

# THE INCOHERENT ROLE OF BARGAINING POWER IN CONTRACT LAW

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Most first-year law students quickly learn that the concept of superior bargaining power plays a critical role in contract law. Unequal bargaining power is a precondition for a contract of adhesion and a requirement of unconscionability.<sup>1</sup> Cases involving questions of public policy often rest in part on the view that large disparities in bargaining power yield contracts that are socially unacceptable. Standard-form contracts regularly raise suspicion about whether a powerful drafter is taking unfair advantage of weaker consumers by presenting its forms on a take-it-or-leave-it basis.

The intuition behind the law's mistrust of unequal bargaining power is simple to grasp. Whenever the powerful can dictate terms to the weak, they will take unfair advantage of them, making the resultant contract a "bargain" in name only. Usually the powerful are corporations, whose wealth and power dwarf those of their counterparties, who are typically consumers of limited means and limited experience with the contracting process. Contracts formed under these circumstances strike many as not only intuitively unfair but also as a problem that merits judicial resolution. On this view, courts should refuse to enforce contracts or terms that result from large interparty power disparities.

The standard first-year curriculum develops and reinforces this view. Well-known cases devoted to teaching other building blocks of contract law, such as *Batsakis v. Demotsis*<sup>2</sup> and *Alaska Packers' Ass'n v. Domenico*,<sup>3</sup> are often viewed as most interesting for what they say about the hardships imposed by unequal bargaining power. Other equally well-known decisions, such as *Broemmer v. Abortion Services of Phoenix*,<sup>4</sup> discuss and employ the bargaining-power

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1. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 123–24 (Ct. App. 1982).

2. 226 S.W.2d 673 (Tex. App. 1949).

3. 117 F. 99 (9th Cir. 1902).

4. 840 P.2d 1013 (Ariz. 1992).

concept more directly. Through these cases and others, students learn that judicial views about the relative bargaining power of contracting parties can exert a powerful influence on the determination of disputed cases.

Contracts scholars have been writing about the untoward effects of superior bargaining power for almost seventy years. Luminaries, such as Friedrich Kessler, have developed important constructs—"contracts of adhesion" in his case—to describe and critique take-it-or-leave-it form contracts imposed on weaker parties by stronger ones.<sup>5</sup> More recently, academic symposia have focused on ways to restrict or mitigate the consequences of superior power.<sup>6</sup> Other scholarship advocates the redesign of default rules pertaining to the application of the "hypothetical bargain" model so as to recognize that power imbalances would naturally and inevitably affect the outcome of that bargain.<sup>7</sup>

For a concept so often invoked and so frequently analyzed, superior bargaining power has gone oddly undefined in judicial opinions, contracts casebooks, and scholarly literature. Though its importance is well-recognized, its meaning is obscure.<sup>8</sup> The few judges and authors who have acknowledged the need to define superior bargaining power have identified an assortment of arguably relevant components, but they have not specified which might matter most, how important any one factor might be, or what to do when individual factors conflict.<sup>9</sup> They have sometimes equated bargaining power with the unavailability of alternative

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5. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); see also Karl Llewellyn, Book Note, 52 HARV. L. REV. 700, 703 (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1939)).

6. See, e.g., Daniel D. Barnhizer, *Foreword: Power, Inequality, and the Bargain: The Role of Bargaining Power in the Law of Contract—Symposium Introduction*, 2006 MICH. ST. L. REV. 841, 841–42 (2006).

7. See, e.g., Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 429 (2009) (arguing that contractual gaps should be filled with the terms that would be preferred by the party with the greater bargaining power) [hereinafter Ben-Shahar, *A Bargaining Power Theory*]; Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 905–06 (2011) (discussing the viability of a rule that would minimally reform contracts that are found to have unfair terms so that they contain the minimally tolerable term for the weaker party) [hereinafter Ben-Shahar, *Fixing Unfair Contracts*].

8. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 24 (1986) (describing bargaining power as a "notoriously slippery" concept); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 101–04 (3d ed. 1986) (questioning whether the bargaining-power concept is "even meaningful").

9. See *infra* Parts I & II.

counterparties,<sup>10</sup> sometimes with the status or organizational form of the “powerful” and the “weak,”<sup>11</sup> and sometimes with the parties’ actual or presumed wealth.<sup>12</sup> But none have ever formulated, nor attempted to formulate, a coherent definition of the term.

While the meaning of bargaining power has been assumed rather than defined, the meaning of the term’s modifier—most commonly, “superior”<sup>13</sup>—has been ignored. The concept of bargaining power, as developed in the courts and commentary, rests not on a simple inequality of interparty power, but on a “grossly disproportionate” mismatch.<sup>14</sup> Descriptors such as “superior,”<sup>15</sup> “overwhelming,”<sup>16</sup> and “substantial,”<sup>17</sup> among others, suggest the nature of the disparity that animates the application of the doctrine.<sup>18</sup> The use of those adjectives, however, rests inevitably on the idea that power disparities are susceptible to measurement and comparison. Without a means of measurement, courts cannot objectively determine when an unacceptable power imbalance is present. No judicial or scholarly discussion of bargaining power, however, has suggested a coherent method—or any method for that matter—for identifying and assessing this critical fact.

These definitional voids are not the only problem with the bargaining-power construct. Unlike other contract doctrines, which prohibit socially undesirable conduct across all transactions,<sup>19</sup> the bargaining-power concept divides contracts into two categories: those involving “substantial” power discrepancies between the

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10. See, e.g., *Spears v. Ass’n Ill. Elec. Coops.*, 986 N.E.2d 216, 223 (Ill. App. Ct. 2013); *Barber v. E. Karting Co.*, 673 A.2d 744, 757 (Md. Ct. Spec. App. 1996).

11. See, e.g., *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 201–02 (3d Cir. 2010).

12. See, e.g., *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 267 (Sup. Ct. 1969); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 169 (Wis. 2006).

13. See, e.g., *Fluor W., Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35, 39 (5th Cir. 1971); *Peng v. First Republic Bank*, 162 Cal. Rptr. 3d 545, 550 (Ct. App. 2013); *Hinely v. Fla. Motorcycle Training, Inc.*, 70 So. 3d 620, 624–25 (Fla. Dist. Ct. App. 2011).

14. See, e.g., *Elliott & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 325–26 (3d Cir. 2006).

15. See, e.g., *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983 (9th Cir. 2007).

16. See, e.g., *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1284 (9th Cir. 2006).

17. See *L & R Realty v. Conn. Nat’l Bank*, 715 A.2d 748, 755 (Conn. 1998); *Garrison v. Combined Fitness Ctr., Ltd.*, 559 N.E.2d 187, 189 (Ill. App. Ct. 1990).

18. See *Cumberland Valley Contractors v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 651 (Ky. 2007) (noting the “significant disparity” in bargaining power).

19. See *L & R Realty*, 715 A.2d at 754–55 (discussing that a jury trial waiver is enforceable unless there is some form of substantial disparity in bargaining power).

parties and those involving the possession of roughly equal power between the parties.<sup>20</sup> Only contracts falling into the former category are subject to further scrutiny, even when contracts in the latter contain equally objectionable (and perhaps identical) terms.<sup>21</sup> The bargaining-power doctrine is unique in promoting the differential treatment of contracts whose terms are alike but whose signatories differ.<sup>22</sup> Contract law, and general notions of fairness, would normally favor treating similar contracts similarly. The bargaining-power doctrine is therefore ultimately and unfortunately exceptional, affording different treatment to similar contracts solely on the basis that some arose from the use of an unspecified, and unspecifiable, power imbalance between the relevant parties.

Taken together, these flaws constitute an implicit admission that the bargaining power construct is too plastic to serve contract law well. Any legal doctrine whose most basic terms remain undefined is apt to produce confusion, uncertainty, and unfairness. The bargaining-power doctrine has produced all three. Moreover, these problems will endure for as long as the concept continues to occupy a role in contract law. There is no way to define substantial bargaining-power usefully, no workable proxy for identifying the "powerful," no good justification for preventing the "strong" from contracting on terms available to the "weaker," and thus no way to justify the continued use of the construct.

These problems might be daunting if contract law needed the bargaining power doctrine to police certain objectionable contracts effectively. But, as mentioned above, it does not. Bargaining power serves no useful role in contract law. It performs no analytical work that cannot be accomplished through other doctrines. Its unique role is to import a form of unexplained and inexplicable unfairness into the law. It is, for this reason, completely replaceable. And because it cannot be helpfully reformed or rehabilitated, it should be eliminated.

Part I of this Article provides an introduction to the concept of bargaining power and offers a review of the case law in which superior bargaining power has played a central role. It demonstrates the wide array of approaches taken by courts in explaining and applying the concept, as well as the contexts in which they have used the concept as an explanatory device. This review reveals the absence of judicial consensus on the meaning of bargaining power and suggests that courts use the term as an entry point for the discussion of concerns not clearly related to the concept

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20. *Cumberland Valley Contractors*, 238 S.W.3d at 650–51 (focusing on the parties' bargaining power in deciding whether or not to invalidate an exculpatory clause).

21. *Daley v. People's Bldg. Loan & Sav. Ass'n*, 59 N.E. 452, 453 (Mass. 1901) (holding an agreement valid due to the parties' equal bargaining power).

22. *Id.*

of power or its misuse. Part II describes the academic literature focusing on bargaining power, paying particular attention to the lack of a shared notion of what bargaining-power means. Part III analyzes the term superior bargaining power, demonstrating its incoherence and the impossibility of measuring and comparing relative degrees of interparty power. Part IV discusses possible alternatives to the bargaining power construct, some doctrinal, others legislative and regulatory. It suggests that all are superior to the continued use of bargaining power and that it would be better still to eliminate bargaining power as a factor in contractual analysis.

### I. BARGAINING POWER AND CONTRACT LAW

Since the middle of the twentieth century, courts have viewed disparities between the bargaining power of contracting parties as relevant to the enforceability of the parties' contracts. Historical accounts of the judiciary's adoption of this view have portrayed it as a single event, a collective decision by like-minded judges to import the notion of unequal bargaining power into the analysis of contract enforceability.<sup>23</sup> A careful review of this development, however, reveals the inaccuracy of those accounts. Courts did not agree then, and still have not agreed, on a uniform view about the meaning of bargaining power or the role it should play in contract law.

The judiciary's approach to bargaining-power issues has instead been haphazard, unconsidered, and incoherent. While a weak consensus has developed around the idea that contracts resulting from large disparities in bargaining power merit additional scrutiny,<sup>24</sup> little else has been accepted as a constitutive part of the doctrine. The following subpart provides a brief overview of this history. It proceeds by discussing how judges have sought to answer four questions: (1) what is bargaining power; (2) why is it relevant to contract law; (3) how might one identify objectionable power disparities; and (4) what effect should those disparities have on the enforceability of contracts resulting from their exercise?

#### A. *Bargaining Power: The Definitional Dilemma*

One of the most peculiar and troubling aspects of the judiciary's analysis of bargaining power is that the basic characteristics of the concept—its definition and the relationship between contract enforceability and bargaining power—are weakly specified. Hundreds of decisions discuss bargaining power, but not one provides a robust description of the term. Only a handful even

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23. See, e.g., Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 194–98 (2005); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 89–90 (2006).

24. Barnhizer, *supra* note 23, at 237.

attempt to explain why the parties' bargaining power should affect the enforceability of their contract.

In the standard opinion, the analysis of bargaining power consists entirely of an assertion that the parties' power bears on the enforceability of their contract and a cursory examination into whether a significant power disparity existed between the parties.<sup>25</sup> Any additional discussion centers on whether qualities that the court considers to be indicia of bargaining-power disparities appeared in the challenged transaction.<sup>26</sup> There is no analysis of what bargaining power means or how superior bargaining power might be measured.

One might interpret the courts' failure to define bargaining power as an indication that the concept is too elementary to require explanation. But even if one assumes that the presence of bargaining power is self-evident, there are still important questions to address: how much bargaining power suffices to make an imbalance legally significant; how is that increment best measured; and how much and what kind of judicial intervention might correct the imbalance? Courts have fallen short on these fronts too, with only a few decisions discussing the relationship between bargaining power disparities and contract validity. Collectively, they express an intuitive view—that severe disparities in bargaining power preclude contract formation by undermining the weaker party's ability to consent meaningfully to the transaction<sup>27</sup>—which is unadorned by definition or specificity.

In the earliest decision to express a connection between bargaining power disparities and consent, *Holden v. Hardy*,<sup>28</sup> the Supreme Court of the United States upheld a state law limiting the number of hours that employees could be required to work.<sup>29</sup> While the case did not directly raise a question of contract enforceability, the Court's opinion suggested that consent-impairment issues could

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25. See, e.g., *Berry Plastics Corp. v. Protecto Wrap Co.*, No. 3:12-cv-73-RLY-WGH, 2013 WL 772871, at \*10–11 (S.D. Ind. Feb. 28, 2013) (holding that no significant disparity in bargaining power existed between the parties and therefore the contract was freely negotiated); *James v. Whirlpool Corp.*, 806 F. Supp. 835, 841 (E.D. Mo. 1992) (holding a contract enforceable notwithstanding unequal bargaining power because the contractual terms were reasonable and not oppressive); *Fischer v. Gen. Elec. Hotpoint*, 438 N.Y.S.2d 690, 690–91 (Dist. Ct. 1981) (holding that a court can refuse to enforce an unconscionable contract where one party used disparity in bargaining power to obtain unreasonably favorable terms for itself).

