# Discussion & Implications

The results show that pro-consumer gaps persist across various types of retail stores, including chain and local, large and small, luxurious and casual. While gaps are more prevalent in some contexts and stores than in others, the general conclusion is that a significant proportion of retailers behaves more leniently towards non-opportunistic, one-time consumers than their formal policies require.

These results lend support to the theory that sellers often intentionally use seemingly harsh, one-sided terms in their standardized agreements in order to distinguish between different types of consumers through selective enforcement of these terms. As a result, even clear, bright-line terms may operate as standards in practice, allowing store clerks to exercise discretion on the ground.

Why do some stores deviate from their formal policies in favor of consumers and not others? The results show that several store characteristics are strongly associated with a higher likelihood of applying pro-consumer gaps. In particular, more luxurious, more established, and chain stores were more likely to depart from their policies when facing one-time, non-opportunistic consumers than were less luxurious, less established, and local stores.

Indeed, these stores were already significantly associated with more generous return policies on paper. Yet, even when keeping the paper policy constant across stores, more luxurious and established stores, and stores operating as part of a chain, were more likely to depart from their policies in order to cater to consumers’ demands. These findings suggest that product and store quality is signaled by, and reflected in, more generous return policies, both on paper and in practice.

The strategy of allowing employees the discretion to grant case-specific benefits beyond those that are required by standard-form contracts can be seen as a sophisticated way for the firm to grow its revenues by gaining the loyalty of existing customers and establishing a good reputation that will attract new customers. Yet, despite this apparently encouraging picture, the findings raise several major concerns.

## Seemingly One-Sided Terms are Often Enforced

One concern involves the finding that most stores do not depart from their formal policies, even when facing non-opportunistic consumers. Sellers were particularly reluctant to deviate from harsh policy terms. In fact, no refund policy terms were enforced in all but one of the stores that adopted such strict terms, regardless of whether or not consumers were able to show receipts. Yet, even in the context of the more lenient terms, the majority of stores strictly adhered to their formal policies. In fact, in 78% of the stores, store clerks refused to grant consumers *any concessions*; and in 92% of the stores, store clerks initially refused to refund consumers for the returned products.

While more luxurious and experienced stores were more likely to exercise forgiveness, even among those stores the majority of sellers were unwilling to depart from the four corners of the agreement. And while consumers’ complaints significantly increased their chances of securing forgiving behavior, the majority of sellers refused to depart from the formal requirements even after consumers had complained, and in most cases—even after consumers had bargained with the store’s manager.

The fact that sellers often refuse to grant concessions does not, in and of itself, imply that sellers’ adherence to their formal contract terms is inefficient. In competitive markets with no informational asymmetries, sellers have strong incentives to satisfy consumers. It therefore seems unlikely that sellers will insist on enforcing harsh terms to the letter at the risk of driving away customers unless these terms reflect an efficient risk allocation between sellers and consumers. In the case of return policies, for example, the findings suggest that harsh no refund policies are often adopted by local sellers that typically incur high depreciation costs from facilitating returns because of their lower ability to resell used items or return them to the supplier.

Admittedly, sellers’ insistence on following the contract to the letter may be efficient, even if the particular contract term *seems* unfavorable to the consumer. Yet, the results suggest that policymakers should be cautious of inferring that seemingly one-sided terms do not warrant regulatory scrutiny on the sole premise that sellers will depart from these terms in practice.

## Gaps Might Generate Distortions

Importantly, the results reveal significant variations in sellers’ decisions of whether or not to depart from their paper policies. Even after multiple store characteristics are controlled for, stores vary in their departure decisions. The observed variation in return outcomes across stores with identical paper policies might impair consumers’ decisions both *ex ante*, in deciding whether to purchase at the store, and *ex post*, in deciding whether to attempt to return an item to the store despite failure to meet its policy requirements.

### *Ex Ante* Distortions of Consumers’ Decisions

At the *ex ante,* pre-purchase stage,consumers might be unable to distinguish between sellers that strictly enforce their paper policies and those that, by not doing so, provide higher quality services. This informational lacuna could distort consumers’ purchasing decisions. For example, consumers might buy items from a seller with a strict no refund policy even though they are aware that they may need to return the items to the seller, optimistically assuming that the seller will deviate from its policy, while, in fact, the seller is unlikely to demonstrate any leniency. At the same time, consumers might refrain from buying items from particular sellers because they may wrongly assume that these sellers enforce their policies to the letter, while, in fact, the latter often behave more leniently than their policy dictates.

Firms that enforce their terms to the letter will have no incentive to let consumers know that they provide lower quality services by virtue of their refusal to grant concessions. Sellers that systematically deviate from their policies when facing non-opportunistic consumers are apparently incentivized to advertise this practical leniency, thereby distinguishing themselves from the stores that strictly adhere to the written agreement vis-à-vis all consumers. But if a store’s policy to systematically under-enforce its policy is made public, store clerks might not be able to fend off those opportunistic consumers against whom the formal policy was adopted to protect in the first place. The fact that non-lenient firms benefit from the behavior of lenient firms by guising themselves as such might, in turn, lower the incentives of firms to be lenient, thereby resulting in a lemons’ equilibrium.

