Online Consumer Contracts:
No One Reads, but Does Anyone Care?

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Introduction

This essay is part of a symposium discussing and celebrating the scholarship of Professor Florencia Marotta-Wurgler. Prof. Wurgler's research provides a rare blend of rigorous empirical work and analytical depth. Her important studies test - and at times undermine - some of the most basic assumptions of contract theory. In terms of methodology, Prof. Wurgler's innovative work takes advantage of the enormous changes e-commerce has brought about. To some extent, her findings are (additional) proof that the omnipresent surveillance that the digital economy facilitates is not all bad. More specifically, it can enable important findings, including in the context of jurisprudence and social sciences.

Continuing this research trajectory, in this essay we illuminate Prof. Wurgler's work by noting several insights related to the "law and technology" interface. In Part I we set out with a preliminary look into Prof. Wurgler's highly-sophisticated methodology. Here we consider whether users' preferences and technological sophistication might have impacted the dataset used by Prof. Wurgler. If this is indeed the case, a caveat to some of the studies' central findings might be warranted. In Part II we examine the possibility that alternative information flows educate users in various aspects of the standard form contract. We elaborate by considering the implications of such flows for Prof. Wurgler's findings and other aspects of her scholarship. We conclude by briefly reflecting on Prof. Wurgler's vision regarding the policy implications of her work.

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Draft. April, 2015

I. Building the Dataset: Privacy Preference/Reading Preference?

As noted, Prof. Wurgler's empirical studies have rendered remarkable and well-founded results. In this part we take a preliminary look into the dataset used for reaching the studies' conclusions. One of Prof. Wurgler's important results – if not her foremost finding – is that virtually no consumer reads EULAs.[1] That being the case, information about the nature of the agreement could neither spread nor impact the firm's reputation.

To reach this central conclusion Prof. Wurgler examined how many sampled users indeed accessed the EULA's URL (and found that very few indeed did), while employing an innovative methodology which analyzed internet usage data records. Prof. Wurgler's click-stream data was collected from over 90,000 households recruited by an online research company.[2] Apparently, all participants agreed to install a plug-in on their computers as part of their consent to participate in this study. This device anonymously collected and recorded all the URLs they had visited in a given time.

One may wonder whether this recruitment method might have led to a selection bias. The existence of such a bias might cast doubt on the assumption that the sample used is representative of the general population of all users. That is, the participants' willingness to concede to the vast collection of personal information the study involved (or their refusal to do so – which led to their exclusion from the study) might be tied to a personal trait or stable preference. Furthermore, one can hypothesize a possible connection between the consumer's attitude to and preferences regarding privacy, and her tendency (not) to read consumer contracts.

According to such a hypothesis, behaviors and preferences in these two matters might be linked to the individual's grasp of technology and legal risk. An individual with a good understanding of technology and privacy risks has a better chance of (1)

[1] *See* Yanees Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEG. STUD. 1 (2014).
[2] The research indicates that the participants constituted a "representative panel of U.S. households." That is, it reflected all members of society and was "demographically and geographically balanced." *Id.*, at 8.

opting *not* to participate in such a survey (perhaps after reading its fine print) and (2) understanding what a EULA is, where she can find it and why reading it sometimes makes sense. Slightly restated, consumers who opted to participate in the study might have had a poorer understanding of the legal risks they take in the technological environment – whether concerning privacy or contract.

A potential reply to this methodological concern is that the data used in the study that Prof. Wurgler relied on was collected anonymously. The users' online history was not linked to their names but to a unique yet anonymous identifier. Therefore, agreement to participate in the online study would not necessarily reflect any privacy- or technology-related preferences. By this reasoning, this is because participation in the study carries no consequences, risks or exposure. Even the tech-savvy user would have no reason not to participate.

We do not find this reply convincing. The clickstream data gathered was indeed anonymous to the researchers (*i.e.*, Prof Wurgler and her associates) who merely received a list of anonymous unique IDs. However, it is quite possible that this was not the case regarding the relation between users and the online research company. This firm most likely had the technological ability to connect the actual user to the behavioral elements (such as the URLs) collected. It also had the potential economic incentive to use and perhaps abuse the collected information. Thus, the fears of a cautious user prior to agreeing to participate in the study seem to be well-placed. They therefore might lead to the bias noted above.

Furthermore, even if the data was made anonymous to the research company as well, such anonymity provides only limited protection. The anonymity of almost any huge dataset of personal data – including the one in question here – could probably be easily attacked. After some intensive analyses or linking to other datasets, the true identity of the individual behind the unique ID can be revealed by the curious hacker.[3] Accordingly, cautious consumers may prefer to refrain from participating in such a

[3] *See* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1716-1731 (2010).

study to escape such potential risks. Arguably, these consumers are also more likely to review (selectively) contracts they enter into or information about such contracts.

