

CONTRACTUAL SYMMETRY: A DOCTRINAL & ECONOMIC ANALYSIS

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ABSTRACT

When discussing the fairness of boilerplate consumer contracts, courts often rely on the criterion of symmetry: whether a given contractual provision applies equally to both parties. In many states, boilerplate provisions that apply solely to the consumer but not to the merchant are much more likely to be judged unconscionable than provisions creating identical obligations for both parties. However, this approach is misguided. Relying on game theory, this Article demonstrates that the symmetry criterion is unlikely to promote fair or efficient contracts.

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INTRODUCTION

Imagine you are a judge trying to determine the fairness of an arbitration provision in a consumer contract. The consumer argues that the arbitration clause denies the consumer a day in court. The merchant replies that arbitration constitutes a quick and efficient way of resolving conflicts that might otherwise take months, or even years, to litigate.

As you are pondering these arguments, you learn that the clause requires only the consumer's claims to be brought to arbitration, whereas the merchant reserves the right to assert claims in court. Would this make you

more likely to decide that the clause is unfairly one-sided? If so, you are not alone. Many courts take the view that symmetry, or the lack thereof, constitutes a crucial factor in deciding whether a clause is sufficiently unfair to be considered unconscionable.

For example, courts have invoked this symmetry criterion in the context of arbitration clauses,¹ alternative dispute resolution (ADR) mechanism clauses,² forum selection clauses,³ confidentiality agreements,⁴ limitation periods,⁵ and clauses requiring the reimbursement of attorney's fees.⁶ Furthermore, courts have discussed the symmetry criterion with

1. *E.g.*, *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170–71 (5th Cir. 2004) (applying Louisiana law); *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (Cal. App. 2004) (applying California law); *Alltel Corp. v. Rosenow*, No. CV-13-995, 2014 WL 4656609, at *3 (Ark. Sept. 18, 2014) (applying Arkansas law).

2. *See, e.g.*, *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 998 (9th Cir. 2010) (invoking the asymmetric design of an ADR clause as one reason for finding the clause unconscionable under California law); *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 310 (Cal. Ct. App. 2004) (holding that a one-sided ADR requirement was one factor rendering an arbitration clause unconscionable under California law).

3. *See, e.g.*, *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010) (holding that an asymmetric forum selection clause that also had the effect of waiving certain statutory rights of plaintiff was unconscionable); *but see* *Desert Autosports LLC v. Auto. Fin. Corp.*, No. CV-13-01211-PHX-DGC, 2013 WL 4231151, at *1 (D. Ariz. Aug. 14, 2013) (holding that the asymmetric nature of a forum selection clause alone was insufficient to support a finding of unconscionability); *Great Am. Ins. Co. of N.Y. v. Nippon Yusen Kaisha*, No. 13-cv-00031 NC, 2013 WL 3850675, at *5 (N.D. Cal. May 10, 2013) (holding that a forum selection clause can be enforceable despite not providing “reciprocal and equal benefits to contracting parties.”).

4. *Pokorny*, 601 F.3d at 1001 (holding that the asymmetric design of a confidentiality requirement was one factor supporting a finding of unconscionability).

5. *Hermosillo v. Davey Tree Surgery Co.*, No. 18-CV-00393-LHK, 2018 WL 3417505, at *19 (N.D. Cal. July 13, 2018) (applying California law and holding that a contractual provision imposing an asymmetric limitation period of six months for claims brought by the employee was unconscionable); *Flinn v. CEVA Logistics U.S., Inc.*, No. 13-CV-2375 W(BLM), 2014 WL 4215359, at *9 (S.D. Cal. Aug. 25, 2014) (finding a one-sided ninety-day limitation period for claims arising under the Labor Code to be unconscionable under California law); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499 (Cal. Ct. App. 2012) (invoking the asymmetric nature of a contractually imposed limitation period in a subcontractor agreement as one factor supporting a holding of unconscionability under California law); *Nyulassy*, 16 Cal. Rptr. 3d at 307 (holding that a one-sided limitation period was one factor rendering an arbitration clause unconscionable under California law); *but see* *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1043–45 (9th Cir. 2001) (applying California law and stressing that while nonmutuality of a contractual provision was a relevant factor in applying the unconscionability doctrine, the mere one-sidedness of a limitation period did not suffice to render the clause unconscionable).

6. *Samaniego*, 140 Cal. Rptr. 3d at 499–500 (finding a clause, which required the subcontractor to reimburse the general contractor's attorney's fees without imposing an equivalent duty on the general contractor, to be unconscionable).

respect to contract renewal options,⁷ termination rights,⁸ jury trial waivers,⁹ class action waivers,¹⁰ and remedies.¹¹

The symmetry criterion's popularity is unsurprising. Equating symmetry with justice is deeply rooted in our cultural history ("an eye for an eye").¹² Furthermore, the symmetry criterion has strong intuitive appeal: symmetry seems to imply equal treatment, and equal treatment seems to imply fairness. If the merchant subjects the consumer to a particular boilerplate provision, why not let the merchant try a taste of their own medicine?

From a judge's perspective, invoking the symmetry criterion to determine the fairness of contractual provisions also has practical advantages. Determining the fairness of contractual provisions—as the unconscionability doctrine requires—can be difficult.¹³ For example, the fairness review inherent in the unconscionability doctrine constitutes a prime example of what Louis Kaplow has called a standard: a norm that lacks a precise *ex ante* meaning and whose content, therefore, has to be determined *ex post* by the court.¹⁴ Vague standards afford the judge more leeway than clear-cut rules, but this increase in judicial autonomy comes at a potentially steep price: a judge engaging in fairness review may be accused of substituting personal preferences and values for the law.¹⁵ Therefore, the symmetry criterion constitutes a seemingly attractive alternative: the symmetry criterion replaces the vague fairness standard with a clear and elegant rule that is easy for the judge to apply and for the parties to understand.

7. *In re Dep't of Pub. Serv.*, 596 A.2d 1303, 1309 (Vt. 1991) (Morse, J., dissenting) (arguing that nonmutuality did not render an option to renew or cancel the contract void under Vermont law).

8. *H.P. Hood & Sons v. Heins*, 205 A.2d 561, 566 (Vt. 1964) (holding that contractual termination rights need not be symmetric under Vermont law).

9. *Walther v. Sovereign Bank*, 872 A.2d 735, 760 (Md. 2005) (Bell, J., dissenting) (arguing that the nonmutuality of jury trial waiver should have rendered the pertinent contractual provision void).

10. *Id.*

11. Courts generally discuss this issue under the term "mutuality of remedy," a doctrine that most courts reject or at least define restrictively. *E.g.*, *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 625 (Fla. Dist. Ct. App. 1982) (holding that the parties need not have identical remedies in order for contract to be enforceable); *Bossert v. Palm Beach Cty. Comprehensive Cmty. Mental Health Ctr., Inc.*, 404 So. 2d 1138, 1139 (Fla. Dist. Ct. App. 1981) (rejecting the idea that each party must have the same remedy).

12. Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L.Q. 105, 105 (1998).

13. Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 387 (1995).

14. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

15. Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175, 175–79 (2010); *cf.* Ward Farnsworth, Review Essay, *The Taste for Fairness*, 102 COLUM. L. REV. 1992, 2014–15 (2002) (discussing the problem that judges called on to judge the fairness of an outcome may rely on their own values and preferences).

Despite the practical importance of the symmetry criterion, legal literature has yet to undertake any systematic analysis of this issue.¹⁶ This Article fills that gap and argues that courts ought to abandon the symmetry criterion. Relying on game theory, this Article demonstrates that the symmetry criterion does not generally promote efficient or fair contracts. Furthermore, this result persists, even if asymmetric contractual conditions are part of a merchant's boilerplate terms and if one assumes, as most scholars do¹⁷ and as the empirical literature confirms,¹⁸ that consumers usually fail to read boilerplate terms.

What explains the symmetry criterion's inability to promote fairness and efficiency? A central part of the problem is that not all drafters may use contractual provisions in the same way. For example, consider the use of liability waivers by landlords. Assume that there are two types of landlords: "good" landlords and "bad" landlords. Good landlords expect their own performance to conform to the contract and, therefore, plan to use liability waivers solely to protect themselves against frivolous claims.¹⁹ By contrast, bad landlords, if they are protected by liability waivers, fail to take reasonable measures to protect their tenants against harm—even though these measures are both legally required and efficient in the sense that their benefits to tenants outweigh their costs.²⁰ Similarly, assume that there are good and bad tenants: the former will use liability waivers to defend against frivolous claims, the latter will wreck the apartment and use liability waivers to escape liability for their actions.

In this hypothetical, it is easy to see that the use of liability waivers by good landlords is both efficient and fair. It is efficient because its only effect is to avoid the deadweight loss associated with frivolous litigation.²¹ It is fair because tenants have no legitimate interest in benefiting from raising frivolous claims.²² Likewise, it is equally easy to see that the use of

16. Note, however, that two well-known scholars of arbitration law, Christopher Drahozal and Alan Rau, have spoken out against the case law that requires arbitration provisions to be mutual (symmetrical). See Alan Scott Rau, "Asymmetrical Arbitration Clauses" – *The United States*, in JURISDICTIONAL CHOICES IN TIMES OF TROUBLE 21, 21–32 (Bachir Georges Affaki & Horacio Alberto Grigera Naón eds., 2015) (raising a number of doctrinal concerns against the mutuality requirement for arbitration clauses); Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 558 (2002) (arguing that businesses may respond to a mutuality requirement by extending the arbitration clause to their own claims and that this may benefit neither businesses nor consumers).

17. Jens Dammann, *Flytraps, Scarecrows, and the Transparency Paradox: The Case for Redesigning the Law on Vague Boilerplate Contracts*, 2018 U. ILL. L. REV. 185, 201 (2018).

18. *Id.*

19. Cf. Anil Hargovan & Timothy M. Todd, *Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors*, 78 U. PITT. L. REV. 135, 166 (2016).

20. Cf. Leo Salinger & Laura K. Rebbe, *The Importance of a Waiver of Subrogation Clause in a Commercial Lease*, LEXOLOGY (Jan. 30, 2012), <https://www.lexology.com/library/detail.aspx?g=338c9156-926a-42fe-99dd-328ca844fad1>.

21. *Cf. id.*

22. Cf. Mark Tschetter & Hamrik Tschetter, *One Slip Can Cost You Big – The Colorado Premises Liability Act, Part 2*, REAL PROP. MGMT. COLO: LANDLORD ESSENTIALS, <https://www.realpropertymanagementcolorado.com/one-slip-can-cost-big-colorado-premises-liability-act-part-2/> (last visited Mar. 18, 2020).

liability waivers by bad landlords is both inefficient and unfair.²³ It is inefficient because it eliminates the landlord's incentive to make sufficient efforts to avoid harming the tenant.²⁴ Moreover, it is unfair because tenants are deprived of their legally required protections.²⁵

What are the consequences of imposing a symmetry requirement in this context? As explained in more detail below, landlords' reactions to such a symmetry criterion are bound to be strategic.²⁶ Given certain plausible assumptions, good landlords will abstain from using liability waivers because they derive few benefits from such waivers and do not want to shoulder the risk of granting liability waivers to bad tenants.²⁷ Meanwhile, bad landlords know for certain that they derive significant benefits from the waiver and are therefore willing to take a chance that their tenant will abuse his waiver as well.²⁸ As a result, the symmetry requirement prevents the efficient use of liability waivers by good merchants but fails to prevent the inefficient use of such waivers by bad merchants.

This Article does not argue that a symmetry requirement always leads to inefficient outcomes. In fact, this Article shows that, given the right assumptions, a symmetry requirement can help promote efficiency. However, the pertinent assumptions are quite narrow and unlikely to be met, except in rare cases. Accordingly, they cannot justify the recognition of a general symmetry criterion.

The structure of this Article is as follows: Part I analyzes the role that the symmetry criterion plays in contract law cases. Part II contextualizes this criterion by providing background information on the economics of boilerplate contracts. Part III introduces different game-theoretical models to show that the symmetry criterion fails to promote the use of efficient contractual provisions. Part IV shows that fairness considerations cannot justify the symmetry criterion either.

I. THE ROLE OF SYMMETRY IN CONTRACT LAW

Courts generally use one of two legal doctrines as a basis for invoking the symmetry criterion: (1) the consideration requirement,²⁹ or (2) the unconscionability doctrine.³⁰

23. *Cf. id.*

24. *Cf.* Robert E. Scher, *A Landlord's Guide to Landlord's Waivers: Five Potential Pitfalls For Landlords to Consider*, BAKER DONELSON (Aug. 1, 2014), <https://www.bakerdonelson.com/a-landlords-guide-to-landlords-waivers-five-potential-pitfalls-for-landlords-to-consider>.

25. *Cf.* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 583 (1984).

26. *See* discussion *infra* Section III.E.

27. *See* discussion *infra* Section III.E.

28. *See* discussion *infra* Section III.E.

29. *See* sources cited *infra* note 42.

30. *See* sources cited *infra* note 79.

A. Consideration and Mutuality

The consideration requirement is a somewhat surprising basis for the symmetry criterion. Although consideration presupposes a bargain and, hence, a *quid pro quo*,³¹ there is no general requirement in contract law that each of a party's duties be mirrored by an identical duty for the other party.³² In fact, most contractual relationships involve the exchange of goods and services for payment.³³ For example, a landlord makes the rental property available to the tenant, whereas the tenant owes the agreed-upon rent.³⁴ Therefore, a requirement that all contractual duties be strictly symmetrical would be nonsensical.³⁵ Instead, courts merely inquire whether a promise was incurred in exchange for the other party's promise or performance.³⁶

In determining whether the consideration requirement is met, courts do not inquire into whether the promises or performances by both parties are equal in value.³⁷ Rather, the consideration requirement is met as long as the consideration is more than a mere sham.³⁸ Differently put, the law does not require any "symmetry in value" for the consideration requirement to be satisfied.³⁹

Additionally, if a party makes more than one promise as part of the same bargain, courts generally do not spend any time matching and comparing individual duties from that bundle of rights and obligations. Rather, courts ask whether the consideration requirement is met for the entire bundle.⁴⁰ The Restatement (Second) of Contracts captures this approach by making it clear that when confronted with a "set of promises," courts

31. See *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U.S. 183, 197 (1887) (defining consideration as "the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise."); RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (AM. LAW INST. 1981) ("[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.>").

32. E.g., *Walther v. Sovereign Bank*, 872 A.2d 735, 748 (Md. 2005); RESTATEMENT (SECOND) OF CONTRACTS § 79(b). The Restatement even provides that, as long as the contract meets the consideration requirement, there exists no additional requirement of "mutuality of obligation." RESTATEMENT (SECOND) OF CONTRACTS § 79. This provision is meant to reject the principle, sometimes found in older cases, that in order for one party to be bound, both parties must be bound. Of course, this invites an *argumentum a fortiori*. If the consideration requirement does not even presuppose that both parties be bound, then it certainly cannot require that the parties' obligations be identical.

33. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b, illus. 1–5.

34. See *id.*

35. Cf. *id.* § 71(2).

36. *Id.*

37. E.g., *Blumenthal v. Heron*, 274 A.2d 636, 640 (Md. Ct. App. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 79(b).

38. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (noting that "a mere pretense of a bargain does not suffice[.]").

39. Making the enforcement of contracts contingent on symmetry in value (defined as a requirement that the consideration be exactly as valuable as the promise it supports) would be entirely at odds with a market economy in which parties are, in principle, free to decide which bargains they enter into.

