainty*, 102 PSYCHOL. REV. 269 (1995); Martin Weber & Katrin Borcherding, *Behavioral Influences on Weight Judgments in Multiattribute Decision Making*, 67 EUR. J. OPERATIONAL RSCH. 1 (1993); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973).

119. Tversky & Koehler, *supra* note 114, at 552.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Yuval Rottenstreich & Amos Tversky, *Unpacking, Repacking, and Anchoring: Advances in Support Theory*, 104 PSYCHOL. REV. 406, 409 (1997).

125. *Id.*

126. *Id.*

127. Craig R. Fox & Amos Tversky, *A Belief-Based Account of Decision Under Uncertainty*, 44 MGMT. SCI. 879, 882 (1998).

the study, eight teams remained: the sum of the probabilities was close to 1 for the two conferences, nearly 1.5 for the four divisions, and more than 2 for the eight teams.[128] In total, the predicted sum of winning teams was greater than the whole of the league.[129]

Beyond probabilities, social psychologists Leaf Van Boven and Nicholas Epley hypothesize that evaluative judgments are sometimes prone to a similar unpacking effect.[130] That is, more detailed descriptions produce more extreme evaluations of categories or events than less detailed descriptions of the same categories or events.[131] For example, in one experiment, college students read about an oil refinery that was "convicted of polluting the environment."[132] In one scenario, the students read that the pollution produced an increase in "all varieties of respiratory diseases" in the surrounding communities.[133] In another scenario, the students read unpacked descriptions that listed the specific respiratory diseases:

> Imagine that a large oil refinery in northern Alaska was convicted in Federal court of violating Environmental Protection Agency regulations concerning waste disposal. In particular, this refinery sludge burning operation was releasing twice the allowable amount of toxins into the atmosphere. This practice resulted in a 10% increase in the surrounding community of asthma, lung cancer, throat cancer, and all other varieties of respiratory diseases.[134]

The students in both conditions were asked to imagine themselves as jurors in a class action lawsuit against the oil refinery.[135] The students who read the unpacked descriptions of the harms thought victims should be awarded higher remedies and that the plant should be closed for a longer period than those who read the shorter, packed description of the same harm.[136] Van Boven and Epley explain that the findings demonstrate that our evaluations of severity and harm are influenced by descriptions of categories.[137] The researchers concluded with a humorous demonstration of this effect: "Leading people to think about the details of a category or event, thereby making it easier to mentally generate evaluative evidence, results in more extreme evaluations. All of our experiments support this hypothesis. Stated differently, Experiment 1, Experiment 2, Experiment 3, and Experiment

128. *Id.*
129. *Id.*
130. Van Boven & Epley, *supra* note 115.
131. *See id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

4 support this hypothesis."[138] In social psychology, this effect is called the *unpacking effect*, and behavioral literature refers to it as *subadditivity*, the human tendency to judge probabilities differently when events are compiled versus unpacked.[139] The subadditivity effect is a category within the larger field of support theory, which considers how various information we are given supports the judgments we make.[140] The subadditivity effect and support theory are critical to understanding the effects generated by boilerplate intracontract collusion.

Support theory states that subjective probability depends on the manner in which the event is described, and the subadditivity effect is the finding that the judged probability of an event generally increases when its description is unpacked into components.[141] In other words, the subjective probability increases when the event is described in all of its possible subcomponents. Amos Tversky and Derek Koehler describe the behavioral effect of subadditivity as the difference between a single description that compiles various risks or facts versus several detailed, unpacked descriptions.[142] The latter—the unpacked multiple descriptions—psychologically looms larger than when the same event is packed together.[143] Tversky and Koehler describe unpacking as a "basic principle of human judgment."[144] They explain that when people assess their degree of belief that something will happen or is true, they do not normally unpack the hypothesis.[145] Rather, people tend to think about the most representative or most known examples of the possible event, and then form a global impression based on

138. *Id.* Relatedly, one study found that when tasks are unpacked into subcomponents, people can overcome the planning fallacy. Examples included finishing a manuscript, holiday shopping, getting ready for a date, or preparing food. When participants were prompted to unpack the task, they provided longer and more accurate estimates of how long the task would take. *See* Justin Kruger & Matt Evans, *If You Don't Want to Be Late, Enumerate: Unpacking Reduces the Planning Fallacy*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 586, 588 (2004).

139. Steven Sloman, Edward Wisniewski, Yuval Rottenstreich, Constantinos Hadjichristidis & Craig R. Fox, *Typical Versus Atypical Unpacking and Superadditive Probability Judgment*, 30 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 573, 575 (2004).

140. Tversky & Koehler, *supra* note 114, at 549.

141. *See* Sloman et al., *supra* note 139, at 573.

142. *See* Tversky & Koehler, *supra* note 114, at 549–53.

143. *Id.* at 562.

144. *Id.*

145. *Id.* at 549.

those examples.[146] Therefore, "the support of a summary representation of an implicit hypothesis is generally less than the sum of the support of its exclusive components."[147]

Behavioral scientists suggest several possible mechanisms for these effects. First, when descriptions are unpacked, lengthy, and detailed, people are reminded of all the elements and aspects of the facts that they would not have otherwise thought about.[148] Second, as Nobel laureate Daniel Kahneman and his longtime collaborator Amos Tversky suggest in a separate study, multiple detailed descriptions make it easier for people to mentally simulate what an event will be

146. *Id.* at 549.

147. *Id.* A related body of scholarship examines the decomposition of judgments, similarly showing that "decomposed" judgments are understood differently, at times more accurately in terms of the risk imposed, than holistic presentation. *See, e.g.*, MILLETT GRANGER MORGAN, MAX HENRION & MITCHELL SMALL, UNCERTAINTY: A GUIDE TO DEALING WITH UNCERTAINTY IN QUANTITATIVE RISK AND POLICY ANALYSIS 116–18 (1990); HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY 256–62 (1968) (discussing decomposition as an assessment tool for determining several uncertain quantities); Hillel J. Einhorn, *Expert Measurement and Mechanical Combination*, 7 ORG. BEHAV. & HUM. PERFORMANCE 86, 102–04 (1972) (noting combination of objective and expert judgments makes for more accurate predictions, or the Bayesian blending of judgment and sample evidence is better); J. Scott Armstrong, William B. Denniston Jr. & Matt M. Gordon, *The Use of the Decomposition Principle in Making Judgments*, 14 ORG. BEHAV. & HUM. PERFORMANCE 257, 262 (1975) (supporting their hypothesis that the use of the decomposition principle leads to more accurate estimates); Donald G. MacGregor, Sarah Lichtenstein & Paul Slovic, *Structuring Knowledge Retrieval: An Analysis of Decomposed Quantitative Judgments*, 42 ORG. BEHAV. & HUM. DECISION PROCESSES 303, 320–21 (1988) (showing improved accuracy and consistency in estimates where subjects were given a structured list of components); Stephen C. Hora, Nancy G. Dodd & Judith A. Hora, *The Use of Decomposition in Probability Assessments of Continuous Variables*, 6 J. BEHAV. DECISION MAKING 133, 145 (1993) (finding distributions obtained using decomposition more accurate than holistic assessments). *But cf.* Michael Burns & Judea Pearl, *Causal and Diagnostic Inferences: A Comparison of Validity*, 28 ORG. BEHAV. & HUM. PERFORMANCE 279, 391 (1981) (finding validity of judgment the same in causal and diagnostic schemas—decomposition at the expense of simplicity could lead to less accurate decision-making); Max Henrion, Gregory W. Fischer & Theresa Mullin, *Divide and Conquer? Effects of Decomposition on the Accuracy and Calibration of Subjective Probability Distributions*, 55 ORG. BEHAV. & HUM. DECISION PROCESSES 207, 221–22 (1993) (finding decomposition did not affect accuracy of subjective probability assessments); Donald G. MacGregor & J. Scott Armstrong, *Judgmental Decomposition: When Does It Work?*, 10 INT'L J. FORECASTING 495, 505 (1994) (re-analyzing Armstrong et al. 1975 and MacGregor et al. 1988 and finding decomposition improved accuracy with extreme and uncertain values but was otherwise less accurate).

148. Norbert Schwarz, Herbert Bless, Fritz Strack, Gisela Klumpp, Helga Rittenauer-Schatka & Annette Simons, *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCH. 195, 201 (1991) (noting unpacking increases assertiveness and subjective experience informs ease of recalling information).

like and produce vivid imagery of the event.[149] The process is related to salience: when distinct examples or subcategories of the event are made salient, the probability in our minds increases. Van Boven and Epley state that "describing an event in greater detail makes it easier to summon support for the hypothesis that the event will occur, increasing its perceived likelihood and frequency."[150] Another related possibility raised in the literature is that longer descriptions with discrete elements will make people think more about the event.[151] In turn, research on decision making shows that the ease with which people can cognitively retrieve information impacts their judgment.[152]

In particular, unpacking allows the reader to influence evaluations by deciding which elements to list:

> "A day at the beach," for example, contains many positive elements—relaxing, swimming, and tanning—but also some negative elements—crowds, jellyfish, and sunburns. Making it easier to think about the details of "a day at the beach" could thus produce either more extreme or more moderate evaluations, depending on which details people are led to consider.[153]

In effect, the subadditivity effect is a different way to describe what this Article terms *supra-addition*. The behavioral effect helps explain why a contract that unpacks many restrictions and warnings has a greater impact than the sum of its parts on the judgment and behavior of the nondrafting party. In essence, one restrictive clause saying one

149. Daniel Kahneman & Amos Tversky, *Variants of Uncertainty*, 11 COGNITION 143, 153 (1982). *Accord* Fritz Strack, Norbert Schwarz & Elisabeth Gschneidinger, *Happiness and Reminiscing: The Role of Time Perspective, Affect, and Mode of Thinking,* 49 J. PERSONALITY & SOC. PSYCH. 1460, 1464 (1985) (concluding recall of an event is influenced by specificity or "how" conditions and also by the subject's mood).

150. Van Boven & Epley, *supra* note 115, at 263.

151. *Id.*

152. Ap Dijksterhuis, C. Neil Macrae & Geoffrey Haddock, *When Recollective Experiences Matter: Subjective Ease of Retrieval and Stereotyping,* 25 PERSONALITY & SOC. PSYCH. BULL. 766, 766 (1999) (examining ease of retrieval in the context of stereotypes); *see also* Geoffrey Haddock, Alexander J. Rothman, Rolf Reber, & Norbert Schwarz, *Forming Judgments of Attitude Certainty, Intensity, and Importance: The Role of Subjective Experiences,* 25 PERSONALITY & SOC. PSYCH. BULL. 771, 780–81 (1999) (finding subjective assessments, and people's strength or confidence in those assessments, influence judgment); Alexander J. Rothman & Norbert Schwarz, *Constructing Perceptions of Vulnerability: Personal Relevance and the Use of Experiential Information in Health Judgments*, 24 PERSONALITY & SOC. PSYCH. BULL. 1053 (1998); Schwarz et al., *supra* note 148; Michaela Wänke, Herbert Bless & Barbara Biller, *Subjective Experience Versus Content of Information in the Construction of Attitude Judgments,* 22 PERSONALITY & SOC. PSYCH. BULL. 1105, 1105 (1996); Michaela Wänke, Norbert Schwarz & Herbert Bless, *The Availability Heuristic Revisited: Experienced Ease of Retrieval in Mundane Frequency Estimates*, 89 ACTA PSYCHOLOGICA 83 (1995).

153. Van Boven & Epley, *supra* note 115, at 268.

cannot compete with one's former employer weighs less psychologically than ten unpacked detailed clauses of all the things one cannot do when leaving, whether or not those would actually be enforced by a court. Saying one cannot compete with a former employer after leaving is less impactful and less restraining than the aggregate effect of listing the subcategories such as using information, soliciting clients, joining a competitor, poaching coworkers, or founding one's own company.[154] Most events are multifaceted in nature, and comparable dynamics occur when contracts list the restrictions imposed on consumers or employees with regard, for example, to access to litigation and the legal process, to the coverage of an insurance policy, or speaking up against one's employer and leaving for a competitor.

The psychological effects of bundling are likely even more pronounced when bundling occurs within the legal tool of a contract. A new experimental study demonstrates that, even when participants are asked to assume that a certain clause rests on questionable legal grounds, they nonetheless will rarely be willing to pursue a claim in court when the clause was included in the contract.[155] In turn, drafters are incentivized to include these clauses because of the reduced "likelihood that consumers will challenge a practice using market power, informal dispute mechanisms, the court system, or the political process."[156] The assumption lay parties make about a contract is that each of the clauses they have signed will remain part of their contractual obligations.

As we will see in Section II, market opportunities are impacted by aggregation in several ways. The psychology of bundling can also contribute to market concentration by making comparison shopping near impossible. The more complex a contract, the harder it is to compare the terms of an existing contract to a new offer. Thus, complexity of contracts creates a barrier to entry for new firms. Customers are unable to know whether the newcomer is offering a better deal than the incumbent.[157]

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154. Craig R. Fox & Amos Tversky, *Ambiguity Aversion and Comparative Ignorance,* 110 Q.J. ECON. 585, 599 (1995) (supporting hypothesis that people pay little attention to one item in isolation, are sensitive to comparisons with two items, and have even less clear judgment when there are many prospects at play); Tversky & Koehler, *supra* note 114.

155. Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 161–64 (2017).

156. *Id.* at 165.

