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## CLAUSE CONSTRUCTION: A GLIMPSE INTO JUDICIAL AND ARBITRAL DECISION- MAKING

DAVID HORTON<sup>†</sup>

### ABSTRACT

*For decades, the U.S. Supreme Court has insisted that forcing a plaintiff to arbitrate—rather than allowing her to litigate—does not affect the outcome of a dispute. Recently, the Court has invoked this “parity assumption” to expand arbitral jurisdiction. Reasoning that it does not matter whether an arbitrator or a judge resolves a particular issue, the Justices have allowed arbitrators to decide important questions about the arbitral proceeding itself.*

*The parity assumption has proven impossible to test. First, cases that are arbitrated differ from those that end up in the judicial system, complicating efforts to compare outcomes from each sphere. Second, arbitral awards are rarely published and thus remain shrouded in mystery.*

*However, one important topic defies these limitations. Jurisdictions are divided over whether courts or arbitrators should perform a task known as “clause construction”—determining whether an arbitration clause that does not mention class actions permits such procedures. As a result, both judges and arbitrators have been weighing in on the same question. Moreover, because class members are entitled to notice of rulings that impact their rights, the American Arbitration Association requires arbitral clause-construction awards to be available to the public.*

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<sup>†</sup> Professor of Law and Chancellor’s Fellow, University of California, Davis, School of Law. Thanks to Andrea Cann Chandrasekher, Christopher S. Elmendorf, Shayak Sarkar, and Donna Shestowsky for helpful comments.

*For once, then, it is possible to assess how the two kinds of decisionmakers resolve the same issue.*

*This Article capitalizes on this opportunity by analyzing a dataset of 150 recent judicial and arbitral clause-construction decisions. Its logit regression analysis concludes that arbitrators are nearly 64 times more likely than judges to allow class actions. This Article then uses its findings to propose a solution to the circuit split over clause construction and to inform the broader debate over the boundaries between judicial and arbitral power.*

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## INTRODUCTION

In 2015, a prison service provider called JPay faced two similar class actions.<sup>1</sup> One accused the company of overcharging inmates and their loved ones for electronic money transfers.<sup>2</sup> The other alleged that JPay’s “video visitation” sessions—a kind of Skype for the incarcerated—were shorter than advertised.<sup>3</sup> Yet, like countless other businesses, JPay had tried to protect itself from lawsuits by placing an arbitration clause in its contract with customers.<sup>4</sup> Thus, in each case, the

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1. See Defendants’ Notice of Removal at 1–2, *JPay, Inc. v. Kobel*, No. 1:16-cv-20121-DPG (S.D. Fla. Jan. 8, 2016) [hereinafter *Kobel* Complaint]; Defendant’s Notice of Removal at 1–4, *JPay, Inc. v. Salim*, No. 1:16-cv-20107-DLG (S.D. Fla. Jan. 7, 2016) [hereinafter *Salim* Complaint].

2. See *Kobel* Complaint, *supra* note 1, at 1.

3. See *Salim* Complaint, *supra* note 1, at 1–2.

4. See *JPay, Inc. v. Kobel*, No. 16-20121-CIV-GAYLES/TURNOFF, 2017 WL 3218218, at \*1 (S.D. Fla. July 28, 2017) [hereinafter *Kobel* Order]; *Salim* Complaint, *supra* note 1, at 3.

first clash between the parties centered on whether the plaintiffs could go to court or instead needed to arbitrate.

However, what happened next was like a chess game in reverse. Bucking the conventional wisdom, both groups of *plaintiffs* invoked JPay's arbitration provision.<sup>5</sup> Although arbitration has acquired a reputation as “the place lawsuits go to die,”<sup>6</sup> the consumers filed their class actions *in* the private forum.<sup>7</sup> JPay responded by doing something equally unexpected; it tried to stop the arbitrations and remove the disputes to court.<sup>8</sup> In turn, this prompted the plaintiffs to file motions in court to compel arbitration of their own claims.<sup>9</sup>

These backward-seeming tactics are the product of a doctrinal anomaly. In the last decade, the U.S. Supreme Court has expanded the Federal Arbitration Act (“FAA”)<sup>10</sup> in two major ways. The first relates to class actions. Starting with 2011's *AT&T Mobility LLC v. Concepcion*,<sup>11</sup> the Court has instructed lower courts to uphold class-arbitration waivers in almost all circumstances, placing the burden on individuals to pursue low-value claims in numerous two-party arbitrations.<sup>12</sup> The second strand of the Court's recent FAA jurisprudence revolves around the mind-bending issue of arbitration about arbitration.<sup>13</sup> Traditionally, judges have decided matters of “substantive arbitrability” — that is, whether a dispute should be sent to arbitration because it falls within the scope of a valid arbitration clause.<sup>14</sup> However, in a line of

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5. See *Kobel* Order, *supra* note 4, at \*1; Order, *JPay, Inc. v. Salim*, No. 16-20107-CV-1434-DLG, 2016 WL 9735069, at 2 (May 24, 2016) [hereinafter *Salim* Order].

6. *Hawkins v. Region's*, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013).

7. See *Kobel* Order, *supra* note 4, at \*1; *Salim* Order, *supra* note 5, at \*3–4.

8. See *Kobel* Order, *supra* note 4, at \*1; *Salim* Order, *supra* note 5, at \*3–4.

9. See *Kobel* Order, *supra* note 4, at \*1; *Salim* Order, *supra* note 5, at \*3–4.

10. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)).

11. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

12. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (“In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (holding that the FAA preempts a California appellate court's conclusion that a class arbitration waiver did not apply to a particular dispute); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013) (extending *Concepcion* to cases involving federal statutory claims); *Concepcion*, 563 U.S. at 344 (prohibiting courts from deeming class-arbitration waivers to be unconscionable).

13. I address this phenomenon in David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363 (2018). In that piece, I flag, but do not analyze, the jurisdictional split over clause construction. See *id.* at 376 n.93.

