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SELLER UNEQUAL BARGAINING POWER AND THE JUDICIAL PROCESS

Alan Schwartz†

INTRODUCTION

In the last two decades, courts have used the concept of unequal bargaining power to strike down a variety of seller practices. A federal district court in California declared unconstitutional § 9-503 of the Uniform Commercial Code,¹ which permits secured creditors to repossess without a judicial hearing, because the Code's jurisdiction was "not limited to secured transactions between parties of equal bargaining power."² More recently, the Supreme Court declared the replevin statutes of Florida and Pennsylvania unconstitutional, because they also allowed repossessions without judicial hearings.³ To the claim that the buyers in those cases had waived their rights to such hearings, the Court replied: "There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power."⁴ And several years ago, in a celebrated and often followed opinion, the New Jersey

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1. CAL. COMM. CODE § 9503 (West 1964).
4. Id. at 95. The Court also held that the clauses at issue did not convey to buyers with sufficient clarity the rights which were being waived. Id. at 94. See also Swarb

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Supreme Court declared the warranty clauses accompanying the sale of new cars unconscionable partly because of the "gross inequality of bargaining position occupied by the consumer in the automobile industry. . . ."

Unequal bargaining power is relevant only when a particular contract clause is "contrary to public policy," but not so contrary that the parties will be prohibited from agreeing to it; put another way, the question whether a seller has unequal bargaining power is germane only when a "bad" clause is savable by buyer consent: if, that is, a seller "imposed" the clause, no saving consent existed, and a court may strike it. The central issue which the unequal bargaining power concept thus raises is whether a term otherwise savable by consent is in fact the product of seller power.

However, this statement of the issue presupposes, as do the opinions quoted above, that whether seller unequal bargaining power exists is easily ascertainable, that the search for such power is value neutral. Both presuppositions are erroneous. Whether "unequal bargaining power" exists turns on what is meant by that phrase, which turns on what values the decisionmaker wishes to realize. And the factual issues, as to whether seller unequal bargaining power is present, can be extraordinarily difficult to resolve. My thesis is that courts are institutionally incapable of choosing the defining values and finding the relevant facts.

One common approach to the central issue thus asserts that a bargaining imbalance sufficient to justify judicial intervention is found when buyers cannot codetermine the bargain's terms. This approach

6. Courts are explicitly given the power to strike contract clauses by Uniform Commercial Code § 2-302 which permits them to refuse to enforce "the contract or any clause of the contract" if it finds either "to have been unconscionable at the time it was made . . . ." Id. Because § 2-302 is without standards, it delegates to courts the decision when clauses should be banned. See Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967) [hereinafter cited as Leff]. Uniform Consumer Credit Code § 5.108 gives courts the power to strike "unconscionable" terms in consumer credit sales, leases and loans. The definition of unconscionability it gives is quite vague, thereby also delegating much to judges. See id. § 6.111(3). The Fuentes and Adams cases indicate that sales contracts are also subject to the imprecise commands of the fourteenth amendment's due process clause. See also Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Finally, common law courts traditionally have had the power to refuse enforcement to contracts contrary to public policy. See 6A A. Corbin, Contracts §§ 1373-75 (1962).
it will be argued, requires factual inquiries which courts are unsuited to make, primarily concerning the existence, extent and costs of allegedly unfair contract clauses. It also raises value choices which are better made legislatively, such as which proportion of a buyer’s resources should be expended on purchasing “fair contracts” and which on other things.

The second standard approach defines unequal bargaining power by reference to aggregate buyer desires, so that the requisite bargaining imbalance exists in markets which are unresponsive to aggregate wants. This approach, however, is for the most part irrelevant to the question whether particular contracts should be enforced, because even concentrated markets generally satisfy consumer preferences regarding purchase terms. Also, the costs to the parties of establishing the unusual case of market unresponsiveness will often be higher than the gains to them from doing so. Therefore, the unequal bargaining power question—whether sellers are responsive—will seldom be fully developed, causing judicial decisions to be made on inadequate records.

The better approach, then, is for courts not to ask whether a relationship is characterized by unequal bargaining power. Should this be done, courts must presume buyer consent to contested clauses or presume its absence. I will argue that consent should be presumed, primarily because courts should protect only aggregate buyer preferences to which markets are generally responsive. Thus, the issues in sales cases, broadly speaking, should be: (1) Is the result a particular clause yields contrary to any judicial goal? (2) If so, will buyer consent, which is presumed present, insulate the clause from attack?

Moreover, a presumption of buyer consent minimizes judicial inter-

8. See Block v. Ford Motor Credit Co., 286 A.2d 228 (D.C. Ct. App. 1972); Carter v. Jackson, 11 UCC Rep. Serv. 983 (D.C. Super. Ct. 1972) where courts upheld questioned clauses because the market was perceived to be competitive. This area is confusing partly because courts employ both definitions of unequal bargaining power, compare Educational Beneficial, Inc. v. Reynolds, 324 N.Y.S.2d 813 (Civ. Ct. 1971), with Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775 (D.C. Ct. App. 1971), sometimes in the same case. For example, in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the court was concerned with the buyer’s inability to affect the terms of his contract and with the degree of concentration in the automobile market. See also, e.g., County Asphalt, Inc. v. Lewis Welding & Eng’r Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970), aff’d, 444 F.2d 372 (2d Cir.), cert. denied, 404 U.S. 939 (1971). For illustrations of this in the literature see Lenhoff, Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law, 36 Tul. L. Rev. 481 (1962); Wilson, Freedom of Contract and Adhesion Contracts, 14 Int’l & Comp. L.Q. 172 (1965). Keeping the two approaches straight, however, does not sufficiently dispel confusion, because each of them has difficulties.

9. Courts may sometimes explain results by reference to unequal bargaining power which in fact were reached on other grounds, a practice made possible by the ambiguity of the unequal bargaining power concept. My argument that courts should abandon the concept may then be directed partly at a fiction, but destroying fictions is also useful.
ventions, which is desirable because those interventions are often futile. Should a court strike a clause used by a seller with market power, it will be replaced by another which may be more offensive. Market power which cannot be exploited in one way will be exploited in another. The public task, therefore, is to regulate economically powerful sellers, to ensure that they comply with the dictates of current policy. Courts, however, cannot gather industry data, analyze complex economic material, or devote continuing attention to a problem, all of which are essential to effective regulation. Thus, even if a court can ascertain whether a particular clause actually was the product of a bargaining imbalance, it often will be unable to respond adequately to the problems which that imbalance poses. The complex task of controlling private centers of economic power should be left to other legal institutions.

Section I of this article demonstrates the inability of courts to answer the question whether a contract clause was the product of seller power, and argues that courts should presume buyer assent to litigated clauses. Section II shows that the public task often cannot be limited to striking single “bad” clauses, but must extend to regulating the market power which produced them, which courts cannot do. Finally, Section III assumes that courts will continue to use the unequal bargaining power concept for some time, and seeks to clarify its application. Even assuming the limited competence courts have in this field, they nevertheless can do better than they have done.

Before turning to the analysis, however, a crucial distinction must be made. Another source of seller power is superior knowledge. If buyers are ignorant of the costs a particular contract clause imposes on them, they may not resist seller use of it. Although seller power stemming from superior knowledge is common, it is not my concern here. This article treats only power arising from market structure; its paradigm is “take-it-or-leave-it” bargaining, where sellers insert a clause whose effect buyers can comprehend but are apparently powerless to change.10

I. THE MEANING OF UNEQUAL BARGAINING POWER

Unequal Bargaining Power as the Inability to Codetermine Terms

1. Institutional Problems

Courts and commentators often make such assertions as:

'[F]reedom of contract' includes the ability to codetermine terms, and . . . if this ability is denied, the resulting unilaterally determined terms will be subject to special scrutiny.¹¹

But it is hard to know what "codetermine" means. Bargaining power, even between business parties, is seldom equal; when a clause is negotiated, one party often has much more say than the other as to its content. If the ability to codetermine terms means the ability to have an equal say in the outcome of a bargain, there are fewer "free contracts" than bald eagles, and an enormous number of contracts will be "subject to special scrutiny." If, however, precise equality is not meant, the issue is how much power must one party lack before it can be said that bargaining imbalance produced a particular term.

One possible answer is that a buyer is sufficiently powerless only when the sum of his resources is insufficient to induce the seller to delete the term at issue. Two objections may be made to this answer. First, it may be difficult to know when bargaining power is so unequal. Suppose, for example, that a seller yields to a buyer's requests to accelerate delivery and modify certain product specifications, but insists on retaining a disclaimer. If the buyer had instead agreed to the original delivery schedule and the original product specifications, would the seller then have deleted the disclaimer? Would he if the buyer had agreed to take delivery in his own truck? It is very hard to know. Assume further that the buyer obtained delivery and product concessions but never challenged the disclaimer. Would he have been successful if he tried? Evidence of the seller's modifying disclaimers in other cases is germane, but will seldom be available or conclusive. It is thus difficult to know whether a buyer had sufficient power to force the deletion of an offensive term.