26. See, e.g., *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 324 (6th Cir. 1998); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925–27 (Minn. 1982); *Cross v. Carnes*, 724 N.E.2d 828, 837 (Ohio Ct. App. 1998).

27. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) (asking whether the weaker party was in effect presented a transaction on a "take-it-or-leave-it" basis).

28. 169 U.S. 366 (1898).

29. *Id.* at 398.

arise where systemic inequality of bargaining power characterized the relationship between the parties.<sup>30</sup> In particular, the Court regarded the parties' relationship as unbalanced because the employees' fear of termination meant that "the proprietors lay down the rules, and the laborers are practically constrained to obey them."<sup>31</sup>

Similar concerns arose over seventy years later in the famous case of *Williams v. Walker-Thomas Furniture Co.*,<sup>32</sup> which concerned the enforceability of a credit agreement between a furniture retailer and a low-income customer with limited education.<sup>33</sup> Affirming the lower court's conclusion that the complaint sufficiently alleged that the contract was unconscionable, the appellate court stated that "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."<sup>34</sup>

Modern cases have built upon the idea that a contract formed in the presence of a large disparity in bargaining power may be invalid due to the lack of effective consent by the weaker party. In a recent case concerning the validity of an exculpatory agreement that a ski resort required season pass holders to sign, a state supreme court reiterated the principles articulated by older decisions, holding that "[w]here there is a disparity in bargaining power, the plaintiff may not be deemed to have freely chosen to enter into the contract."<sup>35</sup> In another, a state trial court applied the nearly forty-year-old rule set forth in *Williams*, concluding that a contract is unenforceable "when a party of little bargaining power" agrees to it "without discussion and with no opportunity . . . to participate in the wording of the contract terms."<sup>36</sup>

The belief that bargaining power can vitiate consent, and thus affect contract enforceability, continues to animate contract law.

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30. *Id.* at 390.

31. *Id.* at 397.

32. 350 F.2d 445 (D.C. Cir. 1965).

33. *Id.* at 447.

34. *Id.* at 449. Interestingly, though a number of reasons suggest themselves, it is unclear from the opinion exactly why the court regarded Mrs. Williams as "a party of little bargaining power." *See id.* The court noted that Mrs. Williams was (a) a consumer, who was (b) poor, (c) of limited education, and (d) faced with a standard form contract, whose terms—and especially the dreaded cross-collateralization clause—were very difficult to understand. *See id.* The qualities that courts have considered relevant to bargaining power are discussed further *infra* Subpart I.B. *See also* *Diamond Hous. Corp. v. Robinson*, 257 A.2d 492, 493 (D.C. 1969) (affirming a fact finder's determination that there was an "absence of meaningful choice" because of appellee's unequal bargaining position and her ignorance of the meaning of the lease provisions").

35. *McGrath v. SNH Dev., Inc.*, 969 A.2d 392, 397 (N.H. 2009).

36. *Knudsen v. Lax*, 842 N.Y.S.2d 341, 347 (Cnty. Ct. 2007).

Despite its continued appeal, however, the bargaining-power construct has never developed beyond a simple expression, a broad judicial view of unfairness writ large. As the next subpart shows, this lack of doctrinal detail has led to a bargaining-power jurisprudence composed of decisions that are disparate, ad hoc, and impossible to reconcile with one another.

### *B. Judicial Approaches to Identifying Unacceptable Forms of Bargaining Power*

The absence of robust descriptive accounts of bargaining power and its connection to contract formation has not discouraged courts from embracing the idea that unequal bargaining power should influence the enforceability of contracts. But other aspects have disrupted jurisprudential consensus. For example, courts have failed to agree on how to identify bargaining power, how to measure differences between the relative power of contracting parties, and how much difference is required in order for the disparity to acquire legal significance.<sup>37</sup>

Not only has the judiciary failed to agree on the proper criteria for bargaining-power determinations, but some courts have also ignored the factors announced in their earlier cases in favor of novel approaches of their own devising.<sup>38</sup> Even when judges have seemingly agreed on the relevance of certain criteria, differences in interpretation and application have undermined doctrinal uniformity.<sup>39</sup>

The current, jumbled state of affairs offers three separate categorical approaches for identifying significant bargaining-power disparities. Two of these focus on the contracting process: the “availability of alternatives” and “negotiability” criteria.<sup>40</sup> The third—“social stereotyping”—looks at certain characteristics of the contracting parties.<sup>41</sup> While courts sometimes rely exclusively on

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37. See Barnhizer, *supra* note 23, at 149–50 (“[T]here are no generally accepted standards for appraising whether disparities of bargaining power unduly affect a transaction.”).

38. Compare *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) (refusing to consider the availability of alternative contracts), with *Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 556 (Ct. App. 2006) (looking at the availability of alternatives when assessing bargaining power). See also *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 985 (9th Cir. 2007) (reviewing the disagreement among California state courts); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925 (Minn. 1982) (indicating that Wisconsin courts should look at the availability of alternative transactions); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 165–66 (Wis. 2006) (stating that Wisconsin courts should look at the parties’ social characteristics and the negotiability of the contract).

39. See discussion *infra* Subparts I.B.1–I.B.3.

40. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 324 (6th Cir. 1998).

41. *Wis. Auto Title Loans*, 714 N.W.2d at 165–66.

one criterion for determining whether a disparity of bargaining power exists,<sup>42</sup> more often they consider multiple types of evidence.<sup>43</sup> Indeed, the prevailing tests in many jurisdictions require judges to weigh factors related to each approach.<sup>44</sup> None of these tests, however, can reliably identify the presence of bargaining-power disparities, nor do they include a valid method for measuring bargaining power.

### 1. *The Availability of Alternatives Test*

Many courts analyzing bargaining-power disparities look primarily to whether, at the time of contracting, a party could have procured a similar contract from another entity. For instance, a court might ask whether a consumer seeking to invalidate a provision in a contract with her gym was able, *ex ante*, to obtain similar services, but without that provision, from a different gym.<sup>45</sup> This inquiry embodies the view that parties need to be able to credibly threaten to take their business elsewhere to have any bargaining power.

Several jurisdictions have embraced the availability-of-alternatives test. They have identified three types of situations in which objectionable power disparities are apt to be present: (1) when one party has a monopoly over the relevant good or service, (2) when logistical difficulties severely limit consumer choice, and (3) when the market does not provide the consumer an opportunity to obtain the good or service without agreeing to a particularly onerous contractual term.<sup>46</sup> In these situations, courts have held that the lack of alternatives makes individuals so weak that they “may not

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42. See *Andersons, Inc.*, 166 F.3d at 324 (applying Michigan law and focusing on “(1) whether the relatively weaker party had an alternative source with which it could contract, and (2) whether the contract term in question was in fact negotiable”).

43. *Cross v. Carnes*, 724 N.E.2d 828, 837 (Ohio Ct. App. 1998); see also *Vistein v. Am. Registry of Radiologic Technologists*, 342 F. App’x 113, 122 (6th Cir. 2009); *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1018 (6th Cir. 2006).

44. See, e.g., *Wis. Auto Title Loans*, 714 N.W.2d at 165–66 (stating that courts should look at the parties’ social characteristics and the negotiability of the contract).

45. See, e.g., *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925 (Minn. 1982).

46. See, e.g., *Barnes v. N.H. Karting Ass’n*, 509 A.2d 151, 154 (N.H. 1986) (“[A] disparity in bargaining power may arise from the defendant’s monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by all those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause; or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms.”); see also *Spears v. Ass’n Ill. Elec. Coops.*, 986 N.E.2d 216, 223 (Ill. App. Ct. 2013); *Hamer v. City Segway Tours of Chi., LLC*, 930 N.E.2d 578, 581–82 (Ill. App. Ct. 2010); *Barber v. E. Karting Co.*, 673 A.2d 744, 756–57 (Md. Ct. Spec. App. 1996).

be deemed to have freely chosen to enter into the contract” and refuse to enforce the deal.<sup>47</sup>

Courts have struggled to apply these criteria coherently. Their primary difficulty arises from the need to distinguish between choices sufficiently similar to count as substitutes, on the one hand, and those too different to constitute realistic alternatives, on the other. The impossibility of generalizing across different types of transactions and the resultant need to identify a “viable alternative” on an ad hoc, case-by-case basis have created problems for courts and litigants alike. The inability of courts to develop an objective test for power has led to conflicting precedents on basic doctrinal issues, such as the degree of extra cost or diminished function required to disqualify a possible alternative,<sup>48</sup> and whether the urgency of a party’s need should bear on whether something counts as an alternative.<sup>49</sup> For litigants and arguably powerful firms, the application of these tests inevitably turns on case-specific factual contingencies, making outcomes very difficult to predict and rendering advanced planning useless.

## 2. *The Negotiability Test*

A second criterion for identifying disparities in bargaining power asks whether the terms of the impugned contract were negotiable.<sup>50</sup> Courts have found bargaining-power infirmities when one party could not have persuaded the other to modify the terms of the deal.<sup>51</sup> More specifically, they have found a significant disparity in bargaining power when one party has presented a contract to the

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47. *N.H. Karting Ass’n*, 508 A.2d at 154.

48. *Anderson v. Ashby*, 873 So. 2d 168, 176–77 (Ala. 2003) (finding that a loan contract’s arbitration provision was procedurally unconscionable based on plaintiff’s evidence that nearly all of the region’s lenders also included arbitration provisions in their loans); *Allen v. Mich. Bell Tel. Co.*, 171 N.W.2d 689, 693 (Mich. Ct. App. 1969) (finding that a lack of available alternatives for yellow page advertising and an exculpatory clause in the contract made the contract unenforceable).

49. *Compare* *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 575 (App. Div. 1998) (striking an arbitration term as unconscionable without considering the necessity of the contract), *with* *Myers v. Lutsen Mountains Corp.*, 587 F.3d 891, 895–97 (8th Cir. 2009) (finding a liability waiver clause enforceable because of the nonessential nature of the subject matter of the contract), *and* *Ransburg v. Richards*, 770 N.E.2d 393, 402 (Ind. App. Ct. 2002) (holding an exculpatory clause contrary to public policy insofar as it sought to immunize a landlord against damages caused by her negligence), *and* *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789–90 (Minn. 2005) (invalidating an exculpatory clause due to the essential nature of the service provided under the contract).

50. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003).

51. *See, e.g., Tillman v. Comm. Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008).

other without affording it a meaningful opportunity to negotiate the contract's terms.<sup>52</sup>

Deciding whether a party possessed "enough" bargaining power to enable it to negotiate terms has proven difficult. By the time courts are brought into a contractual relationship, negotiations have long since concluded. Recreating, or reimagining, the parties' negotiating tactics and options is impossibly difficult. Consequently, judges have struggled to identify a workable method for determining retrospectively whether the terms of a contract were open to negotiation. Some courts have focused on whether one party was wholly responsible for writing the contract or whether the contract was set out on a preprinted form.<sup>53</sup> Other courts have considered whether the weaker party successfully negotiated different terms<sup>54</sup> or attempted to determine whether it could have done so if it had tried.<sup>55</sup>

As with the availability-of-alternatives criterion, courts applying the negotiability test have reached outcomes that are inconsistent with one another. While most decisions conclude that a negotiability problem does not arise when the weaker party has successfully bargained for any of the contract's terms, a few have held that a problem can exist even when a weak party has negotiated the modification of a term.<sup>56</sup> Courts have also split over whether a contract was not negotiable when the complaining party did not bargain for different terms. Some have required the weaker party to prove that it attempted to bargain, while others have found that proof of an attempt is unnecessary when other evidence shows that the attempt would have failed.<sup>57</sup>

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52. *Ingle*, 328 F.3d at 1172; *Cleveland v. Oracle Corp.*, No. C 06-7826 MHP, 2007 WL 915414, at \*8 (N.D. Cal. Mar. 23, 2007).

53. *See, e.g., Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 381–82 (9th Cir. 1984) (pre-printed form); *Goodridge v. KDF Auto. Grp., Inc.*, 147 Cal. Rptr. 3d 16, 27–28 (Ct. App. 2012) (contract presented for signature on a "take-it-or-leave-it" basis); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 924–25 (N.D. 2005) (pre-printed form).

54. *See Meijer v. Thompson*, 655 F. Supp. 2d 607, 613 (E.D. Va. 2009); *Stirlen v. Supercuts, Inc.*, 60 Cal Rptr. 2d 138, 146 (Ct. App. 1997); *Ellis v. McKinnon Broad. Co.*, 23 Cal. Rptr. 2d 80, 83–85 (Ct. App. 1993); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 133–34 (Tex. 2004).

