Contract as Swag

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ABSTRACT

In the past, legal scholars have analogized the contract to a product, a social artifact, and a form of technology. In this Article, we suggest that contracts may also be usefully analogized to swag. The term "swag" refers to branded merchandise that is given away for free to people who attend or participate in an event. Companies and law firms increasingly give away contracts—and specific contract provisions—to contract users with the goal of enhancing their reputations. In so doing, they deploy their contracts in a manner that resembles a water bottle or tote bag emblazoned with the name of a law firm.

There are a number of benefits that flow from conceptualizing contracts as a form of swag. First, the analogy helps to explain why lawyers would invest time and energy in developing contract innovations that are ineligible for formal intellectual property protections. Second, the analogy provides important insights into how and why some contractual innovations become widely known in the years after their creation while others languish in obscurity. Third, and finally, the analogy highlights the futility in attempting to develop an all-encompassing theory of contractual innovation.

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Contract (noun)*: a binding agreement between two or more persons or parties.*[1]

Swag (noun)*: promotional goods or items; goods given to people who attend or participate in an event.*[2]

I. INTRODUCTION

In the past, some legal scholars have analogized the contract to a product.[3] Others have compared it to a social artifact.[4] Still others have compared it to a form of technology.[5] Each of these analogies serves a distinct purpose. Reimagining the contract as a product makes it easier to argue that contracts of adhesion should be regulated in the way that other products are regulated. Analogizing the contract to a social artifact makes it possible to develop a deeper understanding of why social actors form particular kinds of contracts and why social systems generate distinctive

1. *Contract*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/contract (last visited Sept. 22, 2019).

2. *Swag*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/swag (last visited Sept. 22, 2019).

3. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 74–75 (2008); *see also* Arthur A. Leff, *Contract As Thing*, 19 AM. U. L. REV. 131, 147 (1970).

4. *See* Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 92 (2003).

5. *See* Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83, 84 (2013). This list does not exhaust all of the possible contract analogies. *See, e.g.*, Stephen J. Choi & Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1130 (2006) (analogizing standard-form contracts to statutes); D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 2 (2009) (proposing that scholars utilize several organizational theories as lenses through which to view contracts).

contract regimes. And conceptualizing the contract as a form of technology allows researchers to draw upon the existing literature on technological innovation to explain how and why contract language evolves over time.

In this Article, we suggest that the contract may also be usefully analogized to swag. The term "swag" is generally understood to refer to branded merchandise that is given away for free to people who attend or participate in an event. A list of examples might include Westlaw handing out water bottles with its name emblazoned across the side, a law firm giving its associates umbrellas with the firm's name on them, or a law school providing free flash drives decorated with the university's colors and seal. Over the past few decades, we argue, certain contracts have increasingly come to resemble the water bottles, umbrellas, flash drives, and other tchotchkes that are given away by law firms and other providers of legal services. These contracts have, in short, become a form of swag.

Consider the Keep It Simple Security ("KISS"). The KISS is a contract that was developed by a startup incubator—500 Startups—to facilitate the task of channeling capital from investors to early-stage technology companies.[6] Unlike most contracts, the KISS is not tucked away on a password-protected hard drive at a law firm.[7] It is available for free download from the 500 Startups website.[8] Unlike most contracts, the KISS does not have a boring, descriptive name (like stock purchase agreement). It has a distinctive, memorable name that sets it apart from the mass of other startup financing contracts. The KISS is being given away by 500 Startups for the express purpose of improving its reputation in the startup community in much the same way that Westlaw distributes water bottles with its name on it to improve its brand awareness among lawyers and law students. Significantly, the KISS is not unique. There are a number of other examples of contracts—and individual contractual provisions—being handed out like swag in contemporary practice.[9]

A number of benefits flow from conceptualizing these contracts as a form of swag. Among other things, the analogy helps to explain otherwise inexplicable behavior by lawyer-innovators.[10] It has always been the case that it is difficult, and therefore exceedingly rare, for lawyers to obtain intellectual property rights in the contractual language that they create. This fact has, in turn, led some scholars to argue that lawyers lack meaningful incentives to innovate and disseminate contractual innovations. "What's the point of creating a new and original contract

6. John F. Coyle & Joseph M. Green, *The SAFE, the KISS, and the Note: A Survey of Seed Financing Contracts*, 103 MINN. L. REV. HEADNOTES 42, 47–48 (2018).

7. *Id.*

8. *Id.*

9. *See infra* Part II (discussing examples).

10. *See infra* Section III.A.

provision," so the argument goes, "when other firms can simply take that language and incorporate it into their own agreements?" If a contract is reimagined as a form of swag, however, it is easy to see why lawyer-innovators might develop new contracts notwithstanding the lack of intellectual property protection for their creations.[11] These contracts can serve as branding devices that the innovator can use to attract additional clients to her practice.

The contract-as-swag analogy also highlights a distinction that is frequently overlooked in the contractual innovation literature. This is the distinction between the *creation* of a particular innovation and the subsequent *dissemination* of that innovation to the broader community of contract users.[12] Creators develop new contract language to solve specific problems. Disseminators spread the word about this innovation. The bulk of the scholarship in this area to date has focused on factors that motivate the creation of new innovations rather than their dissemination. The swag analogy serves to remedy this imbalance because it provides insights into how and why some contractual innovations become widely disseminated in the months and years after their creation while others languish in obscurity.

Finally, reimagining the contract as a type of swag illustrates the futility in attempting to develop an all-encompassing theory of contractual innovation.[13] Over the past two decades, a number of scholars have sought to develop a general theory of contractual innovation modeled on the cycle

11. *See infra* note 42 and accompanying text (discussing distinction between brand and reputation). A number of scholars have previously written about how certain *deal structures* may be used to develop a brand. *See, e.g.,* 189, 196 (2007); Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1600–05 (2006); Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, 12 HARV. NEGOT. L. REV. 137, 150 (2006); Fleur Johns, *Performing Party Autonomy*, 71 LAW & CONTEMP. PROBS. 243, 266 (2008); D. Gordon Smith, *The Branding Effects of Contracts*, 12 HARV. NEGOT. L. REV.).189, 196 (2007). The notion that firms might *give away* contracts in order to develop their brands, by contrast, has attracted virtually no scholarly attention. [CITE]

12. *See infra* Section III.B. This omission is difficult to understand. In other scholarly traditions, the diffusion of innovations is commonly recognized as essential to understanding the innovation process. *See* EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 43–94 (5th ed. 2003) (discussing various research traditions relating to the diffusion of innovations). In the legal literature, however, the distinction has only rarely played a role in the discussion of contractual innovations. *See* Davis, *supra* note 5, at 88 ("Unlike some previous work in this vein, the analysis emphasizes the importance of both the generation and the dissemination of innovations."); *see also* Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and Its Assimilation of Innovations*, 52 SANTA CLARA L. REV. 1241, 1268–69 (2012) (discussing diffusion of doctrinal innovations in tort law); Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75, 77 (2015) (same).

13. *See infra* Section III.C.

of product development.[14] Such models, while useful in many respects, cannot account for all the relevant factors underlying the successful introduction of a contractual innovation. In some cases, reputation may play an important role in driving the creation and dissemination of a particular innovation. In other cases, reputation may be completely irrelevant to this inquiry. One final benefit of the contract-as-swag metaphor, therefore, is that it helps to highlight the idiosyncratic character of innovation and to illustrate challenges in trying to develop a single, one-size-fits-all model to explain the process of contractual innovation.

The Article proceeds as follows. Part I surveys the existing legal literature on contract metaphors and discusses the strengths and weaknesses of these analogies.[15] Part II identifies a number of contracts from various areas of the law—including venture capital, corporate law, and arbitration—that bear a strong resemblance to the swag that is so familiar to lawyers and law students. Part III discusses the advantages of conceptualizing these contracts as swag. It shows how this analogy simultaneously explains otherwise inexplicable behavior on the part of lawyer-innovators, supplements the existing literature on the dissemination of contractual innovations, and highlights the challenges in developing a universal model for explaining the process of contractual innovations.

II. CONTRACT METAPHORS

In 1970, Arthur Leff famously argued that consumer sales contracts should no longer be conceptualized as "contracts."[16] Such agreements, in his view, bore little resemblance to the classic negotiated contract in which two parties dickered over the terms of their future performance. Instead, Leff argued that consumer contracts were more properly analogized to *products* that were a non-negotiable part of the overall sales transaction.[17] Having drawn this analogy, Leff then argued that consumer contracts should be regulated as products.[18] Just as society seeks to protect

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14. *See* Suchman, *supra* note 4, at 133; *see also* Stephen Choi et al., *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 152 (2012); Stephen Choi et al., *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 9–10 (2013).

15. Technically, an analogy is saying something is *like* something else whereas a metaphor is saying something *is* something else. *See* Brian Clark, *Metaphor, Simile and Analogy: What's the Difference*, COPYBLOGGER, (May 3, 2007), https://bit.ly/33d2pNc. This difference notwithstanding, we use the two terms interchangeably throughout the Article.

16. Leff, *supra* note 3, at 147.

17. *See id.*

18. *See id.*

consumers from unsafe automobiles, he maintained, so too should it seek to protect those same consumers from one-sided contracts of adhesion.[19]

Over the past fifty years, the notion that contracts should be treated as products has spawned an extensive literature. Scholars have argued that a wide range of contract types—including but not limited to consumer contracts, insurance contracts, financial contracts, and contracts concluded over the internet—should be analogized to products and regulated as such.[20] The decision to characterize a particular type of contract as a product is generally made with the goal of justifying some sort of regulation. This strand of the literature is largely uninterested in some of the other implications that flow from the decision to analogize a contract to a product.

In 2003, sociologist Mark Suchman explored some of these other implications.[21] Suchman urged scholars to reimagine the contract as a type of social artifact.[22] Such artifacts, he argued, serve many purposes. Joint venture agreements serve as "blueprints" for a future relationship.[23] Punitive liquidated damages clauses and hair-trigger repossession policies, conversely, can be used to "intimidate" or to "destroy."[24] The mere act of

19. Leff made clear that he was not arguing that "one *must* view a contract as a thing in order to regulate its content." *Id.* at 150. He maintained, however, that "viewing a contract as a product facilitates such a strategy, and much more important, makes it necessary for the draftsman actually to think about what he is trying to do." *Id.* Such protection could be afforded in one of two ways. First, the substantive terms set forth in contracts of adhesion could be directly regulated by the government. Alternatively, the government could require contract drafters to include warning labels at the top of such agreements to highlight some of the risks inherent in signing them. *See* Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead*, 2017 U. ILL. L. REV. 65, 98–101 (2017) (discussing the problems with transparency as a solution to standard form contracts).

20. *See* Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1389 (2007) (insurance contracts); *see also* Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 983–85 (2005) (internet contracts); Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 WASH. U. L. REV. 63, 63 (2012) (financial contracts); Jeffrey W.Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1135 (2000) (internet contracts); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 813 (2009) (insurance contracts). *But see* Robert M. Lawless, Response, *The Limits of Contract as Product*, 157 U. PA. L. REV. ONLINE 160, 162 (2009), http://bit.ly/2kugBQO (arguing that "consumer contracts are not like products and suggest that product safety regulation is not the right frame to approach the many problems that consumer credit contracts do create").

21. *See* Suchman, *supra* note 4, at 92.