The second objection to this definition of unequal bargaining power is that in practice it is probably of trivial significance. Although it may be difficult to establish whether an individual buyer could or could not have affected a particular term, it is generally true that most buyers will be able to avoid any one term, if they concentrate their entire resources on doing so. Thus in the illustrations above it is likely that the buyer could have given up on enough other terms to avoid the disclaimer.

The objection that the unequal bargaining power concept, as just defined, is practically insignificant may be avoided by redefining it to provide that buyers with limited resources should not be forced to choose, at their peril, which clauses of the contract to affect. Since many buyers


HeinOnline -- 49 Ind. L.J. 371 1973-1974
have limited resources, the unequal bargaining power concept will then be broadly applicable. However, this definition raises great problems of factfinding, and is otherwise objectionable on the ground that it forces courts to make value choices which should be made legislatively. Consider, for example, consumer buyers purchasing under form contracts. In some cases, sellers offer a choice of terms. Buyers of color television sets, which are usually sold with limited express warranties and no implied ones, may purchase service contracts which shift much of the risk of defects to sellers. And some automobile dealers offer greater warranty protection than manufactures provide, at extra cost. These illustrations reflect the fact that sellers insist on clauses such as disclaimers because they increase profits, but they will delete any term when the price for deletion produces a similar profit. If, for example, the risk of nonconformity (the likelihood of a defect multiplied by the costs a defect imposes) is $5, and the seller disclaims, thereby shifting that risk to buyers, he would, in theory, delete the disclaimer for $5 cash. Consumer buyers always have cash, although some have little of it. Therefore, if the inability of buyers to codetermine terms means that buyers with limited resources should not be made to decide which offensive terms to buy away, courts must then decide how limited the resources must be. Such a determination, we will see, is unsuited to judicial resolution.

But first we should deal with a possible objection to this analysis, which is that buyers often cannot purchase the absence of offending terms at all. When they cannot, sellers possess unequal bargaining power by definition; the terms are imposed. If the risk that a product will break is valued at $5 and the seller shifts that risk to buyers by disclaiming, he will theoretically delete the disclaimer if the buyer offers $5. However, it is often more efficient, when many sales are made, to use the same form contracts with many of its products.

12. Sears also offers service contracts with many of its products.

13. This and later statements I make presuppose that sellers cost out each contract clause, but obviously they do not. At times the cost of being this precise will exceed the gains, and some sellers may be too unsophisticated or magnanimous to price precisely. As to the number of sellers like these, costing out particular terms is conducive to maximizing profits. I assume most sellers attempt to maximize profits for the reasons Professor Stigler gives:

First, and most important, it [the maximizing assumption] yields a vast number of testable conclusions, and by and large these conclusions agree with observation. Second, no other well-defined goals have yet been developed and given empirical support.

contract. A seller may be unwilling to sell the absence of a term to one buyer because the costs of negotiating the price, and keeping track of the contract, will exceed the gains. Only if a number of buyers manifest interest will a new form contract, or an option to buy without the term, be employed. Thus, it may be argued that until enough buyers manifest a desire for sales without disclaimers some of them will be victims of unequal bargaining power.

This objection is misconceived because at some price the seller will delete the term—for an additional $500 one can buy a television without a disclaimer. Sellers, however, will seldom delete a term for only the value of the risk which it represents, since we have seen that the use of several contracts costs more than the use of one. In the illustration above, if forty percent of the buyers prefer not having a disclaimer, they will not get one; but the cost of its deletion will not be $5, the risk value, but a higher figure such as $5.30. The increase of $.30 reflects the cost to the seller of making two kinds of deals.

Courts should allow sellers to recover this cost of variety for two reasons. First, if sellers cannot recover it, there will be much less variety; courts will then be diminishing buyer choice in the guise of increasing it. Second, a court which refuses to allow sellers to recover actual costs is ordering sellers to reduce them, or go out of business. Courts should only exercise such power, if at all, when the business practice which the costs support is socially harmful. Yet recovering the costs of two kinds of contracts through price seems as innocent as recovering the costs of labor or capital.

Thus, the objection that buyers sometimes cannot purchase the absence of a term is reduced to the claim that sometimes they can only buy away clauses at prices much in excess of the costs those clauses reflect. But if courts are to strike clauses on the ground of unequal bargaining power when they can be excised only for "excessive" prices, they must have criteria to ascertain the costs of contract clauses, as well as the permissible profit in excess of those costs which sellers can recover. Such criteria, as our experience with enforcing an excess profits tax14 and regulating wages and prices shows, will be difficult to develop, and the courts have not yet developed them.

To summarize, unequal bargaining power, it may be argued, justifies banning a particular contract clause because the clause produces results inconsistent with policies courts prefer, and because the seller's power produced that clause. If one believes unequal bargaining power is present

when buyers cannot codetermine terms, the requisite inequality exists if buyers cannot purchase a contract term's absence when they concentrate their entire resources on doing so, or if they have "so little money" that while they can buy the term's absence, it is "wrong" to make them do so. Whichever meaning of inability to codetermine terms is chosen, unequal bargaining power exists when the price sellers charge for deleting terms is "excessive." A rational use of the unequal bargaining power concept requires a choice to be made between these two meanings, and also requires content to be given the quoted phrases.\footnote{Some commentators suggest that unequal bargaining power is absent when sellers offer a choice of contractual provisions, but is present when the terms are everywhere the same. E.g., Murray, supra note 11, at 32-33; Speidel, The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code, 51 VA. L. Rev. 804, 848-49 (1965). This definition is misconceived, because an individual may buy the deletion of offending terms from his own contract. The presence of several form contracts indicates that buyers in the aggregate prefer variety, but their absence cannot support the inference that a buyer lacks power vis-à-vis his own seller. Buyers who are ignorant of the impact which particular clauses have, however, may not know how much money to offer to avoid them. The state's choices then include giving buyers the facts, so they may bargain rationally; refusing to enforce the relevant clauses; or regulating the entire transaction so as to ensure its fairness. Courts, however, can only refuse to enforce the clauses. I do not suggest that courts should always intervene when they perceive information gaps because ascertaining them can be a more difficult job than courts can sometimes handle, and because solutions other than banning clauses may be preferable. Indeed, the impression that courts are dealing with the problem may prevent more from being done. For extensive discussions as to when clauses should be banned or information provided, see Schwartz, Optimality and the Cutoff of Defenses Against Financers of Consumer Sales, 15 B.C. IND. & Com. L. Rev. 499 (1974); Defective Products, supra note 10.}\

The choice between meanings seems never to have been explicitly faced, let alone made. Implicitly, however, courts seem, without giving reasons, to be choosing the view that buyers should not be compelled to expend scarce resources on buying away offensive contract terms. They apply the unequal bargaining power concept more frequently than the first meaning apparently warrants, and rarely consider the possibility that a buyer could have bought a clause's absence.\footnote{In one of the few cases that did do this, County Asphalt, Inc. v. Lewis Welding & Eng'r Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970), aff'd, 444 F.2d 372 (2d Cir), cert. denied, 404 U.S. 939 (1971), the court, in finding that unequal bargaining power was absent, cryptically remarked that even if every seller used the same terms, "plaintiff would have retained the impressive negotiating power of one prepared to spend approximately one-half million dollars." Id. at 1308. See also Bill Stremmel Motors, Inc. v. IDS Leasing Corp., 89 Nev. —, 514 P.2d 654 (1973); cf. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).} But if this view is chosen, it must be given content, and this courts cannot do.

The question is how little money must a buyer have before he will be relieved of the task of buying away those contract clauses which displease judges. If we assume that a buyer could purchase the absence of a
particular clause, he may be considered poor enough when after he buys away the instant clause too many disfavored terms remain. In other words, a buyer should be helped when his resources are insufficient to purchase fair contracts. To apply this answer to concrete cases, a court must ascertain: (1) the cost of each disfavored term the buyer faces in the contract at bar and in others he will make; and (2) how many such terms he can buy away (at nonexcessive prices). The court must then decide, if any unfavorable terms remain, or are likely to remain, whether "any" is too many. If not, how many are too many? Moreover, will some clauses count more than others in the decision whether the buyer has resources enough to purchase fair contracts? Which clauses? How much more will they count?17

These questions involve policy inquiries as well as factual ones. For example, the question how many clauses a buyer could avoid is unlikely to be answered by measuring the cost of the clauses against the buyer's assets, for buyers must also use those assets to live. But courts must then decide which proportion of a buyer's assets "should be" devoted to buying fair contracts and which to such other things as shelter, clothing and leisure.