55. *See St. Jude Med., S.C., Inc. v. Biosense Webster, Inc.*, No. 12-621 ADM/AJB, 2012 WL 1576141, at \*4 (D. Minn. May 4, 2012); *Brandt v. MillerCoors, LLC*, 993 N.E.2d 116, 121–22 (Ill. App. Ct. 2013); *First Fin. Ins. Co. v. Purolator Sec., Inc.*, 388 N.E.2d 17, 21–22 (Ill. App. Ct. 1979); *In re Prudential*, 148 S.W.3d at 133–34. While the epistemic problems with this inquiry are obvious—how can one know whether a party's attempt to negotiate would have succeeded?—they have not been acknowledged by the courts that have adopted this standard.

56. *Compare In re Prudential*, 148 S.W.3d at 134, *with Ellis*, 23 Cal. Rptr. 2d at 83–85.

57. *See Royal Ins. Co. v. S.W. Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999) (stating that courts have refused to invalidate an exculpatory provision in

### 3. *Stereotyping and Party Characteristics*

The third criterion examines social characteristics of the contracting parties to decide whether a meaningful disparity in bargaining power exists.<sup>58</sup> Courts deploying this approach regard membership in certain groups as a meaningful proxy for bargaining power. In particular, courts have looked to whether the parties belong to certain groups or possess certain qualities, including their economic role (employer/employee, seller/consumer, and corporation/individual), wealth, level of education, and business sophistication, among others.<sup>59</sup> While many courts supplement their initial categorizations with individualized information, some have based their assessments exclusively on a party's membership in the relevant group.<sup>60</sup>

Perhaps the best-known case utilizing the categorical approach is *Williams v. Walker-Thomas Furniture Co.*, noted above. In *Williams*, the U.S. Court of Appeals for the D.C. Circuit held that the trial court erred by failing to consider that the plaintiff's poverty and lack of education might bear on her ability to understand and negotiate a draconian cross-collateralization clause in the contract under review.<sup>61</sup> Other courts have followed *Williams's* approach,

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contracts where the party seeking invalidation assented to the terms without complaint); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 388–89 (9th Cir. 1990) (finding a forum selection clause in a consumer contract unenforceable on the grounds that the consumers could not have bargained over its language); *Grott v. Jim Barna Log Systems-Midwest, Inc.*, 794 N.E.2d 1098, 1102–03 (Ind. App. Ct. 2003) (refusing to invalidate a forum selection clause due to evidence establishing that the plaintiff never attempted to negotiate the term).

58. *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 165–66 (Wis. 2006).

59. See, e.g., *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 196–97 (3d Cir. 2010) (corporation-individual); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983–84 (9th Cir. 2007) (seller-consumer); *Alexander v. Anthony Int'l L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) (education and sophistication); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, 538 (Ala. 2002) (wealth); *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 145–46 (Ind. 1972) (education); *Kugler v. Romain*, 279 A.2d 640, 651–52 (N.J. 1971) (education, wealth, and merchant/consumer status); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 265 (Sup. Ct. 1969) (wealth, education, and merchant/consumer status); *Wis. Auto Title Loans, Inc.*, 714 N.W.2d at 178 (wealth).

60. Compare *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 229–30 (3d Cir. 2008) (looking past the parties' employee-employer relationship and holding the employee to a higher standard due to his work experience and business sophistication), and *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666–67 (6th Cir. 2003) (same), with *Rodriguez v. Wet Ink, LLC*, No. 08-cv-00857-MSK-CBS, 2011 WL 1059541, at \*6 (D. Colo. Mar. 22, 2011).

61. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965).

using a mix of the parties' presumed and actual characteristics as a basis for assessing their bargaining power.<sup>62</sup>

### C. *The Use of Bargaining-Power Disparities in Judicial Decision Making*

Just as courts have disagreed with one another about how to identify bargaining-power disparities, they have taken different approaches to incorporating bargaining power into contractual analysis. Some consider the presence (or absence) of power disparities to bear importantly on contract enforceability, while others do not.<sup>63</sup> Prior courts have been unwilling to hold that a large disparity in power is itself a sufficient basis for invalidating a contract.<sup>64</sup> Instead of deploying inequality of bargaining power as an independent doctrine, courts have typically incorporated it into two traditional contract defenses—unconscionability and public policy.<sup>65</sup>

The issue of bargaining power most commonly arises in connection with unconscionability claims. The party seeking to invalidate the contract or to strike a particular term will usually argue that it lacked bargaining power vis-à-vis its counterparty in

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62. *Asch Webhosting, Inc. v. Adelpia Bus. Solutions Inv., LLC*, 362 F. App'x 310, 314 (3d Cir. 2010) (finding that there was not unequal bargaining power between the parties because the plaintiff "was a commercial entity that had previously entered into [similar] agreements with several other service providers and was managed by an experienced business man who had graduated from law school"); *Anthony Int'l, L.P.*, 341 F.3d at 266 (finding that a party "which conducts business throughout the nation and the world, clearly possessed more bargaining power than two long-time equipment operators with limited educational backgrounds and, at best, very narrow options for other employment"); *Circuit City Stores, Inc.*, 317 F.3d at 666–67 (concluding that the fact that an employee was highly educated and held a master's degree in administration meant that there could not be a disparity in bargaining power sufficient to invalidate his employer-drafted, nonnegotiable employment contract); *Diesel "Repower", Inc. v. Islander Invs. Ltd.*, 271 F.3d 1318, 1325 (11th Cir. 2001) (finding that the parties had equal bargaining power under Alabama's contract law after looking at the parties' business sophistication and familiarity with the relevant markets). *But see Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 720 (8th Cir. 2003) (stating that "the district court's observation that the [defendant] is a corporation and the [plaintiffs] are individuals . . . does little to inform the issue of whether the [defendant] exerted unequal bargaining power").

63. *Compare Anderson v. Ashby*, 873 So. 2d 168, 176 (Ala. 2003) (invalidating an arbitration provision due, in part, to the power disparity between the parties), *with Lamoille Grain Co. v. St. Johnsbury & Lamoille Cnty. R.R.*, 369 A.2d 1389, 1390–91 (Vt. 1976).

64. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *Graham v. State Farm Mut. Auto Ins. Co.*, 565 A.2d 908, 912 (Del. 1989).

65. *See Barnhizer, supra* note 23, at 141–42, 144–54.

order to satisfy the procedural prong of the unconscionability defense.<sup>66</sup> Courts have responded to this argument in a variety of ways. In several jurisdictions, an overwhelming difference in bargaining power can suffice to establish procedural unconscionability.<sup>67</sup> In others, the salient factors in demonstrating procedural unconscionability are the same as those serving as indicia of bargaining power (e.g., availability of alternatives, negotiability).<sup>68</sup> And in a few jurisdictions, bargaining power, no matter how large, is insufficient to support a determination of procedural unconscionability.<sup>69</sup>

While courts have not linked bargaining power differences directly to substantive unconscionability, large disparities have influenced their reasoning.<sup>70</sup> Many courts employ a “sliding scale analysis” when making unconscionability determinations.<sup>71</sup> Under

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66. See *Roman v. Superior Ct.*, 92 Cal. Rptr. 3d 153, 158 (Ct. App. 2009) (providing that the plaintiff asserted that the agreement was procedurally unconscionable because it was a contract of adhesion).

67. *Ashby*, 873 So. 2d at 175–77 (quoting *Am. Gen. Fin., Inc. v. Branch*, 793 So.2d 738, 749 (Ala. 2004)) (“[A] primary indicium of unconscionability in the modern consumer-transaction context is whether the consumer has the ability ‘to obtain the product made the basis of [the] action without [agreeing to the objectionable] clause.’”); *Lloyd v. Serv. Corp. of Ala.*, 453 So. 2d 735, 739 (Ala. 1984) (citing *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971)) (“Traditionally, a contract was the result of free bargaining of parties brought together by the play of the market, parties who met each other on a footing of approximate economic equality. Today, however, an individual consumer often faces an enterprise with strong bargaining power and position. That consumer, in need of goods or services, is frequently not in a position to shop around for better terms, because all competitors use the same clauses.”).

68. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 324 (6th Cir. 1998).

69. *Hydraform Prods. Corp. v. Am. Steel & Aluminum Corp.*, 498 A.2d 339, 343–44 (N.H. 1985); *Maglin v. Tschannerl*, 800 A.2d 486, 490 (Vt. 2002) (“[W]e are primarily concerned with unequal bargaining power when the differential is used to coerce the less powerful party into agreement because that party has no other meaningful choice.”); *Adler v. Fred Lind Manor*, 103 P.3d 773, 783 (Wash. 2004); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 169 (Wis. 2006). These courts have stated that the key inquiry in the procedural unconscionability analysis is whether a party lacked meaningful choice when entering into the contract due to the lack of alternatives available—a quality that many courts consider a compositional part of bargaining power. This justification seems somewhat incoherent, given that the presence (or lack) of meaningful choice is one of the key determinants of bargaining power.

70. See, e.g., *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 201–02 (3d Cir. 2010); *Manfredi v. Blue Cross & Blue Shield of Kan. City*, 340 S.W.3d 126, 132–33 (Mo. Ct. App. 2011).

71. See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 134 (2d Cir. 2010) (applying a sliding-scale approach in a contract dispute governed by California law); *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, Nos. 165-72C3–168-72C3, 1980 WL 98403, at \*37 n.20 (W.D. Wash. Jan. 4, 1980); *Tillman v. Comm. Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008) (“[W]hile the presence of both procedural and substantive problems is necessary for an

this approach, major flaws in the contracting process lower the threshold for proving substantive unconscionability.<sup>72</sup> Since courts view many of the factors that contribute to power disparities as indicia of procedural deficiencies, large differences in bargaining power have led them to invalidate contracts or terms that might otherwise have been enforced.<sup>73</sup>

The public policy defense is the other major doctrine into which courts have incorporated bargaining-power considerations.<sup>74</sup> Interparty bargaining power is often a critical issue in cases involving the enforceability of exculpatory provisions or mandatory arbitration clauses.<sup>75</sup> In general, courts have invalidated contractual provisions on public policy grounds only when one party possessed so little power that it had no ability to influence the terms of the bargain.<sup>76</sup> Indeed, in several jurisdictions, establishing the

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ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa.”). Variations on this analysis can be found in certain states’ holdings. *See* *McGrath v. SNH Dev., Inc.*, 969 A.2d 392, 396–97 (N.H. 2009) (considering how the contract was formed and whether its enforcement implicated matters of public interest); *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 687 (N.J. 2010) (considering the way the contract was formed and whether “enforcement of the contract implicates matters of public interest”); *Wis. Auto Title Loans, Inc.*, 714 N.W.2d at 175 (same); *see also* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism*, 44 *LOY. U. CHI. L.J.* 1, 6 (2012) (noting that twelve state supreme courts have adopted the sliding-scale approach to unconscionability).

72. *Tacoma Boatbuilding Co.*, 1980 WL 98403, at \*37 n.20 (“[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less ‘bargaining naughtiness’ that is required to establish unconscionability.”).

73. *See* Barnhizer, *supra* note 23, at 201–13.

74. *See, e.g.*, *Martin Cnty. Coal Corp. v. Univ. Underwriters Ins. Servs., Inc.*, 792 F. Supp. 2d 958, 965 (E.D. Ky. 2011) (stating that contracts can be void as contrary to public policy where extreme disparities of bargaining power severely disadvantage one party); *Wolf v. Ford*, 644 A.2d 522, 526 (Md. 1994) (same).

75. *See* *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 7 (Mont. 2002) (holding that a great disparity in bargaining power will cause the court to invalidate the agreement “when it is: (1) not within the reasonable expectations of said party, or (2) . . . when considered in its context, is unduly oppressive, unconscionable or against public policy”); *Barnes v. N.H. Karting Ass’n*, 509 A.2d 151, 154 (N.H. 1986) (“A defendant seeking to avoid liability must show that an exculpatory agreement does not contravene public policy; i.e., that no special relationship existed between the parties and that there was no other disparity in bargaining power.”).

76. *See, e.g.*, *Ransbury v. Richards*, 770 N.E.2d 393, 401 (Ind. Ct. App. 2002) (“[A]s a result of the essential nature of the service and the economic setting of the transaction, a residential landlord has a decisive advantage in bargaining strength against any member of the public who seeks its services.”).

existence of such a disparity has become a required element of the defense.<sup>77</sup>

#### D. Summary

Although different jurisdictions vary markedly in their approaches to bargaining-power issues, power disparities have played a critical role in informing courts' views of contract enforceability. While this variance is remarkable in its own right, more noteworthy is the fact that, despite its historical and continued significance, the concept of bargaining power has escaped definition, and its role in contractual analysis has gone unexplained. The concept is opaque, lacking both a clear meaning and a theoretical justification for its use.

In our view, there are good reasons for these definitional and theoretical vacuums. But before turning to those reasons, we briefly canvass the scholarly literature discussing bargaining power. In the process, we demonstrate that academic discourse, like judicial discussion, has assumed that the concept of bargaining power has a coherent meaning, without examining or questioning that most basic assumption.

