Brigham Young University Law Review
2013

Article

*1 CONTRACT AND CHOICE

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This Article contributes to an ongoing debate, afoot in academic, legal, and policy circles, over the future of consumer arbitration. Utilizing a newly available database of credit card agreements, the Article offers an in-depth examination of dispute resolution practices within the credit card industry. In some respects, the data cast doubt on the conventional wisdom about the pervasiveness of arbitration clauses in consumer contracts and the presence of unfair terms. For example, the vast majority of credit card issuers do not utilize arbitration clauses, and by the end of 2010, the majority of credit card debt was not subject to such an agreement. Likewise, while the use of class waivers is widespread in arbitration clauses, most clauses lack the sort of unfair procedural terms for which arbitration is often criticized. The upshot of these and other findings is that consumers, in some respects, have more choice in their contracts than the literature suggests. Our work also responds to the suggestions of some scholars that businesses favor arbitration clauses in their consumer contracts but not their business-to-business agreements. On the contrary, our research suggests that the difference may not be as dramatic as previous research suggests. These results hold important implications for ongoing policy debates, including the proposed Arbitration Fairness Act pending in Congress as well as the work of the newly minted and controversial Consumer Financial Protection Bureau (CFPB). Our findings suggest that the Arbitration Fairness Act may be based on faulty empirical premises and that the blanket prohibition contained in the Act may be overbroad. Our findings also provide a model that the CFPB might follow in conducting its statutorily required study of the use of arbitration clauses in consumer financial services contracts.

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Introduction

Arbitration clauses in consumer contracts have been the subject of much recent controversy. Central to this controversy has been the argument that consumers lack meaningful choice in deciding whether to accept arbitration as a precondition to their purchase of a good or service. This criticism has not been isolated to academic debates but has emerged in judicial, legislative, and regulatory debates over the future of arbitration. [FN1]

In the judicial sphere, a recurring refrain has been that arbitration agreements, particularly when coupled with a class waiver, are "unconscionable" and, thus, unenforceable under the savings clause ***3** to section 2 of the Federal Arbitration Act. [FN2] A finding that an arbitration clause (indeed, any contract provision) is unconscionable typically requires both substantive unconscionability--unfairness in a particular provision or provisions of the contract--and procedural unconscionability--absence of meaningful choice by one party. [FN3] Some courts find sufficient procedural unconscionability from the fact that an arbitration clause is in a standard form consumer contract, without regard to actual market conditions; [FN4] others require consideration of whether the consumer had "meaningful choice" when entering into the contract. [FN5]

In AT&T Mobility LLC v. Concepcion, a sharply divided Supreme Court held that the FAA preempted application of California's unconscionability doctrine to make an arbitration clause in a consumer contract coupled with a class arbitration waiver unenforceable. [FN6] But the decision hardly heralded an end to the controversy surrounding the use of such clauses in consumer contracts. AT&T's clause contained a number of distinctive features, such as attorney fees for prevailing plaintiffs and a "reward" or "incentive" formula; other arbitration***4** clauses lack such features. [FN7] California's rule was a blunt tool, amounting to a per se invalidation of class waivers in arbitration clauses; by contrast, other states employ more nuanced unconscionability tests to class waivers. [FN8] Other features of arbitration clauses, such as discovery and remedy limits, have also been subject to attack in litigation and academic criticism. [FN9] Indeed, before Concepcion even hit the United States reports, several lower courts invalidated arbitration clauses in consumer contracts, assuring continued battles over the decision's sweep. [FN10]

In the legislative sphere, Congress has considered a variety of bills that, to various degrees, would invalidate pre-dispute arbitration agreements in consumer contracts. [FN11] As with the above-described unconscionability challenges, one premise of these legislative efforts is that the consumer lacks a meaningful choice in deciding whether to accept arbitration as a precondition to their purchase of a good or service. [FN12] Congress has already enacted some specialized bills, including most recently a provision of the Dodd-Frank financial reform law that prohibits pre-dispute arbitration clauses in residential-mortgage***5** loans. [FN13] Previously, Congress enacted a little-known law that prohibited the use of arbitration clauses in consumer credit agreements with members of the armed forces. [FN14] More comprehensive legislation, such as the Arbitration Fairness Act (which, in relevant part, would invalidate pre-dispute arbitration agreements in all consumer contracts), remains on the congressional agenda. [FN15]

Finally, in the regulatory sphere, interested parties eagerly await proposed rules from the newly created Consumer Financial Protection Bureau (CFPB). The legislation creating the CFPB vested it with authority to issue rules regulating the use of arbitration clauses in consumer financial services contracts, including credit card agreements. [FN16] Before the CFPB can regulate, however, the CFPB must study and report to Congress on the use of pre-dispute arbitration clauses in such contracts. [FN17] The study has not yet been done, and it is too early to know what the rules will look like, although the CFPB has requested and received public comment "to help identify the appropriate scope of the Study, as well as appropriate methods and sources of data for conducting the Study." [FN18]

The continued controversy in all three arenas--judicial, legislative, and regulatory--over the use of arbitration clauses in consumer contracts necessitates systematic thinking about the principles underlying the controversy. Whether directed at class waivers or some other feature of arbitration clauses in consumer contracts, arguments against them take two dif-

ferent forms. In some instances, these arguments rest on a normative proposition that a particular feature (or combination of features) of an arbitration clause should render the clause unenforceable. We call these “Type I challenges.” A familiar reply to these Type I challenges has been that the consumer retains adequate alternatives. If the consumer prefers not to waive her right to a class action, she is free to choose another product provider, one ***6** whose form contract does not contain an arbitration clause or whose contract contains an arbitration clause but without the offensive provision. [FN19] Because the consumer retains a modicum of choice, the consumer's choice of the particular agreement is voluntary and not the result of overreaching by the company. The plausibility of this response rests in part on an empirical proposition about the use of arbitration clauses within a given industry.

In other instances, the argument against arbitration clauses sweeps more broadly. Some attacks on arbitration clauses posit both that an arbitration clause contains the offending provisions and that all (or most) contracts for a particular consumer good contain that provision. For example, in one case recently considered by the Florida Supreme Court, a consumer challenged the enforceability of an arbitration clause contained in his cell phone agreement with Sprint/Nextel on the grounds that it contained a class arbitration waiver. [FN20] The consumer alleged that the offending provision was especially pernicious because, he alleged, all of Sprint's competitors in the Florida cell phone market also included class arbitration waivers in their subscriber agreements. [FN21] Like the Type I challenge, these challenges rest on a normative premise about the social desirability of a particular procedural right. They also rest critically on a positive premise--namely that the use of arbitration clauses within the industry is so pervasive in the relevant market that the consumer is ***7** effectively denied a meaningful choice. [FN22] We call these “Type II challenges.”

This Article addresses the empirical premises underlying both types of arguments in an industry that has been at the center of the controversy over consumer arbitration--the credit card industry. As to Type I arguments, we consider the extent to which arbitration clauses employ particular features that have generated controversy, including class arbitration waivers and remedy limitations, among others. As to Type II arguments, we consider the pervasiveness of arbitration clauses among firms within an industry. To test these empirical questions, we again mine a rich (and largely untapped) database of credit card agreements. [FN23] This database allows us to take an exceptionally thorough snapshot of the dispute resolution choices made within the credit card industry. As noted above, that industry has been a central, though certainly not the only, battleground in these judicial, legislative, and regulatory debates. Our empirical study examines, among other things, the frequency with which arbitration clauses are utilized, the features employed in those clauses, and the extent to which the drafter utilizes safeguards (like small-claims carve-outs) to offset some effects of the arbitration clause. While our findings are unavoidably industry-specific, they carry implications for the wider debates and offer a model for future empirical research.

Our findings chart new ground. In some respects, they dispel certain misconceptions about the use of arbitration clauses within the industry; in other respects, they confirm the conventional wisdom. Perhaps most significantly, our research demonstrates that, contrary to widespread belief, the use of arbitration clauses among firms in the industry is not widespread-- fewer than twenty percent of the credit card issuers employ arbitration clauses. When measured not by ***8** firms but instead by the volume of credit card loans, the figure is larger. But still, as of December 31, 2010, less than half--only forty-eight percent of the outstanding credit card loans in the industry--are held by firms using arbitration clauses (down from ninety-five percent as of December 31, 2009, as a result of a civil settlement under which several banks agreed to suspend their use of such clauses). Accordingly, many consumers who wish to avoid arbitration clauses in their credit card agreements likely have more options than commonly believed.

Our findings on the terms of such clauses are equally revealing. Nearly seventy percent of firms employing such clauses included some form of small-claims carve-out like that provided by the arbitration clause in the Concepcion decision. (As a practical matter, the proportion is likely even higher, because essentially all of the clauses provide for either

the American Arbitration Association or JAMS to administer the arbitrations, and the Due Process Protocols followed by those providers also require a small-claims carve-out.) This finding casts doubt on criticisms that arbitration clauses completely foreclose a right of access to court. At the same time, other findings support the view that arbitration reconfigures how court is accessed--specifically, the unavailability of the class mechanism. Nearly ninety-five percent of arbitration clauses in our sample employ class waivers; when measured not by firms but instead by loan volume, the figure jumps to over ninety-nine percent.

Finally, our findings address ideas discussed by Ted Eisenberg, Geoff Miller, and Emily Sherwin about the comparative utilization of arbitration clauses in consumer contracts and other sorts of contracts. According to Eisenberg, Miller, and Sherwin, companies support the use of arbitration clauses in the consumer context, because they are an effective device for avoiding class actions, but they generally eschew such clauses in their contracts with other businesses. Contrary to this view, our research does not identify any clear difference in the utilization of arbitration clauses with respect to consumer credit card and bank account agreements as opposed to business agreements. Admittedly, our findings are modest--they are based on a limited sample set in a single industry. Nonetheless, they suggest that the Eisenberg, Miller, and Sherwin proposition cannot be automatically accepted and, at a minimum, demands further examination.

These findings carry important implications for the ongoing judicial, legislative, and regulatory debates in this field. On the judicial ***9** front, they suggest that the empirical premises underpinning the Type I and, especially, the Type II challenges demand closer examination. Blunt judicial rejection of arbitration clauses (or arbitration clauses with particular features) can overlook the more nuanced, sophisticated practices of companies (like AT&T and some banks) that attempt to ensure that arbitration does not deprive consumers of a meaningful choice. On the legislative front, our findings lend further support to our previously stated view that legislative debates in this field can suffer from faulty assumptions about the use (or non-use) of arbitration clauses; the variation within the credit card industry suggests that the use of arbitration clauses reflects firm-specific considerations, perhaps in reaction to various economic realities, that Congress must understand more fully before it acts. Finally, on the regulatory front, our findings provide a possible model for the CFPB to use as it conducts its broader statutorily mandated study of the use of arbitration clauses in consumer financial services contracts.

This Article develops the foregoing arguments in three parts. Part I reviews the literature on the use of arbitration clauses in consumer contracts, paying particular attention to the increased importance of empirical legal research in this field. Part II discusses our findings on the use of arbitration clauses within the credit card industry, including a detailed examination of the provisions of credit card arbitration clauses (such as the role of carve-outs and opt-outs from arbitration and the extent to which such clauses employ controversial features such as remedy limitations), and variations in patterns based on the type of account. Part III explores the implications of our research for the above-described judicial, legislative, and regulatory debates as well as the ongoing academic research in this field.

I. Background & Literature Review

The literature on the use of arbitration clauses in consumer contracts developed in response to several strands of Supreme Court jurisprudence in the 1980s and 1990s. One line of decisions stretched the Federal Arbitration Act into state court proceedings and limited the ability of states to refuse enforcement of arbitration clauses under their consumer protection laws. The Court held in Southland Corp. v. Keating that section 2 of the Federal Arbitration Act (setting forth a substantive standard governing the enforceability of domestic ***10** arbitration agreements) applied in state court. [FN24] It subsequently held in Allied-Bruce Terminix Cos. v. Dobson that section 1 of the Federal Arbitration Act (setting forth an interstate commerce requirement) represented an expansive exercise of Congress's power to regulate interstate com-

merce rather than the narrower conception of Congress's commerce power that prevailed at the time of the FAA's enactment in 1925. [FN25] A second line of decisions interred the nonarbitrability doctrine and required Congress to speak clearly if it wished to declare a class of claims nonarbitrable. Decisions such as Shearson/American Express, Inc. v. McMahon [FN26] and Rodriguez de Quijas v. Shearson/American Express, Inc. [FN27] accomplished this result in the securities context, and subsequent decisions like Gilmer v. Interstate/Johnson Lane Corp. [FN28] set forth a framework that governed federal statutory claims generally. These lines of decisions made possible the widespread use of arbitration clauses in consumer contracts [FN29] and spawned several eras of academic literature on the topic.

Early scholarship on arbitration clauses in consumer contracts was decidedly not empirical. [FN30] For example, one early critic could confidently declare that:

> ***11** By requiring customers and employees, through standardized contracts across entire markets, to agree in advance to submit all potential violations of common-law and statutory rights to arbitration--where defense costs and judgments will on the whole be less than under a regime of judicial enforcement--corporate defendants have begun to deregulate themselves. [FN31]

Such arguments provided the intellectual basis for the Type I challenges described above. But they hardly offered a bulwark to protect against the typical response to the Type I challenge ("If consumers do not like arbitration clauses, or arbitration clauses with particular features, then they may purchase another product."). Nor did such arguments offer any support for the Type II challenge (that is, a statement about the pervasive use of arbitration clauses or arbitration clauses with objectionable features in a particular industry).

Of course, early pioneers in this field of scholarship could hardly be faulted for the lack of empirical support. Good empirical evidence about the use of arbitration clauses--whether within a particular industry or across industries--was extraordinarily hard to come by. Ordinarily, companies were not obligated to disclose their arbitration agreements systematically in a form usable by researchers. While their customers received copies of the contracts, others could not readily obtain them. To the extent such agreements were available, this was only because the agreement was published in some form (such as a judicial opinion in a case challenging the agreement) or because the agreement was included as part of a disclosure obligation designed to serve some other purposes (such as disclosure obligations under franchise or securities laws).

The next generation of scholarship sought to fill this gap in the literature through some old-fashioned gumshoeing. Some researchers contacted companies and requested copies of their arbitration agreements. Amy Schmitz's research into the credit card and cellular telephone industries made an important contribution in this regard.***12** [FN32] Other scholars went one step further and, in a bit of self-sacrifice for the sake of knowledge, went about obtaining products (such as credit cards) in order to have access to those agreements. An especially important contribution to this literature was the pathbreaking work of Linda Demaine and Deborah Hensler, who sought to undertake one of the first inter-industry studies of the use and terms of arbitration clauses in consumer contracts. [FN33] This permitted some more robust, albeit tentative, conclusions such as their finding that 30.8% of arbitration clauses in consumer contracts contained class action waivers. [FN34] Studies like Demaine and Hensler's helped to build the empirical architecture by which the positive premises of Type I and Type II challenges could be meaningfully assessed.

While studies like Demaine and Hensler's made an important contribution to the literature, they too suffered from shortcomings. Many studies of this generation suffered from unusually small samples, thereby precluding any statistically significant results. Moreover, the data gathered through the studies was unavoidably unsystematic. Researchers who attempted to contact companies necessarily were at the mercy of voluntary compliance by the companies. Researchers who attempted to obtain the products necessarily were limited by the amount they were willing to pay (one can only have

so many credit cards!). Finally, much of this research tended to be limited to a single point in time and did not permit any sort of meaningful assessment of trends over a longer time span. Despite these shortcomings, this generation of research provided an important template for further empirical scholarship.

Most recently, scholars have sought to develop more rigorous sets of empirical data to evaluate more systematically the use of arbitration***13** clauses in consumer contracts and other settings. [FN35] The work of renowned empirical scholar Ted Eisenberg has been critical in this regard. In a series of papers coauthored in various combinations with Geoffrey Miller and Emily Sherwin, Eisenberg compared consumer contracts with business contracts in securities filings by publicly traded companies. [FN36] Eisenberg and his coauthors concluded, in relevant part, that over seventy-five percent of financial services and telecommunications companies utilized arbitration clauses in their consumer agreements. [FN37] Such findings finally offered the empirical tools to assess the response to the Type I challenges and also laid the intellectual groundwork for the Type II challenges that make claims about the pervasive use of arbitration clauses (or arbitration clauses with specific terms) within a particular industry.

While pathbreaking, Eisenberg's research is not foolproof. Elsewhere, one of us has explained the limited explanatory value of some of their findings. [FN38] Moreover, Eisenberg's dataset necessarily constrains his findings in two distinct ways. They are limited to a single point in time and, therefore, do not lend themselves to a more dynamic analysis. They also offer, at best, an incomplete snapshot of the industry. To the extent Eisenberg et al. draw their data from contracts ***14** attached to SEC filings, they necessarily miss contracts that are not attached to those filings, either because the companies are not subject to reporting requirements or because the company's reporting requirements do not extend to particular contracts that might shed more light on a company's practices.

Given the state of the literature, the natural next step is to develop an empirical assessment of arbitration clause practices in consumer contracts that seeks to avoid the shortcomings in Eisenberg's data. This enables a fuller assessment of both the response to the Type I challenge and the validity of the Type II challenge, described above. The next Part explains how the Credit CARD Act of 2009 provided such a mine of data with respect to practices in the credit card industry.

II. What Do Arbitration Clauses in Credit Card Agreements Look Like?

This Part undertakes a comprehensive examination of the use of arbitration clauses in credit card agreements. [FN39] It first examines trends in the use of arbitration clauses: to what extent do issuers provide for arbitration of disputes and to what extent can cardholders opt out of the obligation to arbitrate? It then takes a detailed look at the provisions included in arbitration clauses in credit card agreements. Finally, it compares the use of arbitration clauses in business credit card and deposit account agreements to the use of arbitration clauses in consumer credit card and deposit account agreements.

A. Sample

The Credit Card Accountability, Responsibility, and Disclosure Act (Credit CARD Act) of 2009 requires all issuers to provide electronic copies of their consumer credit card agreements to the Federal Reserve, [FN40] which, in turn, is to "establish and maintain on its publicly***15** available Internet site a central repository of the consumer credit card agreements received from creditors." [FN41] Our sample consists of 293 credit card agreements submitted by issuers to the Federal Reserve as of December 31, 2009 and 2010, and made available via the Internet. [FN42] We collected the arbitration clauses, if any, from the credit card agreements and classified the provisions of the clauses as described throughout

this Part. [FN43]

We report our findings by number of issuers and by market share of the issuer, as measured by its share of the dollar value of credit card loans outstanding for all issuers in the relevant sample. Data on the amount of credit card loans outstanding come from the December 31, 2009, and December 31, 2010, call reports filed by issuers with the appropriate federal regulators. Our sample is limited to those issuers for which such data is available. [FN44]

***16** The number of reported observations varies. When we examine the use of arbitration clauses, we use the full sample of 293 credit card agreements. When we examine the terms of arbitration clauses as of December 31, 2010, we use a sample of forty-seven issuers that included arbitration clauses in their credit card agreements as of that date. [FN45] When we examine the change in the terms of arbitration clauses between 2009 and 2010, we limit the sample to the thirty-nine issuers that had arbitration clauses in both of those years, so that we can focus on changes in the terms while holding the use of arbitration constant.

B. Trends in the Use of Arbitration Clauses

Until recently, credit card agreements have been a standard example of a consumer contract that always, or almost always, included an arbitration clause. Most often, commentators (accurately) stated that most credit card agreements included arbitration clauses. [FN46] Less often (and less accurately), commentators sometimes stated that most credit card issuers included arbitration clauses in their credit ***17** card agreements. [FN47] The limited empirical evidence in support of those statements focused on the very largest credit card issuers, [FN48] which, given the degree of concentration in the credit card market, provided a reasonable view of what most credit card agreements included. But because the studies focused on the very largest issuers, they provided little evidence of what most issuers did.

In this Part, we provide a broader view of trends in the use of arbitration clauses in credit card agreements. [FN49] First, we examine the use of arbitration clauses across a broad range of issuers. Second, we look at the extent to which arbitration clauses in credit card agreements carve certain types of claims or disputes out of the obligation to arbitrate. Third, we consider the extent to which credit card agreements permit consumers to opt out of the arbitration clause. Our data, although the most recent data available at the time of this writing, predate the Supreme Court's 2011 decision in Concepcion, so that we do not examine how credit card issuers responded to that decision.

1. Use of arbitration clauses

As of December 31, 2009, most credit card agreements included arbitration clauses, but most credit card issuers did not use arbitration clauses. As shown in Table 1, 95.1% of the dollar value of outstanding***18** credit card loans in the sample was subject to credit card agreements with arbitration clauses. But only 17.4% of credit card issuers in the sample included arbitration clauses in their credit card agreements. [FN50] A minority of very large issuers used arbitration clauses; the majority of much smaller issuers did not.

Table 1. Use of Arbitration Clauses in Credit Card Agreements (2009 & 2010)

	Contracts as of 12/31/09		Contracts as of 12/31/10	
	Number of Clauses	% of credit card loans outstanding	Number of Clauses	% of credit card loans outstanding

No Arbitration Clause	242 (82.6%)	4.9%	250 (85.3%)	52.0%
Arbitration Clause	51 (17.4%)	95.1%	43 (14.7%)	48.0%
Totals	293 (100.0%)	100.0%	293 (100.0%)	100.0%

In mid-to-late 2009, two events occurred that had a significant effect on the use of arbitration clauses in credit card agreements. First, in July 2009, the National Arbitration Forum (NAF) settled a consumer fraud lawsuit with the Minnesota Attorney General by agreeing to stop administering new consumer arbitration cases. [FN51] ***19** Prior to the settlement, the NAF had the largest caseload of consumer arbitrations (almost all debt collection arbitrations) in the United States. [FN52]

Second, in December 2009, four of the largest credit card issuers settled a pending antitrust suit (Ross v. Bank of America) by agreeing to remove arbitration clauses from their consumer and small business credit card agreements for three-and-one-half years. [FN53] Bank of America, Capital One, Chase, and HSBC were the settling defendants; other large issuers-- Citibank and Discover Bank (with American Express and Wells Fargo alleged to be co-conspirators but not named as defendants)--remained in the case and continue to use arbitration clauses. [FN54]

Table 1 illustrates the effect of those two events on the use of arbitration clauses in credit card agreements. [FN55] The percentage of issuers***20** using arbitration clauses declined from 17.4% on December 31, 2009, to 15.0% on December 31, 2010. [FN56] More dramatically, the percentage of credit card loans subject to arbitration clauses declined from 95.1% to only 48.0%. [FN57] In the aggregate, eight fewer issuers used arbitration clauses at the end of 2010 than at the end of 2009. Ten issuers switched away from arbitration (including the four settling issuers), while two switched to arbitration. [FN58]

***21** 2. Carve-outs

Parties do not always agree to arbitrate all disputes that arise under their contract. Even if the contract includes a broad arbitration clause, the parties may agree to exclude, or "carve-out," certain claims from arbitration. [FN59] Some courts are skeptical of carve-outs, which might permit one party to bring its claims in court while requiring the other party to arbitrate its claims. The California Supreme Court, for example, has held that nonmutual carve-outs are unconscionable, unless the business can show a "reasonable justification" for the nonmutual provision--"i.e., a justification grounded in something other than the [business's] desire to maximize its advantage based on the perceived superiority of the judicial forum." [FN60]

In some industries, carve-outs are common. Over half of the arbitration clauses in a sample of franchise agreements, for example, included multiple carve-outs, such as for trademark disputes, interim measures, or injunctive relief. [FN61] In credit card agreements, carve-outs are somewhat less common. [FN62]

Far and away the most common carve-out in credit card arbitration clauses is for small claims (defined either by the dollar amount sought or by the claims being brought in small claims court). Of the issuers studied, thirty-two (of forty-seven, or 68.1%) excluded small claims from arbitration. Most of the agreements that did not exclude small claims were from small issuers (the fifteen issuers not includeing***22** a small claims carve-out comprised only 1.6% of credit card loans outstanding, while the thirty-two including a small claims carve-out comprised 98.4% of credit card loans outstand-

ing).

The form of the exclusion varied. As Table 2 shows, the most common type of carve-out (twenty-one of forty-seven, or 44.7% of issuers; 65.6% of credit card loans outstanding) excluded both issuer and consumer claims in small claims court from arbitration. A smaller group (seven of forty-seven, or 14.9% of issuers; 31.5% of credit card loans outstanding) limited the exclusion to consumer claims. [FN63] The remaining four carve-outs (8.5% of issuers; less than 1.5% of credit card loans outstanding) used dollar cut-offs (ranging from $5,000 to $25,000) and usually applied to both consumer and issuer claims.

Table 2. Small Claims Carve-Outs (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding
Cardholder small claims	7 (14.9%)	31.5%
Issuer and cardholder small claims	21 (44.7%)	65.6%
Under $5000; issuer and cardholder	1 (2.1%)	0.0%
Under $7500; issuer and cardholder	1 (2.1%)	0.0%
Under $15,000; issuer and cardholder	1 (2.1%)	0.1%
Under $25,000; issuer and cardholder	1 (2.1%)	1.2%
No provision	15 (31.9%)	1.6%

Relatedly, five issuers (of forty-seven, or 10.6%; but 51.4% of credit card loans outstanding) excluded debt collection claims from arbitration. (Four of the five also excluded issuer and cardholder small claims cases from arbitration.) One clause (of forty-seven, or ***23** 2.1%; 0.0% of credit card loans outstanding) by a very small issuer sought to obtain a similar result by expressly providing that the issuer's filing of a debt collection action does not waive its right to demand arbitration in the event the cardholder files a counterclaim. [FN64] Whether a court would honor such a no-waiver provision is uncertain.

Other types of carve-outs are less common in credit card arbitration clauses. Nine issuers (of forty-seven, or 19.1%; 3.8% of credit card loans outstanding) excluded from arbitration claims for interim relief, such as preliminary injunctions and attachments. Twelve issuers (of forty-seven, or 25.5%; 11.2% of credit card loans outstanding) excluded repossession and other self-help remedies, while six issuers (of forty-seven, or 12.8%; 3.6% of credit card loans outstanding) excluded claims in bankruptcy.

3. Opt-out provisions

Some courts consider whether cardholders have the ability to opt out of an arbitration clause in deciding whether the clause is procedurally unconscionable. [FN65] As can be seen in Table 3, most arbitration agreements in our sample (thirty-five of forty-seven, or 74.5% of issuers; 76.3% of credit card loans outstanding) do not include an opt-out provision. [FN66] For those that do, the amount of time in which the ***24** cardholder can exercise the right to opt out varies from thirty days (the most common-- seven of forty-seven, or 14.9% of issuers; 17.4% of credit card loans outstanding) to sixty days (four of forty-seven, or 8.5% of issuers; 6.2% of credit card loans outstanding).

Table 3. Cardholder Agreements Permitting Opt Out of Arbitration (2010)

	Number of Clauses	% of credit card loans outstanding
Right to Opt Out--within 30 days	7 (14.9%)	17.4%
Right to Opt Out--within 45 days	1 (2.1%)	0.2%
Right to Opt Out--within 60 days	4 (8.5%)	6.2%
No Right to Opt Out	35 (74.5%)	76.3%

C. Provisions of Arbitration Clauses

By agreeing to arbitration, parties agree to a form of dispute resolution that differs from litigation in court. Parties retain the ability to customize the arbitration process to a large degree, as discussed more in this and following sections. But even if the parties do not customize the process, arbitration still differs in important ways from court: juries are not available, [FN67] discovery tends to be more limited,***25** [FN68] and courts do not review awards on the merits but rather only on the limited grounds set out in the governing arbitration statute. [FN69]

Many of the clauses in the sample gave cardholders notice (almost always in capital letters and bold type) of those differences. All but two of the clauses (forty-five of forty-seven, or 95.7%; 99.9% of credit card loans outstanding) notified cardholders that by agreeing to arbitration they were giving up any right to a jury trial. [FN70] The majority of the clauses also notified cardholders that both the availability of discovery (twenty-eight of forty-seven, or 60.0%; 41.6% of credit card loans outstanding) and the right to appeal (twenty-nine of forty-seven, or 61.7%; 53.5% of credit card loans outstanding) were more limited in arbitration than in court. (An additional five clauses (of forty-seven, or 10.6%; but 38.8% of credit card loans outstanding) provided notice that the procedures in arbitration were simpler and more limited than in court, without being specific as to what those procedures were.) Finally, forty-three clauses (of forty-seven, or 91.5%; but 99.9% of credit card loans outstanding) informed cardholders that they could not be a party to a class action in court if the dispute was subject to an arbitration clause.

Parties to an arbitration agreement may modify these typical characteristics of arbitration or otherwise define the arbitration process in their arbitration clause. The rest of this section examines the extent to which credit card agreements in our sample contain provisions that (1) set out the governing arbitration law, (2) select a provider to administer the arbitration, (3) delegate certain decisions to the arbitrators, (4) provide a minimum recovery to a prevailing cardholder,***26** (5) contain possibly “unfair” provisions, (6) regulate the costs of arbitration, and (7) establish an arbitral appeals panel or

address the scope of court review of awards.

1. Governing arbitration law

In Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, the Supreme Court held that parties can incorporate state arbitration law by reference into their contract, even if the provision of state arbitration law otherwise would be preempted by the FAA. [FN71] If the parties so agree, the provisions of the state arbitration law are treated as part of the arbitration agreement and are to be enforced as such by courts under the FAA.

So understood, this aspect of Volt is unexceptional. To illustrate, under well-settled FAA preemption principles, a state law that precludes arbitrators from resolving claims under a particular state statute (such as a franchisee protection statute) would be preempted. [FN72] But the FAA certainly does not preclude the parties themselves from agreeing to exclude claims under the state franchisee protection statute from their arbitration agreement. Thus, if the parties' agreement incorporates by reference state arbitration law to define its scope, then courts will enforce the agreement so construed.

The more difficult issue is deciding when the parties have agreed to incorporate state arbitration law by reference into their agreement. In Volt, the Supreme Court did not decide that issue; instead the Court deferred to the California court's interpretation of a general choice-of-law clause in the contract as constituting the parties' agreement to state arbitration law. [FN73] Following Volt, numerous lower courts construed general choice-of-law clauses as incorporating state arbitration law. [FN74] Given how frequently parties include choice-of-law ***27** clauses in their contracts, the result was to restrict the scope of FAA preemption substantially. In subsequent cases, however, the Supreme Court rejected that interpretation of a general choice-of-law clause. In Mastrobuono v. Shearson Lehman Hutton, Inc., the Court refused to construe a general choice-of-law clause (which specified New York law as the governing law) as "mean[ing] 'New York decisional law, including that State's allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law.'" [FN75] Instead, as reiterated in Preston v. Ferrer, "the 'best way to harmonize' the parties' adoption of the AAA rules and their selection of [state] law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's 'special rules limiting the authority of arbitrators.'" [FN76]

Data from the credit card agreements we studied, as shown in Table 4, are consistent with the view reflected in Mastrobuono and Preston that parties do not ordinarily intend to incorporate state arbitration law, to the exclusion of federal arbitration law, into their arbitration agreements. Only one very small issuer (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) in our sample contracted solely for application of a state's arbitration law to the arbitration proceeding. By contrast, forty-three issuers (of forty-seven, or 91.5%; 99.9% of credit card loans outstanding) specified that the FAA applies, ordinarily with either no mention of state law or expressly excluding the application of state arbitration law. [FN77]

Presumably the provisions specifying the governing arbitration law were included in response to Volt to make clear that parties were not trying to incorporate state arbitration law by reference. Such a wholesale rejection strongly suggests that, at least for credit card issuers, the contract interpretation in Mastrobuono and Preston is more in accord with the parties' agreement.

Table 4. Governing Arbitration Law (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding

FAA	28 (59.6%)	75.9%
FAA and not state law	8 (17.0%)	7.0%
FAA and state law if applicable	6 (12.8%)	11.6%
FAA and state law	1 (2.1%)	5.3%
State law	1 (2.1%)	0.0%
No provision	3 (6.4%)	0.1%

***28** 2. Provider rules

All of the arbitration clauses in the sample provide for administered arbitration--that is, arbitration in which an arbitration provider handles the administrative aspects of the case, makes available detailed rules governing the proceeding, and serves as an appointing authority if the parties cannot otherwise agree on an arbitrator. The arbitration rules promulgated by providers, which the parties incorporate into their arbitration agreement, also modify the default characteristics of arbitration. [FN78]

Table 5 lists the arbitration providers specified in the arbitration clauses in our sample as of December 31, 2009 and 2010. [FN79] The AAA ***29** is named as the exclusive provider in sixteen (of thirty-nine, or 41.0%; 16.3% of credit card loans outstanding) of the arbitration clauses as of December 31, 2010, and is listed as one of two or three permissible providers in an additional sixteen (of thirty-nine, or 41.0%; 82.3% of credit card loans outstanding). [FN80] Two clauses (of thirty-nine, or 5.1%; 0.1% of credit card loans outstanding) name JAMS as the exclusive provider, and another seventeen (of thirty-nine, or 43.6%; 82.3% of credit card loans outstanding) list it as one of two or three permissible providers. Two (of thirty-nine, or 5.1%; 0.1% of credit card loans outstanding) continue to name the National Arbitration Forum as the exclusive provider, despite the fact that it no longer administers consumer arbitrations. [FN81] One clause (of thirty-nine, or 2.6%; 0.0% of credit card loans outstanding) gives the parties a choice between JAMS and National Arbitration and Mediation, [FN82] a less well-known provider, and another clause (one of thirty-nine, or 2.6%; 1.2% of credit card loans outstanding) specifies only that the provider shall be “a national arbitration organization with significant experience in financial and consumer disputes.” [FN83]

***30** The data illustrate how credit card issuers responded to the National Arbitration Forum's decision to cease all administration of new consumer arbitrations in July 2009. [FN84] A number of large issuers (reflecting 47.6% of credit card loans outstanding and subject to arbitration in the sample) still specified the NAF as a possible provider in the credit card agreements they filed with the Federal Reserve as of December 31, 2009. [FN85] By December 31, 2010, all of those issuers (with the exception of one very small issuer) had replaced the NAF with JAMS as an approved provider. Even a year and a half after the NAF's decision, a surprising number of issuers continued to include the NAF in their arbitration clauses. When the NAF is listed as one of multiple providers, the risks of not updating the arbitration clause are limited because another provider continues to be available. The persistence of the NAF in some credit card arbitration agreements for at least a year and a half after it was no longer available suggests that the costs of updating the issuer's arbitration clauses exceed the benefits, or that the provision for some other reason is “sticky.” [FN86]

Table 5. Choice of Provider (2009 & 2010)

	Contracts as of 12/31/09		Contracts as of 12/31/10	
Provider(s)	Number of Clauses	% of credit card loans outstanding	Number of Clauses	% of credit card loans outstanding
AAA or JAMS	8 (20.5%)	30.6%	13 (33.3%)	81.8%
AAA, NAF, JAMS	3 (7.7%)	0.5%	2 (5.1%)	0.5%
AAA	15 (38.5%)	20.3%	16 (41.0%)	16.3%
AAA or NAF	6 (15.4%)	47.6%	1 (2.6%)	0.0%
JAMS	1 (2.6%)	0.1%	2 (5.1%)	0.1%
JAMS or NAF	1 (2.6%)	0.0%	1 (2.6%)	0.0%
JAMS or NAMS	1 (2.6%)	0.0%	1 (2.6%)	0.0%
NAF	4 (10.3%)	0.8%	2 (5.1%)	0.1%
Nat'l org. w/ significant experience in consumer & financial disputes			1 (2.6%)	1.2%

***31** Finally, only one arbitration clause in the sample expressly referred to the Consumer Due Process Protocol--a set of privately developed fairness standards used by the AAA in administering consumer arbitrations. [FN87] (None referred to the JAMS Minimum Standards of Procedural Fairness.) [FN88] That clause stated:

> ***32** This Provision is Drafted with intent to provide a "fair" alternative to the judicial system and its risks. This is not drafted in the same anti-consumer fashion as many bank and financial entity provisions that have been attacked as burdensome and overzealous by "advocates" such as Remar Sutton. The terms have been prepared in general accord with the equitable principles set forth in the "Consumer Due Process Protocol" of the American Arbitration Association. [FN89]

To the extent the clauses choose the AAA or JAMS as a provider, any arbitrations under the clauses are subject to the Consumer Due Process Protocol or the JAMS Minimum Standards of Procedural Fairness regardless of whether the clause expressly incorporates those standards. [FN90]

And, as the discussion that follows suggests, the substantial majority of the clauses we studied appear to comply with those standards. [FN91]

3. Delegation clauses

In Rent-A-Center, West, Inc. v. Jackson, the Supreme Court held that parties can agree by contract to delegate to the arbitrators the exclusive authority to rule on unconscionability challenges to the arbitration clause. [FN92] The so-called "delegation clause" in Rent-A-Center provided:

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable. [FN93]

***33** In the absence of such a delegation clause, an unconscionability challenge to the arbitration clause would be one on which courts would have the final say. [FN94]

Commentators predicted that after Rent-A-Center, businesses would likely revise their consumer and employment arbitration clauses to include delegation clauses. [FN95] If so, courts would lose their ability to police arbitration clauses on unconscionability grounds, unless the court first held the delegation clause unenforceable. [FN96] And to do so, challenges to that clause must be directed specifically to that clause, not the contract as a whole or the arbitration clause as a whole. [FN97] Our data provide an early look at whether credit card issuers have revised their arbitration clauses to include delegation clauses.