Another possible reply to the concern of selection bias and the methodological challenges it raises is that Prof. Wurgler's survey was conducted in 2007. At that time people were perhaps not aware of privacy risks, or their understanding of them was substantially different from what it is today. According to this line of reasoning, the lack of sensitivity to privacy concerns, as we view it today, does not necessarily reflect a specific personality trait or ignorance at the time of data collection. Therefore, it does not compromise the sampling process and does not undermine the ability to infer valid conclusions on its basis.

We believe that such a reply would prove somewhat inaccurate. It is indeed true that the press and the public's interest in privacy issues has substantially grown in the last few years. However, it was already evident in 2007. Even then the risks of allowing the collection of such "anonymous" data were apparent and might have reflected the internet user's decision as to whether to participate in the survey.

A brief example may illustrate. In August 2006, just a few months before the survey was apparently conducted, the story of the AOL search data scandal broke. As many may recall, in this incident journalists easily linked real people to a unique set of URLs (mostly pertaining to search queries) which AOL thought were anonymous, and thus were made public.[4] This unfortunate turn of events clearly demonstrated that the individual's real, offline identity could be derived from a substantial data stream.[5] Hence a cautious and privacy-aware user might have had this event and others in mind when approached to participate in the 2007 survey.

To summarize this point, an individual's willingness to participate in the voluntary survey later used by Prof. Wurgler may not be trivial. Possibly, it indicates ignorance of the privacy risks or a specific preference for or attitude to privacy

[4] Michael Barbaro & Tom Zeller Jr., *A Face Is Exposed for AOL Searcher No. 4417749*, THE NEW YORK TIMES, (Aug. 9, 2006), http://www.nytimes.com/2006/08/09/technology/09aol.html?ex=1155787200&en=6c5dfa2a9c1be4ec&ei=5070&emc=eta1&_r=1& ; *see also* Ohm, *supra* note 3, at 1717.

[5] Subsequent studies have illustrated this point with greater force. *See* Ohm, *supra* note 3, at 1716-1731.

protection. Such a preference or attitude might prove interrelated to the tendency to read EULAs. We therefore recommend that further studies examine the nature of such linkage and its possible implications.

That said, in the analysis below we assume that the dataset used is not biased and that it is indeed reasonably representative of the entire population of online consumers. Accordingly, in the rest of this essay we address what we believe to be the crux of Prof. Wurgler's findings.

II. "Finally the Tables Are Starting to Turn"

In this part we discuss the notion of information flow and its relevance to Prof. Wurgler's work and findings. In the first section we demonstrate how information on consumer contracts flows in various interesting ways in the digital age. More specifically, we maintain that both traditional as well as the new online media show interest in the nature of online form contracts. We further argue that such a dynamic raises challenges to Prof. Wurgler's analysis. In the second section we examine five counter-arguments. Yet these notwithstanding, we maintain that alternative information flows should still be profoundly considered a powerful force in today's information environment, the existence of which carries substantial implications. In the third section, we discuss further implications of the growth of popular interest in consumer contracts.

II.1 Sign of the "Times"?

In October 2014 the *New York Times* featured a follow-up on an interesting study it had conducted which found that a third of the top 200 retail websites included mandatory arbitration clauses and class action bans in their user and sale agreements.[6] Findings which indicate that the provisions of standard form contracts are generally pro-seller should come as no surprise to those familiar with Prof. Wurgler's work,[7]

[6] Jeremy B. Merrill, *The Upshot: One-Third of Top Websites Restrict Customers' Right to Sue*, THE NEW YORK TIMES (Oct. 23, 2014), .
[7] Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMP. L. STUD. 677, 703 (2007).

albeit not necessarily in the context of dispute resolution clauses.[8] What is somewhat surprising, or the real story here, is the "story" itself. That is, the fact that such a prominent publication devoted resources to the intricacies of online Standard Form Contracts ("SFCs") – a tedious issue readers tend to yawn at and ignore. Interestingly, the paper dedicated not only valuable space to report the issue but also the necessary resources to examine the contracts themselves.

Press interest in the nature of online SFCs and terms of service was not a one-time event. The *New York Times* has repeatedly reported on the inclusion of mandatory arbitration clauses in online terms. One conspicuous case was the paper's extensive reporting on the amendments that General Mills – a major supplier of food products – applied to its online terms regarding mandatory arbitration (among others blocking class actions). These reports did not go unnoticed and eventually led to several interesting responses by the firm. At first General Mills apparently somewhat hardened the amended clauses and further clarified the extent of legal protection it was seeking via contract.[9] Thereafter, the story further circulated and, as a result, the firm's reputation seemed to be coming under attack. At this latter stage General Mills rescinded some of the contractual amendments pertaining to mandatory arbitration.[10]

Press interest, however, is obviously not the only mechanism that can draw consumers' attention to the content of SFCs. In one famous incident, known as "United Breaks Guitars," a protest song against United Airlines' terms of service went

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[8] See Prof. Wugler's findings in Florencia Marotta- Wurgler, *'Unfair' Dispute Resolution Clauses: Much Ado About Nothing*?, *in* BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS 45 (Omri Ben-Shahar, ed., 2007). Note, however, that other researchers have found evidence of biases in dispute resolution clauses in the context of social networks. *See* Michael I. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, WAKE FOREST L. REV. 28 (forthcoming, 2015), available at: http://ssrn.com/abstract=2479918 (last visited March 14, 2015).