## II. THE SCHOLARSHIP ON BARGAINING POWER

There has been very little academic discussion about the significance of bargaining power in contract law. The few articles addressing the topic fall generally into three categories. The largest group consists of those arguing that, because transactions between powerful and weak parties are inherently problematic, courts should adopt particular doctrinal remedies that would help them identify and invalidate unfair contracts.<sup>78</sup> A second, smaller grouping includes proposals that courts take bargaining-power disparities into consideration in contexts other than contract invalidation and nonenforcement.<sup>79</sup> The third and smallest group criticizes the

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77. See *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 745–47 (Conn. 2005); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924–25 (Minn. 1982); *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 880–84 (N.J. 2002); *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 415 A.2d 1156, 1164–65 (N.J. 1980); *Shell Oil Co. v. Marinello*, 307 A.2d 598, 602 (N.J. 1973); *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843, 857 (N.J. 1967).

78. See, e.g., Frank Darr, *Unconscionability and Price Fairness*, 30 HOUST. L. REV. 1819, 1847–48 (1994); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 755–63 (1982); Shahar Lifshitz, *Distress Exploitation Contracts in the Shadows of No Duty to Rescue*, 86 N.C. L. REV. 315, 362 (2008); Lonegrass, *supra* note 71, at 50.

79. Ben-Shahar, *A Bargaining Power Theory*, *supra* note 7, at 400 (arguing that courts should fill contractual gaps with the “maximally tolerable term,” a term “which is modified sufficiently so that it is tolerable” in order to “mimic the hypothetical bargain that parties negotiating over a truncated domain would reach”); Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 7, at 877–85

judiciary's analysis of bargaining power and attempts to address theoretical questions that have been raised, but not answered, by the case law.<sup>80</sup> In sum, these articles suffer from the same flaws discussed in the preceding Part: scholars, like courts, have failed to generate a satisfactory definition of bargaining power and have proposed no method for distinguishing between objectionable and non-objectionable power disparities.

All of the articles proposing doctrinal solutions view large bargaining-power disparities as a serious problem that the law should remedy. This point of agreement, however, yields an impressive diversity of opinion about the nature and extent of the problem and about the appropriate methods for resolving it. While some articles have claimed that increased judicial intervention is necessary to ensure that the state enforces only those contracts that are truly consensual,<sup>81</sup> others have focused on the need to prevent the exploitation of those who lack bargaining power,<sup>82</sup> while still others have argued that stricter policing of power disparities will increase both the efficiency and the fairness of contract law.<sup>83</sup>

These articles disagree with one another about how strictly the judiciary should police power disparities. One camp of scholars criticizes contemporary contract jurisprudence in broad terms, arguing that courts should more thoroughly scrutinize contracts when there is a "profound disparity"<sup>84</sup> or "imbalance"<sup>85</sup> in the contracting parties' bargaining power. Critical contract scholarship condemns contract law as a whole for "institutionaliz[ing] unequal bargaining power" and for doing little to prevent powerful parties from exploiting the weak.<sup>86</sup> Other scholars argue that courts should invalidate specific types of contracts—for example, those where a

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(discussing the viability of a rule that would minimally reform contracts that are found to have unfair terms so that they contain the minimally tolerable term for the weaker party).

80. See Barnhizer, *supra* note 23, at 171; Blake D. Morant, *The Salience of Power in the Regulation of Bargains*, 2006 MICH. ST. L. REV. 925, 959 (2006); see also LARRY A. DIMATTEO ET AL., *VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION*, ch. 5 (2007).

81. Morant, *supra* note 80.

82. Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 65–68 (2011) (portraying an individual consumer procuring a subprime mortgage loan as an example of a party lacking bargaining power).

83. Eisenberg, *supra* note 78.

84. Lonegrass, *supra* note 71, at 59–61 (arguing that there is a profound disparity in bargaining power in consumer contracts of adhesion and advocating in favor of a rule that would make all contracts of adhesion procedurally unconscionable).

85. Morant, *supra* note 80, at 926–27 (arguing that courts should adopt standards that focus on bargaining power when evaluating the enforceability of contracts).

86. Hart, *supra* note 82.

“distressed” party has no choice but to accept an offer,<sup>87</sup> agreements setting prices that are “significantly different” than normal,<sup>88</sup> and contracts involving parties that lack “transactional capacity.”<sup>89</sup>

Much of this scholarship unintentionally illustrates the problems that can arise when an undefined concept of bargaining power serves as a linchpin for broader discussions about contract law. Thus, a number of articles assert that a “profound disparity in bargaining power” characterizes contracts of adhesion, assuming that such disparities spring inevitably from the use of standard-form contracts with nonnegotiable terms.<sup>90</sup> But whenever the weak are able to choose from a number of sellers, each of which uses a different standardized form, the presumptive power associated with such forms disappears.<sup>91</sup>

A similar problem undermines claims that “merchants almost always enjoy superior bargaining power.”<sup>92</sup> While merchants may control whether their terms of sale are negotiable, the pressures generated by competitive markets—new entry, invention, easy availability of substitute goods, etc.—lead to lower quality-adjusted prices.<sup>93</sup> These qualities are the most salient feature of a contract for most consumers, and hence, the pressures imposed on sellers by competitive markets enable them to choose among vendors and to exercise significant bargaining power of their own.<sup>94</sup>

Because these articles do not define bargaining power, their proposals for reform fail to meaningfully or usefully address the problems that they associate with contractual power disparities. Without a coherent definition of bargaining power or an objective means for measuring it, their reforms are so amorphous that their

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87. Lifshitz, *supra* note 78 (arguing for the invalidation of contracts due to disparity in bargaining power when there is (1) distress accompanied by a semi-monopolistic situation, (2) unconventional contract terms in favor of the non-distressed party, and (3) exploitation (defined as the stronger party being aware of the weaker party's distress and the agreement's unconventionality)).

88. Darr, *supra* note 78, at 1841 (arguing that contracts should be voided for price-based unconscionability when (1) the price varies heavily from an established norm, (2) a procedural flaw exists, and (3) the transaction occurs in a market where private enforcement mechanisms do not exist and finding some empirical support in reported cases).

89. Eisenberg, *supra* note 78, at 763–73 (arguing that courts should invalidate deals when one of the parties lacked the ability to understand the value of the performances exchanged or the meaning of the deal's other terms).

90. See Lonegrass, *supra* note 71, at 35.

91. *Id.* at 35–37.

92. See *id.* at 50; see also W. DAVID SLAWSON, *BINDING PROMISES: THE 20TH CENTURY REFORMATION OF CONTRACT LAW* 23–25 (1996).

93. Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 *YALE J. ON REG.* 313, 363–65 (2011).

94. See, e.g., Wayne R. Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 *U. PA. J. BUS. L.* 661, 664, 668 (2012); Schwartz, *supra* note 93, at 364 (discussing adhesive contracts where consumers have equal or greater bargaining power than merchants).

implementation would do little more than confuse the already muddled case law.<sup>95</sup> One critical theory paper argues that the state should restrict the ability of individuals to enter into contracts where “[i]mbalances of power” mean that the party with more power would dictate the terms of the deal.<sup>96</sup> Another article advocates revising the unconscionability doctrine so as to make all standard-form contracts procedurally unconscionable, recommending that courts “refine their understanding of bargaining power . . . unify many conflicting definitions of the term ‘contract of adhesion,’” and “look to the commercial purpose of . . . provision[s] . . . to determine whether [they] appropriately balance[] consumer and merchant concerns.”<sup>97</sup> Notably, how this refinement might occur or which definition of bargaining power courts should embrace is not specified.<sup>98</sup>

Even articles that seem to offer a relatively clear proposal—do not enforce contracts when one party lacks full transactional capacity<sup>99</sup> or when the price varies significantly from market norms, a procedural flaw exists, and private measures of enforcement do not exist<sup>100</sup>—break down under moderate scrutiny. Thus, the meaning of the phrase “full transactional capacity” is hardly self-evident. It is equally unclear what kind of variance from market norms might qualify as significant and which procedural features might amount to “flaws.”

A second set of articles describes various ways in which traditional contract doctrines might benefit from incorporating the concept of bargaining power into their analysis. They propose that evidence of disparate bargaining power should inform the judicial resolution of disputes about the proper interpretation of contract terms and the enforceability of certain types of contractual provisions. One of these articles advocates that courts condemning a term as unconscionable replace that term with another that is “minimally tolerable” for the weaker party.<sup>101</sup> A second article contends that courts should supply default terms that accurately

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95. See Morant, *supra* note 80, at 956–58 (advocating that courts should scrutinize the context of the bargain, including the stronger party’s perceptions, beliefs, and biases related to the disadvantaged party, the limited choices of the weaker party, and “the bargaining power of the respective parties with power defined as education, knowledge, and bargaining sophistication”); *id.* at 945–46 (identifying several categories of terms that indicate impermissible advantage taking by a more powerful party).

96. Hart, *supra* note 82, at 80.

97. Lonegrass, *supra* note 71, at 59, 62.

98. *Id.*

99. Eisenberg, *supra* note 78, at 763–73.

100. Darr, *supra* note 78, at 1841.

101. Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 7, 877–78 (discussing the viability of a rule that would minimally reform contracts that are found to have unfair terms so that they contain the minimally tolerable term for the weaker party).

reflect the distribution of power between the contracting parties.<sup>102</sup> Others argue that bargaining-power considerations generally weigh in favor of enforcing penalty clauses<sup>103</sup> and against expansive employee noncompete clauses.<sup>104</sup>

This scholarship bears on our discussion of bargaining power in two ways. First, unlike many articles seeking doctrinal reform, these articles recognize that there is nothing inherently illegitimate about a contract that reflects the superior bargaining position of one of the parties.<sup>105</sup> This view stands in stark contrast to the doctrinal reform literature, which insinuates that the use of superior bargaining power inevitably corrupts the contracting process and the terms of the resultant contract.<sup>106</sup> Second, and more significantly, even this more sophisticated scholarship fails to define bargaining power. Invariably, the articles either fail completely to address the definitional issue<sup>107</sup> or acknowledge it without offering a discussion or solution.<sup>108</sup>

The third category of scholarship contains the few articles that have attempted to address some of the foundational questions raised by the role of bargaining power in the resolution of contract disputes. Chief among the issues discussed, unsurprisingly, are the proper definition of bargaining power, an appropriate method for measuring it, and its relationship to the enforceability of contracts.<sup>109</sup> Yet, while articles in this category recognize that these problems preclude the concept of bargaining power from playing a coherent role in contract law, they fail to grapple with the problems or to offer workable solutions for them. For example, an article published in a law review symposium devoted to the general issue of bargaining power suggests that bargaining power is best seen as a relational concept that encapsulates the ability of one party to fulfill its expectations by entering into a deal with another.<sup>110</sup> Since the application of this definition depends upon (1) a post hoc

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102. Ben-Shahar, *A Bargaining Power Theory*, *supra* note 7, at 398 (arguing that courts should fill contractual gaps with the terms that would be preferred by the party with the greater bargaining power).

103. Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883, 902–03 (2006).

104. Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 638, 647 (2006).

105. *See supra* notes 101–04 and accompanying text.

106. *See, e.g.*, Morant, *supra* note 80.

107. *See* DiMatteo, *supra* note 103; Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 7, at 897–901, 906 (discussing bargaining power without providing a definition of it).

108. *See* Ben-Shahar, *A Bargaining Power Theory*, *supra* note 7, at 400 (noting the “elusive” nature of the concept of relative bargaining power).

109. *See, e.g.*, DiMATTEO ET AL., *supra* note 80; Barnhizer, *supra* note 23, at 171.

110. Morant, *supra* note 80, at 926–27 (calling it a “bargaining interaction”).

determination of each party's *ex ante* expectations, and (2) an *ex post* and self-reported assessment of the extent to which those expectations were fulfilled in the contract, it offers courts and prospective litigants no fixed benchmarks by which to assess liability.<sup>111</sup> While the article identifies harms associated with the use of disproportionate bargaining power—it can yield agreements with objectively unfair terms, undermine the voluntariness of weaker parties' assent, and injure public confidence in the free market<sup>112</sup>—it offers no methodology that might enable courts to identify power disparities, gauge their severity, or determine when they become sufficiently severe to warrant enhanced scrutiny of the relevant contract.

A recent article attempts to provide meaning to the bargaining-power construct by defining bargaining power as the ability of one party to obtain “the greatest possible value from the other party at an exchange price equal to or less than their respective reserve prices.”<sup>113</sup> This definition, like the one discussed above, fails to identify objectively verifiable indicia of bargaining power. The article goes on to suggest that bargaining-power determinations would raise fewer problems if courts “develop[ed] and employ[ed] more sophisticated standards that reflect the omnipresent, complex and dynamic reality of power.”<sup>114</sup> But as to what exactly the “more sophisticated” standards might be, the article offers no clue.