22. Suchman defines an artifact as "a discrete material object, consciously produced or transformed by human activity, under the influence of the physical and/or cultural environment." *Id.* at 98 (emphasis omitted). Utilizing this definition, he argues that "contract documents clearly qualify as artifacts. They are products of conscious human effort; they are tangible and discrete physical objects; and, in both form and content, they reflect a wide array of natural and social influences." *Id.*

23. *See id.* at 107.

24. *Id.* at 110.

asking someone to sign a contract can be used "to signify commitment, seriousness, and finality."[25] Suchman's core insight was that reimagining the contract as a social artifact made it possible to develop a deeper understanding of why particular social actors form particular kinds of contracts and why social systems generate distinctive contract regimes.

Suchman also urged scholars to look to the existing sociological literature on technological innovation and diffusion to gain insights into how contract documents evolve and change over time.[26] He identified specific contractual innovations—including the poison pill—that bore a close resemblance to other types of technological innovations developed outside the legal space.[27] He cautioned that it was difficult to predict precisely when a particular innovation would take root.[28] Finally, he observed that "[w]hen efficacy is uncertain and plausible alternatives abound, even technically superior innovations can vanish under the wheels of on-rushing bandwagons, unless those innovations manage to secure strong, visible, and well-connected champions."[29]

The notion that contracts constitute a form of technology—and that the process of contractual innovation is similar to the process of technological innovation in other fields—was further developed in a recent article by Kevin Davis.[30] In this article, Davis first sought to provide a general model of the supply and demand for contractual innovations.[31] On the supply side, he identified contract users, law firms, specialized providers of legal documents, non-profit organizations (like trade associations) and academics as the primary actors who regularly supply contractual innovations to the legal marketplace.[32] On the demand side, he identified contract users as the actors who demanded contractual innovations. Davis also noted the differences between the incentives of for-profit actors (such as law firms) and non-profit actors (such as trade associations) in generating contractual innovation.[33]

As the foregoing discussion makes clear, there is no "right" way to think about a contract. In some situations, it is useful to analogize it to a product. In others, it is useful to reimagine it as a social artifact. In still others, it is useful to conceptualize it as a form of technology. Nor are

25. *Id.* at 113.
26. *Id.* at 92.
27. *Id.* at 118–20.
28. *Id.* at 119.
29. *Id.* at 117–18 (citing Eric Abrahamson & Lori Rosenkopf, *Institutional and Competitive Bandwagons: Using Mathematical Modeling as a Tool to Explore Innovation Diffusion*, 18 ACAD. MGMT. REV. 487, 487–517 (1993); and then citing Eric Abrahamson & Lori Rosenkopf, *Social Network Effects on the Extent of Innovation Diffusion: A Computer Simulation*, 8 ORG. SCI. 289, 289–309 (1997)).
30. Davis, *supra* note 5, at 85.
31. *Id.* at 88.
32. *Id.* at 112–21.
33. *Id.* at 116–22.

these metaphors mutually exclusive. There is no reason why a contract may not be analogized to both a product and a form of technology. Above all, the list is not exhaustive. There are other metaphors that have the potential to provide important insights into contract practice.

III. CONTRACT AS SWAG

The word "swag" was originally understood to be a synonym for "loot" and was used principally to describe "goods acquired by unlawful means."[34] Today, the term is generally used to describe merchandise and promotional items that are given away.[35] Swag tends to be inexpensive, branded items such as t-shirts, tote bags, writing instruments, water bottles, travel adapters, flash drives and the like.[36] Indeed, some maintain that swag is an acronym for the phrase "stuff we all get."[37] In this Article, we use the word "swag" to refer to items that are given away *gratis* for the purpose of attracting prospective customers, increasing brand awareness, enhancing reputation, or promoting goodwill.[38]

Swag has become a fixture of industry conferences and trade shows.[39] In these contexts, swag is an investment a company makes to entice

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34. *See Why Do We Call It 'Swag'?*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/words-at-play/what-does-swag-mean (last visited Sept. 22, 2019) ("The freebie *swag*, sometimes also spelled *schwag*, dates back to the 1960s and was used to describe promotional items. According to our files, early swag was everything from promotional records sent to radio stations to free slippers for airline passengers. In short order, this particular meaning of *swag* broadened and soon referred to anything given to an attendee of an event (such as a conference) as a promotional stunt.").

35. *See Our Story*, SWAG.COM, https://bit.ly/2kGse7x (last visited Sept. 22, 2019) ("We're extremely passionate about good swag. We've attended a ridiculous number of events and received our fair share of promotional products; some good but most bad. A company purchasing poor swag is not only throwing away their money, as no one will want it, they're also smacking their own brand in the face. We know Swag is a champion marketing tool. Be impactful, strengthen your company culture and communicate your core values with our superior quality.").

36. *See* Elizabeth Segran, *It's Time to Stop Spending Billions on Cheap Conference Swag*, FAST COMPANY (Nov. 2, 2018), https://bit.ly/2PzTEsV. Not all swag is inexpensive. A so-called "swag bag" from the Oscars has been valued at over $100,000. *See* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 317–19 (2011) (discussing taxation of swag bags); *see also* Anosheh Azarmsa, *Award Shows, Gifts, and Taxes: A Criticism of the Tax Treatment of Celebrity Gift Bags*, 28 LOY. L.A. ENT. L. REV. 27, 28–29 (2007) (same).

37. *See The Office: The Convention* (NBC television broadcast Sept. 28, 2006) (in which Michael Scott, Regional Manager of the Dunder Mifflin Paper Company's Scranton branch, uses the word "swag" as an acronym for "stuff we all get" and observes that he "basically decorated [his] condo for free with all of [his] swag!"); *see also Swag*, URB. DICTIONARY, https://bit.ly/2GE6uOs (last visited Sept. 22, 2019) (defining the acronym to mean "Stuff We All Get," such as t-shirts, coffee mugs, bumper stickers from vendors at a trade show).

38. Swag is a big business. *See* ANNA MILLER, PROMOTIONAL PRODUCTS INDUSTRY IN THE US – MARKET RESEARCH REPORT NO. 54189 (2019), https://bit.ly/2NIRVPd ("Producing promotional products is a $18 billion-dollar industry in the U.S.").

39. *See* Segran, *supra* note 36.

prospective customers to engage with them about their products with the end goal of converting them into paying customers.[40] While the goal of handing out swag is to make sales, it is not typically an immediate *quid pro quo* transaction. No company offers swag with the expectation that the mere act of doing so will convince a customer to buy their product or service. The hope is that offering the swag will make a prospective customer more open to a sales approach at the time the swag is given or in the future. Swag can create a positive association with a brand in the mind of the recipient. It can also generally increase brand awareness by creating hundreds or thousands of walking billboards toting a company's logo around with them at the event where the swag is distributed and out in the world-at-large.

Law firms are prolific distributors of swag. Since few law firms have brands as recognizable as Coke or Pepsi, traditional swag can help law firms increase name recognition and differentiate their brands from the host of similar service providers competing for prospective clients' attention.[41] In the legal industry, however, it is reputation far more than mere brand awareness that drives most of a firm's economics. This is because so many of a law firm's clients come by word-of-mouth and through referrals.[42] This focus on building and maintaining the firm's

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40. *See* Jae Um, *Inspire. Legal Case Study*: *Building a New Frame of Reference for the Ecosystem Era*, LEGAL EVOLUTION (Feb. 17, 2019), https://bit.ly/2mbog79 ("Conferences, like most commercial endeavors, are exchanges of value for value. They work by offering distinct value propositions to three primary participating groups. Attendees usually pay for learning and networking; their employers often subsidize this expense to complement internal training. Sponsors pay for access to attendees as defined market segments as a means to drive sales (and usually invest in swag and booth experiences to lure those attendees to the expo hall). Speakers spend time and effort to provide content in exchange for professional credentialing and personal brand lift.").

41. Law firms have increasingly been devoting attention to their brands, as evidenced by the many firms that have chopped the number of name partners down to one or two to create a more memorable brand. *See, e.g.*, Micah U. Buchdahl, *Branding Is the Heart of Your Marketing Message*, LAW PRAC. MAG., Nov.–Dec. 2013, at 60, 61–62, *available at* http://bit.ly/2m6MHTm ("In recent years, law firm merger mania has led to changes in long-recognized law firm names. . . . This type of rebranding is part of the law firm marketing fabric today."); Gregg Wirth, *Branding Growing More Important in Hyper-Competitive Legal Space, New Acritas Surveys Show*, LEGAL EXECUTIVE INST. (Oct. 22, 2018), https://bit.ly/2m0R3uQ ("Branding — the cementing of an image of quality, specialization and price point into the minds of clients — is becoming of the utmost importance in today's heavily crowded and hyper-competitive legal marketplace.").

42. Reputation and brand awareness are distinct, but related concepts. *See* Richard Ettenson & Jonathan Knowles, *Don't Confuse Reputation With Brand*, MIT SLOAN MGMT. REV.., Winter 2008, at 19, *available at*https://bit.ly/2tXmoTr. A "brand" is a "'customercentric' concept that focuses on what a product, service, or company has promised to its customers and what that commitment means to them." *Id*. "A strong brand helps communicate that the company and its offerings are relevant and uniquely able to meet customer needs." *Id.* Reputation, by comparison, is a "'companycentric' concept that focuses on the credibility and respect that an organization has among a broad set of constituencies, including employees, investors, regulators, journalists, and local communities . . . ." *Id*.

reputation is why law firm websites trumpet the credentials of their lawyers—Law Review! Supreme Court clerkship! Super Lawyer!—when many companies in other industries decline to publish lists of their employees. When it comes to external relations, therefore, many firms are engaged in a two-pronged strategy: (1) they distribute swag—in the form of umbrellas, tote bags, and flash drives—to improve brand awareness; and (2) they trumpet the credentials of the lawyers and the prestige of their clients in order to enhance their reputations.

Over the past few decades, we argue, some enterprising lawyers have sought to combine these two strategies. These lawyers have developed new contract language—thereby enhancing their reputation as forward-thinking innovators—and then freely distributed that language to the world as a means of improving their firms' (as well as their own) brand. They have, in other words, started treating contract language as a distinctive form of swag. Significantly, this type of swag is a far cry from the cheap tchotchkes that we have described thus far. The contract as swag is more of a sneak peek or preview of the cutting-edge, high-quality work product that a particular lawyer, firm, or organization can offer its prospective customers; should they choose to give them their business.

While not all contracts or contractual innovations qualify as swag, there are more than enough examples of such behavior to constitute a distinct phenomenon. In this Part, we identify some of the more prominent examples where contracts or contract language operate, in effect, as swag dispensed by a range of legal service providers.

A. Seed Financing Contracts

In 2013, the partners at Y Combinator, the premier startup accelerator in Silicon Valley, published a new contract on the company website.[43] This contract—the Simple Agreement for Future Equity ("SAFE")—was created with the goal of supplanting a different type of contract (the convertible note) as a means of channeling capital from investors to early-stage technology companies.[44] Viewed from the perspective of the entrepreneur, the convertible note was an imperfect means of raising capital for two reasons. First, it had a maturity date, which provided

43. *See* John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 168 (2014) [hereinafter *Contractual Innovation*]; *see also* John F. Coyle & Gregg D. Polsky, *Acqui-hiring*, 63 DUKE L.J. 281, 288 n.15 (2013) (describing the role played by Y Combinator within the start-up ecosystem of Silicon Valley).

