

2012

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Recommended Citation

Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines v. Shute*, 12 *Neu. L.J.* 553 (2012).

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Author: Charles L. Knapp

Source: Nevada Law Journal

Citation: 12 NEV. L.J. 553 (2012).

Title: *Contract Law Walks the Plank: Carnival Cruise Lines v. Shute*

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CONTRACT LAW WALKS THE PLANK:
CARNIVAL CRUISE LINES, INC.
V. *SHUTE*

Charles L. Knapp*

Being no expert in the niceties of constitutional law, my first impulse was to decline the invitation to take part in this Symposium devoted to decisions of the United States Supreme Court. On reflection, however, I thought perhaps a bit more ink might appropriately be expended on the Court's 1991 decision in the case of *Carnival Cruise Lines, Inc. v. Shute*.¹ While probably not the worst Supreme Court decision of all time—okay, *clearly* not the worst—the *Shute* case was, from my standpoint as a teacher of contract law, a bad decision for the parties, for the court, and for the future of contract law.

Factually, at least, the case was apparently a simple one. Eulala and Russel Shute, residents of Washington state, purchased through a Washington travel agency tickets for a cruise on one of the defendant's ships.² The ship set sail from Los Angeles, California, and returned there when the voyage was over, having sailed to Puerto Vallarta, Mexico, and back.³ While at sea, the Shutes along with other passengers were treated to a guided tour of the ship's galley, in the course of which Mrs. Shute slipped and fell on a wet floor.⁴ After returning to their Washington home, the Shutes brought a negligence action against the defendant cruise line in the United States District Court for the Western District of Washington, seeking damages for their injuries.⁵

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¹ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Professor Linda S. Mullenix is also contributing to this Symposium a critique of the *Shute* case, concentrating on its procedural-law aspects. In this piece, I will confine myself to considering the contract law ramifications of the decision. Notable contemporary commentaries on *Shute* include an earlier article by Professor Mullenix, see Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992), and others by Professor Jean Braucher, see Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 61–68 (1995), and Lee Goldman, see Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 707–10 (1992). See also Richard A. Gantner, *Contracts—Forum Selection—Absent Bad Faith, Fraud, or Overreaching, a Reasonable Forum Selection Clause in a Commercial Cruise Form Contract is Enforceable—Carnival Cruise Lines v. Shute*, 22 SETON HALL L. REV. 505, 539 (1992) (Court should have held Carnival's clause “patently unreasonable, unenforceable and unconscionable”).

² See *Shute*, 499 U.S. at 587–88.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

After several courts had weighed in at various stages of the proceedings, the Shutes' matter ended up before the United States Supreme Court.⁶ Although at earlier stages the issue of jurisdictional due process had figured importantly in the case, by the time Shute reached the Supreme Court that point had been settled, and the principal question remaining was the effect of the following language contained in the Shutes' tickets for their voyage:

8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.⁷

If the Court were to hold this forum-selection clause to be valid and enforceable, the Shutes' suit could only be prosecuted in a court located in the state of Florida, across the continent; if not, it could be heard in the state of Washington. Ultimately, application of the clause depended on whether as a matter of policy the Court found it appropriate in light of established (or, more accurately, newly-discovered) choice-of-law principles to allow the Shutes' access to the defendant to be so restricted by contract. In an opinion written by Justice Blackmun, the court held that the clause was valid and enforceable, and not in violation of federal statute.⁸ A dissenting opinion by Justice Stevens (joined by Justice Marshall) would have reached a contrary result on both the general validity of the clause and the question of statutory application.⁹

In reaching its decision, the Court necessarily had to consider the question of contract formation—whether there was a valid contract between the Shutes and the defendant containing the forum-selection clause. That was a question of contract law—*federal* contract law, to be sure, since admiralty law generally governed the case, but *contract* law nonetheless. Speaking principally from the contract-law perspective, then, was the *Shute* case “wrongly decided”? Let us count the ways.

