Draft January 31, 2005. Please do not reproduce, quote, or cite without permission. © 2005 Margaret Jane Radin

Machine Rule: the Latest Challenge to Law[*]

Margaret Jane Radin

Introduction

Ordering by property and contract—"private ordering"-- always has significant regulatory dimensions, because whether or not entitlements and transactions are valid and efficacious depends on state definition and enforcement of the authoritative directives that comprise the legal infrastructure. The state's structuring of the contours of property rights delimits the list of recognized entitlements and the possible range of exploitation of them. The state's structuring of what counts as contract separates legitimate from illegitimate redistributions of those entitlements. In saying this, I affirm the basic insight of the legal realists.

In spite of recurring realist deconstructions such as this, the public/private distinction has been central to liberal thought about jurisprudence and justification. Something like it remains a cornerstone in liberal thought: the state is imagined as justified by the idea of setting up a background infrastructure by means of which private actors can realize and exercise their freedom. This is what underlies the central ideal of

[*] This draft builds on (and borrows passages from) two earlier essays: Regulation by Contract, Regulation by Machine, 160 J. Institutional & Theoretical Econ. 142 (2004), and Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm, 1 U. Ottawa L. & Tech. J. 173 (2003-2004.

the Rule of Law--the idea of setting up an appropriate scheme of public ordering that will foster private freedom. I am a pragmatist about the public/private distinction, meaning that in my view it is a not a conceptual or formal distinction, an either/or that is easy to deconstruct, but rather a contextual characterization that tends to work in practice most of the time. [1] Most of the time, that is, what is public and what is private has been capable of being sorted out in a way that is functionally understood, in spite of the difficult borderline cases. Yet I believe that the advent of the digital era is causing the "line" between what the state imposes, on the one hand, and structuring of the social environment by "private ordering," on the other, to become even more blurred than it was.

To explore this hypothesis, this essay focuses on two phenomena of the digital networked environment. One is the proliferation of the purported mass contracts called shrink-wrap, click-wrap, and browse-wrap. These "-wraps" involve the use of widespread standardized purported contracts to attempt to structure legal regimes of entitlement, dissemination and use. The other is the development and expected widespread deployment of technological protection measures (TPM's)—machine rule--which empower content providers to exercise technological control over downstream access, use, and further dissemination. To the extent that these phenomena appear to supplant the legal infrastructure of the state with regimes of entitlement and use dictated by firms, they may have finally rendered the public/private distinction unworkable, which may in turn finish off the ideal of liberal legalism (the Rule of Law) before we have anything to replace it. These phenomena not only pose issues for our understanding of the

[1] See Margaret Jane Radin and Frank Michelman, Pragmatist and Poststructuralist Critical Legal Practice, 139 U. PA. L. REV. 1019 (1991).

normative basis of contract, therefore, but also for the ideal of the Rule of Law, and ultimately for the survival of juridical ordering and for the justification of the state. At least we should be aware of these issues. Evoking that awareness is my somewhat modest goal in this essay.

EPSERS: the Contract [W]rap

The place to begin is with what has been happening to contract in the digital world. The original form of shrink-wrap contract, usually called a shrink-wrap license[2], came with software marketed in boxes covered with transparent plastic shrink-wrap film. The terms were either printed on the shrink-wrap, or on the box beneath, or on a card between the box and the shrink-wrap. The terms stated that by breaking the shrink-wrap the purchaser was signifying acceptance of the terms. In this type of procedure the purchaser could have seen the terms before purchasing—though whether in fact anyone ever actually read them is unknown but doubtful. The term shrink-wrap was later extended to refer to a procedure that has come to be known as "rolling contract" or (more colorfully) "money-now-terms-later." In this situation there are additional terms that the recipient sees only after receiving the product. Here the terms cannot be seen before purchase. They are on a separate sheet or in a separate envelope containing the diskettes or CD in which the software is fixed, and/or they are shown on the start-up screen when the user runs the program. The terms usually state that using the software constitutes

[2] The proponents of these contracts prefer to characterize the transactions they govern as "licenses" rather than "sales" in order to get around the first-sale doctrine in copyright law, which grants the owner of a physical copy the right to do with that copy what he wishes, free of restraint by the copyright owner.

acceptance of the terms, and that if the buyer wants to reject the terms he must return the software and will receive a refund.[3]

The term click-wrap has nothing to do with wrapping, other than the functional resemblance—the proponent's desire to achieve legally binding commitment-- to procedures called shrink-wrap. Click-wrap just means that the user or customer is asked to signify acceptance of terms by clicking with her mouse in a box on her computer screen. Similarly, the term browse-wrap has nothing to do with wrapping either. This locution refers to terms on an interior page of a website, which the viewer, who is browsing, will not see unless he chooses to click on the small print of a link at the bottom of a home page, usually labeled "Terms" or "Terms of Use," or sometimes merely "Legal Notices."[4] The terms commonly say that continuing to use the site—whether or not the user ever clicks on or even sees the link that would reveal the terms—binds the user to these terms and such new terms as the site owner may post from time to time.[5] Thus the terms declare themselves binding on anyone accessing the site, regardless of whether anyone ever opens the link that reveals them.

It is clear that these "-wrap" procedures are not "agreements" in accord with the traditional contract rhetoric of "consent" and "meeting of the minds," but neither are most contracts in the contemporary offline world. Although the principles to be applied in these cases are not fully developed, U.S. law inclines in the direction of finding contractual obligation in many or most of them. The controversial proposed UCITA

---

[3] A celebrated case enforcing a shrink-wrap license of the second kind is *ProCD v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996), which I discuss later in this essay. Other courts have been doubtful. See, e.g., *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991).

[4] See, e.g., www.stanford.edu ("Terms of Use") and www.aol.com ("Legal Notices").

[5] See, e.g., www.aol.com and www.disney.com

(Uniform Computer Information Transactions Act) would have validated them explicitly in a broad range of cases, but that initiative seems to have failed, and the body responsible for the UCC is moving more slowly.[6] It is my impression that non-U.S. jurisdictions are much less likely than U.S. states to find binding commitment vis-a-vis a consumer in cases involving standardized purported contracts of this kind. What should ultimately be the appropriate legal position(s) on validity and enforceability of these purported contracts? That is a complex question, and an urgent one, because if e-commerce is to flourish we will need more harmonization and more certainty of contract.

