

**Congressional Internet Caucus Advisory Committee Privacy Task Force
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**SECTION: Approaches to Consumer Consent/Choice
SUBSECTION: The Economics of Consent/Choice Options**

A Market Approach to Consent

The assumption behind the opt-in/opt-out debate has been that there is no real “choice” for the consumer if they are not offered the chance to veto a company’s use of information learned about them learned in the course of a transaction. The idea is that there is no real consent if a company explains that it might or does share information it learns about its web site’s visitors or customers with third parties and does not offer either opt-out or opt-in. This assumption is based on an incorrect view of the ordinary meaning of “consent” and “choice.” A “take it or leave it” contract is still a voluntary contract; it is fundamentally different from a coerced exchange like a mugging. A difficult choice is still a choice.

Even if opt-out *and* opt-in are lacking, there is still meaningful consumer choice. To reject this view is to turn one’s back on markets themselves, the most amazing mechanism for distributing goods and services ever developed.

Consent Outside the Ivory Tower. There is a very nice-sounding legal theory being promulgated by legal academics, that there is something coercive about what are called “contracts of adhesion” or “take it or leave it contracts.” In a handful of shocking or extreme cases courts have sometimes overturned contracts of adhesion.

But the reality is that the vast majority of transactions concluded in the United States every day are “contracts of adhesion.” One does not ordinarily negotiate the price of one’s dinner at a restaurant, bargain with Safeway over the price of an apple, or question the color or number of garbage bags in a box. Nor would one usually want to; it would require a great deal of time and wasted effort, with no particular likelihood of getting better terms. Contracts are no less consensual for coming, like the goods themselves, in a convenient package. A legal theory that such contracts are somehow illegitimate is fundamentally at odds with reality.

The Difference Between “We Will Share Your Information” and Being Mugged.

Suppose a web site offers the bare statement that they might or do share transactional information like names and addresses with third parties (they might offer much more information, or even less—without affecting the point that the transaction is consensual). And take the example of a given visitor, Sam. If the site had offered an opt-out or opt-in, Sam would probably have opted out. But the site does not offer one. Sam knows that if he chooses to complete the transaction, his information may be shared with another company for use in product development, marketing, or some other such purpose. Sam thinks about it for a few seconds. He could go to another web site. But he’s been looking for this product he’s buying for a long time, and the information-sharing site has the best price. Or he doesn’t have much time, and doesn’t want to bother looking for an alternative. Either way, he goes ahead with the transaction.

As hard as this choice may have been for Sam, it was still a choice. He got the stuff he was looking for, for the price of some money plus his transactional information. By his own estimation, he is better off with the transaction than he was without it. How do we know this? *Because he would not have gone ahead with the transaction if he thought, on the whole, that it made him worse off.* This is the hallmark of a voluntary transaction.

By contrast, had a mugger offered Sam the choice of “your money or your life,” Sam is worse off whichever way he elects. He loses either his money, or his life, both of which were his before the “transaction.”

If we accept the alternative view, that the “take it or leave it” web site is somehow “forcing” Sam to give up his information, then we must accept that *no* “take it or leave it” aspect of the transaction concluded between Sam and the web site is voluntary—including the price, the color in which the product is offered, the shape of the box it comes in, the shipping terms, and so on. The idea that only opt-in or opt-out really offers a choice, carried to its logical conclusion, amounts to a call for universal price regulation—to say nothing of all other contract terms.