157. David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 987 (2006).

II. INTERBOILERPLATE COLLUSIONS

> "A standardized contract, once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service."
> — Friedrich Kessler[158]

A. ANTITRUST'S BLINDSPOT: TOO FEW & TOO MANY CONTRACTS

The idea of legal tools forming a thicket originates from the world of patents. In intellectual property, a patent thicket is the term used when many patents cover a product or field, and each patent is separately owned.[159] An active debate in the field considers whether a large number of patents in a single innovation space obstructs development of further innovation.[160] Such obstruction may occur in two ways. First, too much of the knowledge pertaining to a certain field is locked out of the public domain, making it difficult to continue to invent and build upon the innovation of the past.[161] Each restriction—that is, the temporary monopoly that each patent gives its owner—is not detrimental in itself to the next steps of innovation, but the sheer density of restrictions in a single space of innovation erodes the potential for future work.[162] In this situation, the whole is larger than the sum of its parts. Perhaps absent each part, a solution could be reached—but as a whole, the space for innovation disappears. Second, dispersed ownership in the patent thicket creates an anticommons.[163] The anticommons arises when ownership is parsed into small fragments.[164] The classic example comes from real property ownership. Dispersed ownership increases transaction costs because planning a development project on a large area of land requires negotiations with each of the many property owners, and holdouts are likely because

158. Kessler, *supra* note 34, at 631.

159. Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard-Setting*, in 1 NAT'L BUREAU ECON. RSCH., INNOVATION POL'Y & ECON. 119–26 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2000).

160. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 698 (1998); David E. Adelman & Kathryn L. DeAngelis, *Patent Metrics: The Mismeasure of Innovation in the Biotech Patent Debate*, 85 TEX. L. REV. 1677, 1679–80 (2007) (arguing that there is no patent thicket in biotech); James Bessen, *Patent Thickets: Strategic Patenting of Complex Technologies* (Mar. 2003) (unpublished manuscript), http://www.researchoninnovation.org/thicket.pdf [https://perma.cc/S2SC-6635] (discussing empirical evidence that patent thickets reduce incentives).

161. Shapiro, *supra* note 159, at 119.

162. *Id.* at 119–21.

163. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 656 (1998).

164. *See id.* at 667–68.

each owner has an incentive to demand disproportionate compensation.[165] Thus, a thicket is formed by the sheer number of people holding small pieces of the desired land, rendering change absent government intervention nearly impossible.

The patent thicket is densified by companies that utilize multiple patents in a single space as a business strategy.[166] The aggressive use of broad patents allows a company to deter competitors and access additional revenue through licensing.[167] This reality of navigating a large number of patents can deter new entrance of competitors and suppress innovation and market growth across entire industries.[168]

Analogous to a patent thicket is what I term a "contract thicket." A contract thicket is formed when a large number of contracts in a market or industry adopt the same restriction, together impacting the likelihood of a market to be active, accountable, and competitive. Like the aggregation of multiple clauses in a single contract, the aggregation of multiple contracts in a single market has a collusive, supra-addition effect. Each additional contract signed not only binds the parties to the contract, but also affects everyone else in their ability to operate in the market, compete, and assert their rights. The thicket shapes the market in several ways, limiting the ability of knowledge to flow and limiting each individual's ability to learn about bad behavior, further reducing the incentives to engage in collective action.

When a type of contract is extremely common, it creates a thicket that shapes the power relations in a market. Noncompetes are a central example, supported by empirical evidence, of how contracts between firms and private individuals—employees in most cases—cause harm in the aggregate.[169] Noncompetes seek to discourage employees from leaving their employer to join a new firm or establish their own firm in the same field. They also prevent competitors from hiring the best and most experienced talent in the market by limiting exit opportunities for key employees. As such, these contracts hold harms for employees and entrepreneurs.

What has made the prevalence of noncompetes such a high-profile issue in recent years is the sheer aggregation of these contracts in the market. As Eric A. Posner writes, "[n]one of this would matter if

165. *Id.* at 622–24.

166. *See* Bessen, *supra* note 160.

167. *Id.*

168. *See* Shapiro, *supra* note 159, at 119–26.

169. *See, e.g.*, Balasubramanian et al., *supra* note 3 (detailing the empirical harm to wages caused by noncompetes).

noncompetes were used infrequently. But . . . noncompetes are extremely common."[170] In adopting a practice of pervasive noncompetes, incumbent employers can depress the overall wages in an industry and create barriers to entry for newcomers. Economists Kenneth Burdett and Dale Mortensen modeled how friction during a job search can lead workers to accept wage offers that are lower than what they could obtain if such a search was costless.[171] Their theoretical model is now established empirically.[172] Industry-level data shows both the pervasive use of noncompetes and the harms this numerosity imposes on mobility, wages, and competition.[173]

A new study finds that nearly one in five workers is bound by a noncompete and nearly forty percent have signed one at some point in their career.[174] Empirical studies of labor markets that use noncompetes also establish the wage suppression effects. A series of new studies finds wage differentials between places that allow noncompetes and those that ban them, revealing 8 percent lower wages in markets that enforce noncompetes.[175] Moreover, studies find an even higher differential of approximately 15 percent for those employees who have signed the noncompete.[176] Studies also show that markets that enforce noncompetes are more concentrated, with fewer competitors

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170. Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts* 83 ANTITRUST L.J. 165, 191 (2020).

171. Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT'L ECON. REV. 257, 257–58 (1998).

172. *See generally* Guido Menzio & Randall Wright, *Introduction to the Special Issue in Honor of Dale Mortensen*, 19 REV. ECON. DYNAMICS 1 (2016) (summarizing impact of Mortensen's model).

173. Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931, 950–51 (2020) (noting harm of noncompetes on mobility and wages); Norman Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 526–31 (2016); Orly Lobel, *Companies Compete But Won't Let Their Workers Do the Same,* N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html [https://perma.cc/SJ2B-QX9L].

174. *See* Starr et al., *supra* note 5, at 60–64 (summarizing survey results on "[t]he use of noncompetes" in graphs and box plots).

175. *See* Evan Starr, *Are Noncompetes Holding Down Wages?* 5 (June 13, 2018) (unpublished manuscript), https://papers.ssrn.com/abstract=3223659 [https://perma.cc/HVP4-2G3K]; *see also* Omesh Kini, Ryan Williams & David Yin, *CEO Non-Compete Agreements, Job Risk, and Compensation*, 34 REV. FIN. STUD. 4701, 4733–34 (2021); Mark Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation and Firm Investment*, 27 J.L. ECON. & ORG. 376, 401–05 (2011); Evan Starr & Michael Lipsitz, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming 2021), https://papers.ssrn.com/abstract=3452240 [https://perma.cc/HVP4-2G3K] (finding that banning noncompetes increases hourly worker wages by 2–3%).

176. Starr et al., *supra* note 5, at 60.

over labor and talent.[177] In other words, the wage effects are greater for employees who have signed noncompetes, but the empirical evidence shows that restrictive covenants also impose externalities on employees *who have not signed them*—that when noncompetes are enforced, wages and mobility are lower even for those not bound by noncompetes.[178] These externalities are most intuitively understood with nonsolicitation agreements, which essentially reduce the job opportunities of every coworker that the former employee knew regardless of whether that coworker agreed to be part of a restrictive regime. Thus, nonsolicitation of coworkers is a key example of a contract thicket shaping not only the contractual relationship between employer and employee, but the market, including the wage market, as a whole.

Given these industry-wide effects of suppressing wages and competition, antitrust law emerges as a natural path with which to address the contract thicket. However, contemporary antitrust law presents a catch-22. The relationship between individual contract terms and antitrust presents a paradox of legal theory. Contract law, when considering reasonableness, examines a restraint in relation to its justification. Antitrust adopts a different lens: it examines the net market effects of an action. In 1890, Congress passed the Sherman Antitrust

177. *See* Burdett & Mortensen, *supra* note 171; *see also* Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961, 975 (2019) (finding enforceable noncompetes increase frictions in the labor market which reduces mobility and wages); José A. Azar, Ioana Marinescu, Marshall I. Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* (Nat'l Bureau Econ. Rsch., Working Paper No. 24395, 2018), https://www.nber.org/system/files/working_papers/w24395/w24395.pdf [https://perma.cc/GT5E-STBZ] (finding 60% of labor markets are highly concentrated and such markets are negatively correlated with wages); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3–4 (Nat'l Bureau Econ. Rsch., Working Paper No. 24307, 2018), https://www.nber.org/system/files/working_papers/w24307/w24307.pdf [https://perma.cc/5HKR-D58E] (supporting findings that labor market monopsonies are negatively correlated with wages and emphasizing the role of local-level labor markets); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1382–93 (2020) (proposing four reforms to antitrust law to address the problem of labor monopsony, or when employers pay workers less than their productivity because workers lack a credible threat to quit); Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, ECON. INNOVATION GRP. 2 (Feb. 2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf [https://perma.cc/JX4Y-H88A] (summarizing how noncompetes have resulted in wage stagnation and reduced mobility). *See generally* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS (2003) (discussing the effects of frictions in the labor market).

178. *See* Starr, *supra* note 175, at 7–8.

Act, prohibiting "restraints of trade."[179] Under antitrust law, courts evaluate contracts between individuals, such as employees and consumers—what antitrust law refers to as "vertical restraints"—under the rule of reason rather than the per se approach.[180] In antitrust, either the activity is one of the few that have been deemed per se illegal, or the violation of the law is tested under the rule of reason analysis.[181]

This distinction between contracts that are deemed to be per se illegal and contracts that are seemingly too dispersed (and therefore judged under the rule of reason) is antitrust law's blind spot with respect to contract thickets. Courts have historically determined that noncompetes—vertical single contracts between employers and their employees—will be analyzed under the rule of reason. In a series of cases, courts have determined that "the legality of noncompetition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason."[182] By contrast, horizontal do-not-hire agreements between firms who agree not to recruit each other's employees are deemed per se illegal. This creates a blatant asymmetry; the rule of reason is notoriously difficult to defy. The rule of reason requires a showing that the business has market power and that the restraint has actual or likely effects on competition.[183] The rule of reason thus subjects the restraint to an individualized factual inquiry into its nature, purpose, circumstances, and history.[184] Empirical studies have established that once the rule of reason standard has been adopted, antitrust claims are very difficult to prove. For example, one study found that 97 percent of cases analyzed under the rule of reason framework were dismissed on the grounds that the plaintiff could not show an anticompetitive effect.[185]

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179. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

180. Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265–67 (7th Cir. 1981) (upholding requirement that plaintiffs prove adverse impact in the relevant market to establish a § 1 Sherman Act rule of reason violation and concluding this case did not establish such a threshold).

181. *Id.* at 265 (rule of reason); *see also* Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–92 (7th Cir. 1985) (finding noncompete covenant violated antitrust laws because the activity was per se illegal); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082–83 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (finding partner attempting to dissolve partnership in a law firm did not demonstrate an anti-competitive impact sufficient enough to render the noncompete restriction unenforceable).

182. *Lektro-Vend Corp.*, 660 F.2d at 265.

183. *Id.*

184. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (concluding district court erred by not considering history and purpose, which demonstrate a reasonable regulation of business).

185. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009).

Single litigation of noncompetes under the rule of reason presents significant challenges. First, noncompetes are far more widely adopted than can be counted from reported case law. Reported decisions on noncompetes in fact constitute "the proverbial iceberg's tip."[186] Without proactive efforts, most noncompetes will go unchallenged. Second, noncompetes have effects on the whole market beyond what a court can surmise when adjudicating a single dispute between an employer and former employee. When examining a single contract, it is difficult for courts to determine that the aggregate effect of similar contracts serves to establish lock-in and exit, voice, and access suppression effects. Noncompetes are normally challenged ex post by an employee who is sued for breaching her employment contract after she leaves and seeks a new job. As a consequence, the single enforcement of an overbroad noncompete has traditionally been viewed by the courts to not have anticompetitive market effects.[187] This rule of reason proves to be detrimental because each case means that a single noncompete has to be shown to harm the entire market. Unwilling to extrapolate from a single contract lawsuit's market-wide effects, courts generally view employee noncompetes as having "de minimis" effects on competition because each plaintiff cannot show how the single noncompete affected the entire market.[188] Even if through discovery the attorneys for the employee can uncover the pervasiveness of the contract used by the employer, they will not be able to establish that other firms adopt a similar contract. Thus, a court has no way to know the ubiquity of the contract thicket. The research strongly shows that noncompetes lead to depressed wages.[189] However, the total effect is impossible for a single employee fighting the enforcement of a single noncompete to demonstrate statistically.[190] In practice, when an individual challenges a noncompete absent a class action, it is difficult to prove market impact of the single noncompete.[191] Third, as we saw, antitrust law when analyzed under

186. Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restrictions of Trade*, 1977 UNIV. ILL. L. F. 621, 623.

187. Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082–83 (2d Cir. 1977); Consultants & Designers, Inc. v. Butler Serv. Grp., 720 F.2d 1553, 1560–61 (11th Cir. 1983) (finding noncompete covenant met the rule of reason and did not have sufficiently adverse impact under the Sherman Act).

188. Bradford v. New York Times Co., 501 F.2d 51, 59, n.5 (2d Cir. 1974) (finding agreement met rule of reason); *accord Lektro-Vend Corp.*, 660 F.2d at 269.

189. *See supra* note 177.

190. *See* Posner, *supra* note 170.

191. Carrier, *supra* note 185, at 837 (finding that 97% of cases analyzed under the rule of reason framework were dismissed by courts because the plaintiff could not show an anticompetitive effect).

the rule of reason standard requires proof of market impact.[192] Ironically, if noncompetes are so pervasive as to form a thicket, and in turn, if most labor markets are monopsonies, requiring proof of market impact could signal to the court that each noncompete has only small incremental effects on the overall market because mobility in the but-for world is low anyway. Thus, the difficulty for an employee to demonstrate the market impact of an individual noncompete allows employers to increase their market power over the labor force and further suppress wages. The case of sandwich makers at Jimmy John's is illustrative of this paradox.[193] As the court describes:

> Each employee beginning employment with Jimmy John's is required to sign various employee authorizations as a condition of their employment. One of the most prominent authorizations is the Confidentiality and Non-Competition Agreements. The Defendants include the Confidentiality and Non-Competition Agreements in an employee orientation folder for each new employee at any Jimmy John's Sandwich Shop .... [T]he Non-Competition Agreement prohibits former employees from working at food service venues which derive 10% or more of their revenue from the sale of sandwiches, submarines, or wraps. This prohibition is applicable to all food service venues within a prescribed radius of the employees' former Jimmy John's Sandwich Shop.[194]

The trend towards widespread inclusion of noncompete agreements, even in contracts for low-skilled workers, demonstrates that parties include noncompetes for illegitimate reasons.[195] When the inclusion of noncompetes becomes standard across an industry, even if done without explicit agreement between employers, the effect can be to suppress the industry as a whole—decreasing wages and employee mobility and preventing competitors from entering.[196] Thus, an antitrust analysis is better suited to address the problem of noncompetes than a single contract analysis. However, antitrust doctrine, as it has developed in practice, creates major impediments to litigating individual boilerplate contracts and exposing contract thickets.