Nevertheless, rather than beginning with the question of validity and enforceability, I want to begin by examining the world these contracts would create.[7] So let us assume all of these contracts are efficacious. By efficacious I mean that the regimes of rules laid down in the contracts are binding on the recipients and govern the actual behavior of parties in the world. By assuming the contracts are efficacious in this sense, I am assuming that all of the state's rules of entitlement are default rules, and also that the courts will not use contract-limiting doctrines such as unconscionability to preclude enforcement. The assumption that all entitlements recognized and laid down by the state are default rules means that all legal rights granted or protected by the constitution, all legal rules enacted by legislatures, and all doctrines worked out by the

---

[6] The proposed Uniform Computer Information Transactions Act [UCITA] has been enacted in two states, but three states have enacted "bomb shelter" legislation to prevent its being applied to their residents. The National Commissioners on Uniform State Laws [NCCUSL], after several years of championing (and redrafting) UCITA, has now put it on hold. The comments to the proposed revisions of Article 2 of the Uniform Commercial Code (UCC) deliberately take no position on the issue of rolling contracts.

[7] For some thoughts on whether these procedures create binding commitment, see Margaret Jane Radin, Humans, Computers and Binding Commitment, 75 INDIANA L. J. 1125 (2000).

courts can be waived or altered by contract.[8] The assumption that the courts will not use contract-limiting doctrines means that the traditional limits built into contract law, such as unconscionability, will not be used to alter the terms as written.

The state of the world in which standardized sets of terms are efficacious could come about because the contracts are consistently enforced as written, or consistently implemented by everyone without legal enforcement. In an idealized world of rational actors, consistent judging, and perfect information about legal decisions, consistent enforcement would lead to implementation without legal intervention, because once it was known that these terms would be enforced, people would stop bringing actions.[9] Although my assumption of efficaciousness is hypothetical for purposes of this essay, it is not a wholly counterfactual hypothesis. Stable implementation without legal intervention could also arise in a less ideal world, such as the real world we live in, because of transaction costs of bringing actions, and various social factors militating against litigation, including the fact that people assume contractual terms are enforceable even if they are not. In the real world, limiting doctrines such as unconscionability and declarations of invalidity as against public policy are sporadically and unpredictably used. Moreover, even if the terms would be deemed unenforceable in some fraction of cases, normal contract damages would not deter firms from using those same terms against the majority of other recipients who do not bring suit.

[8] The terminology of default rules for this species of alienability comes from Ian Ayres and Robert Gertner, -----------------.

[9] I am leaving out of account here the possibility of efficient breach and the accompanying legal intervention, though it is an important feature of the institution of contract, and I will mention it later in this essay.

In a world of contractual efficaciousness and default rules, a standardized mass market contract creates its own regime of liberties and obligations, in which the constitutional, legislative or judicial rules engendered by the state are superseded by the contractual regime. Of course, a traditional, customized contract creates particular liberties and obligations between two parties, which could be considered a two-party world, the world in which A transfers his horse to B and B transfers his money to A. But when I refer here to a "regime" I mean an ordering that is socially widespread, ubiquitous or nearly so.

If the AOL TOS ("Terms of Service") were to provide that the recipient shall not bring a class action, then a regime without class actions prevails in this social world, even if the legislature has seen fit to provide the polity with class action remedies. If the Microsoft EULA ("End User License Agreement") were to provide that anyone using the software is precluded from publishing a critical review of it, then in this regime the First Amendment is inoperative and superseded. If eBay's TOS were to decree that data made available to the public on the site could only be used by consumers for personal and noncommercial purposes, then the U.S. constitutional holding[10] that facts are not propertizable under copyright law is irrelevant. I am calling these regimes "efficacious promulgated superseding entitlement regimes"— EPSER's. They are "efficacious" by my hypothesis for purposes of this essay; "promulgated" because they are developed and "enacted" by the company without negotiation or input from the recipient; "superseding" because they replace the background law of the state with the provisions ("law") of the

[10] *Feist Publications, Inc. v. Rural Telephone Service Co, Inc.*, 499 U.S. 340 (1991).

company; and "regimes" because they are widespread, governing many millions of people.

Using EPSER's to Trump a Property Regime

To focus more clearly on how an efficacious contractual regime of this sort supersedes the law of the state, let us examine what happens to property in this hypothetical world of EPSER's. The exact contouring of property entitlement—what specific package of rights constitutes a property interest recognized by the state—is evolutionary and is a balancing enterprise undertaken by the polity. By delimiting property rights the entities of the state at the same time thereby limit propertization, and limit the extent of control propertization confers on owners. (Consider for example, nuisance law: when certain activities are declared nuisance-like, certain others are implicitly recognized as non-nuisances and thereby beyond the control conferred on owners by virtue of their ownership.)

Propertization has a democratic component, because the entities of the state are, at least ideally, responsive to democratic input. The connection with democratic input is significant because propertization responds to agendas that are important for society as a whole but will not be within the profit-maximizing objectives of firms. Particularly important here are the social goals of maintaining a competitive marketplace and ease of entry of new firms, and the goal of fostering freedom of speech, both commercial and noncommercial.

Consider this perspective on copyright law. Suppose that after extensive and expensive political debate and maneuvering, extensive consideration of the arguments of

all parties, the U.S. Congress arrives at a regime of intellectual property entitlements representing various incentives, trade-offs, balances, deals, respect for property ideology and culture, express or inherent constitutional commitments, and so forth. Suppose the regime as thus constructed looks like the U.S. Copyright Act of 1976, as interpreted by the federal courts. In that regime, property in information is limited to expression of ideas; ideas are non-property. Expression can also be non-property in special situations where others need to use it for their business. Property in expression expires after a fixed term, albeit a long one. Thus, older information is non-property, and property does not include the right to extend monopoly control past the enacted term. Property in information is limited to expression that is original (exhibits some modicum of creativity); unoriginal information, such as facts, is non-property. Infringement against property can be excused on a case-by-case basis in certain circumstances labeled fair use. Whatever activity in derogation of rights of the copyright holder that is adjudicated fair use becomes non-property, just as whatever activity of a landowner is adjudicated nuisance becomes non-property. Copyright law also contains an exhaustion provision (known as the first-sale doctrine), such that when the owner passes a tangible object in which a work is fixed to a new owner, the new owner is free to pass on the object subsequently. Property in information does not include the right to restrain alienation of information-containing objects, nor thereby to preclude subsequent transferees from accessing or using the information. Property in information does not include the right to leverage the monopoly against would-be competitors in ways that courts interpret as copyright misuse.