Courts plainly cannot gather the data to decide when buyers will be unable to purchase fair contracts. They cannot cost out terms, nor can they ascertain how many a buyer will face after avoiding those his resources permit. Courts also cannot make principled determinations as to how many "unfair" clauses are permissible or how much money buyers "should" spend on purchasing fair terms.18 Finally courts lack the fact

17. For a thoughtful discussion of how difficult such questions can be, see Leff, supra note 6, at 513-16.
18. An analogous problem to determining how much buyers should spend on purchasing fair contracts is raised by efforts to define poverty. The most simple definitions relate only to income, but these vary widely. Thus, Professor Lampman urged an income guarantee of $1500 for a family of four, with government support cut off when total income reached $3,000. Lampman, Expanding the American System of Transfers to Do More for the Poor, 1969 Wis. L. Rev. 541, 543. Professor Tobin's guarantee was either $1600 or $2600, with a cutoff point of $4800 or $5200. Tobin, Pechman & Mieszkowski, Is a Negative Income Tax Practical?, 77 YALE L.J. 1, 5 (1967). Harvey Brazer sought a guarantee of $1200 and a cutoff exceeding $10,000, Marmor, On Comparing Income Maintenance Alternatives, 65 AM. POL. SCI. REV. 83, 84 (1971). In light of such diversity, an economist and former assistant director of the Office of Economic Opportunity observed:

The word "poverty" has no absolute meaning, and there is no generally satisfactory definition that people can agree on and work with. . . .

Most attempts to define poverty have been mainly concerned with some "necessary" amount of income—necessary that is, to command some minimum quantity of goods and services. . . . The problem is to characterize or describe this minimum quantity of goods and services. No two observers come up with the same quantity, and any quantity selected changes over time.

gathering apparatus and the expertise to deal adequately with the question of what a "fair" contract is.

Because these issues are so unsuited to judicial resolution, the concept of unequal bargaining power, in the sense of an ability to codetermine terms, is likely to be used to rationalize particular results—sales without disclaimers—rather than to reach them. And the cases bear this out: the concept is invoked, not employed.\textsuperscript{19}

Nevertheless, it may not follow, to some, that courts should never do things they can only do badly. However, the philosophic premise which underlies the view that buyers should be able to codetermine terms is itself questionable, and this coupled with the difficulties just noted argues strongly for abandonment.

2. The Philosophic Premise

A cogent statement of why buyers should be able to codetermine terms was recently given by Professor Slawson:

Since so much law is made by standard form it is important that it be made democratically—\textit{i.e.}, in accordance with the desires of the immediate parties to the contract. Private law which is made by contract in the traditional sense is democratic because a traditional contract must be the agreement of both parties. . . . But the overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered.\textsuperscript{20}

\textsuperscript{19} Thus, in Educational Beneficial, Inc. v. Reynolds, 324 N.Y.S.2d 813 (Civ. Ct. 1971), the contracts of a computer programming school provided that it could retain the downpayment, plus seven dollars per hour for lessons scheduled but not necessarily attended if a student dropped the course. In a suit against a student who dropped out, the court struck the retention clause as a penalty. \textit{Id.} at 819. This left the school with a cause of action for services rendered, but the court declined to enforce the rest of the contract. It explained only that the clauses themselves raised a question (which the court made no attempt to answer) as to whether defendant understood the contract, and that the court was "deeply concerned that consumers who are victims of gross inequality of bargaining power should be protected against overreaching by those who would prey on them . . . ." \textit{Id.} at 820. And in Fairfield Lease Corp. v. Pratt, 6 Conn. Cir. 537, 278 A.2d 154 (1971), the court refused enforcement, by an assignee, of an equipment lease which contained an acceleration clause. Citing a New York case which had held these clauses in leases to be penalties, it dismissed the action for the entire rental. Its only explanation of why it refused to enforce the lease for payments due and attorneys' fees was "that the lease agreement is so one-sided as to be unconscionable." \textit{Id.} at ——, 278 A.2d at 156. See also, \textit{e.g.}, Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972); Kosches v. Nichols, 327 N.Y.S.2d 968 (Civ. Ct. 1971); authorities cited note 55 \textit{infra}.

\textsuperscript{20} Slawson, \textit{Standard Form Contracts and Democratic Control of Lawmaking Power}, 84 \textit{Harv. L. Rev.} 529, 530 (1971) [hereinafter cited as Slawson].
One reason, Professor Slawson believes, for the "undemocratic" nature of standard form contracts is that the recipient of the form frequently will not read it. However,

[...]ven the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept.\footnote{Id.}

The democratic analogy is falsely drawn. Individual citizens cannot affect policy directly. In theory, something is done if 51 percent of the people who vote want it done.\footnote{See R. DAHL, A PREFACE TO DEMOCRATIC THEORY 41 (1958).} In practice, it may take more than 51 percent because minorities who feel intensely about a matter may have to be overwhelmingly overridden.\footnote{Cf. id. at 48-49.} At other times, something is done although a majority may not prefer it, because a minority feels intensely enough about a matter to get its way. But it is always true that no matter how democratic a polity may be, a significant number of citizens have to live with policies they dislike. If we regard a relevant product market as a polity, and buyers as the citizenry, democratic theory implies that a contract clause should be stricken only if a majority of buyers dislike it. "Dislike" refers to a choice among realistic alternatives. Buyers prefer no disclaimers, but without disclaimers there will be higher prices. Only if a majority of buyers prefer higher prices to disclaimers, do sellers possess unequal bargaining power. The democratic analogy is therefore inconsistent with the view that individual buyers should be able to codetermine terms.

Moreover, the implication of that analogy, that political decisions more accurately reflect consumer preferences than market decisions, is erroneous, for two reasons. First, it does not necessarily take 51 percent or more of the buyers for a given product to get a particular purchase term or product type. It takes enough buyers so that it will be profitable for one seller to satisfy their needs, or enough buyers so that a seller will distinguish his own buyers according to need. Those who preferred small cars found Volkswagen, and now American companies offer a choice of cars by size, including the smallest. Because it often takes fewer "votes" to achieve a result in the market place than in the political arena, buyers sometimes have a greater chance of making their preferences felt.\footnote{However, voting in the market is affected by income distribution—a rich person has more votes than a poor one—while in political polities all votes are equal.} Sec-
ond, political voting usually is not directed to specific issues, such as disclaimers, because political "decisions must be made simultaneously by a large number of persons . . ."); and only so many decisions can be made at one time. The market decision, which is directed to specific issues, may more accurately reflect buyer preferences.

Finally, if markets accurately reflect aggregate buyer preferences, it is questionable whether courts should be concerned with the lack of bargaining power of particular buyers. Although form contracts are often used, buyers have as much, and often more, say in their contents as they do in determining their political representatives, the policy the state pursues, their collective bargaining representatives, the contents of their collective agreements, or the policies of large corporations. No compelling case has been made that a court should give an informed buyer more say in the contract accompanying his purchase of a washing machine than in his choice of a mayor. Moreover, judicial intervention premised on the perceived powerlessness of given buyers has costs. In the political field, the majority choose representatives, who make policies; in the industrial field, many employees choose representatives, who help choose policies. In the commercial field, the majority choose contracts. When a judge strikes a particular contract clause which one buyer disliked but lacked power to alter, he may be creating a precedent, the result of which may be disliked by a majority of buyers. Judicial intervention, that is, may itself be undemocratic.

The case for having buyers codetermine terms, for subjecting to "special scrutiny" those clauses which individual buyers cannot affect, is therefore weak. It presupposes a view as to how much participation individuals should have in decisions which affect them which differs from the views shaping analogous and significant areas of national life. The questionable philosophic basis of unequal bargaining power, in the sense of one party's inability to codetermine terms, together with the great difficulty of giving it practical content, suggest that courts should only define unequal bargaining power by the second-mentioned approach—that is, sellers possess unequal bargaining power when they operate in markets which are unresponsive to the desires of a majority of buyers. But this use also presents grave problems.

In this sense, political outcomes are more democratic than market ones. But absolute political equality, in the sense of affecting policy, is more theoretical than real: as in markets, the rich and the organized count for more.


26. I later argue that courts should not attempt to do this. See notes 42-45 infra & text accompanying.
SELLER UNEQUAL BARGAINING POWER

Unequal Bargaining Power as Market Unresponsiveness: The Majoritarian View

This view holds that a bargaining imbalance sufficient to justify judicial intervention is shown when sellers are unresponsive to the wants of a majority of buyers. Assuming arguendo the proposition's validity, it nevertheless is irrelevant because buyers in the aggregate do choose the contract clauses of economically powerful sellers just as they choose the clauses which are used in competitive markets. This follows from the fact that prohibiting one manifestation of seller economic power, while ignoring the market structure which produced that power, will yield another manifestation of the power. In no event, however, will the power disappear.