***34** None of the arbitration clauses in our sample included the sort of definitive language ("The Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve . . . .") that is in the Rent-A-Center arbitration clause. That said, the majority of the clauses in the sample, both before and after Rent-A-Center, do state that the arbitrators have the authority to rule on the validity of the arbitration agreement, which courts treat as comparable to the language in Rent-A-Center. [FN98] So defined, as of December 31, 2010, twenty (of thirty-nine, or 51.3%) clauses included a delegation clause; and 52.6% of credit card loans outstanding in the sample were subject to a delegation clause. [FN99]

Although not as common as delegation clauses, twelve (of thirty-nine, or 30.8%; 12.8% of credit card loans outstanding) arbitration clauses included a delegation clause that excludes issues of class arbitration from the scope of the clause. In other words, the clauses provided that arbitrators are to decide issues of the validity of the arbitration clause, except for issues related to class arbitration, which are to be decided by courts. Such clauses likely reflect an attempt to avoid the empirical reality that (at least before the Supreme Court's decision in Stolt-Nielsen S.A. v. AnimalFeeds International Corp.) [FN100] AAA arbitrators almost unanimously construed arbitration clauses as ***35** permitting class arbitration, even though almost no clauses expressly permit arbitration on a class basis. [FN101]

Table 6. Delegation Clauses (2009 & 2010)

	Contracts as of 12/31/09		Contracts as of 12/31/10	
Type of Clause	Number of Clauses	% of credit card loans outstanding	Number of Clauses	% of credit card loans outstanding
Anti-Delegation	3 (7.7%)	12.5%	4 (10.3%)	29.2%

Class Exception	11 (38.2%)	26.5%	12 (30.8%)	12.8%
Delegation	22 (56.4%)	60.8%	20 (51.3%)	52.6%
None	3 (7.7%)	0.2%	3 (7.7%)	5.4%

Four issuers (out of thirty-nine, or 10.3%; but 29.2% of credit card loans outstanding) used an anti-delegation clause--expressly providing that the validity of the arbitration agreement may be resolved only in court and not in arbitration. Finally, three of the clauses included no provision on point. But all three issuers did incorporate provider rules--which give arbitrators authority to rule on the validity of the arbitration clause--into their arbitration clauses. Given that most courts construe such provider rules as falling under Rent-A-Center, [FN102] these clauses effectively include delegation clauses, although not by express language. [FN103]

Interestingly, though, the use of delegation clauses declined slightly, and the use of anti-delegation clauses actually increased after Rent-A-Center. Between 2009 and 2010, two issuers added a class ***36** exception to their arbitration clauses, and one (relatively large) issuer replaced its class exception with an anti-delegation clause. [FN104] No issuers in our sample added delegation clauses to their arbitration clauses after Rent-A-Center.

Again, these are early results. The Supreme Court issued the Rent-A-Center decision on June 21, 2010, just six months prior to the December 31, 2010, filings we consider in this study. Given the slow speed of issuer response to the NAF's demise as a provider of consumer arbitration services, [FN105] it may be too early to conclude that credit card issuers will not respond to Rent-A-Center by including delegation clauses in their arbitration clauses. So far, however, we find no such trend.

4. Minimum recovery provisions

The arbitration clause in AT&T Mobility LLC v. Concepcion provided that a consumer who recovered more in arbitration than AT&T's last settlement offer would recover a minimum of $7500 and double attorney's fees. [FN106] The district court in that case found that "[b]ecause the arbitration provision provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim, the subject provision is an adequate substitute for class arbitration." [FN107] The Supreme Court likewise referred to the provision in its opinion, characterizing the district court's decision as finding that "the Concepcions were better ***37** off under their arbitration agreement with AT&T than they would have been as participants in a class action." [FN108]

Only one clause in our sample (which predated the Supreme Court's decision in Concepcion) included a similar provision. The arbitration clause in the World Financial Network National Bank (WFNNB) credit card agreement provided for a "special payment" to a prevailing cardholder as follows:

> 14. Special Payment: If (1) you submit a Claim Notice in accordance with Paragraph 30.B. on your own behalf (and not on behalf of any other party); (2) we refuse to provide you with the relief you request; and (3) an arbitrator subsequently determines that you were entitled to such relief (or greater relief), the arbitrator shall award you at least $5,100 (plus any fees and costs to which you are entitled). [FN109]

Although the amount of the "special payment" is less than that in the AT&T Mobility clause, the structure of the

clause is the same: if the cardholder asserts a claim that the issuer does not pay, and the cardholder then recovers in arbitration at least as much as the amount claimed, the issuer will make a minimum payment that might exceed the cardholder's actual damages. [FN110] It remains to be seen whether additional issuers will incorporate such a clause into their arbitration agreement after Concepcion; our data are not able to answer that question.

5. “Unfair” provisions

Courts and commentators have identified an array of provisions in arbitration clauses as “unfair” to consumers and employees. [FN111] ***38** This section examines the use of some of those provisions in credit card agreements. [FN112] The short answer is that, with the exception of class arbitration waivers, most of these types of provisions are rare or nonexistent in credit card agreements.

Table 7 lists several types of provisions identified by courts and commentators as unfair or at least potentially unfair: clauses resulting in biased decision-makers, class-arbitration waivers, remedy limitations (such as waivers of punitive damages), shortened time limits for filing claims, distant hearing locations, limits on discovery, provisions precluding the cardholder from disclosing the existence of a dispute, and provisions denying a right to counsel or an in-person hearing. The list includes many if not most of the provisions most frequently challenged as unconscionable; those not included (e.g., provisions setting up a nonmutual arbitral appeals process and provisions dealing with arbitral costs) are excluded from this table only because of the greater variety of approaches reflected in such clauses (but “unfair” variations of those provisions are nonetheless rare). [FN113]

The only type of provision in this list of “unfair” provisions that is common in credit card agreements is a class arbitration waiver, the provision at issue in Concepcion. Of the arbitration clauses in the sample, forty-four of forty-seven clauses (or 93.6%) (covering 99.9% of the credit card loans outstanding) waived any right to class arbitration. Because arbitration clauses themselves preclude a party from being a member of a class action in court, [FN114] the vast majority of arbitration clauses in the sample would preclude cardholders from obtaining class relief.

By comparison, as already stated, the other types of “unfair” provisions in the list almost never appear in the arbitration clauses in the sample. None of the clauses in the sample contained a biased arbitrator selection mechanism, specified biasing arbitrator qualifications, or denied the right to counsel. Only three clauses (of forty-seven, or 6.4% of clauses; 1.2% of credit card loans outstanding) included a limitation on the award of punitive damages. Only one clause included a nondisclosure provision, although it covered 5.7% ***39** of credit card loans outstanding. The other provisions listed in Table 7--time limits for filing claims, potentially distant hearing locations, limits on available discovery, and restrictions on the availability of an in-person hearing--are included in at most two clauses and apply to no more than 0.2% of credit card loans outstanding in the sample.

Table 7. Selected “Unfair” Provisions (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding
Biased arbitrator selection mechanism	0 (0.0%)	0.0%
Biasing arbitrator qualifications	0 (0.0%)	0.0%

Class arbitration waiver	44 (93.6%)	99.9%
Remedy limitations	3 (6.4%)	1.2%
Time limits for filing claims	2 (4.3%)	0.0%
Potentially distant location for hearing	2 (4.3%)	0.1%
Discovery limits	1 (2.1%)	0.2%
Denial of right to counsel	0 (0.0%)	0.0%
Nondisclosure provision	1 (2.1%)	5.7%
Lack of in-person hearing	2 (4.3%)	0.0%

A few other points worth noting about provisions dealing with issues related to those listed in Table 7:

• Twenty-five of the clauses (of forty-seven, or 53.2%; 44.4% of credit card loans outstanding) contained no provision requiring particular qualifications for arbitrators. Of the twenty-two clauses that did set out some sort of required qualifications: one (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) required expertise in the subject matter of the dispute; one (of forty-seven, or 2.1%; 1.2% of credit card loans outstanding) required that the arbitrator be a retired ***40** federal judge if a party so requests; while the remaining twenty (of forty-seven, or 42.6%; 54.4% of credit card loans outstanding) required that the arbitrator be either a lawyer (with varying degrees of experience) or a retired judge (one clause provided that "registered arbitrator" was an option as well).

• Although the substantial majority of arbitration clauses included class arbitration waivers, two (of forty-seven, or 4.3%; 0.1% of credit card loans outstanding) contained no provision on the issue and one (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) was silent on class arbitration while expressly authorizing consolidation of related claims.

• Slightly under half of the clauses (twenty-one of forty-seven, or 44.7%) from issuers with slightly more than half the market share (53.6%) contained an "anti-severability provision." Such clauses provide that if a court invalidates the class arbitration waiver, the invalid waiver should not be severed from the rest of the arbitration clause, with the result that the entire arbitration clause is unenforceable and the case proceeds as a class action in court. [FN115]

• Two clauses (of forty-seven, or 4.3%; 6.6% of credit card loans outstanding) provided by contract that constitutional restrictions on the award of punitive damages, which courts have held are not otherwise applicable to arbitration awards, would apply. [FN116]

• Ten clauses (of forty-seven, or 21.3%; 40.0% of credit card loans outstanding) provided that the arbitrator had the authority to award all remedies available under applicable law, and another five (of forty-seven, or 10.6%; 6.4% of credit card loans outstanding) specified that all remedies that were available in court would also be available in arbitration. In one respect, those provisions might be seen as limitations on remedies that otherwise could be available in arbitration, because courts have held that arbitrators are not limited in ***41** fashioning remedies to

the remedies courts can award. [FN117] On the other hand, given that arbitration clauses have been criticized as denying consumers remedies that would be available to them in court, [FN118] these provisions also might be seen as protecting the rights of cardholders by ensuring that the same remedies are available in arbitration as in court.

• Of the clauses in the sample, seven (of forty-seven, or 14.9%; 40.1% of credit card loans outstanding) expressly provided that parties can be represented by counsel in arbitration; the rest of the clauses did not address the issue.

• Six clauses (of forty-seven, or 12.8%; 52.2% of credit card loans outstanding) expressly authorized the arbitrator to protect the confidentiality of customer information upon request.

6. Arbitration costs

Because arbitration is private rather than public dispute resolution, parties to the arbitration proceeding must pay the full cost of the process. [FN119] Typically, when a party files a claim in arbitration, it must pay at least some of the administrative fees upfront and put down a deposit to cover expected arbitrator's fees. [FN120] For larger claims, these upfront costs can exceed the costs of filing a comparable case in court. For smaller claims, both the AAA and JAMS cap the costs to consumers. For all claims, providers may waive their fees in the event of hardship. [FN121] Nonetheless, a number of court decisions have invalidated arbitration agreements on the ground that they imposed excessive costs on consumers. [FN122]

***42** Almost all of the arbitration clauses in our sample selected either the AAA or JAMS as the arbitration provider. [FN123] Arbitrations under those clauses are subject to the provider's cost schedule and rules governing costs, which thus provide the backdrop against which the more detailed provisions in the clauses are operating. Beyond those basics, most of the arbitration clauses in our sample address arbitration costs to some degree, [FN124] but the details of the provisions vary, as can be seen in Table 8. [FN125]

Only one clause in the sample (of forty-seven, or 2.1%; 0.1% of credit card loans outstanding) went as far as the clause in Concepcion in providing that the issuer would pay all arbitration fees. [FN126] Another (one of forty-seven, or 2.1%; 5.9% of credit card loans outstanding) provided that the issuer would pay all fees when the cardholder makes a good-faith request for assistance. [FN127] At the other end of the spectrum, none of the clauses in the sample required the cardholder and issuer to share costs equally. In its internal review of arbitration clauses for compliance with the Consumer Due Process Protocol, the AAA requires businesses to waive such cost-sharing provisions before it will administer consumer arbitrations seeking $75,000 or less because such provisions would impose higher costs on consumers than provided under the AAA's consumer arbitration fee structure. [FN128]

A handful of clauses capped the fees for which the cardholder is responsible-- at a fixed dollar amount (three of forty-seven, or 6.4%; 1.4% of credit card loans outstanding); at the amount of court filing fees (one of forty-seven, or 2.1%; 13.4% of credit card loans outstanding); or for small claims (two of forty-seven, or 4.3%; 0.2% of credit card loans outstanding). A number of clauses addressed the ***43** circumstances under which the issuer would advance the upfront filing and arbitrators' fees on behalf of a cardholder. (Fourteen (of forty-seven, or 29.8%; 7.2% of credit card loans outstanding) contained no provision on point.) Again, the details varied widely, with the most common clauses providing that the issuer would advance arbitration fees for good cause (eight of forty-seven, or 17.0%; 60.2% of credit card loans outstanding); would consider advancing the fees in good faith (four of forty-seven, or 8.5%; 13.5% of credit card loans outstanding); or simply would consider advancing the fees (ten of forty-seven, or 21.3%; 4.1% of credit card loans outstanding). Finally, just under half the clauses (twenty of forty-seven, or 42.6%; 45.7% of credit card loans outstanding) dealt with how costs would be allocated at the end of the case, with the most common such provision stated that the issuer will reimburse the cardholder for his or her arbitration fees if the cardholder prevails or for good cause (three of forty-seven, or 6.4%; 38.8% of credit card loans outstanding).

Provisions specifying the number of arbitrators also can affect the cost of the arbitration proceeding: three arbitrators will almost certainly cost more than one. Accordingly, in applying the Consumer Due Process Protocol, the AAA requires businesses to waive any contract provision requiring three arbitrators before it will administer consumer arbitrations seeking $75,000 or less. [FN129]

In our sample, none of the arbitration agreements imposed an across-the-board requirement that the parties use a three-arbitrator panel to decide the case. Sixteen agreements (of forty-seven, or 34.0%; 57.9% of credit card loans outstanding) provided expressly for a single arbitrator, and twenty more (of forty-seven, or 42.6%; 21.0% of credit card loans outstanding) seemed to do so implicitly by always referring to "the arbitrator" in the singular. By comparison, one clause provided that any dispute would be resolved by "one or more" arbitrators, and three clauses refer to the "arbitrator(s)," leaving open the possibility that more than one arbitrator would be chosen but not requiring it. One clause (of forty-seven, or 2.1%; 0.2% of credit card loans outstanding) provided for a single arbitrator unless the claim exceeds $250,000, while three (of forty-seven, or 6.4%; 13.4% of credit card loans outstanding) provided for three arbitrators only if the arbitration provider specified in the contract is ***44** unavailable, otherwise leaving the decision to the provider and its rules.

Table 8. Arbitration Costs Provisions (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding
CAP ON ARBITRATION FEES?		
Issuer pays fees	1 (2.1%)	0.0%
Issuer pays fees on good faith request	1 (2.1%)	5.9%
Capped at court fees	1 (2.1%)	13.4%
Capped at $50/$125	3 (6.4%)	1.4%
Capped for small claims	2 (4.3%)	0.2%
No provision	39 (83.0%)	79.0%
TOTAL	47 (100.0%)	100.0%
WILL ISSUER ADVANCE FEES?		
Issuer pays fees	1 (2.1%)	0.0%
Issuer pays fees on good faith request	1 (2.1%)	5.9%

Will advance on request	2 (4.3%)	6.0%
Will advance on request (capped at $250/$500)	3 (6.4%)	0.7%
Will advance for good cause	8 (17.0%)	60.2%
Will advance if consumer pays amount of court filing fees (capped at $325/$500)	3 (6.4%)	0.7%
Will consider advancing fees in good faith	4 (8.5%)	13.5%
Will consider advancing fees	10 (21.3%)	4.1%
Will pay if necessary for clause to be enforced[FN130]	1 (2.1%)	1.8%
No provision	14 (29.8%)	7.2%
TOTAL	47 (100.0%)	100.0%
HOW ARE FEES ALLOCATED AT END OF CASE?		
Loser pays	2 (4.3%)	0.0%
Costs allocated in award	4 (8.5%)	0.3%
Cardholder need not reimburse issuer above amount of court filing fees	1 (2.1%)	0.0%
Issuer will not seek to recover costs or fees	2 (4.3%)	0.1%
Issuer will reimburse up to $500	1 (2.1%)	0.0%
Issuer will reimburse up to $350 (or more if good cause)	1 (2.1%)	1.2%

Issuer will reimburse if cardholder prevails	2 (4.3%)	0.0%
Issuer will reimburse if cardholder prevails or good cause	3 (6.4%)	38.8%
Issuer will reimburse if cardholder prevails or in other specified circumstances	4 (8.5%)	5.3%
No provision	27 (57.4%)	54.3%
TOTALS	47 (100.0%)	100.0%

Table 9. Provisions Specifying Number of Arbitrators (2010)

	Number of Clauses	% of credit card loans outstanding
Single arbitrator	16 (34.0%)	57.9%‘
‘The arbitrator”	20 (42.6%)	21.0%
One or more	1 (2.1%)	1.2%‘
‘Arbitrator(s)”	3 (6.4%)	6.2%
Single arbitrator unless claim exceeds $250,000	1 (2.1%)	0.2%
Specifies number only if provider unavailable	3 (6.4%)	13.4%
No provision	3 (6.4%)	0.1%

***46** 7. Appeals and court review

As noted above, a common characteristic of arbitration is that court review of awards is limited. [FN131] However, parties can set up an arbitral-appeals process if they wish, appointing a panel of arbitrators to review the decision of the initial decision maker. [FN132] In consumer and employment cases, some courts have found provisions establishing ar-

bitral appeals panels to be unconscionable when they are one-sided--i.e., structured so that only the business is likely to be able to appeal (such as by limiting appeals to cases in which an award exceeds a threshold dollar amount). [FN133]

Just under half of the arbitration clauses in the sample established an arbitral appeals process. Of the forty-seven clauses in the sample, twenty-four (51.1%; 23.9% of credit card loans outstanding) did not set up an arbitral appeals process (although, of course, the award remains subject to review under section 10 of the FAA). Two of the clauses (4.3%; 0.1% of credit card loans outstanding) provided for an appeal if a right to appeal is available under the FAA, again, apparently adding nothing to the usual FAA grounds. But the remaining twenty-one clauses (44.7% of the clauses but covering 76.0% of credit card loans outstanding) authorized an appeal to an arbitral appeals panel.

***47** The triggering event for the availability of an appeal varied, as can be seen in Table 10. Nine clauses (of forty-seven, or 19.1%; 57.4% of credit card loans outstanding) permitted an appeal upon request, making the right to appeal available to both issuers and consumers. Seven clauses (of forty-seven, or 14.9%; 18.5% of credit card loans outstanding) permitted an appeal when the amount claimed exceeded a specified threshold (either $50,000 or $100,000). Given the added expense of an appeal, limiting its availability to higher stakes claims seems to make sense. And setting the threshold based on the amount claimed permits either consumers (who might make claims exceeding the threshold) or issuers (who might be subject to claims exceeding the threshold) to appeal. By contrast, five clauses (of forty-seven, or 10.6%) from small issuers (with 0.2% of credit card loans outstanding) specified the threshold (either $100,000 or $200,000) based on the amount awarded rather than the amount claimed. These provisions, while relatively rare, are potentially problematic under the cases cited above [FN134] because consumers are relatively less likely than businesses to be subject to such awards.

Interestingly, the arbitration clauses studied included a varying degree of provisions that might affect the scope of court review. In Hall Street Associates, LLC v. Mattel, Inc., the Supreme Court held that parties cannot expand the scope of federal court review by contract, refusing to enforce a provision in the arbitration agreement that stated: “The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.” [FN135]

One clause in the sample might run afoul of Hall Street. The USAA Bank Credit Card Arbitration Addendum (one of forty-seven, or 2.1%; 4.9% of credit card loans outstanding) provided:

> The arbitrator's decision . . . may be judicially reviewed on all grounds set forth in 9 U.S.C. § 10, as well as on the grounds that the decision is manifestly inconsistent with the terms of the Agreement or any applicable laws or regulations. [FN136]

Table 10. Provisions Establishing an Arbitral Appeals Panel (2010)

	Number of Clauses	% of credit card loans outstanding
Upon request	9 (19.1%)	57.4%
Claim over $50,000	2 (4.3%)	1.8%
Claim over $100,000	5 (10.6%)	16.7%

Award over $100,000	4 (8.5%)	0.1%
Award over $200,000	1 (2.1%)	0.0%
If right to appeal under FAA	2 (4.3%)	0.1%
No provision	24 (51.1%)	23.9%

***48** The standard of review echoes the "manifest disregard of the law" vacatur ground, which is of uncertain validity under the FAA. [FN137] If manifest-disregard review is no longer available, this provision would have the same flaw as the one in Hall Street: it would specify a vacatur ground not listed in section 10 of the FAA. [FN138] If manifest disregard continues to be available, the provision would be superfluous.

Other clauses might affect the scope of court review indirectly, by requiring the arbitrator to follow the law or to make decisions supported by substantial evidence. Both the California Supreme Court and the Texas Supreme Court have construed such provisions as limitations on the arbitrators' authority and have held that courts can vacate an award for excess of authority when arbitrators fail to comply with those provisions (i.e., make an error of law or decide without substantial evidence support). [FN139] By contrast, some federal courts have rejected this mechanism for obtaining court review of ***49** arbitral awards as an attempt to evade Hall Street, [FN140] even though its use long predates that case. [FN141] Alternatively, rather than attempts to expand the scope of court review, these sorts of clauses might be attempts to ensure that arbitrators do not ignore the law or facts in their decisions (or to reassure cardholders and courts that substantive legal rights remain available in arbitration).

In our sample, the substantial majority of clauses (thirty-five of forty-seven, or 74.5%; 94.0% of credit card loans outstanding) contained some requirement that the arbitrators follow the substantive law in making their awards. The verbal formulations varied slightly (e.g., "must apply"; "must follow"; "shall follow"; "shall resolve"; "will apply"; "will render"), but the substance of the provisions appears to be identical. By comparison, arbitration clauses providing that the arbitrators were bound by the facts or were required to have substantial evidence for their decisions were much rarer. Only three clauses (of forty-seven, or 6.4%; 0.1% of credit card loans outstanding) provided that the arbitrators were bound by the facts, and two more (of forty-seven, or 4.3%; 0.0% of credit card loans outstanding) required the award to be supported by substantial evidence. At bottom, clauses requiring the arbitrators to follow the law were common in the sample, while clauses addressing the facts were uncommon.

D. Arbitration Clauses in Business Credit Card andDeposit Account Agreements

A study by Eisenberg, Miller, and Sherwin compared the use of arbitration clauses in business-to-consumer contracts to the use of arbitration clauses in business-to-business contracts, finding that while commonly providing for arbitration in their consumer contracts, businesses showed "a clear preference for litigation over arbitration in their business-to-business contracts." [FN142] The difference between the two groups of contracts was substantial, with 76.9% of consumer contracts including arbitration clauses and only 23.7% of ***50** business contracts from the same companies including arbitration clauses. [FN143]

A limitation of their study, however, is that it compared very different types of contracts: consumer cell phone and financial services (e.g., credit card) contracts with business transactional (e.g., merger and financing) contracts. [FN144]

Indeed, because their sample consisted of contracts filed as attachments to SEC filings, by definition (i.e., as defined by SEC regulations dictating when such contracts must be filed), [FN145] the contracts in the sample were ones that were out of the ordinary course of business for the companies, the sorts of contracts one would least expect to include arbitration clauses. [FN146]

In this section, we undertake a different comparison between consumer and business contracts, one that avoids this limitation of the Eisenberg, Miller, and Sherwin study but one that has its own limitations. Here, we compare the use of arbitration clauses in consumer credit card agreements (as described above) and consumer deposit account agreements with the use of arbitration clauses in business credit card and deposit account agreements. As such, we compare comparable (in many cases identical) contracts entered into by consumers and businesses, avoiding the limitation of the Eisenberg, Miller, and Sherwin study.

But our approach has its own limitations. First, unlike for consumer credit card agreements, [FN147] no statute requires issuers to make business credit card and deposit account agreements available online. Some issuers do, but many do not. Accordingly, our sample is both limited in size and nonrandom. Second, the business credit card agreements we studied are between issuers and "small businesses," not large businesses. The same may also be true for the deposit account agreements we studied, although it is less obviously so. None of the agreements is individually negotiated, however; they are all form contracts. Of course, the definition of "small business" varies widely, with businesses of annual revenues up to at least $25 million included at the upper end of the spectrum. [FN148] But, even so, ***51** we do not compare businesses of identical or even similar bargaining power. Third, we do not know to what extent businesses are able to negotiate changes to the terms of the standard credit card and deposit account agreements we are studying. Similarly, we do not know whether, if the agreements permit cardholders to opt out of the arbitration clause, businesses cardholders are more likely to opt out than consumer cardholders. For either reason it may be that the provisions we are observing are not the provisions of the actual contracts entered into between business and issuers. Subject to these limitations, our results follow.

1. Business credit card agreements

To obtain business credit card agreements (or information about the terms of those agreements), we reviewed the web pages of issuers that used arbitration clauses in their consumer arbitration agreements as of December 31, 2009. [FN149] We focused on those issuers because we are interested in whether issuers that required consumer cardholders to arbitrate disputes also required business cardholders to arbitrate disputes. Only eight of the issuers made copies of their business credit card agreements available online. An additional eight of the issuers provided disclosure statements for business credit card agreements. However, as discussed earlier, [FN150] issuers do not always disclose the use of arbitration agreements in their ***52** credit card disclosure documents. If the disclosure document indicates that the agreement includes an arbitration clause, we can be confident that it does so. But if the disclosure document is silent, we cannot assume that the agreement does not include an arbitration clause.

Our findings are summarized in Table 11. [FN151] Two of the sixteen issuers were among the settling defendants in Ross v. Bank of America, and so have agreed to remove arbitration clauses from their consumer and small business credit card agreements. [FN152] Our findings are what would be expected given the settlement: one issuer's business credit card agreement does not have an arbitration clause and the disclosure statement of the other does not mention arbitration.

Of the remaining fourteen issuers, eight (or 57.1%) used arbitration clauses in their business credit card agreements, just as they did in their consumer agreements. [FN153] Four (or 28.6%), however, did not, and whether the remaining two used arbitration clauses is uncertain (the issuers provided only disclosure statements on their web pages, and the dis-

closure statement did not mention arbitration). Thus, roughly twice as many of the issuers we studied used arbitration clauses in their business credit card agreements as did not. But, given that all of these issuers used arbitration clauses in their consumer credit card agreements, issuers appear less likely to use arbitration clauses in business credit card agreements than consumer credit card agreements (although definitive conclusions are impossible given the small sample size and other limitations of our data).

Table 11. Use of Arbitration Clauses in Business and Consumer Credit Card Agreements

		Arbitration Clause in Consumer Credit Card Agreement?	Arbitration Clause in Business Credit Card Agreement?
As of 12/31/09	As of 12/31/10	As of 5/1/11	Number of Issuers
YES	NO	Yes	0 (0.0%)
		No	1 (50.0%)
		Uncertain	1 (50.0%)
		TOTAL	2 (100.0%)
YES	YES	Yes	8 (57.1%)
		No	4 (28.6%)
		Uncertain	2 (14.3%)
		TOTAL	14 (100.0%)

***53** 2. Business deposit account agreements

Because the data are so limited for business credit card agreements, we also reviewed the websites of the same issuers for business and consumer deposit account agreements. Fourteen of the issuers made their consumer and business deposit account agreements available online. [FN154] We added to the sample the deposit account agreements from another issuer, Amegy Bank of Texas. In our analysis of credit card agreements, we consolidated Amegy Bank with Zions Bank because they are commonly owned and used an identical arbitration clause. Here, we treat them separately because they used different deposit account agreements. [FN155] Accordingly, our sample includes fifteen issuers for which we have consumer and business deposit account agreements.

Table 12 summarizes our findings. Nine (of fifteen, or 60.0%) of the financial institutions in the sample used arbitration clauses in ***54** both their consumer and their business account agreements. [FN156] Conversely, four (of fifteen, or

26.7%) did not use arbitration clauses in either of the agreements. (Three of those agreements instead had a jury trial waiver; one had no provision.) Thus, thirteen of the fifteen (or 86.7%) financial institutions in the sample specified the same means of dispute resolution in their business deposit account agreements as in their consumer deposit account agreements. [FN157]

Of the remaining two issuers, one--Bank of America--used arbitration for business disputes and not for consumer disputes. [FN158] Bank of America had announced in July 2009 that it was removing arbitration clauses not only from its consumer credit card agreements but also from other consumer contracts, including bank account agreements. [FN159] Unlike its settlement in Ross, which applied to both consumer and small business credit card agreements, [FN160] the more general change of practice by Bank of America evidently did not apply to business deposit account agreements.

The other issuer--Zions Bank--provided in its deposit account agreement that either party had the option to use arbitration to resolve "consumer disputes," defined as consumer claims seeking less than $75,000. [FN161] The option to arbitrate did not apply to business claims or consumer claims above $75,000. For all claims, the agreement included a jury trial waiver and a class action waiver. [FN162]

Table 12. Use of Arbitration Clauses in Business and Consumer Deposit Account Agreements (2011)

	Number of Financial Institutions
Both agreements contain an arbitration clause	9 (60.0%)
Neither agreement contains an arbitration clause	4 (26.7%)
Arbitration clause in business agreement; jury trial waiver in consumer agreement	1 (6.7%)
Jury trial waiver in business agreement; arbitration clause in consumer agreement (claims under $75,000)	1 (6.7%)

*55 * * *

Overall, subject to the limitations described above, [FN163] we find that the business credit card and deposit account agreements in our sample are less likely than consumer credit card and deposit account agreements to include arbitration agreements--although in the case of deposit account agreements, the difference is slight. That said, the difference we find is much less dramatic than that found by Eisenberg, Miller, and Sherwin. It may be that the two sets of findings bracket the actual relationship: the Eisenberg, Miller, and Sherwin findings might understate the degree of correspondence because they were comparing different types of contracts; ours might overstate the degree of correspondence because we do not compare parties with equal bargaining power.

III. Summary and Implications

This Part summarizes the findings in the previous Part and discusses their implications for legal doctrine, ongoing policy debates, and scholarship. After providing a brief summary, it considers four matters: (a) Concepcion, (b) legislat-

ive efforts to ban pre-dispute arbitration agreements, (c) possible rules on consumer credit agreements issued by the Consumer Financial Protection Bureau, and (d) future avenues for empirical legal scholarship on arbitration.

***56** The central empirical findings in the previous Part are as follows:

Most credit card issuers (over eighty percent) do not include arbitration clauses in their credit card agreements. As of December 31, 2010, the majority of credit card loans outstanding (in dollar terms) are not subject to arbitration clauses. As discussed more below, consumers have a much greater degree of choice in whether to arbitrate disputes involving their credit cards than commonly believed.

A sizeable proportion of credit card arbitration clauses (68.1% of issuers; 98.4% of credit card loans outstanding) expressly permit cardholders to bring claims in small claims court. Most if not all of the others likely do so by providing for arbitrations to be administered by either the AAA or JAMS, subjecting the arbitration clause to the Consumer Due Process Protocol (or the JAMS equivalent). Roughly a quarter of the agreements studied permitted consumers to opt out of the arbitration clause at the time they enter into the agreement.

Almost all of the credit card arbitration clauses in the sample opted to have the arbitration governed by the FAA, either without mention of state law or to the express exclusion of state law. This finding suggests that the Supreme Court correctly construed party intent (at least as to credit card agreements) in holding in Mastrobuono and Preston that a general choice-of-law clause does not incorporate state arbitration law by reference into the contract.

Essentially all of the arbitration clauses in the sample provide for either the AAA or JAMS to administer arbitrations arising under the credit card agreement. A handful have a vestigial reference to the National Arbitration Forum. As of the end of December 2010, then, credit card agreements provide for arbitrations to be administered by established, reputable providers.

Despite predictions to the contrary, credit card issuers have not responded to the Supreme Court's decision in Rent-A-Center West v. Jackson by including delegation clauses in their arbitration clauses. The reason for the lack of a response is uncertain. It may reflect simple inertia, a hesitance to give arbitrators authority over gateway issues, or the fact that courts have tended to construe institutional rules as reaching the same result, perhaps making an express provision allocating authority to the arbitrator unnecessary. [FN164]

***57** While class arbitration waivers are ubiquitous in credit card arbitration clauses, other provisions asserted to be unfair to consumers are almost nonexistent. None of the arbitration clauses specifies a biased mechanism for selecting arbitrators. Only a handful of credit card arbitration clauses, almost always by issuers with very small market shares, include provisions limiting remedies or the time for filing a claim, specifying a potentially distant forum for the hearing, or limiting discovery. Indeed, given the strong preference among credit card issuers for class-arbitration waivers, one would expect them not to include other provisions in their arbitration clauses that might result in the clause (together with the class arbitration waiver) being invalidated.

Only one clause in the sample included a minimum recovery provision of the sort used by AT&T Mobility. Courts so far have not limited Concepcion to arbitration clauses including such provisions. If they did so, our data suggest that the decision would (at least in the short run) have a very limited effect.

Issuers often (although not always) include similar provisions in their business credit card and deposit account agreements as in their consumer credit card and deposit account agreements. Issuers are more likely to include arbitration clauses in their consumer agreements, but (particularly in the case of deposit account agreements) the difference is slight.