40. E.g., *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451 (2d Cir. 1995) (applying Connecticut law); *Northcom, Ltd. v. James*, 694 So. 2d 1329, 1335 (Ala. 1997); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 552 (W. Va. 2012) (applying West Virginia law).

should focus on whether “the whole” of what has been bargained for constitutes consideration.⁴¹

A minority of jurisdictions have embraced an exception to these general rules for one particular type of contract: arbitration agreements. Courts in these jurisdictions have held that nonmutual arbitration provisions are void even if they are part of a broader contract that includes promises by both sides.⁴² However, most jurisdictions have rejected this approach.⁴³

Courts adhering to the minority position advance two main arguments. First, many of the relevant decisions invoke the mutuality doctrine, which postulates that neither party is bound unless both parties are bound.⁴⁴ However, this argument seems forced at best. The mutuality doctrine has largely been purged from modern contract law,⁴⁵ and the Restatement of Contracts explicitly rejects it.⁴⁶ Even in the early twentieth century, when the mutuality doctrine was still widely accepted,⁴⁷ it was never meant to imply that each duty had to be mirrored by an identical duty for the other party.⁴⁸ Rather, this doctrine was always understood to refer to the contract as a whole.⁴⁹ The mutuality doctrine’s crucial claim was not

41. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 80(1) (focusing on whether there is “consideration for a set of promises”); *id.* § 80(2) (providing that “[t]he fact that part of what is bargained for would not have been consideration if that part alone had been bargained for does not prevent the whole from being consideration.”).

42. *E.g.*, *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985) (applying New York law); *Alltel Corp. v. Rosenow*, No. CV–13–995, 2014 WL 4656609, at *6–9 (Ark. Sept. 18, 2014); *Money Place, LLC v. Barnes*, 78 S.W.3d 714, 717 (Ark. 2002); *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 366–67 (Ark. 2000); *Cheek v. United Healthcare of Mid-Atl., Inc.*, 835 A.2d 656, 665 (Md. 2003).

43. Most courts have taken the position that a promise to arbitrate does not need to be supported by separate consideration as long as it is part of a larger contract in which each party’s promises are supported by consideration. *E.g.*, *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 77 (1st Cir. 2011) (applying Puerto Rico law); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002) (citing *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999)) (applying Pennsylvania law); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791–92 (8th Cir. 1998) (applying Oklahoma law); *Doctor’s Assocs., Inc.*, 66 F.3d at 451–53 (applying Connecticut law); *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554, 566–67 (N.D. Ohio 2004) (applying Ohio law); *W.L. Jorden & Co. v. Blythe Indus., Inc.*, 702 F. Supp. 282, 284 (N.D. Ga. 1988) (applying federal law); *Northcom, Ltd.*, 694 So. 2d at 1336; *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1185 (Alaska 1983) (applying Alaska law); *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004) (applying Mississippi law); *Kalman Floor Co. v. Joseph L. Muscarelle, Inc.*, 481 A.2d 553, 556 (N.J. Super. Ct. App. Div. 1984) (applying New Jersey law), *aff’d*, 486 A.2d 334 (N.J. 1985); *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (N.Y. 1989) (applying New York law); *Dan Ryan Builders, Inc.*, 737 S.E.2d at 557–58 (applying West Virginia law).

44. *E.g.*, *Hull*, 750 F.2d at 1550 (applying New York law); *Alltel Corp.*, 2014 WL 4656609, at *6–7; *The Money Place, LLC*, 78 S.W.3d at 717; *Showmethemoney Check Cashers, Inc.*, 27 S.W.3d at 366; *Cheek*, 835 A.2d at 665–66.

45. *See, e.g.*, *Harris*, 183 F.3d at 180 (noting that “[m]odern contract law largely has dispensed with the requirement of reciprocal promises, however, provided that a contract is supported by sufficient consideration.”); *Anderson*, 316 F. Supp. 2d at 566–67 (applying Ohio law and rejecting the mutuality doctrine).

46. RESTATEMENT (SECOND) OF CONTRACTS § 71(2).

47. Herman Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law*, 25 COLUM. L. REV. 705, 705 (1925).

48. *Id.*

49. *See, e.g.*, CHARLES GREENSTREET ADDISON, A TREATISE ON THE LAW OF CONTRACTS 14 (William E. Gordon & John Ritchie eds., 11th ed. 1911) (“All contracts founded upon mutual promises

that each of a party's duties had to be matched by an equivalent duty on the other side.⁵⁰ Instead, the mutuality doctrine asserted that if a contract was not legally binding for one party, it could not be binding for the other party.⁵¹ The modern cases that still invoke the mutuality doctrine outside the context of arbitration clauses also apply it in this limited sense by focusing on the contract as a whole, rather than on individual rights and obligations.⁵²

A second, and slightly more plausible, argument for the minority view exists: because arbitration clauses reserve the question of what duties are created for the arbitrator,⁵³ courts assessing the enforceability of an arbitration provision should not have to determine whether the contract as a whole imposes duties on both parties.⁵⁴ As one court put it, recognizing the various contractual duties as consideration for the promise to arbitrate would require "straying into the prohibited morass of the merits of the claims."⁵⁵

This argument is linked to the severability doctrine under which arbitration clauses can be enforced even if the contract that contains the arbitration clause is invalid or unenforceable.⁵⁶ For example, in the leading case on the severability doctrine, *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*,⁵⁷ the U.S. Supreme Court held that "while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"⁵⁸ in deciding whether to stay proceedings. The idea underlying the severability doctrine is that it would run counter to the parties' purpose to render the arbitration proceedings "subject to delay and obstruction in courts."⁵⁹ However, invoking the

between persons of full age must be obligatory upon both parties, so that each may have an action upon it, or neither will be bound.").

50. *See id.*

51. *See, e.g.,* Am. Life Ins. Co. of Ala. v. Carlton, 184 So. 171, 173 (Ala. 1938) (holding that "[c]ontracts must be mutual"); *see also* Weaver v. Weaver, 109 Ill. 225, 233 (1883) ("It is a rule of general application in the law of contracts, that a contract between parties *sui juris* must be mutual,—that is, if either is bound, both will be bound."); Globe Printing Co. v. Bickley, 73 Mo. App. 499, 499 (1898) (holding that "[c]ontracts of guaranty, like all contracts, must be mutual to be binding.") (citing Taylor v. Shouse, 73 Mo. 361, 363 (1881)).

52. *E.g.,* Econ. Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 650 (Iowa 1995); Reed v. Citizens Ins. Co. of Am., 499 N.W.2d 22, 25 (Mich. Ct. App. 1993); Serpa v. Darling, 810 P.2d 778, 781 (Nev. 1991).

53. *Cf.* Check v. United Healthcare of Mid-Atl., Inc., 835 A.2d 656, 668 (Md. 2003) (arguing that if the Court were to "stray into the merits of any underlying disagreements," it would "eclipse the role of the arbitrator").

54. *Id.* at 665–66.

55. *Id.* at 665.

56. *See, e.g.,* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006) (discussing the severability doctrine and noting that this doctrine "permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void"); Meredith Goldich, *Throwing Out the Threshold: Analyzing the Severability Conundrum Under Rent-A-Center, West, Inc. v. Jackson*, 60 AM. U. L. REV. 1673, 1676 (2011) (explaining that the doctrine of severability "holds that arbitration agreements can be severed from broader substantive contracts and enforced, even if terms in the principal contract are unenforceable").

57. 388 U.S. 395 (1967).

58. *Id.* at 404.

59. *Id.*

severability doctrine to justify a separate consideration requirement for the duty to arbitrate is not persuasive.⁶⁰ The severability doctrine does not imply that a court deciding whether to enforce an arbitration clause can never consider issues that are also relevant to the merits of the case.⁶¹ Even in the *Prima Paint* decision, the Court made it clear that “if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it.”⁶² Given this limitation of the severability doctrine, demanding that an arbitration clause must apply to both parties does not protect the court against having to deal with questions that are pertinent to the merits of the case. When a party challenges an arbitration clause’s enforceability, the court will apply the general contract defenses.⁶³ For example, a court confronted with a lawsuit brought in defiance of an arbitration clause cannot ignore the plaintiff’s claim that he was mentally ill and, therefore, lacked legal capacity at the time that he signed the arbitration clause.⁶⁴

Additionally, the requirement that arbitration clauses be supported by separate consideration cannot explain the limits of the pertinent case law. As a practical matter, courts have only invalidated one-sided arbitration clauses in employment and consumer contracts.⁶⁵ However, the consideration requirement is not limited to such contracts.⁶⁶ Hence, if one were to base the case against asymmetric arbitration clauses on the requirement of separate consideration, one could hardly avoid the conclusion that such provisions are void in contracts between merchants as well.

B. Unconscionability

Given the doctrinal concerns about using the consideration requirement, or a separate mutuality doctrine, as a basis for invoking the symmetry criterion, it is unsurprising that most courts applying the symmetry criterion opt for a different approach: applying the symmetry criterion as part of the fairness analysis inherent in the unconscionability doctrine.⁶⁷

One can distinguish between procedural and substantive unconscionability.⁶⁸ A contract is substantively unconscionable if its terms are “overly

60. Cf. Rau, *supra* note 16, at 21, 25–26 (asserting that the mutuality doctrine for arbitration clauses does not constitute a “sensible doctrinal respons[e] to the problem of *Prima Paint*”).

61. *Id.* at 24–26.

62. *Prima Paint Corp.*, 388 U.S. at 403–04.

63. E.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996); *McKee v. AT&T Corp.*, 191 P.3d 845, 857 (Wash. 2008) (en banc).

64. Cf. *Rushing ex rel. Estate of Coon v. Franklin Hills Health & Rehab.*, No. 31055-8-III, 2014 WL 346540 at *3 (Wash. Ct. App. Jan. 30, 2014) (noting that an arbitration agreement is subject to general contract defenses, and that a contract can be invalidated if a party lacked sufficient mental competence).

65. See cases cited *supra* note 42.

66. See Rau, *supra* note 16, at 24–25.

67. See sources cited *supra* notes 57–60.

68. Dammann, *supra* note 17, at 201.

harsh or one-sided.”⁶⁹ The fact that one party benefits more than the other is not enough.⁷⁰ The agreement must be so unfair as to “shock the conscience.”⁷¹ Procedural unconscionability relates to flaws in the bargaining process,⁷² though courts are somewhat divided on the details. According to some courts, the mere use of boilerplate terms renders the bargaining process flawed.⁷³ However, other courts set the bar higher. For example, some courts have held that a consumer’s ability to avoid the relevant contractual provision by choosing another provider precludes procedural unconscionability.⁷⁴

The exact relationship between substantive and procedural unconscionability is somewhat controversial. In many jurisdictions a contractual provision must be both procedurally and substantively unconscionable to violate the unconscionability doctrine.⁷⁵ However, courts adhering to this view frequently stress that if the clause is particularly unconscionable on one of the two dimensions, the other may require a lesser degree of unconscionability.⁷⁶ In other jurisdictions mere substantive unconscionability suffices to invoke the unconscionability doctrine.⁷⁷ Furthermore, some courts have stated, albeit in *obiter*, that procedural unconscionability alone may justify a finding of unconscionability.⁷⁸

69. Pinnacle Museum Tower Ass’n v. Pinnacle Mkt. Dev. LLC, 282 P.3d 1217, 1232 (Cal. 2013). Other courts use similar tests. *E.g.*, *Ex parte Foster*, 758 So. 2d 516, 520 n.4 (Ala. 1999) (“unreasonably favorable to the more powerful party”); *accord* *Blue Cross Blue Shield v. Rigas*, 923 So. 2d 1077, 1086 (Ala. 2005); Dammann, *supra* note 17, at 201–02.

70. Dammann, *supra* note 17, at 201 (noting that “[a] mere imbalance is not enough”).

71. *Pinnacle Museum Tower Ass’n*, 282 P.3d at 1232 (quoting *24 Hour Fitness, Inc. v. Superior Court*, 78 Cal. Rptr. 2d 533, 541 (Cal. Ct. App. 1998)).

72. *E.g.*, *Ex parte Foster*, 758 So. 2d at 520 n.4; *accord* *Blue Cross Blue Shield*, 923 So. 2d at 1086; *Cheshire Mortg. Serv., Inc. v. Montes*, 612 A.2d 1130, 1134 n.14 (Conn. 1992); *NEC Techs., Inc., v. Nelson*, 478 S.E.2d 769, 771 (Ga. 2012); Dammann, *supra* note 17, at 201–02.

73. *Rodriguez v. Raymours Furniture Co.*, 138 A.3d 528, 541–42 (N.J. 2016).

74. *Blue Cross Blue Shield*, 923 So. 2d at 1087–88; *see* *Leeman v. Cook’s Pest Control, Inc.*, 902 So. 2d 641, 648 (Ala. 2004) (denying procedural unconscionability because the consumer did not shop around).

75. Dammann, *supra* note 17, at 202. Examples of court decisions embracing this view include: *Blue Cross Blue Shield*, 923 So. 2d at 1087; *Urban Invs., Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983) (finding that both procedural and substantive unconscionability are typically required but that one might be sufficient in a special case); *SA-PG Sun City Ctr., LLC v. Kennedy*, 79 So. 3d 916, 921 (Fla. Dist. Ct. App. 2012); *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808, 820–21 (W. Va. 2012).

76. Dammann, *supra* note 17, at 202; *see also* *Pinnacle Museum Tower Ass’n*, 282 P.3d at 232.

77. *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) (in banc); *Smith v. Mitsubishi Motors Credit of Am., Inc.*, 721 A.2d 1187, 1192 (Conn. 1998); *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829, (N.Y. 1988) (citing *State v. Wolowitz*, 468 N.Y.S.2d 131 (N.Y. App. Div. 1983)); *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985).

78. *Frank’s Maint. & Eng’g, Inc. v. C.A. Roberts Co.*, 408 N.E.2d 403, 409–10 (Ill. App. Ct. 1980); *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1199 (Wash. 2013) (en banc); *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 638 (Wash. 2013) (en banc). Other courts have left this question open. *E.g.*, *Maxwell*, 907 P.2d at 59; *Smith*, 721 A.2d at 1192.

Courts invoke the symmetry criterion to evaluate the substantive unconscionability of contractual provisions.⁷⁹ However, states differ substantially in the weight that they attach to this criterion. In some states, such as California and West Virginia, courts frequently use the symmetry criterion to invalidate contractual provisions.⁸⁰ This strong approach is echoed in the pertinent courts' rhetoric. For example, California and West Virginia courts have held that the mutuality criterion is of "paramount" importance in determining whether contractual provisions are substantively unconscionable.⁸¹

Courts in many other jurisdictions do not go as far but agree that the symmetry criterion is relevant to the unconscionability analysis.⁸² The main difference lies in how rigorously courts apply this criterion. The disparate treatment of nonmutual arbitration clauses nicely illustrates this point. For example, courts in some jurisdictions note that nonmutuality is only one factor in assessing the fairness of arbitration agreements but are rather quick to categorize nonmutual arbitration clauses as unconscionable.⁸³ Courts in other jurisdictions are more generous to merchants.⁸⁴ These jurisdictions recognize that nonmutuality is a pertinent factor but generally refuse to judge nonmutual arbitration clauses unconscionable and often stress that nonmutuality, alone, is not enough to support a finding of unconscionability.⁸⁵ Finally, in some states, such as Texas and

79. *E.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1075 (9th Cir. 2007) (applying California law); *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1043 (9th Cir. 2001) (applying California law); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012).

80. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 998 (9th Cir. 2010); *Hermosillo v. Davey Tree Surgery Co.*, No. 18-CV-00393-LHK, 2018 WL 3417505, at *19 (N.D. Cal. July 13, 2018) (applying California law); *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 306-08 (Cal. Ct. App. 2004) (applying California law); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998) (applying West Virginia law). Courts in other states have characterized this approach as a per se rule, at least where arbitration agreements are concerned, though that would seem to overstate the pertinent case law. *See Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 755 (Tenn. 2015).

81. *E.g.*, *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 921 (W. Va. 2011); *cf. Dan Ryan Builders*, 737 S.E.2d at 560 (holding that "under the doctrine of unconscionability, a trial court may decline to enforce a contract clause . . . if the obligations or rights created by the clause unfairly lack mutuality.").

82. *See* cases cited *supra* note 79.

83. *See, e.g.*, *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 434 (Mo. 2015) (en banc) (stressing that nonmutuality is only one pertinent factor in the unconscionability analysis, but concluding that the arbitration clause in the case at hand was, in fact, unconscionable); *Berent*, 466 S.W.3d at 755 (stressing that there was no per se rule against nonmutual arbitration clauses but concluding that the arbitration clause in the case at hand was unconscionable).

84. *See, e.g.*, *Desert Autosports LLC v. Auto. Fin. Corp.*, No. CV-13-01211-PHX-DGC, 2013 WL 4231151, at *1 (D. Ariz. Aug. 14, 2013) (holding that nonmutuality of a forum selection clause alone is insufficient to support a finding of unconscionability); *Mason v. Acceptance Loan Co.*, 850 So. 2d 289, 301-02 (Ala. 2002) (holding that "[w]hile relevant to any unconscionability analysis, [nonmutuality] cannot *alone* be determinative."); *Green Tree Fin. Corp., v. Wampler*, 749 So. 2d 409, 417 (Ala. 1999) (holding that the one-sidedness of an arbitration clause alone does not amount to a violation of public policy).

85. *See, e.g.*, *Desert Autosports LLC*, 2013 WL 4231151, at *1; *Mason*, 850 So. 2d at 301-02; *Green Tree Fin. Corp.*, 749 So. 2d at 417.

Georgia, the symmetry criterion appears to play little or no role in the unconscionability analysis.⁸⁶

In Part II, I show that this last approach is preferable. Despite the symmetry criterion's intuitive allure, it fails to bring about more efficient or fairer outcomes.

II. THE ECONOMICS OF BOILERPLATE CONTRACTS

In an ideal contractual setting, characterized by the absence of transaction costs, information asymmetries, externalities, and market power, the symmetry criterion is unnecessary and typically detrimental: in this ideal setting, both parties, left to their own devices, will choose the contractual design that maximizes their combined gains, their "joint payoff," from contracting. Any constraints that the law imposes on the contractual design, including the requirement that some or all contractual provisions have to be symmetrical, will prove either irrelevant or harmful: if the pertinent constraints lead the parties to choose a contractual design that they would have chosen anyway, they are irrelevant.⁸⁷ If the constraints force the parties to deviate from the contractual design that they consider optimal, they are harmful.

In real life, of course, the formation of contracts rarely, if ever, occurs under ideal conditions. Most notably, contracts routinely involve boilerplate terms: the fine print that one party has prepared in advance.⁸⁸ Boilerplate terms are generally lengthy and hard to understand.⁸⁹ Therefore, consumers generally fail to read them.⁹⁰ As a result, the merchant using the boilerplate terms knows their content, but the consumer does not.⁹¹ To address this informational asymmetry, and the risk of highly one-sided

86. See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183 (3d Cir. 1999) (applying federal law to determine the enforceability of an arbitration provision and holding nonmutuality does not make an arbitration agreement unenforceable); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001) (refusing to hold an arbitration clause unenforceable for nonmutuality); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 233 (Tex. 2008) (applying Texas law and holding that "arbitration clauses generally do not require mutuality of obligation.")

87. In economic parlance, they are "nonbinding" since they fail to have an impact on the solution to the parties' maximization problem.

88. Many authors have noted the ubiquity of such boilerplate terms in practice. E.g., Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 723 (2008); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003).

89. Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 746 (2002).

90. See, e.g., Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 294 (1990); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983); Omri Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 EUR. REV. CONTRACT L. 1, 2 (2009); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971).

91. Hillman, *supra* note 89, at 746.

contractual provisions that it may engender, courts rely on the doctrine of unconscionability.⁹²

For the symmetry criterion, the ubiquity of boilerplate terms in everyday contracting raises an important issue: even if the application of the symmetry criterion cannot be justified in an ideal contractual setting, does the symmetry criterion constitute an efficient tool for policing boilerplate contracts?

To address this question, one must delve into the economics of boilerplate contracts. As a preliminary matter, a few remarks on the terminology employed in this Article are helpful. Because the informational asymmetry resulting from the use of boilerplate contracts is particularly obvious in consumer transactions, I will refer to the party that drafted the boilerplate contract as the “merchant” and to the other party as the “consumer.”⁹³ Furthermore, I will refer to boilerplate terms that benefit the consumer as good boilerplate terms and to terms that are detrimental to the consumer as bad boilerplate terms.⁹⁴

A. *The Lemon Problem*

Economists conceptualize the boilerplate problem as a “lemon problem.”⁹⁵ The pertinent narrative can be summarized as follows: Consumers know the use of bad or good boilerplate terms is common. However, because consumers often fail to read boilerplate contracts, they do not know whether any particular contract that they are entering into contains good or bad boilerplate terms. Accordingly, consumers will base their decision on whether to enter into a contract, not on the actual quality of the boilerplate terms that the merchant uses but rather on the expected quality,⁹⁶ where the expected quality is equal to the average quality of boilerplate terms used by all merchants.⁹⁷ Therefore, if at least some portion of merchants uses bad boilerplate terms, rational consumers will only accept a contract price that reflects the risk of receiving bad boilerplate terms.

Merchants are aware of this dynamic. They understand that consumers are ignorant of the actual quality of the boilerplate terms used.

92. See, e.g., Becher, *supra* note 88, at 768 (noting that “unconscionability doctrine is an important judicial tool for coping with transactions entered with imperfect information”); Dammann, *supra* note 17, at 190 (arguing that the traditional response to the informational asymmetry between merchants and consumers has been to declare excessively onerous terms void); Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 CAN. BUS. L.J. 437, 439 (1991) (explaining why the unconscionability doctrine may serve as a corrective for informational asymmetries between merchants and consumers).

93. Cf. Dammann, *supra* note 17, at 189 (employing the same terminology).

94. This is not meant to obscure the fact that boilerplate contracts can also be used in business-to-business (B2B) or consumer-to-consumer (C2C) contracts.

95. The term “lemon problem,” and the economic model associated with this term, were introduced by George A. Akerlof. See generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

96. E.g., Dammann, *supra* note 17, at 190; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995).

97. Dammann, *supra* note 17, at 190.

Therefore, an individual merchant is unable to charge a higher price in exchange for offering good boilerplate terms.⁹⁸ Hence, assuming that it is less burdensome for the merchant to use bad boilerplate terms than to use good boilerplate terms, merchants will only offer bad boilerplate terms.⁹⁹ After all, why should a merchant use costly, high-quality boilerplate terms if consumers do not reward the merchant? As merchants increasingly use bad boilerplate terms, consumers realize that they are more likely to end up with these bad terms, meaning that the expected quality of boilerplate terms declines.¹⁰⁰ This process continues, ultimately, until all merchants use bad boilerplate terms,¹⁰¹ and consumers are only willing to pay a price reflecting this fact.¹⁰²

This outcome constitutes a Nash equilibrium: a combination of strategies adopted by a game's players such that each individual player's strategy constitutes the best response to the other players' strategies.¹⁰³ Offering bad boilerplate terms is the merchant's best response to the fact that no buyer pays higher prices for good boilerplate terms.¹⁰⁴ At the same time, paying a low price is the consumer's best response to the fact that all merchants use bad boilerplate terms. Crucially, in this Nash equilibrium, consumers are not being overcharged. On the contrary, they are getting exactly what they pay for: bad boilerplate terms.¹⁰⁵ Nonetheless, the equilibrium is inefficient because it prevents certain mutually beneficial transactions: some or even most consumers would be happy to pay a higher price in exchange for better boilerplate terms, and some or all merchants would be more than willing to supply better boilerplate terms for a higher price.¹⁰⁶ However, because consumers do not know the actual content of the boilerplate terms that they agree to, they are unable to distinguish good from bad boilerplate terms.¹⁰⁷ Therefore, contracts that involve paying a higher price for good boilerplate terms are unlikely to be formed.

B. *Skeptics*

Not everyone agrees that a failure to read contracts is bound to result in a lemon problem. Some scholars have suggested that other market mechanisms, such as reputational incentives or the existence of an informed minority of consumers, may prevent a lemon market.¹⁰⁸ Although these mechanisms have the potential to attenuate or even eliminate lemon

98. Eisenberg, *supra* note 96, at 244; Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & ECON. 461, 485 (1974).

99. Eisenberg, *supra* note 96, at 244.

100. *Id.*; see also Dammann, *supra* note 17, at 190.

101. Dammann, *supra* note 17, at 190.

102. *Id.*

103. E.g., DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 11 (11th ed. 1991).

104. Dammann, *supra* note 17, at 190.

105. *Id.*

106. *Id.*

107. *Id.*

108. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 648–56 (1979).

problems in some markets, their economy-wide relevance should not be overestimated.¹⁰⁹

1. Reputational Incentives

First, this Section focuses on reputational incentives. Although consumers typically fail to read boilerplate contracts at the time of signing, they may well learn of burdensome clauses once a conflict between the parties develops.¹¹⁰ For example, a tenant may not have been aware that their lease agreement contained a liability waiver. However, the tenant will find out when they try to collect damages from the landlord and the landlord invokes the waiver in question. Therefore, if a merchant uses particularly one-sided contractual provisions, consumers may eventually spread the word about this practice, and future consumers may be unwilling to contract with the merchant in question. Accordingly, reputational concerns may prevent merchants from using extremely one-sided provisions in the first place.¹¹¹

How effective are reputational incentives in practice? Several considerations suggest that they are unlikely to constitute a satisfactory answer to the boilerplate problem. First, reputations constitute a rather coarse mechanism.¹¹² Except in the most salient cases, the public is unlikely to learn of individual instances in which merchants invoked unfair boilerplate provisions.¹¹³ Second, even if some of the less outrageous cases were brought to the public's attention, consumers would typically lack the necessary expertise to determine whether or not the consumer had been treated unfairly.

Even in online markets where customers can benefit from consumer reviews, reputational incentives are unlikely to prevent the use of bad boilerplate terms. The vast majority of reviews focus on the quality of the product or service purchased rather than on the content of the boilerplate terms that the merchant uses.¹¹⁴ Tellingly, the only empirical study focusing on the relationship between ratings and boilerplate conditions was unable to find a positive correlation between the quality of boilerplate terms and the seller's rating.¹¹⁵ Moreover, online reviews are well-known to be vulnerable to manipulation.¹¹⁶ Some merchants write reviews for their own

109. Dammann, *supra* note 17, at 191–93 (pointing out various limitations of the informed-minority argument and reputation-based arguments).

110. *Id.* at 192.

111. Cf. R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 663 (1996) (reasoning that reputational incentives will prevent the use of extremely one-sided terms in some markets).

112. Dammann, *supra* note 17, at 192.

113. Becher, *supra* note 88, at 751.

114. Dammann, *supra* note 17, at 192.

115. Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618, 1643 (2010).

116. David Streitfeld, *His Biggest Fan Was Himself*, N.Y. TIMES: BITS (Sept. 4, 2012, 10:42 AM), <https://bits.blogs.nytimes.com/2012/09/04/his-biggest-fan-was-himself/> (noting that one-third of all reviews may be fake).

products.¹¹⁷ Others offer freebies to induce select customers to write positive reviews.¹¹⁸ Yet others pay “review factor[ies]” to contribute favorable reviews.¹¹⁹ Moreover, these various tactics can be applied cumulatively.

The problems do not stop there. Whereas a seller may not be able to easily change the physical qualities of the products for sale, the seller can change the quality of the boilerplate terms used from one day to the next. Nothing prevents a merchant from changing the boilerplate terms for the worse, with respect to future clients, once the merchant has accumulated a sufficient number of positive reviews. Customers can, of course, react by writing negative reviews that complain about the new boilerplate terms.¹²⁰ But incentives are stacked against them.¹²¹ This is because, as the number of existing reviews increases, the marginal impact of each additional review declines.¹²² Differently put, once a large number of reviews have been written, each individual review will only have a slim impact on the product’s or merchant’s average rating. Hence, customers may abstain from writing reviews, knowing that their review will have little impact anyway.

Another challenge to the effectiveness of reputational constraints lies in the possibility of selective enforcement.¹²³ Merchants, armed with terabytes of customer data, may be able to anticipate which types of customers are likely to litigate, or otherwise draw public attention to, their complaints and which ones are not.¹²⁴ For example, an online retailer may know that middle-aged customers living in Iowa who buy office equipment are more likely to file suit or initiate arbitration proceedings than twenty-somethings residing in California who purchase consumer electronics. Hence, merchants can minimize the reputational damage resulting from the use of bad boilerplate terms by only invoking the relevant boilerplate provisions in those cases in which they are reasonably sure that the consumer will not publicize the case. In sum, reputational incentives are often unlikely to eliminate or substantially reduce merchants’ incentives to use bad boilerplate terms.¹²⁵

117. *Id.*

118. David Streitfeld, *For \$2 a Star, an Online Retailer Gets 5-Star Product Reviews*, N.Y. TIMES (Jan. 27, 2012), <https://www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html>.

119. David Streitfeld, *In a Race to Out-Rave Rivals, 5-Star Web Reviews Go for \$5*, N.Y. TIMES (August 19, 2011), <https://www.nytimes.com/2011/08/20/technology/finding-fake-reviews-online.html?auth=linked-google>.

120. *See id.*

121. *See id.*

122. *See id.*

123. *Cf.* Becher, *supra* note 88, at 747–48 (highlighting the possibility of ex-post discrimination).

124. Corporations’ efforts to predict individual consumers’ future behavior is well known, the insurance industry being a typical example. *See* Meghan F. McClure, *Adverse Action Notices Under the FCRA: The Supreme Court Provides Guidance*, 12 N.C. BANKING INST. 273, 276 (2008) (pointing out that “[i]nsurance companies use credit reports and credit scores to help predict the likelihood that a consumer will file an insurance claim, commit insurance fraud, or commit arson.”).