[9] "*In language added on Tuesday after The New York Times contacted it about the changes, General Mills seemed to go even further, suggesting that buying its products would bind consumers to those terms."; See* Stephanie Strom, *When 'Liking' a Brand Online Voids the Right to Sue,* THE NEW YORK TIMES (April 16. 2014), http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html. The original changes to the SFC which addressed mandatory arbitration were probably prompted by General Mills's inability to block several class actions through a request for dismissal.

[10] Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, THE NEW YORK TIMES (April 20, 2014), http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html

viral.[11] The song was an immediate hit, reaching many millions in North America. Later, the song turned into a trilogy, which enjoyed the attention of broadcasters and the press elsewhere.[12]

While these developments might delight consumers, they also indicate a swelling information flow pertaining to SFCs. Such a flow is generated by distinguished secondary sources and to some extent is enabled by technological progress.[13] Perhaps most importantly, evidence of such an information flow might necessitate rethinking and even updating one of Prof. Wurgler's chief findings.

As noted, Prof. Wurgler has shown that the number of times the online contract's URL is accessed by users is extremely low.[14] However, this low number does not give the full picture as to consumers' actual knowledge of the terms of SFCs. In light of the information flow discussed above, many consumers may be informed of the nature of such online contracts through popular secondary resources. That is, consumers need not access the online contract webpage to learn more about the nature of the relevant SFC. Information flows can educate them instead.

The emergence of popular interest in SFCs challenges the ability to measure what prospective consumers know about their SFCs. In light of the enhanced interest of prominent secondary sources in SFCs, counting URL visits through internet logs does not teach us much. Thus, the extent of consumers' knowledge of some contractual provisions is expected to be quite different from the results presented by Prof. Wurgler.

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[11] The song was uploaded to YouTube. As of January 2015, it had more than 14.5 million views. *See* Sons of Maxwell, *United Breaks Guitars*, YOUTUBE (Jul. 6, 2009), .

[12] The second and third songs were uploaded to YouTube as well. *See* Sons Of Maxwell, *United Breaks Guitars Song 2*, YOUTUBE (Aug. 17, 2009), https://www.youtube.com/watch?v=h-UoERHaSQg and Sons Of Maxwell, *United Breaks Guitars Song 3 - "United We Stand" on the Right Side of Right*, YOUTUBE (Mar. 1, 2010), https://www.youtube.com/watch?v=P45E0uGVyeg (respectively). For media coverage see e.g., Ryan Sisters sing Law of Attraction, *United Breaks Guitars - CNN Situation Room - Wolf Blitzer*, YOUTUBE (Jul. 9, 2009), https://www.youtube.com/watch?v=-QDkR-Z-69Y; Mark Tran, *Singer Gets his Revenge on United Airlines and Sours to Fame*, THE GUARDIAN (July 23, 2009, 11.39 BST), http://www.theguardian.com/news/blog/2009/jul/23/youtube-united-breaks-guitars-video.

[13] *See* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 12 MICH. TEL. & TECH. L. REV. 303, 314 (2008).

[14] *But see*, Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 303-4 (2013). Schmitz notes a survey indicating that 20-30% of unhappy consumers have returned to the relevant website to review the terms after a dispute has arisen.

More generally, one may argue also that software markets are unique, and therefore the findings and lessons that can be learned from this market are limited. To rebut such an assertion it would be necessary to duplicate similar studies in other consumer markets. However, the flows and dynamics described above may profoundly inhibit the ability to examine retail contexts beyond those of software (studied by Prof. Wurgler) that do not feature agreements on internet pages which are relatively easy to measure (in spite of the caveats listed above).

II.2 Five Possible Responses and Their Limitations

Prof. Wurgler did not neglect to consider the prospect of alternative flows of information via secondary resources. In several instances she and her colleagues acknowledged and responded to this critique. Below we examine four such responses – two of them empirical and two of a merely analytical nature. Then we add a potential fifth response, deriving from Prof. Wurgler's empirical findings. In this discussion we also provide what we believe are adequate counter-arguments to all these responses, and conclude that the alternative information flows are a substantial force which must be considered.