We discuss this finding more below.

To reiterate: these findings are limited to credit card contracts and arbitration agreements. Whether they can be generalized beyond the credit card context depends on how representative credit cards are of other types of consumer contracts. Moreover, the findings necessarily are limited to the time periods studied. Whether the findings will continue to hold over time, or whether subsequent events (such as the decision in Concepcion) will alter that conclusion remains to be seen.

These findings have potentially important implications for an array of legal, regulatory, and scholarly matters.

First, our findings suggest that contract law doctrines premised on a lack of consumer choice may not apply (or may apply only weakly) to the use of arbitration clauses in the credit card industry. Most credit card issuers do not include arbitration clauses in their ***58** credit card agreements, allowing consumers to choose a credit card that does not require them to arbitrate disputes with the issuer. [FN165] Moreover, like the AT&T Mobility clause in Concepcion, many clauses in our database contained some form of a small-claims carve-out that mitigate the claims-discouraging effect of an arbitration clause combined with a class arbitration waiver. Not all courts are willing to consider the availability of market alternatives in ruling on whether a contract provision is unconscionable. But for ones that do, our findings provide important data in evaluating the extent of such alternatives in the credit card industry.

Moreover, our findings also suggest a potential side benefit of Concepcion: it gives users of arbitration clauses with class arbitration waivers an incentive to make the rest of the arbitration clause as fair to consumers as possible. Indeed, Concepcion could be viewed as providing a goal to which they can aspire, and it will be worth watching to see whether, in light of Concepcion, financial services companies (or other users of consumer arbitration clauses) shift toward a clause more closely resembling that used by AT&T. [FN166]

We acknowledge several assumptions in our argument--that is, it depends on beliefs about a consumer's knowledge of her rights under the arbitration clause and a willingness to act based on that knowledge. In other words, the availability of credit card agreements without arbitration clauses may not make any difference to consumers who either do not know about arbitration or who are not willing to choose a different credit card issuer on that basis. Similarly, devices such as small-claims carve-outs and reward payments for prevailing parties help overcome concerns that arbitration clauses coupled with class waivers can discourage the pursuit of valid, small-stakes claims, but not if consumers, despite having these rights, do not pursue these claims because they never become aware of these opportunities. Our argument also assumes that consumers actually become aware of reward payments and other incentives designed to ensure that arbitration clauses, coupled with class waivers, do not discourage the pursuit of valid small-stakes claims. [FN167] Testing this ***59** proposition, of course, becomes a difficult empirical undertaking. One would need some way of measuring the extent to which consumers forego claims due to their ignorance about the provisions of their arbitration agreements. Some research has begun to delve into this area through the use of surveys testing how respondents react to a series of hypothetical cases. [FN168] This research holds forth some promise, but studying actual consumer behavior based on actual clauses would offer a more revealing method of testing the assumption on which our argument rests.

Second, our findings suggest that congressional efforts to restrict the use of arbitration clauses in certain contracts rest on some faulty empirical premises. As discussed above, Congress has enacted a series of laws prohibiting or restricting the use of arbitration agreements in specialized contracts. These contracts include automobile dealer agreements, consumer financial agreements with military personnel, poultry wholesale contracts, employment agreements with defense contractors and, most recently, residential mortgage loans. More ambitiously, Congress currently is considering--and has considered for several years--the Arbitration Fairness Act, which would impose a blanket prohibition on arbitra-

tion agreements in consumer and employment contracts.

Many of these laws and bills rest on a series of empirical premises about the use of arbitration clauses. For example, the current version of the Arbitration Fairness Act finds that "[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration." [FN169] Our research suggests that such sweeping generalizations about industry practices are, at best, misguided and, at worst, demonstrably wrong. Contrary to the above-quoted "finding" of the Act, arbitration clauses do not necessarily permeate entire industries (at least judged by the credit card industry as examined here). Even firms that utilize such clauses do not employ a "one size fits all" approach. Instead, the clauses display a diverse array of features, ranging from clauses with reward payments to clauses with "unfair" provisions that have sparked controversy among academic skeptics and consumer advocates.

***60** Moreover, the results of our study suggest that a blanket prohibition on the use of arbitration clauses in consumer contracts is difficult to justify. Our study demonstrates that the contracting practices within the credit card industry vary widely. Some segments of the industry, especially credit unions, do not use arbitration agreements at all. [FN170] Moreover, among those industry participants employing such agreements, practices vary widely.

When coupled with other data suggesting that arbitration produces results for consumers that are at least as favorable as those obtained in litigation, the case for wholesale prohibition is a difficult one. This is especially true given the complete dearth of empirical evidence suggesting that congressional prohibition of arbitration agreements in certain discrete areas has somehow made consumers (or the analogous party in the allegedly inferior bargaining position) better off.

Our conclusion here is measured. Just as our findings do not support a wholesale condemnation of arbitration clauses (as urged by measures such as the Arbitration Fairness Act), so too do they not amount to an unqualified endorsement of all clauses in whatever shape and form. Rather, our findings support a more nuanced, case-by-case approach to testing the validity of arbitration clauses. That is precisely the sort of fact-bound, common law approach facilitated by section 2 of the Federal Arbitration Act and the current doctrine. Whereas wholesale prohibitions like the Arbitration Fairness Act declare entire areas of contract off limits to arbitration regardless of the terms of the agreement, the section 2 model enables courts to test particular clauses in light of their impact in a certain context, both with respect to the nature of the contractual relationship and with respect to the claim affected by the clause. Additionally, in the context of statutory claims, a separate doctrinal defense--derived from cases like Mitsubishi, Gilmer, and Green Tree--allows courts to test whether a particular arbitration clause enables a plaintiff adequately to vindicate her statutory rights. To the extent courts conclude that a particular clause does not fulfill this purpose (as some courts recently have concluded [FN171]), this approach permits a more modest check on the use of arbitration clauses without the need for wholesale invalidation***61** of those clauses. Our point here is not to defend a particular application of section 2 or the "vindication of statutory rights" defense but, instead, merely to explain why, at a conceptual level, that model provides a superior, and more nuanced, method of regulating arbitration agreements as compared to the blunt, empirically dubious approach typified by recent legislative enactments and pending bills.

Likewise, our research does not necessarily disprove the case for targeted regulation. It may well be appropriate for Congress to consider regulating certain features of clauses (like remedy limitations or cost splitting provisions) to the extent those practices are employed within the industry. We do not take a position on that issue here, for we do not believe our empirical findings yield a clear answer to that question (other than suggesting that they are rare in credit card agreements). It may be that judicial interpretation of section 2 provides an adequate mechanism for policing those agreements without the need for legislative oversight. Moreover, voluntary self-regulation by the industry through the development of certain "best practices" protocols similar to the due process protocols developed in the consumer, employment, and health care contexts, may be superior to legislative oversight. [FN172] Ultimately, if Congress wishes to regulate arbitra-

tion agreements in credit cards in a manner that stops short of outright prohibition, a more complete empirical case is needed.

Third, our research provides a possible model for the CFPB to follow in conducting its study of the use of arbitration clauses in consumer financial services contracts. As noted above, the CFPB has been vested with the authority to consider whether to regulate or even prohibit the use of arbitration clauses in credit card (and other consumer financial services) agreements. Before it can adopt those regulations, however, it must study the use of pre-dispute arbitration clauses in such contracts, and the "findings in such rule shall be consistent with the study." [FN173] The CFPB has stated that its obligation to study the use of arbitration clauses includes "a study of the prevalence of such agreements," possibly including "the prevalence of particular terms in pre-dispute arbitration agreements" and "how the ***62** prevalence of pre-dispute arbitration agreements and the prevalence of particular terms within them have changed over time." This Article presents data on precisely those questions for credit card agreements, one of the types of contracts subject to the CFPB's jurisdiction, and hence provides a model that can be updated and extended for the Bureau's study. [FN174]

Finally, our findings speak to the academic research in this area, especially the path-breaking work of Professor Eisenberg and his various co-authors. Part I explained what we believe to be the limitations on the findings of Professor Eisenberg's research. Part II explained how our findings cast doubt on Professor Eisenberg's broad conclusion that companies such as banks systematically treat their consumer clients differently than their more sophisticated corporate partners. Our findings suggest that the differences in treatment may not be as stark as Professor Eisenberg and his coauthors suggest. These findings, thus, cast doubt on whether companies are using arbitration clauses in their consumer contracts as a litigation-avoidance device as opposed to simply a reasonable tool to manage litigation risk, just as they do in their business-to-business arrangements. Our findings are by no means conclusive, as they have their own methodological weaknesses. But they do highlight the importance of comparing, to the extent possible, comparable types of contracts between businesses and consumers.

IV. Conclusion

This Article contributes to the growing body of empirical scholarship on the use of arbitration clauses, particularly in the context of consumer agreements. Our analysis of arbitration clauses in credit card agreements has yielded important findings that, in some respects, challenge the conventional wisdom about those practices within the industry. Most centrally, contrary to the conventional wisdom, most industry participants do not employ such agreements, and, with the exception of class waivers, most agreements do not contain the sorts of provisions that have sparked so much controversy among academic skeptics and consumer advocates. While we find some variation in practices between consumer agreements and business agreements, those variations are not as stark as others have ***63** suggested. Our findings identify a possible side benefit of the Supreme Court's decision in Concepcion and sound a note of caution to lawmakers who are considering prohibition or regulation of arbitration clauses in these contexts.

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at Creighton University School of Law. Thanks to Annie Booton for her excellent research assistance.

[FN1]. See infra text accompanying notes 2-18.

[FN2]. 9 U.S.C. § 2 (2012) (“save upon such grounds as exist at law or in equity for the revocation of any contract”).

[FN3]. See, e.g., 1 Larry E. Edmonson, Domke on Commercial Arbitration § 8:30 (3d ed. 2012) (“The unconscionability of an arbitration provision has both ‘procedural’ and ‘substantive’ elements.”); 1 Thomas H. Oehmke, Commercial Arbitration §20:19 (rev. ed. 2011) (“An agreement can become unconscionable and unenforceable where it is both procedurally and substantively unconscionable, though both of these elements need not be present to the same degree.”); 21 Richard A. Lord, Williston on Contracts § 57:15 (4th ed. 2011) (“The courts are split on whether a party must show both procedural and substantive unconscionability to establish a valid defense to the attempted enforcement of an arbitration agreement, although most courts require a showing of both.”) (footnote omitted); 2 Ian R. Macneil et al ., Federal Arbitration Law § 19.3 (1994 & Supp. 1999).

[FN4]. E.g., Shroyer v. New Cingular Wireless Servs., 498 F.3d 976, 985 (9th Cir. 2007) (concluding that “a contract may be procedurally unconscionable under California law when the party with substantially greater bargaining power ‘presents a “take-it-or-leave it” contract to a customer--even if the customer has a meaningful choice as to service providers”’) (quoting Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1068 (9th Cir. 2007)(per curiam)).

[FN5]. E.g., Pendergast v. Sprint Nextel Corp.,592 F.3d 1119, 1135 (11th Cir. 2010) (“To determine whether a contract is procedurally unconscionable under Florida law, courts must look to: (1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a ‘take-it-or-leave-it’ basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract.”).

[FN6]. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[FN7]. Id. at 1744.

[FN8]. Gordon v. Branch Banking & Trust, 419 F. App'x 920 (11th Cir. 2011); Jones v. DirecTV, Inc., 381 F. App'x 895 (11th Cir. 2010); Pendergast, 592 F.3d at 1119; Pleasants v. Am. Express Co., 541 F.3d 853 (8th Cir. 2008); Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005); Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868 (11th Cir. 2005).

[FN9]. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Guyden v. Aetna, Inc., 544 F.3d 376 (2d Cir. 2008); Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Caley, 428 F.3d at 1359; Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).

[FN10]. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011), vacated sub nom., Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. __ (2012) (per curiam); see also Chen-Oster v. Goldman, Sachs & Co., 2011 WL 2671813 (S.D.N.Y. 2011); Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854 (Ct. App. 2011); Rivera v. Am. Gen. Fin. Servs., Inc., 259 P.3d 803 (N.M. 2011).

[FN11]. See, e.g., Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, §§ 11005, 210, 122 Stat. 1357-58 (to be codified at 7 U.S.C. § 197(c) (2012)) (a 2008 statute that restricts the use of arbitration clauses in livestock and poultry production contracts); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §§ 670(a), 987(f)(4), 120 Stat. 2267-68 (2006) (codified at 10 U.S.C. § 987(f)(4) (2012)) (a 2006 statute ex-

empting members of the military and their dependents from arbitrating consumer credit disputes); 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §11028, 116 Stat. 1836 (2002) (codified at 15 U.S.C. § 1226(a)(2) (2012)). See generally Peter B. Rutledge & Anna W. Howard, Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad, 65 Disp. Resol. J. 30, 32 (2010).

[FN12]. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 2 (2011).

[FN13]. 15 U.S.C. § 1639c; Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1414 (2010).

[FN14]. 10 U.S.C. §§ 987(e)(3), (f)(4).

[FN15]. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

[FN16]. 12 U.S.C. §§ 5481, 5518.

[FN17]. Id. § 5518(a).

[FN18]. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148 (Apr. 24, 2012), available at http://files.consumerfinance.gov/f/201204_cfpb_rfi_predispute-arbitration-agreements.pdf [hereinafter CFPB Request for Information].

[FN19]. Brief of Defendants-Appellees at 20, Pendergast v. Sprint Nextel Corp., 592 F.3d 1119 (11th Cir. 2010) (No. 09-10612-H), 2009 WL 5862576.

[FN20]. Pendergast, 592 F.3d at 1135.

[FN21]. The Florida Supreme Court recently declined to answer the question certified to it by the United States Court of Appeals for the Eleventh Circuit on the ground that the Supreme Court's decision in Concepcion obviated the certification and declined jurisdiction. See Pendergast v. Sprint Nextel Corp., No. SC10-19, 2012 WL 2948594 (Fla. July 17, 2012). The Eleventh Circuit recently held that the arbitration clause was enforceable, despite the class waiver, under Concepcion. See Pendergast v. Sprint Nextel Corp., 691 F.3d 1224 (11th Cir. 2012). In the interest of complete disclosure, it should be noted here that one of the authors, Professor Rutledge, filed in the Florida Supreme Court a brief amicus curiae in the Pendergast matter on behalf of an industry association. The views expressed in this article reflect his own and not necessarily those of any entity involved in the litigation.

[FN22]. Lisa B. Bingham, Designing Justice: Legal Institutions and Other Systems for Managing Conflict, 24 Ohio St. J. on Disp. Resol. 1, 24 n.111 (2008) (“I recognize some scholars would argue that there is consent to form contracts or adhesive arbitration clauses in personnel manuals because the prospective consumer or employee can simply walk away. However, when growing numbers of services providers and employers adopt these practices, there are no meaningful alternatives.” (emphasis added)).

[FN23]. Christopher R. Drahozal & Peter B. Rutledge, Contract and Procedure, 94 Marq. L. Rev. 1103 (2011) [hereinafter Drahozal & Rutledge, Contract and Procedure]; Christopher R. Drahozal & Peter B. Rutledge, Arbitration Clauses in Credit Card Agreements: An Empirical Study, 9 J. Empirical Legal Stud. 536 (2012) [hereinafter Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements].

[FN24]. Southland Corp. v. Keating, 465 U.S. 1 (1984).

[FN25]. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-75 (1995).

[FN26]. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

[FN27]. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[FN28]. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[FN29]. To state the obvious, our focus here is on domestic practice in the United States. As we have each noted elsewhere, practices in Europe and the rest of the world are quite different. See Rutledge & Howard, supra note 11, at 30; Christopher R. Drahozal & Raymond J. Friel, A Comparative View of Consumer Arbitration, 71 Arb. 131 (2005).

[FN30]. For exemplary literature, see Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331; Paul D. Carrington, Regulating Dispute Resolution Provisions in Adhesion Contracts, 35 Harv. J. on Legis. 225 (1998); Sarah Rudolph Cole, Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees, 64 UMKC L. Rev. 449 (1996); Paul H. Haagen, New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration, 40 Ariz. L. Rev. 1039 (1998); David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33; Richard E. Speidel, Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?, 40 Ariz. L. Rev. 1069 (1998); Jeffrey W. Stempel, Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent, 62 Brook. L. Rev. 1381 (1996); Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1 (2000) [hereinafter Sternlight, Class Action]; Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637 (1996) [hereinafter Sternlight, Panacea or Corporate Tool?].

[FN31]. Schwartz, supra note 30, at 132. A steadfast critic of arbitration clauses in consumer and employment contracts, Professor Schwartz has also been highly skeptical of the view that the policy debates described in Part I should be resolved on empirical grounds at all. For a recent exposition of this view, see David S. Schwartz, Claim-Suppressing Arbitration: The New Rules, 87 Ind. L.J. 239 (2012).

[FN32]. Amy J. Schmitz, Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms, 15 Harv. Negot. L. Rev. 115, 143-50 (2010) [hereinafter Schmitz, Legislating in the Light] (analyzing small samples of credit card and cell phone contracts); Amy J. Schmitz, Dangers of Deference to Form Arbitration Provisions, 8 Nev. L.J. 37 (2007) (examining telecommunications contracts); Amy J. Schmitz, Curing Consumer Warranty Woes Through Regulated Arbitration, 23 Ohio St. J. on Disp. Resol. 627 (2008) (same); see also W. Mark C. Weidemaier, Arbitration and the Individuation Critique, 49 Ariz. L. Rev. 69, 85 n.102 (2007) (reviewing agreements in thirty-two AAA awards and finding that five of the sixteen consumer agreements contained class waivers, but none of the sixteen employment agreements contained such provisions).

[FN33]. Linda J. Demaine & Deborah R. Hensler, ‘‘Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 Law & Contemp. Probs. 55, 62, 64 (2004) (finding arbitration agreements in 69.2% of consumer contracts in the financial services industry, although the sample size was relatively small).

[FN34]. Id. at 65.

[FN35]. For examples of scholarship outside the consumer context, see Christopher R. Drahozal & Quentin R. Wittrock, Franchising, Arbitration, and the Future of the Class Action, 3 Entrepreneurial Bus. L.J. 275 (2009) (analyzing franchise agreements); Christopher R. Drahozal & Quentin R. Wittrock, Is There a Flight from Arbitration?, 37 Hofstra L. Rev. 71, 80 (2008) [hereinafter Drahozal & Wittrock, Flight from Arbitration] (analyzing franchise agreements); Erin A. O'Hara O'Connor, Kenneth J. Thomas & Randall S. Thomas, Customizing Employment Arbitration, 98 Iowa L. Rev. 133 (2012) (finding that 51.5% of CEO contracts contained arbitration clauses); Stewart J. Schwab & Randall S. Thomas, An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?, 63 Wash. & Lee L. Rev. 231, 257 (2006) (finding that 41.6% of CEO contracts contained arbitration clauses).

[FN36]. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. Mich. J.L. Reform 871, 882-83 (2008) [[[hereinafter Eisenberg et al., Arbitration's Summer Soldiers] (finding that over 75% of financial services and telecommunications companies used arbitration clauses in consumer agreements and over 93% used arbitration clauses in CEO employment agreements); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts, 92 Judicature 118, 121 (2008) (same); Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies, 56 DePaul L. Rev. 335 (2007) (examining the use of arbitration clauses in material contracts in SEC filings).

[FN37]. Eisenberg et al., Arbitration's Summer Soldiers, supra note 36.

[FN38]. Christopher R. Drahozal & Stephen J. Ware, Why Do Businesses Use (or Not Use) Arbitration Clauses?, 25 Ohio St. J. on Disp. Resol. 433 (2010).

[FN39]. As such, this study is an “inter-firm study”--it compares the use of arbitration clauses across firms in a single industry (although the part of the study examining carve-outs from arbitration, see infra text accompanying notes 59-64, is an “intra-contract” study because it looks at the use of arbitration to resolve different types of disputes within the same contract). See Drahozal & Wittrock, Flight from Arbitration, supra note 35.

[FN40]. Credit Card Accountability, Responsibility, and Disclosure Act of 2009, Pub. L. No. 111-24, § 204(a), 123 Stat. 1734, 1746-47 (codified at 15 U.S.C. § 1632(d)(2) (2012)).

[FN41]. Id. (codified at 15 U.S.C. § 1632(d)(3) (2012)). At the time we collected the data, the credit card agreements were available on a web page maintained by the Federal Reserve. Subsequently, responsibility for making credit card agreements publicly available has shifted to the Consumer Financial Protection Bureau, which now posts the agreements on its web page. Credit Card Agreement Database, Consumer Fin. Protection Bureau, http://www.consumerfinance.gov/credit-cards/agreements (last visited Feb. 9, 2013).

[FN42]. The starting point for the sample is the sample used in Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23, at 551-52 (for credit card agreements as of December 31, 2009). To that sample we added new issuers submitting credit card agreements as of December 31, 2010 (which were filed prior to June 1, 2011), and identified agreements from issuers in the original sample that had been updated as of December 31, 2010. We also excluded five issuers for which credit card agreements were no longer available as of December 31, 2010. Issuers almost always specified the same form of dispute resolution in each credit card agreement they submitted to the Federal Reserve--i.e., when an issuer used an arbitration clause, it typically used an identical clause in all of its agreements. In the handful of cases in which an issuer submitted credit card agreements specifying different forms of dispute resolution or with different arbitration clauses, we used the most common form in our analysis. For further discussion, see id. The one

exception is HSBC, which settled an antitrust suit by agreeing not to use arbitration clauses in its credit card agreements for three-and-one-half years. See infra text accompanying notes 53-54. The standard HSBC credit card agreements for December 31, 2010, do not contain arbitration clauses, consistent with the settlement. But those agreements are outnumbered by specialty credit card agreements that HSBC apparently administers for merchants, which do include arbitration clauses. Because the standard HSBC agreement does not include an arbitration clause, and because HSBC has agreed not to use arbitration clauses, we coded HSBC as not using arbitration as of December 31, 2010.

[FN43]. Issuers were only required to update their filing if they amended the credit card agreement during the quarter. 12 C.F.R. § 226.58(c)(3) (2011). Accordingly, when the most recent filing available was for December 31, 2009, we also used that filing for December 31, 2010.

[FN44]. As a result, our sample is limited to financial institutions (almost always banks and credit unions) and does not include nonfinancial institutions. See Mark Furletti & Christopher Ody, Measuring U.S. Credit Card Borrowing: An Analysis of the G.19's Estimate of Consumer Revolving Credit 15 (2006), available at http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2006/DG192006April10.pdf (describing the "complexities of gathering data on the revolving consumer loans owed to nonfinancial businesses"). We did not include two new issuers in the sample that reported zero dollars in credit card loans outstanding as of December 31, 2010. By comparison, several issuers that had nonzero amounts of credit card loans outstanding as of December 31, 2009, reported zero credit card loans outstanding as of December 31, 2010. We kept those issuers in the sample, although they obviously affected only the number of agreements and not the market-share calculations.

[FN45]. Two credit unions indicated in their credit card agreements that disputes were subject to arbitration under the terms of an arbitration clause included in the credit union membership agreement. Because disputes under the credit card agreement were subject to arbitration, we included the two credit unions as issuers that used arbitration clauses. But because the arbitration clause itself was not available, we treated those credit unions as missing when analyzing the terms of credit card arbitration clauses.

[FN46]. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(3) (finding that consumers "must often give up their rights as a condition of...getting a credit card"); Public Citizen, Forced Arbitration: Unfair and Everywhere 3 (2009), available at http:// www.citizen.org/documents/UnfairAndEverywhere.pdf (reporting that "the use of forced arbitration remains rampant," citing credit card agreements as an example); Alex Raskolnikov, Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement, 109 Colum. L. Rev. 689, 747 (2009) ("A binding arbitration clause is a staple of credit card agreements."); Yuki Noguchi, Credit Card Arbitration Trumps Lawsuits, Court Says, NPR.org (Jan. 11, 2012), http://www.npr.org/2012/01/11/144990644/credit-card-arbitration-trumps-lawsuits-court-says ("To get a credit card, a consumer generally must sign a detailed agreement. In the fine print, almost always, is an arbitration clause that says that if consumers want to dispute fees, they must do so through arbitration, not in court.").

[FN47]. See, e.g., Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?: Hearing Before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 1-2 (2009), available at http://judiciary.house.gov/hearings/printers/111th/111-39_49475 . PDF ("Nearly every credit card issuer includes an arbitration agreement in [[[its]... contracts with cardholders.") (statement of Rep. Steve Cohen, Chairman, H. Subcomm. on Commercial and Admin. Law); see also Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157, 158 n.6 (2006) (referring to "the fewcredit card companies that do not compel arbitration").

[FN48]. E.g., Public Citizen, supra note 46, at 5-9; Eisenberg et al., Arbitration's Summer Soldiers, supra note 36, at 881-82.

[FN49]. Prior to enactment of the Credit CARD Act of 2009, see supra text accompanying notes 40-41, credit card agreements were difficult for researchers to obtain. See, e.g., Public Citizen, supra note 46, at 3, 5 ("[S]everal credit card companies told us that we had to apply for a credit card and be approved before we could see their terms.... Only three of the 10 credit card providers we queried would share the contractual language of their arbitration clauses with us."); Demaine & Hensler, supra note 33, at 60 ("[O]ne coauthor acquired four credit cards while conducting the study, as that was the only means by which to obtain the clauses used by these businesses."); Schmitz, Legislating in the Light, supra note 32, at 145 ("[I]t was notably difficult to obtain copies of consumer credit contracts in order to analyze their inclusion of arbitration clauses.... [Credit card issuers] rarely include or make available their full form contract terms.").

[FN50]. Based on the sample used in Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23, at 551-52, we reported that, as of December 31, 2009, 51 of 298 issuers (17.1%) used arbitration clauses and 247 of 298 issuers (82.6%) did not; and that 95.1% of credit card loans outstanding were subject to arbitration clauses while 4.9% were not. These results differ marginally from the results reported in Table 1 because of the slight difference in the samples used. For the results reported in this article, the sample is limited to those issuers for which we had information as of both December 31, 2009, and December 31, 2010. Credit card agreements were not available as of December 31, 2010, for five issuers that had provided credit card agreements to the Federal Reserve as of December 31, 2009 (none of which included arbitration clauses), so we excluded those issuers from the sample.

[FN51]. Consent Judgment, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), available at http:// pubcit.typepad.com/files/nafconsentdecree.pdf. At the same time, but unrelated to pending or threatened litigation, the American Arbitration Association announced a moratorium on administering most consumer debt collection arbitrations. See Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight, 111th Cong. 123-32 (2009) (testimony of Richard W. Naimark, American Arbitration Ass'n), available at http:// oversight.house.gov/images/stories/documents/20090722112616.pdf.

[FN52]. Complaint at P 3, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18559, (Minn. Dist. Ct. July 14, 2009), available at http:// www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.p.

[FN53]. Stipulation and Agreement of Settlement with Bank of America, N.A. (USA) (N/K/A/ FIA Card Services, N.A.) and Bank of America, N.A., at 10, Ross v. Bank of Am., N.A., (USA), No. 05-CV-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-bank-of-america.pdf; Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., at 10, Ross v. Bank of Am., N.A., (USA), No. 05-CV-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf; Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., at 10, Ross v. Bank of Am., N.A., (USA), No. 05-CV-7116 (S.D.N.Y. Feb. 23, 2010), available at http:// www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf; Stipulation and Agreement of Settlement with HSBC Finance Corp. and HSBC Bank Nevada, N.A., at 11, Ross. v. Bank of Am., N.A., (USA), No. 05-CV-7116 (S.D.N.Y. Feb. 24, 2010), available at http:// www.arbitration.ccfsettlement.com/documents/files/2010-02-24-stip-and-agreement-with-hsbc.pdf.

[FN54]. See First Amended Class Action Complaint at PP 45-58, 69-77, Ross v. Bank of Am., N.A., (USA), No. 05-CV-7116 (S.D.N.Y. June 4, 2009), available at http://www.arbitration.ccfsettlement.com/documents/files/2009-06-04-1st-amended-complaint.pdf.

[FN55]. We are not able to separate out the relative importance of the two events, nor are we able to identify which is the cause and which is the effect. Chase announced in July 2009 that it would no longer file new credit card arbitration cases against consumers, and Bank of America announced in August 2009 that it would stop using arbitration clauses in its credit card and other consumer agreements. See Kathy Chu, Bank of America Ends Arbitration of Credit Card Disputes, USA Today Online (Aug. 13, 2009, 11:29 PM), http://www.usatoday.com/money/industries/banking/2009-08-13-bank-of-america-no-arbitration_N.htm. The settlements by Chase and Bank of America in Ross were not announced until November and December 2009, at around the same time as the settlements by Capital One and HSBC. See Ravi Panchal, BofA Reaches Settlement in Cardholders Arbitration Case, SNL Bank Wkly. S. Edition (SNL Fin. LC, Charlottesville, Va.), Dec. 21, 2009; Pankti Mehta, Capital One Agrees to Drop Arbitration Clause from Credit Card Agreements, SNL Bank Wkly. S. Edition, (SNL Fin. LC, Charlottesville, Va.), Dec. 28, 2009; Bob Van Voris, HSBC Settles Suit over Arbitration, Boston Globe, Jan. 5, 2010, at B10; Maria Aspan, JPMorgan Chase to Scrap Arbitration, Cardline (Nov. 23, 2009), http://www.paymentssource.com/news/jpmorgan-chase-scrap-arbitration-2709661-1.html.

[FN56]. The sample used in preparing Table 1 does not include thirty-nine issuers for which no agreements as of December 31, 2009, were available, and two issuers for which such agreements were not available by our cut-off date for collecting that data. See Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23, at 552 n.76. Of the 334 issuers for which we have credit card agreements as of December 31, 2010, 49 (14.7%) of the agreements included arbitration clauses, while 285 (or 85.3%) did not. Out of the total credit card loans outstanding for those 334 issuers, 47.8% were subject to arbitration clauses as of December 31, 2010, and 52.2% were not.

[FN57]. In July 2010, the Pew Health Group reported finding a "dramatic drop in arbitration clauses" in credit card agreements: "In March 2010, only 10 percent of bank cards indicated a cardholder was subject to arbitration... down from 68 percent in 2009." The Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards Are Safer and More Transparent--But Challenges Remain 19 (2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/PEW-CreditCard%20FINAL.PDF?n=1231 [hereinafter Pew Health Group (2010)]. As of May 2011, the percentage of bank cards reported by the Pew Health Group as subject to arbitration clauses was 14%, still well below the percentages we find. The Pew Health Group, A New Equilibrium: After Passage of Landmark Credit Card Reform, Interstate Rates and Fees Have Stabilized 2 (2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_ Cards/Report_Equilibrium_web.pdf. The difference results from the fact that the Pew Health Group collects its data from the disclosure documents available on issuer web pages, not the cardholder agreements themselves. Pew Health Group (2010), supra, at 32 ("Data in this report is based on an analysis of application disclosures provided by credit card issuers at the time a consumer applies for a credit card."). Not all issuers disclose the use of arbitration clauses in their disclosure documents; as a result, the Pew Health Group numbers understate the extent of arbitration clause use. Compare Card Agreement, Citi®Platinum Select®/AAdvantage®Visa Signature® Card 9-13, available at https://www.citicards.com/cards/acq/cmaView.do?PID=204&cma=true&locale=en_US (last visited Feb. 9, 2013) (including arbitration clause), with Citi Disclosures, Citi®Platinum Select®/AAdvantage® Visa Signature® Card, available at http://bit.ly/TUAEPj (last visited Feb. 9, 2013) (not mentioning arbitration clause).

Using the same sample of twelve bank issuers as the Pew Health Group, we find that as of December 31, 2010, 58.3% of the issuers (seven of twelve) used arbitration clauses and 49.5% of the credit card loans outstanding for those issuers were subject to arbitration clauses.

[FN58]. One of the issuers that we classified as switching to arbitration had submitted multiple agreements to the Federal Reserve as of December 31, 2009, one of which included an arbitration clause and the rest of which did not. Because the majority of the clauses submitted for 2009 did not include arbitration clauses, we classified the issuer as not using arbit-

ration. By comparison, all of the clauses submitted by the issuer for 2010 included arbitration clauses.

[FN59]. See, e.g., Drahozal & Wittrock, Flight from Arbitration, supra note 35, at 113-14.

[FN60]. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000); see Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1005 (9th Cir. 2010) ("The only businessjustificationoffered by Fastbucks for the non-mutual judicial remedy provision was its need to seek provisional remedies, which is insufficient under California law to justify non-mutuality(because California law protects parties' rights to seek provisional remedies in court regardless of any arbitrationclause that may cover the parties' dispute)."); Fitz v. NCR Corp.,13 Cal. Rptr. 3d 88, 105 (Ct. App. 2004) ("NCR's concern that arbitration may not always meet its legitimate dispute resolution needs is not a proper business justification for the exception."); Mercuro v. Superior Court., 116 Cal. Rptr. 2d 671, 677-78 (Ct. App. 2002) (rejecting asserted business justification for carve-out of claims for injunctive relief); see also Christopher R. Drahozal, Nonmutual Agreements to Arbitrate, 27 J. Corp. L. 537, 552-55 (2002) (discussing business justifications for carve-outs); O'Hara O'Connor et al., supra note 35.

[FN61]. E.g., Drahozal & Wittrock, Flight from Arbitration, supra note 35, at 113-14.

[FN62]. As an extreme example, one (but only one) small issuer in our sample (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) gave itself the option to arbitrate while requiring the cardholder to arbitrate. Typically, however, carve-outs are more narrowly tailored to exclude only certain types of claims from arbitration.

[FN63]. If claims brought by issuers in small claims court are excluded from arbitration, a small claims exclusion may permit issuers to avoid arbitration for many of its claims. Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23, at 545 n.48.

[FN64]. Iberiabank, Cardholder Credit Card Agreement and Additional Disclosures (Dec. 31, 2010) (copy on file with authors):

> No Waiver: You and we agree that bringing a lawsuit, counterclaim, or other action in court shall not be deemed a waiver of the right to demand arbitration of any Dispute brought by the other party. As an example, and not by way of limitation, if we file a lawsuit against you in court to collect a debt and you file a counterclaim against us in that lawsuit, we have the right to demand that the entire Dispute, including our original lawsuit against you and your counterclaim against us, be arbitrated in accordance with this arbitration provision.

Id.

[FN65]. See Circuit City Stores, Inc., v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002); Circuit City Stores, Inc., v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); see also Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1085 (9th Cir. 2008) (remanding for district court to determine whether cardholder had meaningful ability to opt out of arbitration clause and requiring the court to consider "issues such as how much additional time the expiration date cutoff typically provides, how many customers exercise their ability toopt outand whether other banks use similar provisions"). But see Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1106 (9th Cir. 2003) (finding employee had no "meaningful opportunity to opt-out of the arbitration program" when "management impliedly and expressly pressured [the employee] not to opt-out").

[FN66]. Of those that do, the clause in the Discover Bank cardholder agreement is illustrative:

> You may reject the Arbitration of Disputes section but only if we receive from you a written notice of rejection within 30 days of your receipt of the Card. You must send the notice of rejection to: Discover, PO Box 30938, Salt Lake City, UT 84130-0938. Your rejection notice must include your name, address, phone number, Account number and per-

sonal signature. No one else may sign the rejection notice for you. Your rejection notice also must not be sent with any other correspondence. However, if you previously had the chance to reject an arbitration agreement with us but did not, you may not reject it now. Rejection of arbitration will not affect your other rights or responsibilities under this Agreement or your obligation to arbitrate disputes under any other account as to which you and we have agreed to arbitrate disputes. If you once sent us a rejection notice on a different account or card, you must send us a new rejection notice or else this arbitration agreement will apply to any disputes with us relating to your other accounts or cards.