In summary, the academic literature divides itself into three unsatisfying groups. In the first are articles assuming without discussion that superior bargaining power does not require a definition, that bargaining power can be inferred from the parties' personal characteristics or the form of the contract they adopt, and that large power disparities are inherently bad. In the second are articles that acknowledge in passing the unspecified nature of the bargaining power concept and proceed to argue that courts should utilize the concept in other areas of contract law, such as in formulating the hypothetical bargain. And in the third group are those few articles that focus more directly on the meaning of bargaining power, but define the term so abstractly that their proposals offer no improvement over the status quo. Like the others, they assume that bargaining power can play a useful role in contract law, if only it could be coherently defined.

### III. THE BARGAINING POWER CONCEPT IS INCOHERENT

The previous Parts of this Article have shown that neither the courts nor the academy have developed a cogent definition of

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111. *See id.*

112. *Id.* at 927.

113. Barnhizer, *supra* note 23, at 169.

114. *Id.* at 241.

bargaining power. For their part, the courts have relied on vague and undefined modifiers like superior or overwhelming to guide their inquiries, adopted a variety of inadequate criteria to identify supposedly powerful parties, and used the concept as a lever to open up certain contracts to closer scrutiny.<sup>115</sup> Academics have largely assumed the existence of a universal, unproblematic understanding of bargaining power as a starting point for the development of arguments promoting doctrinal change.<sup>116</sup> Although a few have asked what bargaining power might mean, no opinion or article has questioned the absence of a definition, or attempted to develop one.

This state of affairs is no accident. Rather, it represents the logical if unsatisfying consequence of a simple but hitherto overlooked problem: bargaining power is not amenable to a definition that would make it a legally usable concept. Power cannot be measured objectively. Determining the degree to which a party wields superior power, therefore, largely resides in the eye of the beholder. Since bargaining power is necessarily a relational concept, it cannot be reduced to a set of observable components. At best, it can be identified *ex post* and described in specific factual settings, but never *ex ante*, nor with the generality or criteria necessary for clarity and predictability.

The notion of superior bargaining power posits that one of the two parties engaged in contract negotiations has “more” power than the other. But this is so often the case in fact—parties are hardly ever “equally” powerful in any respect—that slight disparities in power arguably ought to have no bearing on contract enforceability. If they did, not only would every contract be suspect on bargaining-power grounds, but there would be the real possibility that small errors in judicial measurement would yield too many false positives and negatives, even on the heroic assumption that bargaining power itself could be usefully defined.

Consequently, as noted above, courts and commentators have narrowed the bargaining-power problem to situations involving superior or overwhelming disparities in bargaining power.<sup>117</sup> Small differences do not matter; large ones do.<sup>118</sup> The sense of the requisite differential is conveyed, albeit inadequately, by words such as “vast,” “significant,” or “grossly disproportionate.”<sup>119</sup> But these

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115. See *supra* Part I.

116. See *supra* Part II.

117. See, e.g., *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983 (9th Cir. 2007); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1282, 1284 (9th Cir. 2006).

118. See *Manfredi v. Blue Cross & Blue Shield of Kan. City*, 340 S.W.3d 126, 132–33 (W.D. Mo. 2011); *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 799 F. Supp. 363, 383 (S.D.N.Y. 1992).

119. See *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1017–18 (6th Cir. 2005) (“vast”); *State v. Baldon*, 829 N.W.2d 785, 801 (Iowa 2013) (“grossly

terms are not, to state it mildly, highly specific. None provide any guidance about the means of measuring the amount of power that each party possesses or the level of inequality necessary to a finding of superior power—threshold determinations that are needed for deciding whether the relevant differential exists.

A. *The Impossibility of Determining Superior Power*

However one might measure bargaining power, no two contracting parties are apt to possess it in exactly the same amount. As noted above, if inequality of bargaining power is the norm, though, then all contracts are marked in some way by the exercise of superior bargaining power, since on one side of every deal is a weaker party who could claim that its stronger counterparty has overreached. For obvious reasons, therefore, contract law has not recognized such a broad role for bargaining power but has applied the concept more sparingly. Deploying assumptions that make small differences insignificant and focusing instead on proxies such as status, organizational form, or wealth, courts have adopted an array of factors arguably indicative of the large disparities that could result in contracts that seem unfairly one-sided.<sup>120</sup>

It seems sensible for courts to ignore cases involving small differences in power. Since the problems encountered in attempting to gauge bargaining power suggest that precise measurement is impossible, one might think it is better to deploy the test only when the asserted power differential is sufficiently large enough that small errors in measurement would not disturb the assessment of whose power is greater. But what, then, should constitute the relevant unit of measurement, and how large a differential must exist for a court to conclude that one party's power is superior to the other's? Answering these questions coherently is impossible because the answers require measurement tools that do not exist and hinge on criteria that are inevitably arbitrary. The descriptors used by courts—"huge," "inordinate," or "overwhelming"<sup>121</sup>—provide some rough approximation of what magnitude of differential is relevant but offer no idea about the means for measuring it. All of those terms are too vague to provide guidance, yet no other term is any better.

Some courts have attempted to avoid these measurement difficulties by assuming a connection between the possession of bargaining power and corporate status. Take, for example, the

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disproportionate"); *Cumberland Valley Contractors v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 651 (Ky. 2007) ("significant").

120. See discussion and cases cited *supra* Part I.

121. See *Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1075 (9th Cir. 2007) ("overwhelming"); *Atl. Pools & Spas, Inc. v. BellSouth Adver. & Publ'g Corp.*, 64 F. Supp. 2d 708, 712 (M.D. Tenn. 1999) ("inordinate"); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1179 (Ohio Ct. App. 2004) ("huge").

opinion of the U.S. Court of Appeals for the Seventh Circuit in *We Care Hair Development v. Engen*.<sup>122</sup> In determining that an arbitration clause in a franchise agreement did not take unfair advantage of the plaintiff-franchisees, the court observed that “the franchisees were ‘not vulnerable consumers or helpless workers,’ but rather ‘business people who bought a franchise,’ who were therefore not “forced to swallow unpalatable terms.”<sup>123</sup> The distinction between “vulnerable consumers” and “helpless workers” on the one hand, and “business people” on the other, though meant to dispose of the bargaining-power argument, raises as many questions as it answers: Are all consumers “vulnerable?” Are all workers “helpless” or only those pitted against a powerful franchisor, or any franchisor? Are all business people equally powerful in the relevant sense? This categorical approach does nothing to resolve the measurement problem but simply obscures it behind a set of difficult second-order questions.

Some might argue that this critique of bargaining power is incomplete. In particular, they might claim that there are other, better ways to identify bargaining power, ways that do not require courts to measure and compare immeasurable quantities of an inchoate attribute. Power, they might argue, is a function of negotiating “skill,” which might be more easily measured than power itself. Or, they might claim that power (and skill, for that matter) yield better outcomes for those possessing them, outcomes that—again—are amenable to measurement and comparison. But these arguments are unpersuasive.

First, negotiating skill is not a quality that one can use to sort people into discrete, hierarchical categories. While there are many books aimed at teaching negotiating skills to actual and would-be negotiators, the attributes composing “skillful” negotiating can be possessed in greater or lesser amounts. The measurement problem is thus inescapable. Moreover, those with the most skilled negotiators are usually the wealthy, who can more easily identify and hire the skillful. So, skill can collapse into wealth, and, if it does, the measurement problem resurfaces in a somewhat different form. In addition, though skillful negotiating on behalf of the wealthy might produce an outcome very disadvantageous to the weak, negotiating skill exercised on behalf of the weak might yield an unobjectionable result. Negotiating skill can thus account for a range of outcomes, many of which might not warrant judicial concern. The relationship between “high skill” and “unfair outcomes” is not necessarily a strong one. Skill, we might well

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122. 180 F.3d 838 (7th Cir. 1999).

123. *Id.* at 843 (quoting *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies*, 970 F.2d 273, 281 (7th Cir. 1992)).

conclude, is a means to an end—"favorable," but not necessarily exploitative, contract terms.

Perhaps then, the law could look usefully to the ends themselves, measuring substantial bargaining power by assessing outcomes, and striking down or modifying contracts or clauses that are too "one-sided." But this notion simply moves the measurement problem to a different, and more complicated, area. For a contract to seem one-sided, we must start with a concept of the "two-sided" contract, the contract that is "fair" to both parties or the contract that fairly divides the surplus that its creation produces. But how can one locate that baseline? How, and when, does one measure the surplus produced by the contract? Ex ante? Ex post? How does one monetize the anticipated value of harsh clauses—liability waivers, for example—that might never be invoked? What is a "fair" division of surplus? May it be slightly uneven? And when does a slight unevenness become "too" one-sided? Engaging in this line of inquiry simply leads to further unanswerable questions and will not improve current practices.

### *B. Bargaining Power, Contract Negotiations, and Economic Duress*

The notion that superior bargaining power can yield contractual terms so unfair as to render the underlying contract unenforceable sits uneasily—if at all—with another important tenet of contract law. It is widely accepted in the United States that, absent a separate undertaking, no party need exercise good faith in negotiating a contract with its potential counterparty.<sup>124</sup> This rule has several important implications for the role of superior bargaining power in contract doctrine. One obvious, but important, consequence of the "no-duty" rule is that even the most powerful firm need not reach an agreement with its negotiating partner unless fully satisfied that the contract will serve its interests, however it defines them.<sup>125</sup> This means that the powerful party can use all of its power to negotiate the best deal possible as judged from its self-interested perspective.<sup>126</sup> As a result, it might lawfully use its power to achieve a bargain heavily weighted in its favor. If it did achieve such a result, the logic behind the no-duty rule suggests that courts ought not condemn the resulting one-sided contract as the product of "bad faith" negotiating.<sup>127</sup>

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124. See, e.g., *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988); *Bercoon, Weiner, Glick & Brook v. Mfrs. Hanover Trust Co.*, 818 F. Supp. 1152, 1157 (N.D. Ill. 1993); *Dacourt Grp., Inc. v. Babcock Indus., Inc.*, 747 F. Supp. 157, 160 (D. Conn. 1990).

125. *Feldman*, 850 F.2d at 1223.

126. *Id.* ("In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market.")

127. *Id.*

Similarly, the use of superior bargaining power as a lever to undo or remake otherwise valid contracts is difficult to square with the United States' approach to "economic duress." Courts have applied that doctrine, also known as "business compulsion," very sparingly.<sup>128</sup> Its application does not hinge on a significant difference in the power of the contracting parties, but rather on the commission of a "wrongful act" by one party, or conduct "tainted with some degree of fraud" that "deprives" the other of free will and thus generates terms highly disadvantageous to the latter.<sup>129</sup> Importantly, the defense of economic duress "cannot be predicated upon a demand which is lawful or upon doing or threatening to do that which a party has the legal right to do."<sup>130</sup> Setting aside the circular quality of the last clause, it seems that the forthright insistence by a stronger party on a contract whose terms weigh heavily in its favor would not offend the doctrine should the weaker party be compelled by its own needs alone to accept those terms. Any other rule would effectively require stronger parties to refrain from securing the best deal available to them or would leave the weaker party without any deal at all.

Together, the no-duty rule and the doctrine of economic duress demonstrate that *ex ante*—during and throughout the negotiation process—those possessed of superior power are free to use it as they wish, subject only to constraints, such as the avoidance of fraud, that govern the conduct of all contracting parties. Logic suggests that the foreseeable consequences of conduct permissible *ex ante* ought not be deemed impermissible *ex post*. That is, if the contract doctrine governing negotiations permits the powerful to extract favorable agreements from the weak, then the resultant agreements ought not be subject to condemnation on the ground that their enforcement unfairly disadvantages the weak.

What are the implications of these observations for post-negotiation efforts to undo or modify one-sided contracts? The most significant conclusion is that courts should enforce contracts as long as neither party negotiated the contract fraudulently and as long as the terms would be permissible in a contract between like parties of "equal strength." The opposite approach would require courts either (1) to intervene in the bargaining process, after the fact and on a case-by-case basis, to determine where in the course of particular negotiations superior power was misused, or (2) to rewrite the law

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128. See, e.g., *Strickland Tower Maint., Inc. v. AT&T Commc'ns, Inc.*, 128 F.3d 1422, 1426 (10th Cir. 1997) (noting the doctrine's limited scope and the acceptability of hard bargaining); *Shufford v. Integon Indem. Corp.*, 73 F. Supp. 2d 1293, 1299 (M.D. Ala. 1999) ("The doctrine applies only to special, unusual, or extraordinary situations . . .").

129. *Gross Valentino Printing Co. v. Clarke*, 458 N.E.2d 1027, 1031 (Ill. App. Ct. 1983).

130. *Id.*

so as to impose an obligation on the powerful not to take full advantage of their power when negotiating contracts with the weak. Each of these inquiries, though, would defy sound administration. How much power, for example, would stronger firms be able to exert? How one-sided a deal could they permissibly reach? How careful must they be not to taint the bargaining process by the "misuse" of their power? And of course, and again, when is one party so much more powerful than its counterparty that it must restrain itself from reaching the best deal possible? How could such a party know in advance of negotiation that its power was sufficient to trigger this requirement?