Empirical response (1): The Robustness Check. On the empirical level, Prof. Wurgler conducted a robustness check to address the existence and impact of alternative information flows pertaining to SFC. This check examined alternative ways in which consumers can become informed as to the nature of the contracts they enter into.[15] Accordingly, Prof. Wurgler located the URLs which featured discussions of the EULA on the most prominent websites. Next she examined whether the purchasing consumers indeed accessed the reviews on these other sites. These checks found that only a very limited and insignificant number of individuals did visit these specific websites that featured information about the EULA. In other words, according to these findings alternative information flows do not undermine Wurgler's overall thesis as they are rather limited in their scope.

We believe people's practices pertaining to the examination of such secondary sources are changing. Therefore, the "robustness check" must be repeated and altered.

[15] Bakos et al., *supra* note 1, at 21-23.

Identifying the precise URL from which consumers could have learned of the firm's drafting practices would now be daunting if not impossible. Even if researchers could identify all the URLs of press articles addressing this topic and examine whether these were reviewed by consumers prior to purchase, the precision of the "robustness check" might still be compromised.[16] Once stories are circulated by the national press and other prominent secondary sources, they are immediately bounced around the web through blog posts, tweets, lists – and probably social network feeds above all. Therefore, tracking their exposure is very difficult.

As noted, the "conventional" press is not the only outlet driving current interest in the actual language of SFCs. For instance, public advocacy groups such as "Public Citizen" have also emerged as influential secondary resources regarding SFCs. This NGO's website features a *Forced Arbitration Rogues Gallery*.[17] It lists the firms that have had or recently added mandatory arbitration clauses. Again, it would be difficult to establish how information derived from such an online source has (and can) spread online. Of course, additional initiatives appear constantly. These sources enrich the discourse and encumber the proper measurement of consumers' knowledge of contractual terms.[18]

Empirical response (2): Contract Bias and Consumer Ranking are not Positively Correlated. Another empirical response comes from a study conducted by Nishanth Chari, one of Prof. Wurgler's students.[19] This study examines whether online ranking mechanisms properly reflect the nature of various SFCs. It approached

[16] A possible methodology might scan the users' internet logs and examine all the search queries that consumers entered prior to their purchase, seeking whether they include terms which might have led to the noted expert opinions. Yet this strategy would most likely prove both over- and under-inclusive. It would include searches which lead readers to general discussions of the product and no information about its contract. It would also neglect individuals who learned of the potential contractual biases from reviewing the press generally, or from other online information flows (such as Twitter or other feeds). Indeed, a recent article indicates that news publishers receive most of their traffic from Facebook (rather than from search engines as Google). *See* David Carr, *Facebook Offers Life Rafts, But Publishers Are Wary*, THE NEW YORK TIMES (Oct. 26, 2014), http://www.nytimes.com/2014/10/27/business/media/facebook-offers-life-raft-but-publishers-are-wary.html.

[17] *Forced Arbitration Rogues Gallery*, PUBLICCITIZEN, http://www.citizen.org/forced-arbitration-rogues-gallery (last visited March 13, 2015). Some of the information is collected by the NGO itself. Yet much of it is reported by "active whistleblowers" who the firm actively solicits.

[18] *See* TERMS OF SERVICE – DIDN'T READ, https://tosdr.org/ (last visited March 13, 2015).

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

this general question by testing a related hypothesis: the extent to which a contract is biased towards the seller (defining and measuring said bias using a methodology similar to that applied by Prof. Wurgler elsewhere)[20] and negative ranking on prominent online sites are positively correlated. Such a correlation would arguably arise if a sufficient number of individuals read the relevant SFC and reflected on it using various online tools.

Chari's study concludes that the data does not support this hypothesis. Rather, it indicates a slight negative correlation between the factors, thereby possibly undermining the argument that an alternative flow of accurate information on the nature of SFCs is easily available to consumers. This is because the online ranking sites did not correctly portray the true nature of the contracts' provisions. The study therefore illuminates the shortcomings of uncoordinated, general and user-driven feedback mechanisms in reflecting the nature of SFCs.

However, Chari's findings could be partially explained in a manner that does not undermine an argument premised upon the existence of rich and accurate alternative information flows. The nature of such information, when it relates to a specific product - including its relevant SFC - might be somewhat affected by the contractual language and consumer's impression of it. However, this specific effect would most likely be "drowned" or distorted by other forms of user feedback, which relate to other important attributes. So clearly, alternative online information flows and consumer feedback pertaining to the firms' actions need not correlate with the biases the contract might introduce – which explains Chari's findings. Rather, the overall nature of the consumers' feedback will more likely reflect the manner in which firms interact with their consumers in practice. The firms might rely on or even ignore the contractual language. Indeed, in many cases firms might choose to forgo the full array of rights in the pro-seller SFC they carefully drafted. In that case a firm's actions open a gap (on which more later) between its legal rights as detailed in the contract, and its actual behavior.

[20] *See infra* note 25, and related text.

