

2000

The Sound of One Form Battling: Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

Richard Craswell
Stanford University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Commercial Law Commons](#), [Contracts Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Richard Craswell, *The Sound of One Form Battling: Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'*, 98 MICH. L. REV. 2727 (2000).

Available at: <https://repository.law.umich.edu/mlr/vol98/iss8/15>

This Symposium is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE SOUND OF ONE FORM BATTLING

Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

*Richard Craswell**

Daniel Keating has provided a thoughtful and useful study of the way that businesses form contracts.¹ In particular, he has given us a good deal of data concerning the problem known as the "battle of the forms." Commercial lawyers have, of course, been wrangling over this problem for decades, so it is no small accomplishment to be able to offer a useful contribution.

In Part I below, I describe more precisely just what Keating's data does and does not illuminate. Parts II and III then focus on a particular contracting practice that Keating has identified: the practice of getting both parties to sign a "master agreement" in advance of a series of deals. These master agreements let the parties agree in advance to the terms that will govern their subsequent deals, without leaving those terms to depend on the invoices and other forms that will subsequently be exchanged. This encapsulation of the parties' agreement in a single document could be said to eliminate the battle entirely, for it certainly solves many of the technical problems that plague commercial lawyers whenever the parties' documents fail to match. I argue, though, that these master agreements may not solve all of the objections that some courts and some scholars have raised in "battle of the forms" cases. While I believe these objections are misguided, they may nevertheless be influential, so there is at least a question about how often these master agreements will be upheld by courts.

I. THE BEHAVIOR BEHIND THE CONTRACTING BEHAVIOR

At the outset, it is worth clarifying what Keating's study does and does not address. His study tells us a good deal about *contracting* behavior: about how businesses draft standard forms, negotiate with one another, and so on. However, his study does not attempt to examine the underlying *economic* behavior those contracts govern — that is,

* Professor of Law, Stanford University. B.A. 1974, Michigan State; J.D. 1977, University of Chicago. — Ed.

1. Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678 (2000).

Keating does not study the production, pricing, or sale of actual goods. As a result, his study does not address the issues that are most central to the normative literature on the battle of the forms.

For example, one issue raised by that normative literature is whether it should be easier or harder for sellers to displace the U.C.C.'s standard default rules. Unless the parties agree otherwise, the U.C.C. makes sellers liable for all consequential damages caused by any defect that leaves a product less than "merchantable,"² and this rule is sometimes criticized as inefficient.³ If this criticism is correct — an issue to which I return below — then it might be desirable to give sellers an easy way to contract around those default rules, perhaps by specifying some other remedy in their standard form. Other scholars, however, argue that sellers' forms may be inefficient in the opposite direction, by being overly stingy toward buyers (for example, by disclaiming any warranty entirely).⁴ If this criticism is correct, we might be better off with a battle-of-the-forms rule that made it *harder* for sellers to contract around the U.C.C.'s default remedies.

My only point here is that a study such as Professor Keating's cannot resolve the question of whether the U.C.C.'s default remedies are either more or less efficient than those that appear in sellers' (or buyers') standard forms. This is because the efficiency of any remedial provision — either a default remedy in the U.C.C., or a remedy stipulated in a standard form — depends on the underlying economic behavior that will be governed by the contract. For example, a clause disclaiming all warranties might indeed be inefficient (all else being equal) if the resulting freedom from liability reduced sellers' incentives to produce merchantable products, leading to inefficiently low levels of product quality. To test this hypothesis, though, we would need to measure actual product quality to see whether sellers whose forms disclaimed warranty liability tended to produce lower-quality products than those whose forms did not. In other words, the underlying economic behavior — in this case, the level of quality produced by sellers — is what must be studied to resolve this normative debate.

The same is true of the contrary claim, that the U.C.C.'s default remedies are inefficient because they are overly generous to buyers. For example, the default remedy of full liability for all consequential damages might be inefficient if it unduly reduced buyers' incentives to take their own steps to reduce those consequential damages. This de-

2. U.C.C. §§ 2-314, 2-715(2).

3. E.g., Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1250-51 (1982); Victor P. Goldberg, *The "Battle of the Forms": Fairness, Efficiency, and the Best-Shot Rule*, 76 OR. L. REV. 155, 157 (1997).

