CONTEXT AS POWER: DEFINING THE FIELD OF BATTLE FOR ADVANTAGE IN CONTRACTUAL INTERACTIONS

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INTRODUCTION

This Article explores the appropriate role for explicitly extralegal contextual factors in regulating, creating, and enforcing contracts. While contract law appears relatively neutral and acontextual on its face, extralegal factors such as party status; the circumstances of the bargain; performance by the parties; trade usage and custom; and background political, economic, and social contexts and circumstances may sometimes be more determinative of the outcome of contract disputes than the explicit terms and legal rules applicable to the parties' transaction.[1] It arguably follows that courts should expansively use context to enforce the "real" relationship between the parties.[2]

Potentially, expansive use of context may provide courts with a more accurate sense of the parties' subjective agreement.[3] But this possibility is not without risks and limits. While contextual approaches to contract hold real promise as a means of critiquing and understanding contract law, there is little evidence that courts can actually use context to achieve a more accurate picture of the

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1. *See, e.g.*, Alberto Salazar Valle, *The Complex Context of Contract Law*, 42 OSGOODE HALL L.J. 515, 516–17 (2004) (Can.) (reviewing IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS (David Campbell et al. eds., 2003) & LEONE NIGLIA, THE TRANSFORMATION OF CONTRACT LAW IN EUROPE (2003), which suggest that contract law should incorporate "implicit" contexts such as nonlegal sanctions, customs, trust, cooperative practices, expectations, and conventions of meaning in language); *see also* David Campbell & Hugh Collins, *Discovering the Implicit Dimensions of Contracts*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS, *supra*, at 25, 25–28.

2. *See, e.g.*, Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 M.L.R. 44, 45–46 (2003) (U.K.) (recognizing that context, in part, illuminates the "real" deal between the parties).

3. *See, e.g.*, *id.* at 45–47 (noting the gap between words used to express agreement and the parties' actual understanding of their agreement).

parties' real relation.[4] This inability is due to subjective limits on the quality and validity of the data used in judicial analysis as well as inherent restrictions on judicial methods and capabilities. At the extremes, an open-ended contextualism risks becoming a judicial version of postmodern literary criticism or Monday-morning quarterbacking in which widely varying subjective and subconscious motivations are assigned to the helpless authors of the written contract. Instead of a means for increasing the accuracy or quality of judicial assessments of contract disputes, this Article argues that deliberate attempts to expand the use of implicit contextual factors are better understood as attempts to delegitimate existing contract regimes and shift bargaining power to apparently disadvantaged parties.

The use of high-context analysis to get at the "real" deal between the parties, rather than restricting analysis to the acontextual bargain evidenced by the "paper" terms and controlled by abstract contract rules, is tremendously seductive.[5] High-context contract strategies promise nuanced understandings of the parties' contractual relationship.[6] Compared with the deficiencies of neo- and classically formalist contract doctrines[7] in which ice-houses are left standing undisturbed,[8] sister Antillico wanders homeless,[9] and

4. *See, e.g.*, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1804–06 (1996) (noting increased costs associated with high-context approaches to commercial-contract disputes and observing that "although the [Uniform Commercial] Code's adjudicative philosophy presupposes the existence of an embedded set of unwritten customs that are truly known and agreed to by transactors, there is some evidence that the existence of such customs might be less pervasive than the Code assumes"); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 863 (2000) (observing that the state is incapable of supplying contextual factors and filling gaps in contracts between heterogeneous parties).

5. For an excellent analysis of the potential false dichotomy lurking within the real/paper distinction, see Catherine Mitchell, *Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal*, 29 O.J.L.S 675 (2009) (Eng.).

6. *See* Macaulay, *supra* note 2, at 49–56 (discussing the benefits of achieving better understanding of parties' actual agreement and asserting that actual agreement is more important than the benefits of certainty and predictability supposedly gained from more formalist approaches to contract).

7. *See* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 195–218 (2009). Professor Hart argues persuasively that modern contract law, even with critical safety valves such as "unconscionability, economic duress, and misrepresentation," is still fundamentally coercive with respect to unfair bargaining tactics by repeat players who control nearly every aspect of the contract formation process. *See id*. at 178, 216–18 ("[L]eaving formation completely intact *and* making it easier to form a contract [under modern contract law] expands one party's capacity for coercion.").

8. *See* Mitchill v. Lath, 160 N.E. 646, 647 (N.Y. 1928) (using the parol evidence rule to bar evidence of a collateral parol agreement to demolish an

Michigan drivers wonder why they bothered paying for uninsured motorist coverage,[10] high-context strategies promise to legitimate contract law by enabling courts to enforce the "real" deal between the parties and making contract law more reflective of actual social understandings and interactions between the parties.[11]

High-context approaches to contract are also seductive for another reason. While specific components of expanded context analysis are relevant to assessing the parties' relative bargaining power, context-based arguments also concern power on a more fundamental level. At their heart, arguments for expanded use of context seek to change or expand the metaphorical field of battle for power in the contract relation—to remove the advantages of the (apparently) strong and balance out the disadvantages of the (apparently) weak.[12]

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unsightly ice house).

9. *See* Kirksey v. Kirksey, 8 Ala. 131, 131 (1845) (holding a promise to provide home to widowed sister-in-law unenforceable for lack of consideration).

10. *See* Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 787 (Mich. 2003) (rejecting the reasonable expectations doctrine for Michigan insurance contracts and reaffirming a textualist, plain-meaning approach to contract interpretation).

11. For instance, in the examples above, relatively low-context rules on parol evidence, consideration, and textualist contract interpretation contrast with relatively high-context approaches that ameliorate apparently unjust outcomes mandated by the low-context rules by making additional factors legally salient. Thus, in a case like *Wilkie*, formalist textual interpretations and objective theories of assent may be "softened" by making the insured's reasonable expectations a legally salient factor in interpreting and enforcing insurance contracts. Likewise, approaches to the parol evidence rule that reject the capacity of written terms to define the parties' obligations completely and unambiguously require the court to examine the entire context of the deal to determine whether the written terms were in fact complete or unambiguous. *See, e.g.*, Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1968) ("[T]he meaning of a writing '. . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.'" (quoting Universal Sales Corp. v. Cal. Press Mfg. Co., 128 P.2d 665, 679 (Cal. 1942)). And expanding the context of promissory obligations to include reasonable detrimental reliance on a promise likewise diminishes the situations in which seriously intended promises cause injury to the promisee. *See, e.g.*, Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc., 704 A.2d 1321 (N.J. Sup. Ct. 1998) (expanding promissory estoppel doctrine to include situations in which promise enforcement is necessary to avoid injustice).

12. *See, e.g.*, Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141–44 (2005) (arguing that courts should take a more nuanced approach to assessing the parties' relationship in order to properly balance bargaining power disparities); *cf.* ROBERT GREENE, THE 48 LAWS OF POWER, at xviii (1998) ("Another strategy of the supposed nonplayer [seeking to expand its power to influence surrounding events] is to demand equality in every area of life. Everyone must be treated alike, whatever their status and strength. But if, to avoid the taint of power, you attempt to treat everyone equally and fairly, you will confront the problem that some people do certain things better than others. . . . Again, many of those who behave this way are actually deploying another power strategy, redistributing people's rewards in a

This shift of bargaining power occurs both at the level of specific classes of contracting parties and at the overall systemic level. At the class-specific level, for instance, contextual claims that courts should acknowledge that franchisees lack bargaining power in contracting with franchisors in turn limit the ability of franchisors to impose exploitative terms on their franchisees.[13]

At the systemic level, expanding the legally salient considerations for assessing formation, interpretation, and enforceability of contracts necessarily increases the scope of judicial discretion and the variability of potential outcomes in contract disputes.[14] Expanded judicial discretion and variability of outcomes in turn systemically shift bargaining power from repeat players that benefit most from consistent application of the abstract rules of law to other classes of contracting parties who can achieve advantage (or minimize disadvantage) only by altering the rules of the game.[15] In this sense, the question of whether courts should adopt relatively high-context strategies for contract dispute resolution is identical in many cases to the question of whether courts should attempt to shift bargaining power from repeat players such as business firms to sporadic contractors such as consumers, employees, and franchisees.

These dual views of context—justice through detail and power through changing the shape of the playing field—are potentially either legitimative or delegitimative of the institutions in which expanded context claims seek to operate. Although the legitimative thesis promises a better quality of judicial contract dispute resolution,[16] it is not clear that high-context approaches improve actual treatments of disputes. In contrast, the delegitimative thesis does not concern the quality of judicial decision making, but rather the contest over relative bargaining power between particular classes of parties or systemically throughout contract law.[17] While there remains significant debate over the relative competence of courts and legislatures to address issues of social policy,[18] the characterization of contextual claims as macrolevel bargaining power contests suggests that these questions should be largely

way that they determine.").

13. *See, e.g.*, Weaver v. Am. Oil Co., 276 N.E.2d 144, 147 (Ind. 1971) (finding indemnification term in franchise agreement unconscionable in part because of franchisee's lack of business sophistication and education).

14. *See* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 125–28 (1997) (recognizing the judicial flexibility attendant to expanding the courts consideration of contextual factors).

15. *See infra* Part IV.B.

16. *See, e.g.*, Macaulay, *supra* note 2, at 45–46 (recognizing that analysis of context captures the "real" deal between the parties).

17. *See infra* Part IV.

18. *See, e.g.*, Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 782 (1999) (noting the inability of courts to accurately identify or evaluate contextual factors).

reserved for legislative action.

Part I of this Article briefly surveys what "context" could mean in contract law. This Part includes arguments that courts should expand their analyses of particular doctrines to respond to particular, not currently salient contextual factors. Contextual arguments also include, however, claims that abstract background factors such as social, political, and economic influences on courts and parties affect contracting outcomes. Both types of context implicitly include a normative argument that courts should recognize and respond to contextual factors in resolving contract disputes.

Part II assesses the use of contextual factors in practice. In particular, this Part introduces the problems that may arise from a highly contextualized inquiry at the dispute resolution stage. Part III assesses the proposition that contextualist analysis is valuable for contract law because it in some sense legitimates contract law by prompting courts to engage in a richer and more nuanced inquiry into the context of disputes. Concluding that this legitimative thesis is potentially incoherent, Part IV examines context as a delegitimating influence on contract law that attempts to effect systemic shifts in bargaining power between classes of contracting parties. This Article concludes that it is questionable whether the legitimative thesis justifies use of high-context contract dispute resolution strategies, but that such strategies may be justified under the delegitimative thesis.