⁶ Initially, the case was brought in the Federal District Court of Washington, Western District. *See Shute v. Carnival Cruise Lines*, 1988 A.M.C. 591 (W.D. Wash. 1987). That court granted the defendant's motion for dismissal on grounds that the court lacked personal jurisdiction over the defendant. *Id.* at 595. On appeal, the Ninth Circuit Court of Appeals initially reversed, on the basis that the lower court did indeed have jurisdiction over the defendant and the forum-selection clause was unenforceable. *See Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1448 (9th Cir. 1988). That opinion was subsequently withdrawn, however, and the case was referred to the Supreme Court of Washington for decision of certified question. *See Shute v. Carnival Cruise Lines*, 872 F.2d 930, 930 (9th Cir. 1989). The Washington court held that Washington's long-arm statute did provide a basis for jurisdiction over the defendant in Washington state. *See Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82 (Wash. 1989) (en banc). The case then returned to the Ninth Circuit, which issued a revised version of its earlier opinion, holding once again that jurisdiction was present and that the forum-selection clause was unenforceable. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 389 (9th Cir. 1990). Thereafter, certiorari was granted by the U.S. Supreme Court and this decision followed. *Shute*, 499 U.S. at 589.

⁷ *Shute*, 499 U.S. at 587–88 (internal quotations marks omitted).

⁸ *Id.* at 587, 596–97.

⁹ *Id.* at 597.

DOES THE DECISION FOLLOW ESTABLISHED PRECEDENT?

This is clearly not an inappropriate question to ask in a legal system that relies on the principle of *stare decisis*, but probably less important in the case of the United States Supreme Court than anywhere else. It's hard these days to be anything but "legally realistic" about the fact that the law is what the Supreme Court says it is on any given day, regardless of what the Court might have said yesterday, or the day before, or for that matter may say tomorrow.¹⁰ And the *Shute* decision does indeed follow precedent, in the sense that it enforces the contractual choice-of-forum clause, just as in 1972 the Court had done in *M/S Bremen v. Zapata Off-Shore Co.*¹¹ In deciding *M/S Bremen*, however, the Court broke sharply with established precedent, which had previously disfavored choice-of-law clauses;¹² *Shute*, in that sense, merely followed in *M/S Bremen*'s wake. Yet viewed from the contract law perspective, *Shute* was a case that cried out for different treatment. *M/S Bremen* had enforced a forum-selection clause contained in a contract for the towing of an underwater drilling rig from Louisiana across the Atlantic to the Italian coast; that contract, made between two business corporations (one American and one German), provided for disputes to be resolved in court in London. As the Court noted in *M/S Bremen*, that contract was "a far from routine transaction," and it would be "unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations."¹³ And indeed the Court in *Shute* at first appears to be going to some pains to show that it, too, saw the substantial difference between the facts of *M/S Bremen* and those of the case before it:

[The Shutes'] passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. . . . Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.¹⁴

But this "common sense" appraisal was immediately walked back, with a statement that the Court does not "adopt the Court of Appeals' determination that a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."¹⁵ So it is neither the reasoning nor the rationale of *M/S Bremen* that the court in *Shute* is following here; rather *M/S Bremen* is just a stepping-stone to a now-favored and much more far-reaching result.

¹⁰ The poster case for this proposition is probably *Bush v. Gore*, 531 U.S. 98 (2000), although perhaps *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), is a strong contender. And, speaking of Justice Blackmun (he wrote the *Shute* majority opinion), some might nominate *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹ See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972).

¹² See *id.* at 8–9.

¹³ *Id.* at 13–14.

¹⁴ *Shute*, 499 U.S. at 593 (citations omitted).

¹⁵ *Id.*

DOES THE DECISION RECOGNIZE AND CORRECTLY APPLY
BASIC PRINCIPLES OF CONTRACT LAW?