So why do we see gaps persist? One reason is that even if most consumers could not distinguish between high quality, lenient stores and low quality stores ex ante, stores may still be incentivized to apply a gap, because after the gap is applied, some consumers—the more sophisticated ones—will learn about it. Thus, applying the gap becomes a way in which to gain consumer loyalty and create a customer base. Still, less sophisticated and one-time customers might not be able to distinguish between stores, and might make inefficient consumption decisions because of this informational asymmetry.

### *Ex Post* Distortions of Consumers’ Decisions

The observed gaps may also lead to several inefficiencies at the post-contract stage. First, some consumers might be discouraged from even trying to obtain concessions from the seller that either vary from or directly contravene its formal policy. In the specific context of returns, consumers may be discouraged by the clear language of the policy and may consequently refrain from trying to return items to the seller if, according to the explicit terms of the policy, the items are not eligible for returns or if the consumers otherwise fail to meet the conditions set forth in the policy. In fact, sellers may adopt harsh contract terms precisely in view of this *in terrorem* effect on consumers.

Second, even if consumers do request concessions from sellers, they may relinquish their claims once sellers refer them to the contracts that they had “agreed” to enter. It is important to note that in this study, store clerks referred testers to the formal policy in the vast majority of stores, including half of the stores in which a gap was ultimately applied. Testers were instructed to continue to bargain and complain despite initial rejections of their claims. Yet, recent evidence suggests that other purchasers, perhaps most, would react to the store clerks’ initial negative responses dismissing their requests by acquiescing and accepting the formal contractual terms without dispute.

This is because consumers are contract formalists. They tend to believe that the contract is the final word. This preconception may be particularly strong in the context of standardized consumer agreements. Consumers are often demoralized by harsh and unconditional contractual language, and consequently refrain from bringing claims to the seller.[[1]](#footnote-1) In fact, previous research has shown that consumers rarely question the validity of contracts that disclaim their mandatory rights and remedies.[[2]](#footnote-2) Consumers are similarly unlikely to challenge contracts induced by fraud because they feel bound by contracts they signed.[[3]](#footnote-3)

In the specific context of the gap, consumers are not likely to realize that sellers often depart from their policies upon consumers’ requests. Indeed, consumers may reasonably assume that if the seller’s policy was one of leniency, the seller would put this policy in writing in order to increase sales.[[4]](#footnote-4) If substantial proportions of high-value, non-opportunistic consumers are unlikely to complain (even when their gains from the concession exceed the costs to the seller), the observed complaint-based segmentation of consumers might lead to inefficient outcomes.[[5]](#footnote-5)

Yet, even if consumers do not relent and continue to bargain and complain, ultimately, if the seller remains firm in its decision to strictly enforce the agreement, consumers do not have any real ability to discipline the seller. Having no legal entitlement, consumers cannot even threaten to take legal action.[[6]](#footnote-6)

Some of these concerns may be addressed and mitigated through informational flows. For example, consumers may post online reviews that praise stores that exercise leniency while criticizing or shaming those that do not. Sellers, in turn, will be incentivized to depart from one-sided terms, fearing the risks of reputational harm, either from attempting to impose unwanted terms on buyers or from becoming known as inflexible when disputes arise. Yet, there are reasons to fear that these informational flows will be inadequate in disciplining sellers.

First, consumers may not feel wronged by a seller’s adherence to the written policy, even if a seller is known for exercising leniency towards other consumers. In such cases, consumers may believe that the seller has a legitimate reason for failing to forgive or to respond to their complaints, reasoning that a store that enforces the terms of its contracts, even selectively, is merely doing what it has a contractual right to do.

Concurrently, when sellers depart from the contract in favor of consumers, consumers might not report this more lenient behavior because they may believe, perhaps erroneously, that the seller’s leniency was a one-time occurrence rather than strategic, albeit concealed, behavior. Consumers are unlikely to realize that sellers use these harsh terms in order to fend off opportunistic consumers. For why would sellers advertise strict policies or terms that might discourage or scare away consumers, rather than more lenient terms that could encourage consumers to buy more, if sellers actually intended to behave leniently towards consumers at the post-contract stage? As a result, consumers may not share their experiences of sellers’ leniency with others.

But even if they did provide information about sellers’ deviations from their formal policies on social media, other consumers may fail to realize that these deviations reflect a systematic inclination, rather than one-time deviations, for the same reasons mentioned earlier.