I. CONTEXT IN CONTRACT

Contextual inquiries raise two separate but related problems of scope and selection. In terms of scope, "context" in contract is theoretically unlimited. Conceptually, some contexts are near in scope to the agreement of the parties so that they more directly impinge on the actual parties and transaction at issue, while others are more removed such that the connection between those factors and the actual agreement is tenuous. Thus, contextual scope may be seen as a series of concentric rings around the actual agreement including the terms of the agreement; the surrounding facts and circumstances; the parties' understandings of applicable legal requirements;[19] trade usages and customs;[20] party status or

19. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60–62 (1963) (recognizing that parties to an agreement focus primarily on the terms and circumstances of the agreement and pay little attention to legal sanctions flowing from the agreement).

20. *See* Richard Craswell, *Do Trade Customs Exist?*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 118, 118 (Jody S. Kraus & Steven D. Walt eds., 2000) (noting the implicit assumption of the drafters of the Uniform Commercial Code ("U.C.C.") that trade customs

characteristics;[21] the subject matter of the contract;[22] background cultural and linguistic understandings;[23] and background social, political, and economic frameworks.[24]

Courts, whether adopting high-context or low-context contract dispute resolution strategies ("HCS" and "LCS," respectively), must limit the scope of contextual inquiry, even if only for judicial economy. This scope may be constrained, as with classical and neoformalist approaches that attempt to limit judicial discretion, to relatively few legally salient factors, such as the mere existence of consideration, and exclude a wider array of factors, such as the value of the consideration or the parties' commercial backgrounds.[25] For instance, Professor Robert Scott would confine the proper scope of contract law to relatively simple, acontextual factors suitable for constrained, rules-based assessment and resolution. For Professor

exist, can be identified, and can be incorporated into analysis of commercial disputes).

21. *See* Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1066 (1986) (noting the use of equity and unconscionability doctrine to rescue from bad contracts "particular classes of people who were deemed to be easily duped, such as widows, orphans, farmers, sailors on leave, and the weakminded").

22. *See, e.g.*, Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 964–67 (cubewrap employment contracts); Hugh Beale & Tony Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 J.L.S. 45, 54 (1975) (U.K.) (commercial contracts); Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 154–55 (1996) (premarital agreements); Richard Kaplan et al., *Retirees at Risk: The Precarious Promise of Post-Employment Health Benefits*, 9 YALE J. HEALTH POL'Y L. & ETHICS 287, 295 (2009) (retiree health insurance contracts); Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM. & ENT. L.J. 453, 461–63 (1996) (publishing contracts); David F. Tavella, *Are Insurance Policies Still Contracts?*, 42 CREIGHTON L. REV. 157 (2008) (insurance contracts).

23. *See, e.g.*, Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199, 199–203 (1990) (discussing the social institution of promising); *see also* Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1 (2008).

24. As Professor Leone Niglia argues:

> [T]wentieth-century contract law was never an autonomous legal development, but the product of each polity's political order at any given time. For, if one concentrates solely on the law, one cannot hope to understand why the courts overwhelmingly applied rules that protected consumers in one country but did not do so at all in another, and today place more emphasis upon market factors than they do on the rule book.

NIGLIA, *supra* note 1, at 6–7; *see also* Richard Danzig, Hadley v. Baxendale*: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 260–67 (1975) (describing the holding in *Hadley* as driven by the economic conditions of 1850s England).

25. *See* HILLMAN, *supra* note 14, at 126–28 (discussing the desire of "neoformalists" to limit the discretion of the judiciary).

Scott, "Contract . . . is complex and subjective and synthetic in every sense of those terms. The debate . . . is over the proper nature of *contract law*. All contracts are relational, complex and subjective. But contract law . . . is none of those things. Contract law is formal, simple, and (returning to Macneil's terminology) *classical*."[26]

Alternatively, the scope may be relatively unconstrained, as proposed by contextualists, who argue that contract law should be more responsive to the "real" deal between the parties and account for a wider array of factors such as trade usage and the unconscionability of terms within commercial contexts.[27] Professor Stewart Macaulay has written extensively on the relationship between the "real" and the "paper" deal.[28] For Professor Macaulay, contract law controls the abstract paper deal but has only a tenuous connection to the social institution and practice of contract that informs the parties' real bargain.[29] This real contract is informed by a wide scope of contexts, including business culture, expectations of good faith, and intrarelational understandings that develop between parties.[30]

Selection of legally relevant contexts within each level of contextual scope is far more complex. Undeniably, many contextual factors, such as the gender and race of contract participants, correlate with suboptimal outcomes.[31] But the effect of such factors is indeterminate in individual cases. Courts must make subjective

26. Scott, *supra* note 4, at 852.

27. *See* HILLMAN, *supra* note 14, at 125–60 (discussing contextualism); Macaulay, *supra* note 2, at 45–47 (arguing that contract law should address the "real" bargain between the parties).

28. *See, e.g.*, Macaulay, *supra* note 19; Macaulay, *supra* note 2.

29. *See* Macaulay, *supra* note 19, at 60 ("[M]any, if not most, exchanges reflect no planning, or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances."); Macaulay, *supra* note 2, at 61 ("'Contract law contributes to trust most of those who know the least about it. My guess is that it operates as a vague threat that should be avoided in all but a few situations.'" (quoting Stewart Macaulay, *Crime and Custom in Business Society*, 22 J.L.S. 248, 254 (1995) (U.K.))).

30. *See* Macaulay, *supra* note 2, at 59–61; *see also* Beale & Dugdale, *supra* note 22, at 54 (recognizing that parties contract based on a series of nonlegal expectations and tend to avoid lawyers and legal remedies as inflexible and unable to apprehend trade custom and commercial needs).

31. *See, e.g.*, LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1–8, 54–58 (2003); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 309–10 (1995); *cf.* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 896–97 (1997) ("[T]hose who teach, research, or practice contract law should broaden their perspective to ensure that the dynamics of human perception and disparity based upon race, gender, and class are explored in case analyses when these issues play a role in the analysis of legal rules. When relevant, issues of disparity should be considered and analyzed, not as exclusive determinants, but as possible contributing components to the thought processes that lead to the formation and breakdown of bargains.").

selections of salient contextual criteria. But given the complex relation between potentially relevant contextual factors and the actual effect of such factors in individual cases, courts and later observers and consumers of judicial output may not be capable of identifying or evaluating them.[32]

High-context courts are thus relatively unconstrained in their discretion to include and weigh particular contextual factors and may even hide the true contextual basis for their decisions behind a screen of other, plausibly relevant factors.[33] Such disparate and unbounded selection of contextual factors eliminates potential network benefits from development of standardized default contract terms[34] and potentially threatens judicial legitimacy as users of the legal system lose confidence in the quality of judicial product.[35]

32. In this regard, Professor Omri Ben-Shahar identifies two separate critiques: (1) courts cannot accurately identify or evaluate contextual factors; and (2) those factors may not exist to be identified. Ben-Shahar, *supra* note 18, at 782.

33. For instance, Dean Blake Morant's teaching on *Williams v. Walker-Thomas Furniture* provides an excellent analysis of the racial context of that decision despite Judge Skelly Wright mentioning a host of other highly contextualized factors. *See* Morant, *supra* note 31, at 925–36. Whatever may be said about the ability of standards or rules to constrain the discretion of decision makers, the greater the number of potentially relevant factors, the easier it is for courts and other decision makers to obfuscate, justify, and conceal the actual decision process.

34. *See* David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 437–38 (2009) (offering a sophisticated justification for acontextual application of *contra proferentem* interpretive rules based on network benefits arising from standardization of both the terms used and the legal meaning assigned to those terms); *see also* Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1401 (2009) ("When one consumer creates an idiosyncratic deal, the information-savings benefits of standardization are reduced for all other potential customers.").

35. For example, users of relatively high-context regimes like the U.C.C. and the Convention on the International Sale of Goods ("CISG") may decide to opt out of those regimes. *See, e.g.*, Bernstein, *supra* note 4, at 1815–20 (identifying reasons why parties to a grain and feed transaction would decide to opt out of the U.C.C. and select a private adjudicative approach); Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & COM. 1, 14 (2008) (reporting that "55% of U.S. practitioners who said they were familiar with the CISG specifically choose to opt out of its coverage"). Although it is not clear that the parties described by Professors Bernstein and Fitzgerald opted out specifically to reject HCS, it is notable that the National Grain and Feed Association's ("NGFA") private arbitration system is a formalist, relatively acontextual dispute resolution mechanism. *See* Bernstein, *supra* note 4, at 1815–20. Similarly, if parties actually valued HCS, one could hardly ask for a more contextualized regime than the CISG. *See, e.g.*, Convention on Contracts for the International Sale of Goods arts. 8–9, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489

Beyond these general observations and critiques, both the scope problem and the selection problem can be understood as claims about bargaining power.[36] The relationship between the selection of legally salient contextual factors and bargaining power is obvious. Producers, employers, franchisors, and other repeat players, for example, suffer a loss of bargaining power if courts recognize a gross disparity of bargaining power in favor of those classes and attempt to correct that perceived disparity. And the adoption of HCS systemically shifts bargaining power from those who benefit from relatively low-context contract regimes to those who are currently perceived as lacking such power.

Finally, "context" also implicitly includes a normative argument that contract law should reflect the actual or real bargain between the parties, of which the abstract explicit terms are only part.[37] In this sense, context arguably provides courts with a more accurate picture of the real-world undertakings and understandings of the parties, as opposed to the abstract and formalistic image provided by reliance on the texts crafted by lawyers who were unconnected with the deal.[38]

Implicitly, these context-based arguments also suggest that courts should account explicitly for extralegal contextual factors that are currently legally irrelevant but nonetheless outcome-determinative or outcome-influencing. Although we may acknowledge intellectually that the limitations of human decision-making capacities mean that more information may not yield

U.N.T.S. 3 (incorporating subjective intent and international trade custom and usage into contract interpretation).

36. *Cf.* Kellye Y. Testy, *Whose Deal Is It?: Teaching About Structural Inequality by Teaching Contracts Transactionally*, 34 U. TOL. L. REV. 699, 700 (2003) ("Contracts . . . are bargains between particular persons or entities, not free-floating bargains. Those identities matter in terms of the bargaining power of the parties and the kind of contract that they need to embody their deal.").