Discover Bank, Cardmember Agreement 5 (Dec. 31, 2010) (copy on file with authors).

[FN67]. See, e.g., Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for BindingArbitration: A Fresh Assessment ofJury Trial, Separation of Powers, and Due Process Concerns,72 Tul. L. Rev. 1, 5 (1997).

[FN68]. See, e.g., 3 Macneil, supra note 3, §34.1 at 34:2 (“Limitations ondiscovery... remain one of the hallmarks of American commercialarbitration, including arbitration under the FAA. Avoidance of the delay and expense associated withdiscoveryis still one of the reasons parties choose to arbitrate.”) (footnotes omitted).

[FN69]. See 9 U.S.C. § 10 (2012). Courts are split on whether manifest disregard of the law, which provides a very slight degree of merits review for arbitration awards, remains available as a ground for vacating an award. Kulchinsky v. Ameriprise Fin., No. 11-0319, 2011 U.S. Dist. LEXIS 75917, at *19 n.8 (E.D. Pa. July 14, 2011) (noting that “Courts of Appeals are presently divided on the issue”). For the leading cases, see Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010); Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 355-56, 358 (5th Cir. 2009); Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009); Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93-95 (2d Cir. 2008); Coffee Beanery, Ltd. v. WW, L.L.C., No. 08-1830, 2008 U.S. App. LEXIS 23645, at *4 (6th Cir. 2008).

[FN70]. One other clause (of forty-seven, or 2.1%; 0.1% of credit card loans outstanding) informed parties generally that they were waiving their right to litigate in court, without being more specific.

[FN71]. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (“Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.”).

[FN72]. E.g., Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

[FN73]. 489 U.S. at 474 (“Appellant acknowledges, as it must, thatthe interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.”). The Supreme Court did decide that, on the facts of the case, the FAA did not preempt the state court's interpretation. Id. at 468.

[FN74]. E.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 717 (7th Cir. 1994), rev'd, 514 U.S. 52 (1995)
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[FN75]. 514 U.S. 52, 60 (1995).

[FN76]. Preston v. Ferrer, 552 U.S. 346, 363 (2008) (quoting Mastrobuono, 514 U.S. at 63-64).

[FN77]. The other three issuers, also very small, had no provision on the applicable arbitration law in their arbitration clause.

[FN78]. See Christopher R. Drahozal, ‘‘Unfair” Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 728-31; Christopher R. Drahozal & Samantha Zyontz, Private Regulation of Consumer Arbitration, 79 Tenn. L. Rev. 289, 310-15 (2012) (describing provisions of AAA Consumer Due Process Protocol); supra notes 67-69 and accompanying text.

[FN79]. In reporting the arbitration providers specified in credit card arbitration agreements as of December 31, 2009, Drahozal and Rutledge used a broader sample of issuers from the Federal Reserve web page, which both (1) included issuers that did not file call reports with federal banking regulators, and (2) did not consolidate related entities. Drahozal & Rutledge, Contract and Procedure, supra note 23, at 1126 tbl.3. Even so, the results are broadly consistent with those reported here using a narrower sample. As noted previously, the sample of issuers included in Table 5 are those issuers that included arbitration clauses as of both December 31, 2009, and December 31, 2010. If the sample instead is expanded to all issuers with arbitration clauses as of December 31, 2010, the choice of arbitration providers is as follows: AAA or JAMS (fifteen clauses, 81.7% of credit card loans outstanding); AAA, NAF, JAMS (two clauses; 0.5%); AAA (twenty-one clauses, 16.3%); AAA or NAF (one clause, 0.0%); JAMS (two clauses, 0.1%); JAMS or NAF (one clause, 0.0%); JAMS or NAMS (1 clause, 0.0%); NAF (three clauses, 0.1%); a national organization with significant experience in consumer and financial disputes (one clause, 1.2%).

[FN80]. Two small issuers incorporated the AAA rules into their arbitration clause but did not specify the AAA itself as the provider. Although we classified these issuers as choosing the AAA, their arbitration clauses might be construed as not specifying any provider.

[FN81]. The unavailability of the NAF raises serious questions about the enforceability of an arbitration agreement that lists only the NAF to administer the arbitration. Courts currently are split on whether the use of NAF is integral to the arbitration agreement such that its unavailability makes the arbitration clause as a whole unenforceable. Compare Jones v. GGNSC Pierre LLC, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) (“Under all of the circumstances, the Court finds no reason to believe the specification of the NAF rules was integral to the Arbitration Agreement. Thus, the Court finds that Section5 of the Federal Arbitration Act authorizes and requires the Court to appoint an arbitrator.”), Levy v. Cain, Watters & Assocs., No. 2:09-cv-723, 2010 U.S. Dist. LEXIS 9537, at *12 (S.D. Ohio Jan. 15, 2010) (same), and Adler v. Dell Inc., No. 08-cv-13170, 2009 U.S. Dist. LEXIS 112204, at *11 (E.D. Mich. Dec. 3, 2009) (same), with Ranzy v. Tijerina, No. 10-20251, 2010 U.S. App. LEXIS 17872, at **4-5 (5th Cir. Aug. 25, 2010) (unpublished opinion) (holding that because designation of NAF as the sole arbitration forum “is an integral part of the agreement to arbitrate,... a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable”), Carideo v. Dell, Inc., No. C06-1772JLR, 2009 U.S. Dist. LEXIS 104600, at *18 (W.D. Wash. Oct. 26, 2009) (same), and Carr v. Gateway, Inc., 944 N.E.2d 327, 336-37 (Ill. 2011) (same).

[FN82]. See National Arbitration & Mediation, http://www.namadr.com (last visited July 28, 2011).

[FN83]. First National Bank of Omaha, Cardmember Agreement 11 (Dec. 31, 2010) (copy on file with authors).

[FN84]. See supra notes 51-52 and accompanying text.

[FN85]. This figure understates the market share of NAF before July 2009, as all four of the issuers (Bank of America, Capital One, Chase, and HSBC) that settled the antitrust claims against them--by removing arbitration clauses from their credit card agreements for a period of years--listed the National Arbitration Forum as a provider in their arbitration clauses before the Settlement. See First Amended Class Action Complaint para. 121, Ross v. Bank of Am., N.A., No. 05-cv-7116 (S.D.N.Y. June 4, 2009), available at http://www.arbitration.ccfsettlement.com/documents/files/2009-06-04-1st-amended-complaint.pdf.

[FN86]. E.g., Florencia Marotta-Wurgler & Robert Taylor, Set in Stone? Change and Innovation in Consumer Standard Form Contracts, N.Y.U. L. Rev. (forthcoming 2013).

[FN87]. Nat'l Consumer Disputes Advisory Comm., Consumer Due Process Protocol (1998), available at http://adr.org/aaa/ShowPDF?doc=ADRSTG_005014.

[FN88]. See JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (2009) [hereinafter JAMS, Minimum Standards of Procedural Fairness], available at http://www.jamsadr.com/consumer-arbitration.

[FN89]. South Carolina Federal Credit Union, Credit Card Agreement and Disclosures para. 34 (Sept. 30, 2010) (copy on file with authors).

[FN90]. See Am. Arbitration Ass'n, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses 8 (2007) (copy on file with author); JAMS, Minimum Standards of Procedural Fairness, supra note 88, at 2 ("JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.").

[FN91]. Compare infra Tables 7-9, with Drahozal & Zyontz, supra note 78, at 320-21.

[FN92]. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010).

[FN93]. Id. at 2775.

[FN94]. Id. at 2778.

[FN95]. See, e.g., Jean R. Sternlight, The Role of Courts in Interpreting and Enforcing Arbitration Clauses: A Process Viewed Through Two Different Lenses 4-5 (2011) (paper prepared for conference on "The Future of Arbitration" (Mar. 17-18, 2011)), available at http:// www.law.gwu.edu/News/2010-2011Events/Documents/Sternlight%20Submission.pdf ("It seems quite likely that in light of RentaCenter many companies will now draft clauses largely delegating to the arbitrator the question of whether the arbitration clause is enforceable.... Thus, it would not be surprising to see companies draft clauses in the mandatory arbitration context that require courts to determine the availability of class claims, and whether a class action prohibition is unconscionable, but require arbitrators to decide all other issues pertaining to the validity of arbitration clauses.").

[FN96]. Courts since Rent-A-Center are split on whether delegation clauses in consumer and employment contracts are unconscionable. See Howard v. Rent-A-Center, Inc., No. 1:10-CV-103, 2010 U.S. Dist. LEXIS 76342, at *15 (E.D. Tenn. July 28, 2010) (holding that "allowing arbitrators [to] determine their own jurisdiction is neither contrary to... public policy nor unconscionable"); Chin v. Advanced Fresh Concepts Franchise Corp., 123 Cal. Rptr. 3d 547, 554 (Ct. App. 2011) (asserting that "[t]here is substantial authority that a delegation clause in an adhesion contract is unconscionable," but refusing to invalidate clause because franchisee "makes no colorable claim that any other term of the arbitration provision is unconscionable"); see also Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 480-81 (Ct. App. 2008) (holding that "the provision in the arbitration agreement giving the arbitrator exclusive authority to decide enforceability issues is unconscionable and, therefore, unenforceable," because when "one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable"); Murphy v. Check 'N Go of Cal., Inc., 67 Cal. Rptr. 3d 120, 125 (Ct. App. 2007) ("[I]n this contract of adhesion, the provision for arbitrator determinations of unconscionab-

ility is unenforceable. Under the circumstances of this case, the judge is the proper gatekeeper to determine unconscionability.").

[FN97]. The one exception is for the question whether the parties assented to the arbitration agreement. See Rent-A-Center, 130 S. Ct. at 2782 n.2 ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,' and, as inBuckeye Check Cashing, Inc.v.Cardegnawe address only the former.").

[FN98]. Because none of the delegation clauses in our sample is as definitively worded as the clause in Rent-A-Center, our classifications of those clauses are broad. A court that construed these clauses narrowly might find that they did not fall under the holding in Rent-A-Center. To date, however, most courts construe language such as that in the clauses we studied as falling under Rent-A-Center, and we follow those decisions in our coding. See, e.g., Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011) (finding that language in arbitration agreement providing that parties agree to arbitrate any dispute that "'arises out of or relates to... the validity or application of any of the provisions of thisSection 4'... constitutes 'an agreement to arbitrate threshold issues concerning the arbitration agreement"' under Rent-A-Center).

[FN99]. In reporting the use of delegation clauses in credit card arbitration agreements as of December 31, 2009, Drahozal & Rutledge, Contract and Procedure, supra note 23, at 1123 tbl.2, used a broader sample of issuers from the Federal Reserve web page, which both (1) included issuers that did not file call reports with federal banking regulators and (2) did not consolidate related entities. Even so, the results are broadly consistent with those reported here.

As noted previously, the sample of issuers included in Table 6 are those issuers that included arbitration clauses as of both December 31, 2009, and December 31, 2010. If the sample instead is expanded to all issuers with arbitration clauses as of December 31, 2010, the use of delegation clauses is as follows: anti-delegation (four of forty-seven (8.5%) clauses; 29.1% of credit card loans outstanding); class exception (fifteen of forty-seven (31.9%) clauses; 12.8% of credit card loans outstanding); delegation (twenty-four of forty-seven (51.1%) clauses; 52.7% of credit card loans outstanding); and none (fourof forty-seven (8.5%) clauses, 5.4% of credit card loans outstanding).

[FN100]. Stolt-Nielsen S.A. v. AnimalFeeds Int'l,130 S. Ct. 1758 (2010).

[FN101]. Drahozal & Rutledge, Contract and Procedure, supra note 23, at 1141, 1157-58 (noting that AAA arbitrators continue to construe arbitration clauses to permit class arbitration, although at a lower rate following Stolt-Nielsen).

[FN102]. SeeFallo v. High-Tech Inst., 559 F.3d 874, 877-78(8th Cir. 2009); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 10-12 (1st Cir. 2009); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1331-32 (11th Cir. 2005);Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005); FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1312-13 (8th Cir. 1994); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472-73 (1st Cir. 1989). But see Restatement (Third) of U.S. Law of Int'l Commercial Arbitration §4-14 cmt. e & reporter's note e (Tentative Draft No. 2, 2012).

[FN103]. For the other arbitration clauses in our sample, the language in the clauses (including anti-delegation and class-exception clauses) will control over the language in the provider rules.

[FN104]. One issuer revised its credit card agreement in 2010 to collect all of the definitions in one section at the beginning of the agreement. As a result, it moved the definition of "claim" from the paragraph entitled "Arbitration" to a paragraph entitled "Definitions." The relevant language of the definition of "claim"--which included "the validity, enforceability or scope of this provision"--remained the same in the two agreements. But because of the location of the clause, instead of "this provision" referring to the arbitration clause (and hence making the provision a delegation clause), it now refers to the definitions section of the agreement (arguably making the provision no longer a delegation clause). Compare

Fifth Third Bank, Select Card Alliance Agreement 1 (Dec. 31, 2010) (copy on file with authors), with Fifth Third Bank, Card Agreement for MasterCard® and Visa® para. 25 (Dec. 31, 2009) (copy on file with authors). In coding the provision, we took the view that the reorganization of the agreement likely was not intended to make a substantive change in the terms of the arbitration clause, and so coded it as including a delegation clause in both 2009 and 2010.

[FN105]. See supra notes 51-52 and accompanying text.

[FN106]. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[FN107]. Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 U.S. Dist. LEXIS 103712, at *37 (S.D. Cal. Aug. 11, 2008), aff'd sub nom. Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), rev'd sub nom. Concepcion, 131 S. Ct. 1740.

[FN108]. Concepcion, 131 S. Ct. at 1753.

[FN109]. World Financial Network National Bank, Trek Bikes Credit Card Agreement P 30.C.14 (Dec. 31, 2010) (copy on file with authors).

[FN110]. We discuss the legal significance of this type of provision infra Part III.

[FN111]. See Michael G. McGuinness & Adam J. Karr, California's “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act, 2005 J. Disp. Resol. 61, 87-89 (2005) (listing types of provisions held unconscionable by California courts); Sternlight, Panacea or Corporate Tool?, supra note 30, at 638 (“[T]he arbitration clauses are crucial in that they not only bar judicial relief but also may allow companies to select the arbitrators, set the arbitration in a location convenient for the company but not for the little guy, exclude certain recoveries such as punitive damages, shorten the statute of limitations, deny discovery and other procedural protections, and eliminate virtually any right to appeal.”). But see Drahozal, supra note 78, at 756-64 (arguing that “unfair” provisions might make consumers and employees better off or at least are not unambiguously unfair).

[FN112]. Some provisions alleged to be unfair (e.g., delegation clauses and exclusions from arbitration) have already been discussed. See supra text accompanying notes 59-64, 92-105. Others (e.g., provisions allocating arbitration costs and providing for arbitral-appeals panels) are addressed in later sections. See infra text accompanying notes 119-41.

[FN113]. See infra text accompanying notes 119-41.

[FN114]. See supra text accompanying note 70.

[FN115]. Class Actions in Arbitration--An Idea Whose Time Should Pass, Metro. Corp. Counsel, Aug. 2006, at 25 (interview with Lewis Goldfarb); see also Patrick E. Gaas, The Evolving Unpredictability of Class Arbitration, For the Defense, June 2005, at 37, 39 (“[C]lass arbitration may be worse for the corporate defendant than class action litigation.”).

[FN116]. See Hadelman v. DeLuca, 876 A.2d 1136, 1138-39 (Conn. 2005); MedValUSA Health Programs, Inc. v. Memberworks, Inc., 872 A.2d 423, 429 (Conn. 2005).

[FN117]. See, e.g., Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994, 1001-02 (Cal. 1994).

[FN118]. E.g., Carrington & Haagen, supra note 30, at 344-45 (“Commercial arbitration, at least as it is practiced in America, is a method of dispute resolution, but not necessarily a method of enforcing legal rights.”).

[FN119]. By comparison, the public court system is subsidized by the taxpayers, so that parties do not bear anywhere near the full cost of the process. See, e.g., Stephen J. Ware, The Case for Enforcing Adhesive Arbitration Agreements--with Particular Consideration of Class Actions and Arbitration Fees, 5 J. Am. Arb. 251, 285 (2006).

[FN120]. Christopher R. Drahozal, Arbitration Costs and Contingent Fee Contracts, 59 Vand. L. Rev. 729, 737-39 (2006) .

[FN121]. Id. at 740-42; see, e.g., JAMS, Minimum Standards of Procedural Fairness, supra note 88, at para. 7.

[FN122]. Drahozal, supra note 120, at 752-57.

[FN123]. See supra text accompanying notes 79-80.

[FN124]. Five clauses (of forty-seven, or 10.6%; 0.1% of credit card loans outstanding) contained no provision on arbitration costs, and one clause (of forty-seven, or 2.1%; 5.7% of credit card loans outstanding) stated that costs were addressed in the provider rules.

[FN125]. In addition, every credit card agreement in the sample but one (forty-six of forty-seven, or 97.9%; 98.8% of credit card loans outstanding) permitted the issuer to recover its costs, typically including attorneys' fees, for bringing a collection action to recover a past-due debt. Such provisions typically are not found in the arbitration clause, and, indeed, are found in credit card agreements that do not have arbitration clauses.

[FN126]. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[FN127]. Four clauses in the sample (of forty-seven, or 8.5%; 38.7% of credit card loans outstanding) provided for the issuer to pay for one hearing day, while one clause (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) provided for the issuer to pay for two hearing days.

[FN128]. Drahozal & Zyontz, supra note 78, at 313.

[FN129]. Drahozal & Zyontz, supra note 78, at 313.

[FN130]. One other clause provided that the issuer would pay either for the arbitration clause to be enforced or if the cardholder made a good faith request. The latter provision is the basis for its classification in Table 8.

[FN131]. See supra text accompanying note 69.

[FN132]. For example, JAMS has an optional appeals process in its arbitration rules, although parties must opt into the process by agreement. See JAMS, JAMS Optional Arbitration Appeal Procedure (June 2003), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_ Procedures-2003.pdf.

[FN133]. See Little v. Auto Stiegler, Inc., 63 P.3d 979, 985 (Cal. 2003) (holding unconscionable a provision limiting arbitral appeals to awards exceeding $50,000):

> From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that

the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants.

Compare Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091, 1098 (Alaska 2009) (same), and Saika v. Gold, 56 Cal. Rptr. 2d 922, 927 (Ct. App. 1996) (holding that a provision limiting arbitral appeals to awards exceeding $25,000 violates public policy), with Monex Deposit Co. v. Gilliam, 671 F. Supp. 2d 1137, 1146-47 (C.D. Cal. 2009) (rejecting an unconscionability challenge to a three-member arbitral-appeals panel when review was permitted for all awards), and Marshall v. John Hine Pontiac, 287 F. Supp. 2d 1229, 1232-33 (S.D. Cal. 2003) (same).

[FN134]. See supra text accompanying note 133.

[FN135]. Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 579 (2008).

[FN136]. USAA Credit Card Agreement Arbitration Addendum para. A.14 (Dec. 31, 2010) (copy on file with authors).

[FN137]. See supra note 69.

[FN138]. The provision might still have effect if the vacatur action is brought in state court instead of in federal court. See infra text accompanying notes 139-40.

[FN139]. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 606 (Cal. 2008); Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97 (Tex.), cert. denied, 132 S. Ct. 455 (2011).

[FN140]. See Wood v. Penntex Res. LP, No. H-06-2198, 2008 U.S. Dist. LEXIS 50071, at *20-21 (S.D. Tex. June 27, 2008) (“This reading would impermissibly circumvent Hall Street.”).

[FN141]. See Christopher R. Drahozal, Contracting Around Hall Street, 14 Lewis & Clark L. Rev. 905, 912-16 (2010).

[FN142]. Eisenberg et al., Arbitration's Summer Soldiers, supra note 36, at 876.

[FN143]. Id. at 883 tbl.2.

[FN144]. Some of the business contracts in their sample, such as licensing agreements, included arbitration clauses at a higher rate. Id. at 878.

[FN145]. Drahozal & Ware, supra note 38, at 458-59.

[FN146]. Id. at 463-67.

[FN147]. See supra text accompanying notes 40-42.

[FN148]. See Bd. of Governors of the Fed. Reserve Sys., Report to the Congress on the Use of Credit Cards by Small Businesses and the Credit Card Market for Small Businesses 16 (2010), available at http://www.federalreserve.gov/newsevents/conferences/sbc_smallbusine sscredit.pdf (“Each issuer that Board staff spoke with had a unique definition of the term ‘small business.’ Definitions were based on annual revenue and the number of employees. The maximum revenue to be considered a small business ranged from $5 million to $20 million, and the employee limit ranged from 10 to 100.”); Susan Herbst-Murphy, Getting Down to Business: Commercial Cards in Business-to-Business Payments 11 (2011), available at http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2011/D-2011-Commercial-Cards.pdf (“There is no universally accepted definition of small business.... MasterCard's website defines small businesses as those

with less than $10 million in revenues, while Visa's site indicates a higher threshold of $25 million. Bank issuers of Visa and MasterCard cards are not obliged, however, to use the network definition, nor is there consistency from one bank to the next on the parameters determining ‘small business.’ What is considered a small business by one banking organization might be classified as middle market by another.”).

[FN149]. The documents we obtained were ones posted on the issuers' web pages as of May 2011. We do not know whether the issuers' consumer agreements might have changed between December 31, 2010, (the latest date for which we have data) and May 2011.

[FN150]. See supra note 57.

[FN151]. We report only the number of agreements because we do not have data on business credit card loans outstanding.

[FN152]. Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., PP 3(a) & 2(k), Ross v. Bank of Am., N.A. (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf; Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., PP 3(a) & 2(k), Ross v. Bank of Am., N.A. (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccf settlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf.

[FN153]. Of the three issuers for which we have agreements, two use identical arbitration clauses in their consumer and business credit card agreements, while one uses a somewhat simpler clause in its business credit card agreement.

[FN154]. Although we do not include Citibank in the sample because a copy of its business deposit account agreement was not available online, it appears that Citibank includes (or at least included) an arbitration clause in its business deposit account agreement. See Citibank, N.A. v. Stok & Assocs., No. 09-13556, 2010 U.S. App. LEXIS 14912, at *2 (11th Cir. July 20, 2010) (per curiam), cert. dismissed, 131 S. Ct. 2955 (2011).

[FN155]. See Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23, at 553 (describing when commonly owned issuers were consolidated in defining the sample).

[FN156]. Indeed, the financial institutions often used the same deposit account agreements for both businesses and consumers.

[FN157]. In all but one case, the arbitration clauses were identical for businesses as for consumers. The one exception is Wells Fargo, which included a different arbitration clause in its Business Account Agreement than in its Consumer Account Agreement. Compare Wells Fargo, Business Account Agreement 4-6 (Sept. 24, 2010) (copy on file with authors), with Wells Fargo, Consumer Account Agreement 4-6 (Mar. 17, 2010) (copy on file with authors). That said, in substance the agreements were very similar, and the differences might be due to the differing effective dates on the copies available to us rather than any decision to treat business and consumer accountholders differently.

[FN158]. See Bank of America, Deposit Agreement and Disclosures para. XXIV(E) (June 19, 2010) (copy on file with authors) (“This section on arbitration applies to business accounts False”); id. P XXIV(B) (“JURY TRIAL WAIVER FOR PERSONAL ACCOUNTS”).

[FN159]. See Chu, supra note 55 (“In the industry's latest shift away from controversial forced arbitration clauses, Bank of America said Thursday that it will no longer require credit card, bank account and auto loan customers to sign away

their right to sue.") (emphasis added); Robin Sidel, Bank of America Ends Arbitration Practice, Wall St. J. (Aug. 14, 2009), http:// online.wsj.com/article/SB125019071289429913.html (same).

[FN160]. See supra text accompanying notes 53-54.

[FN161]. Zions Bank, Deposit Agreement 13--nclude arbitration agreements, make the objection, then try to get around the objection.(July 2010) (copy on file with authors).

[FN162]. The agreement added that if a court holds the jury trial waiver unenforceable, "any party hereto may require that said dispute be resolved by binding arbitration." Id.

[FN163]. See supra text accompanying notes 147-48.

[FN164]. The latter possibility would not, of course, apply to provisions that expressly delegate authority to the courts. We explore the possible explanations for this inertia in a subsequent paper. See Drahozal & Rutledge, Sticky Arbitration Clauses (unpublished manuscript) (on file with authors).

[FN165]. As we have explained elsewhere, higher-risk consumers will likely have fewer such options. Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23, at 564.

[FN166]. See, e.g., Myriam E. Gilles, Killing Them with Kindness: 'Consumer-Friendly' Arbitration Clauses After A&T Mobility v. Concepcion, Notre Dame L. Rev. (forthcoming 2013).

[FN167]. David Horton, The Shadow Terms: Contract Procedure and Unilateral Amendments, 57 UCLA L. Rev. 605 (2010); Donna Shetowski & Jeanne Brett, Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study, 41 Conn. L. Rev. 63 (2008); Donna Shetowski, Disputants' Preferences for Court-Connected Dispute Resolution: Why We Should Care and Why We Know So Little, 23 Ohio St. J. on Disp. Resol. 549 (2008).

[FN168]. Schmitz, Legislating in the Light, supra note 32.

[FN169]. Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2(3) (2011).

[FN170]. We explore this phenomenon in greater detail in a separate paper. See Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 23.

[FN171]. See, e.g., In re Am. Express Merchs.' Litig., 667 F.3d 204, 214 (2d Cir.), cert. granted, 133 S. Ct. 594 (2012).

[FN172]. For discussion of these protocols, see, e.g., Peter B. Rutledge, Arbitration and the Constitution (2012); Drahozal & Zyontz, supra note 78.

[FN173]. 12 U.S.C. § 5518(b) (2012).

[FN174]. CFPB Request for Information, supra note 18, at 4.
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Marquette Law Review
Summer 2011

Article

*1103 CONTRACT AND PROCEDURE

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This paper examines both the theoretical underpinnings and empirical picture of procedural contracts. Procedural contracts may be understood as contracts in which parties regulate not merely their commercial relations but also the procedures by which disputes over those relations will be resolved. Those procedural contracts regulate not simply the forum in which disputes will be resolved (arbitration vs. litigation) but also the applicable procedural framework (discovery, class action waivers, remedies limitations, etc.). At a theoretical level, this paper explores both the limits on parties' ability to regulate procedure by contract (at issue in the Supreme Court's recent Rent-A-Center decision) and the scope of an arbitrator's ability to fill gaps in parties' procedural contracts (at issue in the Supreme Court's recent Stolt-Nielsen decision). At an empirical level, this paper taps a largely unexplored database of credit card contracts available from the Federal Reserve in order to examine actual practices in the use of procedural contracts.

***1104** I. Introduction

Fifteen years ago, in their seminal article Contract and Jurisdiction, Paul Carrington and Paul Haagen lamented the explosion of devices that manipulated jurisdiction by contract. In their view, various devices, including forum selection clauses and arbitration clauses, enabled sophisticated parties to lock-in significant tactical advantages (especially over their less sophisticated counter-parties) through the enforceable ***1105** designation of an exclusive forum before a dispute ever arose. [FN1] While Carrington's and Haagen's lament garnered significant academic support, [FN2] judicial tides turned in the other direction. Courts largely accepted these contractual forum selection devices, subject to a narrow range of exceptions. [FN3] Although the authors' critique has recently gained new traction in legislative corridors, [FN4] including most recently the 2010 financial reform law, [FN5] it is no exaggeration to say that, with little exception, parties presently can largely control jurisdiction by contract.

If judicial battles over contract and jurisdiction have subsided, the larger contest is far from over. Rather, we have

entered an era in which the battles are fought not over parties' ability to control jurisdiction by contract but, instead, over their ability to control procedure by contract. In her important article, Procedure as Contract, Judith Resnik identified one manifestation of this modern phenomenon--bargaining over procedural rights after litigation commences (such as vacatur of orders following settlement). [FN6] Here, we address a related but underexplored manifestation--bargaining over procedural rights even before a dispute arises, a form of bargaining catalyzed by the judicial acceptance of ***1106** arbitration over the last several decades. [FN7] We refer to such pre-dispute agreements as "procedural contracts."

"Procedural contracts" take various forms. They may incorporate by reference the rules of arbitral institutions, which, in Resnik's terms, function like "mini-codes of civil procedure." [FN8] Alternatively (and increasingly), they also may be explicit terms of the parties' contract, decoupled from the rules of an administering institution. Because the rules of most arbitral institutions operate as default rules that can be overridden by the express terms of the parties' arbitration agreement--subject to the willingness of institutions to administer arbitrations under the agreed terms [FN9]--these explicit terms represent private procedural codes that arbitrators are duty-bound to apply unless they (or courts) declare them unenforceable.

The terms of procedural contracts vary widely. One current, hotly contested term is a prospective waiver of the ability to pursue a claim on a class wide basis. [FN10] When these waivers seek to preclude class actions in court, they are known as "class-action waivers"; when they seek to preclude arbitration from proceeding on a class wide basis, they are ***1107** known as "class-arbitration waivers." [FN11] Examples of other terms include contractual limits on the availability of discovery, contractually imposed limitations periods, formulas allocating dispute resolution costs, limitations on remedies, provisions reallocating the power to assess the enforceability of an arbitration agreement, and efforts to alter the standard of judicial review of an arbitration award. [FN12]

Viewing these developments through the lens of contract enables us to tap into the rich literature on contract theory and, thereby, facilitates systematic thinking about procedural contracts. As with any agreement, procedural contracts raise important questions, both positive and normative. Positive questions include: To what extent do parties actually attempt to regulate their disputes through procedural contracts? Why do parties sometimes leave particular procedural questions unresolved in their contracts despite incentives to address them? When a procedural contract is silent as to a particular matter, how do decision makers (such as arbitrators) fill the gap? [FN13] Normative questions include: Should there be limits on parties' freedom to enter into procedural contracts? Assuming that limits should exist, what blend of oversight achieves the optimal degree of regulation? What are the limits on arbitrators' authority to fill the gaps in procedural contracts? What is the proper role of courts in policing arbitrators' gap-filling authority?

The answers to these questions implicate important stakes. For example, critics of class-action and class-arbitration waivers argue that these waivers can operate as exculpatory clauses, [FN14] effectively eliminating any incentive for individual litigants to bring lawsuits when their damages are nugatory. By contrast, defenders argue that they represent an invaluable tool to control the runaway costs of aggregate litigation and, by reducing a company's expected dispute resolution ***1108** costs, benefit individuals in the form of lower prices (or, in the context of employment contracts, higher wages). [FN15] In light of these deep underlying policy disagreements, courts unsurprisingly have reached conflicting conclusions over the enforceability of procedural contracts containing these terms. [FN16]

For similar reasons, procedural contracts have caught the Supreme Court's attention in recent years. The current era of the Court's jurisprudence on procedural contracts can be traced to the Court's 1995 decision in First Options of Chicago, Inc. v. Kaplan, which addressed the parties' ability to allocate contractually the power to determine the enforceability of an arbitration clause. [FN17] More recently, two decisions from October Term 2009 have tackled additional issues in the law governing procedural contracts. Rent-A-Center, West, Inc. v. Jackson, building on First Options, addressed

whether a court has the power to rule on an unconscionability challenge to an arbitration agreement even when the parties' contract vests that power in the arbitrator. [FN18] Stolt-Nielsen S.A. v. AnimalFeeds International Corp. addressed whether the arbitrator can order class arbitration when the arbitration agreement neither explicitly authorizes nor explicitly prohibits such a device. [FN19]

Using Rent-A-Center and Stolt-Nielsen as the springboards for our discussion, we undertake a systematic examination of the positive and normative questions underpinning procedural contracts. [FN20] In brief, our ***1109** argument consists of four propositions:

- First, parties, particularly sophisticated parties drafting form contracts with unsophisticated parties, are increasingly entering into procedural contracts. (Hereinafter we call this the exercise of "procedural contractual freedom.") Over time, the terms of these procedural contracts are becoming more detailed, although interesting variations appear in the use of certain terms. For example, while the use of class-arbitration waivers has grown, the use of discovery limits remains surprisingly static.
- Second, while a variety of mechanisms might be used to regulate procedural contracts, a blend of private self-regulation and case-by-case judicial oversight likely offers the optimal regime. We evaluate this regime as compared to more paternalistic forms of regulation such as oversight by administrative agencies or outright statutory bans.
- Third, arbitrators have not developed a consistent method for determining how to fill procedural gaps--such as the availability of class relief--in arbitration.
- Fourth, while perhaps adopting the correct gap-filler in Stolt-Nielsen, the Supreme Court overstepped in that case when it trimmed arbitrators' gap-filling authority to render procedural rulings in the face of silent agreements.

This argument unfolds in three parts. Part I surveys the history of procedural contracts. It then turns to the empirical record, examining data on changes in franchise arbitration clauses over time to illustrate how some procedural contracts have evolved. Finally, Part I examines why some parties, even when presented with this opportunity, have declined to undertake it.

Part II examines the theoretical issues at the core of Rent-A-Center--namely the scope of parties' freedom to enter into procedural contracts. Rent-A-Center concerned the use of a particular term that allocates to the arbitrator the exclusive authority to resolve challenges to the enforceability of the arbitration agreement. Part II draws on several data sources, including one that, to our knowledge, has not ***1110** previously been examined in the arbitration literature--namely the Federal Reserve Board's recently created and incredibly rich database of credit card agreements, set up under the Credit Card Accountability Responsibility and Disclosure Act of 2009, [FN21] to examine the frequency with which parties employ this term across different types of agreements. It also examines the potential impact of Rent-A-Center for a wider array of arbitration agreements that do not explicitly reallocate the power to rule on the enforceability of the arbitration agreement but arguably do so implicitly through incorporation of arbitral rules. Part II then turns to the normative question lying at the heart of Rent-A-Center--namely the proper limits on procedural contractual freedom. It introduces several possible models--including self-regulation, judicial oversight, administrative regulation, and legislative action. It defends a blend of self-regulation and case-by-case judicial oversight as the optimal form of regulation and responds to several potential objections to this approach.

Part III examines the theoretical issues at the core of Stolt-Nielsen-- namely how arbitrators fill gaps in the parties' procedural contract. Stolt-Nielsen concerned a particular type of gap--the agreement's silence as to the availability of class arbitration. Examining awards in class arbitrations administered by American Arbitration Association, Part III finds that arbitrators have not developed a consistent method for filling procedural gaps in an arbitration agreement when the agreement does not expressly address class arbitration. Part III then turns to the normative question lying at the heart of

Stolt-Nielsen--the proper scope of an arbitrator's gap-filling authority. We argue that the Court took too crabbed a view of the arbitrator's gap-filling authority. After examining the implications of the Court's decision beyond the issue of class arbitration, we urge courts to construe the decision narrowly in order to reaffirm a more deferential approach to an arbitrator's gap-filling authority.