This is a question easier to pose than to answer. As of 1992, “contract law” in America could be seen as an uneasy amalgam of “traditional” or “classical” contract law, “modern” contract law, and “law and economics” contract law.¹⁶ To the extent that the Court in *Shute* appears in effect to place upon the plaintiffs the burden of reading, understanding, and reacting to the terms of the contract they had made, it imposes on them the “duty to read” that countless courts have thought appropriate, even necessary, for a system of contract law to function.¹⁷ In this view, anyone who signs (or as in this case “adheres to”) a document that he or she knows was intended to have legal, contractual consequences is and should be bound by its terms, whether those terms were understood or even read by that person, because to hold otherwise would render the system of contract law simply unworkable.¹⁸ The Court observed in passing that the Shutes had “conceded that they were given notice of the forum provision.”¹⁹ Because of this, the Court reasoned, they “presumably retained the option of rejecting the contract with impunity.”²⁰ This brief passage has been taken by many courts tasked with applying *Shute* as an open invitation to

¹⁶ See generally Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761 (2002); Braucher, *supra* note 1.

¹⁷ See generally Stewart Macaulay, *Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 *VAND. L. REV.* 1051 (1966).

¹⁸ See generally JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 342–57 (6th ed. 2009). The following passage is typical: “Parties to a written contract have the obligation to read what they sign; and, absent actual or constructive fraud, . . . they are not excused from the consequences attendant upon a failure to read the contract.” *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App. 2001). In *Finkelschtein v. Carnival Cruise Lines*, the plaintiff had argued that he was a sixty-seven year old Russian émigré who did not speak or write English, and that he had no knowledge of the defendant’s forum-selection clause. *Finkelschtein v. Carnival Cruise Lines*, MON-L-850-05, 2006 WL 1492469, at *1 (N.J. Super. Ct. App. Div. June 1, 2006). However, his wife could speak (and read, apparently) English. *Id.* at *2. In the lower court, Judge English held that because they both signed a certification which stated that plaintiff had the provisions of the ticket translated to him, and both also signed the ticket contract acknowledgment, this “meant that they received, read and agreed with the terms and conditions of the guest ticket contract.” *Id.*; see also *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083, 1089 (N.D. Cal. 1999) (legally blind plaintiff suing under ADA bound by clause where she failed to have someone read the entire document to her), *rev’d on reconsideration*, 107 F. Supp. 2d 1135 (N.D. Cal. 2000) (clause not enforced because of plaintiff’s physical disabilities).

¹⁹ *Shute*, 499 U.S. at 595. Presumably that statement is based on this passage in the Shutes’ brief:

Petitioner spends considerable time in its brief discussing whether the forum selection clause was incorporated in the ticket and that it was reasonably communicated to the respondents. These are not relevant issues in this case. The respondents do not contest the incorporation of the provisions nor that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated. The issue is whether the forum selection clause should be enforced, not whether Respondents received the ticket.

Brief for the Respondents, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (No. 89-1647), 1990 WL 508102 at *26 (emphasis added). In light of the outcome, one suspects that irony, however effective it may be in daily life, is lost on the Supreme Court.

²⁰ *Shute*, 499 U.S. at 595.

enforce any contract of whose terms the adhering party could be said to have had “notice” (which in practice appears to mean “having potentially an awareness that the other party maybe had some contract terms that it wanted to apply to their transaction”), and thus to have had an “option” to reject those terms—no matter how brief the window of opportunity that existed for the adhering party actually to read, understand and react to them.²¹

The quoted passage from Justice Blackmun’s majority opinion also appears to require that the adhering party have enjoyed in fact an opportunity to reject and withdraw from the transaction before adverse financial consequences became unavoidable—“with impunity”—and thus to imply that the Shutes indeed had such an opportunity. However, Justice Stevens’s dissent pointed out that the Shutes’ contract of passage contained another provision (equally unlikely to have been understood, read, or even noticed) that relieved the carrier of any responsibility to make a refund for unused tickets.²² This provision might or might not have been enforceable against the Shutes had they chosen to cancel their trip,²³ but later courts have seized on this point as making it permissible to read the majority’s “with impunity” language as demanding little or nothing in the way of real redress for the passenger who elects not to accept the offered terms of carriage.²⁴