Assume a widget monopolist who disclaims all warranties. Monopolists price, roughly speaking, just below the point at which substitutes become profitable to buyers. Even without regulation, for example, telephone calls would not be $100 each, for at such a price it will too often be less profitable to use the phone than the mails. Let the monopoly price to buyers be $100—more than this buyers will not bear. Assume further that there is a 2 percent chance of any widget being defective and that the only cost of defects is that the widget is made worthless. If the monopolist disclaims, he can at most charge $98.04. The disclaimer imposes the cost of the risk of defects on buyers, and at a 2 percent failure rate, the value of the risk is $1.96 (price times 2 percent); $98.04 plus $1.96 equals $100, the monopoly price.27 If a court strikes the disclaimer, thereby removing the cost of the defect risk from buyers, the monopolist will then have $1.96 of power to exploit. He may raise the price by this amount, or reduce after sale service by enough to approximate this amount, or insist on summary repossessions when buyers default, etc. Therefore the choice, for buyers as well as judges, is not whether seller market power

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27. Regarding the algebra underlying the text's example, let C = total buyer cost; P = sale price; R = the defect risk. If the seller disclaims, buyers must bear the defect risk. Thus C = P + R. The defect risk here is .02P since the value of that risk is the product of the probability that a defect will occur (here 2%) and the cost a defect imposes (here P because we assume the defect renders the product worthless but causes no other harms). Therefore, C = P + .02P. We have assumed that the monopoly cost, above which buyers will not purchase, is $100, and that a monopolistic seller will impose this cost on buyers. We then have C = P + R = P + .02P = $100; 1.02P = $100; P = $98.04; .02P = R = $1.96. The seller can charge no more than $98.04 if he disclaims because a disclaimer shifts the defect risk to buyers. The principle that sellers will impose on buyers the monopoly cost, which is composed of the sales price plus the costs of those risks the sellers shifts, is also employed, in the context of disclaiming liability for negligence in towing barges, in the perceptive Note, Unconscionable Business Contracts: A Doctrine Gone Awry, 70 Yale L.J. 453 (1961).
should be exploited, but which manifestations of seller power to prefer.

Although courts commonly let consumer choices control, they lack respect for consumer sovereignty when powerful sellers are involved.\textsuperscript{28} They should, however, respect it as much. To be sure, buyers who deal with monopolists lack the choice of going elsewhere for better terms, but these buyers may still, in the aggregate, choose the contract clauses which monopolists offer. Those choices are more likely to reflect their own preferences than the choices courts would make for them. The rationale of freedom of contract is that individual preferences are better satisfied by individual choices than by collective ones. Because judicial interventions cannot prevent seller power from manifesting itself, but only change its forms, and because these forms are determined by buyer preferences, there is therefore no more reason for judges to intervene when sellers have market power than when sellers lack it.

It may be argued that consumers, in fact, have no choices at all, that, for example, the waiver of a hearing prior to repossession is simply thrust upon them. This, however, is unlikely. Even monopolists, who represent the paradigm unequal bargaining power case, wish to increase demand. Commercials seeking to expand use of telephones, water and electrical energy are common. If buyers will pay for one set of terms rather than another, they should get the terms they want. Thus I suspect, although without evidence, that many buyers prefer disclaimers to the steps sellers will take if disclaimers are banned. Sellers, moreover, are better able to ascertain such preferences than judges, for it is their business to do so, and they bear the consequences of guessing wrongly.\textsuperscript{29} There is therefore no need for a concept of unequal bargaining power in the majoritarian sense.

There are intellectually respectable, although ultimately unpersuasive, responses to this position. Initially, sellers sometimes mistake buyer preferences. The Ford Motor Company's decision to build Edsels is a notable example. Monopolists, it may be argued, may make more mistakes than others in ascertaining buyer preferences for two reasons. First, monopoly profits may induce sloth, while competitors want to ascertain consumer preferences so as to enhance their market position, or to prevent it from deteriorating because others have better judged buyer desires. The counterargument is that a monopolist may have a greater incentive to ascertain consumer preferences than do competitors, because only he bene-

\textsuperscript{28} See, e.g., notes 55 & 58 infra & cases cited.

SELLER UNEQUAL BARGAINING POWER

fits from the knowledge. Assume that 100 new buyers may be attracted if more desirable warranty coverage is given. A competitor may initially capture them if he first provides the coverage, but he is unlikely to retain them all because rivals will match the new coverage. A monopolist, on the other hand, will keep them all, and may thus be more motivated to see whether consumers want such coverage. Second, ascertaining consumer preferences, it may be thought, is better done if more people are searching. But the tools of search—market surveys, sales forces and the like—seem equally available to monopolists and competitors.

Theory therefore indicates that monopolists are no less likely than competitors to ascertain buyer preferences accurately. The only evidence is in the analogous area regarding the effect of market structure on the propensity to innovate, and this seems inconclusive. However, since many believe that monopolists do have less incentive than competitors to know

32. For good analyses of the theories and evidence see F. Scherer, Industrial Market Structure and Economic Performance 363-77 (1970) [hereinafter cited as Scherer]; McGee, supra note 30 at 102-23. See also R. Posner, Economic Analysis of Law 108 (1972). The theoretical analysis of the relationship between market structure and innovation, however, implies that monopolists may be more responsive to the consumer preferences with which we are concerned than competitors. Competitive markets, in which sellers are numerous, may innovate substantially in "high payoff" areas. Although the innovative firm must share its gains with rivals, those gains could be so high that the share this firm retains will exceed the costs of innovation. Conversely, competitive markets may not innovate when only small gains will result. See Scherer, supra, at 368-69, 375-76. The payoff to inventive activity is a function of the cost saving such activity makes possible and the elasticity of demand for the relevant product. If, for example, a particular invention makes possible slight cost savings, the resultant slight price decreases may result in only a minimal expansion of output, unless demand for the product is especially elastic. Apparently, because monopolists may recover the total gain from inventive activity, a monopolistic industry is said to have a greater incentive to innovate than a competitive one, if both face demand curves of equal elasticity. The incentive is reversed only if the competitive industry's demand elasticity is significantly higher since the greater the elasticity the greater the payoff to inventive activity. Kamien & Schwartz, Market Structure, Elasticity of Demand and Incentive to Invent, 13 J. Law & Econ. 241 (1970). See also Sheng Cheng Hu, On the Incentive to Invent: A Clarificatory Note, 16 J. Law & Econ. 169 (1973). The "price reduction" to buyers from deleting contract clauses they dislike or adding clauses they want is likely to be small, for buyers probably seldom value particular clauses highly. The payoff to "contract innovation" will then also be small, unless demand is particularly elastic. The demand curve facing a competitive industry must thus be much more elastic than one facing a monopolistic industry for competitive sellers to gain a greater payoff from such innovation than the monopolist. Such great variations in demand elasticities intuitively seem uncommon; so that monopolists will ordinarily face greater incentives than competitors to innovate with respect to contract clauses. In the text's terminology, they should be relatively more responsive to buyer preferences. Empirical work relevant to this argument would be useful.
buyer wants, it may be useful to assume the truth of the proposition, and see what follows from it.

Initially, it may be argued that because monopolists may mistake consumer preferences, others can know them better. Sales contracts, for example, may contain a waiver of the right to a hearing prior to repossession. An authoritative decisionmaker could believe that buyers would prefer the absence of the waiver, at additional cost to them, and strike it on the ground that buyers should get the clauses they prefer, and that the monopolist offered the wrong clause because he lacked the incentive to learn the facts. If that decisionmaker is a judge, such decisions should not be made. Courts cannot do survey research to ascertain actual buyer wants, and a judge is less equipped than is a monopolist to guess what those wants are.

Another objection to my analysis may be that courts should be more inclined to pursue their own policy choices in monopolistic markets. When markets accurately reflect buyer preferences, judicial intervention, we have seen, can be undemocratic because the courts’ choices of acceptable clauses may conflict with buyers’ choices. However monopolists, it is now assumed, lack the incentive to know buyer preferences accurately. A court which strikes a monopolist’s clause, then, runs less risk of offending democratic values.

This objection, however, is unsatisfactory on three grounds. First, monopolists have enough incentive to get some clauses right. A judge may find it difficult to know whether a particular term was chosen by buyers or forced upon them. Second, the argument justifies an intellectually respectable mood, but does not provide a standard for concrete cases. To the question whether a contract clause was the product of unequal bargaining power, the argument asserts only that a court should be more inclined to strike it if used by a monopolist. Third, and most significant, it is of little practical importance.

