

## Menus Matter

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*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 that the state makes to potential contractors themselves.*

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,<sup>1</sup> we also can think of 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."<sup>2</sup> It is an attempt to move beyond

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<sup>1</sup> See generally Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J L Econ & Org 225 (1985) (arguing that state laws act as "products" that corporations select when deciding where to incorporate).

<sup>2</sup> 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.

the bad old days, when market interventionists only had the simplistic tools 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—courts and legislators—can affect the equilibrium.

The central point of this Essay is to go a step further and ask 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 who need protecting without restricting the freedom of those who can do just fine on their own (thank you very much).

But before descending into the details of potential regulations that now amount to little more than a taxonomy of possibilities, let me start with a teaser of a factoid that comes from a working paper written by Yair Listokin.<sup>3</sup>

First, Listokin has found that defaults matter in corporate law. Georgia has an opt-in “fair price” law,<sup>4</sup> while many other states have opt-out laws.<sup>5</sup> Analyzing a database of corporate charters maintained

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<sup>3</sup> Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination* (Yale Law School Working Paper, May 2005) (on file with author).

<sup>4</sup> 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 representative 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 14–15.

<sup>5</sup> Compare Ga Code Ann §§ 14-2-1110 to -1113, 14-2-1131 to -1133 (LexisNexis 2003) (setting the requirements for business combinations with regard to the necessary approval by corporate directors and shareholders), with, for example, 8 Del Code Ann § 203 (2001) (setting the requirements for shareholders to opt out of business combinations). There is a similar dichotomy with regard to director liability statutes: Delaware and many other states have opt-in regimes, see, for example, 8 Del Code Ann § 102(b)(7) (2001) (providing instances in which a director will not be immunized from liability despite of provisions that limit his liability to shareholders), although Ohio and a few others have opt-out statutes. See, for example, Ohio Rev Code Ann 1701.59(D) (West 1994) (mandating that a director can be liable for damages only if a court finds that he deliberately intended to cause injury to the corporation or if he acted recklessly). 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, 696–98 (1990) (explaining that opt-in statutes “permit shareholders to remove breach of the duty of care as a cause of action for money damages,” although under certain opt-out statutes, “a director is liable only if [he] has breached or failed to

by the Investor Responsibility Research Center, Listokin finds that in equilibrium Georgia ends up with fewer fair price corporations than are found in those states where fair price is the statutory default.<sup>6</sup> This result contradicts Bernard Black's triviality hypothesis.<sup>7</sup> It shows that defaults matter and the iron law of default inertia prevails. The equilibrium is biased toward the default meaning of silence.

For my purposes, Listokin reaches 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 different equilibria if one state 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 respective business combination laws. Georgia's statute expressly states that a corporation can opt into fair price treatment, while Delaware and several 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.<sup>8</sup>

Of course, to be convincing, Listokin needs to control for other factors that might be driving the result. 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 about 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 matters as well.

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

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perform his duties in compliance with the statutory standard of care" and if that breach was reckless).

<sup>6</sup> Listokin, *What Do Corporate Default Rules and Menus Do?* at 26 (cited in note 3) (noting that "a company that went public in Georgia after the passage of the fair price statute is 37 percentage points less likely to have fair price anti-takeover protection than a similar company incorporated in an opt-out state").

<sup>7</sup> See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 *Nw U L Rev* 542, 544 (1990) (hypothesizing that state corporate law is trivial because most of the rules are not mandatory, and as a result, they fail to "prevent companies—managers and investors together—from establishing any set of governance rules they want").

<sup>8</sup> Listokin, *What Do Corporate Default Rules and Menus Do?* at 27 (cited in note 3).

## I. STRUCTURING LEGISLATIVE MENUS

The Listokin example suggests that lawmakers should consider whether statutes should expressly set out possible nondefault alternatives and how the parties can reach them. There has been a growing drafting movement to write statutes that more clearly delineate which provisions are contractible and which are not.<sup>9</sup> 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 nondefault 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 nondefault 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 that tell the parties how they can order up one of the nondefault dishes.