14. See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (“[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of

cases about arbitrating arbitrability, the Court has opened the door for arbitrators to resolve any conflict about the arbitration.<sup>15</sup> As counter-intuitive as it seems, the Court has held that “parties can agree to arbitrate ‘gateway’ questions[,] . . . such as whether the[y] have agreed to arbitrate” a particular claim.<sup>16</sup>

These Supreme Court opinions are widely seen as a brutal one-two punch to the plaintiffs’ bar. According to conventional wisdom, *Concepcion* and its progeny have sounded “the death knell for consumer and employment class actions.”<sup>17</sup> As scores of policymakers, scholars, and journalists have noted, few individuals spend the time and money necessary to arbitrate small grievances.<sup>18</sup> Likewise, the Court’s

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[substantive] arbitrability’ for a court to decide.”). Unfortunately, the Court sometimes refers to issues of “substantive arbitrability” simply as issues “arbitrability,” and matters of “procedural arbitrability” as *not* involving “arbitrability.” *See, e.g., id.* at 83–84.

15. The Court announced that parties could empower the arbitrator to decide whether a dispute falls within the scope of an arbitration clause in the collective bargaining context. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960) (explaining that the party claiming arbitrability is “excluded from court determination” and “must bear the burden of a clear demonstration of that purpose”). Eventually, the Justices extended this principle to other settings. *See Rent-a-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (enforcing a provision in a freestanding arbitration agreement between an employer and an employee that delegated to the arbitrator exclusive authority “to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement”); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) (observing that parties to a commercial contract can “clearly agree[] to have the arbitrators decide (i.e., to arbitrate) the question of arbitrability”).

16. *Rent-A-Center*, 561 U.S. at 68–69.

17. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 116 (2015); *see* Aaron Blumenthal, Comment, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 701 (2015) (“The death knell of the consumer class action has sounded.”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (“All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict that companies . . . may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts . . . .”); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) (“A private entity, through contractual arbitration provisions, can now significantly reduce or even remove its substantive legal obligations by eliminating claiming.”); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1222 (2013) (“[C]iting *Concepcion*, judges are compelling arbitration of claims that are destined to fail.”); *see also* Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 118–33 (2011) (critiquing *Concepcion*).

18. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2814–15 (2015) (noting that “almost no consumers or employees ‘do’ arbitration at all”). In 2016, the Consumer Financial Protection Bureau (“CFPB”) cited these concerns to ban class-arbitration waivers in financial-services contracts. *See Arbitration Agreements*, 82 Fed. Reg. 55,500 (Nov. 22, 2017) (to be codified at 12

arbitrating-arbitrability decisions supposedly shield corporations from liability by permitting arbitrators to decide whether the plaintiff must arbitrate her complaint. After all, arbitrators bill by the hour, *and* they have a pecuniary interest in catering to the repeat-playing businesses that might choose them again.<sup>19</sup> Thus, critics speculate that arbitrators are unlikely to exempt matters from arbitration.<sup>20</sup>

However, on one vital issue, the two prongs of the Court's case law collide. Although *Concepcion* mandates that courts enforce express class-arbitration waivers, it does not govern arbitration clauses that neither allow nor prohibit aggregate proceedings.<sup>21</sup> In this common situation—when a provision is “silent” on the topic—somebody needs to engage in “clause construction” and decide whether class actions are permissible.<sup>22</sup> And here the Justices' disdain for class actions crashes headlong into their aggrandizement of arbitrators. Under the arbitrating-arbitrability opinions, there is a colorable argument that arbitrators enjoy the right to interpret the arbitration clause.<sup>23</sup> Moreover, when it comes to clause construction, arbitrators have financial incentives that favor *plaintiffs*. If an arbitrator reads a silent arbitration provision to bar class actions, she is left with a single, small-dollar claim that will likely be abandoned. But if she goes the other way, she christens a lucrative multiparty dispute.<sup>24</sup>

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C.F.R. pt. 1040). Yet, in October 2017, the Senate voted 51 to 50—with Vice President Pence breaking the tie—to repeal the CFPB's rule. See Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class Action Suits*, N.Y. TIMES (Oct. 24, 2017), [https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?\\_r=0](https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?_r=0). [<https://perma.cc/H4AV-FSJJ>].

19. See, e.g., AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES r. 13, at 21, r. 44, at 30 (2009), <https://www.adr.org/sites/default/files/Employment%20Rules.pdf> [<https://perma.cc/JS5G-6AYF>] (outlining arbitrator selection and compensation); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 685 (1996) (“An arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award.”).

20. See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 246 (2012) (“If the arbitrator decides that the arbitration agreement is unenforceable, he loses income.”); cf. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting) (reasoning that arbitrators should not be allowed to decide whether arbitration is warranted because “[t]heir compensation corresponds to the volume of arbitration they perform”).

21. See, e.g., *Oregel v. PacPizza, LLC*, 187 Cal. Rptr. 3d 436, 448 (Ct. App. 2015) (noting that “*Concepcion* [is] irrelevant” if an arbitration clause “[does] not contain a class action waiver”).

22. See, e.g., *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 116 (2d Cir. 2011) (discussing the clause-construction process).

23. See *infra* Part I.A.

24. See Charles H. Brower II, *Mind the Gap*, 2016 B.Y.U. L. REV. 1, 51–52 (2016).

This dynamic explains the bizarre maneuvering in the class actions against JPay. Both sets of plaintiffs were desperately trying to obtain an arbitrator's ruling on clause construction. Conversely, the defendant did everything in its power to obtain a decision from a judge on the matter. Ultimately, these intuitions were correct. In one lawsuit, a federal court in Florida engaged in clause construction itself, holding that the agreement precluded class actions.<sup>25</sup> Within a week, a different judge in the same Florida district passed the baton to the arbitrator,<sup>26</sup> who concluded that the agreement authorized class procedures.<sup>27</sup>

These incongruous results are part of a larger trend. The legal system has been unable to clarify whether an arbitration clause that does not mention class actions allows such procedures.<sup>28</sup> In fact, as the JPay cases illustrate, judges are now disagreeing about an even more elementary question: Should *courts* or *arbitrators* perform clause construction?

