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Menus Matter

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Abstract

Lawmakers can affect contractual equilibria by regulating contractual menus. The potential impact of menu regulation grows more important in contexts where contractors are cognitively constrained or imperfectly informed. This Essay explores the regulation of menus—both with regard to the simultaneous, alternative offers that private parties make to each other and with regard to the offers which the state makes to potential contractors themselves.

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What are contractual menus and why should lawmakers care about them? Let's start with a definition. A menu is a contractual offer that empowers the offeree to accept more than one type of contract. When an offer is not a menu, the offeree has only an all-or-nothing power of acceptance. A menu, in contrast, is a nexus of at least two simultaneous offers. This simple definition comports with common restaurant usage. You can order bacon or ham or nothing at all.

This Essay will explore how—if at all—the law should regulate menus of this type, and will also consider the regulation of menus at a higher level of abstraction. Using Roberta Romano's law as product metaphor,² we can also think of the contract law itself as providing a menu of potential contracts to private contractors. The state says to employers and employees, "we will offer you the ability to enter into employment-at-will contracts or just-cause contracts." The state says to entrepreneurs, "we will offer you the ability to enter into corporate contracts or partnership contracts or LLC contracts."

My thesis is that menus matter. Lawmakers would do well to consider regulating both types of menus—that is, menu offers from the state to contractors and menu offers from one private contractor to another. Menu regulations are usually not necessary. But the mere regulation of menus might affect contractual equilibria—particularly where contractors are cognitively constrained or imperfectly informed. This Essay is yet another prolegomenon to what I hope will be a fuller analysis of "altering rules."³ It is an attempt to move beyond the bad old days, where market interventionists only had the simplistic tools

² Roberta Romano, Law as Product: Some Pieces of the Incorporation Puzzle, 1 J L Econ & Org 225 (1985) (examining the trend of corporations to reincorporate in Delaware and finding they do so because they perceive the laws there to be more favorable).

³ But given the glacial pace at which I have been accomplishing this task, the reasonable reader might view this Essay as an additional piece of "vaporware" intended merely to scare away better scholars who might actually be able to put pen to paper.



of a “tort head”—who, like linguistically challenged parrots, could only ritualistically repeat “prohibit it” or “mandate it.” The mandatory rules of both tort and contract law are warranted in many contexts. But the default-rule revolution in part has been an attempt to show lawmakers that they can move the world without restricting contractual freedom. Merely by changing the default, lawmakers—whether they are courts or legislators—can affect the equilibrium.

The central point of this Essay is to go a step further by asking whether lawmakers can usefully impact the equilibrium of executed contracts merely by regulating these two different types of menus. Thus it is part of the effort to change the world with less intrusive interventions—interventions that protect those that need protecting without restricting the freedom of those that can do just fine on their own (thank you very much).

But before descending into the details of potential regulations that at this point amount to little more than a taxonomy of possibilities, let me start with a teaser of a factoid that comes from a working paper of Yair Listokin.⁴

First, Listokin has found that defaults matter in corporate law. Georgia has an opt-in “fair price” law,⁵ while many other states have opt-out laws.⁶ Analyzing an exciting database of corporate charters maintained by the Investor Responsibility Research

⁴ Yair Listokin, What do Corporate Default Rules and Menus Do? An Empirical Examination (Yale Law School working paper, May 2005).

⁵ Fair price statutes are defined by Listokin:

Fair price statutes are designed to prevent coercive two tier tender offers. . . . Fair price statutes require bidders that do not pay a “fair price” for all shares acquired to satisfy rigorous shareholder approval requirements. Connecticut’s “fairly typical statute requires that a two tier tender offer that fails to offer a “fair price” for all shares obtained must be recommended by the target company’s board of directors and be approved by 80 percent of outstanding shares and two thirds of shares not held by the bidder.

Id at 17.