To conclude, Chari's findings should be understood to state that the online alternative information flow is inaccurate in that it does not reflect the biases inherent in the contractual *language*. Nevertheless, such information flow might still correctly reflect the firms' *actions*. We believe that information pertaining to the firm's actual behavior is a form of information which might be of great value to a prospective consumer – perhaps even greater than enabling consumer acknowledgement of the nature of the SFC's provisions. In theory, it might even be enough to keep firms in check.[21] Therefore, Chari's findings need not undermine an argument that important and helpful forms of data flows are unfolding in the new digital age.

Analytical response (1): Unreliability. In a recent contribution to an online symposium, Prof. Wurgler directly addresses the notion that alternative information flows may educate consumers with respect to SFCs.[22] While countering this argument from an analytical perspective, Prof. Wurgler argues that many of the secondary resources discussing SFCs are unreliable, by mostly focusing on and referring to user-generated sources.[23] Citing several recent studies, Prof. Wurgler further explains that such user-generated sources are by no means a panacea. They suffer from noise and false reports, and rarely address the specific issue of SFC quality directly.

We are not sure that user-generated sources can be easily and categorically regarded as biased. But even if we do accept this assertion, the news reports, and to some extent NGO-based websites – both noted above, cannot be categorized as user-generated content. They are not sources usually associated with noise or false reporting. On the contrary, they probably should be considered as "expert-generated reports." We believe that these and similar sources should be accepted as objective and relatively reliable sources, which we now discuss directly.

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[21] We develop this argument elsewhere. *See* Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap: Language, Behavior and Contract Law* (tentative title, unpublished) (on file with authors).

[22] Jeremy Telman, *Ben-Shahar & Schneider Symposium, Part VIII: Florencia Marotta-Wurgler, Even More Thank You Wanted To Know*, CONTRACTSPROF BLOG (Sept. 23, 2014), http://lawprofessors.typepad.com/contractsprof_blog/2014/09/ben-shahar-schneider-symposium-part-viii-florencia-marotta-wurgler-even-more-thank-you-wanted-to-kno.html.

[23] Prof. Wurgler also asserts that such information is not actively sought by consumers. *Id*. We return to this assertion in the next sub-section.

Analytical Response (2): Expert Opinion and Consumers' Disinterest. Looking beyond user-generated sources, Prof. Wurgler indeed acknowledges that information on SFCs can stream to users from additional sources, refers to these as "expert opinions," and addresses them separately (without naming the NGOs and popular publications).[24] She maintains that expert opinions are very rarely sought by consumers, and in any case these opinions will probably not influence the consumer's final decision whether or not to enter the transaction. Therefore, she finds that the impact of these sources of information on the various conclusions reached by her work should not prove substantial.

However, once stories about the contractual framework have entered the mainstream of national press and NGO reporting (as indeed noted above), Prof. Wurgler's stand has to be reconsidered. Expert opinions are perhaps still not actively sought. Nevertheless, they reach consumers as part of their general inquiries and interest. In addition, the fact that the information is conveyed in a newspaper headline rather than a somewhat boring and technical online discussion board arguably enhances the spread of such information. In any event, once again these new dynamics make measuring the spread of such information far more difficult.

The Fifth Response: Contractual Similarities. This fifth set of responses to the argument that alternative information flows on SFCs exist and must be accounted for is not presented directly by Prof. Wurgler, but can nonetheless be derived from her second substantial contribution to the SFC literature. Beyond examining the scope of contract readability, Prof. Wurgler closely studied the SFCs' *language*. She introduced a methodology to compare various contractual provisions. A substantial part of her findings introduce intriguing and curious similarities among diverse forms of SFCs.

Why are different forms of contracts so similar? One possible explanation is that where no information flows about the SFCs exist, those drafting the agreement are free to do as they please. And when drafters are free to fully protect the firms' interests, the similarity of language in different contractual and business settings should not come as a surprise. Accordingly, at this point we will examine whether the

[24] Telman, *supra* note 22.

persistence of contractual similarities (as made apparent in Prof. Wurgler's work) might indicate a lack of information flows regarding SFCs.

We address three major similarities between different pairs of contracts. The first is the lack of differences found by Prof. Wurgler between PNTL ("Pay Now Terms Later") and non-PNTL contracts.[25] The second is similarities between EULAs in monopolistic and competitive markets.[26] The third is the similarities between B2B (Business to Business) and B2C (Business to Consumer) contracts.[27]

The first comparison above is of contracts consumers could review prior to purchase (non-PNTL) with those that became available only after the transaction was concluded (PNTL). In theory, the former case allows consumers to opt for a different contract with better terms (that is offered by another seller) or avoid the transaction in the first place. Therefore, the contractual language for non-PNTL agreements should prove more pro-buyer. But this hypothesis did not receive empirical support in Prof. Wurgler findings, as these contracts were closely similar to those available only after purchase. The lack of distinction between these two contractual formats is most likely quite simply and intuitively explained: virtually no users read the contract prior to entering into it – so failing to receive the terms in advance makes no substantial impact. Accordingly, PNTL and non-PNTL contracts should indeed prove to be the same.