44. *See Contractual Innovation, supra* note 43, at 168–69. The choice of name was both a clever piece of branding and an accurate descriptor. The SAFE is, in effect, a deferred equity investment. The investor contributes capital now in the hope that the startup will someday raise funds from an institutional venture capitalist, in which case his SAFE will convert into the same security purchased by this venture capitalist at a discount. In this respect, the SAFE truly was a simple agreement for *future* equity.*Id.* at 168–70.

considerable leverage to investors to extract concessions from the startup if, as was usually the case, the debt could not be paid when it came due because the company had already spent all the funds.[45] Second, the notes (being debt instruments) accrued interest, which was viewed as an unnecessary giveaway to investors, who were already receiving a risk premium through a conversion discount.[46] The SAFE sought to address each of these problems, first, by eliminating the maturity date and, second, by dropping the requirement that the notes accrue interest.[47] The resulting agreement was widely perceived as an exceptionally "founder-friendly" document that could be used to raise capital from potential investors.[48]

The SAFE was developed by Carolynn Levy, a Y Combinator partner who had previously worked as an attorney at the Silicon Valley law firm of Wilson Sonsini Goodrich & Rosati.[49] In the months after the SAFE was posted, Levy systematically spread the word of her invention. She gave interviews to print media and bloggers, traveled to academic conferences, and reached out to investors and entrepreneurs in Silicon Valley and beyond to promote her creation.[50] These outreach efforts soon bore fruit. A recent survey of startup lawyers in the United States showed that 91% of respondents had heard of the SAFE.[51] That same survey found that 69% of these same lawyers had represented a client in a deal involving a SAFE.[52]

In many respects, the process by which the SAFE was introduced to the world resembled nothing so much as a traditional product launch. There was, however, one key difference—the SAFE was being given away for free. Any investor, entrepreneur, or startup lawyer could download it from Y Combinator's website, which presented something of a puzzle. Why would Y Combinator go to all the time and trouble to develop and distribute this contract when there was no reasonable prospect of obtaining a return on its investment? The solution to this puzzle, we argue, lies in recognizing the SAFE as a form of swag. Y Combinator's motivations in

45. *See id.* at 165–66.
46. *See id.*
47. *See id.* at 169.
48. *Id.*
49. *See id.* at 168.
50. *See id.* at 170; *see also*at 170; *see also* Zach Abramowitz, *Innovation More Than Another App: How Wilson Sonsini Lawyer Turned YC Partner Carolynn Levy Is Revolutionizing Startup Investing*, ABOVE LAW (Jan. 20, 2015, 4:02 PM), https://bit.ly/2HBta28; Michael Carney, *Y Combinator introduces safe, a new early stage funding structure. Promises all the good of convertible notes, none of the bad*, PANDO (Dec. 6, 2013), https://bit.ly/2lKUzd0; Adam Janofsky & Angus Loten, *Startups Offer Unusual Reward for Investing*, WALL ST. J.,. (Apr. 1, 2015, 11:08 PM), https://on.wsj.com/2tV1UL1P.M.),.
51. *See* Coyle & Green, *supra* note 6, at 51.
52. *See id.* at 54.

giving this contract away were not altruistic. Instead, it gave the SAFE away in order to brand itself as a strong advocate for founders.

The advantages of such an endeavor were quickly recognized by other startup accelerators. About nine months after Y Combinator introduced the SAFE, a different accelerator—500 Startups—made its own startup-financing contract publicly available. This contract—the Keep It Simple Security ("KISS")—bore a strong resemblance to the SAFE but it had a different name and was downloadable from the 500 Startups website. In a blog post introducing the KISS, the general counsel of 500 Startups described this new contract in terms (and in a font) usually associated with the launch of a new product line:

> **The KISS docs are designed to SAVE founders & investors TIME and MONEY. They're FREE legal docs you can use to RAISE MONEY quickly & easily, hopefully WITHOUT GETTING SCREWED.**[53]

The general counsel also sought to differentiate the KISS from the SAFE by arguing that the KISS did a better job of striking a "balance between the interests of the founders as well as those of the investors."[54]

Again, one could be forgiven for wondering why 500 Startups went to the trouble. Why does it care whether investors and entrepreneurs were using the KISS as opposed to the SAFE? There are two explanations. First, 500 Startups was seeking to attract additional entrepreneurs to its accelerator program and it believed that its odds of success were greater if potential applications had already used its branded contract documents to raise money for their startup.[55] Second, it was mimicking a successful innovation by a better-known competitor in the hopes of generating favorable comparisons with that competitor. In this regard, its strategy appears to have paid modest dividends. A survey of U.S. startup lawyers conducted in 2018 found that 66% of these individuals had heard of the KISS and that 26% of them had represented a client in a deal involving a KISS.[56] While these numbers are less impressive than the numbers generated by the SAFE, they show that knowledge of this particular

53. Gregory Raiten, *500 Startups Announces 'KISS'*, 500 STARTUPS (July 3, 2014), https://500.co/kiss/.

54. *Id*. This is debatable. In a subsequent post to the 500 Startups website, a different author acknowledged the many similarities between the KISS and the SAFE. *See* Adam Sterling, *KISSs and SAFEs and Notes. . ..oh my!*, 500 STARTUPS (Feb. 6, 2018), https://500.co/kisss-safes-andnotes-oh/.

55. Raiten, *supra* note 53 ("We've put in a lot of work to make KISS docs one of the best convertible instruments on the market, and *we encourage companies seeking an investment from 500 to use KISS docs*. . . . In fact, we'd love to see KISS docs adopted by other investors, thereby reducing legal costs for everyone and eliminating some of the friction involved in closing a round of financing.").

56. *See* Coyle & Green, *supra* note 6, at 51.

contractual innovation has also spread widely in the years since it first debuted.

There are other examples of seed financing contracts being used as swag. Before Y Combinator created the SAFE and 500 Startups created the KISS, a partner at Wilson Sonsini in Silicon Valley (and the founder of yet another accelerator) created a similar instrument that was publicized and made freely available.[57] This instrument—dubbed the Convertible Security—lacked a flashy name and marketing heft and never gained much traction in the marketplace. Another Silicon Valley law firm, Fenwick & West, has created a stripped-down set of venture financing documents that it branded the "Series Seed" forms and made publicly available on a standalone website.[58] It later open-sourced the forms on GitHub, a major forum for software developers to store and share open-source code.[59] Cooley, Goodwin Procter, and a host of other startup-focused law firms have publicly provided (at no charge) a wide variety of their startup formation and financing forms through branded self-service portals that incorporate document automation technology.[60]

The swag phenomenon can even be observed in some of the most cutting-edge areas of startup law, areas where one might expect that firms would attempt to reserve their innovations for paying clients only. For example, in 2017, Cooley in collaboration with blockchain company Protocol Labs released a white paper promoting the "SAFT" (Simple Agreement for Future Tokens), a modified version on Y Combinator's SAFE for blockchain startups to use when conducting initial coin offerings ("ICOs").[61] More recently, Latham & Watkins worked with blockchain incubator Consensys and its portfolio company OpenLaw to automate a convertible note designed to be used by blockchain startups that may issue digital tokens via smart contracts in connection with capital raising.[62] This automated convertible note, which Latham & Watkins made freely available, was originally based on 500 Startups' KISS documents. These examples are merely the tip of the iceberg when it comes to law firms in the startup space developing innovative contracts, branding them, and giving them away to the startup community-at-large, for free. In many of

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57. *See Contractual Innovation, supra* note 43, at 166–67.

58. *See id.* at 175–76.

59. *See* Press Release, Fenwick & West LLP, Series Seed Funding Documents Go Open Source @ GitHub (Mar. 6, 2013), https://bit.ly/2kIuICe.

60. *See, e.g.*, COOLEYGO, http://www.cooleygo.com (last visited Sept. 23, 2019) (Cooley LLP); FOUNDERS WORKBENCH, http://www.foundersworkbench.com (last visited Sept. 22, 2019) (Goodwin Proctor LLP).

61. *See* Pete Rizzo, *SAFT Arrives: 'Simple' Investor Agreement Aims to Remove ICO Complexities*, COINDESK (Oct. 3, 2017, 11:17 A.M.), https://bit.ly/2lPOOuu.

62. *See Consensys And Latham & Watkins Announce a Convertible Note Generator for Startups Powered by OpenLaw*, LATHAM & WATKINS LLP (May 10, 2019), https://bit.ly/2kB3Eoy.

these cases, we argue, these innovative contracts bear a strong resemblance to swag.

B. The Poison Pill

While the venture capital contracts discussed in the preceding Section constitute modern examples of contract as swag, the analogy can also be extended to legal devices created decades ago. One of the best—and best-known—examples is the poison pill.[63] The pill was invented by Martin Lipton, an attorney at the firm of Wachtell, Lipton, Rosen & Katz.[64] The first version of the pill was deployed in late 1982 in an attempt to help the El Paso Company fend off an unwanted suitor.[65] In reviewing the company's organizational documents in search of possible defensive measures, Lipton discovered that these documents gave the board the power to issue preferred stock without first obtaining the consent of the stockholders.[66] Lipton subsequently took this otherwise unremarkable provision and developed it into a potent anti-takeover device.

On Lipton's advice, the El Paso Company issued shares of preferred stock containing special redemption and conversion rights that would be triggered when—and only when—the acquirer acquired a specified percentage of the target company's stock.[67] The redemption rights would force the acquirer to redeem the stock of all of the stockholders in the target at a price equal to the highest price paid for the stock over the past year.[68] The conversion rights would require the acquirer to convert the stock of the shareholder in the target company into twice as much stock in the acquiring company.[69] The mere possibility of either of these eventualities—each of which would inflict massive costs upon the acquiring company—was intended to deter anyone from attempting a hostile takeover in the first place or, alternatively, to force them to

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63. The poison pill is not a technically a contact. *See* Suchman, *supra* note 4, at 119 n.83 (observing that poison pills "fall at the intersection between contract, property, and securities law"). A company's decision to issue a new security to its existing shareholders giving them the right to purchase company stock, however, arguably creates a contract-like relationship between the company and the shareholders. *See* JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 953 (7th ed. 2008) (describing a poison pill whereby "the target distributes by a dividend to its shareholders warrants or 'rights' that entitle all of them (other than the bidder or its affiliates) to purchase the target's stock for a specified period"). As such, we believe that poison pills are sufficiently close cousins of the standard contract to warrant discussion here. [CITE]

64. *See* Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 434 (1993).

65. *See* Len Costa, *The Perfect Pill – A small innovation that transformed corporate takeovers*, LEGAL AFF. (Mar.–Apr. 2005), http://www.legalaffairs.org/issues/March-April-2005/toa_costa_marapr05.msp.

66. *See id.*

67. Powell, *supra* note 64, at 434–45.

68. *See id.* at 435.