True monopolies are rare, and are often regulated as public utilities when they actually exist. Oligopolies present the more important case. In oligopolistic markets, however, several sellers exist to search out buyer wants, and no one seller has as little incentive as a pure monopolist may be thought to have to find them. Nevertheless, sellers in concentrated markets, it is sometimes said, often achieve supracompetitive prices. It may be argued that courts should be more willing to oversee the contracts

SELLER UNEQUAL BARGAINING POWER

of such sellers than those of competitors. Put another way, unequal bargaining power may exist when sellers behave oligopolistically with respect to a particular subject.

The search for oligopolies, however, raises serious problems. First, few of them exist for the "products" which concern us—credit and sales terms. General Motors, for example, sells in a concentrated market, but if its dealers impose onerous terms in connection with extending credit to purchase GM cars, buyers may make auto loans at banks or sales finance companies. Also, since a warranty is partly an insurance premium against losses, General Motors sells insurance competitively with many others who do or could offer coverage against product failure caused accidents. Few sellers, therefore, are induced by market position to be unresponsive to buyer demands for purchase terms.

Even if a concentrated market in the "products" with which we are concerned is found, ascertaining whether the participants in it behave oligopolistically will cost more than the gain. The gain is an intellectually respectable judicial decision to defer less toward oligopolists' contracts than those of competitive sellers. The costs stem from a court's attempt to ascertain oligopoly behavior from a record which lacks the relevant facts. Records will be sketchy because the costs to the parties of attempting to establish market behavior to the extent needed for sensible decisions will often exceed the gains to them of doing so. This occurs because the existence of oligopoly behavior cannot be inferred from market concentration alone.

An oligopolist is often said to be reluctant to cut prices because his behavior is visible to other market participants and easily copied. A price cut which would expand output will be matched by rivals, with the result that little expansion will take place. Thus, profits will diminish, because each sale brings in less revenue. The price cut will therefore not be made. This theory of behavior has been seriously questioned. Some price cuts can be concealed, particularly if they are in disguised form such as more lenient contract or credit terms. If the price cut can be concealed for a sufficient time, it may produce enough profits to outweigh the costs which will be incurred when other sellers ascertain the facts. Also, the offending seller may be able to raise his price to the prior level when he is discovered, which means that he will be less reluctant to cut initially.

34. The report of the National Commission on Consumer Finance stated that "most markets for consumer credit" are "generally competitive," although it noted some concentration in certain local markets. THE NATIONAL COMMISSION ON CONSUMER FINANCE, REPORT: CONSUMER CREDIT IN THE UNITED STATES 11 (1972) [hereinafter cited as REPORT]. See also id. at 122-23.

35. See, e.g., Approach, supra note 33, at 1563-75.
Price cuts which can be matched may still be made, if they will lure outside buyers into a market and thereby produce additional revenue. Even if price cuts are matched, the initiating party may still profit if he can expand output more quickly than his rivals, and thus temporarily capture his competitors' customers. Finally, the "implicit cooperation" that causes oligopolistic markets to resemble monopolistic ones is difficult to conduct if more than a handful of sellers are present; yet markets with four or less sellers are rare.

We are concerned with competition in the area of sales and credit terms, such as the amount of security sellers may want, the remedies they may exact on default, or the service they will render after sale. It is even more difficult with respect to these matters than with respect to price to infer, from the fact of concentration alone, that a seller will or will not act competitively, and thus has or lacks a strong incentive to ascertain consumer desires. Assume, for example, that a New Jersey finance company alters its contracts so they no longer provide that legal questions will be adjudicated in the courts of one New York county, but instead in the county in which the loan was made. Such a change is less visible than a reduction of interest rates, and fellow oligopolists may be less inclined to attribute declines in their sales to this than to a rate cut. If the new clause is copied, it can then be deleted, which means that sellers are more likely to try it. The question whether a change like this will be followed by others (and therefore not put into use) cannot be answered only by drawing inferences from the fact of market concentration. Instead, a particularized analysis of the actual behavior of market participants is necessary.

Sales cases, however, will then resemble antitrust actions, dragging

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36. J. BAIN, INDUSTRIAL ORGANIZATION 120-21 (2d ed. 1968) [hereinafter cited as BAIN].
38. Professor Bain also shows that the injury to an oligopolist from a rival's price cut is a function of the number of sellers in a market, and decreases rapidly as that number increases. When there are more than five sellers, each having an equal market share, an output expansion of as much as ten percent by one may have only slight effects on others, and thus may not be noticed by them. BAIN, supra note 36, at 115-16. If a seller changes a contract clause, and more than a very few sellers exist, rivals then may seldom feel its effect, which means that market structure should rarely deter such changes. It also seems standard wisdom that oligopolists compete on non-price matters. See, e.g., F. MACHLUP, THE ECONOMICS OF SELLERS' COMPETITION 410, 457-58 (1952).
on for years while enormous masses of data are analyzed.\(^9\) Plainly, though, this will not happen, and as plainly it has not happened, although current doctrine makes the concept of unequal bargaining power relevant. The damages the usual sales case yields, which are not trebled as in anti-trust cases, cannot justify the costs involved.\(^{40}\) Courts in sales cases thus pronounce on the issue of unequal bargaining power in lieu of engaging in economic analysis.\(^{41}\) Moreover, if courts were seriously to seek out oligopoly behavior, the cases would probably be skewed in favor of sellers, because sellers generally have the resources and a greater incentive than buyers to litigate the issue to the hilt. They will want to avoid a finding that they behaved oligopolistically, for that finding may encourage other suits against them. The costs of courts either acting in ignorance or on

\(^{39}\) A recent estimate puts the average length of a private antitrust suit at thirty-seven months. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. Law & Econ. 365, 381 (1970) [hereinafter cited as Study].

\(^{40}\) See 15 U.S.C. § 15 (1970). Counsel fees are also awarded to the successful private plaintiff. *Id.* Moreover, between 1890 and 1963 approximately sixty-two percent of reported private antitrust cases were brought after the government obtained judgments establishing the illegality of the challenged behavior. *Study, supra* note 39, at 381. Such judgments create prima facie cases against private defendants. 15 U.S.C. § 16(a) (1970). That so few private actions are brought without this aid indicates the deterrent effect of the time and cost which seem inevitably to accompany efforts to prove anticompetitive behavior. Cf. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27 (1950).

\(^{41}\) The famous case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), provides an example. In explanation of its decision to strike the standard automobile warranty, the court noted the concentration in the automobile market, and that the major companies used the same contract clause. It then argued:

> Because there is no competition among the motor vehicle manufacturers with respect to the scope of protection guaranteed to the buyer, there is no incentive on their part to stimulate good will in that field of public relations.
>
> Thus, there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold. Since all competitors operate in the same way, the urge to be careful is not so pressing.

*Id.* at 391, 161 A.2d at 87. The year of this decision, the four leading manufacturers raised their warranty coverage from 90 days or 4,000 miles to 12 months or 12,000 miles, whichever came first. Ford also extended its coverage on Lincolns to 24 months or 24,000 miles. Chrysler, whose market share dropped between 1960 and 1962 from 14 percent to 9.6 percent, in 1963 warranted power trains on its cars and light trucks for 5 years or 50,000 miles. It also extensively advertised the warranty, and increased its market share to 12.4 percent. Its competitors soon extended their regular warranties to 24 months or 24,000 miles, thus surpassing Chrysler coverage on nonpower train matters. In August of 1966, Ford, GM and American Motors increased their coverage to 5 years or 50,000 miles, not only on the power train but on steering and suspension components and wheels and wheel bearings. Chrysler quickly matched this. FTC, *Staff Report on Automobile Warranties* 24, 25, 31, Table 65, at 32 (1968). Over the next few years, the companies' coverage gradually decreased, remaining similar (although coverage is greater now than in 1960), but recently American Motors has begun to compete actively on warranties again. A meaningful analysis of the causes underlying the similarity of warranty coverage in 1960 thus may have indicated that it was not the inevitable result of the industry's market structure.
unbalanced records outweigh the intangible gain which ascertaining oligopoly behavior yields.

In summary, the concept of unequal bargaining power in the sense of market responsiveness to buyer wants is also quite weak. Even monopolists will be responsive to the wants of buyers regarding sales and credit terms. Courts should respect the results of these buyer preferences as much as they respect any others. Moreover, although monopolists arguably are somewhat less responsive than competitors to buyer preferences because they may have less incentive to know them, this is of little aid to courts, for it gives them no guidance as to how much more interventionist they should be in monopolistic markets than in others. Finally, since monopolies are rare, courts must decide whether the sellers in a concentrated market will behave oligopolistically in respect of a given subject before deciding whether to be more or less inclined to intervene. However, in sales cases the costs of ascertaining this seem higher than the gains. The better course would be for courts not to use the majoritarian concept of unequal bargaining power at all.