The challenges of antitrust litigation have meant that despite the consensus in the economic literature—established both through theory and in empirical findings—less mobility between employers reduces wages. Further, the actual effects are near impossible to establish in each individual case in which a single employee is prevented by one firm from moving to another competitor. This contractual relationship exists, however, in the thousands and is used by multiple employers, creating a contract thicket that is bigger than the sum of the

192. *See Lektro-Vend Corp.*, 660 F.2d at 265.

193. Brunner v. Liautaud, No. 14-C-5509, 2015 WL 1598106, at *2 (N.D. Ill. 2015).

194. *Id.*

195. *Id.* at *9–10.

196. *See supra* notes 173–77 and accompanying text.

individual clauses. Recently, collusions between companies agreeing not to hire each other's employees have resulted in successful antitrust litigation, including class actions with settlements of hundreds of millions of dollars. In Silicon Valley, a class of 64,000 engineers brought action against major tech companies including Google and Apple for such horizontal no-poach agreements, resulting in a $415 million settlement.[197] Calling these practices "blatant and egregious," the Department of Justice concluded that these agreements were per se violations of American antitrust law.[198] In 2018, the DOJ similarly brought action against two rail equipment manufacturers for agreeing not to hire each other's workers.[199] In June 2020, a class action was brought by the faculties of Duke University and the University of North Carolina against the universities for similar agreements not to compete over each other's employees. The federal Antitrust Division has recognized that these practices stifle opportunities for employees, are bad for the wage market, and are bad for innovation.[200] At the same time, vertical noncompetes that seek to accomplish the exact same goal of preventing an employee from moving from one competitor to another have yet to receive the same rigorous treatment from

197. Jeff Elder, *Silicon Valley Companies Agree to Pay $415 Million to Settle Wage Case*, WALL ST. J. (Jan. 15, 2018), https://www.wsj.com/articles/silicon-valley-companies-agree-to-pay-415-million-to-settle-wage-case-1421363288 [https://perma.cc/5S6S-MM8M].

198. Press Release, U.S. Dep't Just., Antitrust Div., Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conference Call Regarding the Justice Department's Settlement with eBay Inc. To End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/05/01/305619.pdf [https://perma.cc/SR6K-VUVZ] [hereinafter Baer Remarks].

199. Press Release, Off. Pub. Aff., U.S. Dep't Just., Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 4, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete [https://perma.cc/R4HV-GNZH].

200. *See* Baer Remarks, *supra* note 198. In 2013, the Ninth Circuit certified a private class of 64,000 former employees in their claims that these above-mentioned nonsolicitation horizontal agreements depressed wages in the industry. *In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1229 (N.D. Cal. Oct. 24, 2013) (No. 11-02509). The 2014 proposed settlement of $324.5 million was denied by District Court Judge Lucy Koh as it fell short of the actual harm caused by the unlawful agreements. *In re* High-Tech Emp. Antitrust Litig., No. 11-02509, 2014 WL 3917126, at *1 (N.D. Cal. Aug. 8, 2014). Eventually a higher settlement was reached. *In re* High-Tech Emp. Antitrust Litig., No. 11-CV-02509, 2015 WL 5158730, at *4 (N.D. Cal. Sept. 2, 2015). A similar class action was filed and settled against Disney, DreamWorks, Lucasfilm Ltd, and Sony Pictures Animation. *See* Nitsch v. Dreamworks Animation SKG, No. 14-04062, 2016 WL 4424965, at *1 (N.D. Cal. July 6, 2016).

antitrust law. As we shall see in the next section, the problem of a single litigation and the challenge to show overall market effects is compounded by class action waivers and the confidentiality of employment contracts.

Focusing on aggregation of boilerplate contracts and the formation of a contract thicket challenges the distinction between vertical restraints and horizontal restraints. Antitrust analysis should focus on the *practice* of the contract, even when a single contract is involved. However, this may be difficult to establish by the single litigant. Still, through discovery, an employee can demonstrate the prevalence of the standard contract in a large firm. Then, by demonstrating that the practice at a single level firm causes market-wide price change, wage suppression could be established by the rising number of studies that analyze the effects of noncompetes on markets. A more fundamental reform would be to reject the vertical/horizontal distinction altogether and adopt a per se illegal view of noncompetes. The empirical evidence studying the anticompetitive impact on regions and industries supports the argument that boilerplate contracts that restrain exit and mobility, such as noncompetes, should be viewed as presumptively illegal under antitrust law.

The argument made in this Article for antitrust reform comes at a ripe time in which antitrust law is grappling with changing markets and new ways in which companies gain dominance. In his influential work, The *Antitrust Paradox*, Robert Bork argued that the goal of antitrust should be to maximize consumer welfare. In 1979, the Supreme Court cited Bork and declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[201] This stance has since been the basis of much debate and critique.[202] Still, over the years, antitrust regulation has moved from attempts to "preserve and promote market structures conducive to competition" to a focus on prices and efficiency.[203] This has meant that showing antitrust injury requires demonstrating harm to consumer welfare, with a focus on price increases.[204] The 2010 Horizontal Merger Guidelines recognize that en-

201. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

202. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836–37 (2013).

203. *1968 Merger Guidelines*, U.S. DEP'T JUST. (Aug. 4, 2015), https://www.justice.gov/archives/atr/1968-merger-guidelines [https://perma.cc/KAL4-3WWH].

204. William H. Rooney, *Consumer Injury in Antitrust Litigation: Necessary, but by What Standard?*, 75 ST. JOHN'S L. REV. 561, 563 (2001).

hanced harm can also be nonprice harms, such as reduced product variety, service, market access, and innovation.[205] Still, the focus on pricing has been "disproportionately important."[206] For too long, competition scholars have overlooked the labor market as a site of market concentration and anticompetitive practices and have also overlooked wages as prices. Instead, following Bork, antitrust policy has focused on the product market and consumers. The growing evidence about the harms of anticompetitive labor market practices is increasingly exposing this oversight in the past decade.[207] Adding to the empirical research analyzed above, new research shows that the labor market is likely more concentrated than the product market and that the harms are substantial.[208] Economists have studied labor market monopsonies and have demonstrated how market concentration and noncompetes are correlated with wage-setting and wage discrimination.[209] In 2016, the Council of Economic Advisers warned that "employers may be better able to exercise monopsony power today than they were in past decades" and "forces that undermine competition tend to reduce efficiency, and can lead to lower output, employment, and social welfare."[210]

In the consumer price context, antitrust scholars have recognized that firms can engage in tacit collusion over prices without explicit communication.[211] Yet, even within the product market, American antitrust jurisprudence has evolved from viewing parallel tacit pricing

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205. U.S. DEP'T JUST. & FTC, HORIZONTAL MERGER GUIDELINES 2 (2010), http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [http://perma.cc/SQ8H-AB7P].

206. MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 108 (2016).

207. Lobel, *Gentlemen Prefer Bonds*, *supra* note 2, at 668; Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 570–74 (2018); Azar et al., *supra* note 177. Other research has found that employer-side concentration in local labor markets has increased since the 1970s. Benmelech et al., *supra* note 177, at 3.

208. Azar et al., *supra* note 177.

209. Lobel, *Knowledge Pays*, *supra* note 2, at 557–58; Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1870 n.121 (2018) (citing JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 1–12 (2d ed. 1969)); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032, 1041 (2019); Azar et al., *supra* note 177, at 20.

210. COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 1, 10 (Oct. 2016), https://obamawhitehouse.achives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [https://perma.cc/4KWB-H473].

211. *Id.* at 5. *See generally* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 239–70 (1988) (discussing models of dynamic price competition and tacit collusion).

collusion as an agreement violating the Sherman Act to a jurisprudence that generally rejects claims of antitrust violation absent evidence of communication or coordination.[212] Antitrust, in assessing collusion, assumes a human actor and includes "[c]oncepts of intent, fear, and 'meeting of the minds' [which] presuppose quintessentially human mental states."[213] But this kind of assumption fails when we understand how contract thickets grow. As Kessler recognized nearly a century ago, "[t]he weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."[214] Behaviorally, as we saw above, the more complex a contract, the harder it is to compare and understand its terms. Consumers are rarely able to assess minute differences between a contract of one company which bundles numerous terms and that of a competitor.[215] In other words, bundles of clauses help concentrate the market because precisely the same contracts appear everywhere. In turn, concentrated markets offer less competition, and the practice of contract thicketing becomes a vicious cycle. In effect, ironcladding and thicketing—intra and inter-boilerplate collusion—are mutually reinforcing business practices.[216]

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212. Am. Tobacco Co. v. United States, 328 U.S. 781, 810–11 (1946); Interstate Cir., Inc. v. United States, 306 U.S. 208, 226 (1939); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 210 (1993); Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

213. Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323, 1352 (2016); *see also* David J. Lynch, *Policing the Digital Cartels*, FIN. TIMES (Jan. 8, 2017), https://www.ft.com/content/9de9fb80-cd23-11e6-864f-20dcb35cede2 [https://perma.cc/ETZ2-T95J]. "Particularly in the case of artificial intelligence, there is no legal basis to attribute liability to a computer engineer for having programmed a machine that eventually 'self-learned' to co-ordinate [sic] prices with other machines." Lynch, *supra* (quoting Ania Thiemann & Pedro Gonzaga, OECD Competition Division, *Big Data: Bringing Competition Policy to the Digital Era*, OECD 81 (Oct. 27, 2016), https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf [https://perma.cc/4ARR-UHR2]).

214. Kessler, *supra* note 34, at 632.

215. Gilo & Porat, *supra* note 157, at 987.

216. Notably, the effects of a contract thicket may even be greater in markets that are based on multisided networks, such as the emerging model of digital platforms that connect end users in industries such as transportation—think Uber and Lyft—or accommodation, such as Airbnb and VRBO. Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1067–70 (2017). Metcalfe's Law on network effect says that the shape and value of a network is proportional to the square of the number of connected users of the system. *Id.* at 1067–68. For example, in the olden days of the fax machines, a single fax machine was useless. However, the value of every fax machine increases with the total number of fax machines in the network, because the total number of people with whom each user may send and receive documents

And yet, the focus of antitrust regulation continues to be lateral contracts between companies; the more common, but overlooked, practice of thicketing is neglected.

B. NDAs, CLASS WAIVER & THE PRISONER'S THICKET

> "It has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses." — Justice Ruth Bader Ginsburg[217]

In the past two decades, in parallel with the rise of noncompetes, the number of private sector employees that are bound by arbitration agreements has risen from 5 percent to over 55 percent[218] Sixty million workers are subject to arbitration provisions, and nearly twenty-five million workers are subject to employment agreements that require them to arbitrate workplace disputes on an individual basis, waiving the right to class arbitration.[219] One study, conducted by the Employee Rights Advocacy Institute for Law & Policy, finds that 80 percent of the largest 100 domestic U.S. companies, as ranked by Fortune magazine, have used arbitration agreements for workplace related disputes since 2010, and 39 of those agreements included class action waivers.[220] Another survey found that mandatory arbitration provisions rose from 16 percent in 2012 to nearly 43 percent in 2014.[221] According to the Government Accountability Office, only 7.6

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increases. *Id.* at 1068. Network effects can raise antitrust issues. CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 297–318 (1999) (discussing antitrust concerns in the information economy); Ronald A. Cass, *Antitrust for High-Tech and Low: Regulation, Innovation, and Risk*, 9 J.L. ECON. & POL'Y 169, 175–76 (2013) ("For those antitrust enthusiasts, the fear is that network effects will provide a ratchet toward ever increasing dominance and ever decreasing competition: the more valuable it is for people to share the same network—physical, technological, or social—the more different things will be drawn into the orbit of the dominant firm, just as astronomical entities with greater masses inevitably exert stronger attractive powers on other objects in space."); *see also* Rahul Tongia & Ernest J. Wilson III, *The Flip Side of Metcalfe's Law: Multiple and Growing Costs of Network Exclusion*, 5 INT'L J. COMMC'N 665 (2011) (discussing the costs of network exclusion).

217. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

218. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 1 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/PDC3-CBAT].

219. *Id.* at 10–11.

220. Elizabeth Colman, *Forced Arbitration: A Race to the Bottom*, EMP. RTS. ADVOC. INST.FOR L. & POL'Y 2 (June 2018), http://employeerightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report_Forced-Arbitration_A-Race-To-The-Bottom.pdf [https://perma.cc/8NXY-VXAA].

221. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 706–07 (2018) (citing Carlton Fields Jorden Burt, *The 2015 Carlton Fields Jorden Burt*

percent of employers used any form of mandatory employment agreements in 1995, and that number has now risen to 53.9 percent in recent years.[222]

These numbers are rapidly rising with each Supreme Court decision that strengthens the enforceability of a wide range of arbitration clauses. In a concurring opinion, Justice O'Connor wrote, "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[223]

In 2018, the Supreme Court decided in *Epic Systems Corp. v. Lewis* that a contract that requires an employer and an employee to resolve an employment-related dispute through individual arbitration, and waives class and collective proceedings, is enforceable.[224] The *Epic Systems* case involved wage and hour claims, but the decision encompasses any and all employment disputes including discrimination and harassment, health and safety, and misclassification. A few years earlier, the Supreme Court confronted the same question with regard to consumer contracts. In *AT&T v. Concepcion*, the Supreme Court considered the enforceability of antiaggregation agreements—contractual provisions that purport to prohibit a side to a contract asserting claims together with others who have signed analogous or identical contracts.[225] The dispute involved an illegal telephone overcharge of $30. These low stakes for each consumer meant that, absent the ability to aggregate their claims, consumers and their attorneys would not have sufficient incentive to bring claims.[226] AT&T consumer contracts allowed no opt-outs from the mandatory dispute resolution program. The Supreme Court held that the Federal Arbitration Act preempted state laws that deemed class action waivers in arbitration clauses to be unconscionable.[227] Class actions are designed to aggregate common experiences and create a group of shared interests. Conversely,

Class Action Survey 26 (2016), https://classactionsurvey.com/pdf/2015-class-action-survey.pdf [https://perma.cc/4XSF-VNPR]).