37. *See* HILLMAN, *supra* note 14, at 125–27 (identifying this normative position as "contextualist"); *see also supra* notes 27–30 and accompanying text.

38. Thus, as Dean Morant has argued, "[T]he world is not perfect, and rules of law may fail to operate effectively or efficiently when the rigidity of law does not accommodate contextual nuances of specific situations." Morant, *supra* note 22, at 455 (citing Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957 (1995) ("Often rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved.")). Similarly, Professor Kellye Testy argues:

> There are many forces that push contract law toward abstraction . . . . [C]ontract law has an objective theory at its core that tends to reduce its transactors to "reasonable" persons without races, genders, or economic classes. There are no reasonable or unreasonable people without these identity categories: all persons have these identity markers and in this society those are significant determinants of bargaining power. Thus, attention to issues of social location makes the reasonable person a real one.

Testy, *supra* note 36, at 701.

superior results, from an emotional or appetitive perspective more is better. It is hard to argue against the promise of a "more accurate" and "better" picture of the real deal. Calls for greater attention to context are thus also implicitly calls for contract law to adjust outcomes on the basis of that context.

II. CONTEXT IN PRACTICE: JUDICIAL USE (AND MISUSE) OF CONTEXT AS BARGAINING POWER

Actual judicial treatment of contextual factors often seems to assume that context matters *and* that it is the job of courts to account for context *and* that courts can accurately assess and respond to contextual factors. Consider, for example, the highly contextualized treatment advocated by Judge Jerome Frank's dissent in *M. Whitmark & Sons v. Fischer Music Co*.[39] In this case, a lyricist sold a music publisher the renewal rights to his song catalog (which were contingent on the artist's survival and would not mature for twenty-two years) for $1,600.[40] While the majority held the assignment valid and enforced it as written,[41] Judge Frank dissented on purely contextual, extralegal grounds:

> We need only take judicial notice of that which every schoolboy knows—that, usually, with a few notable exceptions (such as W. Shakespeare and G. B. Shaw), *authors are hopelessly inept in business transactions* and that lyricists, like the defendant Graff, often sell their songs "for a song." Here, then, is a case where (a) *the defendant was an author, one of a class of persons notoriously inexperienced in business*, and the particular author was actually, at the time, *in desperate financial straits*, while the plaintiff was a successful and experienced publisher; (b) the property contracted for was of such a character that, when the contract was made, "neither party could know even approximately the value," so that "it was a bargain made in the dark"; and (c) the consideration was a very small sum.[42]

Judge Frank's use of context demonstrates the pitfalls inherent in high-context contract regimes. He begins with an unsupported caricature of artists, a contextual scope well outside the surrounding facts and circumstances of the actual parties and transaction at issue. For Judge Frank, it is enough that Graff is a member of the musician class to support a strong (if not irrebuttable) presumption that Graff was incompetent at business matters. Even if Judge Frank's stereotyping was generally true of the class of musician-lyricists, such reasoning is dangerous both in terms of unintended

39. 125 F.2d 949 (2d Cir. 1942).
40. *Id.* at 954–55 (Frank, J., dissenting).
41. *Id.* at 954 (majority opinion).
42. *Id.* at 955–56 (Frank, J., dissenting) (emphasis added).

paternalistic effects[43] and in terms of the discriminatory impact engendered in members of the protected class, their potential contract partners, and in state attitudes. Although this problem exemplifies the dangers of incorporating context in the form of tainted stereotypes, it also shows another difficulty in determining the scope and selection of appropriate contextual factors. Specifically, Judge Frank's stereotype is not merely wrong and grossly simplistic, it also blinds him to other potentially salient contextual factors.

Consider the gaps in Judge Frank's context selection. The plaintiff was in "desperate financial straits" at the time of the contract. How desperate? Starving? Trying to buy a daveno for his family? Judge Frank notes that M. Witmark & Sons was a successful and experienced publisher but does not indicate that this fact resulted in worse terms for Graff. It is in fact possible that a successful music publisher might be willing and able to pay more for the contingent rights at issue than an unsuccessful and inexperienced firm. And while Judge Frank notes that the parties were consciously ignorant of the value of the copyright assignment, he draws a peculiar conclusion that their ignorance, together with the price paid, made the bargain somehow unfair and unworthy of enforcement.[44]

Judge Frank's stereotype also illustrates that adding context

43. Professor Arthur Allen Leff cuttingly ridiculed this tendency of courts to determine that they must protect classes of parties who lack what the court deems sufficient contracting skill or sophistication. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 556–57 (1967) ("Put briefly, the typical has a tendency to become stereotypical, with what may be unpleasant results even for the beneficiaries of the judicial benevolence. One can see it enshrined in the old English equity courts' jolly treatment of English seamen as members of a happy, fun-loving race (with, one supposes, a fine sense of rhythm), but certainly not to be trusted to take care of themselves. What effect, if any, this had upon the sailors is hidden behind the judicial chuckles as they protected their loyal sailor boys, but one cannot help wondering how many sailors managed to get credit at any reasonable price. In other words, the benevolent have a tendency to colonize, whether geographically or legally.").

44. *M. Whitmark & Sons*, 125 F.2d at 955–56 (Frank, J., dissenting). Of course, any standards-based analysis can be critiqued in this way, and the critique is in some senses unfair. Frank is writing in dissent, and it's not clear how much of the extralegal contextual evidence is contained in his record. Moreover, courts—particularly appellate courts—simply lack the resources to consider the totality (or even an appreciable portion thereof) of the parties' circumstances. *See supra* note 32 and accompanying text. And, even when courts recognize those circumstances and consider that context, judicial economy still requires judges to make gross categorizations of facts in order to apply those facts to the abstract rules and standards of contract law. *See, e.g.*, Barnhizer, *supra* note 12, at 236 (noting that courts may apply two-dimensional approximation in assessing relative bargaining power of the parties because "the costs of developing greater information regarding the parties' actual balance of power would be too great").

does not necessarily add meaning or resolve ambiguity. In particular, Judge Frank uses context to obfuscate as much as illuminate. The stereotype of the bumbling and unworldly musician exploited by the sophisticated music publisher fits with our legal mythology of the underdog and the oppressive business firm.[45] Judge Frank has, in essence, elevated his personal narrative of what it means to be a member of the musician class to the level of a legal myth invoking an archetypal struggle that rhetorically justifies intervention to make sure the story comes out right. But this stereotype prevents further inquiry into Judge Frank's declaration that the consideration was a "small sum." I have no idea whether $1600 in 1917 for a highly contingent copyright renewal right on a song catalog of uncertain value that would not mature for many years was in fact a small sum. And, presumably, neither did Judge Frank.

All that judges can do in particular cases is assess post hoc whether those outcomes fit within their own interpretations of often-implicit background contexts and within their personal narratives and legal mythologies. For Judge Frank, the sum was small most likely because the musician lacked business savvy, not because anyone actually assessed the value of the song catalog.[46] These implicit background narratives are facts about the world, but they cannot be associated with any meaningful right to recovery or defense. They are context without content, nice things to know about the characters in legal dramas, but, like the fact that *Hamlet's* Ophelia was a nutter, not determinative of the outcome.

III. CONTEXT AS LEGITIMATION

While Judge Frank's *M. Whitmark & Sons* dissent illustrates the very real and potentially damaging impact of improper use of HCS, it is also true that HCS hold promise as a tool for assessing contract obligations. Specifically, the promise of HCS rests in two opposing normative theories justifying why courts should favor HCS over LCS. First, HCS may be legitimative of contract law because such strategies promise higher quality outcomes, measured in terms of accuracy, justice, certainty, credibility, "feel-goodedness," or some other metric (the "legitimative thesis").[47] Alternatively, as discussed in Part IV, HCS either demonstrate the internal incoherence of

45. *See* Barnhizer, *supra* note 12, at 238–40 (discussing the myth of unequal bargaining power).

46. Professor Valle notes this problem in critiquing Leone Niglia's macrocontextual analysis of the importance of background factors in contract law. Valle, *supra* note 1, at 524 ("[Niglia] argues that moving forward requires the abandonment of abstracted views of the law. However, beyond this, no clear solutions are offered.").

47. *See, e.g.*, Macaulay, *supra* note 2, at 45–46 (arguing that analysis of context captures the parties' "real" deal).

contract law or undermine the legal infrastructure of contract (presumably to replace it with a different infrastructure).[48] Such delegitimating arguments normatively require courts to adopt HCS or admit the internal incoherence and illegitimacy of contract law (the "delegitimative thesis").

To evaluate these theses, this Article uses examples from unconscionability challenges to arbitration agreements in Ninth Circuit Court of Appeals[49] opinions issued between 2000 and 2010. This is not an attempt at empiricism but rather is merely a useful body of anecdotal cases from a court that has engaged the arbitration unconscionability issue repeatedly and vigorously.[50] The specific legal issue of unconscionability works well for this Article's purpose because it requires a relatively high-context inquiry[51] while

48. *See infra* Part IV. Professor Duncan Kennedy's analysis of specific contextual factors thought to beget inequalities of bargaining power, for instance, identifies claims of bargaining power disparities as incoherent but nonetheless useful as a weapon of Left and Center-Left attacks on the legitimacy of contract. *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 620–24 (1982) (acknowledging the incoherence of the concept of inequality of bargaining power but advocating the use of the doctrine as a destabilizing influence against classically liberal and formalist notions of contract).

49. The Ninth Circuit is arguably relatively hostile to arbitration clauses, particularly to clauses arising from the employment or consumer contexts, as compared to other federal appellate courts. *See* Stephen K. Huber, *Arbitration and Contracts: What Are the Law Schools Teaching?*, 2 J. AM. ARB. 209, 290 (2003) (noting the "Ninth Circuit's lonely position of hostility to arbitration among federal appellate courts"); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 61 ("Recent decisions in California state courts and the Ninth Circuit . . . show that the same judicial hostility ostensibly thwarted eighty years ago continues today, albeit in a more subtle—but equally hostile—form."); Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 503 n.128 (2009) (noting Ninth Circuit hostility to class-action waivers in arbitration clauses).

50. An empirical analysis comparing the degree of contextual analysis in assessments of consumer and employment arbitration agreements versus assessments of agreements between commercial entities is beyond the scope of this brief Article. Notably, in a true empirical examination of related questions, University of Chicago Bigelow Fellow Anthony Niblett has engaged in a highly sophisticated analysis of judicial inconsistencies in reasoning, choice of facts, and application of law in unconscionability decisions by California appellate courts that is the subject of a forthcoming article. *See* Anthony Niblett, Tracking Inconsistent Judicial Behavior (July 31, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1434685.