4. E.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983). I discuss this criticism *infra* at notes 14-19.

fault remedy might also be inefficient if it led to cross-subsidization of some buyers by others⁵ — for example, if small buyers who were unlikely to suffer large consequential damages were charged the same price as larger buyers whose consequential losses were likely to be more severe. To tests these hypotheses, though, we would again have to study the underlying economic behavior of buyers and sellers. To evaluate the first effect, we would have to study the actual precautions taken by buyers to minimize their consequential damages in the event of a breach. To evaluate the second, we would have to study the actual prices set by sellers who were subject to liability for full consequential damages. In particular, we would have to study the extent to which those prices did or did not vary with the consequential damages likely to be suffered by any particular buyer.

Obviously, Professor Keating's study does not attempt to shed light on this underlying business behavior. Keating interviewed lawyers to learn how businesses draft standard forms, and how they respond to forms offered by others. He did not interview engineers to learn how businesses make product quality decisions, or accountants and sales managers to learn how businesses set prices. This is what I mean when I say that Keating's study tells us much about *contracting* behavior, but little about the underlying *economic* behavior those contracts might affect.

I should add at once that this observation is not a criticism of Professor Keating. Keating's method of interviewing business people is a useful way of gaining insights into how contracts are formed, but I doubt that it would have been nearly so useful as a way of assessing underlying price and quality behavior. There are, after all, any number of factors that influence the price that a business charges; and a sales manager who is asked about her pricing decision is unlikely even to mention U.C.C. section 2-207 as one of the factors in her decision. She is more likely to respond only in general terms — for example, "We charge enough to cover our costs," or "We charge whatever the market will bear." Interviews of product quality engineers likely will produce similarly general answers — for example, "We produce the most durable product that we can;" or, if pressed, "Yes, we could make our product even more durable, but our customers wouldn't pay that much."

To be sure, these general responses are still consistent with the possibility that the legal rule does have some effect on price and quality decisions. After all, if the legal rule affects all sellers' costs (or all buyers' behavior), it thereby would influence the equilibrium in the market as a whole, thus helping determine what prices customers were in fact willing to pay, or what prices the market would bear. But these

5. See Gwyn D. Quillen, *Contract Damages and Cross-Subsidization*, 61 S. CAL. L. REV. 1125 (1988).

effects of the legal rule will be remote and indirect (assuming they exist at all): they will be an invisible part of the background environment that sales managers and product engineers take as given. As a result, interviews of the sort that Keating conducted are likely to be of little use in assessing the law's indirect effects.

I can only add, regrettably, that it is also difficult to study these indirect effects even through more formal, statistical methods. In principle, one could measure the prices and product quality chosen by various sellers under various remedial regimes — while also collecting data on all of the other factors that affect sellers' choices of price and quality — and then analyze the statistics to try to isolate the effect of different remedial rules. But data are extremely difficult to gather even on the main variables of concern — price and quality. It is even more difficult to get data on all of the other factors that would have to be controlled for (for example, changes in raw material costs and changes in customer demand) to isolate statistically the effects of any change in the remedial rule. Thus, while it would be wonderful to have such studies (and efforts in that direction should be championed wholeheartedly), this is not an avenue of research that is likely to give us answers any time soon.

Still, the unattainable best should not be the enemy of the merely good. That is, even though we lack studies that would give us the answers we ultimately need, interviews like Professor Keating's can still tell us a good deal about various prior or intermediate questions. I turn now to one such implication of Keating's study, which seems to me to deserve further comment.