Next consider an EPSER promulgated by a firm or firms desiring to expand control over information assets beyond what copyright ownership provides. Let's assume that a term of the contract says that no copying of information—software or other content—will be permitted. This provision supersedes copyright law by extending control of the property owner to information that the copyright law delimits as non-property: information consisting of facts, or consisting of ideas, or older than the duration of propertization, etc. Let's assume that another term says that the recipient is precluded from exercising fair use rights, for example by performing intermediate copying for the purpose of reverse engineering. This provision supersedes copyright law by extending control of the property owner to foreclose a legislatively enacted safety valve, which the legislature deliberately left open to those who were willing to infringe and turn the matter over to a court to adjudicate as non-actionable. Let's assume that still another term says that the recipient is precluded from passing to anyone else the tangible object in which the information is embodied. This provision supersedes copyright law by extending control of the property owner to include a restraint on alienation that the legislature denied.[11]

Under this efficacious mass-market contractual scheme , it is obvious that for a certain subset of the social order, copyright, the law of the state, has been superseded by the promulgated contractual regime, the "law" of the firm. In the limiting case, in which the entire society has become subject to the extended propertization regime, the official constitutional/legislative/judicial regime is completely submerged. In situations short of

[11] In the case of the actual U.S. copyright act as it now stands, Congress has permitted restraint on alienation in some industries: the first-sale doctrine has been abrogated for phonorecords and software but not for videos and print media.

the limiting case, but in which large numbers of people are subject to these superseding regimes, the official constitutional/legislative/judicial regime is severely eroded or marginalized.[12]

Such a promulgated regime extends propertization far beyond the level engendered by the law of the state. The propertization extension regime is promulgated for a firm, for the firm's own benefit. In the limiting case, the regime, for the firm's private benefit, has superseded the state regime of property, which exists for the benefit of the public as a whole. The propertization extension regime is not subject to democratic input and debate. The propertization extension regime was not arrived at by balancing conflicting interests against each other, nor (by my "efficacious" hypothesis) will it be subject to continuing rebalancing and checking by the courts. Social concerns such as competition policy and free speech policy that are not typically adequately achieved by the profit-maximizing activities of individual firms have not been taken into account. In effect, sovereignty has been abrogated in favor of whatever firm has promulgated the regime.

[12] To the extent that those who held entitlements allocated by the regime of the state can be understood to have bargained them away for something of value to them, the regime of the state is not irrelevant in that it provided the entitlement-holders something with which to bargain. Even if we understand there to have been such a bargain, if the bargain is a one-time relinquishment then the state's regime looks irrelevant going forward, even if it played a role in bringing about the current situation of regulation by EPSER's. The state's regime is less irrelevant, even under a regime of EPSER's, if we assume that entitlement holders are continually trading off, in an ongoing manner, their state-engendered entitlements to the firms that promulgate EPSER's.

Rethinking Default Rules

These contractual regimes raise the question whether all of the entitlements of the state are or should be appropriately treated as default rules. In shrink-wrap, click-wrap, and browse-wrap contracts all of the following waivers routinely appear: Waiver of class action remedy, waiver of litigation remedy (i.e., mandatory arbitration), waiver of damages in tort for negligence, waiver of the right to publish a critical review, waiver of fair use, waiver of the right to make commercial use of facts, waiver of the right to make commercial use of content whose copyright has expired, waiver of the right of free access to facts and ideas, waiver of the right of alienation of the medium in which information is fixed. Should these purported waivers be held valid? If the background entitlements of the state are universally default rules, then such waivers are fine as long as the contracts containing them meet the appropriate rules for contract formation. But are the background entitlements universally default rules? To put the question the other way around, should society impose (or interpret the existing legal infrastructure as containing) certain mandatory or immutable rules to modify the universe of default rules? Thus, these contractual regimes raise the question of inalienability.

The universe of default rules could be limited by concerns about commodification,[13] or about wealth distribution, or by economic concerns about market power, heuristic biases, information impactedness, and so on. There is a big set of issues here. At least it is clear that debates about what uses of information can be officially fair use, for example, are pretty empty without parallel debates about whether the fair use

[13]See, e.g., Margaret Jane Radin, Incomplete Commodification in the Computerized World, in THE COMMODIFICATION OF INFORMATION (Neil Netanel & Niva Elkin-Koren, eds. 2002)

entitlement can be routinely waived. We must consider to what extent treating the property regime as consisting of default rules is itself only a default rule, and one that society should alter under certain circumstances.

We may start a consideration of the limits of waivability by taking into account some efficiency arguments (of the kind traditionally associated with the University of Chicago).[14] Normally, of course, Chicago-ish proponents of efficiency argue that all rights should be alienable.[15] To find exceptions to their position, one might argue, first, that blanket non-waivability for certain exceptional categories of entitlements would be less costly and less uncertain in its implementation than case-by-case judicial determination by means of traditional contractual doctrines such as unconscionablility. Unconscionability is discretionary with the judge, and not very predictable in advance; and the same provision is often upheld in one jurisdiction but not in another. Consider, second, the practice of routinely waiving the recipient's litigation rights and compelling arbitration. Although common-law case-by-case adjudication might not be the most efficient way to solve a problem, forcing disputes out of the courts and into alternative dispute resolute could be worse. It might be inefficient for society as a whole to permit firms to impose mandatory arbitration on every party they deal with. Arbitrators and arbitration mechanisms vary in expertise and even-handedness. Their decisions are not published, and are generally not subject to appellate review. Their decisions do not create a clear body of law. The ad hoc aspect of arbitration may be inefficient, because

[14] See, e.g., William M. Landes and Richard A. Posner,"An Economic Analysis of Copyright Law," 18 *Journal of Legal Studies* 325 (1989).
[15] Calabresi and Melamed, not wholly "Chicago-ish" in orientation, argued that "inalienability rules" could be justified when the cost of setting up a market would be too great. Calabresi & Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972).

efficiency is generally thought to be enhanced by clarity and consistency.[16]

A related efficiency concern involves the availability of class actions. Excluding class actions is a major reason firms impose mandatory arbitration. Where no one has immediate access to court, a widespread or common controversy cannot be used to bring a class action. Where a legislature has made a class action remedy available—assuming that the legislature is acting in the public interest—it has made a judgment that it is inefficient for society to tolerate the otherwise recurring small unredressable losses, which in the aggregate can add up to largescale redistribution in favor of firms causing these losses. The power of firms to abrogate that legislative judgment, at least where the abrogation is part of a widespread superseding promulgated regime, should at least require justification. These are reasons, therefore, that weigh in favor of saying that the rights to litigate rather than arbitrate and to initiate class actions where the legislature has provided for them should be among the non-waivable rules; or at least should not be waivable unless an efficient justification is shown rather than just assumed.