⁶ Compare Ga Code Ann §§ 14-2-1110–1113, 1131–14-2-1133 (2003), with, for example, 8 Del Code Ann § 203. There is a similar dichotomy with regard to director liability statutes: Delaware and many other states have opt-in regimes, 8 Del Code Ann § 102(b)(7), while Ohio and a few others have opt-out statutes, Ohio Rev Code Ann 1701.59(D). For a discussion of this difference, see American Bar Association, Committee on Corporate Laws, Changes in the Revised Model Businesses Corporation Act – Amendment Pertaining to the Liability of Directors, 45 Bus Law 695 (1990).



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Center, Listokin finds that in equilibrium Georgia ends up with fewer fair price corporations than found in the states where fair price is the statutory default. This result contradicts Bernard Black's triviality hypothesis.⁷ Defaults matter and the iron law of default inertia prevails. The equilibrium is biased toward the default meaning of silence.

But for my purposes, Listokin has a second result that is even more striking. He finds that menus matter. Even if two states have an identical default, Listokin finds that they will have a different equilibrium if one provides a statutory menu of alternatives and the other does not. For example, both Georgia and Delaware have no fair price requirements as the defaults of their business combination law. Georgia's statute expressly states that a corporation can opt into fair price treatment, while Delaware and a bunch of other states allow opt-in merely as a matter of common law precedent. Surprisingly, the provision of an express statutory menu increases the chance that corporations will opt in. Fifty-seven percent of Georgia companies opt into fair price protection, compared to only 20 percent of companies in states with the same default but no express statutory menu.

Of course, to be convincing, Listokin needs to control for other factors that might be driving the result. But for the moment let us just accept the stylized result and ask what it might mean. As Listokin himself argues, having the legislature include the possibility of unequal tenders in its statute seems to increase their acceptability. Once we start theorizing about statutory menus, we think about not just "best practices" but of a larger set of "acceptable practices." If Listokin is right, Black is wrong. Corporate default setting is far from trivial. Not only do defaults matter but the tertiary question of how we frame mutations of the default matter as well.

⁷ Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 Nw U L Rev 542, 544 (1990) (noting that corporate law is not mandated in the sense that businesses can contract around most provisions).



If menus matter with regard to corporate contracting (where—Black is right—details of contracting around should have their smallest impact) imagine the impact they might have on consumer transactions. That is the question which is the jumping off point for the rest of this Essay.

I. Structuring Legislative Menus

The Listokin example suggests that lawmakers should consider whether statutes should expressly set out possible non-default alternatives and how the parties can get there. There has been a growing drafting movement to have statutes that more clearly delineate which provisions are contractible and which are not.⁸ But besides specifying whether particular rules are mandatory or default, legislatures should also consciously choose whether to specify discrete alternatives that private parties might opt for.

The question of whether to specify a menu of alternatives is analytically distinct from specifying the means of opting for those rules. I have recently taken to calling the latter “altering rules.” Altering rules tell private parties the necessary and sufficient conditions for contracting around a default. One could imagine a statute that expressly included the altering rules but did not include a menu of discrete non-default alternatives: “The default duty of care is X, but corporations may opt for a different duty by indicating in a bylaw amendment approved by a majority of all shares.” Or one could imagine a statute that expressly included a menu of discrete non-default alternatives but did not expressly enunciate the altering rules: “The default duty of care is X, but corporations are free to contract for no liability.” Of course, legislation with menu alternatives often also specifies the altering rules which tell the parties how they can order up one of the non-default dishes.

⁸ See John H. Langbein, The Uniform Trust Code: Codification of the Law of Trusts in the United States, 15 *Trust L Intl* 66 (2001) [Pub: .