This Article uses this split in authority as an opportunity. For decades, there has been a raging debate about whether being forced to arbitrate affects the outcome of a dispute.<sup>29</sup> As noted above, some ob-

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25. See *JPay, Inc. v. Kobel*, No. 16-20121-CIV-GAYLES/TURNOFF, 2016 WL 2853537, at \*4 (S.D. Fla. May 16, 2016); *Kobel Order*, *supra* note 4, at \*5. As this Article was being edited, the Eleventh Circuit reversed the district court's decision. See *JPay, Inc. v. Kobel*, 904 F.3d 923, 931, 936 (11th Cir. 2018) (holding that "that the availability of class arbitration is . . . presumptively for the courts to decide," but that the parties had delegated the question to the arbitrator).

26. See *Salim Order*, *supra* note 5, at 4. *But see Kobel Order*, *supra* note 4, at \*5 ("This Court respectfully disagrees with, and is not bound by, the *Salim* Ruling.").

27. See Opinion, Order and Award on Clause Construction at 15–16, *Salim v. JPay, Inc.*, Case No. 01-15-005-8277 (Am. Arb. Ass'n 2016) (Hochberg, Harding & Dreier, Arbs.).

28. In fact, as this Article was being edited, the Supreme Court granted certiorari in a case in which lower courts had determined that a silent arbitration clause permitted class actions. See *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 673 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018). I address *Lamps Plus* *infra* notes 280, 287.

29. Compare *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986) (contending that "the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law"), and Paul D. Carington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 332 (arguing that enforcing arbitration clauses "weaken[s] enforcement of the national law"), with Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1353 (1997) ("[A]rbitration involves a change in the forum only—from the courts to a jointly selected neutral decisionmaker. It does not involve the waiver of substantive rights.") and Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 769 (arguing that arbitration institutions like the American Arbitration Association ("AAA") have incentives to ensure that the process is fair).

servers believe that arbitration's informal rules and paid decisionmakers tilt the scales of justice toward businesses.<sup>30</sup> Yet, as a matter of Supreme Court precedent, arbitration and litigation are equally hospitable forums for plaintiffs. Indeed, more than 30 years ago, the Court announced that “[b]y agreeing to arbitrate[,] . . . a party does not forgo [any] substantive rights.”<sup>31</sup> This view, which I call the “parity assumption,” is a pillar of contemporary arbitration law.<sup>32</sup> The Court has repeated it like a mantra,<sup>33</sup> and lower courts have cited it more than 600 times.<sup>34</sup>

The parity assumption is hard to disprove. For one, arbitration is *private* dispute resolution—a “black box[,] . . . where the proceedings are confidential and non-precedential.”<sup>35</sup> Unlike judicial opinions, which are available to the public, arbitral awards do not have to be reasoned or written.<sup>36</sup> Thus, even if one could obtain arbitration results, one could only guess at how an arbitrator arrived at a particular holding.<sup>37</sup> Compounding this problem, it is not necessarily instructive to

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30. See *supra* text accompanying notes 19–20.

31. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

32. An earlier draft of this Article used the phrase “parity principle.” However, Professor Luke P. Norris then published a thought-provoking article entitled *The Parity Principle*, 93 N.Y.U. L. REV. 249 (2018). Norris’s “parity principle” is completely different than mine: it refers to his argument that section 1, which exempts certain contracts from the FAA, reveals that Congress did not intend the statute to apply “where *wide* economic power disparities exist between parties.” *Id.* at 253 (emphasis added). To minimize confusion, I changed “parity principle” to “parity assumption.”

33. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469 (2009); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123–24 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987).

34. A Westlaw search in the “all cases” database on February 16, 2019, for “adv: arbitrat! /10 forgo /10 ‘substantive rights’” yielded 675 results.

35. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409; see also Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 422 (2011) (observing that it is notoriously difficult to “obtain[] sufficient reliable data on largely private arbitration processes”).

36. See, e.g., *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”); Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 200 (2011) (“[A]rbitrators do not always write opinions. They are not legally required to do so, and the parties may not want or need them.”). The AAA once discouraged arbitrators from memorializing awards in writing in order to insulate them from judicial review. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 857 (1961).

37. See, e.g., W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Prece-*

compare arbitration outcomes with those from the judicial system. Because complaints that are arbitrated diverge from those that are litigated, any discrepancy in win rates might actually reflect variations in the strength of the underlying cases.<sup>38</sup> For these reasons, “research into the fairness of mandatory arbitration ha[s] produced only a handful of empirical studies, and these have told us very little.”<sup>39</sup>

But clause construction is different. Because class members are entitled to notice of proceedings that impact their rights, the American Arbitration Association (“AAA”) treats clause-construction orders as *sui generis*. For one, the AAA requires arbitrators to memorialize their clause-construction reasoning in writing.<sup>40</sup> Also, rather than shielding awards from disclosure, the AAA publishes all clause-construction rulings on its website.<sup>41</sup> Moreover, these awards showcase how courts and

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*dent*, 90 N.C. L. REV. 1091, 1093 (2012) (“[W]e know very little about how arbitrators behave . . .”).

38. See *infra* Part II.A.

39. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283 (2009); see also David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1559 (2005) (observing that both “critics and advocates” of arbitration make “assertions that [are] generally devoid of empirical support”). The empirical work that does exist falls into three camps. First, some articles compare arbitration results with other arbitration results. See, e.g., Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 9 (2019) (examining whether defendants and plaintiffs’ law firms that arbitrate multiple times outperform their one-shot counterparts); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 18 (2011) (same); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 111 (2015) (same) [hereinafter Horton & Chandrasekher, *After the Revolution*]; David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457 (2016) (same); cf. Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Attorneys as Arbitrators*, 39 J. LEGAL STUD. 109, 128–40 (2010) (examining factors that influence awards in securities arbitration). Second, other scholars use awards to gain a better understanding of how arbitrators decide cases. See Weidemaier, *supra* note 37, at 1111–30 (surveying citation practices in three samples of arbitral rulings). Third, commentators have compared the results of psychological tests that were given to both judges and arbitrators. See Susan D. Franck et al., *Inside the Arbitrator’s Mind*, 66 EMORY L.J. 1115, 1166 (2017) (finding that “international arbitrators performed at least as well as, but never demonstrably worse than, judges”).

