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Arrested Development: The Decline of Legality in Consumer Contract Law

Lauren Henry Scholz
Florida State University

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Author : Lauren Scholz

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Samuel Issacharoff & Florencia Marotta-Wurgler, The Hollowed Out Common Law, 67 **UCLA L. Rev.** 600 (2020).

First year teachers of common law subjects describe the common law system with a little bit of romanticism. Through the aggregation of many court opinions, and through learning from variant approaches in different states' jurisdictions, a process of reflective equilibrium finds legal rules that make sense as applied to diverse fact patterns and that reflect ongoing changes in technology and social mores. The status of each state's supreme court as the final arbiter of questions of common law features keenly in Louis Brandeis's oft-quoted characterization of the states as "laboratories of democracy."[1] Writing with Samuel Warren, Louis Brandeis famously declared that "the common law, in its eternal youth, grows to meet the new demands of society."[2]

As Samuel Issacharoff and Florencia Marotta-Wurgler's important new paper *The Hollowed Out Common Law* shows, changes in procedure and surrounding law have caused the common law of contracts not to function as it has in the past. Specifically, they argue that there has been a dearth of doctrinal elaboration and robustness in the burgeoning domain of online contracting over the past three decades. They document several shifts in law and legal practice that has led to the decline in number and refinement of analysis in these consumer contracting cases. As Brandeis's comments show, the pressure on common law judges to develop doctrine comes from contrasting apex state supreme court opinions, and the consideration of a variety of novel fact patterns by all courts. Yet Issacharoff and Marotta-Wurgler's study shows two shifts against the creation of a robust common law of contracts (1) state supreme courts are no longer the dominant voice in consumer contract law and (2) a depressed number of consumer contract cases are decided on their merits before any court. I will address their contributions on each of these points in turn.

Through an empirical study of cases from 1954 to 2016, the authors show that most consumer contract cases are being heard in federal courts and that federal circuit court opinions have stronger influence than other courts. They show that the dominance of federal courts as forums for state law claims has steadily increased over time. A concomitant trend they document is the rise of class action in consumer contract cases, and the role of the Class Action Fairness Act of 2005 in pushing most class actions into federal court. The statistics here show a striking shift. Before 2000, class actions composed less than 20 percent of the consumer contract cases adjudicated in federal court. Yet the post-2000 data shows that class actions make up 60 percent of consumer contract cases in federal court. The result has been that the leaders in contract law innovation in the information era—such that they are—are courts that do not even have the power to create new state common law.[3] Despite their persuasive influence, such cases are as a technical matter one-off developments, with no binding effect on other courts. Yet the common law lacks robustness for another, more meaningful reason besides the lack of definitive doctrinal statements from state supreme courts: an insufficient amount of cases that reach the merits.

With the blessing of federal legislation and courts, over the past three decades there has been a rise of contract terms that take the adjudication of individual disputes out of the sight of courts altogether. Arbitration and anti-aggregation clauses have been enforced by courts, leading to the resolution of many cases outside of public observation and precedent. While the parties involved may save money in resolving disputes through such terms, decades of removing most consumer disputes to the private sphere retards the law's understanding of contemporary issues in consumer contracting. This results in a collective loss to every actor, even though the costs of litigating an uncertain legal matter are expensive and undesired by parties. Issacharoff and Marotta-Wurgler explain "decisional law generates a public good, even though private parties have no reason to want to invest in its creation. …[P]arties are likely to be unable to

settle and find themselves in litigation when legal claims are uncertain. The testing of boundaries of legal norms under conditions of uncertainty prompts the creation of additional positive law that, in turn, helps avoid costly litigation by future disputants. ." At a certain point, some actor needs to spend the money to figure out how law should apply to innovative forms of social organizing. Arbitration and aggregation clauses have allowed private actors to avoid footing the bill, but legislatures have not stepped up to provide guidance, either.

With no disputes between state courts to provoke conflicting approaches within jurisdictions, and an overall lack of cases to introduce new fact patterns to the case law, there has been dominance in consumer contracts of a handful of cases based largely on the prestige of the court or individual author with little serious contestation, analysis or willingness to adapt to new fact patterns by courts using the cases as persuasive authority. Issacharoff and Marotta-Wurgler seek not to contest the quality of these influential opinions but to observe that as a matter of procedure these leading cases were not subject to the same ongoing process of vetting and contestation as leading cases of yore.

Issacharoff and Marotta-Wurgler show that there is arrested development in the doctrine of consumer contracts due to legal developments outside the law of contracts. There is a natural corollary to this analysis in the specific context of the information age. The absence of court opinions on consumer contract law has lent an artificial youthful ambiguity to governing the information age. The common law is not just about determining rules of law, it is about the fact pattern and analysis that leads to the rule, and that it is a public, ongoing conversation that others in society can listen to.

The notion of the internet as an ungovernable frontier full of infant industries that need protection from lawsuits may have made sense in the mid-1990s, but the landscape has shifted considerably since then. The common law's loss of elasticity and ability to develop due to the shifts Issacharoff and Marotta-Wurgler describe has led to a characterization of information age technology and business practices as permanently brand new and uncharted.

One does not have to be a common law lawyer to be concerned about the hollowing out of the common law. Common law and statutory law have a mutually reinforcing relationship to one another. When disputes are resolved at common law, it brings the attention of legislatures to new types of conflicts and gives them material to use to determine whether statutory law should reinforce the common law rule, alter the common law rule, or even take the matter out of the common law to be codified statutorily. The common law translates disputes in society into legal language that can then be applied by legislatures and stakeholders to predict how the law can and should apply to new forms of socio-economic ordering.

The information age has reached childhood's end, yet due to the procedural hurdles to bringing disputes in consumer contract law, courts and legislators still discuss the field as if it is in its infancy. The common law process has traditionally helped society to understand the law's effect on new phenomena, yet it has been hollowed out at a key inflection point in American history.

1. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting).
2. Warren and Brandeis, *The Right to Privacy*, 4 **Harv. L. Rev.** 193 (1890).
3. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

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