The conclusion explores the implications of this analysis for issues currently before the Court and Congress. As to the judicial agenda, the grant of certiorari (and recent decision) in AT&T Mobility LLC v. Concepcion signals the Court's continued interest in procedural contracts. [FN22] Concepcion presents difficult issues of FAA preemption and highlights the interaction between procedural contract freedom and ***1111** judicial oversight--themes central to our analysis. Our analysis suggests that the issue was more difficult than the majority admitted but, ultimately, supports the majority's conclusion that the FAA preempts judicial doctrines finding arbitration clauses unconscionable based on the mere presence of a class-arbitration waiver. As to the Congressional agenda, several recent enactments and pending bills signal a continued legislative interest in procedural contracts. The recently enacted financial reform bill prohibits arbitration of certain claims created by the statute and authorizes several federal agencies (including the newly created Bureau of Consumer Financial Protection) to prohibit or regulate arbitration agreements in certain industries. [FN23] Even more sweepingly, the Arbitration Fairness Act would completely prohibit pre-dispute arbitration agreements in consumer and employment contracts. [FN24] Our analysis suggests that Congress may have acted hastily when it adopted the anti-arbitration provisions in the financial reform bill and should proceed cautiously before further restricting procedural contractual freedom.

II. Procedural Contracts: History and Trends

This part does two things. First, it examines the history of efforts to control procedure through contract. Second, it provides an empirical snapshot of the trends in efforts to control procedure through contract.

A. History

The history of contract and procedure in the United States can be divided into three eras: (1) prior to the FAA's enactment (until 1925), (2) following the FAA's enactment during the era of non-arbitrability (from 1925 until the mid-1980s), and (3) following the demise of the non-arbitrability doctrine until the present day (from the mid-1980s to the present day). [FN25]

***1112** 1. Pre-1925

Prior to the twentieth century, opportunities to control procedure by contract were largely non-existent. Courts viewed such pre-dispute agreements (whether forum selection clauses or arbitration clauses) with suspicion, characterizing them as contracts that sought to “oust” courts of jurisdiction and, consequently, violated public policy. [FN26] During this era, a party could control procedure only through forum shopping. By filing a case in a particular forum (or seeking to have a case removed or transferred to another forum), a party could influence the procedural rules governing the dispute.

This type of crude procedural manipulation via forum shopping differed from the sorts of devices described in the introduction (like class-arbitration waivers) in two critical respects. First, parties enjoyed far less autonomy--while they might choose from among different systems of procedure (by, for example, filing in state court rather than federal court), they had relatively little influence over the procedures within a particular forum. Second, the decision over the applicable

procedure was not the result of pre-dispute bargaining between the parties. Except in a rare case where one party chose not to object to its adversary's chosen forum, the applicable procedures for a dispute were more the product of one party's prevailing in a forum-shopping fight than the product of a bilateral agreement between disputants.

2. The Non-Arbitrability Era

The enactment of the Federal Arbitration Act and the growing judicial acceptance of forum selection clauses expanded opportunities for controlling procedure through contract, but doctrines continued to impose constraints. By putting arbitration agreements on the same footing as contracts generally, the Federal Arbitration Act heralded the possibility that parties, on a pre-dispute basis, could remove their disputes from the courts and resolve them instead before private bodies. To the extent the rules of those bodies allowed parties to design the system for resolving disputes, the Federal Arbitration Act created the possibility for parties to control procedure contractually too.

Yet the nonarbitrability doctrine supplied an important constraint on this newfound power. Under that doctrine, many disputes arising under federal statutes such as the securities laws, the antitrust laws, and ***1113** the civil rights laws were deemed to be nonarbitrable. [FN27] The underlying theory was that arbitration of such disputes was inconsistent with Congress's intent in creating a cause of action under those statutes. Consequently, claims arising under those laws would remain in court, where opportunities to influence procedure by contract remained limited, not unlike the prior era when contractual forum clauses were altogether unenforceable.

This bifurcation of arbitral disputes and nonarbitrable ones--which largely prevailed from 1925 (the year of the FAA's enactment) until the 1970s and 1980s (when the nonarbitrability doctrine began to crumble)--had important consequences. Specifically, it meant that the parties exercised their newfound power to contract for procedure around particular types of claims, namely contract, tort, and other common-law claims that did not run afoul of the nonarbitrability doctrine's limits. To the extent federal statutory claims presented unique procedural challenges (on matters such as attorneys' fees, discovery, and class actions), parties had no incentive to invest much time or attention in these matters.

3. Demise of the Non-Arbitrability Doctrine

Things changed in the 1970s and 1980s as the nonarbitrability doctrine crumbled, and most claims (including federal statutory ones) became arbitrable. [FN28] The opportunities to control procedure by contract expanded. The proliferation in the types of arbitrable claims created greater opportunities to regulate procedure by contract. To the extent these newly arbitrable claims presented unique procedural challenges (for example, class actions, attorney's fees, discovery), parties now had an incentive--which they lacked in the earlier era that limited arbitration to nonstatutory claims--to use their new contractual freedom to regulate such matters.

***1114** The steady erosion in the non-arbitrability doctrine paralleled the Court's growing judicial acceptance of forum selection clauses. [FN29] While these two strands of jurisprudence shared a common solicitude for freedom of contract, their implications differed sharply. Enforceable forum selection clauses enhanced parties' abilities to site a case in a court that had a favorable set of procedural rules (much like the crude form of forum shopping described above) and, unlike that crude system, enabled explicit pre-dispute bargaining over that forum. Once that forum was fixed contractually, however, most rules of civil procedure limited the parties' ability to contract around its provisions. (To borrow a gastronomic analogy, a party might pick from among several restaurants but could not control what would be on the menu.)

In contrast to forum selection clauses, arbitration clauses have a more profound effect on the procedure by which disputes are resolved. Unlike rules of civil procedure, which function largely like mandatory rules (around which parties cannot contract), most arbitral rules function like default rules (generally subject only to the mandatory rules of the arbit-

ral forum). They generally provide that the arbitrator will conduct the proceedings in a manner consistent with the parties' agreement and, only when such agreement is lacking, may exercise his or her discretion. To the extent arbitral rules regulate some aspect of an arbitration, they often also contain a provision stating that the rules can be modified by the agreement of the parties. The net effect of such rules, which have no perfect analogue in most rules of civil procedure for court systems, is to create far greater potential for parties to regulate by contract the procedures by which their dispute will be resolved. [FN30]

This newfound opportunity to control procedure by contract has raised a host of challenging questions for the Supreme Court. Some questions concern the limits on the parties' freedom of contract. In addition to Rent-A-Center, cases like Gilmer (involving a broadside ***1115** attack on arbitral procedures), Randolph (involving the enforceability of fee-splitting rules in arbitration), and Hall Street (involving the enforceability of contractually expanded judicial review of awards) [FN31] fall in this category. [FN32] A separate set of questions concerns the proper default rules where the parties' contract is silent. In addition to Stolt-Nielsen, cases like First Options (involving the default allocation of authority between courts and arbitrators), Howsam (involving the allocation of authority to decide whether limitations periods have lapsed), Cardegna (involving the default allocation of authority to decide legality challenges to the underlying contract) and Bazzle (like Stolt-Nielsen, involving an agreement that was silent about the availability of class arbitration) fall into this category. [FN33] We return to these themes in Parts II and III. For now, we simply wish to lay out how doctrinal evolutions enabled these current battles over procedure by contract. In the remainder of this Section, we show empirically how parties are exercising this freedom and also consider explanations for why parties sometimes fail to do so.

B. Trends

The preceding subsection explained how the Court's doctrine has evolved so as to create conditions under which parties could--and, indeed, had an incentive to--control procedure by contract. [FN34] Here, we examine the extent to which parties have responded to those incentives. [FN35] Our hypothesis is that over time, arbitration clauses, ***1116** particularly in contracts between sophisticated and unsophisticated parties, have become more complex, seeking to regulate the procedure in arbitration in more and more detail.

The empirical evidence tracking changes in arbitration clauses over time is limited. Most studies examine the provisions of arbitration clauses at a particular point in time, rather than measuring changes in those provisions over time. One exception is data on the terms of arbitration clauses in franchise agreements in 1999 and 2007, as reported by Drahozal and Wittrock. [FN36] The sample consists of 28 form franchise agreements, filed by franchisors with the Minnesota Department of Commerce and collected in 1999 and 2007, that included an arbitration clause in both years. A clear advantage of the dataset is that it examines the same franchisors in each year, enabling a comparison of changes in the arbitration clauses over time.

Franchise agreements, of course, are only one type of contract, and they are not necessarily representative of other types of contracts, such as, for example, employment, consumer, and business contracts. Thus, franchisees, unlike consumers and most employees, are running businesses, albeit often (although not always) small businesses. Conversely, franchise agreements typically are standard form contracts presented on a take-it-or-leave-it basis--i.e., are not fully negotiable between the franchisor and the franchisee. Moreover, the timing of the dataset is not perfect. We would expect to see the move to more detailed arbitration clauses to have begun before 1999, so if anything our results likely understate the degree of change in terms. With those qualifications, Table 1 summarizes the results. [FN37]

Table 1. Percentage of FranchiseAgreements that Include Specified Provisions in Arbitration Clauses (n=28)

	1999	2007
Number of arbitrators	50.0%	60.7%
Discovery	21.4%	21.4%
Judicial review	10.7%	10.7%
Class arbitration or consolidation	64.3%	89.3%
Location	96.4%	96.4%
Costs	75.0%	85.7%
Time limits for filing claims	42.9%	67.9%
Restrictions on punitive damages	75.0%	85.7%

***1117** Table 1 illustrates several important findings:

Dispute resolution clauses in the franchise agreements in the sample have become more detailed. Tellingly, in no procedural category did we see a decline in the percentage of arbitration agreements regulating the matter. This is consistent with our hypothesis that this current era of contract and procedure has enhanced opportunities for sophisticated parties to regulate the procedures by which disputes are settled.

The greatest increase in procedural terms comes in the use of class-arbitration waivers and time limits. This suggests that control over those mechanisms has grown in importance to the franchisor community, which tracks what we've seen in the business community's views of class actions more generally over the last several decades. More modest increases are seen in provisions controlling the allocation of costs and awards of punitive damages, which were among the more important advantages of arbitration to businesses immediately following the decline of the non-arbitrability era.

Some provisions such as discovery limits are more static over time. This is curious because reduced discovery is often cited as among the more appealing features of arbitration. [FN38] So why might this occur? Several preliminary hypotheses are possible.

One reason may simply be ignorance. Until parties become accustomed to the opportunities enabled by arbitration clauses, they may have little incentive to invest in sophisticated forms.

***1118** Another reason may be fear of non-enforceability. With growing reliance on unconscionability (and other) doctrines as a tool for resisting enforcement of arbitration clauses, parties favoring arbitration may be reluctant to build too many procedural advantages into an arbitration clause for fear of jeopardizing its enforceability. [FN39]

A third reason may be incomplete information. At the time parties draft (and enter into) arbitration agreements, they may be unable to predict with sufficient certainty the expected course of a dispute. Consequently, they may be reluctant

to tie their hands over the availability (or unavailability) of a particular procedural right, for fear that in a particular dispute they indeed may want access to that right.

A fourth, slightly more cynical reason may be principal-agent problems. Lawyers drafting arbitration clauses on behalf of their clients may have an incentive to leave certain procedural terms (like discovery) vague. [FN40] The advantage from the agent's perspective is that the vague term creates the conditions in which disputes over gap-filling inevitably will arise. Those disputes translate into increased fees for the attorney. The difficulty with this explanation, it must be noted, is that it is difficult to explain the variation across procedural terms--by logic of this argument, the attorney would have the incentive to leave other terms (like class arbitration) unresolved as well, yet the evidence suggests they have not done so.

A final reason may be transaction costs. To the extent parties have equal (or approximately equal) sophistication, more detailed procedural contracts potentially become more costly, as each party has a negotiable stake in the bargain. Consistent with the literature on incompletely theorized agreements, [FN41] one would expect more detailed arbitration clauses where relatively significant differences in bargaining positions exist and relatively less detailed clauses among parties with similar bargaining positions. In Scott and Triantis's terms, the negotiation of procedural contracts between parties of relatively equal bargaining ***1119** power entails relatively greater “front-end costs as transaction costs” than procedural contracts between parties of relatively unequal bargaining power. [FN42] It bears emphasis that each of the foregoing explanations merely amounts to a hypothesis. The available data do not permit a firm testing of the various hypotheses.

This Part has examined both the history of procedural contracts and the empirical record. The history demonstrates that the demise of the non-arbitrability doctrine has created unprecedented opportunities for parties to regulate procedural rights on a pre-dispute basis. It has given them an incentive to design far more elaborate procedural contracts than during the era when only garden-variety contract claims were arbitrable. The empirical record provides evidence that at least some parties are increasingly exercising their procedural contractual freedom to enter into elaborate agreements regulating the procedure by which their dispute will be resolved. Over time, the most significant movement has been an increase in the use of class-arbitration waivers and contractual limitations periods. Curiously though, discovery has consistently been left unregulated, despite the potential for parties to control the costs of discovery through contractual terms. While several possible hypotheses might explain this curious phenomenon, the necessary data are not yet available to test them. This remains a fertile area for future research.

III. When the Procedural Contract Speaks--Limits on Freedom

This Part addresses the scope and limits of parties' procedural contractual freedom, the issue at the core of Rent-A-Center. [FN43] After laying out the particular contract term at issue in Rent-A-Center--one that allocated to the arbitrator the exclusive authority to resolve challenges to the enforceability of the arbitration agreement (hereinafter a “delegation provision”)--it canvasses several data sources to determine how frequently parties use delegation provisions. It then takes another cut at the data to examine how parties might achieve the same results as a delegation provision, but through indirect means. This Part then turns to the normative question at the core of Rent-A-Center--namely the limits on the parties' ability to exercise their procedural contractual freedom. After introducing several potential ***1120** models of regulation, we defend an approach that relies on a blend of industry self-regulation (through the use of tools like the due process protocols) and case-by-case judicial oversight. This Part concludes by anticipating and responding to several potential criticisms of this approach.

A. Procedural Contractual Freedom: The Case of Delegation Clauses

The facts of Rent-A-Center illustrate well our point about how sophisticated parties utilize arbitration clauses to control procedures by contract. In that case, Rent-A-Center required its prospective employees, as a condition of employment, to sign a separate five-page arbitration agreement. Among other things, that five-page agreement required the parties to split the arbitration fees and limited the parties' ability to conduct discovery. [FN44] It also allocated to the arbitrator the "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the arbitration agreement] including, but not limited to any claim that all or any part of [the arbitration agreement] is void or voidable." [FN45]

This last provision was central to the question before the Supreme Court. In light of this provision, who resolved challenges to the unconscionability of the arbitration agreement? The arbitrator or the court? The answer might have turned on a straightforward interpretation of First Options--specifically, whether the quoted provision provided the necessary evidence of "clear and unmistakable" intent to allocate the decision to the arbitrator.

While the dissent answered this question with an unambiguous "no," [FN46] the majority constructed an entirely novel and unanticipated theory to resolve the case--one neither advanced by the parties nor considered by the courts below. Instead of simply answering the question "yes," the majority reconceptualized the arbitration agreement. Rather than treating the arbitration agreement as a single procedural contract, it described the agreement as embodying two separate contracts--(1) a contract to arbitrate the parties' substantive claims (that is, those arising out of the employment relationship) ("the arbitration agreement") and (2) a separate procedural contract to allocate to the arbitrator the power to resolve challenges to the arbitration agreement (dubbed "the delegation provision" by the ***1121** majority). In the majority's view, since Jackson's unconscionability challenge was directed only at the first contract (the arbitration agreement) and not the second, the challenge was appropriately resolved by the arbitrator, not the court. [FN47]

This conclusion marked a significant expansion of the "separability" principle--a principle first announced by the Court in Prima Paint and one that has become a cornerstone of arbitration, both domestically and internationally. [FN48] As formulated by Prima Paint over four decades earlier, the separability doctrine treats an arbitration clause as a separate contract from the main contract that includes the arbitration clause. Separability permitted the development of a default rule for allocation of authority. Under that default rule, courts resolve challenges to the enforceability of arbitration agreements and arbitrators resolve challenges to the enforceability of the underlying substantive contract. [FN49] Rent-A-Center extended the separability principle by treating the arbitration agreement itself as entailing two separate contracts. This double separability principle enabled a further allocation of power to the arbitrator--now arbitrators could resolve challenges to the arbitration agreement, and courts retained only the competence to resolve challenges directed specifically at the delegation provision.

This extension of the separability doctrine marks a substantial development toward a model of arbitration that allows parties a great deal of procedural contractual freedom (and a concomitant reduction in a court's role to police procedural contracts). While the facts of Rent-A-Center are somewhat unusual (as the case involves a separate, detailed arbitration agreement), the decision logically extends to a case where the arbitration agreement is merely a clause within a broader contract (as is often the case, for example, in franchise or consumer credit agreements). The case thus gives rise to the possibility that a single document qua agreement will be legally understood to contain at least three separate contracts: (1) the underlying substantive commitments ***1122** (for example, a cell phone for a monthly fee); (2) a bilateral commitment to arbitrate; and (3) a bilateral commitment to arbitrate challenges to contract (2). Only if a challenge were directed at contract (3) could a party resisting arbitration seek refuge in court (subject to an important qualification). [FN50]

That is the potential impact of Rent-A-Center. Whether that impact is widely felt, of course, depends on the frequency with which parties employ such clauses. So we sought to ascertain how often contracts, like the Rent-A-Center contract, attempt to allocate competence over challenges to the arbitration agreement exclusively to the arbitrator.

To test this proposition about Rent-A-Center's impact, we consulted three datasets. The first was the franchise dataset, discussed above. [FN51] The second consisted of arbitration clauses collected from a 2008 sample of joint venture agreements (both domestic and international), submitted as attachments to SEC filings. [FN52] The third was derived from a new database of credit card contracts made available by the Federal Reserve Board pursuant to the Credit Card Accountability Responsibility and Disclosure Act of 2009. [FN53] Table 2 summarizes our findings:

Table 2. Delegation Clauses in Arbitration Clauses, by Type of Contract

Type of Contract	Delegation Clause	Anti-Delegation Clause	Class Exception	No Delegation Clause
Franchise Agreements (2007)	4 (14.3%)	2 (7.1%)	0 (0.0%)	22 (78.6%)
Joint Venture Agreements -Domestic (2008)	1 (11.1%)	0 (0.0%)	0 (0.0%)	8 (88.9%)
Joint Venture Agreements - International (2008)	1 (5.0%)	0 (0.0%)	0 (0.0%)	19 (95.0%)
Credit Card Contracts (2009)	31 (49.2%)	6 (9.5%)	20 (31.7%)	6 (9.5%)

***1123** The findings in Table 2 indicate (not surprisingly) that the use of express delegation clauses varies with the type of contract. [FN54] They are rarely used in joint venture agreements and used slightly more frequently in franchise agreements. [FN55] In both instances, though, such clauses appear only in a handful of contracts. By contrast, delegation clauses appear far more frequently (31 of 63, or 49.2%) in the credit card agreements with arbitration clauses gathered from the Federal Reserve database.

Notably, just under ten percent of the credit card arbitration agreements (and just over seven percent of the franchise arbitration agreements) include what we call an “anti-delegation clause”--a provision that reserves decision on the enforceability of the arbitration ***1124** clause to the court rather than the arbitrators. [FN56] In addition, over thirty percent of the credit card arbitration agreements (but none of the franchise arbitration agreements) reserved decisions on the validity of any class-arbitration waiver for the court. [FN57] We suspect that the motivation for these clauses is the desire to preserve the opportunity for immediate, de novo review in the event of an adverse decision (something that a party would not receive if the matter were delegated to the arbitrator). But regardless, such provisions do provide some reason to believe that Rent-A-Center will not result in all businesses including delegation clauses in their consumer and employment arbitration clauses. [FN58]

It is important to stress the limits of the data. We do not have data on employment contracts--the type of contract at issue in Rent-A-Center--and we do not claim that our results are representative of all types of contracts. Moreover, the data on some of the types of contracts may be out-of-date. The most recent data we examined (for credit card contracts, as of December 31, 2009), also have the greatest usage of delegation clauses, which may provide some evidence of a trend toward greater use of such clauses (or which may simply reflect a greater usage of delegation clauses in credit card agreements).

Express clauses are not the only means by which parties might reallocate from courts to arbitrators the power to rule on jurisdictional challenges. Another, potentially more important, means would be through incorporation of institutional rules (like the rules of the American Arbitration Association). Such rules often contain language that authorizes the arbitrator to rule on jurisdictional challenges. Rule 7(a) of the AAA Commercial Arbitration Rules is exemplary: "The arbitrator shall have the power to rule on his or her own jurisdiction, ***1125** including any objections with respect to the existence, scope or validity of the arbitration agreement." [FN59]

Incorporated rules like Rule 7(a) differ from the contract provision in Rent-A-Center in one potentially critical respect. Unlike the contract in Rent-A-Center, these rules do not affirmatively exclude the jurisdiction of courts over the arbitrability challenge. This raises the question whether an incorporated rule such as AAA Rule 7(a) supplies the necessary "'clear[] and unmistakabl[e]' evidence" of the parties' intent to allocate jurisdictional challenges to the arbitration. [FN60]

Opinions differ on this point. Federal appellate courts have overwhelmingly concluded that such language satisfies the First Options standard and, thereby, strips the court of an up-front authority to rule on a challenge to the arbitration clause. [FN61] In contrast, the recent Restatement (Third) of the U.S. Law of International Commercial Arbitration has taken the opposite view, concluding that, to satisfy First Options, the contract (or institutional rule) must use language designating that the arbitrator's jurisdiction over such challenges is exclusive. [FN62] Under the Restatement view, the Rent-A-Center language suffices; institutional rules such as AAA Rule 7(a), as presently phrased, do not.

We do not seek here to resolve that doctrinal quibble. Instead, on the assumption that the federal appellate courts state the prevailing law at present, we again consulted the various contract datasets to ascertain how frequently parties are incorporating institutional rules into their arbitration agreements. Table 3 summarizes our findings:

Table 3. Arbitration Provider Specified in Arbitration Clauses, by Type of Contract

Type of Contract	Provider
Credit Card (2009)	AAA - 20 (30.8%) JAMS - 2 (3.1%) NAF[FN [FN63]] - 7 (10.8%) Choice of Provider[FN [FN64]] - 32 (49.2%) None or missing - 4 (6.2%)
Franchise Agreements (2007)[FN [FN65]]	AAA - 24 (85.7%) JAMS - 1 (3.6%) Choice among providers - 3 (10.7%)
Joint Venture Agreements - Domestic (2008)	AAA - 8 (88.9%) AAA/ICDR - 1 (11.1%)
Joint Venture Agreements -International (2008)[FN]	AAA - 2 (10.0%) CIETAC - 4 (20.0%) FETACC - 3

[FN66]

(15.0%) HKIAC - 2 (10.0%) IAA - 2 (10.0%) ICC - 1 (5.0%) SIAC - 1 (5.0%) SIAC (UNTIRAL Rules) - 1 (5.0%) Ad hoc (UNCITRAL Rules) - 1 (5.0%) Ad hoc - 3 (15.0%)

***1127** As shown in Table 3, the AAA is the most common provider specified in domestic arbitration agreements in the United States. A wider array of providers (not surprisingly) is specified in international arbitration agreements; most, however, have a rule like Rule 7(a) of the AAA Commercial Rules. Thus, to the extent that courts construe the language in the AAA rules consistently with the delegation clause in Rent-A-Center, the decision is likely to have far-reaching effects, even without the need for parties to revise their arbitration clauses. To be clear, however, it will only have those effects in cases in which the parties incorporate institutional rules in their arbitration clauses and do not address the delegation issue specifically in their clause. If the parties address the issue, either by expanding or contracting the scope of the arbitrators' authority, the delegation (or anti-delegation) provision will govern rather than the institutional rules.

Based on the growing use of detailed arbitration clauses, we anticipate two developments in the wake of Rent-A-Center. First, we expect to see an increased use of detailed delegation clauses such as those at issue in Rent-A-Center (in order to avoid the doctrinal question that divides the federal courts from the Restatement), particularly in contracts between sophisticated and unsophisticated parties. But we do not expect delegation clauses to become ubiquitous, given that some sophisticated parties seem to prefer to have courts rather than arbitrators rule on the validity of the arbitration agreement. Second, we expect that opponents of arbitration will seek to develop a jurisprudence attacking the delegation clause (as opposed to the underlying arbitration clause). After Rent-A-Center, attacks on that clause remain the only issue unquestionably within the court's domain where parties have delegated to the arbitrator the power to rule on the enforceability of the arbitration agreement. [FN67]

B. Procedural Contractual Freedom: Limits

Rent-A-Center raises important normative questions extending far beyond the narrow issues involving delegation clauses. At a broad level of generality, the case concerns the extent to which the law constrains parties' ability to contract freely for the procedures governing their dispute. Much has been written on the general limits of contractual ***1128** freedom, and we do not re-plow that familiar ground. Instead, we examine several possible regulatory models and defend a model that involves a blend of industry self-regulation and case-by-case judicial oversight.

1. Industry Self-Regulation

Like many industries, the dispute resolution industry is theoretically capable of self-regulation. In the context of procedures and contract, this self-regulation has taken the form of due process protocols. The protocols and their history have been amply discussed elsewhere, [FN68] so we summarize them here only to the extent necessary to advance our thesis.

The protocols signify a commitment by certain arbitral institutions (such as the American Arbitration Association and JAMS) that they will only administer arbitrations in certain fields (such as employment, consumer, and health care) if the parties ensure that a minimum set of procedural “rights” are observed. As Paul Verkuil has observed, the choice of terminology (“due process protocol”) is an odd one in light of the conclusion that arbitration does not constitute state action and, as a strictly doctrinal matter, is not subject to constitutional requirements of due process. [FN69] Nonetheless, the protocols function in a manner not unlike rules of procedural due process, setting forth a series of norms that must be ob-

served in a decision-making process before the results of that process will be legally enforceable. [FN70] The due process protocol for employment disputes exemplifies the sorts of rights guaranteed to the employee:

- the employee has the right to be represented by a person of her own choosing;
- the employer is encouraged to pay at least a share of the employee's fees;
- ***1129** employees should have access to all information reasonably relevant to their claims;
- before selecting an arbitrator, parties should have sufficient information to contact parties who previously have appeared before her;
- arbitrators should have sufficient skill and knowledge;
- arbitrators should be drawn from a diverse background;
- arbitrators should be free of any relationships that would create an actual or apparent conflict of interest;
- the employee is entitled to the same array of remedies in arbitration as she would be entitled to in a judicial proceeding. [FN71]

In this regard, the protocols function as a type of industry-imposed constraint on parties' freedom to enter into procedural contracts.

2. Judicial Oversight

Courts can also regulate the parties' procedural contractual freedom. [FN72] Doctrinally, they do this in several ways. First, they can rely on Section 2 of the Federal Arbitration Act. [FN73] The Supreme Court has interpreted Section 2 to mean that courts can refuse to enforce arbitration agreements on the basis of generally applicable contract defenses (like fraud, duress, and unconscionability). [FN74] Second, with respect to federal statutory claims at least, they can declare that that an arbitral system is inadequate to permit vindication of a party's statutory rights (for example, by holding that an arbitration clause with a fee-shifting provision deters vindication of a statutory right). [FN75] Finally, they ***1130** can rely on various doctrines allowing them to vacate (or refuse to enforce) arbitral awards on the basis of some procedural defect in the arbitration (for example, by refusing to enforce an arbitral award when the arbitrators acted with "evident partiality"). [FN76]

3. Statutory Regulation

Legislatures can regulate parties' procedural contracts. [FN77] Such regulation might take various forms. One form would be to declare certain disputes non-arbitrable, as Congress previously has done in certain specialized industries such as automobile dealer agreements, consumer financial services contracts with military personnel, poultry wholesale contracts (providing a statutory opt-out from arbitration clauses), employment agreements of defense contractors and most recently, residential mortgages and whistleblower claims in the commodities industry. [FN78] The previously mentioned Arbitration Fairness Act would broadly adopt this approach by making pre-dispute arbitration agreements unenforceable in consumer and employment agreements. [FN79] Though not aimed directly at procedural contracts, such legislative action has the indirect effect of constraining parties' procedural contractual freedom by restoring elements of the second era of contract and procedure. [FN80] Another form would be to condition the enforcement of arbitral awards on adherence to certain procedures. Section 10 of the FAA does this to a degree by providing that an arbitral ***1131** award can be vacated for procedural misconduct by the arbitrator that prejudices a party's rights, as noted above. [FN81] Finally, a legislature might provide that an arbitration agreement will not be enforceable unless the agreement ensures that certain procedures are observed in the arbitration. So far, Congress has not moved in this direction, although it has considered bills such as the Fair Arbitration Act of 2007 that would have had such an effect. [FN82]

4. Administrative Regulation

As an alternative to direct statutory language, legislatures can vest administrative agencies with the authority to oversee arbitration agreements and the procedural choices contained therein. In the securities industry, this already occurs to a degree: the Securities and Exchange Commission oversees the development of rules governing disputes in certain investor and employment agreements. [FN83] Portions of the recently enacted financial reform law embrace this model. That legislation expands the SEC's authority over arbitration agreements and authorizes it to adopt rules banning or regulating the use of arbitration clauses in investment advisory contracts. [FN84] It also vests the new Consumer Financial Protection Bureau with the authority to promulgate rules regulating the content of arbitration agreements in certain consumer finance contracts (like credit card agreements) and, if appropriate, to prohibit those agreements entirely. [FN85]

***1132** 5. What's the Optimal Approach?

In our view, a blend of industry self-regulation and judicial oversight likely is optimal, at least based on a cost-benefit calculation. Here's why:

First, private regulation can reduce transaction costs. A familiar literature in political science has documented the difficulties of enacting legislation due to the multiple decision points where legislative action may fail (committee, floor vote, conference committee, veto). [FN86] The protocols avoid these impediments to action by involving a single decision point, namely voluntary assent by the associations themselves. Due to the reduced number of decision points, they are also more easily changed and adapted to evolving circumstances. [FN87] Administrative regulation avoids some of these barriers but, of course, presupposes a degree of legislative authorization which may be difficult to obtain.

Second, private regulation can offer greater comprehensiveness. In contrast to judicial regulation, private regulation and certain forms of public regulation (both legislative and administrative) can be more comprehensive and more nuanced. Drafters of the protocols can consider the gamut of available data and experience. By contrast, judicial regulators may be constrained by the record evidence offered by the parties.

Third, private regulation is more easily tailored to differing circumstances. Compared to all three forms of public regulation (judicial, legislative, and administrative), the protocol mechanism allows its drafters to tailor the protocols to the particular needs of the regulated industry, as exemplified by the substantive differences between the protocols for employment, consumer, and health care arbitrations. By contrast, the scope of any judicial regulation may be constrained by doctrines such as standing, bars against advisory opinions, and limits on the remedial powers of courts. And legislation that treats all consumer and employment contracts identically (such as by making pre-dispute arbitration agreements in those contracts unenforceable) fails to consider that not all arbitration is alike. [FN88]

***1133** Judicial oversight facilitates this process of adaptation. A rich scholarship has focused the various “feedback loops” between private and public actors in the development of legal norms. [FN89] The protocols provide courts a workable benchmark by which to evaluate the fairness of other procedures; moreover, hammered out through dialogue between the industry and advocates for employees and consumers, they arguably offer a relatively balanced metric rather than a biased one. Forged through this process, the protocols stimulate a dialogue between courts and the arbitration industry. For example, in Cole v. Burns International Security Services, Chief Judge Edwards expressed his disagreement with the employment protocol's cost-sharing provisions, which sparked a lively debate over whether the protocol or some other approach should be used to ensure the affordability of arbitration for employees with statutory claims. [FN90] Just as the protocols can influence judicial understanding of fair arbitral procedures, judicial critique can suggest reform pathways to the protocols' developers. [FN91]

Fourth, private regulation enhances opportunities for participation by interested groups (or policy entrepreneurs acting on their behalf). As Margaret Harding has observed, the protocol process holds forth the potential for greater parti-

cipation by interested groups. [FN92] Whereas access limitations or standing doctrines may limit groups' ability to influence the outcome of legislative or judicial regulation, the process of ***1134** protocol development and acceptance suffers from no such inherent limitations. To be sure, the validity of this premise depends on the extent to which the protocols' developers choose to include various groups in the development process.

While we have offered a variety of reasons that support a regulatory approach based on private regulation combined with judicial oversight, we acknowledge several potential criticisms of that approach and address the most significant ones here.

First, our proposed approach might prompt a "race to the bottom." [FN93] In other words, competition among providers might prompt them to skew their procedural standards in order to cater to the needs of the dominant business interest much like certain states have diluted their standards on matters like corporate law or usury law in order to attract corporate investment. [FN94] Indeed, some arbitral institutions have been severely criticized for doing precisely this. [FN95]

However, we believe this criticism overlooks a powerful counter-incentive-- namely the bond of the arbitrator and the arbitral institution. [FN96] Recall that arbitral awards ultimately are subject to judicial oversight in vacatur and enforcement proceedings. [FN97] This judicial scrutiny provides a compelling counterweight to any incentive that otherwise might incline the arbitrator to favor the repeat player or the party in the superior bargaining position. [FN98] An arbitrator (or institution) whose awards are routinely set aside will not be in the business for long because neither party has an incentive to invest in a decision maker ***1135** whose decisions are likely to be invalidated. Thus, while we recognize the intuitive appeal of the race-to-the-bottom argument, we are disinclined to believe it has much bite in this context. [FN99]

Second, private regulation might reduce transparency. [FN100] Compared to more regulatory forms of rule development, the protocols are not developed according to any standardized methods by which they are closely scrutinized. [FN101] In Gillian Metzger's terms, the protocols lack adequate "accountability mechanisms." [FN102] By contrast, for example, administrative regulation typically would undergo a formal notice-and-comment period followed often by judicial challenge to the reasonableness of the agency's regulation. Likewise, a process of legislative regulation likely would create some sort of legislative record that a court could scrutinize. This criticism is, in our view, overblown. The history of the protocols' development, thoroughly recounted by scholars such as Margaret Harding and Richard Bales, demonstrates that interested groups consistently had a seat at the table as the protocols were developed. [FN103] Metzger's complaint about the lack of "accountability mechanisms" proves too much--for it would necessitate public oversight of any project of private norm development-- something that would be both costly and unworkable.

Third, our proposed approach risks second-best outcomes. As Carrie Menkel-Meadow has explained, private regulation may not achieve as much substantively as direct regulation. [FN104] This stems from the bargaining toward second-best solutions. For example, as Menkel-***1136** Meadow describes, advocates for the employment protocol necessarily compromised on certain procedural protections in order to obtain the assent of the various industry participants and arbitral institutions. As a consequence of this second-best quality to the protocol-development process, critics have called for strengthened protections. [FN105] This criticism is both too static and too platonic. It is static because it ignores the fact that the protocols are capable of refinement. Merely because the protocols might have resulted from some sort of compromise at a given point in time does not preclude their refinement at some future point if empirical evidence is put forth that undercuts the premise of a compromise. It is too platonic because it presupposes that, at a given point in time, the drafters of the protocols had the necessary information to deduce the "right" answer to a given question of arbitral procedure and that other regulators would necessarily do better. As we have explained elsewhere, the empirical record on

many questions of arbitration is woefully incomplete; [FN106] in light of that incomplete record, it is simply not realistic to argue that the compromises embedded in the protocols somehow shifted away from demonstrably correct approaches. And the same limitation applies with perhaps greater force to public, as opposed to private, regulatory mechanisms.