The current regime is schizophrenic. The doctrine governing contractual negotiations imposes no duty on the powerful to refrain from exercising their power to its fullest extent. Taken to its logical conclusion, the no-duty rule permits the strong to use their strength to make a contract that favors them and disadvantages their weaker counterparties. Yet other parts of contract law—the doctrines respecting contracts of adhesion and unconscionable clauses or contracts—authorize courts to review those contracts to determine whether the negotiating process resulted in contract terms so unfair as to be unenforceable.<sup>131</sup> In this fashion, one part of contracts jurisprudence authorizes the unfettered exercise of power to negotiate contracts, while another subjects the results of those negotiations to a post hoc review designed to evaluate the fairness of their terms.

Perhaps, though, this paradox arises only in those few cases when actual negotiations precede agreement on a contract, a circumstance that seems increasingly uncommon. As everyday experience amply demonstrates, many contracts do not result from interparty negotiations. Rather, they are concluded on standardized forms presented, in most cases, by corporate sellers to their buyers (individual consumers, let's assume) on a take-it-or-leave-it basis. For some, this process is inherently objectionable since it appears callously to link one display of power ("I will do business with you, but only according to the terms of my standardized form") with another equally unpleasant assertion ("The terms in the form favor me and my interests over you and yours").<sup>132</sup> This objection, however, simply recasts the paradox into a slightly different form.

Absent a duty of good faith in negotiations, there can be no duty to negotiate at all. No firm, however powerful, can be made to negotiate against its will. But if it has no duty to negotiate, then the more powerful party need not consent to particular terms that it deems unacceptable or to an undesirable form of contract. If the law

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131. See *supra* Part I.

132. See, e.g., Lonegrass, *supra* note 71, at 63; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1217–18 (1983).

permits the powerful to refuse to negotiate terms unacceptable to them—even without considering the real economies derived from the use of standard forms—then it must logically permit parties to adopt take-it-or-leave-it positions. And if those positions are permissible, then the resulting contracts, even if they are contracts of adhesion, should not be deemed unenforceable for reasons of misuse of superior power.

### *C. Bargaining Power Contrasted with Monopoly Power in Antitrust Law*

The difficulty of developing a workable definition of bargaining power is explained by the fact that the concept refers to a quality that is both intangible and relational. In the most general sense, a party's bargaining power is not static—it will vary from deal to deal and depend on a multitude of unobservable factors (e.g., its level of interest in the object of the deal, the desirability of substitutes, the absence or presence of time pressure, its skill in negotiating) as well as on the identity of the counterparty. These characteristics make it impossible to identify specific circumstances or qualities that reliably reveal the extent to which a party has (or lacks) bargaining power.

Revisiting one of the doctrinal paradoxes discussed earlier and comparing it to a similar concept in a related area of private law further demonstrates the deficiencies in contract law's approach to bargaining power. Contract doctrine is agnostic about (or even permissive of) the acquisition of bargaining power. Public policy encourages firms to acquire all the power that they can, provided that they do so properly (i.e., without violating antitrust or consumer protection laws). But if firms can acquire substantial bargaining power without running afoul of contract law or public policy, one would think that they should be free to use what they have lawfully acquired. Yet contract law imposes special limits on powerful firms—limits not placed on those lacking power—allowing them to exercise their full strength only when dealing with parties that possess some roughly comparable degree of power.

Antitrust law provides an instructive contrast. Though it does not speak explicitly to bargaining power, antitrust refers regularly to "monopoly power."<sup>133</sup> Technically, monopoly power is defined as the ability to raise price significantly, durably, and profitably above the competitive level.<sup>134</sup> Antitrust law constrains certain behaviors of firms that possess such power—they may not use it unfairly to exclude smaller or potential rivals from the market—but all monopolists are free to raise price to the monopoly level. That is,

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133. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 88 (4th ed. 2011).

134. *Id.*

the monopolist may lawfully exercise its power by setting a price that is (a) higher than the competitive price and (b) nonnegotiable.<sup>135</sup>

There are important policy reasons, the Supreme Court has recently said, for affording monopolists the freedom to use their power in this way.<sup>136</sup> The prospect of achieving monopoly power and the concomitant ability to charge a supra-competitive price are both a spur to invention and a reward for commercial success.<sup>137</sup> If all firms seek to obtain that reward, two good things will result: in most cases, the contest for the reward of commercial success will generate vigorous competition, a boon to consumers and to society at large; and in some cases the contest will produce a clear winner, the monopolist, whose success signifies its ability to out-compete its rivals and satisfy its consumers so well that its customers willingly pay a premium for its product. The premium, in turn, is the reward that both generates and attracts the next generation of competition and, occasionally, the next monopoly. Without it—and without the law permitting monopolistic pricing—society would have less vigorous competition and fewer breakthrough innovations.<sup>138</sup>

The treatment that antitrust law affords to monopoly power is sensible. It makes sense because antitrust law employs a definition of monopoly power that is grounded in widely accepted economic theory and is amenable to proof in court. Moreover, it approaches the use of market power through a policy perspective that rewards success but punishes the successful for overreaching. It is clear about who the powerful are and what they are permitted to do. Significantly, the powerful may lawfully charge a high price for their products and refuse to deal with anyone who declines to pay.

Antitrust law also imposes limits on the behavior of the dominant firm, limits that—because they are characterized broadly—are difficult to specify and to apply in practice. Thus, dominant firms may not engage in conduct that “wrongfully excludes” their rivals, or would-be rivals.<sup>139</sup> They may not “abuse” their dominance or act “anticompetitively,” a proscription intended to capture a potentially wide range of conduct that is not honestly competitive and that impairs the opportunities of rivals.<sup>140</sup>

It is not the purpose of this Article to explain antitrust jurisprudence fully, but rather to use it as the basis for a few illuminating comparisons. First, in antitrust law, market power is

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135. *Id.* at 88–89.

136. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414–16 (2004).

137. *Id.* at 407.

138. *Id.* at 407–09.

139. See 15 U.S.C. § 1 (2013); 54 AM. JUR. 2D *Monopolies and Restraints of Trade* §§ 1–2 (2014).

140. HOVENKAMP, *supra* note 133, at 292.

defined by reference to mainstream economic theory, and its possession is encouraged for important reasons of public policy. In contract law, bargaining power is undefined, unexplained, frowned upon, and detached from both theory and public policy. Lacking both a definition and a rationale, bargaining power defies a coherent application across transactions.

Second, antitrust law explicitly authorizes the powerful to use their power within clearly specified parameters. They can price anywhere above cost and can refuse to deal for any reason with those disagreeable to them.<sup>141</sup> In contract law, the powerful are provided with no safe harbors. Their power is constrained by the law in general and ad hoc; they cannot even know whether they possess power in the requisite degree or how much of it they may properly use without transgressing the law.

The contrast between how antitrust and contract law approach standard-form contracts also demonstrates why those forms are poor proxies for bargaining power. In competitive markets, parties can, and sometimes do, compete with respect to the content of their forms (for example, some insurance companies advertise that their policies contain simple terms written in “plain English”).<sup>142</sup> In many markets, though, the salient language in “competing” forms is very much the same from firm to firm. If this identity of terms results from collusion, antitrust law will seek to punish the firms for their agreement to not compete on important contract terms.<sup>143</sup>

But in the absence of collusion, antitrust law regards the market-wide presence of standard-form contracts—even ones with identical language—as evidence that those contracts are efficient and serve the best interests of both buyers and sellers.<sup>144</sup> Based on this view, when a competitive market—one in which no powerful firm holds sway and where there is no collusion—offers standard forms to consumers, those forms must serve the goal of efficiency by lowering the cost of contracting, the cost of contract enforcement,

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141. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.”).

142. See, e.g., Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 965 (2006).

143. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 771–78 (1993); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648–49 (1980).

144. See, e.g., *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992–93 (7th Cir. 2008).

and the cost of the product or service in question. Thus, through the lens of antitrust law, standard-form contracts that do not result from collusion are unworthy of scrutiny. Rather than signifying the presence and misuse of power, those contracts represent an effort—by small firms as well as large ones—to compete more effectively by lowering the costs of contracting.

Contract law would benefit from embracing this approach. Antitrust law appreciates that firms in competitive markets—firms without power—must appeal to consumers on the basis of quality, price, innovation, and efficiency. Efficient contracting can lead to lower prices—that is, since the contracting process can be more or less costly to firms and consumers, opportunities exist for firms to choose a less expensive method over a more expensive one. All things equal, firms choosing a more expensive method will lose business to firms adopting a less expensive one and will thus either exit the market or reduce their costs of contracting. This is as true for small firms—perhaps truer for them—as it is for larger ones. And since small firms, firms that are powerless in the antitrust sense, commonly adopt standard-form contracts,<sup>145</sup> their use is not inevitably or even regularly considered a function of power. Consequently, if antitrust law can recognize that the search for greater efficiency compels small firms to adopt standard-form contracts, then contract law should admit that a standard-form contract is not emblematic of bargaining power.

#### IV. THE BARGAINING-POWER DOCTRINE PROVIDES NO UNIQUE BENEFIT TO CONTRACT LAW

We have argued that there are substantial and irremediable difficulties in using a bargaining-power test to police contracts that appear unfairly one-sided. Despite those problems, however, some might contend that bargaining power should continue to play a role in contract law. They would claim that abandoning the doctrine would require courts to enforce the exploitative contracts that the doctrine currently invalidates, thus encouraging powerful parties to engage in overbearing contracting practices at the expense of the weak. This Part addresses those contentions. It begins by discussing the problematic contracting behaviors that courts have sought to address through the bargaining-power doctrine. It then demonstrates how the bargaining-power construct is superfluous to the resolution of these problems and how each is better resolved through other, superior forms of governmental regulation.

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145. See *Toolkit: Plan, Launch, and Build: Small Business Forms and Contracts*, BLOOMBERGBUSINESSWEEK SMALL BUS., <http://www.businessweek.com/small-business/business-forms> (last visited Aug. 2, 2014) (providing standardized contracts and templates for small businesses to use including, inter alia, employee noncompete agreements, month-to-month lease agreements, and independent contractor agreements).

A. *The Contracting Problems that Bargaining Power Seeks to Address*

In a broad sense, courts have used the bargaining-power doctrine to invalidate contracts that they deem impermissibly exploitative. More specifically, courts have employed the doctrine against transactions with (1) one (or more) of three characteristics and (2) a substantial disparity of power between the parties.<sup>146</sup> They have invoked the bargaining power doctrine only when contracts (1) contain terms exceptionally unfair to the weaker party, (2) result from deficient negotiation processes, or (3) involve a weaker party whose capacity to consent has been reduced by circumstances beyond the control of the stronger party.<sup>147</sup> Further, courts will refuse to enforce such contracts when they find a substantial disparity of bargaining power between the parties.<sup>148</sup>

Most often, courts use the bargaining-power construct to strike down contracts containing terms severely disadvantageous to the weaker party. The reported cases regularly involve challenges to liability waivers and arbitration clauses that foreclose parties from certain types of relief or that establish onerous procedural hurdles as a precondition for obtaining relief.<sup>149</sup> The harsh impact of those clauses on the rights of weaker parties has led courts to scrutinize the clauses carefully. This scrutiny usually includes an analysis of the parties' bargaining power, and while the existence of significant power disparities is not always determinative, courts often rule for the more powerful or stronger party<sup>150</sup>—a finding of superior power can result in the invalidation of the contract.<sup>151</sup>

Courts also use bargaining-power analysis to police contracts resulting from negotiation processes wholly controlled by the stronger party. Of particular concern are negotiations in which one party exerts extreme pressure upon the other to complete the deal quickly—for example, door-to-door sales<sup>152</sup>—or presents the other

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146. See, e.g., *Cumberland Valley Contractors v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 651 (Ky. 2007).

147. See, e.g., *Golding v. Golding*, 581 N.Y.S.2d 4, 5 (App. Div. 1992).

148. *Cumberland Valley Contractors*, 238 S.W.3d at 651.

149. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1755 (2011) (arbitration clause); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 7 (Mont. 2002) (same); *Barnes v. N.H. Karting Ass'n*, 509 A.2d 151, 154 (N.H. 1986) (liability waiver); *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 103 (N.J. 2006) (arbitration clause); *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 385–86 (N.J. 2006) (liability waiver).

150. See, e.g., *Concepcion*, 131 S. Ct. at 1753; *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 694–95 (N.J. 2010).

151. See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003); *Williams v. Walker-Thomas Furniture, Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965); *Ellis v. McKinnon Broad. Co.*, 23 Cal. Rptr. 2d 80, 84–86 (Ct. App. 1993).