222. Alan S. Blinder, *What to Do When the Labor Market Stops Working for Workers*, WALL ST. J. (June 12, 2018), https://www.wsj.com/articles/what-to-do-when-the-labor-market-stops-working-for-workers-1528756950 [https://perma.cc/Z5UB-VX3D].

223. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

224. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018). The Supreme Court consolidated Lewis v. Epic Sys. Corp, 823 F.3d 1147 (7th Cir. 2016) with two additional cases, Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), and Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

225. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011).

226. *Id.* at 365.

227. *Id.* at 343–44.

when disputes involve small amounts of damages, the waiver of a class action "becomes in practice the exemption of the party 'from responsibility for [its] own fraud.'"[228] As Justice Breyer said, a single class action would "surely [be] more efficient than thousands of separate proceedings for identical claims."[229] The pervasiveness of contracts that prevent litigation and, even more so, prevent aggregation of claims even in arbitration, creates a contract thicket that eliminates employer accountability and compliance with the law.

Although class actions retain at least some measure of their former vitality, anti-class aggregation decisions have significantly reduced their use. These decisions create a deterrent effect, leading to a reduction in the number of class actions filed. Moreover, there is generally a low probability that a lawyer will be interested in prosecuting a low stakes case in an arbitration forum that generally lacks the procedural and substantive safeguards of a judicial proceeding.[230] The anti-class aggregation decisions stunt the very purpose of class actions—efficient and timely litigation of claims on a wide scale. Indeed, aggregation of claims creates a market in litigation which, in turn, creates financial incentives for attorneys to bring lawsuits against unlawful conduct.[231] Without aggregation of claims, the market for representation of legal claims is substantially extinguished.[232] An economic analysis of the effects of these anti-class aggregation decisions on markets reveals that the crux of this analysis is "whether the unavailability of aggregation would reduce the potential upside [to plaintiffs' counsel] to such a degree as to demonstrate a 'likelihood' that lawyers will not represent claimants."[233]

Most fundamentally, the inability to aggregate claims means significantly reduced incentives and resources to take action against illegality. For example, for each employee that experiences wage theft, the harm might amount to a few dollars each month. But collectively, wage theft amounts to billions of dollars each year.[234] Individual em-

228. Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (quoting CAL. CIV. CODE § 1668), *abrogated by Concepcion*, 563 U.S. at 352.

229. *Concepcion*, 563 U.S. at 363 (Breyer, J., dissenting).

230. *See id.* at 365 ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

231. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1878 (2006).

232. *Id.* at 1905.

233. *Id.*

234. Stephanie Greene & Christine Neylon O'Brien, Epic *Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers'*

ployees are unlikely to pursue claims because they involve "incremental pay disparities over a few years" and "the cost of litigating them as an individual often exceeds the expected returns."[235] In 2017, an Economic Policy Institute Report showed that employers steal billions from their employees' paychecks annually.[236] Indeed, this wage theft is a business model for some employers.[237] Without the ability to band together, there is currently very little remedy for wage theft and other violations.[238] The justification for class action is that the costs of litigation are larger than the individual potential gains.[239] Antiaggregation clauses directly attempt to prevent this bonding together of claims.[240] As the *Guardian* wrote regarding mandatory arbitration and female employees, "instead of women having strength in numbers and being able to come together to sue, women will be forced to go it alone in private arbitration."[241]

The Supreme Court has acknowledged the decline of incentives to litigate when class waivers are enforced and yet has upheld these clauses as enforceable. In *American Express Co. v. Italian Colors Restaurant*, the Court reversed a Second Circuit holding that such waivers are void.[242] In *American Express*, the cost of bringing an individual claim could exceed $1 million, while the maximum recovery was less

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Rights, 15 STAN. J. C.R. & C.L. 43, 46 (2019) (citing Ben Schiller, *Companies Steal $15 Billion From Their Employees Every Year*, FAST CO. (May 15, 2017), https://www.fastcompany.com/40420451/companies-steal-15-billion-from-their-employees-every-year [https://perma.cc/9VEN-2YQA].

235. Estlund, *supra* note 221, at 695.

236. Brief of Amicus Curiae Nat'l Acad. Arbitrators in Support of Respondents at 25–26, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018), 2017 WL 3499374 (citing David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year [https://perma.cc/HH8S-4AQ3]).

237. *Id.* at 25.

238. Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1111–13 (2012).

239. *Id.* at 1114–15.

240. David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 651 (2012); Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 968 n.6 (2019). For a discussion on unequal contract bargaining power and the doctrine of unconscionability, see Anne Fleming, *The Rise and Fall of 'Unconscionability' as the Law of the Poor*, 102 GEO. L.J. 1383, 1423 (2014) and Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014).

241. Najah Farley, *How the US Supreme Court Could Silence #MeToo*, GUARDIAN (U.K.) (Apr. 18, 2018), https://www.theguardian.com/commentisfree/2018/apr/18/supreme-court-metoo-arbitration-clauses-decision-sexual-harassment [https://perma.cc/W8FJ-V6TW].

242. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237 (2013).

than $40,000.[243] However, this discrepancy was not enough to overturn the waivers.[244] The Supreme Court held that the Effective Vindication Doctrine was of no consequence in light of the law's strong support of arbitration, holding that "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[245] Writing for the majority, Justice Scalia explained the origins of the Effective Vindication Doctrine as dicta in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, where the Court mentioned a willingness to invalidate arbitration agreements on policy grounds if they effectively waived "a party's *right to pursue* statutory remedies."[246] Scalia opined that such a situation "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[247] However, Scalia held that the prohibitive cost of *proving* a statutory remedy is not the same as "the elimination of the *right to pursue* that remedy."[248] Unwilling to examine the prohibitive costs of pursuing litigation individually, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* the Court similarly rejected an argument about the costs of arbitrating, stating that "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier."[249]

The distinction between direct interference with statutory rights and prohibitive restrictions on their enforcement conflicts with the realities of contract aggregation. The principle of *ubi jus ibi remedium* ("no right without a remedy") is one of the most fundamental principles of any legal system. Today, contract aggregation is regularly depriving individuals of such a remedy. In the 2018 *Epic Systems* case, Justice Ginsburg authored a passionate dissent joined by Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg called for "Congressional correction of the Court's elevation of the FAA over workers'

243. *Id.* at 231.

244. *Id.* at 228–29.

245. *Id.* at 231.

246. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 637 n.19 (1985).

247. *Am. Express Co.*, 570 U.S. at 236 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights.")).

248. *Am. Express Co.*, 570 U.S. at 236.

249. Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U.S. 528, 536 (1995).

rights."[250] She wrote that many disputes and violations are "scarcely of a size warranting the expense of seeking redress alone."[251] Banding together—aggregating claims, in other words—is the most efficient way to achieve "effective redress" and strength in numbers is the only way to counteract the "clout" of employers.[252] Justice Ginsburg emphasized that the question here was not what forum to have access to, but about the right to act "in concert in any forum."[253] Justice Ginsburg cited an estimation that "an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages."[254] Moreover, Justice Ginsburg warned that the individual worker will fear retaliation if she has to seek redress alone.[255]

Similar to class action waivers, nondisclosure agreements and nondisparagement clauses that silence employees from speaking create a contract thicket in which individuals are left without support when they witness illegality.[256] When a contract thicket of NDAs exists, it creates a culture of secrecy, signaling to employees that sharing information about misconduct and unlawful work conditions is prohibited. The thicket creates a workplace prisoner's dilemma, in which each employee has too much to lose by being the single David against the Goliath.[257] As I have shown in a series of experimental studies, it takes incredible courage to blow the whistle on a powerful actor.[258] Take Fox News' longstanding corporate culture of harassment and

250. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018).

251. *Id.*

252. *Id.* at 1633–34.

253. *Id.* at 1636.

254. *Id.* at 1647.

255. *Id.*

256. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 459 (2009) [hereinafter Lobel, *Organizational Citizenship*]; Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1187 (2010) [hereinafter Feldman & Lobel, *Incentives Matrix*] (conducting a study to explore "[w]hen and under what conditions . . . individuals chose to report illegality.").

257. Orly Lobel, *The Prisoner's Dilemma in Airing Fox's Corporate Culture,* FORTUNE (July 28, 2016), http://fortune.com/2016/07/28/fox-corporate-culture-roger-ailes-gretchen-carlson [https://perma.cc/G2NT-6V9D].

258. Feldman & Lobel, *Incentives Matrix*, *supra* note 256, at 1158–59 (highlighting the inherent risks associated with whistle-blowing); Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach,* 2 REGUL. & GOVERNANCE 165, 169 (2008) (highlighting fears of retaliation and being viewed negatively or stigmatized as a "troublemaker" as deterrents to whistle-blowing).

gender discrimination.[259] The news channel established its strong culture using pervasive norms of secrecy and NDAs.[260] Such circumstances present what game theorists refer to as a "prisoner's dilemma."[261] Ideally, every employee experiencing or witnessing such harassment would speak up and together bring down the house of cards. However, if just one employee does it alone, she is likely to be shunned and attacked. Even when arbitration does happen, a thicket of secrecy clauses eliminates transparency and the potential for structural change.[262] Courts adjudicating employment law cases have developed the tort of wrongful termination for public policy.[263] The logic of the tort is that in certain contexts, a firing imposes harms to the public or third-party externalities, such as suppressing speech or sanctioning a Faustian bargain that should not be tolerated. In my research on whistleblowing behavior and social reporting, I show how, in many fields of law, the government relies on private action by insiders—parties to contracts such as employees, subcontractors, and partners—to ensure regulatory compliance.[264] But when each individual must take the entire risk of retaliation and contractual liability of breaching a code of silence embedded in legal documents, the likelihood of accountability is vastly decreased.

Courts can consider these effects using the framework of aggregation. If disputes are shaped by the aggregate effect of contractual agreements that prevent disclosure and transparency, the harm to all potential future victims continues. For example, in sexual harassment settlements, the cost to nonsignatories is the increased risk of experiencing the same hostile conditions in the future.[265] Some courts have recognized these harms, finding settlement clauses unconscionable because of their chilling future effects on other potential victims. In a 2018 case involving gender discrimination of a law firm partner who signed an arbitration agreement as part of the firm's partnership

259. Lobel, *supra* note 257.

260. Mark Hudspeth, *Gretchen Carlson and the Complicated Truth About NDAs*, CBS NEWS (Mar. 1, 2020), https://www.cbsnews.com/news/Gretchen-carlson-and-the-complicated-truth-about-ndas [https://perma.cc/TTS7-9PYB].

261. Lobel, *supra* note 257.

262. *Id.*

263. Feldman & Lobel, *Incentives Matrix*, *supra* note 256, at 1162.

264. Lobel, *Organizational Citizenship*, *supra* note 256, at 472; Feldman & Lobel, *Incentives Matrix*, *supra* note 256, at 1160.

265. Lobel, *supra* note 257; Hoffman & Lampmann, *supra* note 32, at 174–82; Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 333–34 (2018); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996).

agreement, the court found the arbitration agreement to be procedurally and substantively unconscionable.[266] The court held that, in particular, the confidentiality provision was unconscionable because "requiring discrimination cases [to] be kept secret unreasonably favors the employer to the detriment of employees seeking to vindicate unwaivable statutory rights and may discourage potential plaintiffs from filing discrimination cases."[267] Other courts should similarly recognize that secrecy clauses create a veil of ignorance behind which each employee is alone in her struggle against systemic injustice. And as we shall see in the next section, a more systemic solution is to pass laws that prohibit secrecy when it comes to illegal behaviors, such as sexual harassment.

III. TAKING CLAUSE COLLUSION SERIOUSLY: THE GOVERNANCE OF CONTRACT LAW

Business incentives are stacked in favor of ironcladding and thicketing. Absent repercussions, businesses benefit from including as many unfavorable terms as possible in widespread identical contracts with their employees, consumers, users, tenants, or licensees, and the empirical evidence shows that they indeed do so frequently.[268] As explored above, both the psychological and macroeconomic effects of bundling and aggregation are to the detriment of weaker parties. Bundling chills behavior. Employees, consumers, tenants, patients, licensees, and other smaller contracting parties tend to believe that the contracts they sign are enforceable—and even if they know they are

266. Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 699–701 (2018). Winston & Strawn, the law firm where the plaintiff worked and who was the defendant in the suit, later appealed to the United States Supreme Court but was denied certiorari on October 7, 2019. Winston & Strawn, LLP v. Ramos, 140 S. Ct. 108 (2019).

267. *Ramos*, 239 Cal. Rptr. 3d at 701.

268. *See, e.g.*, Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845 (1988) ("An offeror may be tempted to increase [unenforceable] terms on the rationale that little may be lost and much might be gained."); Meirav Furth-Maztkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 1 (2017) ("[T]he prevalence of unenforceable and misleading terms in residential rental contracts . . . will persist as long as monitoring and enforcement mechanisms do not sufficiently deter landlords from using such terms in their contracts."); Charles Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L. J. 1127, 1127 (2009) ("Contracts frequently contain clauses that are not enforceable."); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 126–27 (1988); Tal Kastner, *The Persisting Ideal of Agreement in an Age of Boilerplate*, 35 L. & SOC. INQUIRY 793 (2010) (discussing boilerplate contracts); Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is For Suckers*, 63 VAND. L. REV. 1003, 1015–16 (2010); Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1938 (2001).

not, they fear that defending their case would be too costly.[269] Aggregation of contracts across the market reduces accountability, suppresses competition, and disincentivizes assertion of rights. The wide adoption of uniform contracts impacts wages and prices to the detriment not only of those who sign the contracts, but the market at large. When we take aggregation seriously, a series of reforms emerges spanning contract law, antitrust law, regulation and legislation.