II. CONTRACTING AROUND THE RULES FOR CONTRACTING AROUND

I refer here to the practice of firms that require their suppliers or customers to sign a "master agreement" in which they specify an entire set of rules to govern subsequent dealings between the parties.⁶ In effect, these firms have abandoned the effort to draft forms that, *if exchanged in connection with each individual contract*, would survive the application of section 2-207 and give the seller (or the buyer) the terms it wanted. Instead, these firms have opted out of section 2-207 entirely by providing a different set of rules — the rules in the "master agreement" — by which the terms of each subsequent contract will be determined.

This practice is of interest for several reasons. To begin with, most of the prior literature on section 2-207 assumed (quite plausibly) that the fundamental problem was one of high transaction costs. At least

6. See Keating, *supra* note 1, at 2696. Keating refers to these agreements as "practices that eliminate the battle."

for businesses with large numbers of purchases or sales, it simply is not worth the time it would take to hammer out an explicit agreement about every possible contingency that might arise in every single contract. Indeed, for most such businesses it probably is not worth anyone's time to actually *read* every provision in every document. As Victor Goldberg has put it, “[m]aintaining lawyers on the loading dock is not cheap.”⁷

What Keating's interviews tell us, though, is that the transaction costs required to read and understand a contract do not necessarily have to be incurred again and again for every single contract. Instead, if a buyer and seller expect to deal repeatedly, they can agree once on a master contract which itself supplies the terms for each subsequent “contract” they might enter into. Because this master contract need only be read and negotiated once, the cost of reading and negotiating can be spread over a number of subsequent transactions. In effect, the cost per transaction has been reduced. Put slightly differently, even firms that do not find it worthwhile to read and negotiate the terms of each individual *shipment* (the “lawyers on the loading dock” scenario) might still find it worthwhile to read and negotiate the terms of an entire, long-lasting *relationship*.

To be sure, the mere fact that these master agreements are available does not, by itself, establish that they deserve legal enforcement. I will address that issue below in Part III. For now, my only point is that one of the assumptions underlying the previous literature on the battle-of-the-forms — to wit, that it generally is infeasible for firms to read and negotiate explicit provisions governing all their dealings — is now demonstrably untrue, at least for some contracting parties. Even if this were all that Keating's study demonstrated (and it is not), that fact alone would be a significant contribution.

More generally, the “master agreements” phenomenon also shows that there are different ways to contract around a default rule. When we speak of “contracting around a default rule,” we usually imagine firms agreeing to alter some particular rule — a default remedial provision, for example, or an implied warranty. Firms that sign master agreements certainly do this, if the terms of the master agreement differ from the otherwise applicable default rules. Less obviously, however, the master agreements also alter the default rules that would otherwise govern the contract formation process itself, including the rule found in U.C.C. section 2-207. That is, firms that sign master agreements thereby agree that the terms of future dealings will *not* be those that are found in any subsequent expression of acceptance (as would otherwise be the case under section 2-207(1)), plus any additional terms that would otherwise qualify under section 2-207(2). In-

7. Goldberg, *supra* note 3, at 164.

stead, these firms purport to be agreeing that the terms of future dealings will be the terms spelled out in the master agreement itself, without regard to any subsequent invoices or confirmations that might be exchanged. In effect, then, these firms are opting out of the formation regime represented by the current section 2-207 at the same time that they opt out of particular substantive default rules.

This point may be made slightly differently by noting that it is now customary to divide contract law into *mandatory rules* and *default rules*, with the latter being those that firms are allowed to change by private agreement.⁸ This classification, however, is incomplete, for the possibility of displacing default rules by private agreement means that contract law must also contain a set of *enabling rules*, or rules that specify how such agreements can be made.⁹ Indeed, the current section 2-207 is one such enabling rule, for it specifies what the parties must usually do to succeed (or to fail to succeed) in displacing an otherwise applicable default rule. What Keating's study shows, however, is that firms have treated section 2-207 as being itself merely a default rule — a "default enabling procedure," if one wishes to be precise — which is therefore subject to alteration by prior agreement of the parties. (Again, Part III will take up the question of whether such prior agreements will succeed in their aim, or whether courts will instead resist such attempts.)