40. See AM. ARB. ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS r. 3, at 3 (2003), <https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf> [<https://perma.cc/DW8R-YTGJ>] (“[T]he arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”).

41. See AM. ARB. ASS’N, CLASS ACTION CASE DOCKET, <https://bit.ly/2GJuZgS> [<https://perma.cc/KPE9-EHDL>]. Researchers have taken advantage of the accessibility of clause-



arbitrators see the exact same issue. Indeed, as different jurisdictions—and different courts within the same jurisdiction—have splintered over *who* should interpret the arbitration clause, the task of clause construction has been, in effect, randomly dealt to judges and arbitrators across the country.

To capitalize on this rare window into the decision-making process, this Article studies 150 clause-construction orders issued by courts and arbitrators between June 1, 2010, and February 15, 2019. Its results are striking. For most judges, clause construction is simple to the point of being banal. If an arbitration clause does not explicitly permit class actions, it bans them. Indeed, just 2 of the 44 courts in my data (4.5 percent) interpreted a silent arbitration clause to authorize class claims. In sharp contrast, 58 of the 106 arbitrators (54.7 percent) smashed a champagne bottle across the hull of a class action, silent clause notwithstanding. Likewise, this Article's logit regression analysis—which estimates the effect of several variables on clause-construction rulings while holding other factors constant—reveals that the odds of class actions being allowed are 63.7 times higher simply because the issue is arbitrated.

This Article then uses this evidence to reexamine the line between judicial and arbitral power. The Court has used three factors to determine which decisionmaker should resolve issues related to the arbitration.<sup>42</sup> At various times, the Justices have considered (1) the need to streamline dispute resolution, (2) the relative expertise of courts and arbitrators, and (3) the parties' intent.<sup>43</sup> Under the parity assumption, one factor that *cannot* affect the analysis is mere conjecture “that an arbitrator will . . . be driven by an ulterior interest in keeping the case

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construction awards. See, e.g., Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1154 (2011) (examining arbitrators' reasoning in a random sample of 24 clause-construction awards); Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031 (2017) (analyzing 64 clause-construction awards to track trends in outcomes over time); Weidemaier, *supra* note 37, at 1115, 1127–28 (analyzing arbitrator citation practices in a dataset that includes 97 clause-construction awards); Alan Scott Rau, “*Gap Filling*” by Arbitrators 62–63 (The Univ. of Tex. Sch. of Law Ctr. for Glob. Energy, Int'l Arbitration and Envtl. Law, Research Paper No. 2014-03, 2014), [https://repositories.lib.utexas.edu/bitstream/handle/2152/28755/2014\\_06\\_Gap-Filling-by-Arbitrators.pdf?sequence=2](https://repositories.lib.utexas.edu/bitstream/handle/2152/28755/2014_06_Gap-Filling-by-Arbitrators.pdf?sequence=2) [<https://perma.cc/64E3-QZCF>] (criticizing arbitrators' logic in 22 clause-construction rulings).

42. See *infra* Part I.A.

43. See *id.*

in arbitration to generate fees.”<sup>44</sup> Nevertheless, the studied clause-construction rulings suggest that arbitral bias is real, not just theoretical. Thus, this Article proposes that the arbitrability equation should also consider that certain issues create opportunities for arbitrators to warp their rulings in furtherance of their financial self-interest.

This Article contains three parts. Part I provides background about clause construction. It traces the issue to the expansion of arbitration about arbitration and the Court’s use of the FAA to curtail class actions. Part II describes how I gathered and analyzed my data. It then establishes that, at least in the AAA, the only variable with a statistically significant effect on the outcome of clause construction is whether a judge or an arbitrator decides the matter. Part III uses this data to draw descriptive and normative conclusions about arbitral power.

## I. CLAUSE CONSTRUCTION

This Part describes the two hallmarks of the Supreme Court’s modern FAA jurisprudence. First, the Justices have allowed arbitrators to make pivotal decisions about the dispute-resolution process. Second, the Court has encouraged companies to use arbitration as a defense against class actions. This Part then examines clause construction—the hotly contested intersection of these trends.

### A. *Arbitration About Arbitration*

Suppose two parties have a dispute about arbitration. A plaintiff might contend that she never even assented to a contract that contains an arbitration provision. Alternatively, she might concede that she agreed to arbitrate *some* claims but assert that the arbitration clause is narrow and does not encompass *this* particular claim. Finally, the parties could disagree about whether the plaintiff’s complaint is timely or whether the defendant is barred from compelling arbitration under the doctrines of waiver, laches, or estoppel. These skirmishes raise the same vexing question: Should a *court* or an *arbitrator* resolve them? This Section explains that this issue, which is known as “arbitrability,” has long been unsettled. But although the precise contours of the black-letter law may be elusive, the general trend is not—the Court has gradually given arbitrators greater power to decide gateway questions about the arbitration itself.

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44. *Phillips v. Bestway Rental, Inc.*, No. 4:12CV48, 2013 WL 832306, at \*3 (N.D. Miss. Mar. 6, 2013), *aff’d*, 542 F. App’x 410 (5th Cir. 2013) (per curiam).