69. *Id.*

negotiate with the board in order to "redeem" the pill and take it off the table as a takeover defense.[70]

Word of this new defensive measure quickly spread throughout the legal community. The term "poison pill" was coined in 1983 by Martin Siegel, an investment banker who worked closely with Wachtell.[71] At least at first, however, no other firms advised their clients to adopt the pill.[72] Every company that adopted a poison pill in 1983 and 1984 was a client of Wachtell.[73] Other law firms, by and large, viewed the pill as a novel defense that ran a serious risk of being struck down by the Delaware courts. Only Wachtell, the firm that had invented the pill, was willing to stake its reputation on its success. As George Triantis has written:

> Wachtell Lipton knew that their potential clients might hesitate to pay for the pill because of the uncertainty about the new product, and particularly the risk that it might be unenforceable and therefore ineffective when needed in the face of a hostile takeover bid. As such, an important part of the Wachtell strategy was to absorb much of the back-end risk: it essentially guaranteed that the firm would take all steps to ensure that the pill would not be struck down by the courts. The firm used a broad public relations strategy to explain why the pill was in the public interest and they defended against the early legal challenges to the pill.[74]

This public relations strategy was spearheaded by Lipton. He promoted the poison pill in client memoranda.[75] He sat for interviews in which he extolled the virtues of the pill.[76] He encouraged a former summer associate at Wachtell to publish a student note in the *Harvard Law Review* defending

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70. *Id.*

71. *See* Costa, *supra* note 65. Siegel was the first investment banker to throw his support behind the poison pill as a defensive measure. *Id.*

72. Powell, *supra* note 64, at 436.

73. *Id.* at 435–36.

74. George Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177, 199–200 (2013).

75. *See* Martin Lipton, *Pills, Polls, and Professors Redux,* 69 U. CHI. L. REV. 1037, 1037 (2002) (noting "the twentieth anniversary of the publication of my memorandum recommending that companies adopt the poison pill, which I invented in the summer of 1982"); *see also* Memorandum from Martin Lipton, to Clients, Share Purchase Rights Plans ("Poison Pills") (Nov. 21, 1985) (on file with Penn Law School), *available at* https://www.law.upenn.edu/live/files/7876-culled-martin-lipton-publicationspdf ("Takeover entrepreneurs and speculators hate Rights Plans and are continuing their campaign to outlaw them. . . . While Rights Plans do not prevent all take overs they do protect against abusive takeover tactics and they do deter bust-up bootstrap two-tier junk bond takeovers. Naturally those who profit from these takeovers at the expense of American business workers and communities and whose wildly speculative activities threaten our entire economic system oppose anything that restricts their activities. There is no stronger argument for implementing a Rights Plan now.").

76. *See, e.g.*, Chase deKay Wilson, *Marty Lipton's Poison Pill*, 3 INT'L FIN. L. REV. 10, 10 (1984).

the pill.[77] He gave speeches encouraging companies to adopt it. At the same time, Wachtell made a number of revisions to the pill. Subsequent iterations of the pill, for example, were structured as dividends to shareholders rather than preferred stock.[78] This dividend took the form of a warrant to purchase one share of the target company at a price well above its prevailing market price.[79] Attached to this warrant, however, was a "flip-over" provision that granted shareholders the right to purchase shares in any acquirer at half-price if the company was acquired.[80] This latter provision would—the firm hoped—prove to be sufficiently poisonous so as to deter potential acquirers.

Wachtell implemented these changes, among other reasons, because it felt that this new-and-improved pill was more likely to survive a legal challenge. The anticipated legal challenge arrived in 1984, when a shareholder brought a suit in the Delaware Court of Chancery against Household International (a Wachtell client) challenging the validity of a pill adopted by the company's board. At trial, the company prevailed in the Court of Chancery.[81] On appeal, the Delaware Supreme Court specifically concluded that the board's decision to adopt the pill was a proper exercise of its discretion under the business judgment rule. [82] While there were a number of subsequent decisions in which the Delaware courts questioned the propriety of deploying the poison pill in a particular context, its underlying validity has never been challenged.

Once the Delaware courts formally gave their blessing to the pill, a host of other law firms began to develop their own versions. As Michael J. Powell wrote:

> Before the Delaware Supreme Court's affirmative decision, Wachtell Lipton was the only law firm dispensing the pills. Afterward, other firms, including Skadden Arps, which had strongly opposed the pill from the beginning, rushed to join Wachtell Lipton as dispensers, now recommending its adoption to their clients. These new proponents engaged in further modifications of the poison pill as they promulgated their own variations on the basic Wachtell Lipton design in order to present their clients with a distinctive and, they argued, more potent product. *As a consequence, several additional varieties of the poison*

77. *See* David Margolick, *Law Review is Caught in Corporate Crossfire*, N.Y. TIMES (Sept. 24, 1984,), https://nyti.ms/360dimT (noting complaints by partner at Skadden Arps that the student's link to Wachtell was not mentioned in the article, that Wachtell was given the opportunity to review the article prior to publication, and that Lipton had sent copies of the article to his clients after it was published).

78. *See* CHOPER ET AL., *supra* note 63, at 951–54.

79. *See id.*

80. *See id*.

81. *See* Moran v. Household Int'l, Inc., 490 A. 2d 1059, 1082–83 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985).

82. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356–57 (Del. 1985).

> *pill soon appeared in the marketplace, each hawked by different law firms extolling the virtues of their particular model.*[83]

By the time these other law firms got into the game, however, the poison pill had become synonymous with Wachtell and Lipton, and they with it.

There was no realistic way to keep the language that implemented the pill a secret. All the companies adopting it were all publicly traded and hence required to disclose the terms of any new securities or dividends issued to shareholders. Nor did Wachtell and Lipton try to keep it a secret. Indeed, they actively encouraged current and potential clients to adopt the pill and were happy to provide the language to anyone who asked for it.[84] If they could not copyright or patent this particular contractual innovation (and they probably could not, for reasons discussed below) the least they could do was use it to generate goodwill for their respective brands. In this regard, they were immensely successful. There exist hundreds of newspaper profiles of Lipton that mention the fact that he "invented" the poison pill.[85] Even today, almost 40 years after the pill was first deployed, Wachtell's firm website proudly notes that it "originated the shareholder rights plan, or 'poison pill.'"[86] Wachtell and Lipton have continued to reap the reputational benefits (and concomitant pecuniary benefits) from this particular innovation for decades.

Here again, therefore, we have a lawyer-entrepreneur who develops new contract language. That individual actively works to distribute that language as part of a branding exercise intended to cultivate goodwill among a specified group of individuals and firms.[87] Companies learn of

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83. Powell, *supra* note 64, at 440–41 (emphasis added).

84. ROGERS, *supra* note 12, at 177 ("Change agents often seek to speed up the innovation-decision process for innovation-decision process for individuals by sponsoring demonstrations of a new idea in a social system. A demonstration can be quite effective at speeding up the diffusion process, especially if the demonstrator is a diffusion leader.").

85. *See* Costa, *supra* note 65 (observing that the "poison pill quickly transformed takeover law and fortified the reputation of its creator and staunchest defender, Martin Lipton—co-founder of the New York City law firm Wachtell, Lipton, Rosen & Katz."); *see also* Andrew Tutt, *A Fragment on Legal Innovation*, 62 BUFF. L. REV. 1001, 1021 (2014) ("It was not just the fact of the innovation, but the ingenuity and enthusiasm of its diffusion [by Lipton] that made the poison pill a legal innovation we still know and remember."); *Adverse Reaction: Professors find fatal flaws in a body of work on takeovers and corporate governance*, N.Y.U. L., https://bit.ly/2kRylpk (last updated June 17, 2016) ("Also known as shareholder rights plans, poison pills, it so happens, were the brainchild of one of NYU Law's most illustrious graduates: Martin Lipton '55, co-founder of Wachtell, Lipton, Rosen & Katz, a firm that has made its reputation in part by defending companies against hostile takeovers.").

86. *Corporate Practice,* WACHTELL, LIPTON, ROSEN & KATZ, https://bit.ly/2lUxKDE (last visited Sept. 22, 2019).

87. Powell, *supra* note 64, at 448 ("[L]aw firms did not passively wait for clients to ask them for prescriptions for a poison pill but proactively marketed their particular brand through client memoranda and presentations to boards of directors. Law firms acted as legal entrepreneurs with new products to develop and market. They competed with each other over what exactly constituted the best legal product.").

this language and choose to incorporate it into their documents. Thereafter, they have a better opinion of the innovator and are presumably more likely to use the services provided by that innovator in the future. Viewed through this lens, the poison pill—like the seed financing contracts discussed above—may be usefully conceptualized as a form of swag.

C. The Class Arbitration Waiver

Still another contractual innovation that may be usefully analogized to swag is the class arbitration waiver. This contract provision stipulates that (1) all disputes must be resolved by arbitration, and (2) no class actions shall be permitted in arbitration. By requiring consumers to arbitrate small claims that are not economically viable outside of a class action, the class arbitration waiver helps to ensure that many individual claims for relatively low amounts of money are never brought in the first place.[88]

To learn about the origins of this particular innovation, we contacted the person frequently credited with creating it—Alan Kaplinsky, a partner at Ballard Spahr LLP in Philadelphia.[89] The genesis for this particular innovation, Kaplinsky told us, was a desire to reduce the number of class action lawsuits brought against his clients in the financial services industry.[90] In his words:

> In the 1990s, my clients were getting just overwhelmed with litigation in Alabama. This was before tort reform. It was a period of time where the courts in Alabama were considered to be a judicial hellhole in the country and things were really out of control. My clients were being sued in scores—hundreds—of individual and class action lawsuits. They would go down there and get stuck in state court. Every case would either settle or go to trial because you couldn't ever get a court to grant a dispositive motion. My clients asked whether anything could be done to level the playing field. That's when I started looking into arbitration.[91]

Kaplinsky soon ascertained that the use of arbitration provisions had the potential to reduce the number of individual lawsuits. He knew, however,

88. Myriam Giles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 631 (2012) ("[C]lass action waivers embedded in arbitration provisions, if not constrained by legal challenges, would threaten the viability of most forms of aggregate litigation.").

89. Joseph N. DiStefano, *Ballard's Alan Kaplinsky: 48 years helping banks fight consumer advocates*, PHILA. INQUIRER (June 21, 2018, 5:00 AM), https://bit.ly/2kFu4Wg ("Kaplinsky takes credit for the Arbitration Waiver, an agreement that forces bank customers (and, more recently, corporate employees) to accept arbitration to settle disputes, instead of suing or joining well-financed class-action lawsuits.").

90. Telephone Interview with Alan Kaplinsky, Partner, Ballard Spahr LLP (June 4, 2018) [hereinafter *Kaplinksy Interview*].

91. *Id.*

that his company's clients did not want to arbitrate class action suits.[92] Since there was no case law addressing the question of whether class arbitration waivers were enforceable, Kaplinsky had no way of knowing whether the courts would enforce these provisions.[93] He was also aware that adding such waivers to consumer contracts in the financial services industry had the potential to generate a serious backlash among consumer advocates. At the same time, he felt that his clients had little to lose.[94] As he explained it:

> The potential downside with adding express class action waivers is that we're rubbing up against an issue that is not going to resonate well with a lot of courts around the country—state courts and jurisdictions where the judiciary is very liberal. Put in that kind of language and it's like putting a red cape in front of a bull. It's going to attract a lot of attention and political attention. Plaintiffs' attorneys and consumer advocates are going to go ballistic. We weighed all that and had discussions with our clients and our clients went along and said that they wanted very express language and were willing to take the heat in some jurisdictions and it would benefit them where the arbitration class action waiver would be enforced.[95]

The first express class arbitration waiver was written into a consumer financial services contract in 1998.[96] In the years that followed, similar

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92. To guard against this possibility, Kaplinksy advised clients to include "blow up" language in the clause which provided that "if a court concludes that the class action waiver is invalid and that becomes a final judgment, then the entire arbitration clause will blow up and won't exist at all." *Id.*

93. *Id.* ("What I found back then was that there was no such thing as a class action waiver and most of the law that I was able to find were cases when it's appropriate to consolidate two or more arbitrations that may be pending. A lot of law on that subject was to the effect that unless your arbitration provision specifically authorized the consolidation of your arbitration with one or more other arbitrations then the court couldn't order the arbitrations to be consolidated. This was the law just about everywhere but no law dealing with class actions and how would that apply in the class action context.").