Viewed in these terms, the master agreements might be analogized more appropriately to arbitration clauses, or other choice-of-law provisions, by which parties do not merely displace particular default rules but specify an entire *regime* of applicable rules. They might also be analogized to trade associations of the sort studied by Lisa Bernstein,¹⁰ in which members agree (either explicitly or implicitly) to be bound by the rules of the association. To be sure, trade association rules and choice-of-law provisions may displace existing law more comprehensively than do the master agreements found by Keating, which typically change only the formation rules (including section 2-207) plus the particular substantive rules the parties happen to address. Another difference is that trade association rules usually evolve

8. For a discussion of this distinction (and its place in the contracts literature), see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87-93 (1989).

9. I have elsewhere referred to these as "agreement rules." Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489, 503 (1989). For economic analyses of other rules governing contract formation, see, for example, Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 *STAN. L. REV.* 481 (1996).

10. *E.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Value Creation Through Rules, Norms, and Institutions*, 99 *MICH. L. REV.* (forthcoming June 2001); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 *U. PA. L. REV.* 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. LEGAL STUD.* 115 (1992).

over long periods of time, as a result of politicking and negotiation among a sizeable membership, while the master agreements identified by Keating are more likely to have been drafted recently by a single firm. (This difference may be relevant to courts' willingness to uphold such agreements, as I discuss below in Part III.)

My point, for now, is simply that firms seem to be increasingly interested in opting out of default rules on a wholesale basis — that is, by contracting around large sets of default rules at once, rather than contracting around one rule at a time (or one transaction at a time), as is implicitly assumed by much of the default rules literature. This is a *contracting* phenomenon, so it is quite suitable for study by Keating's chosen method (i.e., by interviewing corporate counsel), and he has provided a valuable service by calling it to our attention.

III. WINNING THE BATTLE AND LOSING THE WAR?

While this new method of altering default rules raises a number of interesting questions, the most obvious question is whether the method is likely to be successful. After all, courts often resist attempts to alter individual default rules, either by interpreting the contractual language in a way that negates the attempt, or by throwing out the language as unconscionable.¹¹ Historically, courts have sometimes been even more resistant to terms that specify entire alternative systems of law, such as arbitration clauses.¹²

The answer to this question may depend, in part, on just how one conceives of the "problem" to which the battle-of-the-forms rule is the answer. According to one view, it is merely a technical problem of offer and acceptance, which arises when (and only when) there is no single document that both parties have assented to. In such a case, a battle-of-the-forms rule is needed to determine which document will be enforced as the parties' contract. But if the parties have, instead, signed the same master agreement, this technical problem disappears, for the court can simply enforce the terms of the master agreement. In short, if both parties have signed the same form, it is impossible (on this view) for there to be any battle.

11. For a discussion of the argument that judicial interpretation makes it harder for parties to alter default rules, see Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 290-92 (1985); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997). For a discussion of the similar effects produced by the unconscionability doctrine, see Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 32-34 (1993), and the other articles cited there.

12. See, e.g., *W.H. Blodgett Co. v. Bebe Co.*, 214 P. 38 (Cal. 1923) (refusing to enforce arbitration clause as contrary to public policy).

There is, however, another view of the “battle of the forms” that focuses on a different sort of battle: one that is present even when both parties have signed the same form. On this view, the problem posed by battle-of-the-forms cases is merely one version of the more general problem presented by *all* standard forms, which is that such forms often are imposed by the stronger party on the weaker without any real agreement. This is the view that sees “contracts of adhesion” as inherently suspicious, leading to the conclusion that courts should scrutinize all such contracts and withhold enforcement from any terms deemed unfair.¹³ On this view, then, the absence of any apparent “battle” may mean that the stronger party already has won a decisive victory, and thus has been able to dictate the terms of surrender.¹⁴ If courts incline to this view, master agreements of the sort described by Keating will not be upheld except when they are seen as having been freely consented to by both sides, rather than having been imposed by a stronger party on a weaker one.