The story begins in 1925, when Congress passed the FAA.<sup>45</sup> Under the ancient ouster and revocability doctrines, courts refused to grant specific performance of an arbitration provision.<sup>46</sup> The FAA eliminated these antiarbitration principles through its centerpiece, section 2, which makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>47</sup> By doing so, the statute puts arbitration clauses “upon the same footing as other contracts.”<sup>48</sup>

In addition, the FAA allocates power between courts and arbitrators. On the front end, sections 3 and 4 task judges with ensuring that arbitration is warranted.<sup>49</sup> They require a court to be “satisfied” that a lawsuit is “referable to arbitration”<sup>50</sup> and that there is no conflict about “the making of the arbitration agreement.”<sup>51</sup> On the back end, section 10 permits courts to overrule an arbitrator’s award for extreme defects.<sup>52</sup> To preserve arbitration’s expediency, judges must confirm an arbitrator’s ruling unless it is tainted by “corruption,” “fraud,” or “partiality,”<sup>53</sup> or the arbitrators “exceeded their powers” by addressing an issue that the parties did not submit to arbitration.<sup>54</sup> This makes judicial review of arbitration awards “extremely deferential.”<sup>55</sup>

For decades, arbitration was seen as a pale substitute for litigation. Even the FAA’s draftsman, Julius Henry Cohen, cautioned that arbitration was “not the proper method for deciding points of law of major importance.”<sup>56</sup> Likewise, in *Wilko v. Swan*, the Supreme Court held that Congress did not intend for plaintiffs to resolve federal statutory

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45. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)).

46. See *Kill v. Hollister*, (1746) 95 Eng. Rep. 532, 532 (K.B.); *Vynior’s Case*, (1609) 77 Eng. Rep. 595, 597 (K.B.).

47. 9 U.S.C. § 2.

48. H.R. REP. NO. 68-96, at 1 (1924).

49. See 9 U.S.C. §§ 3–4.

50. *Id.* § 3.

51. *Id.* § 4.

52. *Id.* § 10.

53. *Id.* § 10(a)(1)–(3).

54. *Id.* § 10(a)(4).

55. *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003).

56. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (explaining that the process is “peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like”).

claims outside of the court system.<sup>57</sup> The Court reached this conclusion, in part, by reasoning that judges are superior to arbitrators:

This case requires subjective findings on the purpose and knowledge of an alleged violator of the [Securities] Act [of 1933]. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," . . . cannot be examined.<sup>58</sup>

However, as the decades passed, the lines that Congress had drawn between judges and arbitrators began to blur. One recurring problem arose from the fact that contracts usually contain broad arbitration clauses, such as: "Any controversy or claim arising out of or relating to this [a]greement [must] be settled by arbitration . . . ."<sup>59</sup> When the parties cast such a wide net, which decisionmaker has jurisdiction to rule on arbitrability? That is, who should answer the gateway question of *whether* a claim is even *subject to arbitration*? On the one hand, these are controversies or claims that flow from the contract and fall squarely within the ambit of the arbitration provision. This suggests that the parties had agreed to arbitrate arbitrability. On the other hand, it seems perverse to allow arbitrators to decide the very question of whether arbitration is proper.<sup>60</sup>

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57. *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

58. *Id.* at 435–36; *see also* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (reasoning that "the factfinding process in arbitration usually is not equivalent to judicial factfinding" and "[t]he record of the arbitration proceedings is not as complete [and] the usual rules of evidence do not apply").

59. *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 918 (1st Cir. 1960).

60. A related dilemma occurred when a party contended that the contract that included the arbitration clause (the "container contract") had been obtained through fraud or duress. Arguably, this was a question for arbitrators. Indeed, the parties had agreed to arbitrate all disputes between them, and the validity of the container contract was one such dispute. Yet, if the arbitrator voided the container contract, she "would destroy [her] . . . authority to decide anything and thus make [her] decision a nullity." *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 986 (2d Cir. 1942). The Court eventually resolved this paradox in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* by announcing the separability doctrine. 388 U.S. 395, 402 (1967). Under this principle, "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." *Id.* Separability is the legal fiction that every agreement that includes an arbitration provision is actually *two* agreements: (1) the agreement to arbitrate, and (2) the broader container contract. *See id.* This bifurcated structure permits arbitrators to strike down the container contract without simultaneously foreclosing their own ability to make such a ruling.

The Court has suggested various answers to the arbitrability puzzle. It first tackled the issue in 1964, with *John Wiley & Sons, Inc. v. Livingston*.<sup>61</sup> A union entered into a collective bargaining agreement (“CBA”) with Interscience, a publishing firm.<sup>62</sup> The CBA gave employees seniority and pension rights and also established a multistep dispute-resolution process in which the union could only initiate arbitration after it had tried to negotiate with the employer.<sup>63</sup> John Wiley & Sons acquired Interscience and refused to provide the benefits that its predecessor had granted.<sup>64</sup> The union protested by filing an arbitration, but Wiley countered that it could not be compelled to arbitrate because (1) it had never signed the CBA, and (2) alternatively, the union had failed to meet and confer before filing its grievance.<sup>65</sup>

Justice Harlan, writing for the majority, attempted to solve the problem by dividing arbitrability into two camps.<sup>66</sup> First, he explained, there are matters of *substantive* arbitrability, which judges—not arbitrators—must resolve.<sup>67</sup> Substantive arbitrability arises when a party argues that it never manifested assent to an agreement that includes an arbitration clause.<sup>68</sup> As Justice Harlan explained, because arbitration draws its legitimacy from the parties’ consent, permitting an arbitrator to determine whether a party *had consented* would be premature.<sup>69</sup> Under this rubric, Wiley’s assertion that it had not agreed to the CBA raised a matter of substantive arbitrability.<sup>70</sup> Indeed, the Court held, because “[t]he duty to arbitrate” is wholly “contractual,” a court must “determin[e] that the [CBA] does in fact create such a duty.”<sup>71</sup>

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61. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). *Wiley* did not involve the FAA; rather, it arose under section 301 of the National Labor Relations Act (“NLRA”), which governs collective bargaining agreements. See Labor Management Relations Act, Pub L. No. 80-101, § 301, 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185 (2012)).

62. *Wiley*, 376 U.S. at 544–45.

63. *Id.* at 545, 556–57.

64. *Id.* at 545.

65. *Id.* at 545, 556–57.

66. *Id.* at 547–59.