Finally, our approach might entail a lack of predictability. Specifically, parties are unable to predict precisely how courts will use the protocols. Some decisions, as noted above, cite the protocols as merely indicative of a professional trend; by contrast, others come close to saying that the failure of an arbitration proceeding to comport with the protocols provides a legal reason for denying enforceability of the arbitration agreement altogether. As Richard Bales has explained, the due process protocols function as guideposts for both employers and the judiciary but no longer provide predictable guidance. [FN107]

This criticism is a fair one, at least in part. But it overlooks that the protocols are enforced in the first instance by the institutions themselves, which refuse to administer arbitrations under clauses that fail to comply with the protocols. [FN108] Court review is only a second-line ***1137** defense. As for the predictability of that court review, the best answer that we can offer (which is not a complete one) is that case-by-case judicial review will help give concrete legal content to the protocols over time. As courts vacate awards due to some deviation from the protocols (or where the protocols themselves contain a defect), such action may well prompt a revision to the protocols. At the same time, as courts confirm awards rendered in accordance with protocol-based procedures, the protocols will develop a type of quasi-legal status that enables them to serve as a benchmark for enforceability of an award.

This Part has examined the exercise of and limits on procedural contractual freedom. Using the delegation clause from Rent-A-Center as a point of reference, it demonstrated that the use of such clauses varies widely across types of contracts. It showed further that, when such clauses are absent, the incorporation of institutional rules (such as AAA Rule 7(a)) can achieve the same effect indirectly (at least so long as the view of the federal appellate courts prevails over that of the Restatement (Third) of the U.S. Law of International Commercial Arbitration). As to the normative issues underpinning Rent-A-Center, from a cost-benefit perspective, a blend of industry self-regulation and case-by-case judicial oversight offers the best means of policing procedural contractual freedom--such an approach reduces transaction costs, is flexible, is comprehensive, and affords ample opportunities for participation. While the approach is not immune from criticism, most notably fears about unpredictability, those criticisms ultimately can be answered. In the next Part, we turn to a related set of issues--namely cases in which the parties' procedural contracts are silent.

IV. When the Procedural Contract is Silent--Filling Gaps After Stolt-Nielsen

Arbitration agreements, like other contracts, can be incomplete. Complete contracting is costly, even when the contracts are standard form contracts drafted by only one party. [FN109] Although rules promulgated by arbitration providers offer a low-cost way to supplement contract provisions drafted by the parties, even those rules are not complete.

An important function of arbitration statutes--both the Federal ***1138** Arbitration Act and state arbitration laws--is to fill gaps in arbitration agreements. But the FAA has few clearly identifiable default rules, [FN110] largely a consequence of its 1925 vintage. And state arbitration laws raise difficult and unsettled issues of FAA preemption, which may limit their usefulness as gap-fillers, and are themselves incomplete. [FN111]

As a general matter, arbitrators have substantial discretion in filling procedural gaps in the arbitration agreement. [FN112] But the Supreme Court's recent decision in Stolt-Nielsen S.A. v. AnimalFeeds International Corp. [FN113] raises questions about the extent of arbitrator authority to fill gaps. Stolt-Nielsen involved class arbitration, a setting in which arbitrators have often faced the necessity of gap-filling. As such, this Part focuses on class arbitration as well. The

role of arbitrators in filling procedural gaps, however, is not limited to class arbitration. Other areas in which the question has arisen include consolidation of proceedings, joinder of parties, dispositive motions, [FN114] and issues of confidentiality, among others.

This part first provides background by tracing the development of ***1139** the law and practice of class arbitration. It then analyzes the possible doctrinal implications of Stolt-Nielsen for arbitrator procedural gap-filling. It next examines the positive question of interest to us--how arbitrators fill procedural gaps in arbitration agreements. Finally, this part considers the normative question of the optimal institutional framework for procedural gap-filling in arbitration.

A. Background on Class Arbitration

1. From Bazzle. . .

Although class arbitration has been around for over 25 years, [FN115] its use did not become widespread until after the Supreme Court's 2003 decision in Green Tree Financial Corp. v. Bazzle. [FN116] In Bazzle, the Court granted certiorari to decide "[w]hether the Federal Arbitration Act . . . prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration." [FN117] The South Carolina Supreme Court had held as a matter of South Carolina law that a court could order class arbitration when the arbitration agreement was silent as to class arbitration, and that such a rule was not preempted by the FAA.

The United States Supreme Court reversed and vacated the South Carolina court's ruling, but with no majority opinion for the Court. The plurality opinion, authored by Justice Breyer, concluded that the lower court's decision should be vacated, explaining as follows:

> We are faced at the outset with a problem concerning the contracts' silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? Given the South Carolina Supreme Court's holding, it is important to resolve that question. But we cannot do so . . . because it is a matter for the arbitrator to decide. [FN118]

Stated otherwise, the South Carolina Supreme Court's decision was based on its view that the arbitration agreement was silent as to class ***1140** arbitration--that there was in fact a gap that it could fill using a state-law gap-filler. If the arbitration agreement precluded class arbitration, there was no basis for the South Carolina court to use a gap-filler (because there was no gap), and its ruling would have been improper. But the issue of whether there was a gap in the arbitration agreement, according to the plurality, was an issue the arbitrator had to decide. [FN119]

Justice Stevens did not agree with the plurality's rationale (he wrote that "arguably" the arbitrator should have decided the issue, but because the lower court's decision was "correct as a matter of law," he would simply have affirmed that decision). [FN120] But he concurred in the judgment vacating the award to provide a controlling judgment of the Court. [FN121] Three Justices would have reversed the South Carolina court judgment on the ground that the FAA does not permit a court to order class arbitration when the arbitration agreement is silent on the issue. [FN122] Justice Thomas likewise dissented, but on the ground that the FAA does not apply in state court and so there was no reason to vacate the judgment below. [FN123]

After the splintered decision in Bazzle, several arbitration providers-- most prominently the American Arbitration Association--set up processes for administering class arbitrations based on the plurality's decision. [FN124] The AAA's Supplementary Rules for Class Arbitrations set out a multi-step procedure for a class arbitration to follow. [FN125] First, the arbitrators are to "determine . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf

of or against a class" and to issue a clause construction award reflecting their decision. [FN126] Second, if the arbitrators conclude that the arbitration clause permits class arbitration, they next decide whether class arbitration is appropriate in the case, using standards heavily ***1141** influenced by Federal Rule of Civil Procedure 23, and issue a class determination award. [FN127] Third, if the arbitrators decide that class arbitration is appropriate, they proceed to adjudicate the case on the merits. [FN128] In between each step, the AAA's rules provide for a short, mandatory stay to permit the losing party to seek court review of the award. The AAA subsequently issued a policy statement in which it stated that it would administer arbitrations on a class basis only if the arbitration agreement specified any set of AAA rules and was "silent with respect to class claims, consolidation, or joinder of claims." [FN129] If the arbitration agreement by its terms precluded class arbitration, the AAA would not administer the case unless a court ordered arbitration on a class basis.

In an amicus brief filed in the Stolt-Nielsen case on September 4, 2009, [FN130] the AAA provided a useful overview of its class arbitration caseload. Overall, the AAA indicated that it had administered 283 class arbitrations since promulgating its class arbitration rules. [FN131] Of the 283 cases, 106 (37%) involved consumer claimants and 96 (34%) involved employee claimants, while 81 (28%) were business-versus-business class arbitrations. [FN132] Arbitrators had issued 135 clause construction awards: 95 (70%) holding that the arbitration clause permitted class arbitration; 7 (5%) holding that the arbitration clause did not permit class arbitration; and 33 (24%) in which the parties stipulated that the arbitration clause permitted class arbitration. [FN133] A total of 121 cases (42.8%) were still active at the time the brief was filed. [FN134]

***1142** 2. . . .to Stolt-Nielsen

The Supreme Court revisited class arbitration in Stolt-Nielsen S.A. v. AnimalFeeds International, Corp. [FN135] in a very different setting from Bazzle. The claimants in Stolt-Nielsen were all commercial parties, rather than consumers (as in Bazzle) or employees. As noted above, although most class arbitrations involve consumer or employee claimants, a sizable percentage involve business claimants. [FN136] Moreover, in Stolt-Nielsen the parties entered into two separate arbitration agreements. One was an arbitration clause in the original contract between the parties; the other was a post-dispute agreement to arbitrate the issue of whether class arbitration was permissible under the original arbitration agreement. In entering into the post-dispute agreement, the parties agreed to follow the AAA class arbitration rules (although not to have the case administered by the AAA), and stipulated that the arbitration clause was "silent" as to class arbitration. [FN137] In other words, another way that Stolt-Nielsen differed from Bazzle is that in Stolt-Nielsen the parties agreed that the arbitration agreement had a gap.

Relying on other arbitration awards, which had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration," although none "exactly comparable" to the case, the arbitrators concluded that the evidence did not show "that the parties . . . intended to preclude class arbitration." [FN138] The district court vacated the award, holding that the arbitrators manifestly disregarded the law by failing to analyze the applicable law. The court of appeals reversed, concluding that the arbitrators had not manifestly disregarded the law because nothing in New York law or maritime law precluded class arbitration.

The Supreme Court reversed the court of appeals, reasoning as follows. First, the Court held that the arbitrators' clause construction award should be vacated because the arbitrators had exceeded their ***1143** authority in relying on public policy to determine that class arbitration was appropriate in the case. [FN139] The Court explained:

> Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in

such a situation. . . .

. . . .

. . . [I]nstead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers. [FN140]

Second, the Court stated that because the award had been vacated, "under § 10(b) of the FAA, we must either 'direct a rehearing by the arbitrators' or decide the question that was originally referred to the panel. Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators." [FN141] Accordingly, the Court proceeded to decide itself whether the arbitration clause permitted class arbitration.

Third, because of the consensual nature of arbitration, the Court stated that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." [FN142] Here, the Court concluded, the parties had not agreed to arbitrate on a class basis, relying almost exclusively on the parties' stipulation that the contract was silent on class arbitration. According to the Court, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an ***1144** arbitrator." [FN143] Because the parties had "stipulated that there was 'no agreement"' to authorize class arbitration, "it follows that the parties cannot be compelled to submit their dispute to class arbitration." [FN144]

B. Stolt-Nielsen and Arbitrator Procedural Gap-Filling

Each of these three aspects of the Supreme Court's decision in Stolt-Nielsen--(1) vacating the award for excess of authority; (2) resolving the class arbitration issue itself; and (3) concluding that the parties had not agreed to class arbitration--has potentially important implications for the authority of arbitrators to fill procedural gaps in arbitration agreements. [FN145] This section considers the doctrinal implications of each ***1145** of those aspects of the opinion in turn. [FN146]

1. Arbitrator Authority to Fill Procedural Gaps

So what does Stolt-Nielsen decide about arbitrator authority to fill procedural gaps in the arbitration agreement in the first instance? If the opinion is viewed narrowly, the Court actually may decide very little. Given the Court's emphasis on ensuring that parties not be required to arbitrate if they have not agreed to do so, the Stolt-Nielsen opinion might be limited to class arbitration and comparable, essentially jurisdictional, issues.

But the Court's language is much broader. It states:

- "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." [FN147]
- "In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." [FN148]
- "Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." [FN149]

***1146** What the Court means by "the best rule to be applied in such a situation" is not clear, but it sure sounds like how one would describe a default rule developed by a common-law court. On this reading, the Court in Stolt-Nielsen

concludes that arbitrators can look to statutory or court-developed rules to fill gaps in contracts, but cannot formulate gap-fillers in the same way as a common law court can--and, indeed, an arbitral award will be vacated if the arbitrators do so.

Such a view of arbitrator authority seems out of line with the models of arbitrator authority previously relied on by the Court. In the non-arbitrability era of U.S. arbitration law (and before), [FN150] courts viewed arbitration as a process in which the arbitrator could essentially do what he or she thought was fair between the parties. Carrington and Haagen described this model of arbitration as follows:

> A Latin phrase sometimes employed to describe the spirit of much American commercial arbitration is ex aequo et bono--a resolution is sought that is equitable, minimizes harm to either party, and enables potential adversaries to maintain a valuable commercial relationship; the role of such an arbitrator is said in Europe to be that of an amiable compositeur. It is said of the American commercial arbitrator that he "may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement." [FN151]

Some commentators (including Carrington and Haagen) rely on this "amiable compositeur" model of arbitration to criticize the use of arbitration to resolve statutory claims, describing arbitration as "a method of dispute resolution, but not necessarily a method of enforcing legal rights." [FN152]

With the demise of the non-arbitrability doctrine (or, rather, as part of that demise), the Supreme Court moved to what might be called a "legal" model of the arbitration process. Under this model, arbitration is an appropriate setting for the resolution of statutory claims because "[b]y agreeing to arbitrate a statutory claim, a party does not forego the ***1147** substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." [FN153] The Court presumes that outcomes in arbitration and litigation will not necessarily differ, and refuses to question whether the resolution of statutory claims by arbitrators inherently differs from the resolution of such claims by judges.

The Court in Stolt-Nielsen appears to adopt a hybrid model, rejecting both of these prior models of the arbitration process. Under Stolt-Nielsen, arbitrators are not free to follow their own views of public policy (or "industrial justice," using the labor arbitration terminology). They cannot act as amiable compositeurs. Yet they lack the authority of common law courts to formulate default rules. Apparently, arbitrators can interpret contracts and follow statutory or court-developed default rules, but lack the same authority to develop common-law default rules as judges. [FN154]

In so holding, the Court effectively set out an institutional hierarchy for arbitrators in determining the appropriate procedural default rule. Initially, of course, if the parties expressly agree to permit a particular procedure, there is no need to turn to a default rule at all. [FN155] The parties' arbitration agreement controls the issue, as long as the agreement is not illegal. [FN156]

The parties' agreement certainly includes any specific procedural provisions they set out in their arbitration clause or other written arbitration agreement. It also would include the provisions of any institutional rules that the parties incorporate by reference into their arbitration agreement. Finally, customary practice in the particular type of arbitration--usage of trade in UCC parlance--also can be part of the ***1148** parties' agreement. [FN157] The Court noted the seeming lack of any custom authorizing class arbitration in the admiralty context in Stolt-Nielsen. But in other contexts, and as to other procedures, there may in fact be a customary practice that becomes part of the parties' agreement. [FN158]

But if the parties have not agreed to a particular procedure--i.e., there is in fact a gap in the contract (as the parties stipulated in Stolt-Nielsen)--the decision suggests its own list of permissible sources to fill the gap. At the top of the list

is the legislature--Congress, by enacting the FAA, and state legislatures (subject to as yet undecided issues of FAA preemption) might have enacted a provision setting out a default rule. In Stolt-Neilsen, the Court faulted the arbitrators for not looking to either the FAA or applicable state law for determining the default rule. In addition, presumably court decisions adopting gap-fillers would be a permitted source of gap-fillers. Those decisions, whether interpreting the state arbitration statute or relying on the common law authority of judges to fashion gap-fillers, would also be part of state law.

What is not permitted under Stolt-Nielsen, however, is for the arbitrators themselves to determine the default rule in the manner of a common law judge. [FN159] In this respect, the case represents a bit of a watershed decision because, with few exceptions, most courts (in the United States and elsewhere) have not vacated arbitral awards on the basis of a procedural determination by the arbitrator as to a matter where the agreement was silent. [FN160]

***1149** 2. Arbitrator Authority after a Court Vacates an Award

After vacating the award, the Stolt-Nielsen Court set out what it saw as its options for proceeding--either remand the matter to the arbitrators or decide the matter itself--and attributed those options to Section 10(b) of the FAA. [FN161] But in doing so, the Court badly misconstrued Section 10(b). [FN162] That section provides that "[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." [FN163] Thus, Section 10(b) permits a court after vacating an award, at its option (and if timely), to direct a rehearing by the original arbitrators. [FN164]

Section 10(b) is necessary because, ordinarily, when arbitrators issue their award, their authority to take further actions ends--they become, in the Latin, functus officio. [FN165] Unless the parties agree otherwise, or an arbitration statute directs them to continue, the arbitrators have no authority to reopen the matter. [FN166] Unlike trial courts, arbitrators cannot entertain petitions for rehearing on the merits of an award. And they certainly do not stand ready for a case to be remanded to them if their award is vacated by a court. As a result, Section 10(b) provides ***1150** necessary authority for a court to remand a case to the arbitrators for a rehearing.

But, contrary to the Court's assertion in Stolt-Nielsen, Section 10(b) says nothing about a court having the option to go ahead and decide an issue for itself if it does not remand to the arbitrators, whether only one outcome is possible or not. Rather, the Court's assertion of such an option is flatly contrary to established law [FN167]--and, indeed, contrary to the Court's own decision in Major League Baseball Players Ass'n v. Garvey, cited by the Court elsewhere in its Stolt-Nielsen opinion, [FN168] in which the Court summarily reversed a lower court for doing exactly what the Court did in Stolt-Nielsen. [FN169]

Certainly, Section 10(b) does not require a court to remand a case to the arbitrators. [FN170] Instead, the court's other option is simply to do nothing after vacating an award. If the parties' first effort to arbitrate ***1151** their dispute fails because a court vacates the award, the parties are free to arbitrate again, before a different set of arbitrators, to see if those arbitrators can make an enforceable award. The parties still have an arbitration agreement, and the dispute is still subject to that agreement. For all of the Supreme Court's stated concern in Stolt-Nielsen (and in Rent-A-Center as well) for respecting the parties' agreement to arbitrate, it wholly disregards that agreement in deciding itself whether the parties agreed to class arbitration.

The only exception to this well-established approach is if the ground on which the award was vacated casts doubt on the enforceability of the arbitration agreement. Thus, if a court vacates an award on the ground that the arbitrators exceeded their authority because the parties had never agreed to arbitrate the matter, or because the claim could not be arbitrated as a matter of federal law, then the arbitration agreement would not constrain the court from deciding the issue itself. [FN171] But that was not the case in Stolt-Nielsen. The arbitration agreement at issue was the second, supplement-

al agreement to arbitrate, and nothing in the Court's decision cast the slightest doubt on the enforceability of that agreement.

At bottom, the Court's decision to determine the default rule itself wholly disregards the parties' agreement to have the arbitrators resolve that issue. Fortunately, only rarely do courts vacate arbitration awards, so that the opportunities for courts to disregard arbitration agreements because they find the issue to be arbitrated “clear” are uncommon. But the decision in Stolt-Nielsen is a dramatic departure from prior precedent even as to that unusual of an occurrence.

3. Default Rule of “No Class Arbitration”

At its heart, Stolt-Nielsen was about gap-filling--determining the appropriate default rule when the arbitration agreement is silent about class arbitration. The Supreme Court held that the default rule is that class arbitration is not permitted, explaining that class arbitration is sufficiently different from individual arbitration that the parties must agree as a contractual matter to override that default rule.

Here, again, the Stolt-Nielsen Court's decision that arbitrators lack the authority to fashion default rules has important implications for the types of default rules that will result. The FAA was enacted in 1925, and lacks many of the detailed gap-filling provisions of more modern ***1152** arbitration statutes. And even modern arbitration statutes lack gap-fillers on some issues, such as, for example, class arbitration. By limiting arbitrators to statutory gap-fillers (or court decisions, if any), Stolt-Nielsen may result in arbitrators adopting what might be called “negative gap-fillers”: when the governing legal authorities are silent on a particular procedure, that silence will preclude arbitrators from adopting the procedure.

Perhaps courts will limit Stolt-Nielsen to class arbitration. Most arbitration rules, which are incorporated by reference into the parties' agreement, grant arbitrators broad discretion to manage the arbitration proceeding. [FN172] In other areas, such rules might be construed to grant arbitrators authority to fill procedural gaps. With respect to class arbitration, however, the AAA's class arbitration rules specifically provide that “[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.” [FN173] As a result, the Court in Stolt-Nielsen could not rely on the general procedural authority of arbitrators as a basis for finding that the institutional rules agreed to by the parties overrode the negative gap-filler. For other procedures, however, the arbitrators' general procedural authority may be sufficient.

An important question left unanswered by Stolt-Nielsen is the relationship between the negative gap-fillers of the FAA and the gap-filling provisions of state arbitration laws. [FN174] That issue, actually, is what the Court granted certiorari to decide in Bazzle, but which the plurality avoided. [FN175] The scope of FAA preemption, particularly as to state laws that do not invalidate the parties' agreement to arbitrate, is a highly unsettled issue, [FN176] and one that Stolt-Nielsen did not decide (and did not need to, since no state law gap-filler was at issue in the case). [FN177] But the ***1153** decision in Stolt-Nielsen, with its restriction on arbitrator authority to formulate gap-fillers, makes the issue that much more salient.

C. How Do Arbitrators Decide Whether Parties Have Agreed to Class Arbitration?

The positive question we are interested in is how arbitrators decide whether parties have agreed to regulate a procedural matter in their contract--in other words, is there a gap, and, if so, how is it filled? On what evidence do arbitrators rely, and to what sources do arbitrators turn, in filling procedural gaps?

At a more practical level, the most immediate question after Stolt-Nielsen is--what is left of class arbitration? Given the Court's decision in Stolt-Nielsen, how likely are arbitrators to find that the parties have agreed to have the arbitration proceed on a class basis? In Stolt-Nielsen, the Court did not answer the question of what sort of evidence would be sufficient to show that the parties agreed to class arbitration. As the Court stated: “We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class arbitration.” [FN178] But the Court made clear that the mere fact that the parties agreed to arbitrate does not, itself, constitute an agreement to class arbitration. [FN179] So what evidence might suffice--and, equally importantly--how available is such evidence likely to be?

To get some insight into the answers to both sets of questions, we looked at class arbitration proceedings administered by the AAA under its class arbitration rules. As noted by the Supreme Court in Stolt-Nielsen, the AAA makes available on its web page information on class arbitration proceedings it administers, including clause construction awards issued by arbitrators in the proceedings. [FN180] We divide our analysis into pre-Stolt-Nielsen and post-Stolt-Nielsen cases and awards.

***1154** 1. Pre-Stolt-Nielsen Awards

We collected a random sample of the clause construction awards available on the AAA web site as of July 1, 2010, and reviewed the arbitrators' reasoning in those cases. [FN181]

The awards followed four main approaches in analyzing whether the arbitration agreement “permitted” class arbitration, as specified in the AAA class arbitration rules. [FN182] A small number of awards (2 of 22, or 9.1%) relied on express language in the arbitration agreement that the arbitrators interpreted as authorizing class arbitration. The language required some interpretation (that is, it did not state that “this agreement authorizes arbitration to proceed on a class basis,” for example). But the reading adopted by the arbitrators did not appear to be unreasonable, and was based on language unique to the agreement at issue. These awards, while decided before Stolt-Nielsen, likely would survive application of the Court's analytical framework in that case.

At the other extreme, a greater number of awards (9 of 22, or 41.0%) concluded that the arbitration agreement did not forbid class arbitration, sometimes bolstered by construing the agreement against the party that drafted it. This analysis pretty clearly would not be sufficient to satisfy the standard adopted by the Supreme Court in Stolt-Nielsen. The arbitrators concluded only that the agreement did not preclude class arbitration, not that the agreement authorized it.

A possible explanation for the reasoning in this group of awards is that the issue presented in Bazzle differed from the issue presented in Stolt-Nielsen (and most commonly addressed by arbitrators proceeding under the AAA class arbitration rules). The Bazzle plurality directed the arbitrators to decide whether the arbitration agreement in that case forbade class arbitration. [FN183] If it did, then the South Carolina Supreme Court's attempt to use a state-law gap-filler was inappropriate because there was no gap to fill. By contrast, in Stolt-Neilsen and cases like it, the arbitrators are affirmatively deciding whether class arbitration can proceed. Finding that the arbitration clause does not forbid class arbitration is only a partial answer to that question and unlikely to be ***1155** sufficient in the post-Stolt-Nielsen world.

A slightly stronger case can be made for another group of awards (8 of 22, or 36.4%), in which the arbitrators (unlike those in Stolt-Nielsen, at least in the Supreme Court's view) in fact did construe the arbitration agreement. The analysis in these awards began with the broad language of the arbitration agreement, providing that “any dispute” was subject to arbitration. The arbitrators reasoned that “any dispute” would include disputes being arbitrated on a class basis. Because the parties could have, but did not, exclude class arbitration proceedings from the broad “any dispute” provision (unlike, in many cases, some other types of disputes, which were expressly excluded from the clause), the awards concluded that arbitration could proceed on a class basis.

Although the reasoning of the arbitrators avoided the basis on which the Court vacated the award in Stolt-Nielsen (i.e., the arbitrators interpreted the agreement rather than relying on their own conceptions of public policy), the standard applied by the arbitrators does not satisfy Stolt-Nielsen. A general arbitration clause, according to the Stolt-Nielsen Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration. It is not clear whether awards such as these would be vacated under Stolt-Nielsen. But the arbitrators' analysis is insufficient under that case.

A final group of awards, relatively small in size (3 of 22, or 13.6%), took an approach that might satisfy Stolt-Nielsen, subject to one unknown. After concluding that the arbitration agreements did not forbid class arbitration (i.e., that there was a gap), these awards looked to state law (usually either California or South Carolina) to fill that gap. Under the law of those states, unlike the FAA as interpreted by the Supreme Court in Stolt-Nielsen, the default rule was that class arbitration was permitted. As such, the awards avoided the basis for vacatur in Stolt-Nielsen by looking to state law gap-fillers rather than the arbitrators' own conception of public policy. The unknown, on which the Court granted certiorari in Bazzle and did not address either in that case or in Stolt-Nielsen, is whether the FAA preempts those state law gap-fillers. [FN184] If so, then the analysis in these awards, too, would fail.

Overall, then, the AAA's clause construction awards prior to Stolt-Nielsen did not take a consistent approach to filling procedural gaps in arbitration agreements. Despite their substantial agreement as to outcome (that the arbitration agreements permitted class arbitration), ***1156** the rationales underlying the awards differ in important ways, such that only some are likely to survive after Stolt-Nielsen.

One additional note: keep in mind that the AAA will not administer class arbitrations when the arbitration clause includes a class-arbitration waiver, unless a court has ordered the dispute to arbitration. [FN185] So in none of the cases in the sample did the arbitration agreement include an enforceable class-arbitration waiver. [FN186] One would think that the existence of a class-arbitration waiver would be pretty good evidence that the parties have not agreed to class arbitration--even if the waiver is later held unconscionable or otherwise unenforceable by a court. [FN187] On the other hand, arbitrators might still be able to rely on state law gap-fillers in such cases, unless those gap-fillers are preempted by the FAA as construed in Stolt-Nielsen.

***1157** 2. Post-Stolt-Nielsen Cases and Awards

As of January 1, 2011, over eight months had passed since the decision in Stolt-Nielsen. Subsequent events provide even better insights into the likely effect of the case on the future of class arbitration and on how arbitrators are likely to fill gaps in arbitration agreements. Two points are noteworthy.

First, filings of new class arbitration cases before the AAA appear to have almost completely dried up. Based on cases posted on the AAA's class arbitration web site, only one new class arbitration claim was filed with the AAA in the eight months after the Supreme Court's decision in Stolt-Nielsen. [FN188] By comparison, at least five cases were filed during the first four months of 2010 and at least thirty-three cases were filed during 2009. [FN189]

Second, as of January 1, 2011, arbitrators have filed awards construing arbitration agreements in eight cases since the Supreme Court's decision in Stolt-Nielsen. [FN190] In five of those eight awards (62.5% ***1158** of the time), the arbitrator(s) construed the arbitration clause as authorizing class arbitration. [FN191] The percentage of awards permitting class arbitrations to proceed has declined substantially following Stolt-Nielsen. [FN192] Moreover, the analysis in the awards changed as well, focusing much more on state law and contract language and much less on awards in prior cases (which almost never are discussed in the post-Stolt-Nielsen awards). [FN193] It is unclear whether the analysis in the awards will stand up to review in courts that are applying Stolt-Nielsen. [FN194] But if nothing else the awards provide some

evidence that class arbitration might persist after Stolt-Nielsen.

***1159** D. What is the Optimal Institutional Approach to Procedural Gap-Filling in Arbitration?

The normative questions raised by Stolt-Nielsen are twofold. First, and more narrowly, did the Court properly determine that the default rule should be that arbitration on a class basis is not permitted? Second, and more generally, what is the optimal authority of arbitrators to develop default rules--i.e., should they be restricted to statutory or court-developed gap-fillers or permitted to develop default rules in the same manner as common law courts? We address those issues in turn, after first describing the standard normative analysis of default rules.

1. Normative Analysis of Default Rules

The normative analysis of arbitrator gap-filling tracks to a substantial degree the normative analysis of default rules more generally. In simplest terms, because the rules are default rules, an important part of identifying the optimal rule is identifying the rule that will cause parties to incur the lowest transacting costs--the rule that most parties would otherwise have contracted for, so that they do not have to incur the costs of bargaining around the default. [FN195]

Such a majoritarian theory of default rules is based on a particular view of contractual incompleteness. The implicit assumption of such a theory, as Ian Ayres and Robert Gertner explain, is that contracts are incomplete because the transaction costs of bargaining for complete contracts are too high. [FN196] Ayres and Gertner identify a variety of considerations in determining the appropriate default rule based on "minoritarian" rather than majoritarian considerations: "different private costs of contracting around"; "different private costs of failing to contract around"; "different public costs of filling gaps"; and "ignorance of the law." [FN197] Thus, for example, the public costs of filling gaps are higher when the gap-filler is a default standard rather than a default rule. [FN198] Or, when some parties are less likely to contract around the default than others (such as when one party is less well informed about the law than the other), all else equal "lawmakers should tend to favor ***1160** as defaults the preferred rules of contractors who have a relatively low propensity to contract around other defaults." [FN199]

A final [FN200] (and somewhat related) consideration is the tailoring of the gap-filler: as George Geis asks, "[s]hould lawmakers pick just one simple default rule for an entire legal system, or should they design more complex default rules to offer customized legal treatment for different markets--or even for different parties?" [FN201] A single simple default rule would have the lowest public cost of promulgating the gap-filler in the first instance. But if the optimal majoritarian default would differ systematically for discrete market segments, it may be that a more complex default rule, one that varied across the markets, might reduce the transacting costs of the parties (who otherwise would have to contract around the rule) so as to outweigh the increased public costs of adopting a more tailored rule.

2. Default Rules and Class Arbitration

As for the "no class arbitration" default rule adopted in Stolt-Nielsen, it arguably is defensible as a majoritarian default, at least for commercial contracts. As discussed above, while class arbitration has been around for a long time, only in recent years has it become at all common (if sixty-five cases a year counts as being common). [FN202] Although they do exist, express contract provisions permitting arbitration on a class basis are rare. [FN203] By comparison, many contracts--particularly those in industries in which class actions are common--include class-arbitration waivers, seeking to preclude arbitration from proceeding on a class basis. By contrast, as illustrated in the previous section, arbitrators almost unanimously filled gaps prior to Stolt-Nielsen by holding that class arbitration was permissible, and continue to do so in a significant proportion of cases even after Stolt-Nielsen. [FN204] But those ***1161** awards often did not attempt to de-

termine what the parties would have contracted for in a world of no transaction costs, and were limited to cases in which the parties' arbitration agreement was silent as to class arbitration (thus providing only a partial look at parties' contracting practices). Plus, most, although not all, awards were in disputes between sophisticated and unsophisticated parties, not between two commercial parties. Accordingly, at least for commercial contracts, a default rule of no class arbitration would seem to be the optimal default, consistent with Stolt-Nielsen.

For consumer and (most) employment contracts, the analysis is more complicated. It is more difficult to draw inferences from standard form contracts about the optimal majoritarian default, and consumers and employees are less likely to contract around a default rule than commercial parties. The costs to businesses of contracting around a default rule that permitted class arbitration would be relatively low--since the contracts typically are standard form contracts prepared by the business, which may well be revised periodically for other reasons as well. And a default rule permitting class arbitration could be tailored fairly easily to groups such as consumers and some employees by limiting Stolt-Nielsen to contracts between sophisticated parties.

On the other hand, to the extent businesses perceive that reducing the risk of class actions is a reason to use arbitration clauses, they will quickly contract around a default rule permitting class arbitration--incurring the transaction costs (however slight) of doing so. If, in fact, for policy reasons class relief should be available for consumers and employees in arbitration, implementing that policy choice will likely need to be done by a mandatory rule, rather than a default rule. [FN205]

***1162** 3. Default Rules and Arbitrator Gap-Filling

The broader implications of Stolt-Nielsen, however, are more troubling for arbitration law. If the case is applied to limit the procedural gap-filling authority of arbitrators in areas beyond class arbitration, parties will incur added costs of contracting around the resulting negative default rules, as well as the costs of greater uncertainty about the enforceability of their arbitration agreements and awards.

In recent years, several commentators have argued for vesting less procedural discretion in adjudicators (including both judges and arbitrators), an approach that would seem consistent with the Court's decision in Stolt-Nielsen. Robert G. Bone challenges the “pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases [a]s empirically unsupported and at best highly questionable.” [FN206] Instead, he argues for a greater use of rules restricting judicial discretion--not “deliver[ing] a knock-out punch to discretion,” but contending that rule makers should balance the costs and benefits of discretion, “taking account of all of the costs of case-specific discretion and all the benefits of limiting discretion in various ways, and that they should publicly justify the choices they make.” [FN207]

William M. Park similarly argues for restricting procedural discretion, this time specifically for arbitrators. He states that “the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration's malleability often comes at an unjustifiable cost.” [FN208] He proposes what he calls a “Rules Rich” rather than a “Rules Light” approach: “Rather than a blank page to be completed by arbitrators, institutional provisions could contain specific protocols that the arbitrator would be required to apply unless modified by the agreement of all parties.” [FN209]

In essence, Professor Bone and Professor Park advocate a shift from default standards to default rules governing court and arbitral procedure, at least in particular circumstances. [FN210] The effect of the ***1163** Supreme Court's decision in Stolt-Nielsen may be similar, to the extent that the result is an increase in negative default rules--rules that preclude exercises of arbitrator authority because the FAA does not address a particular issue. [FN211] The normative effects of such a shift reflect a tradeoff between the costs of more precise arbitration rules (the cost of drafting with greater precision; the cost of unanticipated exceptions arising that are not dealt with by the rules; and the cost of more awards

being overturned due to the failure to comply with the more precise rules) and the costs of greater procedural discretion on the part of arbitrators (the cost arbitrators incur in deciding how to apply the vague standards; the cost of changes in party behavior due to uncertainty as to how arbitrators will apply those standards; and the cost of disappointed party expectations about the procedural process in arbitration). [FN212]

Determining the optimal degree of discretion given that tradeoff is difficult in the abstract, and depends on empirical issues such as the frequency with which certain issues arise in arbitration (the more frequently issues arise, the lower the drafting costs of rules relative to the enforcement costs of arbitrators applying standards). [FN213] That said, we are skeptical that an eighty-five-year-old arbitration statute--which sets default rules only by its failure to address certain procedural issues--better strikes that balance than arbitration institutions through ***1164** their rules or parties through their arbitration clauses. [FN214]

As such, we think to some degree that the market has spoken in favor of more, rather than less, procedural discretion for arbitrators. Most arbitration rules give arbitrators broad procedural discretion, and few contain express rules on joinder, consolidation, dispositive motions, and confidentiality--much less class arbitration. [FN215] Arbitration institutions review their rules on a regular basis, with no evidence of a shift toward procedural specificity. It is true that groups such as the International Bar Association have adopted more specific procedural rules that parties sometimes incorporate into their contracts. [FN216] Moreover, arbitration agreements have become more detailed over time, at least in standard form contracts between sophisticated and unsophisticated parties. Even so, the available empirical evidence does not provide a basis for adopting negative default rules of the sort that may result from Stolt-Nielsen. While we do not claim that market acceptance, even among sophisticated parties, indicates that an approach necessarily is efficient, the substantial competition among arbitration institutions--particularly, but not exclusively, in the market for international arbitration [FN217]--provides some assurance that default rules significantly limiting arbitrator discretion would impose net costs rather than net benefits on parties.