A more theoretical concern, still within the domain of efficiency, raises the question of whether firms themselves have an efficiency interest in certain kinds of non-waivable rules. This possibility can be seen as a standard coordination problem usually labeled a prisoner's dilemma. Suppose a situation in which each firm would prefer to keep all of the information it discloses from being used by others, but at the same time it would prefer to have access to information disclosed by others. This situation may very likely occur where firms need access to others' information as inputs to further innovation and information asset creation, but at the same time wish to lock up the information assets

[16] It may also be in tension with the ideal of the Rule of Law, with its commitment to notice of what is required in advance of the governed behavior. (I discussion Rule of Law further below.)

they already have. In most cases it would be difficult or impossible to implement for all firms this first-best solution. Suppose further that the second preferred option is that everyone be allowed access to a certain portion of information disclosed by others. Here we suppose that as a fall-back option, a firm would be willing to allow other firms access to some portion of its information in return for free access to some portion of the information of all other firms. This second preferred solution can be achieved through coordination. Spontaneous coordination is unlikely, however, and also unstable if it does occur, since each individual firm is tempted to "defect" by trying to lock up its own information while still having access to the information of others. The classic prescription for securing the second preferred solution is pre-commitment through legislation. Firms can agree in advance to have the state require them to cooperate in this rational manner, and the state's threat of enforcement deters defection after the deal is imposed.

In fact, parts of the copyright regime itself, including the exclusion of ideas and facts from ownership, as well as the notion of fair use, can be interpreted as a solution to the coordination problem. To the extent that is true, the regime should be seen as setting out some rules for when information developed by one firm is available for use by others, rules that all firms have an interest in supporting. That is, firms would have a rational incentive to organize and get copyright legislation enacted that does allow each firm to have access to some portions of information held by others, on a reciprocal basis. But if copyright rules establishing that some kinds of information are open to access to others are merely default rules, then an individual firm can contract around them. This capability destroys, or at least destabilizes, the commitment enacted in legislation that is

meant to secure a solution to the original problem. To the extent that copyright has holes—rules that establish kinds of information that are not propertized (for example, facts, functional items, ideas, merged ideas and expression) or that describe situations in which propertization can be overridden (for example, fair use)—copyright may represent an efficient solution to a coordination problem involved in fostering innovation. If this is the correct interpretation of copyright, then contracting around the holes in copyright coverage amounts to defection. Thus, widespread promulgated rules that obviate the legislated non-propertization should perhaps be disallowed, or at least be scrutinized carefully rather than assumed to be efficient.

Perhaps a more complex (multi-faceted) question is whether EPSERs could themselves be considered to be efficient. This depends upon the context. When considering standardized (purported) contracts, a set of economic questions is always relevant. A central question is, To what extent does the existence of these regimes indicate that they are efficient? Often the point will be raised that their existence shows that the market has validated them. One response to this is, basically, that each regime in its market context would have to be investigated to see whether this is so, or whether their existence represents some kind of market failure -- Microsoft's EULA in the market for PC operating systems, Google's terms of use in the market for Internet search engines, and so on. Another central economic question is broader than individual markets: evaluating the net effect for the economy as a whole of the reduced incentives for innovation, and of the increased transaction costs for follow-on innovation, associated with increasing propertization in individual markets. I will say a few words below about these economic questions. By asking these questions, though, it is important not to

obscure a more basic question, namely the question whether (when) it is acceptable to override the democratically promulgated regime with one promulgated by a corporation, even if that of the corporation were to be efficient. Holding or assuming that an EPSER is efficient doesn't exhaust questions about whether we want to permit it to operate unchecked, especially in a forest of other EPSER's. Of course, questions other than efficiency haunt some of us; but even for an economistic monomaniac, there remains not only the issue of costs to the overall economy of higher levels of propertization, but also the issue of costs to the overall economy of undermining sovereignty and weakening the law of the state.

To return for now to the usual kind of economic debate, the question whether a regime of standardized terms is efficient has two branches, the branch where we assume that the standardized regime is operating in a competitive market, so that different competing regimes are available, and the branch where we assume that the regime operates in a situation of market failure of some kind (for example, where the regime has been imposed by an entrenched monopolist, or where there is entrenched information failure). Take the latter branch first. If the regime is imposed by a monopolist or if the recipients cannot find out what the terms mean because of entrenched information failure, or if for some other reason there is only one regime available, it is easier to argue that its terms are not what the recipients would have chosen, and harder to argue that the terms, considered in conjunction with the product, maximize value or welfare to society. In the case of a promulgated regime that waives background legislated entitlements, one could argue at least that the recipients' democratically chosen regime, in which they did have a voice (ideally), is being overridden by the regime promulgated by the firm, in which they

do not have a voice. At least, where competing terms are not available, they do not have the usual market "voice" of "voting with their feet" since they cannot, by hypothesis, turn to a competitor. In this case one could argue that the firm has replaced sovereign power--the law of the state--with its own. It has done so for its own benefit, perhaps at the expense of the public; at least, it cannot be assumed that benefit to the society as a whole is coextensive with benefits to promulgating firms.

Now return to the first branch. If we assume, on the other hand, that the market in which a standardized regime appears is actually competitive, are promulgated superseding regimes presumptively efficient? The analysis has different starting points depending upon whether the competing firms each promulgate a different EULA, or they all promulgate the same one. If each of the competitive firms within a market has a different EULA, i.e. a different standardized regime, then we don't have a ubiquitous superseding regime; instead, recipients can move from one regime to another that they like better. In this scenario there is at least less of a problem with whether the regime is chosen by the recipients, and thus less of a problem whether they value it more than its competitors, assuming that we are confident that they can acquire and understand the information about the regime and its effects on them. But each regime still supersedes one aspect of the law of the state, the infrastructure of background rights recognized by law. Therefore, in this scenario we still have the question to what extent this infrastructure should be understood to consist entirely of default rules, completely waivable at will. As I mentioned above, an understanding of the legal infrastructure as consisting entirely of default rules could lead to inefficiency if the legal infrastructure represents a solution to a coordination problem. In addition, of course, there can be

arguments both economic and non-economic about the result for society of the weakening of the law of the state.

Still assuming a competitive market, if all of the firms have the same EULA, then the recipient has a choice of firm but not a choice of regime; the regime is ubiquitous in its domain. There still may not be a clearcut problem of choice, though, because, since we are supposing that competition prevails, it may be that this is the set of terms that has won out in a competitive market. If it has won out, that means that if in a previous stage of this market different sets of terms were offered, the users and customers chose this set of terms and forced all firms to offer them in order to maintain their market share. In these circumstances we might not be too worried about choice, because we are supposing that choice has caused this set of terms to win out. But this is complicated by the possibility that imperfect information has caused market participants to choose an inefficient set of terms as the standard. In this case, choice does not imply an efficient outcome, and the normative persuasiveness of choice is undermined by information impactedness.