67. *Id.* at 545–47. Lower courts had previously used this term loosely to signify “the question of arbitrability of the subject matter.” *Brass & Copper Workers Fed. Labor Union No. 19322 v. Am. Brass Co.*, 172 F. Supp. 465, 467 (E.D. Wis. 1959), *aff’d*, 272 F.2d 849 (7th Cir. 1959).

68. See *Wiley*, 376 U.S. at 558.

69. *Id.* at 546–47.

70. *Id.* at 547.

71. *Id.*

Second, Justice Harlan explained that questions involving *procedural* arbitrability are for arbitrators.<sup>72</sup> Justice Harlan applied this label to Wiley's assertion that the union had failed to exhaust the steps necessary to arbitrate.<sup>73</sup> Justice Harlan reached this result by noting that the evidence necessary to resolve the arbitrability issue overlapped with the evidence that pertained to the merits of the union's complaint:

Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it. In this case, for example, the Union argues that Wiley's consistent refusal to recognize the [CBA] . . . made it "utterly futile—and a little bit ridiculous to follow the grievance steps as set forth in the contract." . . . These arguments in response to Wiley's "procedural" claim are meaningless unless set in the background of the merger and the negotiations surrounding it.<sup>74</sup>

Thus, Justice Harlan reasoned that it would be more economical to allow the arbitrator to entertain both claims.<sup>75</sup> I refer to this view—which allocates power between judges and arbitrators with an eye to abbreviating the dispute-resolution process—as the *efficiency* theory of arbitrability.

Unfortunately, *Wiley* created more questions than it answered. The Court's logic for assigning procedural arbitrability to arbitrators—that the same evidence pertained to the arbitrability of the grievance and to the actual grievance<sup>76</sup>—also applies to matters of substantive arbitrability. *Wiley* itself is a shining example of this phenomenon. The Court held that judges, not arbitrators, should assess whether the CBA's arbitration clause had survived the merger and therefore governed Wiley.<sup>77</sup> But whether the CBA had survived the merger was also the fulcrum of the underlying complaint. Indeed, if Wiley was not

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72. *Id.* at 555. The phrase "procedural arbitrability" was not new. *See* *Carey v. Gen. Elec. Co.*, 213 F. Supp. 276, 283 (S.D.N.Y. 1962), *modified*, 315 F.2d 499 (2d Cir. 1963) (defining "procedural arbitrability" to mean "objections to arbitration on the ground that the party seeking to compel it has failed to comply with the procedural requirements of the grievance and arbitration provisions").

73. *Wiley*, 376 U.S. at 556–59.

74. *Id.* at 556–57.

75. *See id.* at 558 (claiming that failing to allow the arbitrator to decide the two claims would result in a delay that "may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties . . . and contrary to the aims of national labor policy").

76. *See id.* at 556–58.

77. *See id.* at 547–48.

bound by the CBA, then it did not need to honor the concessions that Interscience had made in the agreement. Accordingly, because substantive *and* procedural arbitrability can bleed into the merits, the distinction between the two remains unclear.

Commentators have tried to fill this gap. Some assert that the division between judicial and arbitral authority should revolve around the parties' wishes.<sup>78</sup> Arguably, matters of substantive arbitrability—such as whether a party had manifested assent to the contract that included the arbitration clause—are crucial.<sup>79</sup> To minimize the risk of error, plaintiffs and defendants likely prefer to litigate these topics using traditional judicial procedures and appellate review.<sup>80</sup> Conversely, the parties likely would not object to arbitrating mere procedural issues because the stakes are lower.<sup>81</sup> I refer to the idea that issues should be assigned to judges or arbitrators “based on their importance to the parties” as the *intent* theory of arbitrability.<sup>82</sup>

Another proposal revolves around the fact that arbitrators are steeped in the norms of a particular industry.<sup>83</sup> Thus, the argument proceeds, specialist arbitrators are better than generalist judges at evaluating the interactions between the parties that underlie disputes about procedural arbitrability.<sup>84</sup> Perhaps, then, *Wiley's* rule “that procedural compliance was an issue for the arbitrator implicitly relied upon the presumed special competence of the arbitrator to make this type of decision.”<sup>85</sup> I refer to this as the *expertise* theory of arbitrability.

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78. See *The Supreme Court, 1963 Term—Government Regulation*, 78 HARV. L. REV. 266, 287 (1964) (noting that the most likely explanation for the division is that “various questions are arranged on a spectrum depending in large part on their importance to the parties”).

79. See *id.*

80. See *id.*

81. See *id.* (“The procedural issue can be assigned to an arbitrator because it would seem a less serious imposition . . . to arbitrate when procedural prerequisites have not been met than to compel arbitration of an issue that he asserts he never agreed to arbitrate at all.”).

82. See *id.*

83. See, e.g., Alan Schwartz, Comment, *Procedural Arbitrability Under Section 301 of the LMRA*, 73 YALE L.J. 1459, 1468–71 (1964).

84. See *Phila. Dress Joint Bd. of the Int'l Ladies' Garment Workers' Union v. Sidele Fashions, Inc.*, 187 F. Supp. 97, 100 (E.D. Pa. 1960) (“[T]he grievance procedure concerns the everyday relationships of management and labor and is part of the contract which would benefit from interpretation by the arbitrator, who has specialized knowledge in the field.”).