²¹ See, e.g., *Bowen v. Norwegian Cruise Lines, Inc.*, No. CL0016, 2000 WL 35440459 (Va. Cir. June 13, 2000) (passengers received tickets ten days before sailing, after the fare had been paid in full, and prices were non-refundable); *Golden v. Celebrity Cruises, Inc.*, 780 N.Y.S.2d 701, 703–04 (N.Y. Sup. Ct. App. Term 2004) (passenger had ticket for two to three weeks before learning of father’s illness necessitating cancellation). Occasionally a judge will voice a mild protest:

From the papers, it appears that Carnival’s forum-selection clause is unfair and unreasonable because of the location of the clause, and the microscopic size of its print. The clause also appears unreasonable because passengers do not have an opportunity to read the clause until after they purchase their non-refundable tickets. However, these concerns are the same as those that were unsuccessfully presented to the Supreme Court in *Shute*.

Pucillo v. Doe, M.D., No. 013679C, 2002 WL 31492388, at *2 (Mass. Super. Oct. 2, 2002).

²² *Shute*, 499 U.S. at 597. The provision, paragraph 16(a), is reproduced on page 605 of the opinion. See *id.* at 605.

²³ Justice Stevens seems to suggest that the provision might not have been enforceable, but his language is ambiguous:

Of course, many passengers, like the respondents in this case will not have an opportunity to read paragraph 8 [(the forum-selection clause)] until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16(a), which provides that ‘[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger.’ Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute.

Id. at 597 (second alteration in original) (citation omitted). Grammatically the subject of “not knowing” should probably be “I” (Justice Stevens, that is), but seems more likely to have been intended by him as “the average passenger.”

²⁴ See, e.g., *Bowen*, 2000 WL 35440459; *Golden*, 780 N.Y.S.2d at 703–04. In *Norwegian Cruise Line, Ltd. v. Clark* the court considered and enforced a forum-selection clause that required suit in a particular county in Florida, where plaintiffs had sued in Florida but in a different county. *Norwegian Cruise Line, Ltd. v. Clark*, 841 So. 2d 547 (Fla. Dist. Ct. App. 2003). In the course of its opinion, the court had this to say about the decision in *Shute*:

It can thus be argued that the majority's opinion in *Shute*, although stern and perhaps even harsh, did not go outside the boundaries of traditional contract law. But long before the *Shute* decision, courts and commentators had amply noted the existence in contracting practice of (1) standardized forms, permitting the creation of multiple versions of what is essentially the same agreement, with only a few salient terms varied from one transaction to another,²⁵ and (2) "contracts of adhesion," in which one party proposes a contract on terms which the other party is invited only to accept without negotiation—a "take-it-or-leave-it" basis.²⁶ The contract in *Shute* was, of course, both of those things. As Justice Stevens pointed out, commentators were, by 1992, visibly skeptical that such contracts should be routinely enforced, and by employing the doctrine of unconscionability (among others), were advocating a distinct approach to such agreements.²⁷ Although Justice Blackmun's opinion does not use the term "contract of adhesion," it does (in the passage quoted above) essentially admit that defendant's contract of carriage does indeed look, walk, and quack like a contract of adhesion.²⁸ Having reached this point in its analysis, the Court could have concluded that the transaction was characterized by what is commonly termed "procedural unconscionability," and proceeded to subject the contract to strict scrutiny to see if either its terms in general or the choice-of-law term in particular could pass the test of substantive unconscionability.²⁹ Without using the language of unconscionability analysis, the Court nevertheless kind of does that anyway: at one point it engaged in an analysis of

The Supreme Court clearly recognized that policy benefits accrued to the cruise lines only when the policy regarding the forum for litigation was uniform. The Supreme Court was well aware that passengers like Mrs. Shute would not necessarily be able to obtain a full refund of the ticket price if they objected to the forum selection clause in the passenger ticket Weighing the disadvantages to Mrs. Shute against the advantages to the cruise line industry, the Supreme Court nonetheless determined as a matter of law that this same type of passenger ticket with this same type of forum selection clause has public policy benefits, that there are overriding national concerns that mandated enforcement of the contract, and that inconsistent and varying adjudications within the fifty states would have a detrimental impact on federal law.