Cabining the Chicago Perspective

The arguments sketched above might also illuminate a legal debate in the U.S. involving the doctrine of pre-emption. Under the doctrine of pre-emption, which stems from the federal constitution, federal law invalidates conflicting law of a subsidiary jurisdiction (state or city). A state is not supposed to be able to enact an intellectual propertization scheme in conflict with a federal intellectual propertization scheme. For example, Delaware cannot have its own patent law. Pre-emption is a very difficult and

inconsistent area of doctrine which I will not summarize here.[17] Let me just note that if we suppose that contract law, enforced by state courts, is going to undergird EPSER's that pervasively alter federally structured regimes of property rights, then the use of contract enforcement in this way could be construed as a state implementing a property regime that conflicts with the federal regime.[18]

So it could be argued. This pre-emption argument has so far failed to convince the courts, though not for want of academics trying.[19] *ProCD v. Zeidenberg*,[20] written by a judge with a Chicago economics turn of mind, held that enforcement of a rolling contract in which terms are presented only after the product is paid for was not pre-empted by federal copyright law, though the contract essentially functioned to propertize unoriginal factual data not propertizable under copyright law. The main rationale he gave is that contracts are *in personam*, between two parties, and property is *in rem*, binding on all the world.[21] The judge was thus adhering to the traditional picture of contract as a two-party universe of consent. In this picture, even if contract is being used to undermine or supplant the background legal regime of property, contract itself cannot be assimilated to property. In finding the terms enforceable, the judge also was assuming that the recipient could validly waive his background entitlement under copyright law. Thus he was

---

[17] See Mark A. Lemley, "Beyond Preemption: The Law and Policy of Intellectual Property Licensing," 87 *California Law Review* 111 (1999).
[18] In the U.S., contract law is state law. There are a few exceptions, such as the federal warranty act, but by and large contract law is governed by 50 state legislatures and 50 state court systems. The Uniform Commercial Code, which has been adopted in all 50 states, is not completely uniform since its interpretation is up to state courts.
[19] See, e.g., Lemley (1999), cited in note ---- supra; see also "Brief *Amicus Curiae* on Behalf of the American Committee for Interoperable Systems in Support of Appellee in *ProCD, Inc. v. Zeidenberg*," (1996) (available at http://www.law.berkeley.edu/institutes/bclt/pubs/lemley/procdbrief.html).
[20] 86 F.3d 1447 (7th Cir. 1996).
[21] 86 F. 3d at 1454.

implicitly finding that the terms did not raise the issue of whether or not the recipient, operating in this traditional picture as he assumed him to be, could validly waive his background entitlements. Possible arguments for invalidating such waivers could perhaps have been market failure (unfair competition or an antitrust violation), or unconscionability, or copyright misuse. The judge argued (or rather, purported to explain) that the terms in this case were clearly efficient (pro-competitive) and he stated in passing that unconscionability was not in issue[22]; i.e. he saw no terms that looked onerous enough to raise the issue of whether or not the recipient could be understood to have validly waived his rights.

The argument that I have sketched so far can be used to limit *ProCD* by distinguishing future cases in several ways. One way involves circumstances in which the law might find that the recipient's waiver of entitlements is invalid: where the terms look too onerous so that unconscionability or another limiting doctrine –– some aspect of the background regulatory dimension of contract law –– can kick in. Another possible distinction is to evaluate the market context and determine that the assumption that the terms have arisen in a competitive market and function pro-competitively is unwarranted. Yet another possible distinction involves something more contested: circumstances where the traditional ideological picture of contract has become clearly inapposite, so that the *in personam*/*in rem* distinction is in practice obliterated or at least very much blurred. In other words, circumstances where a regime of contracts has coalesced into a promulgated superseding propertization regime. When contract becomes property, then the public limitations on property should become relevant. This is essentially the argument put

[22] *ProCD*, 86 F.3d at 1449.

forward by legal academics but rejected in *ProCD*. Because this argument involves what is happening in practice, it cannot be resolved without some characterization of what is happening on the ground. When future cases come up, we will have to make some judgment about the extent to which my hypothetical situation of superseding entitlement regimes promulgated by firms actually exists, and then evaluate how far on the continuum toward a completely superseding regime we would have to be before assimilating the regime to unauthorized over-propertization.

Toward Categories of Stricter Scrutiny?

So far I have presented beginnings of a general argument that there could be some exceptions to the idea that the state's background entitlement structure consists entirely of default rules that can be waived by contract. It is not yet to say what those exceptions might be. As a preliminary pass at the problem, I suggest three categories for our attention: (1) rights of legal enforcement or redress of grievances, (2) human rights (including both individual and cultural rights), and (3) politically weak or vulnerable rights. The result of analyzing these categories (or others that may emerge) could be merely to caution legal decisionmakers to scrutinize purported contractual waivers strictly if they fall into one of these categories. We could also go further and consider whether any category or subcategory warrants instead a legislative mandate of inalienability (non-waivability). How difficult we make the waiver of a right is a matter that policy analysts can debate at length. A demand that any waiver of certain rights be subject to more than minimal scrutiny in court is a starting point, and absolute inalienability is the end point.

In the category of terms pertaining to legal enforcement, we can start by observing that if an adhesion contract provided that the recipient would have no right of legal action or remedy under any circumstances, that would take the transaction completely outside the legal system, and there would probably be no reason to call it a contract. (This is just to repeat the legal realist point that the notion of contract is inextricably intertwined with the mechanisms of state enforcement.) Short of that there are many gray areas, in which the promulgated clauses do impinge on the ability of the legal system to enforce its ordering and to stand behind the rights that users of that system are granted.[23] A commitment to binding arbitration as a way to frustrate rights to court action, including class action, seems to me questionable even on economic grounds, as I mentioned earlier. Also, under the US rule, the losing side in court is not generally obligated to pay the other side's legal fees. Some promulgated regimes try to contract around that rule with a term establishing a loser-pays agreement. Such a clause creates a strong financial disincentive to sue a large firm that can as a routine matter be expected to run up very high legal costs in an action. Terms that drastically limit available remedies are both commonplace and highly suspect. It is common to see terms in promulgated contracts that limit the remedies available to the amount the consumer has paid for a product or service. These terms attempt to rule out the possibility of normal contractual consequential damages. If allowed to have legal force, then even where the firm knew of the likelihood of consequential damages and also had within its power the ability to reduce that likelihood, the traditional right of the consumer to recover for such damages will be greatly weakened.