A. BLUE PENCIL, RED PENCIL: REDUNDANCY & REFORMATION

1. Against Reformation

> "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." — Armendariz v. Found. Health Psychcare Services, Inc.[270]

Ironcladding and thicketing demand that we ask not only about the stakes and costs of such practices, but also how the law can effectively recognize and address these costs. As this Article explored above, contract law offers seeds of understanding of the harms of aggregation. At the same time, these adjudicative responses have been piecemeal and implicit. When a court faces a contract with multiple clauses that together rise to unreasonableness, unconscionability, or contravention of public policy, what is to be done with such a contract?

A central answer concerns the remedy when a contract contravenes with public policy or is deemed unconscionable. When courts find unconscionable provisions in an agreement, they have the discretion to either sever ("blue pencil") the offending provisions, thus giving effect to the rest of the agreement, or void ("red pencil") the agreement completely.[271] The insights of aggregation support the adoption of voidance of the entire contract as a default remedy, rather than severing clauses and voiding merely an individual term.

Currently, courts base the decision on whether to void the entire contract or sever individual terms on several factors, such as the number of offending provisions found in the contract, the purpose of the contract, and whether the offending terms are easily severable from

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269. *See, e.g.*, Wilkinson-Ryan, *supra* note 240, at 1775 n.115; Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 277 (1970); Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 86 (1997).

270. 6 P.3d 669, 696 (Cal. 2000).

271. Miranda B. Nelson, *Sharpening South Carolina's Blue Pencil: An Argument for Codifying a Strict Interpretation of the Blue-Pencil Doctrine*, 70 S.C. L. REV. 917, 922–23 (2019).

the rest of the contract. Still, courts have largely overlooked the aggregate effects of those provisions, whether enforceable or unenforceable. This can lead to the belt holding up after the suspenders have been severed.

When addressing multiple unreasonable exit restraints, a contract should be voided rather than reduced by the court to what the court would deem "reasonable" restrictions. In 2016, I served on President Obama's White House working group, resulting in a Presidential Call for Action to curtail the expansion of noncompetes.[272] A leading aspect of President Obama's Call for Action was to incentivize employers to eliminate unenforceable contract provisions. The Call for Action asks the states that enforce covenants not to compete to reject reformation and blue penciling and to take strong action against misleading contracts. In the words of the President's call, states should "promot[e] the use of the 'red pencil doctrine,' which renders contracts with unenforceable provisions void in their entirety."[273] Rejecting reformation clauses will be a significant step toward piercing the contract thicket.

In the context of arbitration clauses, the remedy to a one-sided arbitration agreement, which bundles multiple unconscionable clauses, might be the removal of the entire agreement or the removal of the provision that makes the arbitration agreement unconscionable. Should courts void an entire predispute arbitration contract when it bundles a series of unconscionable provisions? Currently, the answer varies from case to case. However, case law is beginning to consider the effects of aggregation. Courts generally ask whether the unconscionable terms are part of the *fabric* of the agreement, or if they are easily severable without modification.[274] They also consider whether the unenforceable clauses were included in bad faith.[275] As the Supreme Court of California describes:

> Courts are to look to the various purposes of the contract . . . If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.[276]

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272. *State Call to Action on Non-Compete Agreements*, OBAMA WHITE HOUSE 2 (2016), https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf [https://perma.cc/3GU4-LHTY].

273. *Id.* at 2.

274. *Armendariz*, 6 P.3d at 696.

275. *Id.* at 696 n.13.

276. *Id.* at 696.

In other words, when a court finds that only one term is unconscionable, the court often severs that single term from the contract.[277] Correspondingly, courts have held that a provision making up an arbitration agreement is more likely to be severed from the agreement, rather than making the agreement void in its entirety, when either substantive unconscionability or procedural unconscionability exist, but not both.[278] On the other hand, when an arbitration agreement contains multiple unlawful provisions, courts recognize that the illegality will be impossible to cure with the severance of a single provision.[279] For example, when an arbitration agreement included clauses that required the plaintiff to pay half of the costs of arbitration and her own attorney's fees, restricted the panel of arbitrators' ability to "override" or "substitute its judgment" over that of the law firm's management, and contained a broad confidentiality clause, the court ultimately found the entire contract void and refrained from attempting to sever the unconscionable clauses.[280] Aggregation analysis supports the rejection of severance in an attempt to salvage the remaining clauses. Arbitration agreements containing two or more unconscionable terms generally should be wholly invalidated. Again, courts have recognized that unconscionable clauses can "permeate" the entire agreement with unconscionability.[281] As one California appeals court wrote about such an arbitration agreement, it "is unconscionably one-sided and unfair in *numerous* respects and therefore unenforceable in its entirety."[282] A Ninth Circuit court held that, when "the objectionable provisions pervade the entire contract," the entire agreement

277. *See, e.g.*, Carmax Auto Superstores Cal. LLC v. Hernandez, 94 F. Supp. 3d 1078, 1127 (C.D. Cal. 2015); *see also* Farrar v. Direct Com., Inc., 215 Cal. Rptr. 3d 785, 799 (Cal. Ct. App. 2017). In a similar vein, Nevada recently passed a law directing the courts to "blue pencil" overly broad noncompetes. NEV. REV. STAT. § 613.195 (2017). The bill was A.B. 276, 2017 Leg., 79th Sess. (Nev. 2017).

278. *See Hernandez*, 94 F. Supp. 3d at 1127; *see also Farrar*, 215 Cal. Rptr. 3d at 799–800.

279. *Armendariz,* 6 P.3d at 697.

280. Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 703–04 (Cal. Ct. App. 2018).

281. *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 159 (Cal. Ct. App. 1997) (finding an arbitration agreement "unconscionably one-sided and unfair in *numerous* respects and therefore unenforceable in its entirety") (emphasis added); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 896 (9th Cir. 2002) (holding that an entire agreement should be rendered unenforceable when "the objectionable provisions pervade the entire contract"); Penilla v. Westmont Corp., 207 Cal. Rptr. 3d 473, 489 (Cal. Ct. App. 2016) (finding that more than one unlawful term in a contract weighed against severance); Subcontracting Concepts (CT), LLC v. De Melo, 245 Cal. Rptr. 3d 838, 848–49 (Cal. Ct. App. 2019) (finding the "central purpose" of a contract was to evade statutory protections because of numerous substantively unconscionable provisions and therefore void in its entirety).

282. *Stirlen*, 60 Cal. Rptr. 2d at 159 (emphasis added).

should be rendered unenforceable.[283] Another California appeals court provides that, because a contract "has more than one unlawful term . . . that factor weigh[ed] against severance."[284] Yet another found that, because "the central purpose" of the contract at issue was to evade the statutory protections "as reflected in the numerous specific provision[s] that are substantively unconscionable," the contract in its entirety should be void.[285]

This insight that unenforceable clauses can render a contract beyond repair by a court holds true beyond the context of arbitration. For example, in the tenant-landlord context, some courts have similarly invalidated entire contracts for having multiple unenforceable clauses, such as a provision requiring tenants to pay all attorney fees should the parties enter litigation.[286] As a Montana court wrote, severing clauses would not suffice to "address the chilling effect that such provisions could continue to have on the exercise of tenants' statutory rights."[287]

Aggregation analysis should support the intuition that any time an agreement has multiple unconscionable clauses, the contract should be voided in its entirety. As described above, arbitration agreements most commonly deemed unconscionable include a multiplicity of problematic clauses, including (1) the unilateral right of the drafting party to litigate claims most commonly brought against them but the unilateral obligation of the nondrafting party to arbitrate;[288] (2) restrictions on remedies, damages, or relief normally allowed in court;[289] and (3) any additional costs of arbitration beyond the costs

283. *Adams*, 279 F.3d at 896.

284. *Penilla*, 207 Cal. Rptr. 3d at 489.

285. *De Melo*, 245 Cal. Rptr. 3d at 848.

286. *See, e.g.*, Summers v. Crestview Apartments, 236 P.3d 586 (Mont. 2010).

287. *Id.* at 593.

288. *See* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 148 (Cal. Ct. App. 1997); Kinney v. United Healthcare Servs., 83 Cal. Rptr. 2d 348, 354 (Cal. Ct. App. 1999); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000); *Adams*, 279 F.3d at 893–94; Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 677 (Cal. Ct. App. 2002); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1285 (9th Cir. 2006); Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1004–05 (9th Cir. 2010); Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1263 (9th Cir. 2017).

289. *See Stirlen*, 60 Cal. Rptr. 2d at 149–50; *Kinney*, 83 Cal. Rptr. 2d at 354; *Armendariz*, 6 P.3d at 692; *Adams*, 279 F.3d at 894; Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 784–85 (9th Cir. 2002); *Fastbucks*, 622 F.3d at 1003–05; Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 725 (N.D. Cal. 2012); *Penilla*, 207 Cal. Rptr. 3d at 488–89; Subcontracting Concepts (CT), LLC v. De Melo, 245 Cal. Rptr. 3d 838, 845–47 (Cal. Ct. App. 2019). One recent case that also deems a limitation on relief unconscionable is McArdle v. AT&T Mobility LLC, No. 09-cv-01117, 2017 WL 4354998, at *1 (N.D. Cal. 2017). In *McArdle*, plaintiff McArdle entered into a service contract with her phone

the nondrafting party would have to pay in court had the claim been litigated.[290] In one such case, the contract as a whole was found to illustrate "an insidious pattern,"[291] rendering the entire agreement unenforceable.[292] In another case, the court rejected severance of the unlawful provisions on the basis of the contract having both an unlawful damages provision and an unconscionably unilateral arbitration clause.[293] The court reasoned that "[s]uch multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage."[294] In other words, agreement is "permeated by an unlawful purpose."[295] In such a case, it cannot "be cured by severance or any other action short of rewriting."[296] When "the central purpose of the [arbitration clause] is tainted with illegality," the entire agreement is unenforceable.[297]

In a similar vein, a reformation clause is a contract provision that purports to direct a law tribunal to rewrite any unenforceable provision so that the contract clauses will still be enforced "to the maximum extent possible."[298] Further, a reformation clause typically states that invalidity of any provision will not affect any other provisions.[299] Such a clause directing an adjudicator or arbitrator to reform an unlawful

provider, AT&T. *Id.* The contract contained an arbitration clause that contained a waiver of injunctive relief, as well as a class action waiver. *Id.* The district court ruled that the waiver of injunctive relief is contrary to California public policy, and therefore unconscionable. *Id.* at *5. The Ninth Circuit affirmed, and, without ruling on the merits of any other provision, declared the entire arbitration agreement unenforceable because the agreement also contained a no-severability clause. McArdle v. AT&T Mobility LLC, 772 Fed. App'x 575, 575–76 (9th Cir. 2019).

290. *See Ferguson*, 298 F.3d at 785; *Mercuro*, 116 Cal. Rptr. 2d at 680–81; *Newton*, 854 F. Supp. 2d at 725; *Penilla*, 207 Cal. Rptr. 3d at 488–89; *De Melo*, 245 Cal. Rptr. 3d at 845–47.

291. *Ferguson*, 298 F.3d at 787.

292. *Id.* at 788.

293. *Armendariz*, 6 P.3d at 699.

294. *Id.* at 696.

295. *Id.* at 697.

296. Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1293 (9th Cir. 2006).

297. Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 728 (N.D. Cal. 2012).

298. *See, e.g.*, James v. Burlington N. Santa Fe Ry. Co., 636 F. Supp. 2d 961, 973 (D. Ariz. 2007) ("[T]he [contract]'s severability clause . . . provides, 'To the maximum extent possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this Agreement.'"); *see also* CAL. CIV. CODE § 1599; Marathon Ent., Inc. v. Blasi, 174 P.3d 741, 743 (Cal. 2008).

299. *Blue-Pencil Test*, Black's Law Dictionary (11th ed. 2019).

contract and to partially enforce clauses should be deemed unenforceable because it goes against the understanding of aggregation. A reformation clause actually further ironclads the contract to present a misleading message: that whatever the contract may purport to do and however many unenforceable clauses it may contain, at least some of it will still be enforced.

Reformation has both ex-ante and ex-post effects. If reformation is the norm,

> [e]mployers could insert broad, facially illegal covenants not to compete in their employment contracts. Many, perhaps most, employees would honor these clauses without consulting counsel or challenging the clause in court, thus directly undermining the statutory policy favoring competition. Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation.[300]

A 2019 case is a good example for a court's wise rejection of contractual reformation clauses, which encourage overreaching.[301] The court considered a noncompete and concluded that the contract was contrary to public policy.[302] The employer asked the court to "blue-pencil" the agreement and pointed to the reformation clause in the agreement.[303] The court rejected this argument, stating:

> Simply put, the court is not a party to the agreement, and the parties have no power or authority to enlist the court as their agent. Thus, parties to an employment or noncompete agreement cannot contractually obligate a court to blue pencil noncompete provisions that it determines are unreasonable.[304]

If contracts are systematically overreaching in the inclusion of bundles of broad restrictions, a reformation clause within a contract creates an even more pronounced lock-in effect. Therefore, in situations of ironcladding by multiple unenforceable clauses, courts should avoid reformation as a remedy even when a reformation clause is bundled into the contract.

2. Rethinking Redundancy: A Feature, Not a Bug

> "A basic tenet of contract law is that each word in the agreement should be interpreted to have a meaning, rather than to be redundant and superfluous."
> — Wintermute v. Kansas Bankers Surety Co.[305]

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300. Kolani v. Gluska, 75 Cal. Rptr. 2d 257, 260 (Cal. Ct. App. 1998).

301. 23 LTD v. Herman, 457 P.3d 754 (Colo. App. 2019).

302. *Id.* at 760.

303. *Id.* at 757.

304. *Id.* at 759.

305. 630 F.3d 1063, 1068 (8th Cir. 2011) (quoting Jones v. Sun Carriers, Inc., 856 F.2d 1091, 1095 (8th Cir. 1988)); *cf.* CarMax Auto Superstores Cal. LLC v. Hernandez, 94 F. Supp. 3d 1078 (C.D. Cal. 2015) (finding severance of unconscionable provision to be appropriate).