However, these contractual similarities do not undermine the notion that alternative flows regarding the contract are unfolding. Quite to the contrary: the actual information individuals received prior to entering into the agreement should be virtually the same with regard to PNTL and non-PNTL contracts alike – information derived from external sources rather than the contract delivered by the firm. Hence the natures of PNTL and non-PNTL contracts should have no real distinction. Otherwise,

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[25] *See* Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from the Software License Agreement,* 38 J. L. STUD. 309 (2009).
[26] *See* Florencia Marotta-Wurgler, *Competition and the Quality of Standard Forms Contracts: The Case of Software License Agreement,* 5 J. EMP. LEG. STUD. 447 (2008).
[27] *See* Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?* In BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS (OMRI BEN-SHAHAR ED., 2007), p.53.

if the PNTL and non-PNTL contractual balance were different the possible existence of the alternative data-flows could be challenged.

The similarities between contracts drafted in monopolistic and competitive markets are trickier to align with the alternative information flows discussed above and might undermine such a notion. Before proceeding, it should be noted (as Prof. Wurgler acknowledges) that according to one significant line of scholarship contractual similarities are indeed to be expected regardless of information flows; the monopolist seller will not be inclined to lower product quality - or in this case change contractual terms in its favor - for fear of losing marginal consumers. The monopolist seller will rather respond by charging supra-competitive prices.[28] Therefore, the differences between competitive and monopolistic markets will not be reflected in differences in contractual terms and do not teach us anything about the information flows discussed here.

Yet for the sake of this discussion let us presume that monopolistic sellers will *not* shy away from changing contractual terms in their favor and even acting on such terms.[29] The flipside of this argument is that sellers in competitive markets will be somewhat compelled to restrict their pro-seller contractual language, fearing consumer retaliation in the market. According to this line of reasoning, the existence of alternative flows might create forces that lead to an equilibrium where more balanced terms are offered in competitive markets.

On the face of it, Prof. Wurgler's finding that there is no difference between the contractual language in competitive and monopolistic markets might indicate that not only do consumers refrain from reading all consumer agreements (in both forms of market), but no information flow regarding the SFC is unfolding either. Yet other conclusions are possible as well. The similarity between these two forms of contract is

[28] See discussion in Marotta-Wugler, *supra* note 26, at 454. *See also* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 218-19, and FN 151 (2006).
[29] For a discussion of scholars believing that such a dynamic will unfold, see Marotta-Wugler, *supra* note 26, at 452-53. This assumption is also somewhat implied in the recent analysis carried out by Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 565 (2014).

still explainable in a world featuring rich alternative information flows when accounting for the "gap" discussed above.[30]

As stated, alternative information flows regarding SFC might include some information on the contractual language. Yet they will naturally include far more information regarding the firm's actual practices. In addition, recall that at times market and other forces will lead firms to refrain from exercising their full contractual rights, and instead take a more lenient approach. In doing so, the firms create a gap between the legal rights as detailed in the contract and the firm's actual behavior. The prospect of negative information flows might lead firms in competitive environments to act more leniently with their customers. Yet given the limited attention consumers devote to contractual terms, firms in competitive markets can apply contractual language which is just as strict as their monopolist counterparts.

In sum, individuals in competitive markets are provided with the same contractual language as those in monopolistic markets. The alternative flow of information can still play an important role in promoting consumer rights by conveying the firm's actual actions in practice. Of course, this theoretical explanation must be further tested in the future.

The third comparison – between B2B and B2C agreements – presents the strongest challenge to our thesis of information flow. When individuals contract as consumers, one can argue that various rational and irrational impediments make them set the contractual language aside and proceed without reading it.[31] However, in a business setting they presumably will take the time to read the relevant contract and bargain where necessary. This is so not only because B2B transactions typically involve much larger amounts, but also because businesses often have access to legal counsel and other experts who can better evaluate the risks that SFCs allocate between the parties. It is further possible that B2B transactions unfold when the parties are in a business-oriented mindset, which generates greater diligence and

[30] See discussion in *supra* notes 19-21 and related text.

[31] *See, e.g.*, Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LOUISIANA L. REV. 118, 125-33, 152-60, 167-77 (2007); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to be Met*, 45 AM. BUS. L. J. 723, 736-44 (2008).

caution. Nevertheless, Prof. Wurgler's studies revealed that, overall, the contractual language in both instances was very similar. The similarity between B2B and B2C contracts suggests that in both cases promisees do not read the contract.

But what about the alternative information flows? If these are indeed in place and pertain to the contract's language, then for the reasons just stated they reasonably will be examined more closely by businesses (or in a business setting) than by consumers. The absence of differences in the nature of these two contracts (B2B/B2C) challenges this last assertion – and possibly challenges more generally the existence of alternative flows altogether.