In the category of individual human rights, sticking to the information arena, I have in

[23] See Judith Resnik, Contract as Procedure (forthcoming)

mind data privacy and rights of freedom of speech. Privacy concerns are but a subset of the many aspects of information important to personal identity, and personal identity is closely tied to group and cultural identity.[24] Cultural human rights include aspects of information important to cultural identity. A system that allows the allocation of control of such information to be determined by EPSERs rather than by more dialogic means is at minimum not auspicious for democracy and participation of cultural groups in their own identity formation. Notice that these concerns are not concerns about informed consent. Even if we put aside the problem of determining whether there is informed consent to superseding promulgated entitlement regimes and assume for the sake of argument that the majority has made informed consent, the effects of this consent on the group as a whole might be unwanted. The minority who do not want to see control transferred may have no recourse once the majority has consented. There is also a real problem about the ability of people properly to value control of aspects of information relevant to identity. What appears to be at one time a surplus information resource may appear quite differently once control has been surrendered. And, control of information, once surrendered, generally cannot be recovered.

In the realm of privacy there are structurally similar problems. A society that affirmatively values privacy is necessary if any individual is going to have effective means to protect her privacy. Thus majority consent to systems that undermine the value of privacy may have the unwanted effect of taking away the practical possibility of the minority's protection of their privacy. And data privacy is also an example of something that is hard to evaluate accurately. Again, what appears to be at one time a surplus

[24] See, e.g. Madhavi Sunder, "Cultural Dissent," 54 *Stanford Law Review*, 495 (2002).

information resource may come to seem to a more valuable asset at a later time after control has been surrendered.

Rights that are politically weak or vulnerable are those that a majority may have less of an interest in maintaining, and are subject to pressure by motivated minorities. A politically weak right is likely characterized by two conditions: where strong interest groups have an incentive to undermine the right, and where the right does not have a politically strong interest group of its own to defend the right. In this regard we should consider fair use rights in literary, musical, and audiovisual works. The rightsholders have the incentive and possibly the power to undermine fair use rights, while on the consumer's side there has only been organization by libraries to defend the rights of fair use.

Transition to Machine Rule

No doubt the case-by-case limitations of contract law will be invoked to invalidate a "-wrap" license on occasion,[25] though probably in a haphazard way. Moreover, as I have just suggested, legal systems could legislatively impose well-defined pockets of nonwaivability, presumptive nonwaivability, or stricter scrutiny, to bolster their IP regimes. But these avenues of regulation through structuring of contractual implementation may now be blocked. The deployment of technological protection measures (TPM's) has the potential to read out the regulatory contouring of contract just as the deployment of superseding entitlement regimes has the potential to read out the regulatory contouring of property.

[25] See, e.g., *Specht v. Netscape Communications Corp*., 306 F.3d 17 (2d Cir. 2002).

A TPM is a program that limits distribution and use of a particular item of digital content (text, video, music, software).[26] It is elaborate technological copy-protection, with limitless possible permutations. A TPM could prevent content from being copied, or allowed it to be copied once and sent to one recipient, but deleted from the original recipient's hard drive. It could delete the content automatically after a set time period. It could link a copy to a particular computer (a practice known as "tethering"), so that it would not be playable anywhere else. There are many other possibilities.

It is evident that TPM's –-if wide deployment of them does come to pass—will attempt to accomplish by machine fiat what was previously attempted by contract. A EULA that comes with the software and says that I may not copy it for any purpose can be replaced by a TPM that simply makes all copying impossible. A EULA that says my right to use the software will be revoked if I attempt to copy it can be replaced by a TPM that simply disables the software when copying is attempted. The TPM can be configured to render a video unplayable after a certain window of time, or on somebody else's machine. And so on.

TPM's may seem to give rise to the same policy problems that I have mentioned above with respect to the promulgated superseding contractual regimes they replace. Content owners can use "private" technological protection to foreclose activities that the background "public" legal regime has made the right of the user. Common among these foreclosed activities will be prevention of copying of material that is not covered by copyright; and prevention of uses that are covered by copyright but could have been adjudicated fair use.

---

[26] For more information on TPM's, see, e.g., John A. Rothchild, Economic Analysis of Technological Protection Measures (manuscript on file with author).

But these policy issues are not the same as those posed by contracts, because TPM's bypass contract. They bypass the state's structuring of the legal infrastructure of exchange. In my discussion of contracts I postulated EPSER's that are "efficacious" in the hypothetical sense that they govern everyone subject to them without the courts reinterpreting them or invalidating them. This assumption makes an EPSER more like a TPM; or to put it the other way, TPM's are EPSER's on steroids. In the real world we don't have contracts that are "efficacious" in the sense I postulated, because in the real world we have (at least theoretically) a juridical structure to which those contracts can ultimately be referred for interpretation and validation, which means those contracts exist in the shadow of that potential referral. In the real world we do have TPM's, and TPM's do bypass the juridical structure.

Nevertheless, some commentators have considered the "terms" of a TPM to be a contract, rather than, as I am saying, a replacement for contract. I think this locution should not be hastily or casually adopted, because it reads out the regulatory contouring of property and contract. To me it seems instead that TPM's are technological self-help. Using TPM's is more like landowners building high fences and less like using trespass law. Indeed, using TPM's is more like landowners building fences beyond their official property lines, and deploying automatic spring guns to defend the captured territory. Against my labeling TPM's as non-contractual, however, it could be argued that the consumer chooses whether or not to purchase the content-plus-TPM package, and that this decision is consensual, and thus an agreement, a contractual transaction.[27] In order to

[27] On the coalescence of contract and product, see Margaret Jane Radin, Online Standardization and the Integration of Text and Machine, 70 FORDHAM L. REV. 1125 (2002).

think that the consumer chose to be bound by the terms in the package, we are remanded to familiar empirical questions about the market, such as those I have canvassed above: whether the consumer is aware of the operations of the TPM and whether the same content is available in the market without the TPM attached to it, so that the consumer could have obtained it elsewhere on other terms. Assimilating the browse-wrap procedure to consent does seem at least to move the word consent far from what it used to mean, and far from what it has meant in the political, legal and social understanding of the institution of contract. A fortiori, reinterpreting consent to cover what happens when a recipient is forced to comply with the configuration of a TPM is even more of a stretch. Nor would consent necessarily exhaust the need for justification.