Contract law has long-standing precepts about interpretation. One central precept concerns redundancy. According to common law interpretation principles, it is better to give effect to every part of the agreement than to interpret parts of the contract as mere surplusage.[306] In the Roberts Court, "[o]ne frequently referenced subpart is the rule against superfluities."[307] Courts attempt to construe a contract "'so as to give a reasonable meaning to each provision of the contract' and so as to avoid 'render[ing] portions of a contract meaningless, inexplicable or mere surplusage.'"[308] Thus, in standard contract interpretation, courts attempt to avoid 'surplusage,' 'redundancy,' 'meaningless,' or 'superfluous' clauses by construing meaning and purpose in each individual clause. Yet the tenet of imparting independent meaning to seemingly redundant provisions is challenged by the lessons of aggregation. As discussed in Part I,[309] companies benefit from the psychological effects of bundling multiple clauses that restrict exit, voice, and access, to create a whole that is larger than the sum of its parts.

When companies use redundancy as a tool to ironclad their agreements, courts should not strain to find independent meaning in each clause. The insights we have explored about the psychology of bundling and aggregation should instead guide courts in recognizing that redundancy serves an intentional purpose for the drafter. Long lists of overlapping restrictions may actually be a feature of the contract designed to favor its unilateral drafter, signaling to the signer that statutory rights will be near impossible to enforce procedurally—ironcladding the agreement.

Another central precept of contract interpretation is that ambiguous language should be construed against the drafter.[310] The canon of strict construction against the drafter should guide the interpretation of ambiguity and redundancy caused by the bundling and aggregation of one-sided clauses. As with the default of red penciling, the default when facing redundancy in boilerplate contracts should be to narrow the reach of each restraint rather than attempt to avoid surplus by expanding the scope of each clause.

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306. E. ALLAN FARNSWORTH, CONTRACTS 458 (4th ed. 2004).

307. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 243 (2010).

308. Foskett v. Great Wolf Resorts, Inc., 518 F.3d 518, 522 (7th Cir. 2008) (attempting to construe a contract "so as to give a reasonable meaning to each provision of the contract' and so as to avoid 'render[ing] portions of a contract meaningless, inexplicable or mere surplusage.'" (quoting Goebel v. First Fed. Sav. & Loan Ass'n of Racine, 266 N.W.2d 352, 358 (Wis. 1978))).

309. *See supra* Part I.

310. Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 787 (Mich. 2003).

Other fields of legal interpretation have similarly struggled with the tension within redundancy as both useful and harmful, whether strategic or unintentional. In statutory interpretation, the Supreme Court has stated that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[311] At the same time, political scientists have shown that redundancy can often be the outcome of strategic drafting and political compromise. Like redundancy in contracts, statutory redundancy has advantages for drafters. Gluck and Bressman's survey of congressional staffers reported that drafters "intentionally err on the side of redundancy."[312] Redundant drafting can satisfy a number of stakeholders with diverging interests in the exact language adopted. In other words, there may be multiple clauses that intend to serve the same purpose, yet the drafters could not agree on one phrasing over the other and therefore included both. When this is the case, the cardinal principle of judicial construction that each sentence means something different may be misguided.

Judge Richard Posner even notes that lawyers "delight" in doublets:

> The full name of the duty, both in the complaint and in the cases—"duty of good faith and fair dealing"—could be thought ominously open-ended. But the full name is merely what is called a "doublet," a form of redundancy in which lawyers delight, as in "cease and desist" and "free and clear."[313]

With regard to statutory redundancy, Posner has suggested that a statute "may contain redundant language as a by-product of the strains of the negotiating process."[314] Consequently, some have argued "the presumption that redundancy is unproductive and wasteful" is overdone because "redundancy can often add value."[315] This value suggested in Posner's analysis, however, is enjoyed only by the drafters and those who have negotiated the language of what is at

311. TRW, Inc., v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

312. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 954 (2013) (arguing that for legislation, antisurplusage doctrine "cannot be justified as draft-teaching tools because our respondents already know that courts apply the rules but still disregard them").

313. *See In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 646 (7th Cir. 2007) (citing BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 11.2(f) (2d ed. 2006)).

314. Richard Posner, *Statutory Interpretation in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 812 (1983).

315. John M. Golden, *Redundancy: When the Law Repeats Itself,* 94 TEX. L. REV. 629, 671 (2016).

stake. Redundancy serves the purpose of providing assurances to the drafter:

> In situations where a drafter of a legal document has reason for concern that an unknown audience might misunderstand or misapply the message, the drafter might predictably use both linguistic redundancy (redundant language) and substantive redundancy (overlapping substantive provisions) to try to ensure that the document will ultimately be interpreted and applied as desired, at least with respect to the most critical interests of concern.[316]

As we have seen in boilerplate bundles found in contracts of adhesion, redundancy is frequently an intentional feature, rather than a bug.

Similarly, in patent claims, the doctrine of claim differentiation—an anti-redundancy principle—has been challenged by the realities of strategic drafting. Redundancy often appears in the form of multiple patent claims for one invention.[317] The doctrine of claim differentiation is "a rebuttable presumption that each claim in a patent has a different scope."[318] The U.S. Court of Appeals for the Federal Circuit explained that "[i]t is the usual (though not invariable) rule that, in patent claims as elsewhere, the construction of a clause as a whole requires construction of the parts, with meaning to be given to each part so as to avoid rendering any part superfluous."[319] Here again, as with the concept of the thicket, patent law can offer insights to contract interpretation. As Mark Lemley has argued, "patent applicants who draft multiple claims quite often *are* trying to be redundant."[320] The patent lawyers drafting multiple patent claims know the court will strive to impart different scope to each claim and use this to their advantage.[321] Similarly, in contracts of adhesion, the drafters are sophisticated and know the court will attempt to impart separate meaning to each clause.[322] Therefore, "rote application of the canon simply plays into their hands."[323]

These lessons show how drafters—whether of statutes, patent claims, or contracts—benefit from redundancy. Redundancy provides drafters of contracts of adhesion the assurance of the psychological

316. *Id.* at 670.

317. *Id.*

318. Dow Chem. Co. v. United States, 226 F.3d 1334, 1341 (Fed. Cir. 2000); *see also* Peter S. Menell, Matthew D. Powers & Steven C. Carlson, *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 BERKELEY TECH. L.J. 711, 753 (2010).

319. Frans Nooren Afdichtingssystemen B.V. v. Stopaq Amcorr Inc., 744 F.3d 715, 722 (Fed. Cir. 2014); *Dow Chem. Co.*, 226 F.3d at 1341.

320. Mark A. Lemley, *The Limits of Claim Differentiation*, 22 BERKELEY TECH. L.J. 1389, 1394 (2007).

321. *Id.* at 1395.

322. *Id.*

323. *Id.*

effects of bundling and unpacking.[324] Likewise, redundancy serves as an emphasis and omen: any attempt to challenge the enforceability of one restriction will be met with ten other restrictions still standing. Consider, for example, the insurance policy context, where consumers are presented with boilerplate contracts that include multiple restrictions regarding coverage that serve to signal to the consumer that most claims will not be covered. Many courts have noted that "redundancy in insurance policies"[325] is common and that "redundancies abound" in insurance contracts.[326] Courts have been split on whether and when to narrow an insurance coverage inclusion because of overlapping exclusions. Courts agree that "insurance policies are notorious for their simultaneous use of both belts and suspenders."[327] Courts have largely allowed insurance contracts to include extensive exclusions, applying the doctrine against redundancy when interpreting coverage and exclusions. For example, one court stated that insurance contracts are to be interpreted "so as to give effect to every word, clause, and phrase," and avoid rendering "any part of the contract surplusage or nugatory."[328] The Eighth Circuit Court of Appeals explained that "[n]othing prevents the parties from using a 'belt and suspenders' approach in drafting the exclusions [from coverage], in order to be 'doubly sure.'"[329]

As one court described a common insurance contract, which repeated its coverage-off in at least eight different sections of the contract, "it flows from the kind of systematic and formulaic precision, sometimes overdone precision, in which lawyers often seem to take great pleasure."[330] The court explained that "all contract drafting that involves belts (certain damages are excluded) and suspenders (all damages not excluded are covered) has this quality."[331] The court continued by turning to point to redundancy in adjudication itself:

> Not just insurance lawyers frequently say two (or more) things when one will do or say two things as a way of emphasizing one point. Courts themselves frequently apply 'arbitrary and capricious' review in administrative law cases. But no one, I suspect, has ever seen agency action that was 'arbitrary' but not 'capricious.' Emblazoned on the front of the United States Supreme

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324. *See supra* Part I.

325. Ardente v. Standard Fire Ins. Co., 744 F.3d 815, 819 (1st Cir. 2014).

326. TMW Enters., Inc. v. Fed. Ins. Co., 619 F.3d 574, 577 (6th Cir. 2010).

327. Certain Interested Underwriters at Lloyd's, London v. Stolberg, 680 F.3d 61, 68 (1st Cir. 2012); *TMW Enters., Inc.*, 619 F.3d at 577.

328. Royal Prop. Group, LLC v. Prime Ins. Syndicate, Inc., 706 N.W.2d 426, 432 (Mich. Ct. App. 2005) (citing Klapp v. United Ins. Group Agency, Inc., 663 N.W.2d 447, 453 (Mich. 2003)).

329. *In re* SRC Holding Corp., 545 F.3d 661, 670 (8th Cir. 2008).

330. *TMW Enters.*, Inc., 619 F.3d at 577.

331. *Id.*

> Court are the words 'Equal Justice Under Law.' But who would defend something as 'Justice Under Law' if it did not apply equally to all citizens?[332]

This discussion of redundancy misses the context of unilateral contracts that employ aggregation. The principle of attempting to salvage and give significance to each phrase in such contracts is at odds with the realities of contemporary contracts of adhesion. Courts should adopt a principle of unilateral redundancy. When contracts are unilaterally drafted and include multiple clauses that attempt to achieve the same goal—namely, to prevent exit, voice, or assertion of rights—courts should view redundancy—and quasi redundancy, that is overlapping clauses such as nondisclosure and nondisparagement—as a strategic feature of the contract. As the *TMW Enterprises* Court said about the principle that courts should construe clauses to avoid redundancy, "the canon is one among many tools for dealing with ambiguity, not a tool for *creating* ambiguity in the first place."[333] When restrictive clauses in consumer and employee contracts repeat and overlap, courts should not attempt to broaden their scope, for example, adding teeth to several similar clauses about secrecy appearing in sequence in a contract, but rather consider their aggregate effects when determining their enforceability and scope.

B. EXPOSING THE WHOLE OF THE ICEBERG: GOVERNANCE APPROACHES TO CONTRACT REGULATION

1. The Role of Regulatory Agencies in Proactive Compliance

Beyond contract law doctrine and interpretation, a governance framework presents compliance approaches and regulatory rules to proactively prevent aggregation harms. Rather than waiting for a court to invalidate contractual clauses, government agencies should play a more active role in policing their broad inclusion in market relations. A governance approach to contract law emphasizes the realities of contracting and considers the comparative roles of adjudicative and regulatory agencies.[334]

Aggregation analysis supports a direct proactive approach to curtailing contract thickets, including seeking remedies against the practices of ironcladding and thicketing. Seeds of this much-needed practice are already noticeable in state law, recent actions by state Attorneys General, and actions by state and federal agencies. In consumer contracts and landlord-tenant leases, some state legislatures

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332. *Id.* at 578.

333. *Id.*; *see also* Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004); Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

334. *See generally* Lobel, *supra* note 24.

have determined that the inclusion of unenforceable clauses constitutes unfair and deceptive practices, entitling those who have signed them to damages, including punitive damages.[335] In Montana, for example, landlords are prohibited by law from purposely including unenforceable provisions in rental agreements.[336] The statute lists an additional remedy afforded to the tenant whose rights are violated. In addition to actual damages, the tenant may recover an amount equal to up to three months' periodic rent.[337] Similarly, in California, Labor Code § 432.5 forbids employers from knowingly inserting illegal provisions into employment contracts.[338] The statute states:

> No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.[339]

Still, plaintiffs have rarely succeeded in bringing claims under this statute.[340] Another example, the California Consumer Legal Remedies Act, protects consumers by making it unlawful for sellers to insert unconscionable provisions into contracts that purport to sell goods or

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335. Rachel S. Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Charlie Sullivan) with 2020 Vision,* 50 SETON HALL L. REV. 1223 (2020); Lisa Madigan & Jane Flanagan, *Overuse of Non-Competition Agreements: Understanding How They Are Used, Who They Harm, and What State Attorneys General Can Do To Protect the Public Interest*, OFF. ATT'Y GEN. STATE IL (June 13, 2018), https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_madigan_flanagan_june_13_2018.pdf [https://perma.cc/NBV7-QHND].

336. MONT. CODE ANN. § 70-24-403 (2019). Prohibited provisions in Montana rental agreements include: waivers of rights or remedies; confessions of judgment; exculpatory clauses; and clauses requiring an email address as a condition of entering the agreement. MONT. CODE ANN. § 70-24-202 (2019).