125. Dammann, *supra* note 17, at 193.

2. The Informed Minority

Some scholars have argued that the existence of an “informed minority” of consumers can prevent the emergence of a lemon market.¹²⁶ According to this view, even though most consumers do not read boilerplate contracts, at least a minority of consumers do.¹²⁷ Merchants seek to keep these informed consumers as customers and, therefore, have an incentive to offer them good boilerplate terms. Assuming that sellers cannot distinguish which consumers are informed and which are uninformed, they have to offer good boilerplate contracts to all of them. Thus, uninformed consumers benefit from the existence of informed consumers.¹²⁸

It is possible that the existence of an informed minority offers a certain amount of protection against bad boilerplate terms in at least some markets. However, as with reputational incentives, there are reasons to question the economy-wide effectiveness of this mechanism. To begin with, fear of losing informed consumers as customers can only incentivize merchants to use good boilerplate terms if that minority is sufficiently large.¹²⁹ However, there is no evidence that even a substantial minority of consumers actually read, let alone understand, boilerplate terms.¹³⁰ In fact, the existing empirical evidence suggests otherwise. In a landmark study, Yanis Bakos, Florencia Marotta-Wurgler, and David Trossen examined how many shoppers read the boilerplate contracts of online software sellers.¹³¹ They found that “only one or two in 1,000 shoppers access a product’s [end user license agreement] for at least 1 second.”¹³² Furthermore, “the few shoppers who do access [end user license agreements] do not spend enough time doing so to have digested more than a fraction of their content.”¹³³

Finally, the informed minority argument rests on the assumption that merchants cannot offer different boilerplate terms or different levels of enforcement to the informed minority and the uninformed majority.¹³⁴ However, this assumption seems highly dubious. First, merchants in the digital age are frequently armed with enough customer information to predict at least to some degree which customers are informed and which ones are not.¹³⁵ Second, even when merchants do not have this information, they can offer different bundles of products and services, allowing consumers

126. Schwartz & Wilde, *supra* note 108, at 655.

127. *Id.*

128. Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 936 (2006); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1257 (1982).

129. Dammann, *supra* note 17, at 191.

130. Becher, *supra* note 88, at 738.

131. Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 8–10 (2014).

132. *Id.* at 3.

133. *Id.* at 32.

134. Cruz & Hinck, *supra* note 111, at 672; Schwartz & Wilde, *supra* note 108, at 654.

135. Becher, *supra* note 88, at 747; Dammann, *supra* note 17, at 192.

to self-select into different groups.¹³⁶ For example, merchants can offer a basic bundle with bad boilerplate terms and a slightly more expensive version with good boilerplate terms. Only informed consumers will be willing to pay a higher price for the more expensive bundle, and the merchant can thus continue to provide the uninformed majority with bad boilerplate terms.¹³⁷ In sum, the informed minority argument has very little force in today's digital age. Thus, the lemon problem remains a crucial challenge for consumer contract law.

C. *The Role of the Unconscionability Doctrine*

The existence of a lemon market in the area of boilerplate contracts provides a powerful argument for legal intervention. In particular, it provides an economic justification for the doctrine of unconscionability, which allows courts to invalidate contractual terms that are particularly one-sided.¹³⁸ The underlying idea is simple. The unconscionability doctrine guarantees that boilerplate conditions satisfy a minimum standard of quality and thereby prevents a complete market failure.¹³⁹ Consumers know that they can expect at least the level of quality prescribed by the unconscionability doctrine, and they adjust the price that they are willing to pay accordingly.¹⁴⁰

The practical importance of this legal intervention cannot be overstated. Imagine that a boilerplate contract could contain any conceivable term. For example, imagine that a credit card contract could include a clause that calls for a one million dollar fee in case of late payment. If this were a possibility, a rational consumer might well refuse to sign any

136. Note that this argument is slightly different from the discrimination argument typically invoked in the literature on boilerplate contracts. *See, e.g.*, Becher, *supra* note 88, at 746 (pointing out that “[s]ellers can and do discriminate between informed and noninformed buyers”). Direct discrimination between informed and uninformed consumers requires the merchant to know which consumers are informed and which ones are uninformed. By contrast, by offering different bundles of boilerplate terms at slightly different prices, merchants can rely on consumers to self-select. Uninformed consumers do not know that one set of boilerplate terms is better than the other and therefore have no reason to pay the higher price. By contrast, consumers who are aware of the boilerplate terms’ content (“informed consumers”) may decide that the more favorable terms justify the slightly higher price. That way, even though the merchant does not know *ex ante* which consumers are informed and which ones are not, the merchant manages to retain informed consumers as customers while still using bad boilerplate terms in his contracts with uninformed consumers.

137. *Id.* at 748–51.

138. *E.g.*, Korobkin, *supra* note 88, at 1271 (discussing the unconscionability doctrine as a solution to the consumer’s ignorance of the content of boilerplate terms).

139. *Cf.* Dammann, *supra* note 17, at 190 (arguing that “if the parties cannot successfully bargain for good boilerplate, then the law should intervene and correct this market failure by imposing minimum quality standards for boilerplate.”).

140. An equivalent argument has been made with respect to minimum quality standards for services. *Cf.* Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1342 (1979) (concluding that in the presence of a lemon market, the imposition of minimum quality standards can be socially beneficial); Tim R. Sass, *Licensure and Worker Quality: A Comparison of Alternative Routes to Teaching*, 58 J.L. & ECON. 1, 2 (2015) (pointing out that “setting minimum quality standards . . . provides consumers with information and avoids the classic lemons problem whereby consumers’ inability to distinguish quality differences leads to only low-quality practitioners in the market”).

contract that has not been thoroughly checked by a lawyer. As a result, transaction costs would skyrocket.

The unconscionability doctrine is a less than perfect tool to address the lemon problem. In an ideal world, a perfectly informed court could use the unconscionability doctrine to ensure, in each case, a level of boilerplate quality that maximizes the parties' joint payoff from the contract. To do so, the court could announce in advance that it will invalidate any contract that deviates from the terms that the parties would have negotiated in the absence of any informational asymmetry. In the real world, however, courts have to be pragmatic and opt for a reasonable level of fairness.¹⁴¹ Efficiency losses are thus unavoidable: Too strict an application of the unconscionability doctrine means that contracting parties are prevented from using certain contractual provisions, even though their use would have been mutually beneficial.¹⁴² Too lax an approach implies that consumers obtain too little protection against burdensome clauses, and that they will therefore abstain from entering into some mutually beneficial contracts.¹⁴³ In sum, while the unconscionability doctrine helps to mitigate the lemon problem, it is far from a perfect solution.

III. SYMMETRY & ECONOMIC EFFICIENCY

What does all of this imply for the symmetry criterion? I answer this question with a series of game-theoretical models, each of which makes a different set of assumptions. These models yield a clear result: depending on one's assumptions, the symmetry criterion can lead to efficient or inefficient outcomes. However, there is no reason to believe that the assumptions under which the symmetry criterion leads to efficient outcomes are typically met in practice.

A. Shared Assumptions

All of the models assume that consumers do not read boilerplate terms and are therefore ignorant of their content. This assumption accurately captures real life.¹⁴⁴ It is also justified for a different reason: if consumers had the time to read and the expertise to understand a contract's terms, they typically would not need the protection of the unconscionability doctrine,¹⁴⁵ let alone the symmetry criterion. Instead, consumers would select merchants who use fair boilerplate terms. Furthermore, merchants

141. Korobkin, *supra* note 88, at 1278.

142. *Cf.* Leland, *supra* note 140, at 1335 (presenting a formal assessment of the costs resulting from minimum standards that are set too high or too low).

143. *Id.*; *see* Dammann, *supra* note 17, at 193 (noting that courts may err by imposing excessively strict minimum quality standards, thereby forcing consumers to pay high prices for high-quality products even though consumers might prefer to pay low prices for low-quality products).

144. *See* sources cited *supra* note 90.

145. *Cf.* 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, 985 (2006) (noting, with respect to exclusionary clauses in boilerplate terms, that if consumers read and understood such clauses, no intervention would be necessary).

would start using fair terms because they would know that customers read their boilerplate terms.

Furthermore, the various models assume that each merchant interacts only once with a particular consumer. In other words, the models capture a “one-stage” game rather than a “multi-stage” game.¹⁴⁶ In real life, the same merchants and consumers may interact repeatedly, often on the basis of the same boilerplate conditions. This matters, in part, because over time consumers may learn more about the content of merchants’ boilerplate conditions, which eliminates the lemon problem. As shown above, in the absence of informational asymmetry, it is not clear what could justify the imposition of the symmetry rule.¹⁴⁷

The various models also assume that: (a) there are infinitely many merchants, (b) there are infinitely many consumers, and (c) markets are competitive. In practice, there are some markets with few merchants, and some merchants enjoy monopolies or near-monopolies. However, the peculiarities of monopolistic and oligopolistic markets lie beyond the scope of this Article.¹⁴⁸ Moreover, it is worth noting that the information asymmetry that lies at the lemon market’s core may be less pronounced in markets with monopolistic or near-monopolistic merchants: if there is only a single merchant, all consumers in the pertinent market tend to be exposed to the same boilerplate conditions, and thus word-of-mouth is likely to be more effective in spreading knowledge about the merchant’s terms.¹⁴⁹ For example, given Amazon’s dominance as an online retailer, many consumers are aware that Amazon’s returns policy allows for the return of purchased articles within thirty days.¹⁵⁰

The assumption that there are infinitely many sellers has an important implication: in a market with infinitely many merchants and consumers, the decision of any individual merchant to use specific boilerplate terms has no tangible impact on the average quality of boilerplate terms.¹⁵¹ In such a market, individual sellers’ boilerplate terms are merely a single drop in an ocean of boilerplate terms. Accordingly, an individual merchant

146. In game theory, one can distinguish games based on whether the players only interact once or multiple times. In the latter case, we can speak of a repeated game or multi-stage game. *See, e.g.*, FUDENBERG & TIROLE, *supra* note 103, at 146 (explaining the concept of repeated games).

147. Dammann, *supra* note 17, at 193–94.

148. *See* Gilo & Porat, *supra* note 145, at 999–1002, 1010–13 (2006) (discussing various ways in which merchants with market power can abuse boilerplate terms).

149. *See id.* at 1009 (noting that “[i]t is understandable that a monopolistic supplier may want to use a value-reducing boilerplate provision”).

150. *About our Returns Policies*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201819200 (last visited Mar. 18, 2020).

151. Let Q_n be the quality of the boilerplate terms used by merchant n , where Q_n can take on any value between 0 (being the worst value) and 10 (being the best possible value), and let N be the total number of merchants in the market. The average quality of boilerplate terms is then given by $Q = \frac{\sum_{i=1}^N Q_i}{N} = \frac{\sum_{i=1}^{n-1} Q_i}{N} + \frac{Q_n}{N} + \frac{\sum_{i=n+1}^N Q_i}{N}$. As the number of merchants (N) approaches infinity, the term $\frac{Q_n}{N}$ approaches zero. Therefore, as the number of merchants (N) approaches infinity, the impact that a quality of merchant n ’s boilerplate terms (Q_n) has on the average quality of boilerplate terms (Q) approaches zero.

does not have to worry about whether using specific boilerplate terms has any impact on consumers' expectations regarding the average quality of boilerplate terms used by all merchants in aggregate.

Once one embraces these various assumptions, consumers' decisions become predictable. Because consumers fail to read boilerplate terms, they do not know the actual content of an individual merchant's boilerplate terms, and, therefore, a consumer cannot base their decision whether or not to accept or reject a merchant's offer on the boilerplate terms' actual content. Instead, as in Akerlof's standard lemon model,¹⁵² consumers can take into account only the average quality of boilerplate terms used by all merchants in aggregate. Moreover, given that an individual merchant's boilerplate terms have no tangible impact on the average quality of boilerplate terms, individual merchants have no reason to take into account consumers' preferences in deciding whether or not to include specific boilerplate terms.¹⁵³ Thus, when analyzing the question of which legal rule is most likely to cause merchants to adopt efficient boilerplate terms, we can disregard consumers' choices and, instead, focus solely on regulators and merchants. I use the term regulator as a neutral expression that covers both lawmakers and courts.¹⁵⁴

B. *Players*

All of the models that I introduce have two main types of players: regulators and merchants. The regulator acts first by deciding which contractual provisions are binding and which ones are void. The regulator can also decide that a one-sided clause favoring the merchant, the "original clause," is only binding if it is paired with a "matching clause" that mirrors the original clause. To clarify, if a contract contains only the original clause or only the matching clause, it is one-sided. By contrast, together, the original clause and the matching clause yield a symmetrical clause. Furthermore, the regulator is not limited to declaring specific clauses void. The regulator can also specify the legal default by determining what rules apply if the parties' contract fails to address a particular issue or if the contract's provisions are void.

Crucially, the regulator seeks to achieve a Kaldor-Hicks efficient outcome: an outcome that maximizes merchants' and consumers' joint

152. Akerlof, *supra* note 95, at 489.

153. This is obvious if one takes account of the fact that merchants only have an incentive to increase the quality of their boilerplate terms if doing so will cause consumers to pay a higher price. However, recall that an individual merchant's decision to increase the quality of his boilerplate terms has no tangible impact on the average quality of boilerplate terms in the market. *See supra* note 151. Furthermore, recall that consumers do not know the content of individual boilerplate terms and will, therefore, base the price that they are willing to pay solely on the expected (average) quality of boilerplate terms in the market. It then follows that the merchant has no incentive to increase the quality of his boilerplate terms.

154. Lawmakers regulate by way of statutes; courts regulate by way of precedents.

payoffs from their contracts.¹⁵⁵ In practice, it may be that not all regulators will focus on achieving efficient outcomes. However, that is beside the point. This Article does not seek to analyze how regulators behave in practice. Instead, it focuses on the question of how regulators should behave if the goal is to maximize the parties' joint payoff.

The merchant acts second and decides whether or not to include the original and the matching provisions in the contract. Unlike the regulator, the merchant is solely interested in maximizing the merchant's own payoff from the contract. Note, though, that the choice that the merchant has to make depends on whether the court has imposed a symmetry requirement. If the court has imposed no symmetry requirement, the merchant can decide with respect to both the original clause and the matching clause, individually, whether they benefit the merchant. By contrast, if the court has imposed a symmetry requirement, the merchant can only choose between including both clauses (original and matching clause) and excluding both clauses. Thus, in this case, the merchant must decide whether the bundle consisting of the original and the matching clause benefits the merchant or not.

This leaves the question of how the merchant decides if his personal payoff from including the original or matching clause—or, if the court has imposed a symmetry requirement, the payoff from including both clauses as a bundle—is exactly zero. In this case, the merchant is indifferent between inclusion and exclusion. To simplify matters, all models assume that in this neutral scenario, the merchant decides against inclusion. This is a plausible assumption because merchants have no reason to clutter their boilerplate with terms that do not offer any benefits.

C. Model 1: The Informed Regulator

The first model (Model 1) addresses a scenario in which the regulator is quite well-informed.

1. Additional Assumptions

For Model 1, additional assumptions are necessary. First, I assume that the regulator knows how the original clause and the matching clause impact merchants and consumers. I use the terms " O_{Mer} " and " O_{Con} " to denote the original clause's impact on merchants and consumers, respectively. Similarly, I use the terms " M_{Mer} " and " M_{Con} " to denote the matching clause's impact on merchants and consumers. Because the combination of

155. The so-called Kaldor-Hicks criterion was developed independently by two economists, Nicholas Kaldor and John Richard Hicks. For the two landmark articles, see generally J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939). For a fundamental critique of the Kaldor-Hicks criterion (asserting that the Kaldor-Hicks test, as commonly applied, is wrong), see Richard S. Markovits, *A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, the Coase Theorem, and Virtually all Law-and-Economics Welfare Arguments are Wrong*, 1993 *U. ILL. L. Rev.* 485, 486–87 (1993).

the original clause and the matching clause yields a symmetrical clause, one can determine the symmetrical clause's impact by adding the relevant variables. For example, the symmetrical clause's impact on the merchant equals $O_{Mer} + M_{Mer}$.

Second, I assume that there is only one type of merchant and only one type of consumer. In other words, while there are infinitely many merchants and consumers, all merchants share the same characteristics, and all consumers share the same characteristics. I refer to this assumption as the "single-type assumption." Note that the single-type assumption does not mean that merchants have the same characteristics as consumers.