94. *Id.* ("So basically I said to my clients: 'You don't have a lot to lose. You're getting killed right now because of litigation. I can't assure you that this is going to work everywhere but it could work in a few places but the worst-case scenario is you end up right where you are now.'"); *see also* Robert K. Heady, *Credit Card Companies May Change Game At Will*, FORT LAUDERDALE SUN-SENTINEL, Sept. 21, 1998, at A1 (citing Kaplinksy regarding credit card arbitration clauses).

95. *Kaplinksy Interview*, *supra* note 90.

96. *See id.*; *see also In re* Am. Express Merchs. Litig., No. 03-CV-9592(GBD), 2006 11742WL 662341, at *7–8 (S.D.N.Y. Mar. 16, 2006) (noting that American Express first introduced the class arbitration waiver in 1999). Prior to the introduction of the "express" class arbitration waiver, a number of courts and commentators had considered the possibility that a "silent" arbitration clause—one that mandated arbitration but that did not expressly disclaim the right to bring a class action—functioned as a *de facto* waiver of one's right to bring a class action. *See, e.g.*, Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997) (discussing use of arbitration clauses to avoid class actions); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, A.B.A..: BUS.

clauses found their way into other agreements. The precise process by which this occurred—recounted in exhaustive detail in a 2014 antitrust case—offers fascinating insights into the process by which this particular innovation diffused across the industry and the nation.[97]

In the spring of 1999, a group of lawyers representing financial services companies proposed an industry-wide meeting to discuss the possibility of writing class arbitration waivers into their consumer contracts. Kaplinsky—described as a "thought leader" on this issue—participated in this meeting and helped to identify "businesses that might want to join a coalition to defend and foster arbitration."[98] Representatives of seven banks—along with representatives from Sears, Toyota, and GE Capital, among others—ultimately attended a meeting held in July 1999 at which they discussed how to draft "fair, enforceable arbitration provisions."[99] Additional meetings followed. In September 1999, Discover officially added a class arbitration waiver to its agreements with its cardholders.[100] In February 2000, Bank of American followed suit.[101]

Meanwhile, a group of financial services lawyers and in-house counsel—including Kaplinsky—were meeting regularly to discuss public relations, litigation strategy, and drafting tips as they related to class arbitration waivers.[102] By September 2000, several additional companies (including Sears) decided to add a class arbitration clause to their consumer contracts.[103] After a series of U.S. Supreme Court cases endorsing the use of such clauses, many more companies followed suit.[104] Class arbitration waiver clauses can now be found in a wide range of consumer contracts, including those with cable companies, mobile phone companies, and companies that sell goods online.[105]

L. TODAY, May–June 1998, at 24 (discussing use of silent arbitration clause to avoid class actions brought against financial services firms); J.T. Westermeir, *How Arbitration Clauses Can Help Avoid Class Action Damages: Strategies for Managing Risks of Litigation*, COMPUTER L. STRATEGIST, no. 5, Sept. 1997, at 1 (discussing use of silent arbitration clauses to avoid class actions brought against firms selling goods online). To date, the U.S. Supreme Court has not yet weighed in on the question of whether a "silent" arbitration clause operates as a class arbitration waiver; all of its decisions have dealt with clauses that contained "express" class arbitration waivers.

97. *See* Ross v. Am. Express Co., 35 F. Supp. 3d 407 (S.D.N.Y. 2014).

98. *Id.* at 416.

99. *Id.* at 417.

100. *See id.* at 418.

101. *See id.* at 421.

102. *See id.* at 423.

103. *See id*.

104. *See* Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 961 (2014).

105. *See* Ross v. Am. Express Co., 35 F. Supp. 3d 407, 414–27 (S.D.N.Y. 2014) (providing a comprehensive history of the process by which the class arbitration waiver came to be adopted by credit card companies).

Throughout this process, Kaplinsky actively encouraged companies to adopt the class arbitration waiver that he helped create. He personally represented American Express, Capital One, Citi, and Discover and gave his contract language to these companies to assist them in developing their clauses.[106] He advocated for class arbitration waivers at trade association meetings, engaged in debates with other attorneys, wrote articles for industry newsletters, and discussed them with members of the American Bar Association's subcommittee on financial services.[107] Although Kaplinsky was clearly motivated by a desire to represent his clients to the best of his ability, his subsequent actions to take credit for inventing the class arbitration waiver suggest that he was also motivated—at least in part—by a desire to enhance his reputation in the legal community.

The widespread diffusion of this particular innovation has brought a measure of fame—though not necessarily fortune—to Alan Kaplinsky. It is common to read press reports that describe him as the inventor of the class arbitration waiver. His Wikipedia page notes that he was "the first lawyer in the country to include class action waiver language in consumer arbitration clauses that require consumers to individually arbitrate any dispute."[108] His firm's website trumpets the fact that it "pioneered" the use of class arbitration waivers in consumer financial services agreements.[109] To the extent that Kaplinsky was motivated by a desire for reputational benefit, he has been successful in achieving this end.

Kaplinsky has not, however, derived any direct financial benefit from this innovation separate and apart from his hourly billing rate.[110] As he put it: "I only wish I had told my clients that they would have had to pay me not by the hour but by how much I've saved them over the years. It's too bad I couldn't copyright it."[111] Ironically, this particular innovation may have been a net loser for Ballard Spahr, the firm where Kaplinsky has worked for decades.[112] By rendering it uneconomical for plaintiffs to bring claims against financial services firms, the class action waiver makes it unnecessary for these companies to hire litigators who work at firms such as Ballard Spahr to defend them. While Kaplinsky has personally benefited reputationally from developing the class arbitration waiver, and

106. *See id.* at 430.

107. *See Kaplinsky Interview*, *supra* note 90.

108. *Alan Kaplinsky*, WIKIPEDIA, https://bit.ly/2khV2D3 (last updated . 23Oct. 18, 2019, 6:AM44 PM).

109. *See* Alan S. Kaplinsky et al., *Supreme Court Hands Employers "Epic" Win in Class Action Waivers Dispute,* BALLARD SPAHR LLP (May 22, 2018), https://bit.ly/2kMFtTV.

110. *Kaplinsky Interview*, *supra* note 90.

111. *Id.*

112. *Id.* ("This was actually contrary to the economic interests of our firm—or any defense lawyers—because part of our business is to defend clients who get sued in class action litigation.").

while Ballard Spahr has benefited from its association with the innovation, one cannot help but wonder if the costs of developing and disseminating this particular piece of swag may have outweighed the benefits to the corporate defense bar as a whole.

IV. SWAG AND CONTRACTUAL INNOVATION

The insight that flows from the examples discussed above is straightforward—new and innovative contract language is sometimes developed and disseminated with the express goal of enhancing the brand and the reputation of the creator. In this Part, we explore some of the implications of this insight for the contractual innovation literature more broadly. We argue first that the potential for reputational gains can help to explain why lawyers innovate in the first place. The existing literature on contractual innovation is replete with reasons why potential innovators may choose *not* to develop new contract language. These disincentives include the fact that it is difficult to obtain intellectual property protections for contract language. We argue that the possibility of becoming known as the inventor or creator of a widely adopted innovation can serve as a counterweight to these other disincentives even when there are no formal legal protections for these innovations.

Next, we argue that conceptualizing contracts as swag shines a spotlight on a distinction that has received little attention by legal scholars who write about contractual innovation (i.e., the difference between the factors that lead to the *creation* of an innovation and the factors that lead to the *dissemination* of that same innovation). The bulk of the scholarship in this area to date has focused on factors that motivate the creation of new innovations rather than their dissemination. The swag analogy serves to balance the scales because it provides insights into how and why some contractual innovations become widely known in the months and years after the moment of their creation while others never catch on. To the extent that some lawyers are incentivized to disseminate contractual innovations out of a desire to burnish their reputations, these incentives can also help to explain why these innovations spread.

Finally, we rely on the contract-as-swag analogy to highlight the challenges in developing a one-size-fits-all theory of contract innovation. We acknowledge that the swag analogy does not provide a complete explanation for the process of contractual innovation and dissemination. Rather, it merely provides an explanation for a subset of contracts. Other scholars, however, have advanced broader theories that aspire to provide a unified field theory of all contractual innovation. We argue that it is impossible to develop a comprehensive theory in this area due to the enormous number of variables that can impact whether or not a contractual innovation catches on. While it is easy to be seduced by a big idea, one must also be cautious not to ignore the many idiosyncratic factors that can

affect whether an innovation gains transaction in a crowded legal marketplace. The reality of these idiosyncratic factors, we argue, means that all-encompassing theories of contractual innovations will inevitably fall short of achieving their goals.

A. Generating Innovations

Contract scholars have long puzzled over why lawyers devote the time and resources required to develop innovative contractual language when they are limited in their ability to monetize these creations.[113] A lawyer's inability to extract the full economic benefits of a contractual innovation stems from his or her inability to assert property rights in new and innovative contract language. The lack of intellectual property rights for contractual language, in other words, leaves these innovators with few options beyond charging a particular client for the time that it took to create a contractual innovation in connection with a particular matter, billed at their normal hourly rates.[114] Needless to say, this incentive is unlikely to lead to the creation of a mousetrap radically different than the ones that came before.

In this section, we argue that the potential reputational gains that flow from developing a successful contractual innovation may partially offset the deterrent effect derived from the lack of intellectual property for these innovations.[115] As a prelude to making this argument, however, it is useful to briefly explain why it is so difficult to obtain intellectual property protection for contract language in the first place.

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113. There are many other reasons—separate and apart from those relating to intellectual property—why a lawyer may be reluctant to develop new and innovative contract language. These reasons include but are not limited to the stickiness of default rules, the clear meaning that existing contract language has attained over time, and the network effects that accrue to innovations that have already been widely adopted. *See Contractual Innovation*, *supra* note 43, at 138–40. We focus here on intellectual property rights because that is the most frequently cited disincentive to contractual innovation.

114. *See* Davis, *supra* note 5, at 105 ("Inability to appropriate the benefits of innovation, in contracting as well as other fields, is often seen as one of the leading obstacles to profit-oriented innovation.").

115. Intellectual property scholars have identified a number of "negative spaces" where social norms have spurred creativity and innovation despite the absence of intellectual property protections for the items created. *See* Stephanie Plamondon Bair & Laura G. Pedraza-Fariña, *Anti-Innovation Norms*, 112 NW. U. L. REV. 1069, 1071 (2018); *see also Introduction* to CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 1–2 (Kate Darling & Aaron Perzanowski eds., 2017); Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary?: Evidence from Innovation in IP's Negative Space, in* 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 309, [PINCITE] (Ben Depoorter & Peter S. Menell eds., 2019); Christopher Jon Sprigman, *Conclusion: Some Positive Thoughts about IP's Negative Space, in* CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 249 (Kate Darling & Aaron Perzanowski eds., 2017).

