I. Introduction

Scholars for decades have noted the possibility that standard-form contracts disadvantage consumers.¹ For many years, that literature focused on the idea that sellers with market power draft contracts that are disadvantageous to consumers.² Law and economics scholars, however, have been skeptical about that hypothesis, pointing out that a strategy of inefficient terms rarely would be the optimal technique for exploiting market power.³ In recent years, however, the debate has shifted as new product distribution channels have changed the technology of contracting. Now, even firms without market power can exploit the cognitive failures of their customers through “shrouding” of terms and similar techniques.⁴

That concern has become more prominent with the rise of Internet retailing, where electronic standard-form contracts are used extensively,⁵ often undermining the notion of assent on which the contract paradigm traditionally depends.⁶ Scholars have worried that Internet retailers obscure one-sided terms so that customers will continue to shop at their sites, and do so more effectively than their brick-and-mortar counterparts.⁷ This, among other concerns,⁸ has led many to argue for a new contracting regime that deals with electronic contracting.⁹ Indeed, because software is often distributed online, this is a major topic in the ALI’s current project on Principles of the Law of Software Contracts.¹⁰