One implication of the single-type assumption is that any given contractual provision impacts all merchants in the same way. It also impacts all consumers in the same way. However, a clause's impact on consumers may be different from its impact on merchants.

The single-type assumption is quite unrealistic. Therefore, I abandon this assumption in a subsequent model and analyze a scenario involving different types of merchants and consumers.¹⁵⁶ For now, however, the single-type assumption is a useful simplification.

Finally, I assume that the original clause benefits the merchant, whereas the matching clause harms the merchant. This assumption can be expressed via the following two inequalities:

$$(A.1) \quad O_{Mer} > 0$$

$$(A.2) \quad M_{Mer} < 0$$

Assumptions A.1 and A.2 are justified because, in their absence, the issue of symmetry could not arise in the first place. If the original clause harmed rather than benefited the merchant, the merchant would not seek to include the original clause in the contract. If, on the other hand, the matching clause benefited rather than harmed the merchant, the merchant would voluntarily include the matching clause, thereby ensuring a symmetrical contractual design without the regulator's intervention.¹⁵⁷

2. The Merchant's Strategy

The merchant knows that the decision whether or not to include particular contractual clauses has no impact on the average quality of boilerplate terms in the market. The merchant also knows that consumers only react to the average quality of boilerplate terms. Accordingly, the merchant rationally ignores whatever impact the original clause or the

156. For a discussion of Model 3, see *infra* Part III.E.

157. Astute readers may note that this analysis neglects the possibility that the matching clause's impact on the merchant is positive, whereas the original clause's impact on the merchant is negative. In that case, the merchant would voluntarily include the matching clause but fail to include the original clause. However, note that the terms "original clause" and "matching clause" are assigned arbitrarily. Therefore, if the matching provision benefits the merchant, whereas the original provision harms the merchant, one can switch the provisions' designations, and assumptions A.1 and A.2 are satisfied.

matching clause has on consumers. Instead, the merchant focuses solely on the personal impact of the contract's content.

If the regulator takes no action, the merchant includes the original clause but not the matching provision. By contrast, if the regulator imposes a symmetry requirement, the merchant weighs the personal benefits from the original clause against the costs from the matching clause. If the two clauses' combined impact on the merchant is positive ($O_{Mer} + M_{Mer} > 0$), the merchant includes both clauses. If their combined impact on the merchant is negative or zero ($O_{Mer} + M_{Mer} \leq 0$), the merchant does not include either clause.

3. The Regulator's Optimal Strategy

In Model 1, the regulator knows the impact that the original clause and the matching clause have on the merchant and consumer for each type of provision. The regulator's strategy can therefore take into account the parties' joint payoff from the original clause and the matching clause. Recall that a clause's joint payoff is defined as the sum of the clause's effects on both parties.¹⁵⁸ In other words, the parties' joint payoff from the original clause (JP_O) equals $O_{Mer} + O_{Con}$. Similarly, the parties' joint payoff from the matching clause (JP_M) equals $M_{Mer} + M_{Con}$. Furthermore, the parties' joint payoff from both clauses ($JP_{O\&M}$) equals $O_{Mer} + O_{Con} + M_{Mer} + M_{Con}$.

a. Case 1: Both the Original Clause and Matching Clause Are Inefficient

First, let us consider the case that both the original clause and the matching clause are inefficient, meaning that the joint payoff from the original clause is negative ($JP_O < 0$) and that the joint payoff from the matching clause is also negative ($JP_M < 0$). In this case, the parties' total joint payoff is maximized if neither clause becomes part of the contract.

The easiest way for the regulator to achieve this outcome is to hold void the original clause so that the original clause cannot become part of the contract. Moreover, the merchant has no incentive to include the matching clause because, by assumption A.1, the matching clause's impact on the merchant is negative.

By contrast, if the regulator imposes a symmetry requirement instead of banning the original clause, the outcome can be suboptimal: under a symmetry rule, the merchant weighs the personal benefits from the original clause against the costs that the merchant incurs from the matching clause. If their combined impact on the merchant is negative or zero ($O_{Mer} + S_{Mer} \leq 0$), the merchant does not include either clause, resulting in the optimal outcome. However, if the two clauses' combined impact on the

158. See *supra* Part III.C.1.

merchant is positive ($O_{Mer} + S_{Mer} > 0$), the merchant includes both clauses, resulting in the worst possible outcome.

A numerical example illustrates this problem. Assume that $O_{Mer} = 3$, $O_{Con} = -5$, $M_{Mer} = -2$, and $M_{Con} = 1$. In this case, the parties' joint payoff from the original clause is negative ($3 - 5 = -2$), and the same is true for the matching clause ($-2 + 1 = -1$). In other words, both clauses are inefficient. However, the clauses' combined impact on the merchant is positive ($3 - 2 = 1$). Thus, if the regulator imposes a symmetry requirement, the merchant will rationally include both clauses in the contract.

b. Case 2: Both Clauses Increase Efficiency

Second, let us consider the case where both clauses increase efficiency ($JP_O > 0$ and $JP_M > 0$). In this case, the ideal outcome would require both clauses to become part of the contract.

One way for the regulator to achieve this outcome is to declare the matching clause to be part of the jurisdiction's default rules and to provide that any boilerplate term deviating from this default rule is void.¹⁵⁹ This approach would ensure that the matching clause becomes part of the contract. No regulatory intervention is necessary concerning the original clause. Because the original clause benefits the merchant, the merchant will include it voluntarily.

What will happen if the regulator opts for a symmetry requirement instead? In that case, the outcome once again depends on the circumstances. If the two clauses' combined effect on the merchant is positive, the merchant includes both clauses, which is the optimal outcome. By contrast, if the two clauses' combined effect on the merchant is negative or zero, the contract includes neither clause, which is the worst possible outcome.

c. Case 3: One Clause Increases Efficiency, the Other Is Inefficient

Third, it is possible that one of the two clauses increases efficiency and the other is inefficient. In that case, the ideal outcome requires that only the efficient clause becomes part of the contract.

In the absence of any symmetry requirement, this ideal outcome is not hard for the regulator to achieve. If the original clause is efficient and the matching clause is inefficient, no intervention is necessary. Given assumptions A.1 and A.2, it is in the merchant's interest to make the original clause part of the contract while abstaining from using the matching clause. If the original clause is inefficient and the matching clause is efficient, the regulator can achieve the optimal outcome by a combination of measures: the regulator can ban the original clause while also declaring

159. Note that this does not turn the pertinent rule into a mandatory rule: parties are still able to opt out of the pertinent rule, just not via boilerplate terms.

that the legal default corresponds to the matching clause. Additionally, the regulator can ban boilerplate terms that deviate from the default rule to capture the content of the matching clause.

By contrast, if the regulator imposes a symmetry requirement, the outcome is necessarily inefficient. Under a symmetry requirement, merchants can either exclude both provisions or include both provisions. Neither outcome is optimal.

d. Case 4: At Least One Clause Is Efficiency Neutral

Finally, it is conceivable that one or both clauses are efficiency neutral, meaning that their joint payoff is zero. If both clauses are efficiency neutral ($JP_O = 0$ and $JP_M = 0$), it does not matter whether the contract includes them. Hence, in this case, the regulator's decision has no impact on the parties' joint payoff.

If the original clause is efficient ($JP_O > 0$) and the matching clause is efficiency neutral ($JP_M = 0$), the optimal solution is that the original clause becomes part of the contract; whether the contract also includes the matching clause does not matter. The regulator can easily achieve this optimal outcome by taking no action at all, causing the merchant to include the original clause voluntarily. By contrast, if the regulator imposes a symmetry requirement, the optimal outcome is achieved only if $O_{Mer} + M_{Mer} > 0$. Otherwise, the merchant fails to adopt either clause, resulting in an efficiency loss.

Analogous arguments apply, *mutatis mutandis*, in the remaining scenarios:¹⁶⁰ in each case, the regulator can achieve the optimal outcome via a combination of blanket prohibitions and default-rule designations, whereas the symmetry rule's ability to bring about optimal outcomes always depends on whether the merchant's incentives happen to favor the welfare maximizing solution.¹⁶¹

In sum, the symmetry rule proves counterproductive in Model 1. The regulator can easily achieve optimal outcomes in all cases by more traditional means, such as declaring certain types of clauses void or changing

160. The three remaining scenarios are the following: $JP_O < 0$ and $JP_M = 0$; $JP_O = 0$ and $JP_M > 0$; $JP_O = 0$ and $JP_M < 0$.

161. If $JP_O < 0$ and $JP_M = 0$, the optimal outcome requires the original clause to be excluded from the contract. The fate of the matching clause does not matter. The regulator can achieve the optimal outcome by banning the original clause and taking no action on the matching clause. By contrast, the symmetry principle will lead to the optimal outcome solely if $O_{Mer} + M_{Mer} > 0$. If $JP_O = 0$ and $JP_M < 0$, the optimal outcome requires the matching clause to be excluded from the contract; the fate of the original clause does not matter. The regulator can achieve the optimal outcome by taking no action at all. Imposing a symmetry requirement will only result in the optimal outcome if $O_{Mer} + M_{Mer} \leq 0$. Finally, if $JP_O = 0$ and $JP_M > 0$, the optimal outcome requires the matching clause to become part of the contract, whereas the fate of the original clause does not matter. To achieve this optimal outcome, the regulator can create a default rule corresponding to the matching clause and declare that boilerplate terms deviating from this default are void. If the regulator imposes a symmetry requirement instead, the optimal outcome results only if $O_{Mer} + M_{Mer} > 0$.

the legal default. By contrast, the symmetry rule leads to suboptimal outcomes in at least some cases.

D. Model 2: The Uninformed Regulator

In practice, regulators do not always know the effects that particular types of clauses have on merchants and consumers. After all, both lawmakers and courts make decisions that will be applied to future cases, making it difficult to predict their impact. Therefore, the question arises whether the symmetry criterion can be used to improve outcomes in cases where the regulator does not know the original and matching clauses' impact on merchants and consumers. In other words, perhaps the symmetry criterion increases efficiency in an imperfect world by attenuating the problem that regulators have incomplete information.

In this Section, I show that one can, in fact, formulate assumptions under which the regulator's ignorance can render the symmetry rule an efficient regulatory choice.

1. Assumptions for Model 2

Model 2 retains the single-type assumption, as well as the assumption that the original clause benefits the merchant (A.1) and the matching clause harms the merchant (A.2). Unlike Model 1, however, Model 2 assumes that the effects of the original clause and the matched clause are strictly symmetrical: the original clause's impact on the merchant equals the matching clause's impact on the consumer, and the original clause's impact on the consumer equals the matching clause's impact on the merchant. In formal terms:

$$(B.1) \quad O_{Mer} = M_{Con} \qquad (B.2) \quad O_{Con} = M_{Mer}$$

It is vital to distinguish the "strict-symmetry assumption" captured in equations (B.1) and (B.2) from the "symmetry requirement" that the model is meant to justify. The symmetry assumption is a factual assumption regarding the costs and benefits of the original and the matching clause. By contrast, the symmetry requirement refers to the legal requirement that the merchant must either include both or neither clause in the contract. The point of Model 2 is to show that under certain, very narrow assumptions, which include the strict-symmetry assumption, the symmetry requirement promotes efficiency.

A second difference between Model 1 and Model 2 pertains to the information available to the regulator and to the merchants. Recall that in Model 1, both the regulator and the merchants were aware of the impact that the original and the matching clause had on merchants and consumers. Model 2's assumptions regarding the players' information are more complex. Model 2 assumes that both the regulator and the merchants know that the original clause and the matching clause have a symmetrical impact. In

other words, both the regulator and the merchants know assumptions B.1 and B.2. However, only the merchants know what the impact of each clause will be. By contrast, the regulator does not have this information, though the regulator knows that the merchants do.

The intuition behind this information-asymmetry assumption is that regulators (lawmakers or courts) have to adopt rules that will impact parties in future cases. Accordingly, it is plausible that the regulator is unable to predict the rule's impact on future parties when adopting the rule, whereas the merchant who decides whether or not to adopt a particular boilerplate provision has a much better understanding of the provision's impact.

2. The Merchant's Strategy

As in Model 1, the merchant knows that the decision whether or not to include particular contractual clauses has no impact on the average quality of boilerplate terms in the market. Furthermore, the merchant knows that consumers only react to the average quality of boilerplate terms. Accordingly, the merchant rationally ignores whatever impact the original clause or the matching clause has on consumers. Instead, the merchant focuses solely on the personal impact of the contract's content.

If the regulator takes no action, the merchant includes the original clause but not the matching provision. By contrast, if the regulator imposes a symmetry requirement, the merchant weighs the personal benefits from the original clause against the costs of the matching clause. If the two clauses' combined impact on the merchant is positive ($O_{Mer} + M_{Mer} > 0$), the merchant includes both clauses. If their combined impact on the merchant is negative or zero ($O_{Mer} + M_{Mer} \leq 0$), the merchant does not include either clause.

3. The Regulator's Strategy

How can the regulator optimize the parties' joint payoff? A mere combination of inaction, blanket prohibitions, and default-rule designations is insufficient to guarantee optimal outcomes. As long as the regulator does not know the joint payoff from the original clause or the matching clause, no combination ensures optimal outcomes.

For example, if the regulator takes no action, the merchant will adopt the original clause but will fail to adopt the matching clause, meaning that the parties' total joint payoff equals $O_{Mer} + O_{Con}$. If the regulator bans the original clause, the merchant will adopt neither provision, and the parties' total joint payoff equals zero. However, as long as the regulator cannot predict whether the joint payoff from adopting the original clause is

positive or negative, whichever decision the regulator takes will lead to suboptimal outcomes in some cases.¹⁶²

Now consider the symmetry rule's impact. If the regulator imposes a symmetry requirement, there are three possibilities: the two clauses' combined impact on the merchant can be positive, negative, or zero.

a. The Two Clauses' Combined Impact on the Merchant Is Positive

If the two clauses' combined impact on the merchant is positive ($O_{Mer} + M_{Mer} > 0$), the merchant includes both clauses in the contract. Because of assumption B.2, the term M_{Mer} in the inequality $O_{Mer} + M_{Mer} > 0$ can be replaced with the term O_{Con} , thereby obtaining the inequality $O_{Mer} + O_{Con} > 0$. This equation shows that if the two clauses' combined impact on the merchant is positive, the original clause must be efficient. Similarly, if we use B.1 to replace the term O_{Mer} with the term M_{Con} , we obtain the inequality $M_{Con} + M_{Mer} > 0$, demonstrating the matching clause must be efficient as well. Because both clauses are efficient their inclusion in the contract constitutes the optimal outcome.

b. The Clauses' Combined Impact on the Merchant Is Negative

The scenario in which the clauses' combined impact on the merchant is negative ($O_{Mer} + M_{Mer} < 0$) constitutes the flip-side of the previous scenario, and the reasoning is analogous. This time around, the merchant includes neither clause in the contract. By making use of assumptions B.1 and B.2, we can show that $O_{Mer} + M_{Mer} < 0$ implies $O_{Mer} + O_{Con} < 0$ as well as $M_{Con} + M_{Mer} < 0$. Hence, both clauses are inefficient, and the merchant's failure to include them in the contract is the optimal outcome.

c. The Clauses' Combined Impact on the Merchant Is Zero
($O_{Mer} + M_{Mer} = 0$)

If the clauses' combined impact on the merchant is zero ($O_{Mer} + M_{Mer} = 0$), the merchant is indifferent between including and excluding both

162. Whether any of the regulator's options is preferable in terms of maximizing the parties' expected joint payoff depends on the distribution of the underlying variables. For example, assume that O_M , which by assumption A.1 is greater than zero, is a random variable with a uniform distribution between 0 and 1, whereas O_{Con} , which by assumption A.2 is less than zero is a random variable with a uniform distribution between 0 and -1. Furthermore, assume the two random variables are independent. In this case, the joint payoff from the original clause (JP_O), which is given by $O_M + O_{Con}$, is positive if $|O_M| > |O_{Con}|$ and negative if $|O_M| < |O_{Con}|$. Given the distribution assumptions above, both possibilities are equally likely. Hence, the court has no reason to believe that banning the original clause will be more efficient than allowing it or vice versa. If, on the other hand, one makes different assumptions regarding the distribution of the two random variables, a different picture can emerge. For example, assume that, all other assumptions remaining unchanged, O_M has a uniform distribution between 0 and 1, whereas O_{Con} has a uniform distribution between 0 and -2. In that case, the likelihood that $|O_M| > |O_{Con}|$ equals 1/4, meaning that the regulator is well advised to ban the original clause. However, this decision will still produce suboptimal outcomes in some cases because there will be some situations where $O_M + O_{Con} < 0$.

clauses. By assumption, the merchant then includes neither clause. By using B.1 and B.2, we can show that $O_{Mer} + M_{Mer} = 0$ implies $O_{Mer} + O_{Con} = 0$ and $M_{Mer} + M_{Con} = 0$. Thus, from an efficiency perspective, it does not matter whether the contract includes the two clauses; the outcome under the symmetry rule is optimal in this scenario as well.