51. *See* U.C.C. § 2-302 cmt. 1 (2003) ("The basic test is whether, *in the light of the general commercial background and the commercial needs of the particular trade or case*, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of

remaining manageably narrow because such cases are generally limited to challenges to the arbitration clause itself.[52]

Between January 2000 and January 2010, the Ninth Circuit reviewed and addressed unconscionability challenges to arbitration clauses in thirty-eight cases in which the party resisting the arbitration clause explicitly raised an unconscionability challenge to the enforceability of the clause.[53] The contracts in these cases primarily involved employment (nineteen cases),[54] with the other contracts involving telecommunications (nine cases),[55] credit cards

the contract." (emphasis added)); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) ("The determination that a contract or term is or is not unconscionable is made *in the light of its setting, purpose and effect*." (emphasis added)).

52. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

53. These cases were generated by two separate searches within Westlaw's 9th Circuit cases database (CTA9) with a date restriction between January 1, 2000 and January 1, 2010: (1) "arbitration & unconscionability"; and (2) a search for West Key number "25Tk134" (covering Alternative Dispute Resolution-Arbitration-Agreements to Arbitrate-Requisites and Validity-Validity) plus the additional search term "unconscionability." Two additional and related cases involved claims of unconscionability in party briefs or assessments of unconscionability by the dissent that were not addressed by the majority opinion. *See* Aceves v. Autonation, Inc., 317 Fed. App'x 665, 666–67, 667 n.1 (9th Cir. 2009) (holding that a contract clearly and unmistakably reserved for an arbitrator the question of arbitrability and ignoring the dissenting argument that a class-action waiver rendered the arbitration clause substantively unconscionable); Ariza v. Autonation, Inc., 317 Fed. App'x 662, 663–64, 665 n.1 (9th Cir. 2009) (same).

54. Jackson v. Rent-A-Ctr. W., Inc., 581 F.3d 912 (9th Cir. 2009); Gray v. Rent-A-Ctr. W., Inc., 314 Fed. App'x 15 (9th Cir. 2008), *vacated as moot,* 295 Fed. App'x 155 (9th Cir. 2008); Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148 (9th Cir. 2008); Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007); Martin v. TeleTech Holdings, Inc., 213 Fed. App'x 581 (9th Cir. 2006); Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005); Batory v. Sears, Roebuck & Co., 124 Fed. App'x 530 (9th Cir. 2005); Ramsdell v. Lenscrafters, Inc., 135 Fed. App'x 130 (9th Cir. 2005); Semcken v. Genesis Med. Interventional, Inc., 132 Fed. App'x 155 (9th Cir. 2005); Siordia v. Circuit City Stores, Inc., No. 03-56459, 2005 WL 1368083 (9th Cir. June 9, 2005); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003); Domingo v. Ameriquest Mortgage. Co., 70 Fed. App'x 919 (9th Cir. 2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003); Melton v. Philip Morris, Inc., 71 Fed. App'x 701 (9th Cir. 2003); Scott v. Borg Warner Protective Servs., 55 Fed. App'x 414 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002); Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778 (9th Cir. 2002).

55. Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009); *In re* Detwiler, 305 Fed. App'x 353 (9th Cir. 2008); Janda v. T-Mobile USA, Inc., 267 Fed. App'x 727 (9th Cir. 2008); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008); Douglas v. U.S. Dist. Court, 495 F.3d 1062 (9th Cir. 2007); Ford v. Verisign, Inc., 252 Fed. App'x 781 (9th Cir. 2007); Laster v. T-Mobile USA, Inc., 252 Fed. App'x 777 (9th Cir. 2007); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976 (9th Cir. 2007); Ting v. AT&T, 319 F.3d 1126 (9th Cir.

or other lending (three cases),[56] franchising (two cases),[57] business services (two cases),[58] sale of goods (two cases),[59] and joint venture investments (one case).[60] The court either enforced the arbitration clause or remanded the case for further findings as to substantive or procedural unconscionability in nine of the thirty-eight cases.[61] As discussed below, these cases provide anecdotal support for the proposition that the legitimative thesis is incoherent.

The legitimative thesis is attractive because it claims that HCS are desirable because they do contract "better." For example, in a line of cases involving Circuit City's attempt to impose binding arbitration in employment disputes,[62] the Ninth Circuit shows the progressive inclusion of additional context, which, at first blush, appears to improve the quality and accuracy of the judicial outcomes. In 2002, the court affirmed the enforceability of an arbitration clause in two cases, holding that the agreement was not procedurally unconscionable because it permitted employees to opt out and retain their right to litigate.[63] Notably, *Circuit City Stores, Inc. v. Ahmed* is relatively acontextual in that the opt-out term by itself was sufficient to justify a finding of no procedural unconscionability.[64] In contrast, *Circuit City Stores, Inc. v. Najd*

2003).

56. Davis v. Chase Bank USA, N.A., 299 Fed. App'x 662 (9th Cir. 2008); Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078 (9th Cir. 2008); Tamayo v. Brainstorm USA, 154 Fed. App'x 564 (9th Cir. 2005).

57. Nagrampa v. MailCoups, Inc., 469 F.3d 1257 (9th Cir. 2006); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931 (9th Cir. 2001).

58. Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma (USA) Inc., 560 F.3d 935 (9th Cir. 2009); Net Global Mktg., Inc. v. Dialtone, Inc., 217 Fed. App'x 598 (9th Cir. 2007).

59. Chalk v. T-Mobile USA, Inc., 560 F.3d 1087 (9th Cir. 2009); Oestreicher v. Alienware Corp., 322 Fed. App'x 489 (9th Cir. 2009).

60. Dziubla v. Cargill, Inc., 214 Fed. App'x 658 (9th Cir. 2006).

61. *See Kam-Ko Bio-Pharm Trading Co*., 560 F.3d at 942; *In re* Detwiler, 305 Fed. App'x 353, 356 (9th Cir. 2008); *Hoffman*, 546 F.3d at 1084–85; Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1158 (9th Cir. 2008); *Dziubla*, 214 Fed. App'x at 659–60; Semcken v. Genesis Med. Interventional, Inc., 132 Fed. App'x 155, 156 (9th Cir. 2005); Melton v. Philip Morris, Inc., 71 Fed. App'x 701, 704 (9th Cir. 2003); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199–1200 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002).

62. Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1256 (9th Cir. 2005); Siordia v. Circuit City Stores, Inc., No. 03-56459, 2005 WL 1368083, at *1 (9th Cir. June 9, 2005); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1104 (9th Cir. 2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1169 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 891 (9th Cir. 2002); *Ahmed*, 283 F.3d at 1199; *Najd*, 294 F.3d at 1106.

63. *Ahmed*, 283 F.3d at 1200; *Najd*, 294 F.3d at 1108.

64. *Ahmed*, 283 F.3d at 1199–1200 ("[T]his case lacks the necessary element of procedural unconscionability. Ahmed was not presented with a contract of adhesion because he was given the opportunity to opt-out of the Circuit City arbitration program by mailing in a simple one-page form.").

uses a higher context approach, including analysis of the parties' relationship, the meaning of an employee's silence, the clarity of the terms and descriptions of the consequences of failing to opt out, the opportunity to review the agreement with an attorney, Circuit City's statement to its employees that opting out would not affect the employment relationship, and the thirty-day review period provided to employees, to justify its finding that the agreement was not procedurally unconscionable.[65]

In contrast, one year later in *Circuit City Stores v. Mantor* the court held the same agreement[66] procedurally unconscionable because the opt-out provision was not meaningful.[67] There, the court found that despite the abstract opt-out terms, "Circuit City management stressed that employees had little choice in this matter; they suggested that employees ought to sign the agreement or prepare to be terminated."[68] Assuming that Najd and Ahmed would have been subjected to the same unwritten corporate policy, the greater context of the *Mantor* decision appears on its face to deliver a better and more accurate depiction of the parties' real bargain of which the abstract contract terms were only a small (and misleading) part.

But on further examination, the court's greater attention to context does not appear to deliver the promised benefits of greater accuracy and credibility. The distinctions between *Najd*, *Ahmed*, and *Mantor* depended only on the lowest level of contextual analysis—surrounding facts and circumstances that respond directly to elements of the legal rule or standard at issue. Procedural unconscionability in most jurisdictions depends in part on the availability of meaningful alternatives.[69] Whether Circuit City rendered a paper right to opt out illusory is clearly relevant to whether employees had meaningful alternatives to accepting the

65. *Najd*, 294 F.3d at 1109.

66. Circuit City did regularly amend provisions in its Dispute Resolution Agreement ("DRA") and Dispute Resolution Rules and Procedures ("DRRP") contracts. *See, e.g.*, *Siordia*, 2005 WL 1368083, at *1 (reviewing cases holding Circuit City's 1995, 1998, and 2001 DRAs and DRRPs unconscionable and also determining that Circuit City's 1997 and 2000 DRAs and DRRPs were likewise unconscionable). Despite other revisions, the opt-out term was present in the *Ahmed*, *Najd*, and *Mantor* contracts. *Mantor*, 335 F.3d at 1104; *Ahmed*, 283 F.3d at 1199; *Najd*, 294 F.3d at 1106.

67. *Mantor*, 335 F.3d at 1106.

68. *Id.* at 1104.

69. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (Fed. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."); Arnold v. United Cos. Lending Corp., 511 S.E.2d 854, 861–62 (W. Va. 1998) (discussing lack of meaningful alternatives in assessing procedural unconscionability); Coady v. Cross Country Bank, 729 N.W.2d 732, 741 (Wis. Ct. App. 2007) (noting lack of meaningful alternatives as an element of procedural unconscionability).

arbitration agreement. Moreover, these surrounding facts and circumstances concerned events that actually happened between the actual parties to the actual disputes. In short, this level of context is already legally salient to judicial resolution of the dispute.

But at a higher level of contextual analysis, Ninth Circuit unconscionability opinions adopt a contextual approach that is indistinguishable from Judge Frank's absurd speculations about the business savvy of musicians. In these cases, consumers,[70] employees,[71] and franchisees[72] replace musicians in the stereotyped analysis of relative bargaining power and oppression by established business firms. Once the court identifies the party resisting arbitration as a member of a protected status, further inquiry into context ceases. "Context" becomes the new formalism.