The Appropriate Judicial Role

Courts, then, should not ask whether disfavored clauses were the product of seller bargaining power under either definition of the term. This is an inquiry the judicial process cannot competently make. The remaining question is whether to presume consent to disfavored clauses or presume its absence, when deciding whether to strike these clauses. The former should be done, for three reasons.

First, judicial distaste for form contracts rests on the principle that courts should protect persons from irresponsible exercises of power. Large, private companies, it is believed, impose their will on the mass of buyers without the limitations of the political process. They make law—the law of the transaction—in the same sense legislatures do, but are not responsible to their constituencies in the way legislatures are. Courts should therefore protect buyers from offensive and irresponsibly imposed contract clauses.

This picture is largely false. Buyers in the aggregate have as much say, and possibly more, in the law of the transaction as they do in their political choices. Judicial intervention to protect buyers from the dictatorship or autocracy of sellers is unnecessary. Given this, the question is whether courts should pursue the majoritarian principle in sales law, or should seek to give buyers greater protection than democratic theory re-

42. See notes 24-26 supra & text accompanying.
SELLER UNEQUAL BARGAINING POWER

quires. This is an issue on which reasonable people may differ, but courts are institutions, not people, and they should only pursue principles which society generally accepts. When decisions affect large numbers of people whose interests may conflict, our society generally applies the majoritarian principle. Large numbers of buyers are affected by sales contracts, and different buyers probably want different things in them. Democratic theory implies that buyers should vote, with dollars, for the terms they want, with the terms chosen by the majority controlling. Thus courts should presume assent to contested clauses, for when consent is viewed as an aggregate phenomenon, it is generally present.

At least three other principles bear on this issue. The first is that society should help those who fail to help themselves, because no remediable suffering should exist. Courts should then aid buyers who do not protect themselves against onerous terms. Second, those with power should aid those without it. When buyers lack the resources to control sellers, sellers should act, insofar as possible, in the buyers' interests. If they do not, by imposing onerous terms, courts should step in. Third, society should protect the foolish or careless. Buyers, it is sometimes argued, may consume thoughtlessly because they are bemused by seller claims. Courts should relieve such buyers from the consequences of their own foolishness by striking harsh clauses to which buyers would not have assented had they given the matter thought. These principles imply that

43. Professor Wellington has brilliantly articulated how courts should choose legal principles. He argues:

When dealing with legal principles a court must take a moral point of view. Yet I doubt that one would want to say that a court is entitled or required to assert its moral point of view. Unlike the moral philosopher, the court is required to assert ours. This requirement imposes constraints: Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals, in much the same way that the judicial interpretation of documents (contracts, statutes, constitutions—especially constitutions) must proceed from the document. And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located.

The major difficulty for the official charged with the task of determining how the moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles. He must escape the passion of the moment and achieve an appropriately historical perspective. This entails, among things, disinterested attention to the society's moral ideals.

Common law courts must go . . . slowly. They must be reasonably confident that they draw on conventional morality and screen out contemporary bias, passion and prejudice . . . . Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 244, 248, 251 (1973) (emphasis in original) (footnote omitted).
courts, when confronted with onerous clauses, should give no weight to the fact that buyers purchased under them, unless actual assent—whatever that means—is clearly shown. Such clauses otherwise may be said to be the product of permissible buyer indifference, or a wrongful breach of a seller's duty, or excusable buyer bemusement.

None of these principles, however, seem as generally accepted as the principle of majority rule. That principle imposes on people an obligation to participate in matters which affect them. Moreover, just as workable political democracy is possible although some do not participate, so also is market democracy; those who act exert sufficient pressure on decisionmakers to give substantial protection to those who do not. In any given case, one of these competing principles, many would agree, may outweigh the majoritarian one, and a court may be justified in pursuing it. Consent is not inviolate. But this society has too deeply, and for too long, been committed to the principle of voting and freedom for courts to choose another principle over it for general application. Courts should therefore give the weight which buyer assent generally commands to all contested contract clauses.

A second reason for presuming consent is that many individuals can codetermine terms, in the sense that they can conveniently buy away clauses they dislike. Finally, as Section II will make plain, the state's role respecting economic power cannot be limited to banning the contract clauses of economically powerful sellers, but must entail regulating the business of such sellers. This, we will see, courts cannot do. Courts should therefore assume a posture toward consent which will minimize intervention, particularly if other reasons exist to support a limited judicial role.

If courts do presume assent, some buyers may be bound by "contracts" to which they did not in fact agree. This does not vitiate the analysis. Consent, we have seen, does not necessarily insulate terms from

44. The National Commission on Consumer Finance, for example, concluded that levels of awareness of annual percentage rates between forty and fifty percent were sufficient to foster "viable rate competition among credit grantors."
Not all consumers need be aware of the APR or shop for credit to bring about effective price competition. A significant marginal group of consumers who are aware and do shop is sufficient to "police" the market.
An individual creditor cannot know whether a consumer is "aware" or "unaware". If . . . somewhere between one-third and one-half are aware, and if some portion shop for credit, a credit grantor is likely to offer each prospect a given package of credit terms for the same price.

[Effective competition requires only that some consumers shop to police prices in the general market.]

REPORT, supra note 34, at 176-77 (emphasis in original) (footnotes omitted).
judicial scrutiny. The common law, for example, often refused enforce-
ment to gambling contracts, in part because it preferred the principle
that people should be protected against their own foolishness to the prin-
ciple of freedom. Should a court feel principled distaste for particular
clauses in unusual cases, it can ban them, regardless of buyer assent. Also,
the issue is not whether "a contract," in the traditional sense, has been
made. It is whether a court should alter the terms under which a buyer
purchased. Courts should presume assent to those terms because buyers
in the aggregate probably chose them, and because courts cannot compe-
tently ascertain whether choice was present or absent. The writing which
courts may then enforce will sometimes not be "a contract," as that term
is commonly used. But if sufficient reasons exist for courts to treat it
as one, they should do so.66

II. THE MAJORITARIAN APPROACH AND THE REGULATORY TASK

The definition of unequal bargaining power which focuses on the
ability to codetermine terms permits the same clause to be upheld in one
law suit and stricken in another, for the issue is whether a buyer had
resources enough to purchase fair contracts, and buyer Jones may be
rich, while Smith is poor. A seller who loses one suit, because Smith
was a party, thus may retain the clause because Jones could be a party
next. The majoritarian approach, on the other hand, prohibits a seller who
has once lost to use the offensive clause again. The issue it raises is
whether the seller was responsive to the wants of his buyers in the aggre-
gate. If it is found that he is not, he cannot be permitted to assert the

45. 6A A. Corbin, Contracts §§ 1481, 1483 (1962); 6 S. Williston, A Treatise
on the Law of Contracts § 1668 (2d ed. 1938).

46. Commentators have drawn a distinction between the "dickered" terms of
an agreement, those the buyer and seller specifically negotiate, and the printed
"boilerplate." Courts, it is suggested, should enforce the former but seriously
scrutinize the latter. E.g., Slawson, supra note 20; Llewellyn, Book Review, 52
Harv. L. Rev. 700 (1939); cf. Uniform Commercial Code § 2-313, Comment 1.
This distinction rests on one or both of two premises: (1) boilerplate clauses are
often imposed on buyers without their consent; (2) boilerplate clauses are usually
unread, or if read not understood. My thesis is that in respect of the first premise,
courts should treat dickered and boilerplate clauses alike—consent to both should be
presumed. The second premise raises questions beyond the scope of this article, such
as the duty buyers have, or should have, to read contracts and the relevance of a lack
of information, or of information in obscure forms, to the decision whether contracts
should be enforced. For discussion of these issues, see Defective Products, supra
note 10, 31-39, 45, 54-56.

47. In D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), the Court refused to
hold unconstitutional a cognovit note to which a business party assented although it
entailed a waiver of that party's right to a trial on his defense, but the Court added:
[W]here the contract is one of adhesion, where there is great disparity in
bargaining power, and where the debtor receives nothing for the cognovit note
provision, other legal consequences may ensue.

Id. at 188.
"unresponsive" clause against those of his buyers who were not parties to the initial suit.

Sellers are unresponsive, if at all, because their market position reduces their incentive and ability to ascertain buyer preferences. Yet we have seen that when sellers have power, prohibiting one manifestation of it only produces another. If, for example, waivers of the right to judicial hearings prior to repossession of goods are banned, sellers will raise prices or afford worse post sale service. Banning a contract clause of a seller with market power is often futile. Should the contractual activities of such sellers be of concern, their enterprises must be controlled to ensure their operation in accordance with the policies the public wants.