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Before reading Listokin, I would have thought that explicitly stating the altering rules was much more important. Now I'm not so sure. Having a legislature merely tell private parties that an alternative outcome is acceptable may have dramatic consequences. Think for a moment about the impact express menus might have on civil rights. At the moment, we have no federal law prohibiting employment discrimination on the basis of sexual orientation. A bill prohibiting disparate treatment on this basis—the Employment Non-Discrimination Act (ENDA)—has been introduced several times into Congress but has no chance of passage in the Bush administration. At least with regard to federal law, employers are free to discriminate against gays and lesbians.⁹

But of course this is merely a default rule. There is nothing to stop employers from opting in by private contract and giving their employees and applicants the virtually identical rights—including private rights of action—as they would have if ENDA passed.¹⁰ Indeed, Jennifer Brown and I have been working hard to make this theoretical possibility a reality. We have created the “Fair Employment” certification mark which allows employers to promise not to discriminate with language taken word-for-word from the proposed legislation and which makes their employees and applicants express third-party beneficiaries to enforce breaches of the nondiscrimination promise. We have not only applied to the United States Patent and Trademark Office for approval of this certification mark, but we now have up and running a nifty website—www.fairemploymentmark.org—

⁹ Fifteen states covering approximately 47 percent of non-farm employees have passed state statutes that prohibit employers from discriminating on the basis of sexual orientation. Sean Cahill, The Glass Nearly Half Full: 47% of U.S. Population lives in Jurisdiction with Sexual Orientation Nondiscrimination Law, Nat'l Gay and Lesbian Taskforce 1 (2005), online at <http://www.thetaskforce.org/downloads/GlassHalfFull.pdf> (visited Sept 25, 2005) (surveying the legal protections afforded to homosexuals in various jurisdictions of the United States). See also Ian Ayres and Jennifer Gerarda Brown, Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark 3 (working paper 2005) (noting that recent bills to prevent discrimination against gays and lesbians has failed and proposing a certification mark approach to remedying such discrimination) **[Pub: please check both cites for MB'ing—look to prior issues for guidance. JJ]**.

¹⁰ The fair employment license falls short of ENDA protections in a few dimensions. See Ayres and Brown, Mark(et)ing Nondiscrimination at 23 (noting that the license would not be enforced by governmental agencies and private suits could not be brought in federal court).



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where any employer in the United States with a few clicks of the mouse can license the mark, and substantively opt into ENDA, without paying a licensing fee.

To date the fight for ENDA has been the struggle to enact a mandatory rule. Advocates of gay rights would do well to take a cue from the default literature and consider a fight to change the current default. Instead of the current opt-in regime, we might be able to make substantial progress in coverage by shifting instead to an opt-out regime. The iron law of default inertia suggests that fewer employees would end up without rights under an opt-out regime.

But Listokin's generative result suggests a third and even more mild struggle that might be usefully undertaken. Instead of lobbying for a mandatory rule or for a change of default, gay rights advocates might merely lobby for a menu. Even if we kept the current (discrimination legal) default, we might be able to move the equilibrium by including an express statutory opt-in option.

I now see that my efforts with Jennifer Brown in creating this streamlined website can be thought of as an attempt to create a privatized menu option. Instead of a statute that says check this box if you want "close corporation" status,¹¹ www.fairemploymentmark.org contains a literal icon that you can click for a similar status.

But our privatized menu option does not have nearly the same salience as a legislative menu option. Even though Brown and I expressly call upon private employers to adopt the license, it is much easier for employers to resist action. They make fallacious arguments that such private rights of actions would be unduly burdensome.¹² But more

¹¹ 8 Del Code Ann § 203 (setting out restrictions on corporate governance and then immediately following those restrictions with ways m).

¹² They're not. General Accounting Office, Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions, GAO-02-878R 7–11 (2002), online at <http://www.gao.gov/new.items/d02878r.pdf> (visited Sept 25, 2005) (noting that few sexual orientation complaints are filed, as compared to other types of employment discrimination claims).



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importantly, they frame the issue in such a way that it appears as if they are not even making a decision by doing nothing.