Ninth Circuit panels, for instance, ubiquitously hold that potential employees have no bargaining power in applying for or continuing in employment, even when the employer can demonstrate the existence of alternative employment contract terms with different employers.[73] As the court held in *Ferguson v. Countrywide Credit Industries*:

> [W]hether the [employee] had an opportunity to decline the defendant's contract and instead to enter into a contract with another party that does not include the offending terms is not the relevant test for procedural unconscionability. Instead, California courts have consistently held that where a party in a position of unequal bargaining power is *presented* with an offending clause without the opportunity for meaningful negotiation, oppression and, therefore procedural unconscionability, are present.[74]

Likewise, in *Davis v. O'Melveny & Myers*, the court held that a current employee who was given ninety-days notice of a contract amendment that required arbitration, plus an opportunity to review the terms and meaning of the arbitration program with an attorney, had no bargaining power and lacked any meaningful alternatives.[75]

The court repeatedly uses this same technique of adopting a single contextual factor—the status of the plaintiff as an employee, a consumer, a franchisee, etc.—to bar consideration of other contextual factors that might ameliorate the unconscionability analysis. Even when the court engaged in arguably its most wide-

70. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

71. *See, e.g.*, Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005).

72. *See, e.g.*, Ticknor v. Choice Hotels, Int'l, Inc., 265 F.3d 931 (9th Cir. 2001).

73. *See, e.g.*, Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 784 (9th Cir. 2002).

74. *Id.* (emphasis added) (citations omitted).

75. Davis v. O'Melveny & Myers, 485 F.3d 1066, 1073–75 (9th Cir. 2007).

ranging contextual analysis—*Ting v. AT&T*—it did so for the purpose of slamming AT&T's pathological conduct and then only after it had already suggested that additional contextual evidence was irrelevant under California law.[76] In other cases, such as *Ticknor v. Choice Hotels*,[77] the court clearly used contextual assumptions regarding the bargaining power of franchisees and consumers as a bar to further high-level contextual analysis. In *Ticknor*, Ticknor purchased a franchise from Choice Hotels to operate an Econo Lodge hotel in Montana.[78] The contract included a relatively vanilla arbitration clause, requiring arbitration of all disputes except indemnification, collection of moneys owed, and trademark claims.[79] The majority opinion concluded that "the Franchise Agreement was a standardized, form agreement that Ticknor was forced to accept or reject without negotiation."[80] The court buttressed this conclusion by equating the franchisee's alleged lack of meaningful alternatives with that of consumers.[81]

The dissent focused on the multitude of contextual factors that the majority opinion excluded. For instance, when the majority held the contract adhesive because Ticknor was forced to accept it without negotiation, the dissent observed that the district court specifically found that "*negotiations took place* between James Ticknor and a Choice representative in Montana."[82] Likewise, the majority's castrated bargaining power analysis ignored the fact that Ticknor was not unsophisticated regarding hotel operations and franchises:

> Plaintiffs are not unsophisticated "consumers" under any definition of the term and this is not a consumer transaction. Ticknor Lodging Corp. . . . owns and operates at least two hotel properties—the one at issue and another in Colorado. Plaintiffs have been operating these properties under franchise agreements with two [other] separate franchisors . . . . Additionally, unlike the plaintiffs in the cases cited above, the Ticknors have not demonstrated that they had no other viable alternatives, *i.e.*, that they "face[d] the possibility of being excluded from the [hotel franchise] market unless [they] accept[ed] a contract with such an agreement to arbitrate." Rather, the record suggests that *plaintiffs made a conscious decision to change their affiliation because they*

76. Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003) ("[E]ven assuming [contract] alternatives matter under California law . . . it nonetheless fails to overcome the district court's well-founded conclusion that the CSA is a procedurally unconscionable contract.").

77. 265 F.3d 931 (9th Cir. 2001).

78. *Id.* at 935.

79. *Id.*

80. *Id.* at 939.

81. *Id.* at 941.

82. *Id*. at 943 n.4 (Tashima, J., dissenting).

> *believed that the Econo Lodge mark and system would increase their profitability.* They willingly accepted the negotiated burdens of the new franchise agreement in return for the expected benefits of the Econo Lodge mark. *In other words, plaintiffs had not only a theoretical, but also an actual, choice.* No adhesion contract was crammed down their throat.[83]

Similarly, in *Nagrampa v. MailCoups, Inc.*, the court again used a high-context determination that Nagrampa was part of a class of franchisees indistinguishable from consumers to bar consideration of other contextual factors that indicated she had meaningful alternatives to the MailCoups franchise contract and was sufficiently sophisticated to understand that contract.[84] While the MailCoups franchise agreement was nonnegotiable, MailCoups argued that Nagrampa was not unsophisticated because she had substantial expertise working as a sales manager in the direct mail industry, had a choice to continue working for her then employer, and could have (and declared she had) read and understood the franchise agreement before signing.[85] Importantly, the court simply rejected MailCoups' evidence of Nagrampa's bargaining power because it had already determined she was a member of a class of contracting parties that had no bargaining power. Instead of real analysis, the court merely cited broad references to "prevailing, although not universal, inequality of economic resources between the contracting parties" and "typical[]" characteristics of franchisees and franchisors, and noted "[f]ranchising involves the unequal bargaining power of franchisors and franchisees and therefore carries within itself the seeds of abuse."[86]

Ninth Circuit courts' regular use of high-context factors such as the plaintiffs' employee, consumer, and franchisee status to bar consideration of other contextual factors tending to favor the allegedly stronger party is just wrong. Bargaining power is never a simple issue and can change instantly and radically upon an infinite array of inputs.[87] For instance, as Professor Richard Epstein has observed, in many cases employees have *superior* bargaining power to employers, particularly in the application phase.[88] Applicant

83. *Id.* at 942–43 (emphasis added) (citations omitted).

84. Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1282–83 (9th Cir. 2006).

85. *Id.* at 1281–83.

86. *Id.* at 1282 (quoting Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d. 365, 373–74 (Ct. App. 1996)).

87. *See* Barnhizer, *supra* note 12, at 160–92 (explaining the characteristics of power).

88. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 966–70 (1984) (assessing extralegal restraints on the power of employers to abuse at-will employment relationships); *see also* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 314–15 (1975) (assessing extralegal restraints on the power of franchisors to abuse termination-at-will terms in franchise agreements).

employees who have existing jobs or options, for instance, may have superior information regarding employer reputation and available alternative employment opportunities, and a superior ability to bargain for increased wages.[89] Moreover, the economic conditions at the time of contracting—specifically the availability of alternative employment—should be a highly relevant contextual background factor.[90] Likewise, a firm's reputation for treatment of employees should be considered a significant contextual factor in the applicant's decision making. Employees who knowingly or recklessly choose to go forward in a highly negative context should not be able to claim that they were unfairly surprised or oppressed into accepting problematic employment contracts.[91]

The remarkable thing about these cases is not that they generally engage in entirely superficial contextual bargaining power analyses. That is typical of judicial attempts to pretend courts are competent to identify (and, implicitly, correct) bargaining power disparities between contracting parties.[92] Leaving aside the

89. *See* Epstein, *In Defense of the Contract at Will*, *supra* note 88, at 975–76.

90. This is not to suggest that it is realistic to require that employees quit their jobs because of a change in employment contracts requiring employees or prospective employees to submit to arbitration, although in some cases that is undoubtedly the case. Rather, the ability of employees, consumers, or other classes of parties perceived generally to have little bargaining power to affect the quality of the bargains they receive depends not just on whether they read and understood those bargains, but also on their perceptions of the other party's reputation in dealing with similarly situated parties. Thus, to determine whether Mrs. Williams actually had no bargaining power in deciding to purchase the daveno from Walker-Thomas Furniture, the allegedly confusing terms of the cross-collateralization clause in her contract are only part of the analysis. Even if Mrs. Williams did not read or understand the abstract terms on paper, it is very likely that she had real knowledge about what happened to people who defaulted on their payments to Walker-Thomas. *See* Eben Colby, Note, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 652 (2002). While such reputational context might not exist at the time of the first use of an abusive contract (and may never exist if the contract is not enforced abusively), it will definitely come into existence after the company begins attempting to enforce the allegedly unconscionable terms against employees, consumers, franchisees, and other allegedly weak parties.

91. An Internet Ask.com search for "How does Circuit City treat its employees?," for instance, yields numerous stories by disgruntled employees, including employees who believe they were harmed by Circuit City's arbitration process. *See* http://www.ask.com/ (search "How does Circuit City treat its employees?") (last visited July 12, 2010).

92. *See* Barnhizer, *supra* note 12, at 199–201 (discussing the failure of courts to adopt a coherent approach for addressing disparities in bargaining power); Daniel D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69, 105 (2006) ("The contract model for assessing bargaining power looks primarily to limitations on a party's bargaining power. Did the parties lack meaningful alternatives? Was one of the parties operating under necessity? Did the parties

question of whether there is any legitimate normative justification for such judicial interference, these cases demonstrate that the legitimative thesis is likely incoherent.

In this respect, HCS are qualitatively identical to attempts to assess the bargaining power relation between two parties to a particular contract dispute. The legitimative thesis proposes that HCS are better because they give a more accurate picture of the deal the parties "really" intended but may have only imperfectly captured in the abstract terms of their contract.[93] Context theoretically permits courts to interpret the abstract agreement in light of the wider scope of surrounding facts and circumstances, potentially including background social, political, economic, and even philosophical factors.

But the Ninth Circuit arbitration clause unconscionability cases discussed above suggest that when courts actually adopt HCS, they do not seek accuracy or greater fidelity to the "real" contract. Instead, many of these courts seemed to use a small number of high-context factors as a rule or "supercontext" for barring the assessment of other high-context factors that might interfere with or complicate application of a particular rule or standard. Rather than increased nuance or accuracy, or even "feel-goodedness," HCS were used to forestall more nuanced inquiries in favor of a judicial caricature of the relation between the parties.

HCS at the judicial level thus likely would fail to deliver meaningful or measurably superior outcomes compared to LCS.[94]

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fit within traditionally weak or strong status classifications such as poverty, gender, age, education, business sophistication and so on? Once the court satisfies that determination—one way or the other—the inquiry stops." (footnotes omitted)).

93. *See* Macaulay, *supra* note 2, at 79.