In sum, given assumptions B.1 and B.2, the symmetry rule proves to be a highly effective mechanism for securing efficient outcomes. Because the regulator does not know the two clauses' impact, the regulator cannot secure efficient outcomes by banning or allowing certain clauses outright. However, the regulator can use the symmetry rule to incentivize the merchant to choose an efficient outcome even though the regulator does not know what that outcome will be.

4. Criticism

In practice, the strict-symmetry assumption—which lies at the model's core—rarely holds. The situations of merchants and consumers are typically quite different. Therefore, the impact that a contractual provision has on the merchant seldom equals the impact that a matching provision has on the consumer.

Arbitration provisions illustrate this point. Arbitration clauses may bring certain benefits for both parties, such as speedier decisions.¹⁶³ However, their impact on each party is nonetheless bound to differ. For example, the merchant is typically a repeat player in arbitration proceedings.¹⁶⁴ Accordingly, the merchant is much more likely to benefit from bias on the part of the arbitrator—who may be reluctant to decide against the merchant for fear of losing a repeat client—than the consumer.¹⁶⁵ Furthermore, even if the contractual arbitration provision applies to both parties, it is the merchant who drafts the provision, determines how the arbitrator will be chosen, and decides what procedural rules apply. The merchant will rationally design the arbitration clause to protect personal interests rather than the consumer's interest. Finally, to the extent that arbitration favors either the plaintiff or the defendant, the benefits that the parties derive from a symmetric arbitration provision depend on which party is more likely to sue the other. It will hardly ever be the case that both parties are *ex ante* equally likely to sue each other. For example, in many consumer sales, the buyer

163. See, e.g., Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 9 (2019) (noting “arbitration’s speed and relative affordability”).

164. E.g., Richard A. Bales & Sue Irion, *How Congress Can Make A More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1084 (2009) (stressing the merchant’s repeat player advantage in arbitration); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 57, 124 (2015) (exploiting a large dataset on arbitration and concluding that “super repeat-playing companies perform particularly well”); but see Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. & PUB. POL’Y. 549, 566 (2008) (questioning the importance of the repeat player advantage in arbitration).

165. Bales & Irion, *supra* note 164, at 1084. Cf. Drahozal, *supra* note 16, at 564 (pointing out that “so long as the unfairness in the arbitral process is pro-business, rather than pro-respondent, a mutuality requirement will not make the process more fair, and may actually make it less fair, than under a nonmutual arbitration clause”).

has to pay before receiving the goods. That means that the seller rarely has reason to sue the buyer, whereas the buyer may well have grounds to sue the seller. As a result, the arbitration provision's impact on the two parties is unequal. In sum, the strict symmetry assumption will hardly ever be realistic.

A failure to meet the strict-symmetry assumption does not necessarily imply that the symmetry requirement leads to inefficient results. There may be other scenarios requiring different sets of assumptions that also render the symmetry requirement an efficient choice. However, the mere fact that certain sets of assumptions exist under which a symmetry requirement improves efficiency is insufficient to justify broadly embracing the symmetry requirement. Instead, the symmetry requirement's supporters would have to show that: (a) there exists a certain set of assumptions that render the symmetry requirement efficient, and (b) these assumptions are typically satisfied in practice. To date, this case has not been made, and there is no reason to believe that it can be made.

E. Model 3: Strict Symmetry and Different Types of Merchants

In this Section, I show that additional complications arise if one accounts for the fact that, in practice, there are typically different types of merchants and consumers. Models 1 and 2 embrace the single-type assumption that all merchants share the same characteristics and all consumers share the same characteristics. However, this Section introduces a model that abandons this assumption. I demonstrate that, even if one assumes that the impact of the original clause and the impact of the matching clause are strictly symmetrical, a symmetry requirement may no longer promote efficiency once one allows for different types of merchants and consumers.

Before introducing a formal model to prove this result, it is helpful to recall the landlord-tenant example from the introduction. Assume that it is always the landlord who drafts the lease agreement. Furthermore, assume that the landlord has to decide whether to include liability waivers protecting one or both parties

Ideally, the landlord would like to introduce a one-sided liability waiver, which protects the landlord against claims brought by the tenant but does not protect the tenant against claims brought by the landlord. However, if the regulator imposes a symmetry requirement, then the lease agreement can only include a liability waiver in favor of the landlord if the lease agreement also includes a liability waiver in favor of the tenant. The merchant would then have to decide whether the benefits of including a waiver protecting the merchant outweigh the costs of including a liability waiver protecting the tenant.

Furthermore, assume that there are two types of landlords: "good" and "bad." A good landlord expects to perform in conformity with the

contract and, therefore, plans to use a liability waiver solely to personally protect against potential frivolous claims brought by the tenant. By contrast, a bad landlord who is protected by a liability waiver will not take reasonable measures to protect the tenant against harm, even though these measures are both legally required and efficient because their benefits to the tenant outweigh their costs to the landlord. Similarly, assume that there are “good” and “bad” tenants. Good tenants use liability waivers in their favor solely to defend against frivolous claims brought by the landlord. Bad tenants wreck the apartment and, if sued, use any liability waiver that the contract may contain to escape liability.

What are the consequences of imposing a symmetry requirement in this context? As shown in Model 3 below, a symmetry rule fails to secure efficient outcomes. On the contrary, it can deter good landlords from their efficient use of liability waivers while doing nothing to discourage bad landlords from their inefficient use of liability waivers. Furthermore, this result holds even if one makes strict symmetry assumptions regarding the costs and benefits that the original clause and the matching clause impose; herein lies the importance of Model 3.

1. Additional Assumptions for Model 3

To analyze situations akin to the landlord-tenant example, it is necessary to be precise regarding the underlying assumptions. I will once again use merchants and consumers to refer to the parties involved.

The model’s core assumption is that different types of merchants and consumers exist. For the sake of simplicity, I assume that there are only two types of merchants and two types of consumers. Each merchant knows his own type, but neither the consumer nor the regulator knows which type of merchant they are facing. Similarly, each consumer knows his own type, but neither the merchant nor the regulator knows which type of consumer they are facing. I will refer to the different types of merchants and consumers as good merchants and bad merchants and as good consumers and bad consumers, respectively. Furthermore, again for simplicity, I assume that half of all merchants and all consumers are good, and that the other half are bad.

The costs and benefits of the original clause depend on the type of merchant using the original clause. Similarly, the costs and benefits of the matching clause depend on the type of tenant involved. Therefore, it is necessary to use a more complicated notation. Hereinafter, where appropriate, I use parentheses at the subscript level to indicate that the contract involves a particular type of merchant or consumer. For example, the term $O_{Con(GoodMer)}$ refers to the impact that the original clause has on a consumer when the clause is used by a good merchant. And, the term $O_{Con(BadMer)}$ refers to the impact that the original clause has on a consumer when the clause is used by a bad merchant. Similarly, the terms $M_{Mer(GoodCon)}$ and $M_{Mer(BadCon)}$ refer to the matching clause’s impact on merchants when used

in contracts involving good and bad consumers, respectively. For simplicity, this model assumes that the original clause's impact on merchants does not depend on the type of consumer involved. Therefore, I will use the terms $O_{GoodMer}$ and O_{BadMer} to refer to the original clause's impact on good and bad merchants. Similarly, the matching clause's impact on the consumer does not depend on the type of merchant involved. Therefore, I use the terms $M_{GoodCon}$ and M_{BadCon} to refer to the matching clause's impact on good and bad consumers.

I still use the term O to refer to the original clause and the term M to refer to the matching clause. In addition, I use the term $O\&M$ to refer to the combined impact of both clauses. For example, the term $O\&M_{GoodMer}$ refers to the combined impact that the original clause and the matching clause have on the good merchant.

I use the term JP to denote the average joint payoff from a clause. It is now necessary to refer to the average joint payoff because the joint payoff in any given case now depends on which type of consumer and which type of merchant the contract involves.

I index the term JP as appropriate. For example, JP_O refers to the average joint payoff from the original clause, and $JP_{O\&M}$ refers to the average joint payoff from both clauses. I add subscripts in parentheses to indicate that certain parties are involved. For example, the term $JP_{O(GoodMer)}$ designates the parties' average joint payoff from the original clause if the original clause is used by a good merchant.

Like the other models, Model 3 assumes that the original clause benefits the merchant, whereas the matching clause harms the merchant. However, because there are now two types of merchants and two types of consumers, a clarification is in order: this assumption is true regardless of whether the merchant is good or bad and regardless of whether the consumer is good or bad. More formally:

$$(C.1) \quad O_{GoodMer} > 0$$

$$(C.3) \quad M_{Mer(GoodCon)} < 0$$

$$(C.2) \quad O_{BadMer} > 0$$

$$(C.4) \quad M_{Mer(BadCon)} < 0$$

Model 3 further assumes that the effects of the original clause and the symmetrical clause are strictly symmetrical. Because we are now dealing with different types of merchants and consumers, Model 3 cannot include the same version of the strict-symmetry assumption as Model 2. Instead, Model 3 adds an equally strict set of symmetry assumptions: it assumes that the impact of the original clause used by a good merchant on the consumer is the same as the impact of the matching clause used by a good consumer on the merchant, and so on. In formal terms, Model 3 assumes:

$$(C.5) \quad O_{GoodMer} = M_{GoodCon}$$

$$(C.7) \quad O_{Con(BadMer)} = M_{Mer(BadCon)}$$

$$(C.6) \quad O_{BadMer} = M_{BadCon} \quad (C.8) \quad O_{Con(GoodMer)} = M_{Mer(GoodCon)}$$

Furthermore, Model 3 assumes that the original clause is efficient if used by a good merchant but inefficient if used by a bad merchant:

$$(C.9) \quad O_{GoodMer} + O_{Con(GoodMer)} > 0$$

$$(C.10) \quad O_{BadMer} + O_{Con(BadMer)} < 0$$

Given the symmetry assumptions C.5 to C.8, the same must be true for the matching clause, meaning that the matching clause is efficient if the contract involves a good consumer but inefficient if it involves a bad consumer:

$$(C.11) \quad M_{GoodCon} + M_{Mer(GoodCon)} > 0$$

$$(C.12) \quad M_{BadCon} + M_{Mer(BadCon)} < 0$$

Both the regulator and the merchants know the fraction of good and bad merchants as well as the fraction of good and bad consumers. Moreover, both the regulator and the merchants know how a clause, used by a specific type of merchant, impacts a specific type of consumer. However, the merchants also know their own type and can, therefore, deduce how a specific original or matching clause impacts them. By contrast, the regulator does not know an individual merchant's type, and the regulator does not know an individual consumer's type.

Model 3 also assumes that bad merchants benefit more from the original clause than good merchants. Because of symmetry assumptions C.5 to C.8, this assumption implies that bad consumers benefit more from the matching clause than good consumers:

$$(C.13) \quad O_{GoodMer} < O_{BadMer} \quad (C.14) \quad M_{GoodCon} < M_{BadCon}$$

Moreover, Model 3 assumes that all merchants and consumers will derive positive net benefits from entering into contracts, regardless of whether the original clause and the matching clause become part of those contracts. In other words, even though good merchants derive fewer benefits from the original clause than bad merchants, the model assumes that they will continue to enter into contracts. Similarly, even though good consumers derive fewer benefits from the matching clause than bad consumers they, too, continue to enter into contracts.

The significant new assumption that Model 3 introduces—the assumption that there are different types of merchants and consumers—is far more realistic than the introductory model's assumption that there exists only one type of merchant and only one type of consumer. In real life,

some merchants are good in the sense that they plan to abide by the contract. By contrast, other merchants are bad in the sense that they have a high risk of breaching their contract and plan to use their boilerplate terms to avoid liability. Similarly, merchants have to deal with different types of consumers without always being able to tell them apart.

In practice, some provisions are efficient or inefficient regardless of the type of merchant or consumer involved in the contract. However, to deal with such provisions, lawmakers and courts do not need to invoke the symmetry criterion. If a provision is always efficient, lawmakers and courts can make that provision mandatory, or at least bar boilerplate terms from opting out of it. By contrast, if a provision is always inefficient, lawmakers and courts can declare it to be void.

Finally, a few words on assumptions C.13 and C.14, according to which bad merchants benefit more from the original clause than good merchants, and bad consumers benefit more from the matching clause than good consumers. In real life, these two assumptions will almost always be satisfied in cases involving the symmetry criterion. As shown in the introduction, the cases in which courts and parties invoke the symmetry criterion generally concern the parties' remedies, the enforcement of their claims via litigation or arbitration, and the parties' rights and duties regarding arbitration and litigation proceedings. There are at least two compelling reasons to think that such clauses benefit bad merchants and bad consumers more than good ones.

The first reason pertains to the types of benefits that these clauses bestow on merchants and consumers. These clauses can be used to streamline proceedings, reduce deadweight costs, and deter frivolous lawsuits. Generally, these benefits accrue for both good and bad merchants, and good and bad consumers. However, these clauses can also be used to avoid liability for well-founded claims, and bad merchants and consumers are more likely to reap this benefit than good ones.

The second reason pertains to the frequency with which the pertinent contractual terms are likely to be invoked. Bad merchants and bad consumers have a high risk of breaching their contracts. Therefore, they are much more likely to face litigation or arbitration proceedings than good merchants and good consumers. The more frequently parties are involved in litigation or arbitration, the greater the benefits that they derive from boilerplate terms that protect them in litigation or arbitration. In sum, assumptions C.13 and C.14 likely reflect real life.