Typically, when one thinks of how the creator of a useful invention can capture some of the economic benefits of that invention, one turns to patent law. In the case of contractual innovations, however, such creations are typically ineligible for patent protection (even as business methods). In recent guidance, the United States Patent and Trademark Office took the position that "commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations)" are generally ineligible for patent protection.[116] As such, a potential innovator is unlikely to be able to obtain patent protection for new and inventive contract language.[117]

One might also assume that contractual innovations, to the extent that they are truly original works of authorship, could be protected as literary works under copyright law. It would appear, however, that "courts seem more willing to acknowledge the copyrightability of contracts in the abstract than to find actionable infringement in specific cases."[118] While original contractual language is theoretically eligible for protection under copyright law (and there have been a few cases where an innovator succeeded in a copyright infringement claim against a competitor who copied the language) that protection will allow contractual innovators to appropriate the economic benefits of their innovations only in those cases where the contract that is the object of the infringement suit was effectively drafted from scratch.[119] Since such cases are rare, copyright will typically provide little protection to contractual innovations.[120]

116. *See* Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50, 52 (Jan. 7, 2019).

117. *See* Andrew A. Schwartz, *The Patent Office Meets the Poison Pill: Why Legal Methods Cannot be Patented*, 20 HARV. J.L. & TECH. 333, 336 (2007); *see also* Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1180–82 (2011).

118. Suchman, *supra* note 4, at 142.

119. *See* Davis, *supra* note 5, at 106 ("Contracts are protected by copyright as 'original works of authorship,' but only the most blatant and literal forms of copying violate that copyright. Copyright in a document is not infringed by using similar language embodying the same idea, much less by different language. It has also been held that the specific language of a contract or a business form cannot be copyrighted where the use of that language is essential to expressing a particular underlying idea."); *see also* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 292 (1985) ("The limits of copyright law create an initial barrier to innovation by denying contractors substantial property rights in their formulations.").

120. Triantis, *supra* note 74, at 195 ("The specific language of a contract is likely to be protected by the author's copyright, if it is original. However, other expressions of the same idea - whether a promise by a party or the condition under which it is enforceable - are not covered by her copyright. In most cases, therefore, it would be relatively easy for another party to reproduce the innovative contractual provision of the drafter without running afoul of her copyright. Even specific, original language might lose its copyright if it is judicially interpreted and becomes part of the common law.").

Nor does trade secret law offer much in the way of protection. Many contracts are multilateral agreements that involve a number of parties. Innovating lawyers are, moreover, producing new contract language for clients to use out in the world. In light of these facts, trade secret law—which requires reasonable efforts to maintain secrecy—likewise offers little hope of incentivizing contractual innovations.[121]

Even in the rare cases where a contractual innovation may entitle the creator to some enforceable intellectual property right, there are still practical impediments to a contractual innovator wielding her intellectual property right to extract economic value from the innovation. Most notably, the vast majority of contracts in the world are not publicly available. They largely reside out-of-sight in file drawers and on hard drives, their existence and contents only known by the parties to the agreement and the attorneys that helped them draft it. This state of affairs presents a difficult enforcement challenge for the would-be licensors. How can you know that someone is infringing on your intellectual property when it is impossible to identify the infringing publication?

As a practical matter, therefore, there is generally no meaningful intellectual property protection for most contractual innovations.[122] Contract lawyers are notorious and incorrigible plagiarists. Any would-be contractual innovator must assume that his innovation will be widely copied. Which brings us back to the problem that has troubled scholars of contractual innovation—in the absence of intellectual property protection for contractual innovations, with contractual innovators unable to economically benefit from their innovations in the way that an inventor with a patent or an author with a copyright can, why do lawyers develop innovative contractual language at all?

We argue that, at least in some cases, would-be innovators are motivated by the prospect of reputational gain. Carolynn Levy, the attorney who developed the SAFE for Y Combinator, has achieved a degree of fame within the entrepreneurial community for her work. Martin Lipton has achieved even greater renown as the inventor and champion of

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121. Suchman, *supra* note 4, at 104–05 ("[C]ontracts operate essentially as nonproprietary intellectual goods, without even the benefit of trade secrecy once they have been shared with clients, transaction partners, or courts."). In addition, trade secret law does not provide the owner with a property right (that can be monetized through broad licensing arrangements) in the way that patent and copyright law facilitate. *See* Goetz & Scott, *supra* note 120, at 309 ("Trade secret rules offer no alternative protection for innovative formulations, since it is the breach of confidence by unauthorized disclosure, rather than infringement of a property right, which is the gravamen of trade secret liability.").

122. Suchman, *supra* note 4, at 104 ("[A] law firm might wish to prevent others from pirating innovative financial instruments that it is offering for a fee to its clients. In practice, however, although the creators of new contract designs may receive copyright and patent protection under certain circumstances, these rights are only weakly established and rarely enforced.").

the poison pill. This is not to say that a desire for reputational gain *always* motivates potential innovators. Indeed, we suspect that—on the whole—most lawyers develop new contract language to solve a problem, not to become famous. Nevertheless, reputation is a variable that can help to explain why contractual innovations come into existence despite the many obstacles—including the lack of intellectual property protections—that serve to discourage such innovations.

B. Diffusion of Innovations

Another advantage to conceptualizing contracts as a form of swag is that it can help to explain why certain contractual innovations spread in the months and years after they are first created.[123] The process of contractual innovation occurs in two steps. First, a person—typically, though not always, a lawyer—develops a genuinely new piece of contract language or a distinctively different set of contractual provisions creating a new form of agreement.[124] Second, other lawyers learn about this new language and choose to incorporate it into their own agreements or to adopt the new form in their practices.[125] When discussing the various catalysts that drive the process of contractual innovation forward, it is important to distinguish between step one—the *creation* of a new innovation, discussed in the previous section—and step two—the *spread* of that innovation to other contracts and contract users.

To illustrate the utility of this distinction, consider the example of the golden parachute. A golden parachute is a contractual agreement by which a company promises to give one of its employees—typically a top executive—significant benefits in the event the company is acquired by another person or entity.[126] The first golden parachute was given to Charles Tillinghast Jr. when he was hired as the CEO of Transworld Airlines ("TWA") in 1961.[127] When he was offered the job, Tillinghast demanded that a clause be added to his employment agreement requiring the

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123. *See* ROGERS, *supra* note 12, at 39–101 (surveying the scholarly literature on the diffusion of innovations across many different contexts).

124. *Id.* at 136.

125. *Id.* at 168.

126. *See* Richard P. Bress, *Golden Parachutes: Untangling the Ripcords*, 39 STAN. L. REV. 955, 955 (1987) ("Golden parachutes are special compensation agreements that provide guaranteed payments to corporate executives whose employment has been terminated because of a change in control of their corporation.").

127. *See* Claire Suddath, *Biggest Golden Parachutes: Charles Tillinghast, Jr.*, TIME, https://bit.ly/2lI6YhH (last visited Sept. 22, 2019). Although Tillinghast received what we would now term a golden parachute, the term "golden parachute" was not coined until the 1980s. *See* Theodore A. Levine, *Recent Developments in SEC Enforcement*, 61 N.C. L. REV. 463, 466 (1983) (marking the first time the term "golden parachute" appears to have used in a law review article); *see also* Harry Anderson & Erik Ipsen, *Perks for the Merged*, NEWSWEEK, Sept. 7, 1981, at 65 (marking first time the term "golden parachute" appears to have been used in popular press in English).

company to pay him a sum of money if he was fired.[128] He felt compelled to ask for this provision because he was concerned that Howard Hughes—the eccentric millionaire who owned a significant portion of the stock in TWA—would regain control of the company that had recently been wrested away from him and fire him.[129] The TWA board acceded to his request and the golden parachute was born.[130]

Over the next two decades, however, relatively few companies saw fit to offer golden parachutes to their executives and relatively few executives thought to ask for them. There just weren't that many eccentric millionaires threatening to take control of a company and oust incumbent management. In the late 1970s, however, this began to change.[131] As companies began to become the targets of hostile takeover bids, their top executives were thrust on the horns of a dilemma.[132] As fiduciaries, the executives had a legal obligation to support takeover bids that were in the best interests of the shareholders.[133] As employees, however, they were reluctant to support bids that would lead to losing their jobs, as often happened when companies were acquired.[134] To address this conflict of interest, companies began offering golden parachutes to executives to align their interests with those of the shareholders. Yes, the executive would likely lose his job if the takeover went through, but the existence of the golden parachute meant that he would also receive a massive payout.[135] As the 1980s wore on, golden parachutes were written into dozens—and then hundreds—of employment contracts with executives across the United States.[136]

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128. Suddath, *supra* note 127-128.

129. *Id.*

130. *Id.*

131. *See* Peer C. Fiss et al., *How Golden Parachutes Unfolded: Diffusion and Variation of a Controversial Practice*, 23 ORG. SCI. 1077, 1078 (2012) (observing that the golden parachute "emerged in the late 1970s among a handful of firms").

132. *Id.*

133. *See* Bress, *supra* note 127, at 979 ("Golden parachutes can provide the premium necessary to attract top managers to takeover-prone companies and may induce these managers to act in the shareholders' best interests, should a takeover commence.").

134. Kenneth C. Johnsen, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L.J. 909, 914–18 (1985) (discussing economic functions of golden parachutes).

135. After golden parachutes came into widespread use, commentators began to worry that their true impact was to skew the incentives of the executives too far in the opposite direction, such that they would approve takeovers that were *not* in the best interests of the shareholders. *See, e.g.,* Ann Marie Hanrahan, *Koenings v. Joseph Schlitz Brewing Co.: The Wisconsin Supreme Court Addresses Executive Termination Benefits in a Golden Parachute Contract*, 1987 WIS. L. REV. 823, 831 (1987) (arguing that "visions of a large cash pay-out upon merger might foreseeably preoccupy an executive with a golden parachute because the covered executive would be more interested in receiving a generous golden parachute than obtaining the best deal for the shareholders").

136. *See* Fiss et al., *supra* note 132, at 1085 (tracking the spread of golden parachutes).

The catalyst that led to the creation of the first golden parachute was the threat to a specific executive (Tillinghast) posed by a specific shareholder (Hughes) at a specific company (TWA). The lawyers drafting Tillinghast's employment contract were not trying to change the world. Rather, they were just trying to address a specific problem—the prospect that Hughes might regain control of TWA—to persuade Tillinghast to take the job. The catalyst driving the spread of this particular contractual innovation was quite different. The hostile takeover boom that began in the late 1970s forced companies to look for new ways to align the incentives of top executives weighing hostile takeover bids with the incentives of the shareholders. They soon realized that the golden parachute had the potential to accomplish this goal and began to write such clauses into an executive employment contract. The lawyers at TWA may have created the pebble in 1961. However, it was the hostile takeover boom that began in 1979 that sent that pebble cascading down the slope, triggering an avalanche.

When interviewing lawyers who have developed successful contractual innovations, the lawyers will rarely admit that they were motivated by the prospect of reputational gain at the moment they created the innovation. The lawyer will take credit, to be sure, but he will insist that it was all done to benefit the client.[137] The same cannot be said for subsequent actions taken by the attorney to disseminate the innovation. Making speeches and contributing papers to legal publications encouraging others to adopt a particular contractual innovation will confer few (if any) benefits upon the lawyer's current clients. The widespread dissemination of this contract language does, however, serve to enhance the reputation of the lawyer who drafted that language. In order to tease out the extent to which an innovator was motivated by the prospect of reputational gain, therefore, one must look past the lawyer's stated intentions at the moment of creation to the innovator's subsequent actions to market and promote the contractual innovation. These are the actions that most clearly bespeak a desire to lay claim to the reputational gains that flow from a successful innovation.