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<sup>10</sup> (ENDA)—has been introduced several times into Congress but currently has no chance of passage. At least with regard to federal law, employers are free to discriminate against gays and lesbians.<sup>11</sup>

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<sup>9</sup> Consider John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 *Trust L Intl* 66, 76 (2001).

<sup>10</sup> Employment Non-Discrimination Act of 2003, S 1705, 108th Cong, 1st Sess (Oct 2, 2003), in 149 *Cong Rec S* 12376 (Oct 2, 2003).

<sup>11</sup> Fifteen states covering approximately 47 percent of nonfarm employees have passed state statutes that prohibit employers from discriminating on the basis of sexual orientation. See generally 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 2005), online

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 virtually identical rights—including private rights of action—to those they would have if ENDA passed. 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 on the basis of sexual orientation. The language of this promise is taken word-for-word from the proposed legislation and makes employees and applicants express third-party beneficiaries to enforce breaches of the nondiscrimination promise.<sup>12</sup> We have not only applied to the United States Patent and Trademark Office for approval of this certification mark,<sup>13</sup> but we now have a website—[www.fairemploymentmark.org](http://www.fairemploymentmark.org)—where any employer in the United States can license the mark with a few clicks of the mouse, 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 milder 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.

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at <http://www.thetaskforce.org/downloads/GlassHalfFull.pdf> (visited Dec 30, 2005) (recounting Congress’s failed attempts to pass nondiscrimination laws that would protect homosexuals from employment discrimination, and concluding that although there are some state laws that achieve this objective, “the lack of federal protections for LGBT people means that most victims of anti-gay or anti-transgender discrimination have no recourse in federal court”). See also generally Ian Ayres and Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark* (Yale Law School Center for Law, Economics and Public Policy Research Paper No 309, 2005), online at <http://ssrn.com/abstract=712842> (visited Dec 30, 2005) (noting that recent bills to prevent discrimination against gays and lesbians have failed and proposing a certification mark approach to remedy such discrimination).

<sup>12</sup> The fair employment license falls short of ENDA protections in a few dimensions. See Ayres and Brown, *Mark(et)ing Nondiscrimination* at 23 (cited in note 11) (noting that the license would not be enforced by governmental agencies and private suits could not be brought in federal court).

<sup>13</sup> United States Patent and Trademark Office, Trademark Application serial no 78569298 (filed by Ian Ayres & Jennifer Brown, d/b/a FairEmploymentMark.org, on Feb 17, 2005), online at <http://tess2.uspto.gov/bin/showfield?f=doc&state=fdipb8.3.1> (visited Dec 30, 2005).

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,’”<sup>14</sup> our website 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 unconvincing arguments that such private rights of action would be unduly burdensome.<sup>15</sup> More important, they frame the issue so that it appears as if they are not making a decision by doing nothing, as if simply accepting the default is not choosing.

In contrast, if Congress passed a statute that 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, although many universities at least initially have resisted licensing the mark or otherwise explicitly upgrading their policies to nondiscrimination promises, I imagine that a large majority of schools would opt in if Congress made it an option. You’d have to predict, for example, that the American Association of Law Schools would make it a requirement for its member schools.

So Listokin’s stylized fact and the ENDA opt-in hypothetical both strongly suggest that menus matter. A crucial overlooked statutory question is whether to include an explicit menu. We should now see that including a statutory menu that merely reiterates what the private parties could have done contractually by other means can have a big effect.

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<sup>14</sup> 8 Del Code Ann § 203 (setting out restrictions on corporate governance and listing several ways to displace them).

<sup>15</sup> They’re not. See General Accounting Office, *Sexual Orientation-Based Employment Discrimination: States’ Experience with Statutory Prohibitions* GAO-02-878R 7–10 (July 2002), online at <http://www.gao.gov/new.items/d02878r.pdf> (visited Dec 30, 2005) (noting that few sexual orientation complaints have been filed under state laws, as compared to other types of employment discrimination claims).