Id. at 553. There is certainly some creative mind-reading going on here, but the Florida court may nevertheless be correct that this is how *Shute* has come to be perceived, whatever its actual language. The business convenience of the defendant cruise line and a desire for conservation of judicial resources, *see infra* text accompanying notes 32–33, have grown into "overriding national concerns."

²⁵ See, e.g., Karl N. Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L.J. 704 (1931).

²⁶ See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

²⁷ *Shute*, 499 U.S. at 600. Justice Stevens cites works by Professors Llewellyn, David Slawson, and Todd Rakoff, as well as the opinion by Judge J. Skelly Wright in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), the leading early unconscionability case. *Shute*, 499 U.S. at 600. Since *Shute* was decided, Professor Rakoff's article has become the gold standard for present-day discussion of adhesion contracts. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983); *see also* Knapp, *supra* note 16, at 770 n.37.

²⁸ See *Shute*, 499 U.S. at 593.

²⁹ The terms "procedural" and "substantive" unconscionability were coined by Professor Arthur Leff in his leading article and have become standard tools for applying the doctrine. See Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489, 509 (1967). For further discussion of adhesion contracts, *see gener-*

the “reasonableness” of the clause,³⁰ and in a separate passage a bit farther on it subjects the contract to what it terms “judicial scrutiny for fundamental fairness.”³¹

Judicial scrutiny is indeed called for, but this is a particularly myopic version. Distilling the gist of these passages, the factors the Court deems worth mentioning could be lined up as follows:

Favoring enforcement:

1. A cruise line has a “special interest” in limiting its exposure to suit, because cruise ships travel to many different places, and carry passengers from many locales, and thus could be subject to suit in many jurisdictions.³²

2. Choice-of-forum clauses reduce uncertainty about where suits must be brought and defended, conserving judicial resources.³³

3. There has been no showing of “fraud or overreaching” in this case, and there is clearly no “bad-faith motive” behind the clause, because the defendant’s principal place of business is in Florida.³⁴

4. “[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”³⁵

Disfavoring enforcement:

1. . . .

I was prepared at this point to make a list of the items on the other side, but then realized that in this example of “judicial scrutiny” there appear to be none of those deemed worthy of mention, other than the above reference to the absence of such factors as “fraud or overreaching.” Forget about strict scrutiny; this is hardly even a “balancing” test. And among the factors enumerated as favoring enforcement, note the nearly complete absence of any argument that such clauses actually benefit the passenger. As a result of this decision, this cruise line (and all others, for that matter) gets a rule which very clearly reduces its exposure to future liability—fewer passengers will be able to sue, fewer suits will result, and fewer still will succeed or be settled on economically viable terms. For the court to pretend otherwise is to insult the reader’s intelligence. For their trouble, the justices of this Court (and, more significantly, judges in the lower courts as well) get a “conservation of judicial

ally Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOY. L.A. L. REV.* 95 (2006).

³⁰ *Shute*, 499 U.S. at 593–94.

³¹ *Id.* at 595.

³² *Id.* at 593. This seems a bit over-stated, since fundamental rules of due process would presumably have a narrowing effect on the number of potential jurisdictions where suit could be brought against a cruise line, or for that matter, any other business with a global operation.

³³ *Id.* at 593–94. The number of lawsuits dealing with this issue to some extent undercuts this point. And in any case, plaintiffs deprived of their day in court have little reason to cheer the “certainty” that has left them stranded.

³⁴ *Id.* at 595. Of course, the presence of a good faith reason doesn’t preclude the possibility of a bad faith one as well; limiting a plaintiff to one and only one forum necessarily deprives her of the ability to sue in any other, and it would be naive to believe this doesn’t figure in the drafters’ calculations as well.