Economists refer to such behavior as "free revealing."[138] Past research has shown that this behavior is surprisingly common among innovators outside of the business of law.[139] Inventors will "spend

137. *See Kaplinsky Interview*, *supra* note 90.

138. ERIC VON HIPPEL, DEMOCRATIZING INNOVATION 77 (2005) (defining "free revealing" as an act where "all intellectual property rights to that information are voluntarily given up by that innovator and all parties are given equal access to it—the information becomes a public good").

139. *Id.* at 78–80 (discussing examples of free revealing of innovations—though not necessarily for reputational reasons—in industries as varied as steam engines, semiconductor manufacture, sports equipment, and open source software).

significant money and time to ensure that their innovations are seen in a favorable light, and that information about them is effectively and widely diffused."[140] Innovation scholars have hypothesized that there are frequently private rewards to be obtained from free revealing.[141] A chef may conclude, for example, that the reputational gains to be realized from revealing her recipes to the public may offset the reduction in profits from the reveal.[142] Similarly, a lawyer may decide that the reputational gains to be realized from sharing innovative contract language with the world may offset the costs developing that language in the first place. The logic of free revealing is particularly appealing when there are network effects associated with innovation. As Eric von Hippel argued:

> [A]n innovation that is freely revealed and adopted by others can become an informal standard that may preempt the development and/or commercialization of other versions of the innovation. If . . . the innovation that is revealed is designed in a way that is especially appropriate to conditions unique to the innovator, this can result in creating a permanent source of advantage for that innovator.[143]

The theory of free revealing provides a partial explanation as to why Y Combinator was so willing to give away the SAFE. To the extent that that document has now become an informal standard in the legal marketplace, it offers lasting reputational gains to Y Combinator as the "inventor" of this innovation. Wachtell and Lipton derived similar reputational gains from their association with the poison pill, which explains why they undertook such aggressive efforts to market that innovation in the years after it was first developed.

One of the most telling signs that a lawyer-innovator is motivated, at least in part, by the prospect of reputational gain in freely revealing contract language is when that person attempts to "brand" the innovation by giving it a catchy name. There is no need to brand an innovation developed exclusively for the benefit of one's clients.[144] In assigning a

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140. *Id.* at 85.

141. *Id.* at 86.

142. *See* Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 193 (2008) ("[A] chef can use free revealing to raise his reputation with the general public and thus, for example, increase his profit from selling cookbooks and/or from increased traffic to his restaurant. Chefs often select their more important and interesting recipes to reveal in this public way, reasoning that their reputation will be more effectively enhanced by revealing major rather than minor innovations."); *id.* at 196 (reporting that chefs were motivated to present their recipes to the public at large, among other reasons, because doing so would (1) increase their personal reputation, and (2) generate publicity for their restaurant); *see also* Robert C. Allen, *Collective Invention*, 4 J. ECON. BEHAV. & ORG. 1 (1983) (discussing firm incentives to freely reveal innovations).

143. VON HIPPEL, *supra* note 139, at 86.

144. This does occasionally happen. The International Chamber of Commerce, for example, has a registered trademark in the Incoterms that it promulgates for use in

distinctive name to a particular innovation, however, the creator helps to ensure that subsequent adopters of that innovation are able to trace it back to the original source and recognize the brilliance of that particular individual or organization.

In summary, the swag analogy highlights the role that reputation can play in the dissemination of contractual innovations. Having developed a contractual solution to a given problem, the innovator then takes the necessary steps to ensure that word of the innovation spreads far and wide. In cases where the innovation is branded—like the SAFE and the KISS or the poison pill—it is easy for subsequent users to recognize the innovator. In cases where the innovation is unbranded—like the class arbitration waiver—then these subsequent users may still learn the identity of the inventor if that person highlights the invention on his Wikipedia page and on his firm website, for example. In other words, some contractual innovations may spread because a person with a hand in creating them takes steps to ensure that they spread. These steps are taken, in turn, because the innovator wants to become known to all as the person that first developed this particular bit of contract language.

C. *The Virtues of Differentiation*

It is easy to be seduced by a big idea. The possibility that there may exist a single, all-encompassing theory that explains everything about a particular phenomenon is tantalizing. In the existing literature on contractual innovation, the big idea is a universal theory that explains the process of contractual innovation. In this section, we express doubts as to the viability of such a theory. While there may be theories capable of offering a partial explanation of specific types of contractual innovation in specific contexts, there are simply too many possible variables to predict or explain the process of innovation taken as a whole. Our argument, in other words, is that the limits inherent in the contract-as-swag analogy highlight the limits in any general theory of contract innovation.

In this section, we first survey existing scholarly attempts to develop a general theory of contractual innovation. We then identify several weaknesses inherent in these efforts. First, we show that these theories are highly context-specific. Theories that work well to explain changes in sovereign bond contracts, for example, are ill-adapted to explain changes in venture capital agreements. Second, we show that scholars often lack sufficient knowledge to explain why a particular contractual innovation caught on. Unlike superheroes, most contracts lack an origin story. Finally, we show that the process of diffusion is often random. Contract language

international sales agreements. *See* INT'L CHAMBER OF COMMERCE, INCOTERMS 2010, at 125 (2010).), *available at* https://bit.ly/2sf7Ii5 (outlining the ICC Rules for the use of domestic and international trade terms).

will sometimes come to be the industry standard completely unbeknownst to the individuals who first drafted it.

1. Adapting Theories of Technological Innovation to Contracts

Scholars have long attempted to develop a general theory of contractual innovation by drawing upon the existing literature relating to product innovation. Mark Suchman, for example, has suggested that the process of contractual innovation occurs in four phases. In the first phase, there is incremental change but contract language is largely standardized.[145] In the second phase, a technological discontinuity disrupts and displaces previous practices and one begins to see linguistic innovations in contract documents.[146] In the third phase, there is a period of fermentation.[147] Some drafters start to boldly experiment with new contract language; others seek to make incremental changes to the existing language.[148] In this phase, "different models (and their sponsors) compete on the basis of economic performance, numerical prevalence, and political/judicial endorsement."[149] Finally, in the fourth phase, a limited number of dominant designs emerge as the industry standard and the period of ferment comes to an end.[150] This brings the innovation cycle to a close, pending the next technological discontinuity, which then begins a new cycle.

In outlining this theory, Suchman is as interested in the social significance of the changes occurring at each of the four stages as he is in the actual changes in contract language. In phase one, for example, he hypothesizes that contracts are used for primarily symbolic purposes because the language is largely standardized.[151] By comparison, in phase three, he hypothesizes that "the assumptions of a shared grammar" have broken down and that the "transacting parties may find themselves forced to rely on explicit contractual stipulations rather than taken-for-granted relational scripts."[152] Suchman's theory, therefore, is less a hypothesis about how contract language changes over time than about the interplay between contract language and the social context in which this language is used in periods of technological change.

145. Suchman, *supra* note 4, at 133.
146. *See id.*
147. *Id.* at 134.
148. *Id*.
149. *Id.*
150. *Id*.
151. *Id*. at 133.
152. *Id.* at 134.

A different model of contractual innovation has been proposed by Stephen Choi, Mitu Gulati, and Eric Posner.[153] This model, which is similarly based on existing models relating to technological innovation, posits that the process of contractual innovation proceeds in three stages. At stage one, a particular standard form dominates the market. Stage one comes to an end when an external shock disrupts the status quo.[154] While the precise nature of this shock is highly variable—it can be legal, political, or economic—the shock serves as the catalyst for the process of change and kicks off stage two.[155] In stage two, marginal law firms begin to experiment with contractual innovations that depart from the dominant standard form. The effect of these actions is to reduce the dominance of the existing standard form. In stage three, elite law firms and other market leaders begin to promulgate their own innovations with the goal of establishing a new standard.[156] These innovations continue until practice gradually coalesces around a single proposal. This innovation then becomes the new standard form and the cycle begins again.

In contrast to Suchman, Choi et al. are more interested in the changes to contract language over time than in the changing social context in which that language is used. In addition, the model developed by Choi et al. was developed specifically to explain changes to a specific provision (the *pari passu* clause) in a specific type of contract (the sovereign debt agreement). This context-specific limitation notwithstanding, other scholars have looked to this model in an attempt to explain the general process of contractual innovation with respect to contracts other than sovereign debt agreements.[157] We argue that this reliance may be misplaced for the reasons outlined below.

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153. Stephen Choi et al., *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 9–10 (2013) [hereinafter *Dynamics of Contract*]; *see also* Stephen Choi et al., *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 152 (2012).

154. *See Dynamics of Contract*, *supra* note 154, at 27 ("[S]hifts in boilerplate contract terms do not occur without some initial shock.").

155. Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 247–48 (2013) (describing shocks as "changes in legal interpretations of terms, or technological advances").

156. *Dynamics of Contract*, *supra* note 154, at 37 ("[T]op market participants switch from being defenders of the status quo to promoters of their own individual visions of the anticipated new standard.").

157. *See* Rutledge & Drahozal, *supra* note 104, at 982–83 (invoking shock model to explain changes to arbitration clauses); *see also* David A. Hoffman, *Whither Bespoke Procedure*, 2014 U. ILL. L. REV. 389, 394 (2014) ("Contract terms do not evolve linearly and progressively in rational counterpoint to slow changes in doctrine. They change contingently, explosively, and at moments punctuated by shocks."); Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 89 n.83 (2018) (suggesting that "boilerplate evolves according to a punctuated equilibrium model of institutional change, by which concentrated and often dramatic adjustments follow long stretches of stasis").

2. The Problem of Complexity

The contract-as-swag analogy helps to make clear that the process of contractual innovation is too varied, too complicated, and too random to be explained by any single theory.[158] It is indisputable that some contracts are created and disseminated by actors who are seeking to enhance their brand and improve their reputation. It is also indisputable that other contracts are created and disseminated for reasons having nothing to do with reputation. Reputation is, in other words, a variable that is only intermittently relevant to the process of contractual innovation. This fact, in turn, calls into question whether other factors may only be intermittently relevant to the process by which contracts evolve and change.

There are at least five reasons to doubt the viability of a universal theory of contractual innovations. First, the process of contractual innovation will vary depending on the context. Contractual innovation in a sovereign debt agreement, for example, will frequently proceed along very different lines than the innovation of language in a real estate agreement.[159] The evolution of language in a contract drafted by an elite law firm will play out differently than the evolution of language in a contract drafted by a non-profit organization or a solo practitioner.[160] The process by which substantive commercial terms at the front of the contract evolve is likely to be different than the process by which boilerplate terms

158. The general model promulgated by Choi, Gulati, and Posner, for example, seems to presuppose that all contracts are both products *and* commodities that are produced in mass quantities. The model further presupposes that all contracts are bought and sold in a marketplace. While these suppositions may be warranted when dealing with a sovereign debt agreement—which, to be fair, was the type of agreement that they were focused on when writing the paper—it is far from clear that they are warranted when dealing with other types of contracts.