85. Schwartz, *supra* note 83, at 1468; see also *Carey v. Gen. Elec. Co.*, 213 F. Supp. 276, 284 (S.D.N.Y. 1962), *modified*, 315 F.2d 499 (2d Cir. 1963) (observing that “judges should defer to arbitrators on matters over which the latter possess special competence”); Note, *Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability*, 70 YALE L.J. 611, 618 (1961) (arguing that the line between substantive and procedural arbitrability should take into account the fact that “by virtue of his acquaintance with the industry and shop practices

The conflict between these views came to the fore with “scope arbitrability”—the question whether an arbitration clause is broad enough to cover a particular claim.<sup>86</sup> At first blush, scope arbitrability seems to belong to the substantive arbitrability family. Indeed, there is little difference between objecting, “I never agreed to arbitrate *any* cause of action,” and contending, “I never agreed to arbitrate *this* cause of action.”<sup>87</sup> Yet, there are also powerful arguments that arbitrators should interpret the agreement to arbitrate. For one, *Wiley’s* efficiency theory suggests that disputes over the meaning of the arbitration clause are matters of procedural arbitrability because they usually overlap with the underlying merits. For example, in breach of contract cases, the parties’ negotiations shed light on the arbitrability of the merits and on the merits themselves.<sup>88</sup> Similarly, the expertise rationale fits questions of scope arbitrability like a glove. Arbitrators are nothing less than “the parties’ officially designated ‘reader’ of the contract.”<sup>89</sup> One of their greatest assets is their “familiarity with the vocabulary and customs of the industry”—skills that come to the fore when there is conflict over the meaning of the agreement.<sup>90</sup>

Because scope arbitrability has a foot in both worlds, it is a hybrid. Like matters of substantive arbitrability, it is generally “an issue for judicial determination.”<sup>91</sup> However, the Court cast a judge’s jurisdiction over these issues as a mere presumption that the parties could override by “clearly and unmistakably” permitting an arbitrator to de-

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constituting the environment in which the collective agreement was drawn up, the arbitrator is better qualified to settle disputes arising under the agreement”).

86. *Consol. Rail Corp. v. Metro. Transp. Auth.*, No. 95 Civ. 2142 (LAP), 1996 WL 137587, at \*8 (S.D.N.Y. Mar. 22, 1996).

87. Cf. George Bermann & Alan Scott Rau, *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469, 475 (2016) (“[I]t is one thing to say, ‘I never agreed to arbitrate,’ and it is another to say, ‘Well, I did agree to arbitrate, but I didn’t agree to arbitrate *that*.’”).

88. See Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1509 (1959) (“The evidence bearing upon questions of arbitrability is often relevant to the merits.”).

89. *Boise Cascade Corp. v. United Steelworkers of Am., Local Union No. 7001*, 588 F.2d 127, 128 (5th Cir. 1979) (quoting Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977)).

90. Recent Case, *Arbitration and Award—Arbitrators and Proceedings—By Considering Trade Usage Arbitrator Exceeded Authority to Interpret Contract Which Reviewing Court Finds Unambiguous*, 63 HARV. L. REV. 347, 348 (1949).

91. *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).



cide whether a lawsuit falls within the ambit of the agreement to arbitrate.<sup>92</sup>

In the 1980s, the lack of guidance from the Court about arbitrability became a pressing problem. In a series of controversial opinions, the Court expanded the FAA.<sup>93</sup> For example, the Court overruled *Wilko*'s prohibition on the arbitration of federal statutory claims and began to order plaintiffs to vindicate important rights outside of the judicial system.<sup>94</sup> In doing so, the Court announced the parity assumption, decreeing that the choice between arbitration and litigation does not affect the result of a case:

By 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. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>95</sup>

The parity assumption operates as a force field around arbitration agreements. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>96</sup> the plaintiff sued his former employer, a securities firm, for age discrimination.<sup>97</sup> He argued that he could not receive a fair hearing because a New York Stock Exchange rule required that any arbitrators used by the firm be affiliated with the securities industry.<sup>98</sup> The Court

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92. *Id.*; see also *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960) (“Where the assertion . . . is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, . . . the claimant must bear the burden of a clear demonstration of that purpose.”). In addition, lower courts carved out a unique exception to scope arbitrability. Even when the “clear and unmistakable” test was met, some judges refused to allow arbitrators to exercise jurisdiction when a “claim of [scope] arbitrability [was] wholly groundless.” *McCarroll v. L.A. Cty. Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957). However, the Court recently held that the wholly groundless exception violates the FAA. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019); see also *infra* notes 323, 339.

93. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995) (holding that the FAA applies to the maximum extent permissible under Congress’s Commerce Clause authority); *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (holding that the FAA governs in state court and preempts state law).

94. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (“The Court’s characterization of the arbitration process in *Wilko* is pervaded by . . . ‘the old judicial hostility to arbitration.’” (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942))).

95. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

96. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

97. *Id.* at 23–24.

98. Brief on the Merits for Petitioner at 16, *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18, 1990 WL 10008999, at \*16 (U.S. Nov. 15, 1990) (“A panel of industry arbitrators means

disagreed with the plaintiff, refusing to “presum[e] that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.”<sup>99</sup> Similarly, the parity assumption led the Court to hold that the FAA preempts any state rule that operates from the logic that arbitration is inferior to litigation. For example, California exempted workers with wage disputes from arbitration,<sup>100</sup> and Montana required arbitration clauses to be conspicuous.<sup>101</sup> The FAA overrides these laws because they “singl[ed] out arbitration . . . for suspect status.”<sup>102</sup>

This alleged equivalence between arbitration and litigation has provoked fierce debate. Academics object that the Court made a bold empirical claim with no evidence to support it.<sup>103</sup> Because “service as an arbitrator requires no legal training,”<sup>104</sup> they speculate that “arbitrators may be ‘wholly unqualified to decide legal issues.’”<sup>105</sup> Finally, they argue that arbitration is slanted toward the powerful enterprises that routinely use it. Unlike judges, arbitrators bill by the hour, which means that their livelihoods depend on appeasing the frequently arbitrating businesses that might select or veto them in the future.<sup>106</sup> But

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that a discrimination claimant is not assured an unbiased hearing.”).

99. *Gilmer*, 500 U.S. at 30 (quoting *Mitsubishi*, 473 U.S. at 634).

100. See CAL. LAB. CODE § 229 (2018), *invalidated by* *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

101. See MONT. CODE ANN. § 27-5-114(4) (2017), *invalidated by* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

102. *Casarotto*, 517 U.S. at 687.

103. See, e.g., Sternlight, *supra* note 19, at 673 (“[T]he Court has not based th[is] assertion[] on any empirical data. Rather, the Court has simply announced its own opinion that arbitrators are as capable as judges and thereby shifted the burden to a party seeking to demonstrate the inferiority of arbitration.”).

104. Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 844 (2003).