152. See, e.g., *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971); *Toker v. Westerman*, 274 A.2d 78 (N.J. 1970); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d

with a nonnegotiable standard form—for example, consumer sales,<sup>153</sup> end-user licensing agreements,<sup>154</sup> and employment contracts.<sup>155</sup> Courts have found that these processes create decision-making environments that are exceptionally unfair to the weaker party, and they have seized on the bargaining-power doctrine as a means for declaring the resultant contracts unenforceable.<sup>156</sup>

Finally, the bargaining-power doctrine sometimes serves to invalidate contracts where the weaker party's capacity to consent was impaired by causes not attributable to the stronger party. "Distress" contracts, for example, have attracted the application of the bargaining-power construct.<sup>157</sup> So, too, have "exploitation contracts," where one party lacks the mental capacity, skill, or other resources to advocate effectively for himself.<sup>158</sup> In both situations, the stronger party may have behaved in ways that are usually permissible but that were proscribed under the circumstances. Judicial concern for the vulnerability of individuals in compromised conditions, however, has led to the use of the bargaining-power rubric to provide the weak with protections not afforded to others.<sup>159</sup>

Courts, then, have conferred upon the bargaining-power doctrine a highly unusual role. Bargaining-power analysis first divides otherwise identical contracts into two categories: (1) those between the powerful and the weak,<sup>160</sup> and (2) those between parties

264 (Sup. Ct. 1969); *see also* Bennett v. Fun & Fitness of Silver Hill, Inc., 434 A.2d 476, 481 (D.C. Cir. 1981) (high-pressure sales tactics).

153. Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 570 (App. Div. 1998); Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 170–72 (Wis. 2006).

154. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 610 (E.D. Penn. 2007); Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1169–70 (E.D. Mo. 2004); McKee v. AT&T Corp., 191 P.3d 845, 848 (Wash. 2008).

155. Wisdom v. AccentCare, Inc., 136 Cal. Rptr. 3d 188, 195 (Ct. App. 2012); Mayers v. Volt Mgmt. Corp., 137 Cal. Rptr. 3d 657, 670 (Ct. App. 2012); Alder v. Fred Lind Manor, 103 P.3d 773, 787 (Wash. 2004); Zuver v. Airtouch Commc'ns, 103 P.3d 753, 771 (Wash. 2004).

156. *See supra* notes 151–55; *see also* Bennett v. Bailey, 597 S.W.2d 532, 534–35 (Tex. Civ. App. 1980) (invalidating a contract where the stronger party used flattery to induce a lonely widow to agree to a deal).

157. *See* Lifshitz, *supra* note 78; *see, e.g.*, Lonergan v. Buford, 148 U.S. 581, 589–91 (1893); Magnolia Petroleum Co. v. Nat'l Oil Transp. Co., 281 F. 336, 340–41 (S.D. Tex. 1922); Richardson v. Barrick, 16 Iowa 407, 413–14 (1864); Golding v. Golding, 581 N.Y.S.2d 4, 5 (App. Div. 1992).

158. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); Bell v. Cong. Mortg. Co., 30 Cal. Rptr. 2d 205, 209 (Ct. App. 1994) (noting the plaintiff's elderly status in the course of finding a contract unconscionable); Diamond Hous. Corp. v. Robinson, 257 A.2d 492, 493 (D.C. 1969); Wille v. Sw. Bell Tel. Co., 549 P.2d 903, 907 (Kan. 1976); Arnold v. United Co. Lending Corp., 511 S.E.2d 854, 861 (W. Va. 1998) (noting the plaintiff's elderly status in the course of finding a contract unconscionable).

159. *See* Lifshitz, *supra* note 78.

160. *See* Maglin v. Tschannerl, 800 A.2d 486, 490 (Vt. 2002) (discussing unequal bargaining power between the powerful and the "less powerful").

whose power is more or less balanced,<sup>161</sup> and then invalidates some of the former and none of the latter. Unlike other common law doctrines, which universally prohibit certain acts or terms (e.g., contracting with minors or making material misrepresentations during negotiations),<sup>162</sup> the bargaining-power construct aims to identify practices that raise concern only because one party possesses much more power than the other party. Thus, a contract term or negotiation invalidated by the doctrine in one case may well pass muster in another.<sup>163</sup>

Viewed collectively, the reported cases suggest that the bargaining-power doctrine serves in practice as an “equitable safety valve.” It enables courts to seize on large disparities of bargaining power to invalidate arrangements that—absent the disparities—would otherwise be enforceable. The metric that determines the invocation and application of the fairness test is hidden from view. But categorizing the transactional qualities that motivate courts to deploy bargaining-power analysis in this fashion provides a starting point for considering other and better means of regulating the terms and behaviors that have aroused judicial suspicion.

### *B. Other, Better Means Can Address the Underlying Problems*

Legal systems can combat abusive contracting practices in many different ways. The bargaining-power doctrine is but one potential, and highly imperfect, solution. Other contract law doctrines provide better options. Legislative and regulatory actions can also address these problems that bargaining-power analysis seeks to solve. Not only can these substitutes respond more coherently to those problems, but they can also help discourage objectionable commercial behaviors without chilling beneficial conduct. For reasons discussed below, nonjudicial regulatory responses may have the greatest potential for efficiently deterring undesirable conduct.

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161. See *Daley v. People's Bldg., Sav. Ass'n*, 59 N.E. 453, 453 (Mass. 1901); Schwartz, *supra* note 93, at 364.

162. See, e.g., *Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 153 (N.D. Ill. 1997) (“[T]he general rule applicable to all contracts, other than for necessities, is that the contract of a minor is voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification.”).

163. Compare *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 208 (3d Cir. 2010) (refusing to enforce an arbitration agreement between an employer and employee), with *Quilloin v. Tenet Healthsystem Phila.*, 673 F.3d 221, 236–37 (3d Cir. 2012) (enforcing an arbitration agreement between an employer and employee).

### C. *Judicial Regulation*

Instead of relying on the bargaining-power doctrine to strike down inequitable contracts, courts could police contracting practices through more traditional doctrinal defenses. While the most obvious is the public policy defense, several other doctrinal defenses could also provide a sound basis for refusing to enforce certain unfair contracts. These doctrines could be particularly useful if courts interpreted precedent liberally or slightly modified the traditional elements of the relevant doctrine. What follows is an outline of this approach followed by a discussion of the problems associated with its use.

Courts have long relied on the public policy defense as a basis for refusing to enforce contracts containing abusive terms. While the exact formulation of the defense varies from state to state, the core of the defense permits courts to invalidate all or part of a contract if enforcement would conflict with well-established public interests.<sup>164</sup> Determining what constitutes such interests and whether enforcement of the contract might injure them are determinations wholly within the discretion of the court.<sup>165</sup>

The law regarding liability waivers illustrates how the public policy defense can serve as a check against unfair contracting terms. As noted earlier, courts have regularly expressed concern about contractual provisions that limit one party's common law liability to the other.<sup>166</sup> That concern is understandable: permitting one party to opt out of liability would undermine important societal interests, such as compensation, deterrence, and punishment, which the common law seeks to promote.<sup>167</sup> While many courts have used bargaining-power analysis to restrict the enforceability of broad liability waivers,<sup>168</sup> others have achieved the same end by finding that these clauses are injurious to the public's interests.<sup>169</sup> By removing those waivers from the bargaining table, these courts have eliminated one means by which powerful parties might exploit weaker ones. The public policy defense can thus eliminate

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164. See 17A AM. JUR. 2D *Contracts Against Public Policy* §§ 237–245 (2013); 17A C.J.S. *Contracts* §§ 278–282 (2013).

165. See 17A AM. JUR. 2D *Contracts Against Public Policy* § 243 (2013); 17A C.J.S. *Contracts* § 281 (2013).

166. See, e.g., *Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir. 1994); *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678 (N.J. 2010); *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190 (Pa. 2012).

167. See, e.g., *Turkish*, 27 F.3d at 27–28 (refusing to “uphold any provision intended to insulate parties from their own fraud”).

168. See, e.g., *Neustrom v. Union Pac. R.R. Co.*, 156 F.3d 1057 (10th Cir. 1998); *Wolf v. Ford*, 644 A.2d 522 (Md. 1994).

169. See, e.g., *Universal Gym Equip., Inc. v. Vic Tanny Int'l, Inc.*, 526 N.W.2d 5, 6–7 (Mich. Ct. App. 1994); *Rothstein v. Snowbird Corp.*, 175 P.3d 560, 563 (Utah 2007); *Werdehoff v. Gen. Star Indem. Co.*, 600 N.W.2d 214, 222 (Wis. Ct. App. 1999).

potentially abusive terms from contracts, while avoiding the need to assess and compare the relative power of the parties.

The judiciary's use of the public policy doctrine to strike down systematically unfair provisions has extended beyond the area of liability waivers. For instance, courts have held that certain arbitration clauses are so disadvantageous to the non-drafting party (typically a consumer) that they are void as against public policy.<sup>170</sup> Judges have also used the defense to police the enforceability of noncompete provisions in employment contracts, restrictions on the ability of policyholders to recover from insurers, and other restrictions on alienability.<sup>171</sup>

The public policy defense is sufficiently plastic that it could also provide a basis for invalidating contracts resulting from abusive, precontractual behavior. For instance, courts could decide that contracts that result from certain types of solicitation are unenforceable because public policy is against the violation of individuals' privacy interests. Courts might, however, regard other defenses as better suited to policing the contracting process. Thus, they might invalidate a contract achieved through extremely high-pressure sales tactics by finding that those tactics amounted to undue influence.<sup>172</sup> Similarly, they might hold that a vendor's failure to identify and explain terms that undermine the consumer's reasonable expectations constitutes a species of misrepresentation or fraud.<sup>173</sup> Or courts could expand the use of estoppel and waiver doctrines to invalidate contractual terms at variance with parties' prior, contemporaneous, or later representations.

Courts might adapt existing doctrines in order to protect individuals whose ability to consent to a contract has been impaired. Modifications to the misrepresentation and fraud defenses could impose enhanced disclosure duties on parties that contract with individuals lacking the mental capacity, skill, or other resources to advocate effectively for themselves. Courts might require the drafting party to ensure that the non-drafter understands specific terms of the bargain. They could deploy the duress or undue influence defenses to combat attempts to take unfair advantage of parties in distress situations.<sup>174</sup> Finally, and most radically, courts

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170. See, e.g., *Thomas v. Carnival Cruise Lines*, 573 F.3d 1113, 1124 (11th Cir. 2009); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994); *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766, 766–67 (Ala. 2002).

171. See, e.g., *Holdings, Inc. v. Rehab Solutions, LLC*, 307 F. Supp. 2d 1249, 1262 (M.D. Ala. 2004); *ALW Mktg. Corp. v. McKinney*, 421 S.E.2d 565, 568 (Ga. 1992); *Benchmark Med. Burkhart v. Motorists Ins. Co.*, No. 1167, 1982 WL 2846, at \*1 (Ohio Ct. App. 1982); *Sonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 621 S.E.2d 352, 354 (S.C. 2005).

172. See *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 539–41 (Ct. App. 1966).

173. Cf. *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 145 (D.D.C. 2007).

174. See *Lifshitz*, *supra* note 78.

could adopt more restrictive views about whether certain groups of individuals have the capacity to enter into binding contracts.<sup>175</sup>

While existing contract law doctrines, slightly modified, could address some of the problems animating the use of the bargaining-power construct, adapting existing doctrine is not the best course of action. If courts were to expand these doctrines beyond their traditional boundaries, they would likely create a new set of problems—requiring determinations just as difficult as those that accompany bargaining-power analysis. Consider a court's refusal to enforce a sales contract on the grounds that the vendor's high-pressure sales tactics amounted to undue influence. The precedential value of such a decision would be minimal: the exact constellation of facts behind the result (e.g., whether the consumer was educated, whether the subject matter of the contract was readily available elsewhere, or the intent of the vendor) would not reappear in future cases. Later courts would thus have to adjust their approach to different facts, leading to a body of case law just as muddled as the bargaining-power doctrine.

Doctrinal expansion might also introduce an unwelcome element of indeterminacy into the administration of the law. Most of the transactional qualities that would play central roles in these expansive analyses are not amenable to objective measurement. For instance, one cannot meaningfully quantify the extent to which a vendor's advertisements are likely to mislead consumers. Similarly, a more restrictive approach to contractual capacity would necessarily involve a line-drawing exercise based on highly generalized, arbitrary distinctions. The inherently imprecise nature of these assessments, and others like them, would force courts to make decisions based on intuition and would effectively prevent the development of clear standards of conduct for contracting parties.

The uncertainty introduced through regulating contracts in this manner would decrease the ability of private parties to assess *ex ante* the enforceability of their contracts. This, in turn, would increase the cost of contracting, as sellers would either add risk premiums to the contract price, invest in insurance or other hedging mechanisms, or eliminate price-reducing terms that might be deemed unenforceable. In some cases, extreme unpredictability might cause parties to exit certain markets altogether.<sup>176</sup>

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175. See, e.g., *Kayser v. McClary*, No. CV 10-00119-REB, 2011 WL 162296, at \*4 (D. Idaho Jan. 15, 2011) (finding that an individual's advanced age and evidence of moments of mental confusion were sufficient to create a genuine issue of material fact); *R.R. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998) (limiting the ability of mothers to relinquish their rights to their children immediately after birth); *Four Season's Healthcare Ctr., Inc. v. Linderkamp*, 837 N.W.2d 147, 151 (N.D. 2013) (finding a lack of capacity due to dementia).