94. Other high-context regimes have arguably failed to produce meaningfully better outcomes compared to LCS. For instance, the U.C.C. is an explicitly high-context regime intended to incorporate actual business norms and commercial practices as default rules for resolving commercial disputes. But, as Professor Robert Scott observes, judicial decisions have failed to incorporate more definite immanent business norms into the U.C.C.:

> While the Code was explicitly designed to incorporate evolving norms into an ever-growing set of legally defined default rules, incorporation as such has simply not occurred. To be sure, courts have interpreted contracts in which context evidence has been evaluated together with the written terms of the contract. . . . But while such judicial decisions affirm the institutional bias toward contextualizing the contract, the fact-specific nature of the contract dispute leaves, in virtually every case, little opportunity for subsequent incorporation as tailored defaults.

Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW, *supra* note 20, at 149, 165–66. Other commentators have likewise recognized that HCS undermine the ability of tribunals to produce repeatable and credible results. For instance,

Alternatively, even if there are some observable benefits to HCS, such strategies are so costly that any benefits are outweighed by the additional time, expense, and uncertainty that courts and parties must incur. Disregarding whether the court reached the "right" answer in the abstract, there is still no sense in which users of the legal system are left with any feeling that the court got it "more" right because of the contextual analysis.

Further, the incoherence of the legitimative thesis can only increase as the background cultural, economic, and political structures become increasingly heterogeneous. More importantly, HCS necessarily increase the likelihood that users of the legal system will perceive it as chaotic, unprincipled, or biased in favor of particular interest groups. Globalization, multiculturalism, and developments of new hybrid cultures expand the scope of obvious contextual factors that could potentially determine or influence contract outcomes.[95] That variability in turn affects the credibility of the decisions in high-context contracts doctrines like unconscionability.

The legitimative thesis in support of HCS is thus neutral at best and likely incoherent in many cases. It sacrifices the appearance (and perhaps also the fact) of predictability and certainty in contract law and, at the extremes, substitutes the appearance (and perhaps also the fact) of confusion, bias, and ad hoc decision making. But, as discussed below, HCS still serve an important critical role in contract law that may affect bargaining power disparities between classes of contracting parties or even systemically throughout contract law.

IV. CONTEXT AS DELEGITIMATION—CHANGING THE RULES OF THE GAME FOR BARGAINING ADVANTAGE

Claims that contextual differences matter in terms of contract outcome implicitly state a normative claim that contract law should respond to those differences. Under this normative claim, contract law cannot function properly unless it employs HCS in dispute resolution. If courts do not redress contextual differences, the entire regime of contract law that is justified on principles of private

Professor Lisa Bernstein reports the comment of a cotton industry arbitrator preferring LCS precisely because HCS expands the possible inquiry too much: "'We look to the contract and then to the trade rules; this is all we have to base . . . [our decision] on. Other things like custom and the background [of the deal] are infinitely variable so we don't look to them.'" Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1737 (2001); *accord* Ben-Shahar, *supra* note 18, at 813–14.

95. *See* Scott, *supra* note 4, at 848 ("The contract theory literature suggests that the activist role courts traditionally have been asked to assume in specifying default rules ex ante and/or adjusting contractual risks ex post may be far less useful in a complex, heterogeneous economy.").

autonomy, consent, and equality of opportunity loses legitimacy. In that sense, it represents a delegitimation of classical contract law.[96]

The systemic changes to bargaining power that result from delegitimation of specific contract doctrines or contract law generally occur on two levels: the level of specific classes of contracting parties, and the systemic level that affects contracting generally across all classes of contracting parties.

A. Delegitimation To Correct Class Specific Bargaining Power Disparities

HCS establish specific contextual categories that justify post hoc judicial intervention to "correct" perceived bargaining power disparities. Thus, employees, consumers, franchisees, musicians, and other apparently "weak" classes lack (or their opponents possess) some quality that prevents the apparently weaker party from participating fully in contract and from effecting preferred outcomes in the bargaining process. These categorical bargaining power disparities are used to justify normative claims that the state should intervene to adjust contract terms, interpretation, or enforcement in order to correct the negative impact of the inequality of bargaining power.[97]

For example, parties approaching American contract law from different linguistic or cultural backgrounds are disadvantaged by contract law itself and may argue that American contract law should either change or adjust to compensate for these disparities. As one commentator argued in discussing the context of Chinese firms contracting with American companies,

> *[F]or U.S. contract law principles to be legitimate in the global*

96. Admittedly, there are other theories for justifying the modern American contract regime that do not depend upon classical notions of private autonomy, liberal ideals of equality, and public neutrality toward private ordering. Communitarian ideals, for instance, would fully justify differential treatment of classes of contracting parties solely because preferencing members of those classes best accords with social policy or community morality. *See, e.g.*, Philip Selznick, *The Jurisprudence of Communitarian Liberalism*, *in* COMMUNITARIANISM IN LAW AND SOCIETY 19, 20–21 (Paul Van Seters ed., 2006) (attempting to synthesize communitarianism and liberalism in describing communitarianism as an emphasis on both the interests of the individual and the community within which the individual is situated rather than looking "only to baseline standards of equality and justice"); *cf.* PLATO, CRITO, *reprinted in* FOUR TEXTS ON SOCRATES 99, 112–14 (Thomas G. West & Grace Starry West trans., rev. ed. 1998) (relating Socrates' argument that he could not justly flee execution in Athens because it had been the laws of Athens that created and shaped his identity). Nonetheless, it is hardly debatable that modern contract law is generally justified on the classically liberal grounds described above.

97. *See* W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW 23 (1996) (arguing that inequalities of bargaining power justify state intervention into private contracts).

> *business community*, they need to take into consideration the cultural differences of the parties from other countries. . . . U.S. contract law is unfair to people with different cultural values, because this can perpetuate the existing inequities between U.S. companies and companies from other countries with different cultures.[98]

Likewise, Professor Rachel Arnow-Richman's comprehensive analysis of "cubewrap" employment contracts strongly suggests that not only do the vast majority of employees suffer from gross disparities of bargaining power but also that courts should directly police particularly exploitative bargaining power abuses by employers.[99] Similar cases for high-context treatments of other categories of apparently weak contracting parties can be made on the basis of race,[100] gender,[101] nursing home status,[102] retirement status,[103] borrower status,[104] and any other status-based

98. Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*, 21 PACE INT'L L. REV. 1, 15–32 (2009) (emphasis added) (arguing against application of parol evidence rule to non-U.S. contracting parties); *accord* Florestal, *supra* note 23, at 8 (arguing that judicial determination of meaning of contract term "sandwich" to exclude burritos masked unconscious bias that failed to account for race, class, and culture in interpreting contract).

99. *See* Arnow-Richman, *supra* note 22, at 963–67; *see also* Rachel Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1197–1211 (2001); Rachel Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn From Family Law*, 10 TEX. WESLEYAN L. REV. 155, 157–60 (2003).

100. *See, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 827–41 (1991) [hereinafter Ayres, *Fair Driving*]; Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 110 (1995); *see also* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 304–10 (1994) (arguing that objective theories of contract incorporate racial narratives that maintain and promote white race consciousness).

101. *See, e.g.*, Ayres, *Fair Driving*, *supra* note 100, at 818–20, 827–41.

102. *See, e.g.*, Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 181–86 (2009).

103. *See, e.g.*, Kaplan et al., *supra* note 22, at 291–95 (noting that retiree health coverage is particularly vulnerable); Elizabeth C. Borer, Note, *Modernizing Medicare: Protecting America's Most Vulnerable Patients from Predatory Health Care Marketing Through Accessible Legal Remedies*, 92 MINN. L. REV. 1165, 1165–70 (2008) (emphasizing the vulnerability of the elderly and the need for legal protection against abusive contracting).

104. *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 8–11, 33–56 (2008) (identifying and assessing borrower irrationalities, biases, and cognitive distortions across multiple classes of credit transactions that generate bargaining weaknesses in buyers); *see also* Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 611–15 (2010) (arguing in favor

classification that is potentially outcome-influencing in contract.

The Ninth Circuit arbitration unconscionability cases discussed above demonstrate a tendency by the court to single out specific classes for protection from what the court deems exploitative arbitration agreements. The court most clearly accorded consumers the status of "weak" contracting parties, both in the types of challenges it was willing to consider and its treatment of consumers appearing before it.[105] While references to consumers' lack of meaningful alternatives are ubiquitous, the former type of preferential treatment is potentially more insidious and important. In terms of case selection, only two of the thirty-eight cases evaluated involved business-to-business contracts,[106] and one involved a venture-capital investment agreement.[107] The remaining cases involved consumers,[108] franchisees,[109] or employees.[110]

In the consumer context, with only one absurd exception,[111] the court held the arbitration term was unconscionable or remanded for further findings on unconscionability.[112] The court's explicit use of

of using behavioral law and economics to identify payday-loan industry borrower classes at high risk of default).

105. The court repeatedly held that consumers lacked bargaining power and meaningful alternatives. *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 854–55 (9th Cir. 2009); Janda v. T-Mobile USA, Inc., 267 Fed. App'x 727, 728 (9th Cir. 2008); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1220 (9th Cir. 2008); Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1068 (9th Cir. 2007); Ford v. Verisign, Inc., 252 Fed. App'x 781, 783 (9th Cir. 2007); Laster v. T-Mobile USA, Inc., 252 Fed. App'x 777, 779–80 (9th Cir. 2007); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981–86 (9th Cir. 2007); Ting v. AT&T, 319 F.3d 1126, 1148–52 (9th Cir. 2003).

106. Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma (USA) Inc., 560 F.3d 935, 938 (9th Cir. 2009); Net Global Mktg., Inc. v. Dialtone, Inc., 271 Fed. App'x 598, 599 (9th Cir. 2007).

107. Dziubla v. Cargill, Inc., 214 Fed. App'x 658, 659 (9th Cir. 2006).

108. *See supra* notes 55–56, 59 and accompanying text.

109. *See supra* note 57 and accompanying text. Notably, the court treated both of the franchisees challenging arbitration clauses as consumers. *See* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1282–84 (9th Cir. 2006); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 939–41 (9th Cir. 2001).

110. *See supra* note 54 and accompanying text.