### *Ex Ante* Distortions of Sellers’ Decisions

In addition to distorting consumers’ purchasing decisions, the ability to apply a gap might also lead sellers to adopt inefficient contractual risk allocations. Note that the traditional assumption in the gap literature is that, to the extent that firms engage in complaint-based segmentation of consumers, such practice is welfare enhancing. For example, Jason Scott Johnston has argued that firms’ practice of providing “benefits to consumers who complain” beyond those that their standard forms oblige them to provide help maintaining “cooperative, value-enhancing relationships” between firms and their customers. Johnston further maintains that “were firms legally required to extend such benefits […]—as would result either from judicial invalidation of the tough standard-form performance terms or legislatively mandated generous standard-form performance terms—then both firms and their customers would be worse off.”[[7]](#footnote-7)

Yet, the Article’s findings suggest that this assumption may not hold. Sellers may find it profitable to begin with an inefficient risk allocation that assumes that a sufficient number of buyers will not protest. Consequently, the combined costs of accepting the risk for insistent buyers and any reputational loss from alienating disappointed but non-insistent buyers are less than the cost of absorbing the costs of all defects. This is despite the fact that absorbing the costs of all defects would be a more efficient risk allocation from a social welfare perspective.

### Distributional Concerns

The findings reveal that stores are nearly twice as likely to depart from the paper contract once consumers complain, but are otherwise likely to enforce harsh terms to the letter. This complaint-based segmentation of consumers effectively leads to the cross-subsidization of the complaining consumers by the more acquiescent, non-complaining consumers.

If consumer assertiveness is correlated with socio-economic status, this complaint-based discrimination might have troubling distributive implications. There is abundant evidence that people from lower socio-economic backgrounds and members of disadvantaged groups exhibit a lower sense of entitlement, a lower willingness to bargain over payoffs, and a higher inclination to accept unfavorable offers than do people from higher socio-economic strata.[[8]](#footnote-8) Similarly, race and gender were found to influence what people expect and feel they deserve, with blacks and females feeling significantly less entitled than whites and males.[[9]](#footnote-9)

In the particular context of contracts, empirical evidence suggests that low income, less educated consumers and those belonging to minority groups (e.g., black and female buyers) are more likely to feel bound by standardized agreements and to see the four corners of these agreements as the final word.[[10]](#footnote-10)

In the context of the gap, it is plausible therefore, that lower-income, less-educated consumers, as well as members of disadvantaged groups, will feel more discouraged and demoralized by the language of the contract or by sellers’ initial refusals to grant concessions. This, in turn, might lead to a troubling conclusion that in view of sellers’ selective enforcement of their formal agreements, poorer, less-educated consumers, and racial and gender minority groups ultimately cross-subsidize those consumers who are better-off.

1. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Cite Yonathan Arbel’s paper (Reputation Failure). Maybe Rory Van Loo’s work? [↑](#footnote-ref-4)
5. It is also unclear the opportunistic consumers will necessarily refrain from complaining. Consider a customer that is trying to free-ride on a seller’s lenient return policy by returning a used item to the store. It is not necessarily the case that this customer will refrain from complaining once the seller refuses to accept her claim. More empirical evidence is needed in order to establish the relationship between consumer opportunism and assertiveness. [↑](#footnote-ref-5)
6. Zamir Cathedral. [↑](#footnote-ref-6)
7. Johnston, 858. [↑](#footnote-ref-7)
8. *See*, e.g., Jost et al., A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo, Political Psychology, 25(6) 881-919, 2004; Pelham & Hetts, Underworked and Overpaid: Elevated Entitlement in Men’s Self Pay, 37 Journal of Experimental Social Psychology, 92-103, 2001; Paul K. Piff, Wealth and the Inflated Self: Class, Entitlement and Narcissism (2014); Major (1994), from social inequality to personal entitlement; Hu et al., Low Social Status Decreases the Neural Salience of Unfairness (2014); O'Brien, L. T., & Major, B. (2009). Group status and feelings of personal entitlement: The roles of social comparison and system-justifying beliefs. In J. T. Jost, A. C. Kay, & H. Thorisdottir (Eds.), Series in political psychology. Social and psychological bases of ideology and system justification (pp. 427-443). New York, NY, US: Oxford University Press. Lareau, Annette, "Invisible Inequality: Social Class and Childrearing in Black Families and White Families," 67 Am. Sociological Rev. 747 (2002) (that particular logics of childrearing socialize middle and upper income white families to raise their children with a sense of entitlement and assertiveness to get what they want later in life, vs. childrearing strategies among the lower-classes and people of color, that tend to result in a lack of assertiveness or lack of a sense of entitlement, thereby limiting their access to educational and job opportunities later in life. [↑](#footnote-ref-8)
9. *See*, e.g., O’brien et al., Gender Differences in Entitlement: The Role of System-Justifying Beliefs (2012). [↑](#footnote-ref-9)
10. Eigen; Hoffman; Furth-Matzkin & sommers. [↑](#footnote-ref-10)