This possibility of reiterative nondefault alternatives is particularly appropriate if the legislature chooses nonmajoritarian defaults.<sup>16</sup> If a legislature is choosing a penalty or information-forcing default, it can economize on transaction costs both by providing a menu and by setting 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 nondefault alternatives are “standards” rather than “rules.” It may be harder for parties to contract around a default toward a precedent-rich standard.<sup>17</sup> Without a legislative menu, parties who want an idiosyncratic nondefault standard may be driven to adopt differing language across 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 for 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, by providing menus, can play an analogous role.

The question of whether to provide legal menus is not a policy choice to be made only by 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 should presumptively include what amounts to a menu in all of their contract opinions.<sup>18</sup> The most minimal menu would specify a single alternative. For example, I have suggested that courts should routinely indicate how the losing side could have won. Especially in contract interpretation cases, courts should indicate what box future parties should check to achieve the sought-after interpretation of the losing side.

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 menu items the exclusive list of

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<sup>16</sup> See Ian Ayres and Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 *Stan L Rev* 1591, 1600–02 (1999) (considering a variety of minoritarian gap-filling rules including information-forcing rules).

<sup>17</sup> Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 *U Chi L Rev* 1391, 1405–06 (1992).

Michael Klausner and Robert Ahdieh have separately argued for the value of menus to manage network externalities. See generally Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 *Va L Rev* 757 (1995); Robert Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 *S Cal L Rev* 215 (2004).

<sup>18</sup> Ian Ayres, *Three Proposals to Harness Private Information in Contract*, 21 *Harv J L & Pub Policy* 135, 136–37 (1997).

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 concern exposed by Charles Goetz and Robert Scott. They noticed a normatively troubling tendency of courts to transform default rules into mandatory rules.<sup>19</sup> 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 important 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.<sup>20</sup> With every election ballot, the government provides private actors with a menu of choices (and in some jurisdictions this menu is nonexclusive if write-in voting is allowed). Ho and Imai's research 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."<sup>21</sup> If menu choice matters on restaurant menus and on ballots, it is possible 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.<sup>22</sup>

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<sup>19</sup> 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) (observing that "the courts' tendency to treat state-created rules as presumptively fair often leads to judicial disapproval of efforts to vary standard implied terms by agreement").

<sup>20</sup> See generally 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 2004), online at <http://ssrn.com/abstract=496863> (visited Dec 30, 2005) (suggesting that "all electoral jurisdictions should randomize ballot order to minimize ballot effects").

<sup>21</sup> *Id.* at 1.

<sup>22</sup> 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.

The iron law of menu choice also might not hold with regard to the menu of multiple-choice test answers. If the iron law holds true on multiple-choice standardized tests, then one would predict that an answer (regardless of whether it is correct) would be (weakly) less likely to be chosen if it were listed as option B rather than option A.



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 nonmenu 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, we saw menus as a way for lawmakers to economize a bit on transaction costs. But after triangulating 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 previous 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. This Part suggests that the law might at times prohibit menu offers, or it might 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 either to 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. Through the lens of substantive fairness, the paths not taken seem to be irrelevant alternatives. It would be 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 eminent 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 it in slightly more economic terms, if a court could 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. Often this will 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.<sup>23</sup> 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, 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 who 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 clause were too high, it would not be a practicable alternative and should not insulate the arbitration clause from unconscionability scrutiny. Indeed, because arbitrators are supposed to apply the same substantive law as a court would, 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 some private menus. The use of simultaneous offers might be a method for imperfectly informed offerors to induce a separating equilibrium when offerees are privately informed. This separation might be all to the good and enhance efficiency. But such menus might 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 the wisest course. But as with the previous Part’s discussion of legislative

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<sup>23</sup> See generally Barry J. Nalebuff, *Bundling as a Way to Leverage Monopoly* (Yale School of Management Working Paper Series ES Economics Working Paper No 36, 2004), online at <http://ssrn.com/abstract=586648> (visited Dec 30, 2005).