Courts, however, cannot regulate businesses effectively. Initially, the most efficient way to control the contractual practices of economically powerful parties is to set the terms under which they sell, which is sometimes done in the fire insurance field.\(^{48}\) Alternatively, contract clauses may be submitted for approval before use.\(^{49}\) Courts cannot set the terms of sellers' contracts, nor can they approve those terms in advance. Instead, they are limited to banning particular clauses in individual suits. A number of reasons make such a practice unsatisfactory. First, it is productive of much litigation. There will be, as there now is, case after case, testing clause after clause.\(^{50}\)

Second, the choice is not between a term offensive to public policy and no term, but is between the offensive term and the seller action that will replace it. Therefore, courts should not strike a term unless they prefer it to what will come next. Judges, however, will often be unable to know what will come next. The seller himself may not know, because he may not have thought through his future actions. In addition, predicting a seller's future responses requires a knowledge of his business which many judges lack. They may simply have no information respecting the industry at issue. Also, judicial interventions are episodic, yielding only fragmented views of an industry. The cases too will tend to con-

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49. Israel, for example, affords a five year immunity from judicial action in respect of certain clauses, such as disclaimers, which are submitted to an administrative agency for approval before use. *See Comment, Administrative Regulation of Adhesion Contracts in Israel*, 66 Colum. L. Rev. 1340 (1966). Sweden regulates form contracts by referring adjudication under them to a separate court which resembles an administrative agency, and by having an ombudsman bear the major enforcement burden. This system, however, seems unexportable. *See Sheldon, Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control*, 22 Am. J. Comp. L. 17 (1974).

centrate on the bad features of the clause at bar rather than the structure and characteristics of the seller's industry, and the sums at issue may be insufficient to encourage the parties to extensively develop the relevant facts. The courts are therefore unlikely to be sufficiently informed by the cases which come to them. The judicial task, in sum, is to compare seller responses and choose the preferable one, but the judges are unable to make the requisite comparisons.

Finally, regulation of contract clauses without regulating prices may be insufficient. This is unlikely to be so if judicial action is limited to ensuring what Professor Leff calls procedural fairness, so that the contracts in use will be comprehensible and the requisite disclosures are made. But if many substantive practices are prohibited, seller power will be translated into price. Exploitation of monopoly power through price may be as offensive as exploiting it through sales and credit terms; thus the scope of regulation should extend to price. The judicial process, however, is plainly unsuited to price regulation. That requires an extensive knowledge of the particular seller and his industry, expertise in economics and accounting, and an apparatus to collect, keep and organize data. The inability of courts to act in this way was, of course, recognized long ago, most particularly when it was decided to regulate railroads. The creation of the Interstate Commerce Commission and the state railroad commissions were the inevitable consequence of the decision to control railroad rates and practices. Effective regulation of the contractual practices of economically powerful sellers may, then, require regulation of their prices, but this courts cannot do.

We have already seen the difficulties courts encounter in answering the question whether a particular term was the product of seller unresponsiveness to buyer wants. But even answering this is insufficient, for the businesses of the sellers who impose such disfavored terms may have to be regulated. Banning an offensive clause will help the buyers who as-

51. See Leff, supra note 6, at 487-88.
52. See Frankfurter & Hart, Rate Regulation, in The Crisis of the Regulatory Commissions 1, 2 (P. MacAvoy ed. 1970). Channeling seller power into price may be thought preferable to having it manifested in particular contract clauses because some buyers may more easily perceive the impact of a price term than other terms. However, buyers in the aggregate will then be prevented from structuring the transactions under which they purchase. Poor buyers, for example, could not bear risks in return for lower prices. My main point, however, is that judicial intervention to alter terms may imply intervention to regulate price. Indeed the latter is now being done. See note 58 infra.
53. Should courts pursue the approach to unequal bargaining power which focuses on the inability to codetermine terms, and overturn many clauses, the practical effect may be to cause powerful sellers to abandon clauses which have been judicially stricken. If so, they will replace these clauses with others, thereby presenting courts with the problems just described. I suspect that this will often happen, since a clause which has
sent to it, and that is a gain. But the task of regulating the contracts of sellers with market power is so unlikely to be done well that the net of judicial interventions, analysis indicates, should be negative. 64

III. CURRENT USES OF THE UNEQUAL BARGAINING POWER CONCEPT

My thesis is that courts should abandon the unequal bargaining power concept, but they will probably continue to use it for some time. A discussion of common judicial errors is appropriate because within the constraints of institutional competence courts can do better than they have done. Also, an analysis of the use of the unequal bargaining power concept may illuminate legislative intervention.

Judicial errors are of three kinds. First, unequal bargaining power is relevant only insofar as it produces results inconsistent with the courts' conception of public policy. If, therefore, a particular clause yields results which are not inconsistent with public policy, it should stand. Courts, however, sometimes fail to ask whether a clause actually frustrates a policy at issue, and thus they outlaw more than they should. Second, some clauses may be inconsistent with a desired policy, but seller power failed once may become too risky to stay with, so that either approach to unequal bargaining power may produce situations where regulation is essential but judicially unachievable.

54. Section I of this article expresses no objection to courts' striking contract clauses; it argues only that courts should presume buyer assent to any particular clause. Section II, however, argues that striking the clauses of sellers with "excessive" market power is futile, and this implies that courts should not prohibit such clauses at all. I do not mean to go this far, primarily because that position requires courts to ascertain which sellers have such power and that is too difficult an inquiry, in sales cases, for courts to make. Rather, Section II should be taken only to re-enforce the argument Section I makes; since banning the clauses of powerful sellers probably avails nothing, courts should not select out their contracts for worse treatment than they generally accord; buyer assent should be presumed independently of any seller's market position.

This, of course, leaves the question of the actual grounds on which judicial interventions should be based. A premise implicit in the analysis of Sections I and II is that courts should intervene primarily when buyers lack the information to make rational market choices. A major justification of the free market is that it best enables buyers to satisfy their wants, but when buyers are too uninformed to relate the purchase choices the market offers to their own purchase motivations, they cannot know whether the choices they make will satisfy their wants. Moreover, interventions to cure information gaps are different in kind than interventions to limit structural market power, because the former may make buyers better off. Refer to the illustration at note 27 supra in which, with buyers willing to bear no more than a $100 cost, a monopolist who disclaims can charge only $98.04, because the disclaimer shifts a defect risk valued at $1.96 to buyers. If uninformed buyers erroneously value the defect risk at zero, the seller can disclaim and charge $100. Striking the disclaimer, because buyers are uninformed, will thus reduce buyer cost by the value of the defect risk, since the seller was already charging $100 and, ex hypothesis, cannot raise his price to recover the value of the defect risk, which he now bears. The issue of judicial interventions to cure information gaps, however, is too complex to be fully dealt with here. See notes 10 & 15 supra & authorities cited.
SELLER UNEQUAL BARGAINING POWER

arising from market structure was not responsible for their existence. Courts nevertheless occasionally strike such clauses because of the seller's market power. This prevents them from focusing on the real question, which is why buyers cannot consent to these particular clauses. Third, some courts attempt to limit the use of seller economic power by ensuring that buyer expectations as to the nature of the transaction are protected. It is, of course, important for courts to insist on meaningful disclosure and to protect buyer expectations. Informed buyers in the aggregate can make their preferences felt, and individuals may purchase the absence of offensive clauses. But if one defines the concept of unequal bargaining power as the inability to codetermine terms, and if one believes that sellers will not delete offensive clauses or will do so only for excessive prices, protecting buyer expectations avails nothing. The buyers will know what is happening to them but will be unable to prevent it. In this situation, instead of focusing on buyer expectations, courts should do the only thing they can do, strike the offending clause.

The error of failing to ask whether a clause in fact frustrates a desired policy is illustrated in the judicial treatment of warranty disclaimers. Courts frequently explain their distaste for such disclaimers on the ground that buyers are powerless to alter them; yet it can be shown that seller economic power, assuming informed buyers, will not frustrate the policies courts pursue in respect of allocating the risk of product failure. For example, one such policy is to put the risk of product failure on the party who can avoid it at the least cost. Assume a monopolist, selling widgets to buyers informed of risk costs and the costs to them of avoiding those risks. Assume that the monopoly price is $50 per widget, with a cost to buyers of product failure, including damages, of $100, and a two percent chance that a given item will be defective. The risk of product failure is thus valued at $2. If the seller disclaims, he will charge $48. Assume now that the seller can avoid the risk by spending $1 (to install a safety clip), while the buyer could do so only for $5 (clips cost more bought one at a time, and the buyer must expend time learning how to put them on). The disclaimer should then be stricken, but there will be no need to do so, for the seller will not use one. If the seller bears the risk and spends $1 to avoid it, he can charge $49, making the same unit profit and selling more items at the lower price. If a monopolist disclaims, therefore, it is

because he cannot avoid the risk for less money than can the buyer, and
the disclaimer is then not inconsistent with the policy of putting the risk
on the cheapest cost avoider, because it may be doing precisely that.