Reconsidering the Rule of Law (Again)[28]

If you accept my assimilation of TPM's to the category of self-help mechanisms or instrumentalities (like the spring gun), the question emerges whether widespread deployment of TPM's is consistent with adherence to the Rule of Law. Indeed the ideal of the Rule of Law may be the main reason why spring guns are disallowed. We want the law of the state (the rules of tort and property) to hold intruders liable, or not, and we want the law of the state (the remedies for trespass to land) to have sole charge of the level and applicability of remedy available. (You are not allowed to kill someone who breaks in to steal your cabbages. Or to warn you that your house is on fire.)

Self-help puts decisions into private hands that the polity holds are (in categories where it is disallowed, such as my spring gun example) properly public. Our legal system does allow self-help in some categories and to a limited extent, usually with a

[28] See Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. REV. 71 (1989).

backdrop of regulatory safeguards. Repossession of some chattels under lien is allowed under such a scheme, but not repossession of a rented apartment. The legal action of unlawful detainer has superseded any self-help right of the landlord to lock out the tenants and seize their furniture. Landlords who think they have a right to recover their property must tell it to a court. The courts in making this decision understood the connection with the Rule of Law. At worst, self-help looks like vigilante justice, better described as a partial retreat from civil society to a state of nature. Too much self-help "invites disorderly scrambles," that is, reverts to the war of all against all in which it is every man for himself, reverting to the circumstances the state is supposed to supplant with its peaceful juridical order of mutual reciprocal rights and obligations.

The ideal of the Rule of the law is historically stated as "the rule of law, not of men." The meaning of the maxim is that the law should rule the people, not arbitrary rule by a king or a group of powerful nobles. The Rule of Law is central to liberal political thought. It undergirds not only the idea of exiting the state of nature into a structure of binding rules giving the state a monopoly on force, but also the further idea that the monopoly of force must be legitimated by a juridical structure, a specifically legal regime of reciprocal rights and duties. Today the ideal of the Rule of Law is being primarily invoked in urging for reform of property and contract in developing and non-western countries in order to facilitate organization and functioning of free markets. So it is often said that what is needed is stable entitlements and rules of contract, together with impartial courts to administer and enforce them. But the ideal of the Rule of Law is historically broader than the notion of an appropriate market infrastructure of property

and contract; it is the elaboration of the notion of what it means to be governed by law rather than by arbitrary rule, and as opposed to no rule at all in a state of nature.

Almost all important western political theorists have analyzed the Rule of Law. I will summarize here some of the main characteristics they talk about.[29] Legal directives should exist in advance of the conduct they are supposed to regulate. (Retroactivity is embarrassing for the Rule of Law, because in order for an action to be governed by law, the law must at least pre-exist the action. Where there is too much retroactivity, we have passed out of a society governed by law; that is why courts are careful when dealing with retroactivity.) Legal directives should be knowable by those who are supposed to follow them. (Lack of notice is embarrassing for the Rule of Law. It can be caused not only by secrecy but also by instability caused by legal doctrines being too much in conflict or changing too quickly.) Legal directives should not be impossible for human beings to follow, and they should not be irrational or useless for human well-being.

Legal directives should be enforced fairly and impartially, not capriciously and arbitrarily. The entities that declare the directives (such as legislatures) should address them to citizens as a whole or to rationally determined groups, and not single out individuals or unfairly target subgroups. The entity with the power to set directives should be separate from the entities (such as courts) that oversee enforcement against individuals. The courts should enforce the directives impartially and according to pre-existing law and legal principles, rather than arriving at results arbitrarily and ad hoc. The law on the books should correspond with the law in practice (a virtue that Lon Fuller called “congruence”). Judges should be guided by law and legal principles, not by their

[29] For more detail, see Radin, supra note ----.

personal political commitments or monetary interests, and not by arbitrary procedures such as flipping a coin.

This list of precepts is well worth re-examining in the digital era. All of the precepts are related to being able to know the law, being able to follow the law, being equal before the law, and having the law benefit the governed. Interpretations that were not predictable at the time plans were made or businesses were structured or acts were done are problematic for the Rule of Law, in the same way that retroactivity is. Consider, for example, the retroactivity aspect of the US copyright term extension act that the Supreme Court upheld in *Eldred v. Ashcroft*.[30] People who relied on the expiration of copyright terms had their businesses disrupted; rights were "taken" from those who relied on the content of the public domain under existing law, and "given" to those who did not have them. Liberals and conservatives alike were dismayed by this; it is something Larry Lessig and Richard Epstein can agree on, because they are both committed to the ideal of the Rule of Law.[31]

But instead of undertaking at this point the needed re-examination of how the precepts apply in the digital environment, I want to go back to basics. Prior to these precepts of know-ability, do-ability, equality, and benefit, there is an underlying notion of commitment to law itself, to the sovereignty of the political constitution set up and maintained for the very reason of underwriting a government by law (rather than by

[30] ---US---- (2003)
[31] The *Eldred* court held that Congress has broad power to structure copyright law as a whole, such that its rules are not to be re-examined by the courts individually. Thus, a charitable interpretation of the case is that the Court is holding that a pocket of retroactivity can be tolerated in the context of a broader scheme whose overall purpose is to foster innovation and whose overall impact is not unduly discriminatory. A charitable interpretation from an economic perspective would be that in order to evaluate the efficiency of copyright law, a more general equilibrium analysis, rather than a partial equilibrium analysis is required.

arbitrary power). Would widespread deployment of TPM's be contrary to this underlying basis of the Rule of Law, or at least in substantial tension with it? The question is not frivolous. Widespread use of TPM's would undermine the public nature of contract law—that is, its characteristics of legality rather than merely private power. TPM's work automatically. TPM's do not turn disputes over to adjudication by neutral disinterested courts that operate as a branch of sovereign power within a juridical system. TPM's subject parties to their control but deprive those subjected parties of the juridical structure they are entitled to expect in a political state. That includes juridical interpretation and review of what parties have done in their contractual transactions, and a juridical imprimatur on enforcement. That includes balancing the equities, and the ability to withhold enforcement.

Instead, the TPM is like an infallible "injunction" controlled completely by one party. The recipient has no option to breach and pay damages. The commitment of the juridical system to the notion of efficient breach is therefore rendered inoperative.[32] The recipient has no option to infringe and then argue fair use to a court; the juridical safety-valve for fair use is rendered inoperative. The recipient has no option to plead unconscionability or some other grounds for unenforceability in order to stop the "injunction" from "issuing." No entity of the state will balance the hardships and look for irreparable harm before issuing an injunction. Indeed, irreparable harm to the recipient will be ignored in the case of mission-critical systems[33]. The recipient cannot ask the court to reinterpret what the terms mean, in order to balance the rights of the

[32] The recipient could try tit-for-tat and implement her own technological self-help to dismantle the TPM; but see below (discussing the DMCA).
[33] An example of a mission-critical system is licensed software that runs a heart-lung machine in a hospital.

parties. The recipient cannot ask the court to consider reliance, reasonable expectation, economic duress, and so forth. In other words, TPM's will make even non-waivable rights irrelevant, unless legal limitations on the operation of machine "injunctions" come into existence.