176. See, e.g., *Medical Liability: Hearing on H.R.5 and H.R.4280 Before the H. Comm. on Small Business*, 109th Cong. (2005) (statement of Dr. Donald J. Palmisano, M.D., J.D., Immediate Past-President of the American Medical

Some forms of increased judicial intervention, however, would pose fewer problems. Doctrinal adjustments establishing clear rules of easy and general application would avoid some of the indeterminacy and objectivity issues identified above. For example, a holding that insurers cannot provide coverage for punitive damages,<sup>177</sup> or a holding that a clause in a form contract waiving a property owner's liability for gross negligence is unenforceable as against public policy, would set a clear precedent for future cases involving such waivers.<sup>178</sup> But even with these types of rulings, interpretive problems are likely. Courts might, for instance, struggle to determine whether the invalidation of a liability waiver would apply to contracts negotiated in slightly different contexts. Consequently, a judicial effort to police unfair terms through the expanded use of existing doctrine would have limited and piecemeal value and would likely encounter many of the problems associated with the current approach to the bargaining-power construct.

#### *D. Legislative and Administrative Regulation*

State and federal statutes, along with administrative rules, could provide another substitute to the continued use of the bargaining-power notion. When particular contracting practices prove systematically and notoriously unfair, legislatures and regulatory agencies can enact rules proscribing or limiting the offensive behaviors. The ability of these mechanisms to address the problems in the bargaining-power doctrine is clear: many laws already exist that regulate commercial contracting activity.

Examples abound of laws and regulations aimed at resolving the very concerns that have led courts to turn to bargaining-power analysis. In a number of different areas, legislatures and agencies have prohibited contracts from including terms deemed abusive to one of the parties. State usury laws limit the amount of interest that lenders can charge to certain types of borrowers.<sup>179</sup> The Federal Trade Commission ("FTC") has issued regulations dictating terms that must, and must not, be included in payday loans, credit

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Association) (gynecology); Sujatha Vathyam, Note, *No More "Hand-Me-Downs" Please!: Children Deserve Medical Devices Specifically*, 58 RUTGERS L. REV. 719, 727-29 (2006) (pediatric medical devices).

177. See, e.g., *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 517 (Colo. 1996); *State Farm v. Blevins*, 551 N.E.2d 955, 958-59 (Ohio 1990).

178. See, e.g., *City of Santa Barbara v. Superior Ct.*, 161 P.3d 1095, 1102 (Cal. 2007).

179. See, e.g., CONN. GEN. STAT. § 37-4 (1960); DEL. CODE ANN. tit. 6, § 2301 (1953); 41 PA. CONS. STAT. § 3 (1954); VA. CODE ANN. § 6.1-318 (West 1950). It should be noted that these laws are no longer effective due to the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 521, 94 Stat. 132, 164-65 (1980) (codified as amended at 12 U.S.C. § 1831d (2013)) and the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (codified in scattered sections of 12 and 15 U.S.C.).

card agreements, and other consumer-oriented financial contracts.<sup>180</sup> Laws in several states limit the scope and duration of noncompete agreements in employment contracts.<sup>181</sup> Many state insurance regulators have the power to control whether policies can include particular terms.<sup>182</sup> The Occupational Safety and Health Act<sup>183</sup> and minimum wage laws<sup>184</sup> establish mandatory requirements for employment contracts. Foreign governments and trading consortia have directly prohibited consumer contracts from containing terms regarded as overly disadvantageous to customers—such as merger clauses and waivers of implied guarantees of acceptable quality and fitness for disclosed uses.<sup>185</sup>

Legislatures and administrative agencies have also enacted rules prohibiting various preagreement contracting practices. For instance, FTC regulations require vendors to follow certain procedures when engaging in door-to-door sales,<sup>186</sup> and state legislatures have imposed additional requirements on those sales.<sup>187</sup> Widely adopted commercial laws require as a condition of enforceability that the specified contracts set forth certain terms conspicuously.<sup>188</sup> State insurance laws prohibit insurers from engaging in certain practices when reviewing applications for coverage, changing policyholders' premium rates, or refusing to renew existing policies.<sup>189</sup> The federal Patient Protection and

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180. See, e.g., Fair Credit and Charge Card Disclosure Act, 15 U.S.C. § 1637(c)–(g) (2013); Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111–124, 123 Stat. 1734 (2009) (codified in scattered sections of Title 15 of the U.S. Code).

181. See, e.g., ALA. CODE § 8-1-1 (2001); CAL. BUS. & PROF. CODE § 16600 (Deering 2007); COLO. REV. STAT. ANN. § 8-2-113(3) (West 1982); MICH. COMP. LAWS ANN. § 455.772 (West 2014); ORE. REV. STAT. § 653.295 (2013).

182. See, e.g., 215 ILL. COMP. STAT. ANN. 5/143 (West 2014), MASS. GEN. LAWS ANN. ch. 175, § 108 (West 2014); V.I. CODE ANN. tit. 22, § 811 (2013); WASH. REV. CODE ANN. § 48.18.110 (West 2013).

183. 29 U.S.C. § 651 (2012).

184. See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (2012); Minimum Wage Law, CONN. GEN. STAT. §§ 31-58 to 31-76 (2013); 820 ILL. COMP. STAT. ANN. 105/1-15 (2013); San Francisco Minimum Wage Ordinance, SAN FRAN. ADMIN. CODE 12R.4 (2013).

185. See *Competition and Consumer Act 1974* (Cth) ss 18, 134–37 (Austl.) (otherwise titled Schedule 2—The Australian Consumer Law (establishing disclosure standards for the sale of commercial goods (ss 134–37), prohibiting false and misleading representations in connection with the sale of goods and services (s 18), and proscribing the inclusion of certain contractual terms (s 25)).

186. See 16 C.F.R. § 429 (2014).

187. See, e.g., N.J. STAT. §§ 17:16C-61.1 to 17:16C-61.9 (2010); N.Y. PERS. PROP. LAW §§ 425–431 (McKinney 2012); TEX. BUS. & COM. CODE ANN. § 601.001 (West 2012).

188. See U.C.C. § 2-103(b) (2013) (defining when a term is to be considered conspicuous); U.C.C. § 2-316 (2013) (requiring conspicuous text for warranty disclaimers).

189. See, e.g., 29 U.S.C. § 1182 (2013) (limiting the grounds that an insurer offering group health insurance can use for establishing individuals' eligibility

Affordable Care Act limits the ways in which health insurers may screen applicants.<sup>190</sup> Laws targeting pre-contracting practices are not unique to the United States. Members of the European Union, for example, have prohibited a long list of such practices.<sup>191</sup>

Finally, some laws attempt to prohibit the exploitation of individuals who are unable to make informed, fully consensual choices. For example, a number of states have enacted price-gouging laws,<sup>192</sup> which prevent vendors from charging above-market prices for goods in areas devastated by natural disaster or other hardship.<sup>193</sup> While the desirability of these laws is questionable as a matter of economics, they represent explicit legislative efforts to protect individuals temporarily disadvantaged by circumstance.<sup>194</sup>

Significant benefits flow from the use of nonjudicial regulation to address inequitable contracting practices. The largest benefit may be the ability to avoid the incoherence and inconsistency that defines bargaining-power jurisprudence. In particular, this form of regulation enables legislators and administrative agencies to implement rules that address specific, problematic contracting behaviors.<sup>195</sup> By eliminating the need for judicial definition and

for enrollment); Federal Fair Housing Act, 42 U.S.C. § 3601 (2013) (as interpreted by *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995) and *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992)); 215 ILL. COMP. STAT. ANN. 5/143.17 (West 2013) (requiring insurers that intend to not renew a policy to provide advance notice to the policyholder); TEX. INS. CODE art. 5 § 544.01 (2013); 24 C.F.R. § 100.70(b) (1998).

190. Pub. L. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.).

191. See Council Directive 2005/29/EC, 2005 O.J. (L 149) (EU), available at CCH-PLMKG P 40120 (C.C.H.), 2009 WL 3620066 (otherwise titled *Unfair Commercial Practices Directive*, ¶ 40,120 European Union—Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council) (describing prohibited practices generally in Chapter 2 and listing specific behaviors that fall within the prohibited categories in Annex 1); see also, Jennifer S. Martin, *An Emerging Worldwide Consensus for Protections of Consumers in Sales of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT'L. L.J. 223 (2006) (discussing the European Union's Unfair Contract Term Directive).

192. See, e.g., ALA. CODE §§ 8-31-1 to 8-31-6 (2012); CAL. PENAL CODE § 396 (West 2012); ILL. ADMIN. CODE tit. 14, §§ 465.10–465.30 (2013); MICH. COMP. LAWS. § 445.903(1)(z) (2013); R.I. GEN. LAWS ANN. § 30-15-19 (West 2012).

193. See, e.g., *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011); *Abrams v. Two Wheel Corp.*, 525 N.E.2d 692 (N.Y. 1988).

194. See, e.g., Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1132 (2007); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1510–13 (1998).

195. See generally *supra* notes 178–94 and accompanying text.

assessment of bargaining power, well-crafted rules can enable courts to apply consistent standards across cases. Clearer standards will increase predictability, allowing private parties to more accurately assess the legality of their behavior and making it less likely that they will engage in unfair contracting practices.

Nonjudicial regulation is also less likely to deter beneficial contracting behavior. One significant problem with using bargaining-power considerations to invalidate contracts exploiting the powerless is that their powerful counterparties will either charge them additional risk premiums or will avoid transacting with them altogether. Nonjudicial regulation can forestall these problems by proscribing the use of specific terms or by requiring certain disclosures in contracts involving groups deemed vulnerable. While additional regulation would likely result in marginally higher prices, the improved clarity and associated decrease in litigation might well offset that increase.

Of course, legislative and administrative responses are not problem free. Regulatory capture is an important concern.<sup>196</sup> Those adversely affected by strong statutory and regulatory controls are concentrated and well organized, while consumers are dispersed and unorganized—a scenario that may enable lobbying efforts by the former to stifle meaningful change.<sup>197</sup> The continued growth of commercial regulation, however, arguably indicates that current levels of market capture in this area are not substantial enough to prevent new reforms from being implemented.

Another concern arises from the rigidity of legislative action and the problems that arise when there are post-enactment developments that the law did not anticipate. While rules generated by statute and regulation are necessarily less flexible than those created through the common law, they are far from immutable.<sup>198</sup> When significant, unanticipated problems arise, legislative and administrative bodies can modify the original law so that it accounts for the new conditions. Indeed, one can find examples of this responsive mechanism in a variety of areas of commercial regulation.

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196. See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 167 (1990); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341–42 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

197. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 43–52 (1971).

198. See, e.g., *supra* sources accompanying note 179 (noting that the state laws cited are no longer effective due to subsequent lawmaking by the U.S. Congress).

*E. Summary*

The bargaining-power doctrine provides no unique benefit to contract law—the behaviors that it prohibits can be deterred more effectively in a variety of other ways. None of these alternatives is perfect, but each is superior because it eschews the inevitably arbitrary, individualized analysis of the parties' relative power in favor of a more focused look at the troublesome term in question. Contract law would be better served by abandoning the analysis of bargaining power and relying instead on doctrinal, legislative, and regulatory measures to police the use of arguably abusive terms and negotiating practices.

## CONCLUSION

Contracts resulting from the abuse of unequal bargaining power have long been a concern of contract law. Courts have proscribed efforts by the powerful to take unfair advantage of the weak through contracts of adhesion and standard-form contracts. Certain kinds of clauses—liability waivers and covenants not to compete, among others—regularly attract judicial suspicion because their appearance is deemed indicative of an abuse of power. The role that bargaining-power considerations should play in contractual analysis has been debated by generations of contract scholars in books, symposia, and journal articles.

Yet, despite its longevity and initial intuitive appeal, the bargaining-power construct is impossible to specify and is inessential to the broader purposes of contract law. No court or scholar has identified, or even proposed, a useable definition of the term. Nor has anyone proposed a coherent method for objectively measuring interparty power disparities or for determining what degree of inequality should trigger judicial scrutiny. Moreover, it is a doctrine that confuses the application of contract law without offering any significant analytical benefit. The same objectionable practices that courts have invalidated on bargaining-power grounds could be addressed more effectively through other doctrines or through legislative and regulatory provisions.

The coherence of contract law would benefit from the elimination of all consideration of bargaining-power issues from judicial analysis. To the extent that courts employ the construct as a guise for public policy determinations, then the public policy defense itself would serve that purpose better. Reliance on the construct to police exploitative contract practices is unnecessary, as legislation and regulation provide superior tools for this task. Everything that bargaining-power analysis seeks to accomplish can be achieved better and more directly by another route, without requiring courts to engage in the inevitably incomplete assumptions and hopelessly imperfect assessments that the measurement of power entails.