159. To illustrate this point, compare the evolution of language in sovereign debt agreements with the stubborn persistence of dollarization in Israeli real estate contracts. In the 2000s, several U.S. courts interpreted the *pari passu* clause in certain sovereign debt agreements in a manner that required the sovereign to repay certain creditors in full before it made payments to anybody else. *See* Mark Weidemaier et al., *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72, 95–96 (2013). These decisions notwithstanding, the elite lawyers tasked with drafting these agreements did not make any changes to the clause to correct what they generally viewed as a flawed interpretation. Change only came after the Federal Reserve convened a conference attended by representatives of several elite law firms. *See id.* By way of comparison, consider Israeli real estate contracts. These contracts had historically been denominated by U.S. dollars rather than Israeli shekels due to fears about hyperinflation.*See* Doron Teichman, *Old Habits Are Hard to Change: A Case Study of Israeli Real Estate Contracts*, 44 LAW & SOC'Y REV. 299, 309 (2010). In the wake of the U.S. financial crisis beginning in 2008, however, there was a dramatic shift in favor of shekels such that virtually all such contracts were being denominated in shekels by May 2008. *See id.* The language in the sovereign debt contracts changed in response to a series of judicial decisions and the intervention by a federal regulator. The Israeli real estate contracts changed in response to concerns about a weakened dollar in the wake of the financial crisis.

160. *See* Davis, *supra* note 5, at 116–21.

at the back of the contract evolve.[161] It is exceedingly difficult to imagine a single theory capable of capturing the dynamics underlying the process of innovation in each of these disparate instances.[162]

Second, many of the generalist models posit that the process of contractual innovation will be triggered by some sort of "discontinuity" or "shock." This observation is sensible—it is rare that someone wakes up in the morning and suddenly decides to update their contract language—but the triggering event could be almost anything. A financial crisis may prompt a law firm to revise its standard "material adverse effect" clause.[163] A conference presentation by one attorney may prompt another to update his choice-of-law clause.[164] An internal company policy may call for reevaluating all contract language every ten years.[165] The statutory codification of a rule of customary international law may enhance the salience of that rule to the point where lawyers can no longer realistically ignore that rule in their contracts.[166] A well-publicized lawsuit may lead to

161. *See* John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195, 237 (2016) (quoting in-house lawyer as stating that "[i]n the ordinary course of commerce, where there are lots of contracts flying around all the time, and time/cost are always issues, it is not uncommon to agree to a choice of law without doing a detailed analysis of how that jurisdiction's laws work for you or against you").

162. There are also some contracts that seem to evolve on a near-constant basis. *See* Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 IOWA J. CORP. L. 393, 414–15 (2015) ("While commentators frequently note the lack of innovation in many legal documents, leveraged-loan transactions provide an impressive counterexample. In the course of less than a decade, dozens of new provisions were developed that, over time, became standard loan terms."); *see also* Elisabeth de Fontenay, *Do the Securities Laws Matter? The Rise of the Leveraged Loan Market*, 39 IOWA J. CORP. L. 725 (2014) (documenting numerous changes in loan documents).

163. *See* Albert Choi & George Triantis, *Market Conditions and Contract Design: Variations in Debt Contracting*, 88 N.Y.U. L. REV. 51, 52–57 (2013) (noting changes in material adverse change clauses before and after financial crisis).

164. One of us (Coyle) has given numerous presentations to law firms in North Carolina on how to draft choice-of-law clauses and forum selection clauses. Dozens of lawyers have reported to him that they revised the language in their standard forms after attending one of these presentations.

165. The International Chamber of Commerce is the keeper of a set of contract definitions known as "Incoterms." *See* Int'l Chamber of Commerce [ICC], *Incoterms Rules* (2010), https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/. These contract terms are routinely incorporated into contracts for the purchase and sale of goods and function to allocate risks between the buyer and the seller. The Incoterms used to be updated on an as-needed basis, but they are now updated every ten years. *See id.* Since the Incoterms are non-state law—they are effective only when expressly incorporated into the contract—the effect of these updates is roughly analogous to a software company pushing out a patch for its software every ten years.

166. W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 111 (2014) (arguing that the "post-[Foreign Sovereign Immunities Act] contract shift was a formal, largely symbolic, reaction to a development that increased the salience of legal enforcement for the bankers and lawyers who bear primary responsibility for structuring sovereign bond issues and thinking about the consequences of default"); *see*

industry-wide revisions to a particular contract provision.[167] Lawyers eager to make it appear as though they are providing value to their clients may engage in mindless editorial churning that introduces many changes to particular types of agreement.[168] There are so many possible events that can generate new contract language that one hesitates to call them "shocks" or "discontinuities" because they are not all that infrequent. One person's shock, moreover, may be another person's continuity. One can easily imagine a scenario in which two attorneys attend the exact same conference presentation but where only one revises her contract language when she gets back to the office.[169]

Third, the process of dissemination is highly variable.[170] Some innovations spread through word-of-mouth. Others spread because they appear on a particular blog. Others spread because a single actor with many thousands of counterparties changes its standard form agreement.[171] Others spread because a law professor publishes a paper. Others spread because the contract innovator wants to make a name for himself and attract new clients. Still others spread because the New York Fed hosts a conference.[172] How can one single theory possibly account for all of these possible distribution networks at a level of specificity that would meaningfully contribute to our knowledge of contractual innovation?

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also W. Mark C. Weidemaier & Mitu Gulati, *The Relevance of Law to Sovereign Debt*, 11 ANN. REV. L. & SOC. SCI. 395, 399 (2015).

167. *See* William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1657 (2018) (discussing how the Marblegate decision rendered by the Southern District of New York led some drafters to revise their bond indentures).

168. *See* Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 61 (2017) ("This study shows that a high level of 'editorial churning'—unnecessary and ad hoc edits that appear to be cosmetic rather than substantive—takes place in legal drafting. This churning appears to go far beyond the necessary deal-specific edits, with over half of merger agreement text being routinely rewritten even though the substantive provisions of merger agreements have similar features.").

169. In giving presentations about choice-of-law clauses and forum selection clauses at North Carolina law firms, one of us (Coyle) has also been told that lawyers who attended the presentation made absolutely no changes to their form documents. *See supra* note 165 and accompanying text.

170. ROGERS, *supra* note 12, at 169 ("[A]n individual's decision about an innovation is not an instantaneous act. Rather, it is a *process* that occurs over time and consists of a series of different actions.").

171. *See* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 241 (2013); *see also* Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 311 (2009); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 450 (2008).

172. *See supra* note 160 and accompanying text (explaining that provision in sovereign debt contracts only changed after the Federal Reserve hosted a conference attended by representatives of elite New York law firms).

Fourth, most contractual innovation occurs behind closed doors. Scholars can observe only a very small fraction of all contracts. Like the proverbial man looking for his car keys beneath the streetlight, we write only about the things that we can see. In many cases, scholars will not know precisely *why* the language in a given contract was changed because there will be no way to identify the person who made the change.[173] Indeed, in many cases scholars will not even know *that* the language in a given contract changed because that agreement and all of its predecessors are stored in a locked file cabinet. In such cases, it is difficult to know much of anything about the process of contractual innovation.

Fifth, and finally, even in cases where it is possible to identify the pebble that starts the avalanche, it is not always clear that the innovator was actively seeking this result. Consider the example of the forum selection bylaw, a provision that a company writes into its bylaws stipulating that any and all shareholder litigation relating to the internal affairs of the company must proceed in a particular forum.[174] The first known example of such a bylaw appeared in 1991.[175] Other companies adopted a forum selection bylaw in 1992, 1994, and 2006. And yet, each of these innovations led to an evolutionary dead-end—no other companies ever copied the language for use in their own bylaws.

In 2007, a specific version of the forum selection bylaw began to gain traction. This version first appeared in an IPO by a company called Netsuite and was drafted by Joseph Grundfest (a professor at Stanford Law School) in collaboration with lawyers at Wilson, Sonsini, Goodrich and Rosati P.C. The language used in this provision was subsequently replicated—with only minor variations—in 102 of the 111 bylaws (91.8%) adopted by public companies over the next four years.

Significantly, the rapid diffusion of this particular contract language came as a complete surprise to the individuals who drafted it. In 2012, Joseph Grundfest wrote that this particular forum selection bylaw

> appears inadvertently to have become the standard form of forum selection language that today dominates the market for intra-corporate forum selection provisions. I say "inadvertently" because none of the framers of that forum selection language consciously anticipated that

173. *See, e.g.,* John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 COLO. L. REV. (forthcoming 2020)), *available at* https://bit.ly/2Q3s4Uq (discussing challenges of tracking changes to language in choice-of-law clauses over time).

174. *See* DEL. CODE ANN. tit. 8, § 115 (2019) (authorizing use of forum selection bylaws); *see also* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950–52 (Del. Ch. 2013) (upholding validity of forum selection bylaws).

175. *See* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 352 (2012).

> it would become the dominant form of forum selection provision to appear in the organic documents of publicly traded corporations.[176]

Indeed, the lawyers at Wilson Sonsini did not even include a forum selection bylaw in the next twelve IPOs they did post-Netsuite.[177] This fact tends to confirm Grundfest's assertion that neither he nor they fully appreciated the significance of the language they had drafted for Netsuite. These lawyers were not seeking to enhance their reputation when they developed this innovation and yet, somehow, the innovation had a lasting impact on this area of the law. While they may have knocked loose the pebble that started the avalanche, they had no idea that was what they were doing. The prospect for reputational gain does not appear to have played any role in their thinking.

In summary, the contract-as-swag analogy does not purport to be an all-encompassing theory of contractual innovation. It offers a *partial* explanation as to why *some* contractual innovations occur under *some* circumstances. Some readers may find the modesty of this claim to be unappealing. They are looking for the next big idea. However, we believe that grand theories that purport to provide complete explanations as to why all contractual innovations occur under all circumstances are unrealistic. The world of contractual innovation is so complex, and the range of catalysts that can spark change is so varied, that no one theory can explain it all.

V. CONCLUSION

One must always be careful when dealing with metaphors. "Half the wrong conclusions at which mankind arrive," said Palmerston, "are reached by the abuse of metaphors, and by mistaking general resemblance or imaginary similarity for real identity."[178] At the same time, the best metaphors possess an "almost magical capacity to unleash creative thought."[179] Over the past several decades, scholars from many different academic traditions have turned to metaphor in an attempt to better explain the nature of the contract. They have analogized the contract to a product, a social artifact, and a form of technology. Each of these metaphors is useful in its own way. And yet, none of them fully captures the incentives that lead lawyers to develop and to disseminate new contract language.

The contract-as-swag metaphor accounts for these incentives. Every lawyer in the United States has encountered tote bags and water bottles

176. *Id.*

177. *See* Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* 35–36 (Nat'l Bureau of Econ. Research, Working Paper No. 21362, 2015), http://www.nber.org/papers/w21362.

178. PHILIP GUEDELLA, PALMERSTON 182 (Hodder & Stoughton 1950) (1926).

179. *See* Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 414 (1986).

emblazoned with the names of law firms. While it may seem odd to connect this swag with legal agreements, many agreements are given away for the same reasons that a law firm gives away branded flash drives (i.e., to attract prospective customers, increase brand awareness, enhance reputation, and promote goodwill). This realization, in turn, yields several important insights. It shows that the prospect of reputational gain can sometimes lead to the development of new contract language or (more commonly) to the dissemination of that new contract language to other contract users. It also calls into question whether it is possible to develop a universal theory of contractual innovation.