In short, our normative analysis supports limiting the Court's decision in Stolt-Nielsen to class arbitration and not applying it to constrain the procedural gap-filling powers of arbitrators more generally.

***1165** V. Conclusion: Possible Return to Contract and Jurisdiction

The greater judicial solicitude for arbitration agreements that took root in the early 1970s and fully blossomed by the late 1980s has created unprecedented opportunities for parties to enter into “procedural contracts.” Those contracts cover matters far beyond designation of the applicable law or exclusive forum. Whether through explicit terms or incorporation of arbitral rules, they also address an array of procedural matters such as collective litigation, discovery, limitations periods, available remedies, and the allocation of power between courts and arbitrators. When used actively, they can shape the outcome of a dispute; when ignored, they arguably create gaps that arbitrators must fill subject, potentially, to judicial review.

This paper has undertaken a systematic examination of these procedural contracts, along both positive and normative lines. As a positive matter, we have seen that some parties are increasingly exercising their freedom to enter into procedural contracts, though they appear more inclined to leave some procedural terms like discovery unregulated. We also found that, despite the regular need for arbitrators to exercise their gap-filling authority, they have not developed a consistent method for filling gaps in procedural contracts, at least as to the availability of class arbitration. As a normative matter, we have favored a system of oversight that relies on a blend of industry self-regulation and case-by-case judicial scrutiny, over more blunt approaches such as regulation by an administrative agency or outright statutory prohibitions. Finally, we also have misgivings about the Supreme Court's heavy-handedness in Stolt-Nielsen. While that decision can

in principle be limited to the precise issue of an arbitrator's authority to order class arbitration in the face of a silent agreement, it certainly opens the door for significant post-award litigation over other gap-filling determinations by the arbitrator.

In this conclusion, we trace the implications of our findings for two pending matters, one on the judicial agenda and one on the legislative agenda. The first is AT&T Mobility LLC v. Concepcion, pending before the Supreme Court; the second is the Arbitration Fairness Act.

A. AT&T Mobility LLC v. Concepcion

Concepcion concerns a nettlesome question under Section 2 of the Federal Arbitration Act--namely whether the FAA preempts a state court's finding that the presence of a class-arbitration waiver in an ***1166** arbitration clause renders the clause unenforceable? The underlying argument runs as follows: class-arbitration waivers typically are contained in contracts between parties of unequal bargaining positions (a consumer or employee and a company). The class-arbitration waiver represents an effort by the company to preclude class arbitration against the company and, thereby, discourages an injured customer from pursuing her claim at all. Consequently, the class-arbitration waiver effectively functions like an exculpatory clause. For these reasons, the argument concludes, the class-arbitration waiver is unconscionable. Because unconscionability is a "ground for the revocation of any contract" under Section 2, the clause is also unenforceable.

Viewed through the lens of this paper, Concepcion presents the sort of normative question that we explored in Part II, namely the limits on the parties' freedom to enter into procedural contracts. At one level, the argument advanced in Concepcion fits comfortably within the normative framework that we defend--namely as a form of case-by-case judicial oversight through the use of generally applicable contract doctrines under Section 2. At another level, however, Concepcion illustrates how such a framework might be abused. [FN218]

To understand why, imagine if a state legislature enacted a law that declared arbitration clauses invalid when they prevented parties from participating in class actions in court. Such a statute would be preempted because it would invalidate all arbitration clauses--all arbitration clauses prevent parties from participating in class actions in court. [FN219] The result would be the same, one would think, regardless of whether the state law provided more broadly that all clauses that prevent parties from participating in class actions in court are preempted (which would apply also to class-action waivers). [FN220] Nor should it matter that the state rule was implemented by courts under the guise of unconscionability--the rule would be preempted nonetheless. [FN221]

***1167** The reason Concepcion is a difficult case is that the state unconscionability rule there invalidates class-arbitration waivers, and not all arbitration clauses include class-arbitration waivers. [FN222] That said, if the state legislature enacted a statute invalidating arbitration clauses that included class-arbitration waivers, there is a good doctrinal argument that the state statute would be preempted. Moreover, as a theoretical matter, such a law would run afoul of our own framework which favors case-by-case judicial oversight over blunt legislative prohibitions.

The use of the unconscionability doctrine in Concepcion still appears to be indistinguishable from the above-described (albeit narrower) legislative prohibition. It still attempts to accomplish indirectly, through twisting the unconscionability doctrine, what the FAA may preclude state legislatures from doing directly. [FN223] Not only is such an outcome illogical, it is decidedly undemocratic. It licenses judges (who may or may not be elected) to announce rules under the guise of generally applicable state contract law that democratically elected state legislators themselves could not. Moreover, because all this occurs under the guise of generally applicable contract law, such arguments--unless policed-

-run the risk of distorting contract doctrines more generally. [FN224]

There is a counterargument that some members of the Court appeared sympathetic to during oral argument in Concepcion: that as long as the state court would invalidate other waivers of class relief (or exculpatory clauses) as unconscionable, the use of the unconscionability ***1168** doctrine to invalidate class-arbitration waivers should not be preempted. Ironically, it is Stolt-Nielsen, rather than the Supreme Court's prior preemption cases, that underscores the weakness with this argument. In Stolt-Nielsen, the Court held that class arbitration is sufficiently different from individual arbitration that an individual arbitration clause cannot be construed as permitting class arbitration. [FN225] Yet, when courts hold class-arbitration waivers unconscionable, they are essentially turning individual arbitration clauses into class arbitration clauses, changing the fundamental nature of what the parties agreed to. A state statute to that effect would be preempted under most theories of FAA preemption; [FN226] a state court decision applying unconscionability doctrine to that same end should be preempted as well. [FN227]

By this, we do not mean to jettison the doctrinal framework that has built up around Section 2. There certainly is a principled way whereby courts can apply Section 2's "generally applicable" contract defense standard to arbitration clauses. Yet Concepcion demonstrates that with respect to certain more malleable defenses, like unconscionability and public policy, there exists a risk that anti-arbitration courts will contort those doctrines to achieve a particular policy outcome. Unless checked, that approach would simply return us to the era of "judicial hostility toward arbitration agreements" that the FAA sought to end.

In sum, while Concepcion is a hard case, in the end we believe that the analysis offered in this paper suggests that the petitioners had the better of the argument and that the Supreme Court rightly rejected the back-door attempt to embed a prohibition against class arbitration waivers--i.e., to change the nature of the arbitration proceeding to which the parties agreed--in unconscionability doctrine.

B. The Arbitration Fairness Act

For the last several years, members of Congress, especially the recently-defeated Senator Russell Feingold, have introduced the Arbitration Fairness Act. [FN228] The bill is relatively simple to understand. ***1169** At bottom, it prohibits pre-dispute arbitration clauses in consumer and employment agreements (the bill contains partial definitions of those agreements which need not concern us here). [FN229] An earlier version of the bill also provided that courts, not arbitrators, will resolve any challenges to the arbitration agreement (apparently overruling Prima Paint and the First Options "clear and unmistakable" standard). In its current form, the bill operates retroactively--insofar as it applies to disputes that arise after the date of its enactment, irrespective of when the parties entered into the arbitration agreement.

Viewed through the lens of this paper, the Arbitration Fairness Act also presents the sort of normative question that we explored in Part II, namely the limits on the parties' freedom to enter into procedural contracts. In contrast to Concepcion, the consequences are far different. The vesting of exclusive authority in courts to resolve challenges to the arbitration agreement curtails the parties' freedom as to a particular provision of their procedural contracts (namely the allocation issue discussed in the context of Rent-A-Center). The outright ban on certain types of pre-dispute arbitration agreements does not attack procedural contracts directly. Of course, indirectly, the ban hampers the development of procedural contracts by preventing parties from agreeing, on a pre-dispute basis, to resolve their disputes extrajudicially (much like the non-arbitrability doctrine, discussed in Part I, did, only more broadly).

The Arbitration Fairness Act admittedly presents different sets of concerns about inroads on contractual freedom from those we identified ***1170** in Concepcion. It does not raise the same legitimacy concerns because the bill, if enacted,

would be the result of a legislative process. Nor does the bill distort the development of more general contract law; it simply modifies the Section 2 standard.

Nonetheless, under the normative framework we have developed here, we think that Congress should not adopt it. At bottom, the bill, however well-intentioned, works too great an inroad on contractual freedom without there being a sufficiently compelling empirical case for some offsetting benefit. [FN230] The bill puts all employment and consumer agreements on the same plane without considering whether the need for regulation might vary across types of agreement or within subcategories of a single agreement. Thus, we doubt that a highly paid corporate executive whose contract contains an arbitration agreement needs the same degree of paternalistic regulation as a line employee. [FN231] As the protocols demonstrate, industry self-regulation (coupled with judicial oversight) affords a greater opportunity to adapt rules to these nuances and avoids the meat-cleaver approach exemplified by the bill.

A further flaw in the bill is that, if enacted, it would hinder the sort of reexamination that should occur in light of new empirical evidence. As we have explained in great detail elsewhere, the empirical record on arbitration remains incomplete, though important gaps are being filled. If the bill is enacted, the risk is that Congress will naturally turn to other matters, and occasions for reexamination will be scant. By contrast, through industry self-regulation such as the protocols, the industry itself has a natural incentive regularly to reexamine whether the protocols sufficiently take into the account the extant empirical evidence. This helps to avoid risks that awards might be declared unenforceable, an outcome that arbitral institutions have a natural incentive to avoid. [FN232]

***1171** C. Looking Ahead

This Article has offered a systematic treatment of procedural contracts and placed them in the context of contemporary judicial and congressional debates. Much work, however, remains to be done, particularly on the empirical side. Specifically, over the long-run, scholars should attempt to develop more sophisticated data sets on the terms of procedural contracts, especially datasets like the franchise database that permit comparisons of how the use of such terms evolves over time. Furthermore, it is hoped that additional arbitration associations, not just the American Arbitration Association, will make available databases of arbitration awards so scholars can investigate further how arbitrators exercise their gap-filling authority in the face of silent procedural contracts. Finally, future research should unpack the causes behind some of the curious trends that our empirical research uncovered such as the surprisingly high frequency with which parties leave certain terms, like discovery, unregulated in their procedural contracts.

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We would like to thank participants at the annual Emory/UGA Works in Progress Workshop, as well as Eric Tuchmann and Steve Ware, for helpful comments and discussions. Thanks also to Bernard Persky and Nina Pillard for their help in tracking down the Stolt-Nielsen arbitration award. Annie Booton provided superb research assistance. Dean Rebecca White graciously provided financial support for this project. Cindy Wentworth helped with completion of the manuscript.

[FN1]. See Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 351-61.

[FN2]. See, e.g., Charles L. Knapp, Taking Contracts Private: The Quiet Revolution inContractLaw, 71Fordham L. Rev.

761 passim (2002); Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 Cal. L. Rev. 577 passim (1997); Richard E. Speidel, Contract Theory and Securities Arbitration: Whither Consent?, 62 Brook. L. Rev. 1335 passim (1996); Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 Tul. L. Rev. 1 passim (1997).

[FN3]. See, e.g., Krenkel v. Kerzner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009) (holding that forum selection clauses are presumptively enforceable); Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321, 1324 (11th Cir. 2001) (finding that arbitration agreements are presumptively enforceable); Marra v. Papandreou, 216 F.3d 1119, 1126 (D.C. Cir. 2000) (holding that forum selection clauses are presumptively enforceable); Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999) (finding that arbitration agreements are presumptively enforceable).

[FN4]. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §11028, 116 Stat. 1758, 1835-36 (amending 15 U.S.C. §1226(a)(2) (2006)); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §670(a), 120 Stat. 2083, 2266 (amending 10 U.S.C. §987(f)(4) (2006)); Food, Conservation, and Energy Act of 2008, Pub. L. No 110-246, §11005, 122 Stat. 1651, 2119 (codified at 7 U.S.C. §197c(a) (Supp. III 2007-2010)); Department of Defense Appropriations Act, 2010, Pub L. No. 111-118, §8116(a), 123 Stat. 3409, 3454-55 (2010) (“Franken Amendment”).

[FN5]. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§921, 1028, 1414(e), 124 Stat. 1376, 1841, 2003-04, 2151 (2010).

[FN6]. Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 593, 650 (2005).

[FN7]. Others have examined the ability to customize the litigation process by contract. See, e.g., Michael L.Moffitt,Customized Litigation: The Case for Making Civil Procedure Negotiable, 75 Geo. Wash. L. Rev. 461 (2007); Linda S. Mullenix, Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court, 57 Fordham L. Rev. 291 (1988); Henry S. Noyes, If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image, 30 Harv. J.L. & Pub. Pol'y 579 (2007); Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 856-78 (2006); Elizabeth Thornburg, Designer Trials, 2006 J. Disp. Resol. 181; see also David Marcus, The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts, 82 Tul. L. Rev. 973 (2008). In the context of arbitration agreements, a few articles have addressed procedural contracts though without the degree of empirical evidence or normative argument we address here. See David Horton, Arbitration as Delegation, 86 N.Y.U. L. Rev. (forthcoming 2011) (manuscript at 41-53, on file with authors) [hereinafter Horton, Arbitration as Delegation]; available at http://ssrn.com/abstract=1665565 (arguing that FAA was an unconstitutional delegation of procedural rule-making authority); David Horton, The Shadow Terms: Contract Procedure and Unilateral Amendments, 57 UCLA L. Rev. 605, 646-53 (2010) (opposing unilateral modification of the procedural terms of arbitration clauses) [hereinafter Horton, The Shadow Terms]; Meredith R. Miller, Contracting out of Process, Contracting out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process, 75 Tenn. L. Rev. 365, 371 (2008) (opposing procedural contracts in arbitration agreements).

[FN8]. Resnik, supra note 6, at 597.

[FN9]. See the discussion of the Due Process Protocols, infra text accompanying note 71.

[FN10]. For an insightful discussion of the developments in this area, see generally Richard A. Nagareda, The Litigation-Arbitration Dichotomy Meets the Class Action, 86 Notre Dame L. Rev. (forthcoming 2011) (manuscript at 1-2, on file

with authors), available at http://ssrn.com/abstract_id=1670722.

[FN11]. See Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 376 n.15 (2005) (distinguishing between "collective action waivers" and "class action waivers").

[FN12]. See Ramona L. Lampley, Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape, 18 Cornell J. L. & Pub. Pol'y 477, 504 (2009); Miller, supra note 7, at 381-99 (discussing use of collective action waivers, limits on discovery, and shorter limitations periods).

[FN13]. This assumes, of course, that silence in a procedural contract is properly conceptualized as a gap that the arbitrator is authorized to fill (as opposed to a deliberate omission designed to strip the arbitrator of the power to enter a particular procedural order). We address this idea in greater detail in Part III, infra.

[FN14]. See, e.g., Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157, 169 (2006) ; Miller, supra note 7, at 367-68.

[FN15]. See Stephen J. Ware, The Case For Enforcing Adhesive Arbitration Agreements--with Particular Consideration of Class Actions and Arbitration Fees, 5 J. Am. Arb. 251, 253-54 (2006).

[FN16]. See, e.g., In re Am. Express Merchs. Litig., 634 F.3d 187, 199 (2d Cir. 2011) (holding class arbitration waiver unenforceable because it precludes claimants from vindicating their statutory rights); Kristian v. Comcast Corp., 446 F.3d 25, 61 (1st Cir. 2006); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (holding class arbitration waiver unconscionable); Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274-75 (Ill. 2006).

[FN17]. 514 U.S. 938, 942 (1995). Others date the incentive to design procedural contracts to the Supreme Court's 2003 decision in Bazzle. See Miller, supra note 7, at 374. But we believe that First Options created the necessary conditions nearly a decade earlier and believe that the empirical research offered here supports that view. See infra note 35 and accompanying text.

[FN18]. 130 S. Ct. 2772, 2775 (2010).

[FN19]. 130 S. Ct. 1758, 1764 (2010). This article was already in press when the Supreme Court issued its opinion in Concepcion. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Although we reserve detailed analysis of Concepcion for future work, we do note that the Court's decision is consistent with our analysis here. See infra text accompanying notes 225-27.

[FN20]. For an excellent analysis of the decisions in Rent-A-Center and Stolt-Nielsen, see generally Thomas J. Stipanowich, Revelation and Reaction: The Struggle to Shape American Arbitration, in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010 (Martinus Nijhoff Publishers forthcoming 2011).

[FN21]. Pub. L. No. 111-24, 123 Stat. 1734 (2009).

[FN22]. Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), cert. granted sub nom. AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).

[FN23]. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§921, 1028, 1414(e), 124

Stat. 1376, 1841, 2003-04, 2151 (2010).

[FN24]. See S. 987, 112th Cong. § 3 (2011); H.R. 1873, 112th Cong. § 3 (2011).

[FN25]. For alternative surveys of the history, see Horton, The Shadow Terms, supra note 7, at 611-23; Marcus, supra note 7, at 988-1015. We acknowledge that the second era may be appropriately dated to the early 1970s when decisions like Bremen and Scherck laid the intellectual groundwork for the demise of the non-arbitrability doctrine. See Carrington & Haagen, supra note 1, at 352, 364. Nonetheless, we date the end of the second era at the middle of the 1980s, for that is when the "international commerce" rationale for Bremen and Scherck dropped out, and their underlying principles crept into purely domestic disputes. That was the critical move which enabled procedural contracts to proliferate. See Resnik, supra note 6, at 620.

[FN26]. For a fuller discussion of this era, see Carrington & Haagen, supra note 1, at 339-44; Peter B. Rutledge, Whither Arbitration?, 6 Geo. J.L. & Pub. Pol'y 549, 552 (2008).

[FN27]. E.g., Wilko v. Swan, 346 U.S. 427, 438 (1953) ("[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration....").

[FN28]. In addition to the demise of the non-arbitrability doctrine, the scope of Congress's power to regulate interstate commerce expanded dramatically from 1925, when the FAA was enacted, to the 1970s and 1980s. This expansion correspondingly increased the contracts to which the FAA applied. See Christopher R. Drahozal, In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act, 78 Notre Dame L. Rev. 101, 127-30 (2002).

[FN29]. See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 19-20 (1972).

[FN30]. We stress no "perfect" analogue because certain features of garden-variety civil litigation are subject to agreement by the parties. For example, parties may enter into joint stipulations under which they agree to fashion discovery along certain lines, or they may agree on certain substantive questions, thereby eliminating the need for jury determination. The critical difference between these devices and the devices that we describe here is that procedural contracts like joint stipulations occur after the dispute has arisen (where both parties have more information about the nature of the dispute) whereas the devices that interest us here can be designed at the pre-dispute stage (where parties have relatively less information about the course of any dispute). For a thoughtful analysis of this "relatively unexplored" field, see Scott & Triantis, supra note 7, at 857-78.

[FN31]. Expanded review, however, unlike the other issues, is new only in the form it takes--i.e., clauses drafted specifying the grounds courts were to apply in reviewing arbitration awards. An alternative form of expanded review-- restricting the arbitrators' authority to make errors of law--has been around for a long time, and, indeed, predates enactment of the FAA. See Christopher R. Drahozal, Contracting Around Hall Street, 14 Lewis & Clark L. Rev. 905, 914-15 (2010).

[FN32]. See Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 82 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29-33 (1991).

[FN33]. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

[FN34]. For an explanation of why parties choose arbitration as an option generally, see generally Christopher R.

Drahozal & Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J. Legal Stud. 549 (2003); Christopher R. Drahozal & Stephen J. Ware, Why Do Businesses Use (or Not Use) Arbitration Clauses?, 25 Ohio St. J. on Disp. Resol. 433 (2010); Richard A. Posner, The Law and Economics of Contract Interpretation, 83 Tex. L. Rev. 1581 (2005).

[FN35]. During oral argument in Bazzle, Justice Stevens predicted that the Court's view on an arbitrator's authority to order class arbitration lacked "any real future significance, because isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?" Transcript of Oral Argument at 55, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (No. 02-634). In fact, the empirical results of our research suggest that, more broadly, this sort of procedural contracting was already well underway by the time of Bazzle, but that, conversely, it has not become ubiquitous, as Stevens suggested.

[FN36]. Christopher R. Drahozal & Quentin R. Wittrock, Is There a Flight from Arbitration? 37 Hofstra L. Rev. 71, 90-94 (2008).

[FN37]. Id. at 103 tbl.8, 104 tbl.9, 106 tbl.10, 108 tbl.11, 110 tbl.12, 111 tbl.13, 112 tbl.14, 113 tbl.15. Bold type highlights those types of contract provisions that are more common in 2007 than in 1999.

[FN38]. See Rutledge, supra note 26, at 575.

[FN39]. Where courts find an arbitration clause unenforceable on these grounds, that determination raises a corollary question whether the offending provision is severable or, instead, the entire arbitration clause is invalid. See Miller, supra note 7, at 379-80. For a good example of severability analysis, see Booker v. Robert Half Int'l, Inc., 413 F.3d 77 (D.C. Cir. 2005).

[FN40]. This hypothesis presupposes, of course, that an outside counsel either drafted the clause or was consulted by the company about how best to draft the clause. The database does not permit independent verification of this premise.

[FN41]. See generally Cass R. Sunstein, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733 (1995).

[FN42]. See Scott & Triantis, supra note 7, at 823.

[FN43]. We disclose that one of us (Drahozal) provided comments on a draft of the arbitration scholars' brief in Rent-A-Center, but was not a party to the brief.

[FN44]. Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2780 (2010).

[FN45]. Id. at 2775.

[FN46]. Id. at 2784 (Stevens, J., dissenting).

[FN47]. Id. at 2779 (majority opinion).

[FN48]. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967); see also Alan Scott Rau, Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions, 14 Am. Rev. Int'l Arb. 1, 81 & n.193 (2003) (stating that "every modern regime of arbitration--if not indeed every piece of legislation in the civilized world--takes separability as the foundation stone of the entire structure," although recognizing limited exceptions).

[FN49]. This statement of the rule is subject to an important qualification. See infra note 50 and accompanying text.

[FN50]. Here's the important qualification: if the party challenging the agreement alleges that the parties never formed any of the agreements (for example, due to lack of assent), the court would resolve that jurisdictional issue. See Granite Rock Co. v. Teamsters, 130 S. Ct. 2847, 2860 (2010).

[FN51]. Data on delegation clauses were not included in the published version of the study. We reviewed the arbitration clauses used in the study for the presence of delegation clauses.

[FN52]. For further description of the dataset, see Drahozal & Ware, supra note 34, at 465-66 & n.143. Again, data on delegation clauses were not included in the published version of the study, but were, instead, obtained from a review of the arbitration clauses used in the study.

[FN53]. Pub. L. No. 111-24, §204, 123 Stat. 1734, 1746 (2009) (amending 15 U.S.C. §1632); see also 12 C.F.R. §226.58(c)(2) (2010). The sample we use in this article consists of all credit card agreements that included arbitration clauses as of December 31, 2009, which were submitted by issuers to the Federal Reserve and made available on the Federal Reserve web page as of September 1, 2010. A total of 65 issuers--banks, thrifts, credit unions, and several nonfinancial businesses (retailers that offer credit to their customers)--submitted credit card agreements with arbitration clauses, including the largest credit card issuers that at the time were using arbitration clauses. For our purposes here, we do not distinguish among the different types of issuers.

[FN54]. In addition, the delegation clauses themselves varied. By no means did all of the clauses include language as clear and definitive as the language in the Rent-A-Center clause. Note also that the terms of the arbitration agreement were missing for two of the credit card contracts in the sample which otherwise indicated that disputes were subject to arbitration. As a result, those agreements are not included in the results reported in Table 2.

[FN55]. An additional six of the twenty-eight franchise arbitration clauses included language stating that the parties agreed to arbitrate claims that the entire franchise agreement or any provision thereof was invalid. Because those provisions did not specifically refer to the arbitration clause, we did not classify them as delegation clauses.

[FN56]. For example, the arbitration clause for the Merrick Bank credit cardholder agreement provided that "[a]ny claim, dispute or controversy ("Claim") by either you or us against the other arising from or relating in any way to the Agreement or your Account, except for the validity, scope or enforceability of this Arbitration Agreement, shall, at the demand of any party, be resolved by binding arbitration." Merrick Bank, Merrick Bank Visa or MasterCard Cardholder Agreement P22 (Dec. 31, 2009) (copy on file with authors).

[FN57]. For example, the arbitration clause in the M&I Federal Savings Bank credit cardholder agreement provided that "[a] court with proper jurisdiction and not an arbitrator will determine whether this provision prohibiting class actions, joinder and/or consolidation is valid and effective." M&I Bank, M&I Bank FSB Pricing Information Addendum P24 (Dec. 31, 2009) (copy on file with authors).

[FN58]. For different views, see Horton, Arbitration as Delegation, supra note 7, at 46 ("[D]elegation clauses have already become fixtures in consumer and employment contracts."); Stipanowich, supra note 20, at 20 ("In fact, agreements to delegate 'gateway' functions to arbitrators are ubiquitous in business contracts.").

[FN59]. American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule R-7(a) (June 1, 2009), available at www.adr.org/sp.asp?id=22440.

[FN60]. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting AT&T Techs., Inc. v. Com-

mc'ns Workers, 475 U.S. 643, 649 (1986)).

[FN61]. See, e.g.,Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1331-32 (11th Cir. 2005);FSC Secs. Corp. v. Freel, 14 F.3d 1310, 1312-13 (8th Cir. 1994);Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472-73 (1st Cir. 1989).

[FN62]. Restatement (Third) of the U.S. Law of International Commercial Arbitration §5-10 cmt. e & reporter's note e (Tentative Draft No. 1, 2010). Professor Drahozal is an Associate Reporter for the Restatement. The views stated in this article reflect his personal views and should not be attributed to the other Reporters or the American Law Institute.

[FN63]. In July 2009, the NAF discontinued administering new consumer arbitrations, as part of the settlement of a consumer fraud lawsuit brought by the Minnesota Attorney General. Consent Judgment para.3, Minnesota v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), available at http://pubcit.typepad.com/files/nafconsentdecree.pdf. Shortly thereafter, the American Arbitration Association announced a moratorium on its administration of many (albeit not all) debt collection arbitrations brought by businesses against consumers (but not claims brought by consumers against businesses arising out of the same contracts). American Arbitration Association, Notice on Consumer Debt Collection Arbitrations, available at http://www.adr.org/sp.asp?id=36427 (last visited May 16, 2011).

[FN64]. Of the 32 clauses that listed a choice of providers, 29 (or 90.6%) included the American Arbitration Association as an option. In addition, the other major arbitral institutions administering these sorts of arbitrations (JAMS and NAF) both have provisions in their rules similar to AAA Rule 7(a). Thus, the effect of Rent-A-Center on the allocation question potentially will be quite profound.

[FN65]. Drahozal & Wittrock, supra note 36, at 101 tbl.7.

[FN66]. Key to the abbreviations in Table 3: AAA - American Arbitration Association; CIETAC - China International Economic & Trade Arbitration Commission; FETACC - Foreign Economic & Trade Arbitration Commission of China; HKIAC - Hong Kong International Arbitration Centre; IAA - International Arbitration Association; ICC - International Chamber of Commerce; SIAC - Singapore International Arbitration Center; SIAC (UNCITRAL) - administered by Singapore International Arbitration Centre under the UNCITRAL Arbitration Rules; Ad hoc (UNCITRAL) - non-administered arbitration subject to the UNCITRAL Arbitration Rules; Ad hoc - non-administered arbitration subject to various national laws.

[FN67]. See Horton, Arbitration as Delegation, supra note 7, at 30 (“[P]laintiffs may never be able to prove that a delegation clause is unconscionable.... [O]ther than [a handful of] unlikely scenarios, any claim that a delegation clause is unconscionable comes perilously close to being a non-sequitur.”).

[FN68]. Richard A. Bales, The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest, 21 Ohio St. J. on Disp. Resol. 165, 168-174 (2005); Margaret M. Harding, The Limits of the Due Process Protocols, 19 Ohio St. J. on Disp. Resol. 369, 390-91 (2004); Arnold M. Zack, Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model, 7 World Arb. & Med. Rep. 10 passim (1996); Searle Civil Justice Institute, Consumer Arbitration Before the American Arbitration Association 16-24 (Mar. 2009) (copy on file with authors) [hereinafter Searle Study].

[FN69]. Paul R. Verkuil, Privatizing Due Process, 57 Admin. L. Rev. 963, 985 (2005).

[FN70]. The content of some of the protections finds its roots in procedural protections attendant to labor-management arbitrations under collective bargaining agreements. See Harding, supra note 68, at 395-96.

[FN71]. American Arbitration Association, Employment Due Process Protocol (May 9, 1995), available at http://www.adr.org/sp.asp?id=28535.

[FN72]. See Lampley, supra note 12 passim.

[FN73]. Federal Arbitration Act, 9 U.S.C. §2 (2006).

[FN74]. See Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010).

[FN75]. This ground traces to the Court's decision in Gilmer. While the Court in Gilmer dismissed a host of broad-based procedural attacks on the arbitral process (on matters like arbitrator bias, insufficient discovery, the lack of a written opinion and insufficient remedial powers), it left the door ajar for a more targeted attack on procedures in arbitration. In a statement that would set the stage for the current battles over contract and procedure, the Court, quoting its prior decision in Mitsubishi, opined that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)). Logically, this statement implied that when an arbitral forum deprived a litigant of her ability effectively to vindicate her statutory causes of action, that defect could render the arbitration clause unenforceable. For a thoughtful argument that the Court should reorient these categories, see Hiro N. Aragaki, Arbitration's Suspect Status, 159 U. Penn. L. Rev. (forthcoming 2011) (on file with author), available at http://ssrn.com/abstract=1716439.

[FN76]. See 9 U.S.C. §10.

[FN77]. For a spirited defense of this approach, see Miller, supra note 7, at 404-09. See also Horton, Arbitration as Delegation, supra note 7, at 43-46 (defending congressional control over the enforceability of forum selection clauses); Horton, The Shadow Terms, supra note 7, at 665-66 & n.364 (defending a legislative ban on unilateral amendments to arbitration agreements).

[FN78]. See supra notes 4 & 5.

[FN79]. See supra note 24.

[FN80]. See Thomas E. Carbonneau, Arguments in Favor of the Triumph of Arbitration, 10 Cardozo J. Conflict Resol. 395, 399-400 (2009) (noting the tension between the Arbitration Fairness Act and freedom of contract principles); Alicia J. Surdyk, Note, On the Continued Vitality of Securities Arbitration: Why Reform Efforts Must Not Preclude Predispute Arbitration Clauses, 54 N.Y.L. Sch. L. Rev. 1131, 1143 (2009/10) ("[A]t the most fundamental level, the issue is that the cited provisions of the Arbitration Fairness Act are diametrically opposed to the basic principles underlying the nature of a contractual agreement, namely freedom of contract and certainty of contract.").

[FN81]. 9 U.S.C. §10(c).

[FN82]. See Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007). Along similar lines, the American Arbitration Association has proposed codification of the Due Process Protocols. See The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary, 110th Cong. 11-12 (2007) (statement of Richard Naimark, Senior Vice President, American Arbitration Association), available at http:// frwebg-

ate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_ hearings&docid=f:42605.pdf.

[FN83]. See Jill I. Gross, McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration, 76 U. Cin. L. Rev. 493, 495 (2008); Constantine N. Katsoris, Roadmap to Securities ADR, 11 Fordham J. Corp. & Fin. L. 413, 420-24 (2006).

[FN84]. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §921(a), 124 Stat. 1376, 1841 (2010) (amending 15 U.S.C. §78o).

[FN85]. Id. §1028, 124 Stat. 2003-04.

[FN86]. See generally R. Douglas Arnold, The Logic of Congressional Action (1990); John W. Kingdon, Agendas, Alternatives, and Public Policies (2d ed. 2003).

[FN87]. See Harding, supra note 68, at 369-73.

[FN88]. See Christopher R. Drahozal & Samantha Zyontz, An Empirical Study of AAA Consumer Arbitrations, 25 Ohio St. J. on Disp. Resol. 843, 918 (2010) (“These variations suggest the need for a nuanced approach to public policy concerning arbitration.”).

[FN89]. See, e.g., Alex Geisinger, Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation, 57 Ala. L. Rev. 1, 24-30 (2005). See generally Eric A. Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 U. Chi. L. Rev. 133 (1996) (discussing “insulation theory” of nonlegal sanctions).

[FN90]. 105 F.3d 1465, 1483-1485 (D.C. Cir. 1997). For exemplary literature on the cost-sharing debate, see, for example, Michael H. LeRoy & Peter Feuille, When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration, 50 UCLA L. Rev. 143 (2002); R. Brian Tipton, Allocating the Costs of Arbitrating Statutory Claims Under the Federal Arbitration Act: An Unresolved Issue, 26 Am. J. Trial Advoc. 325 (2002). The July 2002 issue of the University of Miami Law Review dedicated an entire symposium to the issue of arbitration cost allocation in the wake of Green Tree Financial.

[FN91]. This consideration favors industry promulgation of the protocols instead of codification of the Due Process Protocols, as some have proposed. See supra note 82. While codification of the protocols could accomplish several of the same ends (and avoid any ambiguity over their legal status, see infra note 107), ultimately we fear that a legislative solution would be too blunt and inflexible an instrument. Given the difficulties in enacting legislation, it would be more difficult to amend or modify the codified protocols than it would be to adjust them through the private revisions, something that arbitral institutions do regularly with their own rules.

[FN92]. Harding, supra note 68, at 371.

[FN93]. See Horton, The Shadow Terms, supra note 7, at 637-38.

[FN94]. See Erin A. O'Hara & Larry E. Ribstein, The Law Market 33, 109-13 (2009). Whether there is in fact a “race to the bottom” in corporate law is hotly debated. Id. at 245 n.1.

[FN95]. See, e.g., John O'Donnell et. al., Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 1-13 (2007) (addressing the National Arbitration Forum).

[FN96]. See Stephen J. Choi, The Problem with Arbitration Agreements, 36 Vand. J. Transnat'l L. 1233, 1235-37 (2003).

[FN97]. See Federal Arbitration Act, 9 U.S.C. §10 (2006); Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. In addition, the arbitration agreements themselves are subject to court oversight prior to the proceeding.

[FN98]. Empirical evidence supports this postulate. The available empirical evidence on the "repeat player" effect is mixed at best. To the extent such an effect has been documented, the prevailing view is that repeat players do better in arbitration not because the arbitrators systematically favor them but, instead, because the repeat players' experience enables them to decide which cases to settle (where their adversary's position is strong) and which to contest (where their adversary's position is weak). See Drahozal & Zyontz, supra note 88, at 908-16; Rutledge, supra note 26, at 565-67.