³⁵ *Id.* at 594. I return to this point below.

resources.”³⁶ The only perceived benefit to these or any other passengers comes in the form of “reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued”—reduced fares which “it stands to reason” future passengers will enjoy.³⁷

At this point, we leave contract law—both “classical” and “modern”—behind, and enter the Looking Glass world of contract-law-and-economics. We are invited to assume that merely because a firm realizes savings by denying to those it has wronged appropriate access to a convenient forum for redress of their injuries, it will pass those savings along to its customers. Apparently we are expected to imagine a hypothetical Professor Farnsworth, CEO of a global transportation business, exclaiming to his staff, “Good News, everyone!! We have successfully avoided a lot of lawsuits, so now we can reduce our prices!!”³⁸ We could reduce our prices, that is—unless instead we prefer adding to our retained earnings (thereby increasing the value of our stock). Or raising executive salaries and bonuses (as a reward for increasing profits by, e.g., dodging lawsuits). Or paying more to lobbyists to battle those pesky regulations (which otherwise could conceivably help protect future passengers from injury). Or contributing (legally, of course) to cruise-line-friendly political candidates. Or—well, you get the idea. Of course, companies may compete on the basis of price, temporarily or otherwise, in a fashion which does benefit their customers. But to assume that in fact this will be the result if we enable a company to avoid liability for its wrongful actions is to make an unjustified leap of faith.³⁹ And to assume farther that this necessarily would be a desirable result if purchased at the expense of reduced compensation to those injured by

³⁶ *Id.* at 593–94.

³⁷ *Id.* at 594.

³⁸ Knowledgeable readers will realize that the reference is not to venerated Professor E. Allan Farnsworth, late of Columbia University School of Law and Reporter for the Restatement (Second) of Contracts, but to Professor Hubert Farnsworth of Comedy Central’s “Futurama,” the elderly chief executive of Planet Express, an intergalactic delivery service. *See, e.g., Futurama, Raging Bender* (20th Century Fox, original broadcast Feb. 27, 2000).

³⁹ For a full analysis of the law-and-economics claims in *Shute*, see generally Goldman, *supra* note 1. Professor Goldman concludes that enforcement of choice-of-forum clauses in mass consumer contracts “does not merely substitute economics for fairness and equity,” it also “represents the triumph of economic theory over reality.” *Id.* at 740. He continues:

[The] premise, that freedom of contract maximizes societal wealth because the parties to a contract know what is best for them, simply is inapposite for secondary terms in consumer contracts. Consumers do not read or understand the subordinate terms of their contracts and, therefore, do not, as a group, voluntarily and knowingly adopt the obligations and duties contained therein. The subordinate terms of the contract are just not a reflection of consumers’ self-interests. To pretend otherwise is to live in a fantasy land.

. . . [C]onsumers’ failure to read or understand the subordinate terms of their contracts is rational economic behavior, . . . economic efficiency favors placing the risk of distant litigation on the seller, and . . . the costs of government intervention in the forum selection clause context are de minimis. Thus, neither normative judgments about consumers’ responsibility for their conduct nor enlightened economic reasoning can support the Supreme Court’s *prima facie* validity rule for forum selection clauses in consumer contracts.

Id. at 740–41.

the corporation's actions is to completely ignore the risk-spreading effect of modern tort law.⁴⁰ Which is, presumably, mostly what this is about.⁴¹

DOES THE *SHUTE* DECISION CONTRIBUTE TO THE
DEVELOPMENT OF CONTRACT LAW?

As one of our presidents might have said, that depends on what the meaning of “contribute” is. Despite its origin as “only” federal admiralty law, the *Shute* decision has been touted by many courts and commentators as a prime exemplar of the so-called “rolling” contract, in which one party is bound not only to terms of which she—in theory, at least—could have been aware at the time she initially manifested her general assent to the transaction, but to any terms the other party sees fit to add either before, during or after what we used to consider as the process of “contract formation.”⁴² “Terms-in-the-box” contracts,⁴³ “shrinkwrap” contracts,⁴⁴ “click-wrap” contracts,⁴⁵ “scroll-down”

⁴⁰ By “modern tort law” I refer to the kind of tort law that roughly corresponds to what I have elsewhere called “modern contract law”—the mid-twentieth-century view that a realistic jurisprudence, attuned to the economic realities of modern life, could contribute to the general welfare by tempering the extremes of laissez-faire economics. See Charles L. Knapp, Commentary, *An Offer You Can't Revoke*, 2004 Wis. L. REV. 309, 316–19. One example would be the development of product liability law through the interaction of tort and contract. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 439–40 (Cal. 1944); see also MARK A. GEISTFELD, *TORT LAW: THE ESSENTIALS* 21–39 (2008).