What kinds of measures might help to make TPM's less problematic from the point of view of the Rule of Law? First of all, it would help to require those who deploy a TPM to give recipients actual notice of its existence and how it operates. It would also help to exempt mission-critical systems. Both of these objectives could perhaps be accomplished by regulatory prescriptions from a body such as the FTC. Or they could perhaps be enacted by Congress as amendments to the DMCA. (Congress has shown, in the consumer protection provisions of the E-SIGN Act,[34] that it can advert to the dangers of automatic operation of computers vis-à-vis recipients.) Mere notice of a TPM might not be enough in cases where the product is not available elsewhere without a TPM, perhaps depending upon what the product is and/or who the users are, so these regulations might have to be rather specific, not a tidy generality.

In addition, the deployment of TPM's could be pulled back toward a juridical structure by providing for an opportunity for recipients to seek a judicial declaration invalidating it. The grounds for invalidating could be that the TPM is illegally locking up information or precluding activities that should be available to the recipient as a matter of public policy or under the background regime of entitlements. Under current US law, there is stringent protection for TPM's (in the Digital Millennium Copyright Act, discussed below) and no limitation on them. To put my point very bluntly, that situation is seriously out of whack with the ideal of the Rule of Law.

---

[34]

Nonideal Democracy (and the DMCA)

In discussing the juridical structure and the regimes of entitlements created and enforced by the state, I have implicitly accepted the standard premise that the legislature (and judiciary) should be assumed to have balanced all factors and come up with a regime that somehow represents the general welfare or the public interest. In a more skeptical view, however, that is just an idealized story. The darker, non-ideal view of democratic politics views legislation as purchased by firms and interest groups—through lobbying, campaign contributions and sometimes bribes. Legislation represents regulation desired by one firm for its own benefit, and purchased by that firm, or else instantiates deals struck by interest groups among themselves for their own benefit, whose enactment is purchased by the group.

The Digital Millennium Copyright Act (DMCA) lends itself to this nonideal view of democratic politics. The DMCA criminalizes the creation of and "trafficking in" technology that could be used to disable TPM's. It is widely seen as a victory of content owners over hardware manufacturers, among others.[35] Although one provision of the DMCA purports not to alter any pre-existing rights under copyright law, the DMCA clearly cuts back on the public's ability to use materials in the public domain (ideas, or merged expression and ideas; facts; materials whose copyright has expired). It also impairs the right of fair use by making the decision to infringe and test the use in court impossible for all but those who can write their own programs. As I mentioned above,

[35] See, e.g., Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised, 14 BERKELEY TECH. L. J. 519 (1999).

there is no legislation on the other side of the TPM issue. That is, there is no legislation limiting the unfettered use of TPM's when they are used to "enjoin" violation of the "law" of the content owner in contexts that are mission-critical, or otherwise seemingly inappropriate to leave to a corporation's pre-programmed inexorable machine. The fact that the DMCA is one-sided in its protection of TPM's may perhaps indicate that it results from industry capture and not from democratic dialogue in the public interest.

In light of the observations of this essay, what should we make of the DMCA? The sequence of events we have observed, in logical if not chronological order, is: Firms use contract to read out the regulatory contouring of property, by treating all property rules as default rules and contracting around them in a manner that increases the scope of the owners' control. Then firms use technology to read out the regulatory contouring of contract rules that might have limited and re-shaped those contracts to respect the state's limitations on property. Then firms obtain legislation to quash design-arounds that would enable users and the public to exercise rights that are part of the property law of the state and still officially on the books.

Should the DMCA be interpreted according to ideal democracy, as a considered reassessment of copyright and a reallocation of rights away from recipients and the general public and in favor of those who maintain TPM's? Or, according to nonideal democracy, should it indeed be viewed as industry capture—a crushing blow for the public dimensions of property and contract?

Many view the DMCA as resulting from industry capture, as indeed some have viewed the Copyright Act itself as resulting from industry capture.[36] If the propertization

---

[36] See, e.g., Jessica Litman, DIGITAL COPYRIGHT (2001)

regimes of the state reflect nothing but capture--that is, private profit-maximization by another avenue that happens to be advantageous under the circumstances-- then there may be nothing to choose between the official regimes of the state and the promulgated regimes of EPSER's or TPM's. If this is the right theory of democracy, then my observation that the state-engendered contouring and limitation of property and contract is being undermined rings hollow. So perhaps does my counsel to pay more heed to the state-imposed entitlement structures in our debates over information policy—though if I am right that the parts of copyright law that leave certain kinds of information unpropertized are the result of an implicit deal among all firms, then at least it could be argued that some measure of strict scrutiny, if not non-waivability, is required in order to prevent easy defection.

I do not think, however, that a simple rent-seeking theory of democracy can be correct. In economic views of politics the primary purpose of the state is to impose efficient, non-rent-seeking regulation to further the general welfare in the face of collective action problems. If all legislation is assumed or defined to be rent-seeking, then this economic justification for there even being a state collapses. I certainly do not hold the opposite view, however, that all legislation is in the public interest merely because a democratic representative body enacted it. My view instead has long been that the difficult problem in political theory is how to differentiate government actions that can be considered rent-seeking (capture) from those that can be considered general welfare-

maximizing (in the public interest).[37] Unfortunately, there is no canonical method for doing that.

The place where I end up, therefore, is only partially skeptical. The regulatory contours of property and contract engendered by the state are not meaningless, though they are by no means ideal. Even if some specific legislative enactments such as the DMCA look as if their purpose is to undermine checks on the superseding regimes promulgated by firms, we should seek policies that shore up such checks on the power of firms to bypass the regimes of the state where those checks seem justified economically or otherwise. Otherwise we may be left with no workable distinction between the ordering engendered by the state ("public") and the ordering engendered by firms ("private") and therefore no basis for inferring that the ideal of the Rule of Law is being maintained by the former in order to govern the latter. Machine rule can perhaps be brought under the Rule of Law, but to date it has not been.

---

[37] See Margaret Jane Radin, Positive Theory as Conceptual Critique: A Piece of a Pragmatic Agenda? 68 S. CAL. L. REV. 1595 (1995).