A possible speculative response will echo the answer above for the similarities between monopolistic and competitive markets. Alternative flows exist, and reliance on them still provides end users with greater insights into the contractual language in the business context, as predicted. But here again, such knowledge presumably does not eventually generate dynamics that impact the contractual language. This is because the actual contractual language used is merely a small slice of the information pie. In many cases it is lost among other insights into the seller's actual behavior that does not necessarily comply with the contractual language. Therefore, given the overall wealth of information provided to both business and consumers by alternative sources, there should indeed be no difference in the contractual language used in these realms.

However, the nature of the business setting somewhat undermines this last assertion, leading us again to question the significance and even existence of alternative information flows in view of the curious contractual similarity. Here one must ask whether businesspeople would not seriously and specifically seek out and examine information, available from secondary sources, *about* the nature of the contract and account for it in their decisions (if such information indeed exists and is available). It is therefore problematic to assume that both consumers and business parties will respond similarly, by mostly disregarding the information flowing to them about the contractual language and focusing on the firm's actual conduct. In theory at least, when interacting in a business setting, parties should understand that the

contractual language is of significance if a dispute arises; more especially if the countering party faces substantial risks.[32] According to this line of reasoning, if such a substantial review of alternative information flows unfolds sellers will hardly be subject to equal pressures in B2B and B2C markets.

While this final argument is most challenging, we do not believe that it undermines the existence and significance of alternative information flows, especially in consumer (or B2C) settings. Rather, it might indicate the *lack* of such alternative flows regarding the nature of the SFC in specific, business, settings. Such an assumption could be premised on a review of the central motivations to contribute information to the given alternative flow of information.[33] If these flows are absent in the business setting alone – where they are destined to be closely scrutinized – the similarities between B2B and B2C contexts could be explained.

As we explain elsewhere, contributing to an information flow could result from various motivations, among them altruism (as with the NGO examples mentioned above),[34] striving to belong to a group, or taking revenge on the seller.[35] Some of these central motivations are rather weak in a commercial B2B setting. Here contracting parties might be reluctant to share their experiences with their competitors through online intermediaries (as opposed to peers in the B2B setting). Nor might the business setting generate similar altruistic sentiments.[36] Therefore, the B2B/B2C comparison is nuanced and calls for additional thought, especially in respect of the prospect of alternative information flows. Furthermore, diverse markets and business models must be distinguished, and the nature of alternative information flows in these settings has to be scrutinized.

[32] See discussion in Becher & Zarsky, *supra* note 13, at 341-42.
[33] *Id*., at 336.
[34] *See supra* notes 17-18 and related text.
[35] Becher & Zarsky, *supra* note 14 at 336.
[36] However, the emergence of open source software has demonstrated how similar sentiments can certainly emerge in business settings as well. See YOCHAI BENKLER, THE WEALTH OF NETWORKS, 94-5 (2006).

II.3 The Growth of Popular Interest in SFCs: Further Implications

The growing interest of the popular press and prominent NGOs in the minutiae of contractual language is evident. At the same time, online measures that facilitate distributing new ideas quickly and efficiently are prevalent. This new reality calls for rethinking some other important policy issues related to SFCs.

First, when approaching SFCs the law must consider novel categories and taxonomies. Scholars argue that the law should limit its intervention and generally enforce SFC provisions for salient aspects that draw consumers' attention[37] – foremost examples being price and quantity. However, the spreading of information by prominent secondary resources suggests that due to information flows and keen public attention, the meaning of salience changes from context to context and from time to time. In many cases salience can be driven by issues that newspapers find newsworthy and NGOs find appealing. It is therefore important to examine and perhaps reconsider how we interpret and understand contractual saliency in the age of alternative information flows.[38]

The coverage of the facts surrounding the "General Mills" contractual amendment noted above[39] illustrates this. The background facts of this case exemplified a "perfect storm" for media coverage. The media's ability to dramatize the relevant contractual provision and transform the dry contractual language into a meaningful scenario rendered it salient. Such dramatization unfolded by addressing the potential risk of a hypothetical allergic child who has inadvertently eaten a food allergen. Using this dramatic story, the media was able to demonstrate[40] the implications of the firm's hidden onerous SFC provision that bars litigating actions against it. Clearly, the prospect of such a story unfolding is what sparks readers' interest in the usually boring language of SFC provisions. In contrast, a story about the limited prospects of taking a commercial software company to court is not likely

[37] *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).
[38] For the shift in the notion of "salience" in the discussion of online SFCs and how it might be impacted by information flows, *see* Becher & Zarsky, *supra* note 13, at 351.
[39] *See supra* notes 9-10, and related text.
[40] We put aside the fact that perhaps many of the blocked claims are borderline frivolous suits regarding inadequate labeling.

to catch the public's eye and attention. The latter provision/situation should perhaps be considered "non-salient," therefore possibly justifying greater judicial scrutiny and intervention, even though the contractual language in both cases would be similar.