To be sure, in the real world some buyers will be unable to value the
risk of product failure, and will guess that it is lower than is in fact the
case. Let buyers in our hypothetical guess that risk costs are zero. The
seller will then charge $50, disclaim, and avoid no defects. This result,
however, does not stem from economic power in the sense used here be-
cause buyers can be similarly uninformed and may similarly undervalue
risks in markets with 1,000 sellers. Most of these sellers will take ad-
vantage of such buyer conduct by shifting risks to buyers, charging higher
prices, and avoiding few defects. The disclaimer problem is thus one of
knowledge, not power; courts should strike disclaimers only when and be-
cause buyers are uninformed. 57

The error of wrongly attributing the existence of a clause to eco-
nomic power and thus failing to focus on what is actually at issue is il-
lustrated by several of the price unconscionability cases. There the con-
tract prices were held unconscionable because they exceeded the goods’
“value” by an impermissible margin. The policy pursued was that buyers
should not pay “excessive” prices for goods. The contract term at issue,
the price, was inconsistent with that policy, as it was excessive. But the
offending term was not the product of seller power. The measure courts
used to ascertain that the price was too high was the “reasonable retail
value” of the goods. 58 If, however, the buyers could have bought the
goods elsewhere for less, the sellers lacked the power to impose the price
term. It may be responded that the buyers did not know that lower prices
could have been paid. Price information, however, differs in an important
respect from information about product quality; it is usually accessible to
buyers who lack expertise, if those buyers are willing to search, while in-
formation as to the statistical incidence of product defects, the costs those
defects could impose and the methods of defect avoidance is today very
difficult to obtain and may take special skill to absorb. 59 Thus the courts,
in these price unconscionability cases, were in fact deciding that buyers

57. I elsewhere show that the other policies courts pursue in respect of warranty
liability, avoiding loss concentrations on buyers and allowing the parties to allocate
risks freely, can also be achieved irrespective of seller power, if buyers are informed.
See Defective Products, supra note 10, at 42-44.
See also Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Jones v. Star Credit
59. See Defective Products, supra note 10, at 11-18.
need not protect themselves from unfavorable price terms by taking steps which are apparently well within their competence. Unequal bargaining power, although referred to in the decisions, had nothing to do with them. But if that is so, the question is why buyers need not protect themselves with respect to price, when the courts let them agree to many other unfavorable terms. The question may not be unanswerable, but it is the one the opinions fail to pursue.60

The errors of failing to ask whether a clause in fact frustrates public policy and of attempting to cure problems of economic power by protecting buyer expectations are well illustrated in Professor Kessler’s seminal article on contracts of adhesion.61 He there dealt with the question of where loss should fall when a potential insured applied for a policy, the company delayed in acting on the application, and the loss occurred in the interim. Professor Kessler argued that the company should bear the loss because potential insureds expect them to:

In dealing with standardized contracts courts have to determine what the weaker party could legitimately expect by way of services according to the enterpriser’s "calling," and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.62

Should courts so hold, Kessler recognized that the companies would insist on stipulations that they would not be liable for losses occurring in the period between the making of an application and action on it, and such clauses, he felt, should not be enforced.63 If, however, the real problem were that potential insureds were lulled into taking no precautions by the belief that they were insured, nonliability stipulations would resolve it, by communicating the absence of coverage. Potential insureds could then

60. Certain of the cases may attempt to supplement usury statutes. When lawful interest rates are too low to make credit extensions to risky buyers profitable, sellers sometimes bury interest charges in the cash price charged these buyers, making that price higher than the prices on comparable items sold to low risk buyers. See, e.g., REPORT, supra note 34 at 105-06. Striking the high price may help ensure that statutory rate ceilings are not exceeded. See P. SCHRAG, CASES AND MATERIALS ON CONSUMER PROTECTION 1060-61 (2d ed. 1973). However, the failure of the opinions to focus on the question why buyers cannot consent to the high price may explain why the courts did not explicitly ask whether the prices at bar were inflated by hidden credit charges, or whether it is wise to supplement usury laws by probing cash prices. The difficulty of doing the latter, as well as the shaky philosophic basis of usury laws, argue against the effort. Cf. Note, Unconscionable Sales Prices, 20 Me. L. Rev. 159 (1968).


62. Id. at 637 (footnote omitted). See also id. at 636-37 & n.25, 639.

63. Id. at 639.
purchase interim insurance. These stipulations, in short, would actually achieve rather than impede the policy of avoiding noncoverage due to ignorance. Kessler may have felt, though, that the companies would not sell interim coverage and this would frustrate a different policy—avoiding any uninsured losses, whether due to ignorance or otherwise. If, however, the clause disclaiming coverage and the refusal to sell coverage are the product of unequal bargaining power, protecting the potential insureds' expectations avails nothing. The insureds will expect and obtain no coverage, and the desire to have them covered remains unsatisfied. The appropriate remedy is to ban disclaimers and require sale of the insurance at reasonable rates.

If courts continue to use the unequal bargaining power concept they will thus profit from a better understanding of the relevance of seller economic power. The principal lesson, moreover, is particularity: courts must focus on the particular policies they want realized in the contexts of the particular case at bar, and ask (1) whether the achievement of those policies has in fact been impeded by the particular manifestations of seller economic power complained of; and (2) if the seller has market power, whether striking the clause at bar will yield a better or worse one as the result. General approaches which focus on such things as the "contract of adhesion" or "unconscionability" simply obscure the issues. But much the better course is to avoid the subject altogether.

CONCLUSION

The unequal bargaining power concept should be abandoned. In its place, courts should presume buyer consent to any contract clauses at issue; and then ask whether those clauses are consistent with the courts' notions of public policy, and if not, whether buyer consent should render them immune to judicial attack. Courts should so act because they cannot competently resolve the central question posed by the unequal bargaining power concept, which is whether a particular clause was the product of seller power or buyer choice. Moreover, presuming buyer consent is more consistent with reality than presuming its absence; for buyers in the aggregate generally do choose the clauses sellers use, and it is buyers in the aggregate which should be the judicial frame of reference. Finally, presuming buyer consent conduces to less judicial intervention than a contrary presumption. As courts cannot regulate private

65. Courts of course cannot order insurance to be sold at all, let alone at reasonable rates, which is another reason for them to avoid the problem.
SELLER UNEQUAL BARGAINING POWER

centers of economic power well, a rule which requires less regulation is preferable.66

None of what I have written should be taken to mean that seller economic power does not pose problems of legitimate public concern, or that monopolies should be ignored, or that the lot of all consumer buyers is enviable. My point only is that these are problems which courts deciding sales cases cannot resolve. It is thus appropriate to conclude by recalling what may be the most famous and is certainly the best article on the relevance of economic power to private law, Professor Dawson's Economic Duress—An Essay in Perspective.67 Professor Dawson there said:

It is evident that courts have neither the equipment nor the materials for resolving the basic conflicts of modern society over the distribution of the social product and the limits to be set to the use, or misuse, of economic power. The issues involved in these conflicts must be reserved, for the most part, for decision by other means. The limited range of judicial action makes it no less important, however, that the issues raised in private litigation be correctly identified and placed in proper perspective.68

Professor Dawson treated restitution problems, and he assumed that courts would at most concern themselves with ordering restored those "excessive and unjustified gains that are directly traceable to disparity in bargaining power." He concluded his analysis by cautioning:

This assumption does not involve any expectation that the methods of private litigation will be used to overhaul the immense range of transactions involving the sale or exchange of goods and services in a competitive society. The factors that

66. Minimizing judicial interventions in sales cases is not to ignore the problems which seller market power poses. The antitrust laws are explicitly devoted to preventing and restraining monopoly power. Consumer protection statutes are now frequently passed. See, e.g., Uniform Consumer Credit Code; Wisconsin Consumer Act, Wis. Stat. Ann. §§ 421-27 (Spec. Pamphlet 1973); Willier, Need for Preservation of Buyers' Defenses—State Statutes Reviewed, 5 U.C.C.L.J. 122 (1972). And administrative agencies, such as the Federal Trade Commission, have recently been devoting much time to consumer problems. Cf. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 94 S. Ct. 1475 (1974).
68. Id. at 289.
lead to judicial abstention are themselves basic; but it is time that they be examined.\textsuperscript{69}

Those factors are not only "basic" but compelling. The courts should stay out.

\textsuperscript{69} Id. at 290.