111. *In re* Detwiler, 305 Fed. App'x 353, 356 (9th Cir. 2008). In that case, the consumer challenged as unconscionable a clause specifying the *consumer's home state of Florida* rather than the producer's home state of Washington as the arbitral forum. *Id.*

112. *See* Chalk v. T-Mobile USA, Inc., 560 F.3d 1087 (9th Cir. 2009); Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009); Oestreicher v. Alienware Corp., 322 Fed. App'x 489 (9th Cir. 2009); Davis v. Chase Bank USA, N.A., 299 Fed. App'x 662 (9th Cir. 2008); Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078 (9th Cir. 2008); Janda v. T-Mobile USA, Inc., 267 Fed. App'x 727 (9th Cir. 2008); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008); Douglas v. U.S. Dist. Court, 495 F.3d 1062 (9th Cir. 2007); Ford v. Verisign, Inc., 252 Fed. App'x 781 (9th Cir. 2007); Laster v. T-Mobile USA, Inc., 252 Fed. App'x 777 (9th Cir. 2007); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976 (9th Cir. 2007); Tamayo v. Brainstorm USA, 154 Fed. App'x 564 (9th Cir. 2005); Ting v.

context in these cases varied widely. In many instances, the court held the arbitration clause unconscionable using a low-context strategy such as a per se rule against arbitration clauses that acted as class-action waivers in consumer contracts.[113] In others, the court engaged in a high-context evaluation of the case before invalidating the clause.[114] Regardless of the degree of explicit contextual inquiry, however, the paucity of opinions addressing unconscionability challenges between commercial entities suggests that the court may have used contextual factors such as a belief in the inherent weakness of consumers to favor that status group in post hoc policing of contractual fairness.

On its face, that courts might be more sympathetic to consumers than to firms in determining whether to hear unconscionability-based appeals is not surprising. But importantly, nothing in the abstract legal standard for unconscionability compels such a lopsided result. In fact, unconscionability standards explicitly are open to claims by commercial entities as well as traditionally weak classes.[115] And it is also clear that business entities and their owners—particularly small businesses—are susceptible to exactly the gross disparities of bargaining power that motivate courts to find unconscionability in consumer contracts.[116] Given this reality, it seems highly unlikely that contracts between business firms would account for less than eight percent of arbitration clause unconscionability opinions by the court if the legal standards were applied in the abstract. Such disproportionality at least raises the possibility that background contextual factors operate to prevent the courts from examining, or even the parties themselves from bringing, some types of unconscionability-based claims.[117]

AT&T, 319 F.3d 1126 (9th Cir. 2003).

113. *See, e.g.*, *Lowden*, 512 F.3d at 1218–19; *Tamayo*, 154 Fed. App'x at 566.

114. *See, e.g.*, *Ting*, 319 F.3d at 1130–34, 1148–52.

115. *See* Net Global Mktg., Inc. v. Dialtone, Inc., 217 Fed. App'x 598, 600–02 (9th Cir. 2007) (holding an arbitration agreement between business firms unconscionable); *see also* Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 941 (9th Cir. 2001) (holding Montana unconscionability law applicable to "supposedly sophisticated business owners").

116. *See* Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 250–67 (2003).

117. It is possible that this disparity arises because commercial parties are more capable than consumers of signaling preferences for LCS. Contracting firms may, for instance, signal LCS preferences by lawyering up their deal or contracting within highly formalized industries such as the grain and feed markets described by Professor Bernstein. *See* Bernstein, *supra* note 4, at 1771–82. I anticipate that this signaling phenomenon as it relates to the quality of the parties' assent and their preference for LCS will be the subject of a future article.

B. *Delegitimation as Systemic Bargaining Power*

HCS also systemically shift bargaining power from repeat players to sporadic contractors.[118] Specifically, LCS that dominate the classical and modern contract regimes described by Professor Danielle Kie Hart will strengthen the bargaining power of repeat players who act within that system over time.[119] LCS, such as a strict four-corners approach to parol evidence or the peppercorn theory of consideration, provide bargaining power advantages to repeat players by limiting the array of factors they must control in transactions with nonrepeat players. Repeat players gain bargaining power advantages over time in a low-context regime by simply having a better grasp and control of the playing field.

Consider the contract formation arrangements that Hart describes as inevitably coercive, particularly with respect to adhesion contracts.[120] Repeat players benefit from contract doctrines that treat adhesive standard form contracts as the equivalent of dickered agreements for purposes of contract formation.[121] The repeat player controls the initial presentation of contract terms and establishes routines and bureaucracies that inhibit the effectiveness of sporadic contractors' attempts to bargain away from the initial terms.[122] After contracting, the sporadic

118. Professor Hillman notes a similar phenomenon with respect to the advantages of repeat players in rules-based systems as compared to standards-based systems. *See* HILLMAN, *supra* note 14, at 136 ("Contextualists assert that a rule-based legal framework . . . favors parties repeatedly involved with the legal system, generally large companies that can most easily adapt to the rules."). But the systemic shift of bargaining power is not limited to the rules versus standards question and extends to any high-context dispute resolution system.

119. Professor Hart observes that modern contract doctrine purports to limit the unfairness of classical contract law primarily through interpretive doctrines and expanded defenses. *See* Hart, *supra* note 7, at 177–82. Such differences between modern and classical contract law obfuscate the similarities in contract formation that coercively presume the validity of purported contracts created by adherence to classical theories of contract formation. *See id.* at 217 ("The easier it is to form a contract . . . the easier it is for the coercing party to obtain the presumption of contract validity.").

120. *See id.* at 217–18 (citing contracts for consumer credit products such as payday loans, fee harvester cards, refund anticipation loans, generic credit cards, and subprime mortgages); *see also* Freidrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630–32 (1943) (noting the existence of coercive agreements in the form of standardized contacts and arguing that courts should not be hostile to legislation designed to resolve bargaining power disparities in adhesion contracts).

121. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1585–86 (1998). Sporadic contractors as a class may also receive a net benefit even from adhesive standard form contracts, compared to the alternatives. *See id.* at 1594–95.

122. *See id.* at 1587–93.

contractor will necessarily incur significant costs in attempting to escape from its terms.[123] And when courts adopt LCS, the repeat player has already metaphorically placed all of its pieces in controlling positions, leaving the nonrepeat player with few or no meaningful options for resisting the outcome preferred by the repeat player.[124]

Successful claims that contract law should adopt HCS for dispute resolution will shift bargaining power away from repeat players by increasing the number of potential outcome-determinative or outcome-influencing factors that are relevant to formation, interpretation, and enforcement of contracts. HCS inject a greater number of salient factors into the process of evaluating and enforcing contracts. While LCS create incentives for repeat players to maximize their bargaining power by controlling the key determinative issues—objective indicia of assent, consideration, and the contract terms—HCS introduce factors that are beyond the control of the repeat player. Many such factors will, in fact, be unknowable to either party at the moment of contract. At the extreme, a high-context strategy may introduce so many salient or potentially salient factors into the judicial analysis that the result is just increased unpredictability or even chaos.[125]

Incorporation of HCS would thus seem to increase the systemic bargaining power of the classes of nonrepeat players that are able to make their contextual arguments salient to judicial analysis. In Judge Frank's world, then, musicians may have greater ability to achieve preferred outcomes in the bargaining process because publishing companies would be barred from demanding exploitative terms.[126] In the arbitration context, the Ninth Circuit has engaged in a high-context march against what it considers to be exploitative or abusive arbitration contracts with consumers, employees, and franchisees.[127] In both situations, the HCS employed in unconscionability and other analyses appear to improve the bargaining power of the nonrepeat players.

The problem is that bargaining power is dynamic, and the normal and likely inevitable reaction to the development of any position of power is the development of an opposing source of power.[128] Repeat players—usually business firms—will always have

123. *See* Hart, *supra* note 7, at 217–18 (noting the difficulty for a nondrafting party to rebut the presumption of contract validity after signing the contract).

124. Except, of course, the obvious solution of simply walking away from a bad deal.

125. *See supra* notes 32–35, 95 and accompanying text.

126. *See supra* notes 39–42 and accompanying text.

127. *See supra* Part III.

128. *Cf.* Vegelahn v. Guntner, 44 N.E. 1077, 1081–82 (Mass. 1896) (Holmes, J., dissenting) (recognizing the development of opposing power loci in the capital versus labor relationship).

incentives to use their resources to stack the deck in their favor until it is no longer profitable to continue to engage in business. As with the Walker-Thomas Furniture Co., which reduced its business and supply of credit and altered its contract terms to some extent following *Williams*,[129] judicial attempts at protection of particular members of apparently disadvantaged classes have always carried the threat of unintended and potentially disastrous consequences for other members of the protected classes.[130]

Likewise, the ability of repeat players to make incremental adjustments to their contracting practices in response to specific decisions invalidating specific contract terms is well documented.[131] This phenomenon can be seen in the arbitration field as producers, employers, and franchisors adjust the terms of their arbitration clauses to attempt to satisfy holdings invalidating their clauses by providing opt-out opportunities, lengthy notice and cooling-off periods, alterations in the mutuality of claims subject to arbitration, and so on. Courts, in effect, play catch-up as each change is introduced into arbitration agreements systematically and works its way through the judicial system.[132]

A recent Ninth Circuit and Supreme Court arbitration case—*Jackson v. Rent-A-Center West, Inc.*[133]—deals with exactly this type of reaction by repeat players to the HCS employed by courts against arbitration clauses. In *Jackson*, the Rent-A-Center employment contract attempted to eliminate judicial attacks on arbitration clauses by giving the "Arbitrator, *and not any federal, state, or local court or agency*, . . . exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the] Agreement including, but not limited to any claim that all or any part of [the] Agreement is void or voidable."[134] Compared to prior incremental changes in arbitration contracts, the

129. *See* Colby, *supra* note 90, at 658.

130. *See* Leff, *supra* note 43, at 556–57.

131. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 884–97 (2006) (noting the perverse impacts on the ability of firms and consumers to negotiate flexibly around standard form terms as a result of state intervention); *see also* Colby, *supra* note 90, at 650–60.

132. Professor Scott addresses the difficulty of crafting default rules to control strategic or opportunistic behavior:

> While the goal is laudatory, implementation may be counterproductive as it is difficult to fashion any default rule that outlines an elaborate contingent set of rights and duties for both parties. Where the default rules are complex, it is difficult to determine who is in breach and who is not.

Robert Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 611 (1990).

133. 581 F.3d 912 (9th Cir. 2009), *rev'd,* 130 S. Ct. 2772 (2010).

134. *Id.* at 914 (emphasis added).