Secondly, reports by popular secondary sources also call for rethinking the overall forces impacting firms and their strategies regarding SFCs. Let us assume that the information provided through the media will *not* influence individuals in their capacity as consumers to opt against purchasing the product. Yet it might move individuals - or their proxies - to act in their capacity as citizens and civil leaders.[41] For instance, it could incentivize readers to contact their representatives and urge them to enact laws which will resolve the tensions SFCs create. Indeed, the "Public Citizen" NGO prods viewers to contact their representatives to promote legislation blocking the enforceability of mandatory arbitration provisions.[42] Anticipating such public interest, press reports might directly urge regulators to take action against the relevant firm or phenomenon to gain popularity.[43] Such steps are indeed feasible in many contexts. For example, the *New York Times* article discussed above explained that mandatory arbitration clauses do not ban regulators from acting against contractual wrongs and consumers' exploitation.[44]

Recognizing the potential impact of these alternative flows on the prospect of regulatory actions might have important implications. Prof. Wurgler's empirical findings show that over time, firms themselves changed some contractual provisions towards a more pro-buyer version. This outcome is again curious, as apparently no one reads these provisions.[45] A reason for these changes might be firms' fears of grave consequences in the political and regulatory arena or in the courts,[46] which might unfold in view of their harsh contractual language. This explanation was also

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[41] *See* CASS SUNSTEIN, THE REPUBLIC.COM 2.0, 128 (2009) (discussing differences between these two individual capacities).
[42] *See Forced Arbitration Rogues Gallery*, PUBLICCITIZEN, http://www.citizen.org/forced-arbitration-rogues-gallery (last visited March 13, 2015).
[43] For a discussion of a similar dynamic stemming from disclosures regarding data breeches see Edward Janger & Paul M. Schwartz, *Notification of Data Security Breaches*, 105 MICH. L. REV. 913, 925 (2007).
[44] Merrill, *supra* note 6.
[45] Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard Form Contracts*, 88 N.Y.U. L. REV. 240, 258 (2013).
[46] *Cf.* Guy Halfteck, *Legislation Threats*, 61 STAN. L. REV. 629 (2008).

acknowledged by Prof. Wurgler, who pointed out that external forces such as reputation and litigation can discipline sellers.[47]

Yet it is also interesting to note that recognizing the fear of regulatory intervention (motivated among others things by information flows) might also explain why Prof. Wurgler found that different firms change different provisions and to a different degree: the (apparent) risk of political and regulatory pressure varies from one context to the next. It is linked to a variety of parameters that have yet to be explored. Establishing the parameters which might help predict when firms will react to the prospect of regulatory responses will allow regulators to channel their attention more effectively. In doing so, it will enable focused regulatory scrutiny in instances where firms feel confident to take a pro-seller position without fearing retaliation.

Conclusion

Electronic and virtual commerce is growing in size and scope. People are entering – without reading – into a greater number of contracts, which are becoming longer over time.[48] Yet the volume, complexity and innovative nature of the electronic transactions render close inspection by courts an unattractive option.[49] Regulators as well will have a difficult time keeping up with the novel challenges markets raise.

What is the best strategy to govern these transactions? Considering the policy implications of her research, Prof. Wurgler notes that "*regulators should perhaps focus on solutions that increase the role of reputation and litigation as mechanisms to*

[47] Bakos, Marotta-Wurgler & Trossen, *supra* note 1, at 5 ("While this article limits its scope to assessing whether readership levels are consistent with the informed minority hypothesis, we note that other mechanisms may incentivize sellers to offer terms preferred by buyers even if none read. Sellers might be constrained by reputation or the threat of litigation; or they might offer one-sided terms to all consumers but relax them to accommodate reasonable complaints. In the case of experience goods or repeat purchases, buyers who do not read terms might ultimately become familiar with the contents of boilerplate. Our data cannot speak to the relevance of these mechanisms.")

[48] Marotta-Wurgler & Taylor, *supra* note 45, at 244. *See also* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANT TO KNOW 20-25 (2014).

[49] See for instance Ayres & Schwartz, *supra* note 29, at 558 (noting that "…*there is no well-developed fairness theory to guide decision makers in regulating contract terms that are freely and rationally chosen and do not affect third parties*.")

curb seller abuse."[50] We certainly agree, at least as far as this statement pertains to the role of reputation mechanisms.

The information economy has enabled various forms of useful information flows. It is now up to the policymakers to influence intelligently those building and operating digital infrastructures. Setting such flows in a direction that promotes fairness and efficiency in online SFCs is the present need. Much can be done.

[50] Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?* 168 J. THEO. INST. ECON. 94, 96 (2012).