⁴¹ Like the Supreme Court's aggressive promotion of mandatory arbitration clauses in adhesion contracts, the Court-created “strong presumption” in favor of choice-of-law and choice-of-forum clauses has the effect—presumably not unintended—of decreasing enterprise liability, which in turn hampers the risk-spreading effect that the rules of both contract and tort, as developed over the twentieth century, could provide. For excellent discussions of the role that contract law can play in these areas, see generally William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1 (2006); Jillian R. Camarote, Comment, *A Little More Contract Law with My Contract Please: The Need to Apply Unconscionability Directly to Choice-of-Law Clauses*, 39 SETON HALL L. REV. 605 (2009).

⁴² The *Shute* case was decided as a matter of federal admiralty law, and its ruling has been applied in many similar suits against cruise lines, Carnival and others, in both federal and state courts. E.g., *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7 (2d Cir. 1995) (American passenger required to litigate in Greece); *Norwegian Cruise Line, Ltd. v. Clark*, 841 So.2d 547 (Fla. Dist. Ct. App. 2003) (passenger deemed to have notice of contract's terms when ticket in possession of travel agent); *Walker v. Carnival Cruise Lines, Inc.*, 889 N.E.2d 687 (Ill. App. Ct. 2008) (cost and inconvenience to Illinois plaintiff might deter her from suing in Florida, but do not prevent her from doing so); *Keikian v. Norwegian Cruise Line, No. 9865*, 2004 WL 1293262 (Mass. App. Ct. 2004) (whether plaintiff “had a sufficient or even rational reason for not reading the contract” irrelevant; he had an opportunity to do so). It has also been applied as federal law in diversity cases not involving admiralty. E.g., *Sawyer v. Bill Me Later, Inc.*, No. CV 10-04461, 2010 WL 5289537 (C.D. Cal. 2010) (credit dispute with on-line billing service). And it has been expressly adopted by many states as an appropriate approach to choice-of-forum clauses. E.g., *Am. Online, Inc. v. Booker*, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001) (class action suit against internet provider); *Secure US, Inc. v. Gen. Solutions, Inc.*, No. 06-C-302, 2006 WL 4633901 (Cir. Ct. W. Va. 2006) (state authority lacking; court will follow federal rule).

⁴³ E.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

⁴⁴ E.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

⁴⁵ E.g., *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

terms,⁴⁶ “terms to-be-added-or-changed-later”⁴⁷—all of these involve a kind of “contracting” in which one party not only dictates the terms, it may even retain the power to change them later, and to do so in ways which the other party is effectively powerless either to anticipate or to avoid. Both in the world of paper contracts and in the world where contracts are only “virtual,” contract law is seemingly moving inexorably toward a state in which neither the presence nor the absence of actual consent has any real significance. And—not coincidentally—to a world in which, to paraphrase the late Grant Gilmore, “ideally, no [drafting party] should be liable to anyone for anything.”⁴⁸

Captain Blackmun and his jolly piratical crew have affixed our blindfolds, and prodded us out onto the plank. We can only imagine how cold the water is going to be, and hope that some of us can swim.

⁴⁶ *E.g.*, *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007). *See generally* Francis J. Mootz III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, 4 *I/S: J.L. & POL'Y FOR INFO. SOC'Y* 271 (2008).

⁴⁷ *E.g.*, *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000). *See generally* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 *UCLA L. REV.* 605 (2010) (presenting a comprehensive survey of this area).

⁴⁸ GRANT GILMORE, *THE DEATH OF CONTRACT* 14 (1974).