[FN99]. In this regard, we part company with Carrington and Haagen, who contend that arbitrators "are dependent for their careers, to a degree that no judges are, on the acceptability of their awards to the parties, and perhaps especially on their acceptability to parties who are 'repeat players."' Carrington & Haagen, supra note 1, at 346. This account overlooks the arbitrator's more compelling incentive to develop and maintain a reputational bond for rendering enforceable awards, irrespective of the identity of the prevailing party.

[FN100]. On the relationship between arbitration and democratic theory, see generally Richard C. Reuben, Democracy and Dispute Resolution: The Problem of Arbitration, 67 Law & Contemp. Probs. 279 (2004) (asking whether arbitration furthers the goals of democratic governance).

[FN101]. On the defects in the decision-making process behind the protocols' development, see Leona Green, Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution, 12 Notre Dame J.L. Ethics & Pub. Pol'y 173, 215-22 (1998).

[FN102]. Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1456-76 (2003).

[FN103]. See Bales, supra note 68, at 171-72; Harding, supra note 68, at 390-91.

[FN104]. See Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949, 949-951 (2002).

[FN105]. See, e.g., Bales, supra note 68, at 167; Harding, supra note 68, at 370-72, 417.

[FN106]. See Drahozal & Zyontz, supra note 88, at 845; Rutledge, supra note 26, at 576.

[FN107]. Bales, supra note 68, at 167; see also Martin H. Malin, Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree, 41 Brandeis L.J. 779, 787-88 (2003).

[FN108]. The Searle Study found that "the AAA effectively reviews arbitration clauses for protocol compliance and appropriately responds to clauses that do not comply." See Searle Study, supra note 68, at 83-100, 111.

[FN109]. Ian Ayres & Robert Gertner, Filling Gaps inIncomplete Contracts:An Economic Theory ofDefault Rules,99 Yale L.J. 87, 92-93 (1989) [hereinafter Ayres & Gertner, Filling Gaps]. See generally Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules,101 Yale L.J. 729 (1992) [hereinafter Ayres & Gertner, Strategic Contractual Inefficiency]; Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law,113 Yale L.J. 541 (2003).

[FN110]. See Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 587-88 (2008).

[FN111]. Christopher R. Drahozal, Federal Arbitration Act Preemption, 79 Ind. L.J. 393, 416-20 (2004); William W. Park, The Specificity of International Arbitration: The Case for FAA Reform, 36 Vand. J. Transnat'l L. 1241, 1245 n.16 (2003) [hereinafter Park, FAA Reform].

[FN112]. For example, one commentator has noted:

Arbitrators can conduct proceedings in almost any manner they deem best, as long as they respect the arbitral mission and accord the type of fundamental fairness usually called ‘due process' in the United States and ‘natural justice’ in Britain, which includes both freedom from bias and allowing each side an equal right to be heard.

William W. Park, The 2002 Freshfields Lecture--Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion, 19 Arb. Int'l 279, 281 (2003) [hereinafter Park, Arbitration's Protean Nature]; see also William W. Park, Procedural Default Rules Revisited, in Arbitration Insights--Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfields Bruckhaus Deringer 360 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007) [hereinafter Park, Procedural Default Rules Revisited].

[FN113]. 130 S. Ct. 1758 (2010).

[FN114]. D. Brian King & Jeffrey P. Commission, Summary Judgment in International Arbitration: The “Nay” Case 4 (2010) (Paper Presented at ABA International Law Spring 2010 Meeting - Common Law Summary Judgment in International Arbitration), available at http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%C20Summary%C20Judgment%C20in%C20International%Ärbitration/King%20-%20Commission.pdf (“[T]he major institutional commercial arbitration rules lack an express grant of power to tribunals summarily to dispose of cases. In the light of this, arbitrators have, for the most part, been reluctant to rely on implicit, gap-filling or inherent powers to introduce such a procedure.”).

[FN115]. See Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1, 40-42 & n.149 (2000).

[FN116]. 539 U.S. 444 (2003).

[FN117]. Petition for Writ of Certiorari at i, Green Tree Fin. Corp. v. Bazzle, 539 U.S 444 (2003) (No. 02-634).

[FN118]. Bazzle, 539 U.S. at 447.

[FN119]. Although the case also involved a related arbitration proceeding-- i.e., a proceeding in which the arbitrator already had construed the arbitration agreement--the Court held that the arbitrator's determination could have been influenced by the South Carolina court's decision and so vacated the award as well. Id. at 453-54.

[FN120]. Id. at 455 (Stevens, J., concurring in the judgment and dissenting in part).

[FN121]. Id.

[FN122]. Id. at 459-60 (Rehnquist, C.J., dissenting).

[FN123]. Id. at 460 (Thomas, J., dissenting).

[FN124]. For example, JAMS also began administering class arbitrations following Bazzle. See JAMS, JAMS Class Ac-

tion Procedures, May 1, 2009, http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf.

[FN125]. American Arbitration Association, Supplementary Rules for Class Arbitrations, Oct. 8, 2003, available at http://www.adr.org/sp.asp?id=21936.

[FN126]. Id. Rule 3.

[FN127]. Id. Rules 4-5.

[FN128]. Id. Rule 7.

[FN129]. American Arbitration Association, AAA Policy on Class Arbitrations, July 14, 2005, http://www.adr.org/Classarbitrationpolicy.

[FN130]. See infra text accompanying notes 131-134.

[FN131]. Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 22, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198).

[FN132]. Id. at 23-24. The AAA provided a breakdown of the types of business-versus-business class arbitrations: 21 (7%) franchises; 20 (7%) healthcare; 9 (3%) financial services; and 31 (11%) other. Id. at 23.

[FN133]. Id. at 22. The AAA reported further that arbitrators issued class determination awards in 48 cases: in 24 (50%), the award certified the class; in 18 (38%) the award denied class certification; and in 6 (13%) the parties stipulated to certifying a class. Id. At the time the brief was filed, none of the class arbitrations had been resolved on the merits. Id. at 23.

[FN134]. Id. at 22.

[FN135]. 130 S. Ct. 1758 (2010).

[FN136]. See supra text accompanying note 132.

[FN137]. 130 S. Ct. at 1765-66.

[FN138]. AnimalFeeds Int'l Corp. v. Stolt-Nielsen, SA, Partial Final Clause Construction Award at 5, 7 (Dec. 20, 2005) (ad hoc arbitration award), reprinted in Petition for a Writ of Certiorari at app. D, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198). The award described the “test” as follows: “arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class arbitration.” Id. at 4. As described below, the Supreme Court ultimately characterized the arbitrators' award as based solely on the arbitrators' own conception of public policy. See infra text accompanying notes 139-144.

[FN139]. The Court also held that the award should be vacated as in manifest disregard of the law, although refusing to decide whether that ground actually was available to vacate an award. 130 S.Ct. at 1768 n.3. In other words, the Court simply assumed away a possible argument that AnimalFeeds had in defense of the award (that manifest disregard of the law is not available as a vacatur ground under the FAA), and then proceeded to rely on that very ground (although only in the alternative) as a basis for vacating the award.

[FN140]. 130 S. Ct. at 1768-70.

[FN141]. Id. at 1770.

[FN142]. Id. at 1775.

[FN143]. Id.

[FN144]. Id. at 1776. On its facts, Stolt-Nielsen presented at least two other issues that the Court did not expressly decide. First, the circuits currently are split on whether courts should vacate "non-domestic" awards-- awards made in the United States but with an international nexus--using FAA Section 10 or using the grounds set out in Article V of the New York Convention. Compare Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23-25 (2d Cir. 1997) (basing decision on Section 10 grounds), with Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1441-46 (11th Cir. 1998) (basing decision on Article V grounds). Stolt-Nielsen came from the Second Circuit, so not surprisingly the Court of Appeals, consistent with circuit precedent, reviewed the award under Section 10. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1766 (2010). The Supreme Court did not address the issue, but likewise used the Section 10 vacatur grounds. Id. at 1767-68. Second, U.S. courts have not definitively resolved whether partial awards (awards that resolve finally some but not all issues in the arbitration, like the clause construction award in Stolt-Nielsen) are subject to vacatur under the FAA. Cf. Restatement (Third) of the U.S. Law of International Commercial Arbitration §1-1 reporter's note a (Tentative Draft No. 1, 2010). The Supreme Court expressly rejected the argument that the partial award was not ripe for review under constitutional standards. 130 S. Ct. at 1767 n.2. But it refused to address prudential ripeness, finding it not timely raised. Id.

[FN145]. One note as a matter of terminology: The Court in Stolt-Nielsen seems to reject the idea that the case involves procedure at all. It explains:

> The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what "procedural mode" was available to present AnimalFeeds' claims. If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties agreed to authorize class arbitration.

Id. at 1776 (citations omitted). The Court might be read as saying that the case does not involve arbitral procedure, but rather the jurisdiction of the arbitrators (an arbitrability issue, in the Court's usual, confusing, parlance). The problem with that view, as the Court itself acknowledged, is that the parties in Stolt-Nielsen had expressly agreed in a post-dispute arbitration agreement to arbitrate the issue of whether the original arbitration agreement permitted class arbitration. Id. at 1772 ("But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible."). As a result, the Court could not treat the arbitrators' decision as one involving the arbitrators' jurisdiction, because the parties had clearly given the arbitrators jurisdiction to decide the issue.

Instead, the Court's discussion of the "procedural mode" of the arbitration (or the lack thereof) in Stolt-Nielsen was in the part of the opinion dealing with the proper default rule. Id. at 1775. In essence, the Court was holding that the default rule in Stolt-Nielsen was no class arbitration, and rejecting an alternative default that the issue was within the arbitrators' usual discretion over procedural issues.

[FN146]. For other analyses of Stolt-Nielsen, see generally William G. Whitehill, Class Actions and Arbitration Murky Waters: Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 4 World Arb. & Med. Rev. 1 (2010); Stipanowich, supra note 20, at 5-15.

[FN147]. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767 (2010) (alteration in original) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (per curiam)).

[FN148]. Id.

[FN149]. Id. at 1768-69.

[FN150]. See supra notes 26-27 and accompanying text.

[FN151]. Carrington & Haagen, supra note 1, at 345.

[FN152]. Id. at 344.

[FN153]. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[FN154]. Obviously, each of these models, like all models, oversimplifies reality. The cases in the different eras reflect some aspects of both models, not any one exclusively. But the models do, we believe, help in portraying how the Supreme Court seems to have viewed arbitration in the different eras, and how Stolt-Nielsen opinion seems to take yet another approach.

[FN155]. Although it is very unusual for pre-dispute arbitration agreements to provide for class arbitration, such agreements do exist. E.g., Drahozal & Wittrock, supra note 36, at 109.

[FN156]. Certainly if federal law precludes a particular arbitration procedure, the mandatory rule of federal law would override the parties' agreement. E.g., 15 U.S.C. §1226(a)(3) (2006) ("[T]he arbitrator shall provide the parties to such contract with a written explanation of the factual and legal basis for the award."). If state law prohibits a particular arbitration procedure, the mandatory rule of state law would override the parties' agreement only if the state law is not preempted by the FAA.

[FN157]. U.C.C. §1-303(c) (2010).

[FN158]. There also is a hierarchy of terms within these sources of the parties' agreement. Presumably the express terms of the arbitration clause govern over the institutional arbitration rules and customary practice, and the institutional rules govern over customary practice. One caveat is that the arbitration institution itself is a contracting party, so that courts should be cautious not to impose the terms of the parties' arbitration clause onto a nonconsenting institution.

[FN159]. Although Stolt-Nielsen did not deal with a decision by the arbitrators on the merits of the case, its rationale--that arbitrators lack the authority of common law courts to make decisions on the basis of public policy--raises questions about arbitrators' authority to fill gaps in contracts and statutes on substantive issues. The Court has repeatedly stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." E.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). But if arbitrators lack the gap-filling authority of common law courts, might not parties be forgoing substantive rights by agreeing to arbitration?

[FN160]. Until Stolt-Nielsen, there were two primary exceptions to this general trend. First, courts sometimes vacated awards when a procedural decision by the arbitrator interfered with a party's opportunity to be heard (such as a refusal by

the arbitrator to continue a hearing in order to accommodate the schedule of a key witness). See, e.g., Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 17-18 (2d Cir. 1997). This ground finds firm foundation in both the FAA and most other country's arbitral laws, which expressly list it among the possible grounds for vacatur. See Federal Arbitration Act, 9 U.S.C. §10(a)(3) (2006); U.N. Comm'n on Int'l Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, art. 36 (1985) (amended 2006). Second, courts occasionally (but rarely) have vacated or refused to enforce awards where the arbitrator rendered fundamentally inconsistent procedural orders (the classic case is one in which the arbitrator informed a party that it need not present certain evidence, and then found against that party due to its failure to supply that evidence). Cf. Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992) (refusing to enforce award under analogous provisions of Article V of the New York Convention).

[FN161]. 130 S. Ct. at 1770. Nothing in the opinion limits the Court's holding on this issue to procedural gap-filling. Given, however, that the decision conflicts with a number of the Court's prior opinions, one possible way to avoid the conflict would be to limit Stolt-Nielsen's holding in this respect to procedural gap-filling, or perhaps even class arbitration issues.

[FN162]. Justice Ginsburg made this point in dissent, albeit only briefly. Id. at 1782 (Ginsburg, J., dissenting).

[FN163]. Federal Arbitration Act, 9 U.S.C. §10(b) (2006). The Stolt-Nielsen Court does not address the timing requirement in the statute, but nothing in the arbitration clause or the AAA Class Arbitration Rules specify a time in which a clause construction award must be made.

[FN164]. Id.

[FN165]. Black's Law Dictionary defines “functus officio” as “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” Black's Law Dictionary 743 (9th ed. 2009).

[FN166]. E.g., Gary B. Born, International Commercial Arbitration 2517 (2009) (identifying as exceptions minor matters such as clerical errors).

[FN167]. Id. at 2699-2700 (“[T]he annulment of an award should have no effect on the parties' underlying agreement to arbitrate. That agreement subsists even if an arbitral tribunal engaged in procedural misconduct or manifestly misapplied the law.”); Gary B. Born, International Commercial Arbitration: Commentary and Materials 710-11 (2d ed. 2001) [hereinafter Born (2001)] (“When a court vacates an arbitral award on one of the grounds (other than lack of an arbitration agreement or non-arbitrability) set forth in §10, it may not also resolve the merits of the parties' dispute. That dispute generally remains subject to the parties' underlying arbitration agreement and therefore cannot be litigated (save where the award was vacated on the grounds that no valid arbitration agreement covered the parties' dispute).”); Julian D.M. Lew et al., Comparative International Commercial Arbitration P25-61, at 682 (2003) (“If an award is set aside for reasons other than invalidity of the arbitration agreement, the agreement would survive the award and the parties would still be bound to have their disputes settled by arbitration.”); Ian R. Macneil et al., Federal Arbitration Law §42.1.1.1, at 42:2 to 42:3 (1994) (“Where the award is vacated and not remanded,... [m]ost often the parties are left legally where they were before the arbitration, that is to say unresolved disputes exist subject to an arbitration clause. Thus the parties may or may not negotiate in hopes of settlement, but if they do not settle and one party wants to pursue the dispute, the forum for doing so will normally remain arbitration.”); see also Unif. Arb. Act §12(c) (amended 1956); Unif. Arb. Act §23(c) (2000).

[FN168]. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767 (2010).

[FN169]. 532 U.S. 504, 511-12 (2001) (per curiam) ("[E]stablished law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision. Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings."); see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.10 (1987) ("Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, ... the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement.").

[FN170]. See Peter Bowman Rutledge et al., United States, in Practitioner's Handbook on International Commercial Arbitration 877, 935-36 (Frank-Bernd Weigand ed., 2d ed. 2009).

[FN171]. Born (2001), supra note 167, at 710-11; Macneil, supra note 167, at 42:3 to 42:4.

[FN172]. See supra note 112 and accompanying text.

[FN173]. American Arbitration Association, supra note 125, Rule 3.

[FN174]. For examples of state law default rules, see Unif. Arb. Act §4 (2000).

[FN175]. See Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447, 453-54 (2003).

[FN176]. Drahozal, supra note 111, at 416-20; see infra text accompanying notes 210-14.

[FN177]. Stolt-Nielsen does have possible implications for preemption analysis, however. One theory of FAA preemption is that a state law is preempted if it changes the parties' agreed procedure so much that it is no longer "arbitration." Drahozal, supra note 111, at 417-18. Given the Court's reasoning in Stolt-Nielsen--that class arbitration is so different from individual arbitration as not to be encompassed in a general agreement to arbitrate--one might argue that state laws providing for class arbitration as a gap-filler (such as the South Carolina Supreme Court decision at issue in Bazzle) would be preempted by the FAA. See also infra text accompanying notes 225-27.

[FN178]. 130 S. Ct. 1758, 1776 n.10 (2010).

[FN179]. Id. at 1775 ("An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.").

[FN180]. American Arbitration Association, Searchable Class Arbitration Docket, http://www.adr.org/sp.asp?id=25562 (last visited May 16, 2011) [hereinafter AAA, Searchable Docket]. Although the parties in Stolt-Nielsen agreed to follow the AAA class arbitration rules, the AAA itself did not administer the arbitration and so filings in the case are not available on the AAA web page. Instead, the award in the Stolt-Nielsen case is reprinted in an Appendix to the Petition for Certiorari. See supra note 138.

[FN181]. Our sample consists of twenty-four clause construction awards chosen at random from the clause construction awards available on the AAA web page. Of the twenty-four awards, twenty-two (or 91.7%) concluded that the arbitration clause permitted class arbitration and two (or 8.3%) concluded that the arbitration clause did not permit class arbitration. The results in the text are based on the twenty-two awards concluding that the arbitration clause permitted class arbitration.

[FN182]. See supra text accompanying notes 125-26.

[FN183]. See supra text accompanying notes 117-23.

[FN184]. See supra text accompanying notes 110-11.

[FN185]. See supra text accompanying note 129. In a handful of awards, a court had ordered the case to arbitration on the ground that the class-arbitration waiver in the agreement was unenforceable, or at least that the arbitrators had to decide that issue.

[FN186]. Note that the available empirical evidence suggests that the use of class-arbitration waivers varies significantly depending on the type of contract at issue:

A report recently released by the Consumer Arbitration Task Force of the Searle Civil Justice Instituteaddresses precisely that question. The data show that many consumer arbitrations administered by the American Arbitration Association arise out of contracts that do not preclude class relief in arbitration.... The two types of businesses with the highest usage of class arbitration waivers-- both with 100% of the cases in the sample arising out of clauses including class arbitration waivers--were credit card issuers (26 of 26) and cell phone companies (5 of 5).... By comparison, the use of class arbitration waivers was mixed in car sales contracts (34 of 64, or 53.1%) and contracts with home builders (11 of 17, or 64.7%).And the use of class arbitration waivers was nonexistent in real estate brokerage agreements and in the contract of the single casualty insurer in the sample. Indeed, the substantial majority of cases (190 of 299, or 64.5%) in the sample did not arise out of an arbitration clause with a class arbitration waiver.While the results are limited to AAA consumer arbitrations, they nonetheless identify a significant set of consumer arbitration clauses that do not include class arbitration waivers.

Drahozal & Ware, supra note 34, at 472-73 (footnotes omitted).

[FN187]. E.g., Fensterstock v. Educ. Fin. Partners, 611 F.3d 124, 141 (2d Cir. 2010):

Our conclusion that a given agreement is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement. Thus, excising the Note's class action and class arbitration waiver clause leaves the Note silent as to the permissibility of class-based arbitration, and under Stolt-Nielsen we have no authority to order class-based arbitration.

Id.

[FN188]. See Employment Arbitration Rules, Demand for Arbitration, Schuh v. Johnny Utah 51 LLC (Am. Arb. Ass'n July 23, 2010), available at http:// adr.org/si.asp?id=6226. Between January 1, 2011, and April 12, 2011, two additional class arbitration claims were posted to the AAA's web site. One was a class counterclaim that had been filed on March 26, 2010. See Demand for Class Arbitration, JP Morgan Chase Bank N.A. v. Bhakti, LLC, Case No. 71 148 00796 09 (Am. Arb. Ass'n Mar. 26, 2010), available at http:// www.adr.org/si.asp?id=6338. In the second, the class arbitration demand was signed by plaintiff's counsel on April 26, 2010, the day before Stolt-Nielsen was decided, and received by the AAA on April 28, 2010, the day after Stolt-Nielsen was decided. Commercial Arbitration Rules, Demand for Arbitration, Garrett-Scheier v. Muller Auto. Group, Inc., Case No. 11 155 00892 10 (Am. Arb. Ass'n Apr. 28, 2010), http://www.adr.org/si.asp?id=6339. The case was later suspended for nonpayment of fees. Suspension Order of the Arbitrator, Garrett-Scheier v. Muller Automotive Group, Inc., Case No. 11 155 00892 10 (Am. Arb. Ass'n Dec. 9, 2010) (Bissell, Arb.), http://www.adr.org/si.asp?id=6340. Given the long lags in posting these class arbitration demands, it may be that the apparent dearth of filings since Stolt-Nielsen reflects posting delays rather than an actual decline in case filings. At the very least, we cannot exclude that possibility from the information available on the AAA's web site.

[FN189]. Authors' calculations based on data collected from the AAA's Searchable Class Action Docket. AAA, Searchable Docket, supra note 180. Even that number was a decrease from previous years. William K. Slate II & Eric P. Tuch-

mann, Class Action Arbitrations, 11 Int'l Arb. L. Rev. 50, 53 (2008) (reporting data "for the period October 8, 2003 through January 1, 2008") ("Filings by year are as follows: 2003, 6 cases filed; 2004, 65 cases; 2005, 47 cases; 2006, 58 cases; 2007, 41 cases.").

[FN190]. SWLA Hosp. Assocs. v. Corvel Corp., Case No. 11 193 02760 06 (Am. Arb. Ass'n Sept. 3, 2010) (Gary, Moreland, & Baker Arbs.) (dissenting opinion by Baker), http://adr.org/si.asp?id=6212; Demetriou v. EarthLink, Inc., Case No. 11 117 00273 10 (Am. Arb. Ass'n Sept. 1, 2010) (Hare, Arb.), http://adr.org/si.asp?id=6349; Spradlin v. Trump Ruffin Tower I, LLC, Case No. 11 115 Y 01846 09 (Am. Arb. Ass'n Aug. 10, 2010) (LaMothe, Arb.), http://adr.org/si.asp?id=6232; Clark v. CHDP Condo, LLP, Case No. 11 115 Y 01921 09 (Am. Arb. Ass'n July 21, 2010) (Hendrick, Harr, & Dreier Arbs.), http://adr.org/si.asp?id=6254; Owens v. Auto. Prot. Corp., Case No. 11 188 01140 05 (Am. Arb. Ass'n July 19, 2010) (Green, Arb.), http:// adr.org/si.asp?id=6221; Mensch v. Alta Colleges, Inc., Case No. 11 516 00995 09 (Am. Arb. Ass'n July 16, 2010) (Baker, Arb.), http://adr.org/si.asp? id=6146; Benson v. CSA-Credit Solutions of America, Inc., Case No. 11-160-M-02281-08 (Am. Arb. Ass'n July 6, 2010) (Meyerson, Arb.), http:// adr.org/si.asp?id=6139; Knudsen v. North Motors, Inc., Case No. 11 155 02699 09 (Am. Arb. Ass'n May 18, 2010) (Daerr-Bannon, Arb.), http:// www.adr.org/si.asp?id=6236; see also Smith & Wollensky Rest. Group, Inc. v. Passow, No. 10-11498-EFH, 2011 U.S. Dist. LEXIS 4495, at *2 (D. Mass. Jan. 18, 2011) (stating that, after Stolt-Nielsen, arbitrator had reaffirmed clause construction award finding that parties had agreed to class arbitration) (decision reaffirming award not available on AAA web page).

[FN191]. Knudsen, at 1; Benson, at 8; Owens, at 56; SWLA, at 1; Demetriou, at 1.

[FN192]. See supra note 181.

[FN193]. One award rejects reliance on prior arbitration awards as evidence of a custom or usage of class arbitration in the industry. Mensch, at 30.

[FN194]. We do not analyze post-Stolt-Nielsen court cases in detail here. That said, it is worth noting that courts have dealt with the availability of class arbitration in varied ways since Stolt-Nielsen, including some courts that have refused to vacate clause construction awards finding that the parties had agreed to class arbitration (and some that have vacated such awards). For exemplary cases, see Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 349-50 (6th Cir. 2010) (affirming district court's dismissal of motion to confirm class certification award for lack of jurisdiction); Fensterstock v. Education Finance Partners, 611 F.3d 124, 141 (2d Cir. 2010) (holding that parties did not agree to class arbitration, based in part on unconscionable class-arbitration waiver); Smith & Wollensky Rest. Group, Inc. v. Passow, No. 10-11498-EFH, 2011 U.S. Dist. LEXIS 4495, at *3-4 (D. Mass. Jan. 18, 2011) (refusing to vacate clause construction award finding that parties had agreed to class arbitration); Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 449-50 (S.D.N.Y. 2010) (memorandum order indicating that court would follow Stolt-Nielsen and vacate clause construction award permitting class arbitration); Jock v. Sterling Jewelers, Inc., No. 08 Civ. 2875 (JSR), 2010 U.S. Dist. LEXIS 80896, at *4 (S.D.N.Y. Aug. 6, 2010) (vacating clause construction award for reasons stated in prior memorandum order), and La. Health Serv. Indem. Co. v. Gambro A B, No. 05-1450, 2010 U.S. Dist. LEXIS 135579, at *22 (W.D. La. Dec. 21, 2010) (refusing to vacate clause construction award finding that parties had agreed to class arbitration).

[FN195]. For further discussion, see generally Ayres & Gertner, Filling Gaps, supra note 109, at 87; Ayres & Gertner, Strategic Contractual Inefficiency, supra note 109, at 729.

[FN196]. Ian Ayres & Robert Gertner, Majoritarian vs. Minoritarian Defaults, 51 Stan. L. Rev. 1591, 1592 (1999).

[FN197]. Id. at 1593.

[FN198]. Id. at 1596; see Francesco Parisi, Rules Versus Standards, in Encyclopedia of Public Choice 510, 510 (Charles K. Rowley & Friedrich Schneider eds., 2004) (defining rules and standards).

[FN199]. Ayres & Gertner, supra note 196 at 1602-03.

[FN200]. An additional issue we do not address here is what Professor Ayres calls “altering rules”--“the necessary and sufficient conditions for contracting around a default.” Ian Ayres, Menus Matter, 73 U. Chi. L. Rev. 3, 6 (2006). Rent-A-Center, for example, might be understood as addressing what is necessary for parties to contract around the default allocation of authority between courts and arbitrators.

[FN201]. George S. Geis, An Experiment in the Optimal Precision of Contract Default Rules, 80 Tul. L. Rev. 1109, 1110 (2006); see also Ian Ayres, Preliminary Thoughts on Optimal Tailoring of Contractual Rules, 3 S. Cal. Interdisc. L.J. 1, 1-3 (1993).

[FN202]. See Slate & Tuchmann, supra note 189, at 53 (reporting AAA class arbitration caseloads for 2003-2008).

[FN203]. See supra note 155.

[FN204]. See supra text accompanying notes 182-94.

[FN205]. Some have suggested that the decision in Stolt-Nielsen will increase the likelihood that Congress will enact the Arbitration Fairness Act. E.g., Vinson & Elkins LLP, Supreme Court Strikes Down Arbitrators'Decision Allowing Class Action Arbitration (Apr. 28, 2010), http://www.vinson-elkins.com/resources/SupremeCourtStrikesArbitratorsDecisionAl (last visited May 16, 2011); James P. Duffy IV& Ian Mahoney, Stolt-Nielsen v. AnimalFeeds International: Supreme Court Raises the Hurdle for Class Action Arbitration, May 3, 2010, http://www.dlapiper.com/stolt-nielsen-v-animalfeeds-international:supreme-court-raises-the-hurdle-for-class-action-arbitration. As a policy matter, however, even if Stolt-Nielsen is extended to consumer and employment contracts, it would at most justify a much narrower statutory change, such as a mandatory rule permitting class arbitration or the exclusion of class actions from arbitration.

[FN206]. Robert G. Bone, Who Decides? A Critical Look at Procedural Discretion, 28 Cardozo L. Rev. 1961, 1963 (2007).

[FN207]. Id. at 1965.

[FN208]. Park, Arbitration's Protean Nature, supra note 112, at 283.

[FN209]. Id. at 289.

[FN210]. Professor Bone offers five reasons why the terms of arbitration agreements should not be taken as evidence in favor of case-specific discretion in litigation: (1) even if discretion is appropriate for arbitrators, it might not be appropriate for judges; (2) parties might not include detailed provisions in their arbitration clauses because arbitrators might “follow some customary protocol, such as the procedures specified by the American Arbitration Association or industry arbitration guidelines”; (3) parties might not include detailed contractual provisions not because such provisions are inefficient, but because attempting to negotiate such provisions might interfere with making a deal at all; (4) “even in international arbitration, parties often agree on procedures after the dispute arises, especially in large-stakes arbitrations with

sophisticated counsel and skilled arbitrators"; and (5) lawyers, acting with bounded rationality, might underestimate the risk of a dispute and spend insufficient time contracting for detailed procedures that might actually be beneficial to their clients. Bone, supra note 206, at 1979 n.80. Some of these reasons overlap with the reasons we identified for why parties--even sophisticated parties drafting standard form arbitration agreements--might not include detailed provisions governing discovery and the like. See supra text accompanying notes 38-42. And other reasons, while likely true (such as a growing use of more detailed customary procedural rules such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration, see Park, Procedural Default Rules Revisited, supra note 112, at 361-62), do not support the use of negative default rules of the sort likely to result from Stolt-Nielsen.

[FN211]. See supra text accompanying note 172..

[FN212]. This tradeoff is a variation on the familiar analysis of rules versus standards. For a detailed analysis, see generally Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 560 (1992); Parisi, Rules Versus Standards, supra note 198, §§2.1-2.2. See also Schwartz & Scott, supra note 109, at 594-609 (criticizing use of default standards in modern contract law).

[FN213]. Parisi, supra note 198, §2.

[FN214]. Note that Professor Park argues for arbitration institutions to change their standard form rules, not for national legislation restricting the discretion of arbitrators. See Park, Arbitration's Protean Nature, supra note 112, at 289. In effect, he is participating in the market to make it perform better, rather than seeking a legislative change because the market is not functioning well.

[FN215]. See supra text accompanying notes 172-73.

[FN216]. E.g., International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration 3-5 (May 22, 2004), http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918; International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration 2-3 (May 29, 2010), http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC.

[FN217]. Christopher R. Drahozal, Commercial Norms, Commercial Codes, and International Commercial Arbitration, 33 Vand. J. Transnat'l L. 79, 98-110 (2000); Peter B. Rutledge, Toward a Contractual Approach for Arbitral Immunity, 39 Ga. L. Rev. 151, 161-65 (2004).

[FN218]. At this point in the paper, it is appropriate to disclose that one of us (Rutledge) served as counsel to an amicus curiae in several cases, including one pending before the Florida Supreme Court (Pendergast v. Sprint-Nextel), in which an argument along these lines was advanced. The other of us (Drahozal) provided comments on a draft of the law professors' amicus brief in Concepcion, although he was not a party to the brief.

[FN219]. See, e.g., Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683-86 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268-70, 271-72 (1995).

[FN220]. Drahozal, supra note 111, at 408-10.

[FN221]. See, e.g., Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). Counsel for Concepcion conceded as much before the Supreme Court. Transcript of Oral Argument at 39, AT&T Mobility LLC v. Concepcion, No. 09-893 (U.S. argued Nov. 9, 2010) ("[I]s the rule tantamount to a rule of non-enforceability of arbitration agreements[?]").

[FN222]. See supra note 186.

[FN223]. Thus, it is not alone enough that the court uses a generally applicable contract law defense such as unconscionability. It must apply that defense in the same way to arbitration agreements as it applies the defense to other contract provisions. For an easy example of a court applying a general contract law defense differently to arbitration clauses than to other contract clauses, see Arkansas' development of a special mutuality requirement for arbitration clauses that is not applicable to other contract provisions. Drahozal, supra note 111, at 411 n.138.

[FN224]. Recent research indicates that the litigation over the enforceability of arbitration has come to dominate the development of general principles of contract law. According to one recent study, “battles over arbitration clauses likely constitute a plurality of all contract cases.” Horton, The Shadow Terms, supra note 7, at 658; see also Aaron-Andrew P. Bruhl, The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. Rev. 1420, 1449-50 (2008). Some research suggests that litigation over the enforceability of arbitration agreements accounts for the development of most unconscionability law, a sharp change from the state of affairs twenty-five years ago. See Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L. Rev. 185, 185-189 (2004). Recent evidence suggests that this volume of litigation has begun to abate, perhaps as the doctrinal gaps are filled. See Bruhl, supra, at 1489.

[FN225]. See supra notes 177-44 and accompanying text.

[FN226]. Drahozal, supra note 111, at 422-23.

[FN227]. Questions by Justices Ginsburg and Alito seemed to suggest this possibility during oral argument in Concepcion. Transcript of Oral Argument at 40-47, AT&T Mobility LLC v. Concepcion, No. 09-893 (U.S. Nov. 9, 2010).

[FN228]. Here, it is appropriate to disclose that we both have testified in congressional hearings about the bill. Rutledge has testified against the bill. Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 95-113 (2007) (statement of Peter Rutledge), available at http:// judiciary.house.gov/hearings/pdf/Rutledge071025.pdf; The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary, 110th Cong. 7-9 (2007) (statement of Peter Rutledge), http://judiciary.senate.gov/hearings/testimony.cfm?id=3055&wit_id=6831. Drahozal testified in the context of presenting the findings of the Searle Civil Justice Institute's study on consumer arbitration. Arbitration or ‘Arbitrary’: The Misuse of Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform, 111th Cong. (2009) (statement of Christopher R. Drahozal), available at http://oversight.house.gov/images/stories/Hearings/pdfs/20090722Drahozal.pdf; Federal Arbitration Act: Is the Credit Card Industry Using it to Quash Legal Claims?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 121-38 (2009) (statement of Christopher R. Drahozal).

[FN229]. Defenders of the bill argue that they do not oppose arbitration, but merely binding pre-dispute arbitration agreements. They contend that, if arbitration really does offer comparative advantages over other forms of dispute resolution, then those advantages will remain after an actual dispute has arisen and, under the Act, parties remain free to enter into post-dispute arbitration agreements. For an argument that the promise of post-dispute arbitration is illusory, see generally Peter B. Rutledge, Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act, 9 Cardozo J. Conflict Resol. 267 (2008).

[FN230]. For discussions of the state of empirical literature on the issues surrounding the Arbitration Fairness Act, see generally Drahozal & Zyontz, supra note 88, at 847-62; Peter B. Rutledge, Arbitration Reform: What We Know and

What We Need to Know, 10 Cardozo J. Conflict Resol. 579 (2009).

[FN231]. See E. Gary Spitko, Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements, 43 U.C. Davis L. Rev. 591, 593-600 (2009).

[FN232]. A good example of this phenomenon is the debate in the 1990s over the allocation of arbitration costs. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).
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