2. Some Basic Implications

Before analyzing the regulator's and the merchant's optimal strategies, it is helpful to address the technical implications from Model 3's various assumptions.

a. Calculating Joint Payoffs

Recall that the payoffs that the parties derive from the original clause depend on the type of merchant. Equations C.15 and C.16 capture the parties' joint payoffs—meaning the sum of the merchant's and the consumer's payoffs—for contracts involving good merchants and bad merchants.

$$(C.15) \quad JP_{O(\text{GoodMer})} = O_{\text{GoodMer}} + O_{\text{Con}(\text{GoodMer})}$$

$$(C.16) \quad JP_{O(\text{BadMer})} = O_{\text{BadMer}} + O_{\text{Con}(\text{BadMer})}$$

Analogously, the joint payoffs that the parties derive from the matching clause depend on the type of consumer:

$$(C.17) \quad JP_{M(\text{GoodCon})} = M_{\text{GoodCon}} + M_{\text{Mer}(\text{GoodCon})}$$

$$(C.18) \quad JP_{M(\text{BadCon})} = M_{\text{BadCon}} + M_{\text{Mer}(\text{BadCon})}$$

If neither party's type is known, one can still calculate the expected joint payoff from the original clause and the matching clause. Given that half of all merchants are good and the other half are bad, the expected joint payoff from the original clause ($E(JP_O)$) is given by C.19.

$$(C.19) \quad E(JP_O) =$$

$$\frac{1}{2}(O_{\text{GoodMer}} + O_{\text{Con}(\text{GoodMer})}) + \frac{1}{2}(O_{\text{BadMer}} + O_{\text{Con}(\text{BadMer})})$$

Analogously, given that half of all consumers are good and the other half are bad, the expected joint payoff from the matching clause (JP_M) is given by C.20.

$$(C.20) \quad E(JP_M) =$$

$$\frac{1}{2}(M_{\text{GoodCon}} + M_{\text{Mer}(\text{GoodCon})}) + \frac{1}{2}(M_{\text{BadCon}} + M_{\text{Mer}(\text{BadCon})})$$

The expected joint payoff from both clauses ($JP_{O\&M}$) is simply the sum of the expected joint payoff from the original clause and the expected joint payoff from the matching clause:

$$(C.21) \quad E(JP_{O\&M}) = E(JP_O) + E(JP_M)$$

Because of symmetry assumptions C.5 to C.8, the expected joint payoff from the original clause (C.19) is equal to the expected joint payoff from the matching clause (C.20):

$$(C.22) \quad E(JP_O) = E(JP_M)$$

b. Calculating the Clauses' Impact on Good and Bad Merchants

It is also useful to examine the model's implications regarding the impact that the original clause and the matching clause have on good and bad merchants. Each merchant, regardless of type, expects that half of the customers will be good consumers and the other half will be bad consumers. Therefore, C.23 gives the impact of including the matching clause in the contract (M_{Mer}) for both types of merchants:

$$(C.23) \quad E(M_{Mer}) = \frac{1}{2} (M_{Mer(GoodCon)} + M_{Mer(BadCon)})$$

Equations C.24 and C.25 define the merchant's payoff using both the original clause and the matching clause. Because the benefits that merchants derive from the original clause depend on their type, the merchants' expected payoffs from including both clauses also depend on whether the merchant is good ($O \& M_{GoodMer}$) or bad ($O \& M_{BadMer}$).

$$(C.24) \quad E(O \& M_{GoodMer}) =$$

$$O_{GoodMer} + \frac{1}{2} (M_{Mer(GoodCon)} + M_{Mer(BadCon)})$$

$$(C.25) \quad E(O \& M_{BadMer}) =$$

$$O_{BadMer} + \frac{1}{2} (M_{Mer(GoodCon)} + M_{Mer(BadCon)})$$

Further, note that because $O_{GoodMer} < O_{BadMer}$, equations C.24 and C.25 together imply:

$$(C.26) \quad E(O \& M_{BadMer}) > E(O \& M_{GoodMer})$$

3. The Merchants' Optimal Strategies

Given Model 3's assumptions, what strategies will good and bad merchants adopt? If the regulator fails to intervene, this question is easy to answer: the original clause benefits both types of merchants, whereas the matching clause harms both types of merchants. Therefore, both good merchants and bad merchants will include the original clause but not the matching clause.

If the regulator imposes a symmetry requirement, each merchant will weigh the original clause's personal benefits against the matching clause's costs. If the former outweighs the latter, the merchant will adopt both clauses. If the latter outweighs the former, the merchant will adopt neither clause. However, the benefits that the merchant reaps from the original

clause depend on the merchant's type. Therefore, the cutoff at which a good merchant switches from including both clauses to including neither clause is different from the cutoff for a bad merchant.¹⁶⁶

4. The Regulator's Optimal Strategies

What strategy should the regulator adopt to maximize the joint payoff of all parties? By assumption, the original clause is efficient if it is used by a good merchant and inefficient if it is used by a bad merchant. Similarly, the matching clause is efficient if the consumer is good and inefficient if the consumer is bad. Therefore, the ideal—though not necessarily achievable—outcome occurs if the original clause is exclusively used by good merchants and if the matching clause is exclusively used in contracts with good consumers.

One advantage that the regulator enjoys in Model 3 is knowing the percentages of good and bad merchants and consumers. The regulator also knows how the two clauses impact different types of consumers and merchants. Therefore, the regulator can adopt different strategies depending on the two clauses' average impact. However, the regulator cannot distinguish between different types of merchants or consumers. Thus, the regulator's strategy cannot differentiate between contracts involving good and bad merchants or between contracts involving good and bad consumers.

To evaluate the regulator's options, it is helpful to distinguish different scenarios based on whether the expected joint payoff from the original clause is positive, negative, or zero.

a. The Average Joint Payoff from the Original Clause Is Positive ($JP_O > 0$)

If the average joint payoff from the original clause is positive, the average joint payoff from the matching clause must be positive as well (C.22). In this scenario, the regulator may choose to take no action on the original clause. Moreover, the regulator may choose to adopt a default rule corresponding to the matching clause, providing that boilerplate terms cannot deviate from that default. Because both types of merchants benefit from the original clause, both types of merchants will voluntarily adopt the original clause. And because both types of merchants cannot opt out of the matching clause, both clauses will govern the contract. The total joint payoff is then equal to $JP_{O\&M}$. I will refer to this approach as the conventional approach to distinguish it from an approach involving the symmetry rule.

Even though the conventional approach's joint payoff may seem decent, it stops far short of the perfect outcome: the conventional approach

166. See inequality C.26, which captures the fact that the expected payoff that a merchant derives from including both the original clause and the matching clause is higher for the bad merchant than for the good merchant.

fails to prevent bad merchants' inefficient use of the original clause. Moreover, it also fails to prevent the matching clause from being used in contracts with bad consumers. Therefore, the question remains whether the symmetry rule can be used to achieve an outcome that is closer to the ideal solution.

If the regulator imposes a symmetry requirement, merchants will weigh the benefits they reap from the original clause against the costs that the matching clause imposes on them. Therefore, for analytical purposes, it is helpful to distinguish several further scenarios:

i. The Expected Combined Payoff Is Positive for Both Merchants

If the expected combined impact of both clauses is positive for both merchants, the symmetry rule will cause both merchants to include both clauses. Accordingly, the outcome is the same as under the conventional approach.

ii. The Expected Combined Payoff Is Nonpositive for Both Merchants

Next, one may be tempted to consider the case that the expected combined payoff from both clauses is nonpositive, meaning it is negative or zero for both types of merchants. However, if the average joint payoff from the original clause is positive ($E(JP_O) > 0$), this situation cannot arise.¹⁶⁷

iii. The Expected Combined Payoff Is Positive for One Merchant, Nonpositive for the Other

Finally, if the expected combined payoff from both clauses is positive for one merchant, but nonpositive for the other, then because of C.13, the bad merchant must have a positive expected combined payoff, and the good merchant must have a negative expected combined payoff.

167. In formal terms, the statement to be proven can be expressed as follows:

$$E(JP_O > 0) \rightarrow (E(O\&M_{GoodMer}) > 0 \vee E(O\&M_{BadMer}) > 0)$$

This can be shown via a proof by contradiction, meaning that if we hypothetically assume the statement to be false, we can show that this hypothetical assumption leads to a contradiction. Assume, hypothetically, that the parties' expected joint payoff from the original clause is positive ($E(JP_O) > 0$) and that the two clauses' expected combined impact is negative or zero for both merchants ($E(O\&M_{GoodMer}) \leq 0$ and $E(O\&M_{BadMer}) \leq 0$). By C.22, we know that $E(JP_O) = E(JP_M)$. Accordingly, $E(JP_O) > 0$ implies $E(JP_M) > 0$, which means that the two parties' expected joint payoff from both clauses must also be greater zero: $E(JP_{O\&M}) > 0$. Now, because of symmetry assumptions C.5 to C.8, we know that if $E(O\&M_{GoodMer}) \leq 0$ and $E(O\&M_{BadMer}) \leq 0$, then the same must be true for the two clauses impact on good and bad consumers, meaning $E(O\&M_{GoodCon}) \leq 0$ and $E(O\&M_{BadCon}) \leq 0$.

But the parties' expected total joint payoff from including both clauses must be equal to the two clauses' expected impact on merchants plus the two clauses' expected impact on consumers. In other words:

$$E(JP_{O\&M}) = \frac{1}{2} (E(O\&M_{GoodMer}) + E(O\&M_{BadMer})) + \frac{1}{2} (E(O\&M_{GoodCon}) + E(O\&M_{BadCon})).$$

Therefore, if all four variables of the right side of this equality are negative or zero, then it must be true that $E(JP_{O\&M}) \leq 0$. Yet, as shown above, $E(JP_{O\&M}) > 0$. In other words, our hypothetical assumption leads to a contradiction, which means that it must be false. Therefore, the statement we set out to prove must be correct.

Accordingly, the bad merchant will use both clauses whereas the good merchant will use neither. This outcome is worse than the one produced by the conventional approach because it prevents the good merchant from using both clauses, even though the good merchant's use of both clauses is efficient.¹⁶⁸

b. The Average Joint Payoff from the Original Clause Is Negative ($JP_O < 0$)

If the average joint payoff from the original clause is negative, the same must be true for the matching clauses' average joint impact (C.22). In this scenario, one obvious option for the regulator is to ban the original clause while taking no action on the matching clause. Both good and bad merchants will react by including neither clause in their contracts, resulting in the total average joint payoff from the two clauses equaling zero.

What happens if the regulator imposes a symmetry rule instead? Merchants will then weigh the benefits they reap from the original clause against the costs that the matching clause imposes on them. Accordingly, one must once again distinguish different possibilities depending on how the two clauses, used in combination, impact good and bad merchants. Given that $JP_O < 0$, it cannot be true that the two clauses' combined payoff is nonnegative for both merchants.¹⁶⁹ Thus, two possibilities remain:

168. In formal terms, the statement to be proven can be expressed as follows:

$$E(JP_O) > 0 \rightarrow E(JP_{O\&M(GoodMer)}) > 0.$$

The proof comprises several steps:

First, by C.23, we know $E(JP_O) > 0$ implies $E(JP_M) > 0$. Because $E(JP_{O\&M}) = E(JP_O) + E(JP_M)$, it follows that $JP_{O\&M} > 0$.

Second, by C.13, we know that $E(JP_{O(GoodMer)}) > 0$, and by C.14, we know that $E(JP_{O(BadMer)}) < 0$. Combining both inequalities, we obtain: $E(JP_{O(BadMer)}) < E(JP_{O(GoodMer)})$.

Third, we know that the matching clause's impact does not depend on the merchant, and so $E(JP_{M(BadMer)}) = E(JP_{M(GoodMer)})$. Hence, we can take the inequality $E(JP_{O(BadMer)}) < E(JP_{O(GoodMer)})$ and add $E(JP_{M(BadMer)})$ to the left side and $E(JP_{M(GoodMer)})$ to the right side. Thus, we obtain $E(JP_{O(BadMer)}) + E(JP_{M(BadMer)}) < E(JP_{O(GoodMer)}) + E(JP_{M(GoodMer)})$. This can be written as: $E(JP_{O\&M(BadMer)}) < E(JP_{O\&M(GoodMer)})$.

Fourth, from step one, we know that $E(JP_{O\&M}) > 0$. But $E(JP_{O\&M}) = \frac{1}{2} E(JP_{O\&M(BadMer)}) + \frac{1}{2} E(JP_{O\&M(GoodMer)})$, and so we know $E(JP_{O\&M(BadMer)}) + \frac{1}{2} E(JP_{O\&M(GoodMer)}) > 0$.

Fifth, the sum of nonpositive terms must also be nonpositive, and so if $\frac{1}{2} E(JP_{O\&M(BadMer)}) + \frac{1}{2} E(JP_{O\&M(GoodMer)}) > 0$, then at least one of the two terms on the left side must be positive. Because we have previously shown that $E(JP_{O\&M(BadMer)}) < E(JP_{O\&M(GoodMer)})$, we can conclude that $E(JP_{O\&M(GoodMer)})$ must be positive. This concludes the proof.

169. In formal terms, the statement to be proven can be expressed as follows:

$$E(JP_O) < 0 \rightarrow (E(O\&M_{GoodMer}) \leq 0 \vee E(O\&M_{BadMer}) \leq 0)$$

The proof is analogous to the one in note 167 and works by contradiction. Assume, hypothetically, that the parties' joint payoff from the original clause is negative ($E(JP_O) < 0$) and that the two clauses combined impact is positive for both merchants ($E(O\&M_{GoodMer}) > 0$ and $E(O\&M_{BadMer}) > 0$). By C.22, we know that $E(JP_O) = E(JP_M)$. Accordingly, $E(JP_O) < 0$ implies $E(JP_M) < 0$, which means that the two parties' joint payoff from both clauses must also be less than zero: $E(JP_{O\&M}) < 0$.

Now, because of symmetry assumptions C.5 to C.8, we know that if $E(O\&M_{GoodMer}) > 0$ and $E(O\&M_{BadMer}) > 0$, then the same must be true for the two clauses impact on good and bad consumers, meaning $E(O\&M_{GoodCon}) > 0$ and $E(O\&M_{BadCon}) > 0$.

But the parties' total joint payoff from including both clauses is simply equal to the two clauses' average impact on merchants plus the two clauses' average impact on consumers. In other words: $E(JP_{O\&M}) = \frac{1}{2} (E(O\&M_{GoodMer}) + E(O\&M_{BadMer})) + \frac{1}{2} (E(O\&M_{GoodCon}) + E(O\&M_{BadCon}))$. If all four

i. The Expected Combined Payoff Is Nonpositive for Both Merchants

If neither merchant expects to benefit from using both clauses, then the symmetry principle will lead both merchants to exclude both clauses. Hence, the outcome is the same as if the regulator banned the original clause.

ii. The Expected Combined Payoff Is Negative for One Merchant and Nonnegative for the Other

If the expected combined payoff from both clauses is negative for one merchant but nonnegative (zero or positive) for the other, then because of C.13, the bad merchant must have the nonnegative expected combined payoff and the good merchant must have the negative expected combined payoff. The good merchant will, therefore, exclude both clauses. Should the clauses' expected combined impact on the bad merchant be zero, the bad merchant will also exclude both clauses so that the outcome is the same as the one achieved if the regulator simply bans the original clause. By contrast, if the two clauses' expected impact on the bad merchant is positive, the bad merchant will include both clauses. This outcome is worse than the one that results from simply banning the original clause because the bad merchant's use of both clauses is inefficient.¹⁷⁰

c. The Expected Joint Payoff from the Original Clause Is Zero ($JP_O = 0$)

If the expected joint payoff from the original clause is zero, the expected joint payoff from the matching clause must be zero as well (C.22). In this scenario, one option for the regulator is to take no action. Both types

variables of the right side of this equality are positive (see the previous step), then it must be true that $E(JP_{O\&M}) > 0$. Yet, as shown above, $E(JP_{O\&M}) < 0$. In other words, our hypothetical assumption leads to a contradiction, which means it must be false. Therefore, the statement we set out to prove must be correct.