In contrast, if Congress passed a statute which included a “check this box” option if you want your employees to have ENDA rights, I imagine that there would be much, much stronger pressure to opt in. Under the current framing, people are wont to say “no employer in its right mind would sign up for potential legal liability with your license.” But these same people would never opt out of Title VII if they were given the opportunity. Creating an explicit menu option to opt into ENDA liability would make it very hard for the boatload of prominent firms who have openly endorsed the passage of ENDA (including the likes of AT&T, Coors, IBM and General Mills) to resist stepping up and opting into the statute’s coverage. Indeed, while many schools at least initially will resist licensing the mark or otherwise explicitly upgrading their policies to nondiscrimination promises, I imagine that the large majority of schools would opt in if Congress made it an option. You’d have to predict, for example, that the AALS would make it a requirement for its member schools.

So Listokin’s stylized fact and the ENDA opt-in hypothetical to my mind both strongly suggest that menus matter. And a crucial, overlooked statutory question is merely whether to include an explicit menu or not. We should now see that including a statutory menu that does no more than reiterate what the private parties could have done contractually by other means can have a big effect.

This possibility of reiterative non-default alternatives is particularly appropriate if the legislature chooses nonmajoritarian defaults.¹³ If a legislature is choosing a penalty or information-forcing default, it can economize on transaction costs by setting up both a

¹³ Ian Ayres and Robert Gertner, Majoritarian vs. Minoritarian Defaults, 51 Stanford Law Review 1591 (1999) (considering rules which are designed as information forcing to me minoritarian, as compared to majoritarian gap-filling rules).



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menu and altering rules that make it easier for private parties to contract toward more preferred alternatives.

The legislative provision of a menu may also be appropriate when some of the non-default alternatives are “standards” rather than “rules.” It may be harder for parties to contract around a default toward a precedent-rich standard.¹⁴ Without a legislative menu, the parties who want a idiosyncratic non-default standard may be driven to adopt language in disparate contracts that fails to generate a coherent body of precedent—or does so only after a longer period of time. But a legislature, by creating a check this box menu that includes leading candidates of sought-after standards, can channel contractors toward more substantial partial pooling. Insurers have long known that inducing people to contract on identical language makes it easier to price the value of the contract. Legislatures in providing menus can play an analogous role.

The question of whether to provide legal menus is also not just a policy choice for the legislature. Common law courts can in effect provide menus by telling litigants in their contract opinions what words they might have used to achieve a different outcome. Indeed, I have suggested that common law courts in all of their contract opinions should presumptively include what amounts to a menu.¹⁵ The most minimal menu would specify a single alternative—and this in effect is what I have suggested. Courts should indicate how the losing side could have won. Especially in every contract interpretation case, the court should indicate what box future parties could check to achieve the sought- after interpretation of the losing side.

¹⁴ Ian Ayres, Making a Difference: The Contractual Contributions of Easterbrook and Fischel, 59 U Chi L Rev 1391, 1405–06 (1992) (noting that, as compared to specific rules, unclear rules are useful as defaults because the ensuing case law will apply to many situations).

¹⁵ Ian Ayres, Three Proposals to Harness Private Information in Contract, 21 Harv J L & Pub Policy 135, 136–37 (1997) (arguing that courts should explicitly tell litigants what options would permit their desired outcomes).



Beyond this most basic “to menu or not to menu” question, lawmakers, like restaurants, have an array of choices about how to frame their menus. For example, are the items on the menu the exclusive of what can be ordered? If the menu choices are close-ended this entails a restriction of freedom of contract, which would need to be independently justified. And one might worry about a menu analog to a Goetz and Scott concern. Goetz and Scott noticed a normatively troubling tendency of courts to transform default rules into mandatory rules.¹⁶ We might want to see whether courts analogously tend to transform nonexclusive menus into exclusive menus. Indeed, this might be an interesting topic for further research.