337. MONT. CODE ANN. § 70-24-403.

338. CAL. LAB. CODE § 432.5 (2020).

339. *Id.*

340. *See* Brown v. Dow Chem. Co., No. 18-cv-07098, 2019 WL 1438865 (N.D. Cal. 2019); Johnson v. Sunrise Senior Living Mgmt. Inc., No. CV 16-00443, 2016 WL 8929249 (C.D. Cal. 2016); Madison v. U.S. Bancorp, No. C-14-4934, 2015 WL 355984 (N.D. Cal. 2015); Lakeland Tours, LLC v. Bauman, No. 13cv2230, 2014 WL 12570971 (S.D. Cal. 2014); Arkley v. Aon Risk Servs. Co., Inc., No. CV 12-1966, 2012 WL 12886445 (C.D. Cal. 2012). Only one case, *Arkley v. Aon Risk Servs. Co., Inc.*, has "succeeded" in court. In *Arkley*, former employees sued their employers for several claims, including violation of Cal. Lab. Code § 432.5 for including a noncompetition covenant in their employment agreements. In denying defendants' motion to strike the § 432.5 claim, the court reasoned that Plaintiffs alleged enough in their complaint to support the claim that Defendant "knew that Plaintiffs' employment activities would occur in California," and that Defendant "tendered . . . covenants not to compete . . . with the knowledge that said covenants . . . are facially invalid as a matter of California law." *Arkley*, 2012 WL 12886445, at *3.

services to consumers.[341] Yet the actual cases asserting violations of the statute have been limited.[342] In *Miller v. Bank of America N.T. & S.A*,[343] a class action of more than one million plaintiffs sued Bank of America for several claims, including insertion of a provision in their agreements that allowed the bank to seize customers' social security funds in order to satisfy debts the customers owed to the bank.[344] The trial court granted plaintiffs damages of $284,385,741 for the inclusion of the clause, restitution of the same amount, attorneys' fees, and injunctive relief.[345] However, the appellate court reversed the trial court's judgment in its entirety a couple of years later.[346] The Supreme Court of California ultimately affirmed the appellate court, reasoning that the charges levied by the bank were not unlawful.[347]

Federal agencies, including the Department of Labor, the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission, and the Department of Justice can all play an important enforcement role. The EEOC has recently challenged several overly broad boilerplate employment contracts, taking the position that a standard employment contract may be unlawful if it contains clauses that silence employees, such as nondisparagement clauses that prohibit the employee from making any statements that "disparage" the business or reputation and nondisclosure clauses which prohibit the employee from disclosing any "confidential information," including information about terms and personnel.[348] The EEOC contends that such

341. "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful: . . . (19) Inserting an unconscionable provision in the contract." CAL. CIV. CODE § 1770(a)(19) (2020).

342. In *Arevalo*, a class action was filed against Bank of America for involuntarily enrolling credit cardholders in credit protection programs or disabling enrolled credit cardholders from using their credit protections programs. Arevalo v. Bank of America Corp., 850 F. Supp. 2d 1008 (N.D. Cal. 2011). The court in this case only ruled that Plaintiffs had successfully stated a claim under § 1770(a)(19) because Defendant failed to respond to this allegation in their pleadings.

343. Miller v. Bank of America N.T. & S.A., No. CGC-99-301917, 2004 WL 2403580 (Cal. Super. Ct., Cnty. 2004).

344. *Id.* at *1.

345. *Id.* at *33.

346. Miller v. Bank of America N.T. & S.A., 51 Cal. Rptr. 3d 223, 234 (Cal. Ct. App. 2006).

347. Miller v. Bank of America, 207 P.3d 531 (Cal. 2009). The statute that supported the Court's decision was repealed in 2012. *See* CAL. FIN. CODE § 864.

348. *See, e.g.*, EEOC v. CVS Pharmacy, Inc., 70 F. Supp. 3d 937, 939–40 (N.D. Ill. 2014); EEOC v. CollegeAmerica Denver, Inc., 75 F. Supp. 3d 1294, 1303 (D. Col. 2014); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089–90 (5th Cir. 1987); EEOC v. Astra USA, Inc., 94 F.3d 738, 742 (1st Cir. 1996).

provisions violate Title VII because they interfere with the employees' ability to voluntarily communicate with enforcement agencies.[349]

The chilling effects of using unenforceable contracts could also be addressed by proactive private action by those who have been harmed by signing the contract. A private right of action modeled after qui tam suits can also serve to offset the anti-aggregation restrictions in arbitration clauses, which have curtailed the reach of class actions. Qui tam actions have existed for hundreds of years in the common law.[350] The novel Private Attorneys General Act of 2004 (PAGA), created by the California legislature to allow private individuals to sue their employers on behalf of the Labor Commissioner for violations of the Labor Code, is one such qui tam model established through a statutory framework.[351] Under PAGA, an employee who helps enforce the Labor Code receives 25 percent of all civil penalties recovered.[352] In *Iskanian v. CLS Transportation Los Angeles*, the Supreme Court of California held that although a class action waiver in an employment arbitration agreement was valid, a waiver of PAGA representative actions in any forum was "contrary to public policy," and was not preempted by the authority of the FAA.[353] PAGA-like claims could be expanded to any context where contract thickets exist, including in employment, housing, consumer, insurance, and financial regulations.

Notably, the curious distinction between what is prohibited by contract law and what is merely void or voidable by the court presents a point of tension with a proactive approach that penalizes inclusions of unenforceable clauses.[354] For example, one court interpreting an employment statute refused to impose penalties for the inclusion of void clauses because the statute "proscribes only agreements that are 'prohibited by law' rather than those that are void."[355] In this case, the

349. *See* cases cited *supra* note 348.

350. McKenzee D. McCammack, *PAGA is the New Qui Tam: Changing the Landscape of Employment Law in California*, 43 W. ST. U. L. REV. 199, 202–03 (2016).

351. *Id.* at 219.

352. *Id.* at 200–01.

353. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 133 (Cal. 2014). *Iskanian* was upheld after Epic Sys. Corp. v. Lewis, in Correia v. NB Baker Elec., Inc., because "*Epic* did not address the specific issues before the *Iskanian* court involving a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum." 244 Cal. Rptr. 3d 177, 179 (Cal. Ct. App. 2019) (emphasis in original). *See also* Tanguilig v. Bloomingdale's, Inc., 210 Cal. Rptr. 3d 352, 361–62 (Cal. Ct. App. 2016) (a PAGA claim cannot be compelled to arbitration without the state's consent).

354. Jesse A. Schaefer, *Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, 33 CAMPBELL L. REV. 193, 194–96 (2010).

355. Beebe v. Mobility, Inc., No. 07-cv-1766, 2008 WL 474391, at *3 (S.D. Cal. 2008).

court reasoned that because California's Business and Professions Code only makes noncompetes *void*, entering into restrictive covenants is not an illegal activity, and thus, statutory penalties for including illegal clauses does not apply.[356] This reasoning circumvents prohibitions on knowingly including unlawful provisions in consumer and employment agreements. For example, one of the leading employer-side law firms, Littler Mendelson,[357] explains in a white paper that "voidable provisions" mean that the employee has an *option to void*, rather than that the provision would be unenforceable in court and therefore, unlawful.[358] The firm differentiates between statutes that use the language "shall not," which suggests an outright prohibition on inclusion, and statutes that use the language of "voidable by the employee," which the law firm argues seems to suggest is merely "*potentially illegal* depending on what the employee elects to do."[359] Of course, the notion that an employee can *elect* to challenge a contract thicket ignores the reality of unequal bargaining, lack of true consent, ironcladding, and thicketing, which make such a challenge unlikely.

Particular attention to the roles attorneys play in creating contract thickets is warranted. Attorneys are central to drafting contracts. Indeed, attorneys are often aware of the chilling effects of bundling. However, this awareness has not slowed the prevalence of bundling. In a new article, Cathy Hwang looks at contracts between sophisticated parties in M&A deals and considers why even in such contracts unenforceable terms appear.[360] Hwang conducted interviews with deal lawyers who report that they bundle binding and nonbinding

356. *Id.*; CAL. BUS. & PROF. CODE § 16600; CAL. LAB. CODE § 432.5.

357. In analyzing the impact of a fairly new addition to CAL. LAB. CODE § 925, the statute provides:

> (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
>
> (1) Require the employee to adjudicate outside of California a claim arising in California.
>
> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.
>
> (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.

358. M. Scott McDonald & Jim Hart, *New California Law Prohibits Choice of Law and Venue in Employment Contracts*, LITTLER (Oct. 3, 2016), https://www.littler.com/files/2016_10_insight_new_california_law_prohibits_choice_of_law_and_venue_in_employment_contracts.pdf [https://perma.cc/CFH6-6NTQ].

359. *Id.* (emphasis added).

360. Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025 (2019).

clauses together to motivate adherence: "[t]his bundling can either occur structurally, by putting two types of provisions into one physical document, or substantively, by making binding and non-binding provisions depend on each other to some extent."[361] In the context of two equally situated parties who have negotiated the contract, such psychological effects are benign. However, attorneys regularly include unenforceable contractual clauses in boilerplate contracts, where the psychological effects are often far from benign.

In our current legal regime, attorneys who knowingly draft or include unenforceable provisions in contracts generally face no sanctions or other legal or professional discipline. Yet such practice potentially violates several rules of professional conduct. In the Model Rules of Professional Conduct, attorneys are prohibited from criminal or fraudulent action, and deceptive contract drafting can fall within such prohibited actions.[362] Moreover, competent lawyering requires that an attorney advise his client about the risk of invalidating a client's contract.[363] In one American Bar Association (ABA) opinion, the ABA opined on the attorney's duty to notify the opposing side of an agreed-upon provision that was mistakenly left out of the final draft of the contract, despite the fact that the missing provision was unfavorable to the attorney's client.[364] This duty stems from compliance with the rule that the attorney must not assist her client in fraud.[365] The same logic should apply to including unlawful clauses in contracts of adhesion. The current model rules are somewhat ambiguous. Whether an attorney who drafts an unenforceable clause is unethical under Model Rule 1.2 depends on whether she intended to deceive consumers.[366] According to one interpretation of the rules:

> A lawyer engaged in the difficult line drawing necessary to distinguish between whether a contract provision is valid or invalid in certain jurisdictions, or concerned that the law might change, can disclose conspicuously in the agreement itself that a provision might be invalid. Such disclosure would avoid any risk of disadvantage to his or her client. Disclosure signals that the

361. *Id.* at 1057; *see also* Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676, 715–18 (2012).

362. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

363. Christina L. Kunz, *The Ethics of Invalid and Iffy Contracts Clauses*, 40 LOY. L.A. L. REV. 487, 503 (2006).

364. *Id*. at 508–09.

365. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2018).

366. Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 1014–15 (2010).

> contracting parties did not assent to the provision (if it is invalid), just as does omitting the provision altogether.[367]

A rule of ethics that imposes a duty on attorneys to avoid inserting clearly unlawful clauses into consumer and employment contracts, as well as to disclose in the language of the contract the possibility that certain provisions will be deemed invalid, significantly supports a proactive governance approach to contract thickets.

2. Against Aggregation: Legislative and Regulatory Solutions

An understanding that contract clauses, when combined, are greater than their sum points to the impossibility of the signer to release herself from any one clause. In his early critique of the doctrine of unconscionability, Arthur Leff argued that deeming a contract void was too abstract and difficult to do as an adjudicative task, and therefore the role of such policing should be legislative and regulatory.[368] With respect to consumer contracts, Leff argued against naming "those pieces of paper"[369] as contracts; instead, he contended that the "unitary, purchased bundle" of terms are a *product* itself to be regulated.[370] For example, in the insurance contract, "the only thing a purchaser of insurance receives in exchange for the payment of a premium is the policy itself—a lengthy, complex, and incomprehensible bundle of terms and conditions."[371] This insight that boilerplate contract bundles are closer to market regulatory tools than contractual agreements has resonated with other scholars. For example, David Slawson suggested that modern contracting is lawmaking.[372] Still, as Tal Kastner astutely observes, "the fact that contract in general is about allocating power is not explicitly addressed in current scholarship on boilerplate."[373] Focusing on contract thicket dynamics helps us better consider such allocations of power and their practical effects,

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367. *Id*. at 1015.

368. Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 147–55 (1970).

369. *Id.* at 132.

370. *Id.* at 147.

371. Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Institutions*, 89 TEMPLE L. REV. 535, 538 (2017).

372. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 533–34 (1971).

373. Tal Kastner, *How 'Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts*, 7 DREXEL L. REV. 67, 70 n.5 (2014); *see also* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 19 (2014) (describing "normative" and "democratic degradation" resulting from current boilerplate prevalence); Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 CAP. U. L. REV. 617, 633 (2012).

and question narrow solutions that center around contract law doctrine.

Legislative reforms in specific contexts—job mobility, consumer choice, employee voice—can directly address the harms of aggregation and the resulting contract thicket. Anne Fleming has shown that unconscionability led to a series of regulations that formed the basis of consumer protection law.[374] These reforms have mostly been focused on substantive mandatory rules. According to Fleming, "unconscionability review allowed courts to openly do what they had been doing covertly for years—refuse to enforce harsh, one-sided bargains as written."[375] Mandatory rules to address aggregation harms are often preferable to either default or disclosure rules as no one expects consumers to actually read the terms of a long contract.[376] When they do attempt a reading, as Tess Wilkinson-Ryan describes, such clauses "are functionally unreadable (or at least indigestible) for consumers with bounded cognitive capacity—i.e., everyone."[377] To combat the inclusion of unenforceable contracts and the intentional development of contract thickets, legislatures and regulatory agencies can develop requirements of disclosures within the contract and adequate advance notice. Requirements for specific notice in employment contracts about the limits of the contract could be used to give employees a bet-

374. Fleming, *supra* note 240, at 1422–32.

375. *Id.* at 1383 (abstract).

376. Ian Ayres & Alan Schwartz, *The No Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 246–48 (1995); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–45 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1205–09 (2003). Interestingly, with regard to default rules, the literature generally considers penalty default rules, as opposed to majoritarian rules, as beneficial to weaker, nondrafting parties, as it sets the default in a way that protects the nondrafting party. The logic is that setting the default to what the drafting party would not prefer will induce the drafter to explicitly draft the clause they want, thus alerting the nondrafting party about the selected term. However, as we have seen, such notice or inclusion of explicit terms does not resolve the main problem of contemporary boilerplate contracts. On the contrary, the practice today is to draft as many desirable (or undesirable, for the nondrafters) terms as possible in form contracts. Thus, penalty default rules merely support the impulse of companies today to dictate a plethora of terms to consumers and employees. Contract interpretation rules can offset the impulse to over include and incentivize self-governance by the drafting party. The decision to void an entire contract that includes both enforceable and unenforceable terms, or an aggregate of terms that becomes unreasonable and unconscionable, can be understood as a penalty interpretation rule to incentivize drafters to refrain from such practices.

377. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1749 (2014).

ter understanding of their rights. One such example is the recent whistleblower immunity clause in the 2016 Defend Trade Secrets Act.[378] The notice requirement provides that all employers must include the whistleblower immunity right "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."[379] Analogous requirements could be adopted in other employment contexts as well as with regard to consumer contracts. Regulators could require a mandatory summary of the jurisdiction's stance on noncompetes and nonsolicitations in the employee's handbook. The effectiveness of disclosure requirements, however, has long been a point of debate in legal scholarship and policy reforms. Recent scholarship highlights how mandated disclosure is often ineffective.[380]

Substantive mandatory rules focus on providing rights and imposing duties on the drafting party that impose contours to the contract. For example, shifts from adjudication to statutory or agency contract governance can be observed in the context of arbitration. State courts that have been actively policing arbitration contracts as a whole have devised terms that must appear together in order for such a contract to be enforced. The Supreme Court of California outlined five factors that need to be present for a mandatory arbitration agreement to be valid. To be lawful, the arbitration agreement must:

> (1) provide for neutral arbitrators
>
> (2) provide for more than minimal discovery
>
> (3) require a written award
>
> (4) provide for all of the types of relief as would be available in court, and,
>
> (5) not require employees to pay either unreasonable costs or fees.[381]

This reversal of the default to positive requirements—a contract is unlawful unless it complies with certain baselines—offers promise. But

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378. Peter S. Menell, *Misconstruing Whistleblower Immunity Under the Defend Trade Secrets Act*, NEV. L.J. 92, 92–94 (2017); Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369, 381 (2017).

379. Lobel, *supra* note 378.

380. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATORY DISCLOSURE 182 (2014); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 655–79 (2011); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 565–66 (1971). One interesting suggestion is to provide preapproved form contracts for certain contexts, such as standard consumer sales or lease or employment contracts. Matthew Seligman, *Personalized Choice of Private Law* 8 (Cardozo Legal Stud. Research Paper No. 596, 2020), https://ssrn.com/abstract=3493093 [https://perma.cc/7CNJ-XHSU] (citing RESTATEMENT OF THE LAW: CONSUMER CONTRACTS §2(a) (AM. L. INST., Tentative Draft, 2019)).

381. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682 (Cal. 2000).

even more promising would be to address the harms of arbitration through legislation. On October 10, 2019, California Governor Gavin Newsom signed a law (AB 51) prohibiting employers in California from requiring any applicant or employee to agree to mandatory arbitration for violations of the California Labor Code and the California Fair Employment and Housing Act.[382] In June 2019, a New York federal court held that the FAA preempted a similar New York law that prohibited forced arbitration of sexual harassment claims.[383] A federal bill, the Forced Arbitration Injustice Repeal Act of 2019 (FAIR Act), would render mandatory arbitration of employment, consumer, or civil rights claims against a corporation invalid and unenforceable.[384] Before AB 51 was set to come into effect on January 1, 2020, the U.S. Chamber of Commerce challenged AB 51 arguing that AB 51 was preempted by the Federal Arbitration Act.[385] A federal district court granted an injunction on February 7, 2020, but that injunction was vacated by the Ninth Circuit Court of Appeals.[386]

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382. "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act" (FEHA) or California Labor Code, "including the right to file and pursue a civil action or complaint with . . . any court." CAL. LAB. CODE § 432.6(a).

383. Latif v. Morgan Stanley & Co. LLC, No. 18-cv-11528, 2019 WL 2610985, at *4 (S.D.N.Y. June 26, 2019).

384. H.R. 1423, 116th Cong. (2019); S. 610, 117th Cong (2021).

385. Plaintiffs' Supplemental Brief in Support of a Motion for a Preliminary Injunction at 1–3, Chamber of Com. of the U.S., v. Becerra, No. 2:19-cv-02456 (E.D. Cal. Jan. 10, 2020).

386. The Ninth Circuit held that the injunction was improper because the appellees "have not established that they are likely to succeed on the merits of their complaint for declaratory and injunctive relief." Chamber of Com. of U.S. v. Bonta, No. 20-15291, 2021 WL 4187860, at *11 (9th Cir. Sept. 15, 2021). In granting the preliminary injunction, the trial court found that the plaintiffs had satisfied their burden of showing that AB 51 is likely to be preempted by the FAA. Chamber of Com. of U.S. v. Becerra, 438 F. Supp. 3d. 1078, 1095–110 (E.D. Cal. 2020). The trial court held that AB 51's express purpose and operation is to single out arbitration agreements for unequal treatment, a violation of the "equal footing" principle. *Id.* at 1095–99. For an overview of the arguments presented at the trial court, see also Scott P. Jang & Sierra Vierra, *Court Hears Oral Argument on Challenges to AB 51, Orders Further Briefing, and Maintains Temporary Restraining Order*, NAT'L L. REV. (Jan. 11, 2020), https://www.natlawreview.com/article/court-hears-oral-argument-challenges-to-ab-51-orders-further-briefing-and-maintains [https://perma.cc/B596-T4QY]. Congress has also passed another law, notwithstanding the FAA, to limit arbitration contracts. 12 U.S.C. § 5567(d)(2) (for resolution of consumer financial protections disputes following Sarbanes-Oxley reforms, predispute arbitration agreements are barred from being used).

New state and federal efforts have also been made in reaction to the rise of clauses that suppress employee speech, and the many stories of companies, as well as public figures, who, for years, have been shielding themselves from public scrutiny by demanding nondisclosure from their employees both in standard employment contracts and in dispute settlements. In the aftermath of the first #MeToo revelations, California enacted a new law that prohibits confidentiality provisions in settlement agreements pertaining to sexual harassment, assault, and discrimination based on sex.[387] The law is far-reaching, covers all discrimination-related claims, and is designed to increase transparency and prevent habitual offenders from cyclically harassing or disparately treating their employees. In April 2018, New York passed amendments to its laws prohibiting confidentiality in sexual harassment settlements.[388] In June 2018, the State of Washington passed a law which prohibits employers from making employees sign nondisclosure agreements pertaining to sexual assault and harassment in the workplace.[389] A federal bill, the "Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act" (EMPOWER Act), would prohibit nondisclosure clauses regarding workplace harassment and establish a confidential tip-line for reporting systematic workplace harassment.[390]

With regard to noncompetes, growing evidence of talent pool depletion has led some states to ban noncompetes only for certain professions or industries. For example, tech workers in Hawai'i, physicians in Massachusetts, security guards in Connecticut, and broadcasters in Illinois and New York are all protected from the enforcement of noncompetes. In total, over a dozen federal and state legislative bills have been introduced in the past few years to ban noncompetes.[391]

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387. 2018 Cal. Stat. 6262 (codified as amended at CAL. CIV. PROC. CODE § 1001 (2019)).

388. The New York amendments are narrower than the new California law and do not include gender-based discrimination other than harassment. N.Y. C.P.L.R. § 7515 (CONSOL. 2019); N.Y. GEN. OBLIG. § 5-336 (2019); N.Y. C.P.L.R. § 5003-b (CONSOL. 2019).

389. 2018 Wash. Sess. Laws 688 (codified as amended at WASH. REV. CODE § 49.44.210 (2020)).

390. H.R. 6406, 115th Cong. (2018); *see also* Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 176–79 (2018).

391. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/10 (2017) (prohibiting noncompete agreements for workers making less than $13.00 per hour); H.B. 1450, 66th Leg., 2019 Reg. Sess. (Wa. 2019) (enacted) (effective January 1, 2020); S.B. 197, 2019 Gen. Assemb., Reg. Sess. (N.H. 2019) (enacted July 2019) (prohibiting noncompetes for workers making less than 200% of the federal minimum wage); Workforce

At the same time, legislative reforms that address the substantive contours of market relations will always be merely a partial solution to contract thickets. We have seen that contracts have been subverting existing legislation. As Radin puts it, contracts today "undermine or cancel the rights of users granted by legislatures."[392] Therefore, antitrust analysis of contract thicketing has a greater role than ever before in evaluating the effects of clauses on a market-wide basis, instead of merely an individual basis. As Kessler argued, the law of contracts needs to consider the social importance of the contract as well as "the degree of monopoly enjoyed by the author."[393] As regulation has expanded into more areas, so should an antitrust theory of contract law expand, recognizing the ways contracts shape industries in ways that are in tension with regulatory goals. Antitrust law should develop a greater focus on the pervasiveness of boilerplate clauses. To develop better tools for considering thicketing, antitrust law can facilitate claims about vertical restraints on trade by adopting a presumption that such clauses have a wage-suppressing effect.

Antitrust enforcement could play a great role in exposing the anticompetitive effects of contract aggregation. We have seen that with aggregation, both through ironcladding and thicketing, contract drafters can keep wages low because the individual worker cannot leverage outside offers. With arbitration clauses, employers can engage in noncompliance and abuses without facing real threats of repercussions. The Federal Trade Commission's antitrust division can develop

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Mobility Act, S. 2782, 115th Cong. (2018) (introduced by Sen. Warren) (banning noncompetes nationwide); Workforce Mobility Act, H.R. 5631, 115th Cong. (2018) (banning noncompetes nationwide); Freedom to Compete Act, S. 124, 116th Cong. (2019) (introduced by Sen. Rubio) (banning noncompetes for most nonexempt workers); HAW. REV. STAT. § 480-4(d) (2015); CAL. BUS. & PROF. CODE § 16600 (1941); MONT. CODE ANN. § 28-2-703 (1947) ("Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by [statutory exception], is to that extent void."); N.D. CENT. CODE § 9-08-06 (2019). It should be noted that California's prohibition on noncompetes is phrased much more broadly than a ban on "noncompete." The California Business Code § 16600 prohibits restraints on trade, much like the language of the federal antitrust law. CAL. BUS. & PROF. CODE § 16600 (1941). Consider nonsolicitation of coworker clauses, which prohibit former employees from recruiting their former colleagues. In a series of cases from the past two years, the California courts have invalidated such employee nonsolicitation clauses, deeming such clauses unlawful restraints on trade. AMN Healthcare Inc. v. Aya Healthcare Servs. Inc., 239 Cal. Rptr. 3d 577 (Cal. Ct. App. 2018).

392. RADIN, *supra* note 373, at 16.

393. Kessler, *supra* note 34, at 642; Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, EMP. RTS. ADVOC. INST. FOR L. & POL'Y 4 (Mar. 2018), http://employeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf [https://perma.cc/MNS3-TANC].

a richer understanding of market power as it relates to contract aggregation. Currently, because of the impediments of antitrust doctrine in vertical contracts, "for all practical purposes, antitrust law is a nullity for employment noncompetes. Employers face virtually no legal consequences under the antitrust laws if they use noncompetes for anticompetitive purposes."[394] But this omission is far from a necessary or optimal equilibrium of competition regulation. In 2020, the FTC held a first-ever public meeting to consider rulemaking concerning noncompetes.[395] The FTC has the authority to prohibit unfair methods of competition. As the Supreme Court has described the FTC's role, the Commission can, "like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[396] The FTC can thus serve as a central regulatory agency that identifies ironcladding practices and contract thickets and hold such practices to be a per se violation of the FTC Act. Moreover, as we have seen above, antitrust law should recognize the realities of the contract thicket and reject the sharp doctrinal divides between horizontal and vertical collusions.[397] Instead, contract practices that are found to be anti-competitive, such as

394. Posner, *supra* note 170, at 175.

395. Press Release, FTC, *supra* note 20. In contract law as well, courts should explicitly recognize the relevance of market power when looking at individual contracts. For example, in a housing market case decided by the Illinois Supreme Court, in *O'Callaghan v. Waller & Beckwith Realty Co.*, Justice Shaefer refused to find legal relevance in an admitted shortage of housing: "[t]he relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid. There are literally thousands of landlords who are in competition with one another . . . ." 15 Ill. 2d 436, 440 (1958). In contrast, the Supreme Court of California held that exculpatory clauses in residential leases do violate public policy, in large part because of the presence of "[u]nequal bargaining strength," stating that "[i]n a state and local market characterized by a severe shortage of low-cost housing, tenants are likely to be in a poor position to bargain with landlords." Henrioulle v. Marin Ventures, Inc., 573 P.2d 465, 469 (Cal. 1978). In *Shell Oil Co. v. Marinello*, the court invalidated a form clause giving Shell the right to terminate a dealer's franchise on short notice and without cause. The court viewed these boilerplate contracts as against public interest: "[t]hat the public is affected in a direct way is beyond question. We live in a motor vehicle age. Supply and distribution of motor vehicle fuels are vital to our economy." 307 A.2d 598, 602 (N.J. 1973); *see* N.J. STAT. ANN. § 56:6-19(c) (West 2021).

396. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); *see also* FTC v. Ind. Fed. Of Dentists, 476 U.S. 447. 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, . . . but also practices that the Commission determines are against public policy for other reasons . . . .").

397. For a critique of this sharp distinction that pervades antitrust law, see: Robert Livingston Steiner, *Vertical Competition, Horizontal Competition and Market Power*, 53

noncompetes and overly broad secrecy clauses that misleadingly prohibit information that has been deemed public, should be deemed per se illegal.

CONCLUSION

The nature and implications of aggregation in private law theory have been undertheorized for too long. When considering legal enforceability, individual terms must not be analyzed in isolation, but in context of other related terms. The implications of the use of these terms together must also be studied in relation to how contractual parties understand contracts and behave in the market. The contemporary behavioral research on the effects of bundling can inform the contract analysis of aggregate terms. Contract doctrines, like unconscionability, reasonableness, and public policy, have performed the role of restricting aggregate onerous terms, but in a dispersed and inconsistent way and without attention to the supra-addition effects of bundling. Moreover, contract law as well as antitrust law have largely neglected the problem of numerous identical contracts of adhesion that form contract thickets. Law, including both contract law and regulatory law, should play a larger, proactive role in evaluating aggregation of clauses in single contracts and pervasive terms that shape industries and markets.

ANTITRUST BULL. 251 (2008); Murilo Lubambo, *Vertical Restraints Facilitating Horizontal Collusion: 'Stretching' Agreement in a Comparative Approach*, 4 U. COLL. LONDON J.L. & JURIS. 135 (2015).