Of course, this second view has engendered a good deal of criticism in legal scholarship, especially from an economic perspective.¹⁵ It is notoriously difficult to define what should count as “free consent,” especially in any way that does not render *all* contracts invalid, and thus require judicial scrutiny of every term in every contract.¹⁶ Indeed, from an economic perspective the relevant question is not whether consent was truly “free” (however that term might be defined), but whether judicial scrutiny of contract terms will produce better or worse results than simply enforcing such contracts as written, thereby leaving the terms to depend on whatever constraints market forces

13. For an early expression of this viewpoint, see Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). More recent examples include John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); and Rakoff, *supra* note 4.

14. Significantly, many scholars who favor a strong doctrine of unconscionability to police “contracts of adhesion” also endorse the use of § 2-207 to set aside terms in buyers’ or sellers’ standard forms in favor of the U.C.C.’s normal default rules. *E.g.*, John E. Murray, Jr., *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 57-60 (1984).

15. For early criticisms, see, for example, Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151 (1976); Michael J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359 (1976); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977). Similar concerns are noted in Douglas G. Baird, *Commercial Norms and the Fine Art of the Small Con: Comments on Daniel Keating’s ‘Exploring the Battle of the Forms’*, 98 MICH. L. REV. 2716 (2000).

16. Relatively few advocates of the second view have been willing to suggest that virtually all contracts should be subject to this sort of judicial scrutiny. A possible exception is Rakoff, *supra* note 4.

may or may not provide.¹⁷ In other words, economists would want to ask questions like: How well are market forces working in the market in question? Are buyers reasonably well-informed, so that any seller that offers unfavorable terms is likely to suffer a loss in business? Or are buyers almost completely oblivious to the contract terms, so a seller could profit by using a one-sided term even if the term were not in fact efficient? Economists would also ask analogous questions about judicial review of contract terms: How good are courts at deciding which terms are indeed in buyers' interests? Will courts properly assess the extent to which striking down a term might lead sellers to raise prices, or to respond in other ways that might leave buyers worse off? Or will courts be unable to understand such issues, and end up making matters worse than if the courts had not even tried to evaluate contract terms, and had instead simply enforced the contracts as written?¹⁸

Nevertheless, in spite of two decades of economic skepticism, courts often continue to write as though standard forms (or "contracts of adhesion") were proper objects of suspicion.¹⁹ Indeed, Professor Keating's own discussion provides some support for this view. In describing the master agreements that he found, Keating says that they are used most often by "some of the larger companies,"²⁰ who are later described as adopting "a more or less take-it-or-leave-it approach to their forms," and as "ha[ving] the leverage to insist on the other side signing its form."²¹ To be sure, these descriptions may be mere tautologies: in a sense, any party who succeeds in getting its own terms must necessarily have had "leverage" sufficient to "insist" that the other party agree. But the connotation of these descriptions does not suggest the kind of voluntary assent that sometimes is seen as essential

17. I discuss this question at more length in Craswell, *supra* note 11, and in Richard Craswell, *Remedies When Contracts Lack Consent: Autonomy and Institutional Competence*, 33 OSGOODE HALL L.J. 209 (1995).

18. As Arthur Leff once put it, the regulation of contract terms can have:

important economic (and therefore social) costs. If carried forward with vigor, no lawful contract could descend in 'fairness' or 'safety' below a certain qualitative minimum. In certain situations that would have the same effect as some building codes: the cheapest one can get is more expensive than one can afford.

Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 155 (1970).

19. For example, courts continue to cite the language of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960):

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. . . . But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position.

See, e.g., *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 607 A.2d 703, 704 (N.J. 1992); *Multi-Family Management, Inc. v. Hancock*, 664 A.2d 1210, 1227 (D.C. Ct. App. 1995).

20. Keating, *supra* note 1, at 2697.

21. *Id.* at 2702.

to freedom of contract by judges (or scholars) who lean toward the second view described above.