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 menu matter, are a strong indication that private offer menus also nontrivially affect 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 waves 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.<sup>24</sup>

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 pull of the default choice. Russell Korobkin notes that “the evidence is robust that the presence of a large number of alternatives causes decisionmakers to employ relatively simple decisionmaking strategies.”<sup>25</sup> This simplification in the face of an increased number of alternatives occurs because “individuals’ selection of choice strategies can be viewed as balancing the desire to achieve

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<sup>24</sup> More choices ordinarily would also reduce the probability that an offeree would choose an item not explicitly offered on a nonexclusive menu. The longer menu is more likely to include what the offeree wants and hence reduce the demand to order a la carte.

<sup>25</sup> Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1227 (2003). 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) (“[A]s 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. . . . [People] 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) (“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) (“[M]ultiple outcomes are more difficult to think through and, as a result, are more likely to give rise to nonconsequential reasoning.”).

accuracy with the desire to minimize effort.”<sup>26</sup> Therefore, “it follows logically that as decisions become more complex, decisionmakers will tend to adopt simpler choice strategies to cope with that complexity.”<sup>27</sup> 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 Arrow’s “independence of irrelevant alternatives” assumption.<sup>28</sup> Cass might choose chocolate ice cream instead of the default of vanilla on a short menu, but faced with a menu that is longer than *War and Peace*, he might rationally decide to stick with the vanilla. Indeed, Amos Tversky and Eldar Shafir 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 CD player; but when the additional choice of buying a better CD player was added to the mix, more people chose to defer the choice.<sup>29</sup>

Shlomo Benartzi and Richard Thaler found a different simple rule at play in workers’ choice of retirement plan. As the number of investment options on the menus grew, some workers were apt to follow a naïve “1/n” diversification strategy: dividing their contributions evenly across the funds offered in the plan. Sadly, they found that the proportion invested in stock depended “strongly on the proportion of stock funds in the plan.”<sup>30</sup>

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.<sup>31</sup> Some might allow or encourage contracting 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 are legally commit-

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<sup>26</sup> Korobkin, 70 U Chi L Rev at 1226 (cited in note 25).

<sup>27</sup> Id.

<sup>28</sup> See generally Kenneth J. Arrow, *Social Choice and Individual Values* (Wiley 1951).

<sup>29</sup> Eldar Shafir, Itamar Simonson, and Amos Tversky, *Reason-Based Choice*, 49 *Cognition* 11, 22 (1993). See also Iyengar and Lepper, 79 *J Personality & Soc Psych* at 1003–04 (cited in note 25) (analyzing situations in which consumers are faced with an overload of choices).

<sup>30</sup> Shlomo Benartzi and Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans*, 91 *Am Econ Rev* 79, 79 (2001) (finding that “poorly informed employees” generally rely on simple heuristics when allocating the assets in their defined contribution saving plans and privatized Social Security plans).

<sup>31</sup> Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L J* 87, 127 (1989) (arguing in favor of “more diverse forms of default rules,” particularly penalty defaults because they “encourage the better informed parties to reveal their information by contracting around the default”).

ted 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 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.<sup>32</sup> 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 of Bernard Black and others that menus are relatively unimportant features of our legal landscape.

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<sup>32</sup> At the conference where this Essay was presented, Cass Sunstein (among others) was skeptical whether merely adding an explicit menu to a preexisting default would be likely to change the contracting equilibrium very much. Like Professor Sunstein, I continue to believe that changing defaults is likely to have a more powerful impact 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 H. Thaler and Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J Polit Econ S164, S166 (2004) (advocating a retirement plan program, which gives “workers the option of committing themselves now to increasing their savings rate later, each time they get a raise”).