Jackson contract is a nuclear bomb that would remove the high-context unconscionability determination from courts altogether and place it in the hands of an arbitrator.[135]

While delegitimation of classical contract law (and the resulting bargaining power contests as repeat players adjust their contracting practices to new rules or standards) is likely a primary driver of the evolution of common law doctrine over time, it is a poor mechanism for enacting significant social policies and achieving meaningful justice in contract. When successful delegitimation increases the number of potentially salient contextual factors for resolving contract disputes, HCS also increase the potential bases on which the loser may view the court's decision as biased, illogical, and not worthy of respect. Situations in which repeat players have opted out of judicial contract resolution altogether, such as the Rent-A-Center arbitration clause in *Jackson* or the private arbitration systems of the National Grain and Feed Association and diamond merchants observed by Professor Lisa Bernstein,[136] may represent reactions by repeat players against the HCS of the judicial contract dispute resolution system.

In light of these problems, courts should be highly resistant to delegitimating arguments favoring HCS. First, courts are not really competent to assess the types of arguments and evidence that must be proved to justify many types of delegitimating claims. Even in the case of consumer arbitration contracts, it remains an open question whether consumers actually are made worse off by having to make their claims in an arbitral rather than a judicial forum.[137]

135. The ultimate validity of such agreements is unclear even after the Supreme Court reversed the Ninth Circuit opinion and upheld the enforceability of the *Jackson* arbitration agreement. Writing for the majority, Justice Scalia held that Jackson had only challenged the arbitration contract as a whole, rather than the specific provisions delegating to the arbitrator authority to determine the enforceability of the agreement. *See Rent-A-Ctr. W.*, 130 S. Ct. at 2777–78. Under the reasoning of two prior Supreme Court cases the Court held that because Jackson only challenged the validity of the arbitration agreement as a whole, those challenges were to be determined by the arbitrator, not the courts. *See id.* at 2778–80. Notably, Justice Scalia's opinion expressly left open the possibility that had Jackson challenged the delegation provision itself as unconscionable, that challenge would have been properly determined by the court. *See id.* at 2779. Justice Scalia also opined in dicta that even a properly framed challenge to the delegation provision would have been unlikely to succeed. *See id.* at 2780.

136. *See* Bernstein, *supra* note 4, at 1775–77 (describing NGFA arbitration system as highly formalistic, acontextual, and generally unfavorable to relatively high-context U.C.C. rules that would otherwise apply to grain contracts); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 124–30 (1992) (describing private dispute resolution mechanism of diamond industry).

137. *See, e.g.*, Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–62 (2006) (noting the likely cost savings to

Similarly, class-action waivers in the consumer context likewise are not immediately abhorrent given that many consumer class actions result in consumers receiving de minimis settlements such as coupons they do not value for additional products they do not want.[138] These are issues of social policy that courts are generally not equipped to handle.

Second, the more courts come to be seen as sources of systemic bargaining power advantages, the more they will become a battlefield for parties seeking those advantages. As courts incorporate more HCS into specific contract disputes, they weaken the ability to reject high-context arguments in other cases. Widespread or universal incorporation of HCS risks destroying many of the efficiency- and wealth-maximizing benefits of contract law.[139] The LCS approach to modern contract law is a relatively efficient dispute resolution mechanism that is theoretically accessible to anyone who wants to contract. It may be that practically some parties cannot (or will not) meaningfully take advantage of that access. But incorporating HCS, at the extreme, means that contract law becomes accessible to no one and loses the efficiency benefits it currently enjoys. Contextualization in this sense risks becoming a metarule for contract analysis that begins with the presumption that extralegal contextual factors are salient to that analysis. In that event, courts should adopt HCS even when such strategies would produce results identical or even inferior to those following from LCS.

While the delegitimative thesis does not provide a meaningful justification for widespread HCS in the judicial context, it does justify political action in the legislative and regulatory context. Ultimately, the delegitimative thesis is an argument that some transactions and contexts are unsuited for private ordering. Indeed, the residual nature of contract law is already defined by legislative

consumers generated by arbitration and the impossibility of empirical analysis of the actual amount of savings passed on to consumers as a result of arbitration); *see also* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90–93 (recognizing the price-lowering effect of arbitration clauses).

138. *See* Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1127–31, 1132–55 (2010) (describing critiques of consumer class-action settlements and assessing cognitive distortions affecting decision maker choices in determining whether to accept proposed settlements); *see also In re* Cuisinart Food Processor Antitrust Litig., Nos. H 81-196, H 81-610, H 81-444, H 81-194, H 81-170, H 81-193, H 81-71, H 195, 1983 WL 153, at *7–8 (D. Conn. Oct. 24, 1983) (approving coupon settlement requiring additional purchase of defendant's products); West v. Carfax, Inc., No. 2008-T-0045, 2009 WL 5064143, at *4–5 (Ohio Ct. App. Dec. 24, 2009) (remanding for determination of whether proposed coupon settlement had actual value to members of plaintiffs' class); *cf.* 28 U.S.C. §§ 1712–1715 (2006).

139. *See* Macaulay, *supra* note 2, at 79 (noting the high cost and low predictability associated with HCS).

interventions that remove particular transaction types from regulation through private contract altogether. For example, Congress has provided legislative protections for employment contracts for seamen since 1790.[140] As the Fifth Circuit observed, seamen need such legislative protection because of their lack of bargaining power in dealing with shipowners: "A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment."[141] Similarly, contracts between organized labor and management have been regulated by statute since 1935, expressly because of Congressional determinations that employees lack bargaining power in dealing with employers.[142] And with respect to arbitration clauses, the proposed Arbitration Fairness Act of 2009, among other things, would ban the use of binding arbitration clauses in consumer and employment contracts.[143]

In these situations, contextual arguments support rhetoric that contract law "failed" in regulating those relationships. That delegitimation of contract law justified a political response to remove those relations from regulation by contract and establish an alternative regime to control the terms and enforcement of the transaction. The ultimate result shifted bargaining power from one class of parties to another, but unlike judicial actions, this shift is relatively transparent and susceptible to additional contests to expand, limit, or eliminate its scope as the factions continue to lobby for greater contracting strength.

Such legislative responses to the use of HCS to delegitimate regulation of particular transaction types or classes of parties within contract law are preferable to attempts to create new doctrines within contract law because they preserve the availability of a low-context contract regime for parties who truly benefit from that regime.[144] There are some classes of parties that prefer LCS for contract resolution. As with the National Grain and Feed Association's decision to opt out entirely of the relatively high-context U.C.C. regime,[145] LCS may provide greater benefits for sophisticated commercial entities than could be obtained from high-

140. *See* Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1151–52 (9th Cir. 2008) (discussing the history of Congressional protections for wages and employment contracts of seafaring employees, currently codified at 46 U.S.C. § 10313).

141. *See* Castillo v. Spiliada Mar. Corp., 937 F.2d 240, 243 (5th Cir. 1991).

142. *See* Labor Management Relations Act of 1947, 29 U.S.C. § 151 (2006).

143. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. §§ 3–4 (2009); S. 931, 111th Cong. §§ 3–4 (2009).

144. *See supra* notes 115–17 and accompanying text.

145. *See supra* note 35 and accompanying text.

context regimes.[146] As discussed above, however, delegitimative uses of HCS will tend to infect all of contract law, thereby reducing the efficiency and utility of contract for those parties who actually do engage in the classical contract model of a dickered exchange between parties of relatively equal bargaining power. If the delegitimative argument shifts from judicial application of contract law to the political arena, legislative responses will avoid the problem of normatively justifying new contract rules that benefit only particular classes of contracting parties.

However, it is also unrealistic to expect much from legislative reactions to context. While legislatures are better constituted than courts for responding to political arguments, they are also more subject to capture and other public choice problems.[147] And while legislative responses are not subject to the same normative limitations as courts, this freedom of action is not unlimited. Ultimately, the distinction between HCS that are the domain of courts and those that belong to the legislatures is imperfect and constantly shifting.

The political reaction to HCS is thus only a partial solution to the problem of context in contract law. As noted, context is constitutive of contract law, and it is impossible for courts to avoid arguments that they should acknowledge and respond to contextual factors that determine or influence the outcome of contract negotiation, formation, and dispute resolution. Context, as with all types of bargaining power, is often deceptive and hidden. Courts in many cases do not even realize when they have approached individual cases with assumptions based on implicit background factors. Inevitably, context will creep into every judicial analysis of contract law.

CONCLUSION

Contextualist claims in contract are inevitable. I am not directly concerned here with the correct scope of contextual inquiry or the proper selection of contextual factors to be addressed by contract law.

Instead, this Article is about the legitimative and delegitimative justifications for moving along a continuum from modern contract law methods and interpretational principles employing LCS toward a more expansively standards- and context-based HCS regime. Arguments that aim to move contract law in either direction along this continuum are attempts to adjust the rules of the playing field

146. *Cf.* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543–49 (2003) (arguing in favor of a pluralistic theory of contract in which contract law is best suited primarily for contracts between business firms while alternative protective rules govern business to individual, individual-to-individual, and individual-to-business contracts).

147. *See* HILLMAN, *supra* note 14, at 136.

on which the parties make, perform, and enforce their contracts. Although a true assessment of the legitimative thesis would require an empirical analysis beyond the scope of this Article, anecdotal evidence suggests that courts really are not that good at processing large amounts of raw, diverse, and subjective contextual information that often will not even be recognized by the parties at the time of contracting. Moreover, in a highly heterogeneous, rapidly diversifying (or even balkanizing) culture, the challenges of identifying and responding to context will only grow more extreme with time. Context is expensive, in terms of time, attention, resources, and juristic credibility.

But some shifts toward HCS may be justifiable under the delegitimative thesis. Importantly, such delegitimative arguments must be understood as attempts to improve the bargaining power of one of the parties to the dispute. This bargaining power contest occurs at the level of specific classes of contracting parties, such as employer-employee, producer-customer, and franchisor-franchisee, and attempts to shift power from the stronger to the weaker party by recognizing that weakness and adopting corrective doctrines to respond to it.

The contest also occurs on a systemic level as the incorporation of an ever-greater number of contextual factors into contract law works to the disadvantage of repeat players who have previously largely controlled the legally salient contextual factors but now must contend with a larger scope of uncontrollable and unpredictable factors. This process, however, is essentially a political struggle rather than a legal issue. In the judicial context, this strategy likely will not be successful, but it is potentially coherent at the political level of legislation and regulation.