Interestingly, one recent proposal to revise section 2-207 embraced elements of both of the views I have just described. In this proposal, section 2-207(a)(2) provided that the contract consists of, among other things, "terms . . . to which both parties have agreed."²² This language would seem to validate terms in a master agreement that has been signed by both parties.²³ Of course, such terms could still be challenged under the general provision on unconscionability, but, in that respect, the proposed revision is no different from the current version of section 2-207.

At the same time, though, the proposed section 2-207(b)(1) added new language that would have permitted the enforcement even of terms to which the buyer "has not otherwise agreed," as long as the buyer did not object within twenty or thirty days after he received the contract, and as long as the terms, "taken as a whole . . . do not materially alter the contract to the detriment of the buyer."²⁴ This proposal thus embraced the belief that some contract terms have not, in any meaningful sense, been "otherwise agreed to" by the buyer. However, the proposal provided that those terms could still be enforced, as long as they did not inflict a material detriment on buyers.²⁵ Obviously, under this language, it was the courts who would have to decide which terms, in fact, worked to buyers' detriment (when the terms were "taken as a whole"), and when that detriment was sufficiently large to be "material." Thus, this aspect of the proposed revision also reflected at least some degree of faith in the ability of judges to determine which terms are in buyers' interests and which terms are not. In that respect, the proposal was very consistent with the second view outlined above.

There are, of course, further questions that would have had to be answered to fully assess the impact of the proposed revision. For example, when courts evaluated such terms "taken as a whole," would they also have evaluated any price increases (or changes in other terms) that sellers might adopt if the challenged terms were invali-

22. E-mail from James J. White to Richard Craswell (February 14, 2000) (on file with author). This proposal was subsequently modified, *see infra* note 24, but I discuss it here in its original form because that form so nicely illustrates the two contending views.

23. I set aside here the possibility that the language of subsequent invoice forms might be interpreted as proposals to modify the original master agreement.

24. *See* e-mail from James J. White, *supra* note 22. This part of the proposed revision failed to gain sufficient support, and was subsequently dropped (as was the corresponding proposed comment, quoted *infra* note 25).

25. The proposed Comment to this revision stated that this language was intended to strike a balance "between the buyer's need for protection from unexpected and unfair terms with the buyer does not see until the product is delivered and the seller's need for an inexpensive way of contracting with its buyers." *Id.*

dated? And, however that question is answered, how would the resulting evaluation differ (if at all) from that which the court would conduct if the same term were challenged under the general doctrine of unconscionability? After all, any term that might be challenged under the revised section 2-207(b) potentially would have been vulnerable under unconscionability as well, for whenever the buyer has “not otherwise agreed” to a term in the seller’s standard form, the lack of a real agreement might well count as a kind of procedural unconscionability. If so, most courts would then proceed to assess the *substantive* unconscionability of the challenged term, by examining (among other things) the actual effects of the clause on buyers.²⁶ Such an inquiry sounds very similar — and might even be identical — to the proposed section 2-207(b)(3)’s instruction that courts assess the extent to which a clause works “materially” to a buyer’s detriment.

IV. CONCLUSION

In short, many discussions of the battle of the forms (and many proposals about how to fix the problem) reflect a fundamental ambivalence between two contesting views. On one view, the battle of the forms is a mere technical problem, which merely requires courts to decide what to do when different documents do not quite match. On another view, the battle of the forms poses a more fundamental problem about unequal bargaining power. This second problem — like that posed by the more general doctrine of unconscionability — requires courts to decide the deeper question of what to do when the terms of contracts have not all been freely consented to (under some appropriate definition of “freely”).

Obviously, data such as Professor Keating’s cannot, by itself, help analysts choose between these two contesting views of the problem. Keating’s data can, however, provide a more realistic picture of the contracting practices that are being analyzed, and in that capacity it provides a useful service to analysts in either camp. While disagreements between the two camps will doubtless continue, they should continue on a more informed basis.

26. The distinction between procedural and substantive unconscionability was first noted in Arthur A. Leff, *Unconscionability and the Code — The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967). For an economic analysis of this distinction, see Craswell, *supra* note 11, at 17-20.