There is also the interesting question of how the menu choices are presented. Where you place items on the menu almost surely affects how often they are going to be chosen. Indeed, Daniel Ho and Kosuke Imai have just analyzed the impact of menu order with regard to California ballots.¹⁷ The government on every election ballot is in a sense providing private actors with a menu of choices (and in some jurisdictions this menu is nonexclusive if write-in voting is allowed). Ho and Imai exploited the fact that since 1975 California has mandated randomizing the order in which candidates’ names appear on the election ballot. They find that menu order matters, especially in primaries. For example, their analysis of California statewide elections from 1978 to 2002 reveals “that ballot order might have changed the winner in as many as twelve percent of all primary races examined.”¹⁸ If menu choice matters on restaurant menus and on ballots, it is possible

¹⁶ See Charles J. Goetz and Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms, 73 Cal L Rev 261, 263 (1985) (noting that courts treat legislatively created defaults as presumptively fair and begin to find fault with certain other rules) [**Pub: please clarify this parenthetical. JJ**].

¹⁷ Daniel E. Ho and Kosuke Imai, The Impact of Partisan Electoral Regulation: Ballot effects from the California Alphabet Lottery, 1978-2002 (Princeton L and Pub Affairs Paper No 04-001, Harvard Pub L Working Paper No 89, Oct 28, 2004), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496863 (visited Sept 25, 2005) .

¹⁸ Id at 1.



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that it matters on legislative menus as well. Could there be an iron law of menu order that people will never opt more often for an option if it is placed later in the menu? Maybe people tend to endow the first menu choice that they are given and are less likely to trade it away. This of course is testable.¹⁹

Finally, there is the interesting question of how menu choice interacts with altering rules. As mentioned above, laws might include menus with or without rules that describe how the default can be supplanted. But the altering rules might themselves come in interestingly different varieties. Some might just specify how the menu choices can be achieved (“check the box”) and not cover how to contract for non-menu options.

Traditional law and economics scholars have been blind to the possible importance of legislative menus. Like Bernard Black, we have tended to think that the presence or structuring of menus was trivially unimportant. At most, it might be a way for lawmakers to economize a slight bit on transaction costs. But triangulating between Listokin’s analysis of corporate menus, Ho and Imai’s analysis of ballot menus, and my own hypothetical analysis of civil rights menus, I’m not so certain.

II. Regulating Private Menus

There is a second level at which the law might regulate menus. The last Part analyzed menus of laws that the state might (or might not) offer to private contractors. But contractual menus can also constitute simultaneous offers that an offeror makes to an offeree. As discussed in this Part, the law might at times prohibit menu offers, or it might

¹⁹ I’m skeptical that this iron law would always hold true. It casually seems to me that my children have often favored the last option offered. And stores are often designed to put the targeted sale item not next to the door but several yards in—as people have a tendency to blow by the first set of goods. One might also consider an analog of California ballot test applied to standardized testing. In standardized testing is my conjectured iron law of menus confirmed? Is a wrong answer (“the cockroach”) less likely to be chosen if it is listed as option B rather than option A?



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mandate them. The regulation of menus at this level of private offers will normally entail some restriction on freedom of contract and thus needs to be justified as an attempt to either protect parties to the contract (usually offerees) or to protect parties outside of the contract.

The idea that the law might mandate or at least encourage simultaneous offers is well-established in the law of unconscionability. From the perspective of substantive fairness, it seems strange that the enforceability of an agreement would be contingent on offers that the offeree rejected. From the lens of substantive fairness, the paths not taken seem to be irrelevant alternatives. This is a bit like saying that the reasonableness of the contract is judged by something beyond the four corners of the document. But from the perspective of *procedural* fairness, an attention to rejected alternatives makes imminent sense. Both unconscionability and duress often ask whether an offeree had practicable alternatives to the contract in question. If the offeror's offer includes a menu of reasonable alternatives, then we should be less concerned about whether the contract entered into was overreaching. Or to put in slightly more economic terms, if a court can judge that one of the rejected menu items was reasonable, then by revealed preference the court might conclude that the accepted offer made the offeree even (weakly) better off.