170. In formal terms, the statement to be proven can be expressed as follows:
 $E(JP_O) < 0 \rightarrow E(JP_{O\&M(BadMer)}) < 0$.

The proof is analogous to the one in note 168 and comprises several steps:

First, by C.22, we know $E(JP_O) < 0$ implies $E(JP_M) < 0$. Because $E(JP_{O\&M}) = E(JP_O) + E(JP_M)$, it follows that $E(JP_{O\&M}) > 0$.

Second, by C.9, we know that $E(JP_{O(GoodMer)}) > 0$, and by C.9, we know that $E(JP_{O(BadMer)}) < 0$. Combining both inequalities, we obtain $E(JP_{O(BadMer)}) < E(JP_{O(GoodMer)})$.

Third, we know that the matching clause's impact does not depend on the merchant, and so $E(JP_{M(BadMer)}) = E(JP_{M(GoodMer)})$. Hence, we can take the inequality $E(JP_{O(BadMer)}) < E(JP_{O(GoodMer)})$ and add $E(JP_{M(BadMer)})$ to the left side and $E(JP_{M(GoodMer)})$ to the right side. Thus, we obtain $E(JP_{O(BadMer)}) + E(JP_{M(BadMer)}) < E(JP_{O(GoodMer)}) + E(JP_{M(GoodMer)})$. This can be written as: $E(JP_{O\&M(BadMer)}) < E(JP_{O\&M(GoodMer)})$.

Fourth, from step one, we know that $E(JP_{O\&M}) < 0$. But $E(JP_{O\&M}) = \frac{1}{2} E(JP_{O\&M(BadMer)}) + \frac{1}{2} E(JP_{O\&M(GoodMer)})$, and so we know $E(JP_{O\&M(BadMer)}) + \frac{1}{2} E(JP_{O\&M(GoodMer)}) < 0$.

Fifth, the sum of nonnegative terms must also be nonnegative, and so if $E(JP_{O\&M(BadMer)}) + \frac{1}{2} E(JP_{O\&M(GoodMer)}) < 0$, then at least one of the two terms on the left side must be negative. Because $E(JP_{O\&M(BadMer)}) < E(JP_{O\&M(GoodMer)})$, we can conclude that $E(JP_{O\&M(BadMer)})$ must be negative. This concludes the proof.

of merchants will react by including the original but not the matching clause, and the parties' expected total joint payoff will equal zero.

If the regulator imposes a symmetry requirement, the outcome depends on how the two clauses, used in combination, impact merchants. However, given that the expected joint payoff from the original clause is zero, it can be shown that the two clauses' expected combined impact on the merchant must be positive for bad merchants ($E(O\&M_{BadMer}) > 0$) and negative for good merchants ($E(O\&M_{GoodMer}) < 0$).¹⁷¹ Thus, a symmetry requirement will cause bad merchants to use both clauses while preventing good merchants from using either clause. Because the use of both clauses by bad merchants is inefficient,¹⁷² whereas the use of both clauses by good merchants is efficient,¹⁷³ this outcome is worse than the one that results if the regulator takes no action at all.

In sum, given Model 3's assumptions, the symmetry rule promises to reduce rather than increase efficiency. In some scenarios, the symmetry rule leads to the same outcomes that a combination of prohibitions and default-rule designations will produce. However, in other scenarios, the symmetry rule results in less efficient outcomes.

171. To prove this statement, we need to proceed in several steps:

First, note that if the parties' expected joint payoff from the original clause is zero ($E(JP_O) = 0$), then, because of C.22, we know $E(JP_M) = 0$. But if $E(JP_O) = 0$ and $E(JP_M) = 0$, then it must be true that $E(JP_{O\&M}) = 0$.

Second, note that the parties' expected total joint payoff from both clauses $E(JP_{O\&M})$ is equal to the two clauses' expected impact on the merchant plus the two clauses' expected impact on the consumers. In other words, $E(JP_{O\&M}) = \frac{1}{2} (E(O\&M_{GoodMer}) + E(O\&M_{BadMer})) + \frac{1}{2} E((O\&M_{GoodCon}) + E(O\&M_{BadCon}))$. Given that $E(JP_{O\&M}) = 0$, we know that $\frac{1}{2} (E(O\&M_{GoodMer}) + E(O\&M_{BadMer})) + \frac{1}{2} (E(O\&M_{GoodCon}) + E(O\&M_{BadCon})) = 0$.

Third, by symmetry assumptions C.5 to C.8, we know that $E(O\&M_{GoodMer}) = E(O\&M_{GoodCon})$ and $E(O\&M_{BadMer}) = E(O\&M_{BadCon})$. Hence, we know that $E(O\&M_{GoodMer}) + E(O\&M_{BadMer}) = E(O\&M_{GoodCon}) + E(O\&M_{BadCon})$. Therefore, $\frac{1}{2} (E(O\&M_{GoodMer}) + E(O\&M_{BadMer})) + \frac{1}{2} (E(O\&M_{GoodCon}) + E(O\&M_{BadCon})) = 0$ implies $E(O\&M_{GoodMer}) + E(O\&M_{BadMer}) = 0$. Consequently, we have shown that the two clauses' expected impact on the good merchant plus the two clauses' expected impact on the bad merchant equals zero.

Fourth, we know from C.26 that $E(O\&M_{GoodMer}) < E(O\&M_{BadMer})$. Combining this fact with the equality $E(O\&M_{GoodMer}) + E(O\&M_{BadMer}) = 0$, we know that $E(O\&M_{GoodMer}) < 0$ and $E(O\&M_{BadMer}) > 0$. In other words, we have shown $E(JP_O) = 0$ implies that the two clauses' expected combined impact on the good merchant must be negative and that the two clauses' expected combined impact on the bad merchant must be positive. This completes the proof.

172. This result can be proven in several steps: First, recall that from C.22, we know $E(JP_O) = 0$ implies $E(JP_M) = 0$ and, together, $E(JP_O) = 0$ and $E(JP_M) = 0$ imply $E(JP_{O\&M}) = 0$.

From C.9 and C.10, we know that $E(JP_{O(GoodMer)}) > 0$ and we also know that $E(JP_{O(BadMer)}) < 0$. Combining both inequalities, we obtain $E(JP_{O(GoodMer)}) > E(JP_{O(BadMer)})$. Now, recall that the expected impact of the matching clause does not depend on whether the merchant is good or bad, and so $E(JP_{M(BadMer)}) = E(JP_{M(GoodMer)})$. Hence, we can take the inequality $E(JP_{O(GoodMer)}) > E(JP_{O(BadMer)})$ and add $E(JP_{M(GoodMer)})$ to the left side and $E(JP_{M(BadMer)})$ to the right side and obtain $E(JP_{O(GoodMer)}) + E(JP_{M(GoodMer)}) > E(JP_{O(BadMer)}) + E(JP_{M(BadMer)})$. This can be written as: $E(JP_{O\&M(GoodMer)}) > E(JP_{O\&M(BadMer)})$.

Finally, the equality $E(JP_{O\&M}) = 0$ from the first step can be written as: $\frac{1}{2} E(JP_{O\&M(GoodMer)}) + \frac{1}{2} E(JP_{O\&M(BadMer)}) = 0$. Multiplying both sides by 2, we obtain $E(JP_{O\&M(GoodMer)}) + E(JP_{O\&M(BadMer)}) = 0$. But if (as shown in step 2) $E(JP_{O\&M(GoodMer)}) > E(JP_{O\&M(BadMer)})$ and $E(JP_{O\&M(GoodMer)}) + E(JP_{O\&M(BadMer)}) = 0$, then $E(JP_{O\&M(GoodMer)}) > 0$ and $E(JP_{O\&M(BadMer)}) < 0$. This completes the proof.

173. See *supra* note 172 (providing proof.).

IV. SYMMETRY & FAIRNESS

So far, this Article has shown that the symmetry criterion generally cannot be justified on grounds of efficiency. Unless one makes specific assumptions about the information that the parties have and a contractual provision's impact on the parties, the symmetry criterion will not lead to higher joint payoffs. However, economic efficiency may not be the only pertinent value. Regulators who embrace the efficiency criterion may do so primarily because they view it as fair. For example, in the leading California case on asymmetric arbitration provisions, *Armendariz v. Foundation Health Psychcare Services*,¹⁷⁴ the California Supreme Regulator explained: "[A]n arbitration agreement imposed in an adhesive context lacks basic fairness . . . if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences."¹⁷⁵

Accordingly, even if the symmetry criterion does not promote efficiency, can it be justified on fairness grounds? In this Part, I argue that it cannot.

The extent to which fairness should play an independent role in legal policy analysis is controversial. For example, Louis Kaplow and Steven Shavell have famously argued that legal policy analysis should be evaluated solely from the perspective of welfare economics and that notions of fairness not grounded in welfare economics should be given no weight.¹⁷⁶ Other scholars have taken the opposite view.¹⁷⁷ However, this Article side-steps this general debate. As I show below, even if one believes that fairness can play a role independent of welfare analysis, the symmetry criterion has no persuasive fairness justification.

A fairness analysis is, in some ways, more challenging than an economic analysis. Whereas economists mostly agree on a particular definition of efficiency, namely the Kaldor-Hicks efficiency criterion,¹⁷⁸ fairness means very different things to different people. However, the fairness analysis becomes somewhat more tractable in the symmetry criterion's case. Most legal scholars and regulators would likely agree that the symmetry criterion's claim to fairness lies in its nexus with the criterion of

174. 6 P.3d 669 (Cal. 2000).

175. *Id.* at 694.

176. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1381–82 (2001) (noting that to pursue fairness at the expense of welfare economics would lead to the implausible result that one could argue in favor of rules that make everyone worse off and pointing to the lack of justifications for putting fairness ahead of individuals' well-being).

177. See, e.g., Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L. J. 173, 176–77 (2000) (criticizing Kaplow's and Shavell's assumptions); Howard F. Chang, *The Possibility of A Fair Paretian*, 110 YALE L. J. 251, 252 (2000) (arguing that Kaplow's and Shavell's characterization of social welfare is incorrect); but see Barbara Ann White, *Economic Efficiency and the Parameters of Fairness: A Marriage of Marketplace Morals and the Ethic of Care*, 15 CORNELL J.L. & PUB. POL'Y 1, 50–51 (2005) (agreeing with Kaplow's and Shavell's central claims while suggesting her own interpretation of how far these claims reach).

178. But see Markovits, *supra* note 155, at 486–87 (arguing that the Kaldor-Hicks criterion, in its commonly applied form, is wrong).

equality.¹⁷⁹ As noted in the introduction, symmetry seems to imply equal treatment, and equal treatment seems to imply fairness. However, if the symmetry criterion's claim to fairness relies on its ability to achieve equal treatment, then a plausible measure is readily identified: the symmetry criterion can be justified on fairness grounds only to the extent that it leads to equal treatment.

But does the symmetry requirement ensure equal treatment? If one defines equal treatment in a narrow and formal sense, the answer is yes: either both parties are subject to the same contractual clause or neither party is. Hence, if one adopts a formal definition of equal treatment, the symmetry criterion ensures equal treatment by definition. However, such a formal approach is highly problematic. As explained in Part II of this Article, contracts are inherently asymmetric. In the typical contract, the parties exchange real estate, goods, or services for payment. Thus, the duties of the parties do not usually mirror each other. If one party owed the same as the other, the contract would be pointless. It follows that if fairness required identical duties on both sides, then contract law would be inherently unfair. However, no one—least of all the courts who apply the symmetry criterion—takes that position.

Accordingly, any account of how symmetry promotes fairness must be more nuanced. If asymmetric contracts formed in the absence of informational asymmetry and other bargaining problems are generally viewed as not posing a threat to equal treatment, but asymmetric boilerplate conditions are viewed as unfair, then any narrative about why asymmetric boilerplate conditions are unfair has to incorporate the peculiar features of boilerplate terms.

A narrative that satisfies this requirement is that the symmetry requirement functions as a substitute for informed bargaining: in an ideal setting, each party is perfectly informed and can protect their own interests, thereby guaranteeing the fairness of the contract. By contrast, the use of boilerplate terms generally leads to an informational asymmetry between merchants and consumers. Therefore, one may be tempted to argue that the symmetry requirement is necessary to ensure a fair and balanced contract.

Although this more nuanced approach accounts for the peculiarities of boilerplate terms, it fails to be persuasive. Perhaps most importantly, the informational asymmetry between merchants and consumers that characterizes most boilerplate terms does not imply that the resulting contracts are unfair. Recall that, even in a lemon market, the consumer does not overpay. Instead, in a lemon market, the consumer expects low-quality terms, pays a price that reflects that expectation, and gets low-quality terms. In other words, even in a lemon market, the consumer gets exactly

179. See Kaplow & Shavell, *supra* note 176, at 1362–63 (discussing notions of fairness and “the relevance of aspects of equality under welfare economics”).

what the consumer pays for. Thus, the problem with the lemon market is not that one side—the consumer—overpays. Instead, the problem is that certain mutually beneficial transactions do not take place at all.

In sum, any defense of the symmetry criterion on fairness grounds faces a rather vexing challenge: if one argues that unequal contractual duties are *per se* unfair, then all contracts must be considered unfair. By contrast, if one believes that only unequal boilerplate terms are unfair, then one has to come up with some explanation for why unequal duties should be less fair in the boilerplate context than in other contractual terms. It is not clear what that explanation might be.

Moreover, if one abandons a formal understanding of equal treatment in favor of a substantive one, one faces the additional challenge that the symmetry criterion fails to guarantee substantive equality, especially in the context of boilerplate terms. Only one of the parties drafts the contract, and only the drafter can design the contract strategically to maximize the drafter's profit. This role allocation guarantees that boilerplate terms remain inherently one-sided even if one applies the symmetry criterion. To draw a simple analogy, imagine that two very different athletes are required to compete in the same sport, but only one of the two is allowed to choose which sport they will compete in. Does that sound fair? If not, why would one expect fairness from a rule that forces the contract to apply the same provision to both parties but allows only the merchant to choose what that provision is?

CONCLUSION

Many courts now invoke the symmetry criterion in deciding whether contract provisions are enforceable or not. According to the relevant cases, certain types of contractual provisions such as arbitration clauses are much more likely to be enforced if they apply to both parties as opposed to only one of the parties.

In this Article, I have shown that one cannot usually defend this approach on social welfare grounds: in individually negotiated contracts, the symmetry criterion functions as a constraint on the parties' efforts to maximize their joint payoff from the contract. At best, the symmetry criterion proves to be irrelevant. At worst, it reduces the contract's efficiency.

The symmetry criterion also cannot be justified in the context of boilerplate contracts. Unless one makes specific assumptions regarding the costs and benefits of the contractual clauses involved as well as about the information that courts, merchants, and consumers have, focusing on the symmetry of contractual provisions does not promote efficiency.

Finally, the symmetry criterion cannot be grounded in fairness considerations. The symmetry requirement fails to contribute to the substantive fairness of contractual relationships. Moreover, while the symmetry requirement guarantees identical duties for both parties in certain areas,

the claim that fairness requires identical duties for both parties is inconsistent with the essential purpose of contractual relationships. So, if regulators are concerned about fair or efficient contracts, they should no longer rely on the symmetry criterion unless, given the particular circumstances of the case, the symmetry criterion can, in fact, be shown to increase the parties' joint payoff.