Courts understand that they have to look at the relative prices on the menu in order to assess the relative reasonableness of the menu items. This will often turn on the incremental price of menu bundles. Barry Nalebuff has recently shown how the pricing of menu bundles can allow offerors to foreclose sellers of individual items.²⁰ Nalebuff shows that foreclosure can occur when the incremental price of adding on an extra attribute is too low—which will cause most consumers to prefer the bundled menu option. For example,

²⁰ See Barry Nalebuff, Bundling as an Entry Deterrent, Q J Econ (forthcoming). Working paper version online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586648 (visited Sept 25, 2005) .



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the incremental price of adding Media Player to Microsoft's Office software is zero. But in the unconscionability context, the problem often concerns incremental prices that are too high. A manufacturer that wants consumers to buy products without rights to sue in court might be inclined to offer a menu with and without an arbitration clause. Giving consumers the option to buy the product without an arbitration clause would *ceteris paribus* make the arbitration clause more enforceable. But in reaching this conclusion, it would be important for courts to look at the incremental price to a consumer of the "retain her day in court" option. If the incremental price of buying without an arbitration cost was too high it would not be a practicable alternative and should not insulate the arbitration clause from unconscionability scrutiny. Indeed, since the Federal Arbitration Act mandates that arbitrators are supposed to apply the same substantive law, the only justifiable difference in incremental price should be something tied to the potentially lower litigation costs that the seller would face in arbitration.

But these private-offer menus might be regulated in a very different way. Instead of mandating or encouraging more menus, the law might actively discourage private menus. The use of simultaneous offers may be a method for imperfectly informed offerors to induce a separating equilibrium when offerors are privately informed. This separation may be all to the good and enhance efficiency. But menus may also be used to price discriminate in ways that are not only inequitable but inefficient.

Sometimes the law prohibits certain types of individual (non-menu) offers as being inimical to public policy, but here the idea would be to prohibit certain combinations of offers. There may be circumstances where a seller could validly offer A or offer B, but the law might prohibit the simultaneous offering of A or B.



This Essay offers no concrete advice for when the law might want to encourage or discourage menus. And I should emphasize that a neutral, *laissez faire* attitude toward private-offer menus is usually going to be the wisest course. But as with the last Part's discussion of legislative menus, developing a theory of how and when to regulate offering menus seems to be a fruitful research task for both academics and lawmakers. Indeed, the findings of the last Part that the existence and framing of legislative menus matter is a strong indication that private offer menus also non-trivially effect the contracting equilibrium. Lawmakers should strive to understand and potentially exploit these effects.

Conclusion

This brief Essay is unsatisfying in many ways. Instead of a demonstration, it waives its hands. Instead of a promise, it is a mere puff of the possible importance of legislative and private offering menus.

The seeds of a more general theory of menus might be found in existing default theory. Defaults matter because of inertia and imperfect information. These same Coasean frictions may impact menus as well. The transaction cost of reading menus may lead offerees to respond perversely to more choice. We might first think that offering more choices would reduce the chance that an offeree would stick with the default. After all, an increased range of choices reduces the chance that the default is the most preferred.²¹

But once we take into account the transaction costs of having to read and process the additional choices, it becomes possible that more choices will increase the default choice. Russell Korobkin notes that “the evidence is robust that the presence of a large

²¹ More choices ordinarily would also reduce the probability that an offeree would choose an item not explicitly on a nonexclusive menu. Again, the longer menu is more likely to include what the offeree wants and hence reduce the demand to order a la carte.



number of alternatives causes decisionmakers to employ relatively simple decisionmaking strategies.”²² This simplification in the face of an increased number of alternatives is “[b]ecause individuals’ selection of choice strategies can be viewed as balancing the desire to achieve accuracy with the desire to minimize effort.”²³ Therefore, “it follows logically that as decisions become more complex, decisionmakers will tend to adopt simpler choice strategies to cope with that complexity.”²⁴ Instead of reading an epic menu, the offeree might economize by sticking with the default.

This means that menu structures can lead offerees to violate Arrows “irrelevance of independent alternatives” assumption. Cass might choose chocolate ice cream instead of the default of vanilla on a short menu, but in a menu that is longer than “War and Peace,” he might rationally decide to stick with the vanilla. Indeed, Iyengar and Lepper found just such an effect in an experiment concerning the purchase of a CD player. In the study, when faced with the choice between buying a CD player on sale and deferring the choice to buy until later, the majority of participants in a study said they would choose to buy the

²² Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U Chi L Rev 1203, 1227 (2003), citing Eric J. Johnson and Robert J. Meyer, Compensatory Choice Models of Noncompensatory Processes: The Effect of Varying Context, 11 J Consumer Rsrch 528, 539 (1984); Cyde Hendrick, Judson Mills, and Charles A. Kiesler, Decision Time as a Function of the Number and Complexity of Equally Attractive Alternatives, 8 J Personality & Soc Psych 313, 317 (1968). See also Sheena S. Iyengar and Mark R. Lepper, When Choice is Demotivating: Can One Desire Too Much of a Good Thing?, 79 J Personality & Soc Psych 995, 996 (2000) (stating that “as both the number of options and the information about options increases, people tend to consider fewer choices and to process a smaller fraction of the overall information available regarding their choices . . . [and] simplify their decision-making processes by relying on simple heuristics”); Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S Cal L Rev 113, 118 (1996) (noting that “[a] significant body of data gathered by cognitive psychologists studying behavioral decision theory suggests that the structure of many choices lures people into making decisions that are suboptimal from the perspective of a rational model”); Eldar Shafir and Amos Tversky, Thinking through Uncertainty: Nonconsequential Reasoning and Choice, 24 Cognitive Psych 449, 469 (1992) (noting that “multiple outcomes are more difficult to think through and, as a result, are more likely to give rise to nonconsequential reasoning”).

²³ Korobkin, 70 U Chi L Rev at 1226 (cited in note 22) (internal citations omitted).

²⁴ Id.



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CD player, but when an additional choice of buying a better CD player was added to the mix, more people chose to defer the choice.²⁵

The earlier examples suggest that menus may also matter because of imperfect information. Rob Gertner and I long ago suggested that different defaults may have different signaling properties.²⁶ Some might allow or encourage contract parties to reveal private information. But the presence or absence of a menu might change the nature of offer or offeree signals. At the moment, employers might be leery to hire an employee who asks whether they legally committed not to discriminate, but this negative inference might be severely muted if Congress passed an opt-in version of ENDA. By including ENDA on a legislative menu, Congress might make it more socially acceptable to ask for or offer such protection. Georgia made it more socially acceptable for corporate managers to offer fair price amendments.

But the big idea is that lawmakers might at times usefully intervene in the marketplace in a new and remarkably gentle way. Private law theorists have known for a while now that lawmakers can change the world by imposing mandatory rules or changing defaults. But this Essay suggests that without doing either of these things, lawmakers might be able to change the world by regulating the existence and structure of menus.²⁷ Whether lawmakers have sufficient information to do this in a helpful way remains as yet unproven. Not all tools are useful. But a first step is to overthrow the still powerful intuition

²⁵ Iyengar and Lepper, 79 J Personality & Soc Psych at 996 (cited in note 22) . See also Eldar Shafir, Itamar Simonson, and Amos Tversky, Reason-Based Choice, 49 Cognition 11, 21–23 (1993).

²⁶ Ian Ayres and Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L J 87 (1987) .

²⁷ At the conference, Cass Sunstein (among others) was skeptical whether merely adding an explicit menu to a pre-existing default would be likely to change the contracting equilibrium very much. Like Professor Sunstein, I continue to believe that changing defaults are likely to have more powerful impacts than regulating menus. But the less powerful effects of menus may still be significant. Indeed, the “Save More Tomorrow” campaigns that Professor Sunstein has praised themselves show the potential power of adding explicit menu items to an employer’s retirement plan option. See Richard Thaler, Save More Tomorrow, online at <http://gsbwww.uchicago.edu/fac/richard.thaler/research/SMarT14.pdf> (visited Sept 26, 2005).



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of Bernard Black and others that menus are relatively unimportant features of our legal landscape.