105. *Carrington & Haagen*, *supra* note 29, at 344–45 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J. dissenting)).

106. See, e.g., 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, 60–61 (“[A]rbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a ‘track record’ of decisions that corporate repeat-users will view approvingly.”); Sternlight, *supra* note 19, at 685 (“[A]rbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business.”).

arbitration's proponents have counterpunched. They defend arbitrators, noting that they are often "retired judges or retired longstanding practitioners with a deep understanding of . . . [the] law."<sup>107</sup>

Meanwhile, arbitration has spread throughout the economy, making the boundary between judges and arbitrators a kind of demilitarized zone. Companies added arbitration clauses to contracts for goods, services, employment, and medical care.<sup>108</sup> Some went further by slashing remedies<sup>109</sup> and shifting costs to plaintiffs.<sup>110</sup> Judges pushed back by repeatedly striking down one-sided arbitration clauses under the contract law defense of unconscionability.<sup>111</sup> They were able to do so because unconscionability—which centers on whether a party's apparent "agreement" to fine print is authentic—is considered a matter of substantive arbitrability.<sup>112</sup>

However, in 1995, the Court opened the door for companies to end-run this layer of judicial review in *First Options of Chicago, Inc. v. Kaplan*.<sup>113</sup> Manuel Kaplan owned a firm called MKI.<sup>114</sup> Manuel, along with his wife and MKI, entered into four contracts with First Options.<sup>115</sup> Only one contract featured an arbitration clause, and it had been signed by MKI, but not by the Kaplans.<sup>116</sup> First Options initiated arbitration against the Kaplans as individuals and against MKI.<sup>117</sup> MKI

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107. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 29 (2003); see also John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 245 (1986) ("There is no good reason that lawyers with antitrust expertise, retired judges, industrial organization economists, or others with relevant backgrounds could not be used as arbitrators in cases involving antitrust claims.").

108. See, e.g., Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008) (noting that arbitration practices grew significantly in the 1980s).

109. See, e.g., *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 143 (Ct. App. 1997).

110. See, e.g., *Faber v. Menard, Inc.*, 367 F.3d 1048, 1051 (8th Cir. 2004).

111. See, e.g., David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012).

112. See *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 183 (3d Cir. 2010) ("This is a question of [substantive] arbitrability for the court to resolve . . ."); *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 609, 613–14 (D.S.C. 1998), *aff'd and remanded*, 173 F.3d 933 (4th Cir. 1999); *Wiley v. Advance Am.*, No. 3:07–3533–TLW–TER, 2008 WL 4179652, at \*10 (D.S.C. Sept. 5, 2008) ("Whether the agreements to arbitrate are unconscionable . . . are issues of substantive arbitrability . . .").

113. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

114. See *id.* at 940.

115. See *id.*

116. See *id.*

117. See *id.*

agreed to arbitrate, but the Kaplans argued to the arbitrators that they had never agreed to arbitrate any dispute with First Options.<sup>118</sup> The arbitrators rejected the Kaplans's objections to their jurisdiction and then found for First Options on the merits.<sup>119</sup>

The Court granted certiorari to clarify the standard that courts should apply when reviewing an arbitrator's determination that a dispute is arbitrable.<sup>120</sup> In a unanimous decision written by Justice Breyer, the Court held that the answer to this question hinges on the parties' intent.<sup>121</sup> If the parties "agree[d] to submit the arbitrability question itself to arbitration," then a judge should give the arbitrators' resolution of that issue the same broad deference given to arbitral awards on the merits under section 10 of the FAA.<sup>122</sup> Conversely, if "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did *not* submit to arbitration, namely, independently."<sup>123</sup>

The Court then turned its attention to the next step in the analysis—how courts should decide whether the parties intended to arbitrate the very question of whether they have agreed to arbitrate the merits of a complaint.<sup>124</sup> Citing its previous decisions about scope arbitrability, the Court announced that judges "should *not* assume that the parties agreed to arbitrate [substantive] arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."<sup>125</sup> The Court reasoned that this presumption *against* finding an intent to arbitrate matters about arbitration itself stems from the fact that arbitrating arbitrability "is rather arcane."<sup>126</sup> Indeed, "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers."<sup>127</sup> Finally, the Court applied the clear-and-unmistakable standard to the facts of the case. It held that First Options had not demonstrated that the Kaplans had unequivocally agreed to arbitrate the issue of whether they had agreed to arbitrate the merits

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118. *See id.* at 941.

119. *See id.*

120. *See id.* at 942.

121. *See id.* at 943.

122. *See id.*

123. *See id.* (emphasis added).

124. *See id.* at 944.

125. *Id.* (emphasis added) (citation omitted).

126. *Id.* at 945.

127. *Id.*

of the lawsuit.<sup>128</sup> Indeed, only MKI—not the Kaplans in their individual capacities—had even signed a contract that included an arbitration provision.<sup>129</sup> Also, although the Kaplans had appeared in the arbitration, they did so for one purpose only: to vigorously protest the arbitrators’ assertion of power over them.<sup>130</sup>

*First Options* is notable for two reasons. For one, it retreated from *Wiley’s* efficiency theory of arbitrability. Indeed, the Court did not ask whether the arbitrability issue and the underlying complaint involved the same facts. Instead, conferring substantive arbitrability to courts was justified on the grounds that arbitrating whether a party agreed to arbitrate a claim would “force . . . [the party] to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.”<sup>131</sup> Thus, *First Options* suggests that the parties’ expectations should be paramount in distinguishing substantive and procedural arbitrability. As such, it embraced the intent theory of arbitrability.<sup>132</sup>

Even more importantly, *First Options* extended the clear-and-unmistakable principle from the context of scope arbitrability to *all* questions of substantive arbitrability. The rule once only governed disputes about the *coverage* of the arbitration clause.<sup>133</sup> But now, a carefully drafted contract could ask arbitrators to decide the very question of whether the parties had agreed to arbitrate the merits of the case.

Companies saw an opportunity after *First Options* to cut courts out of the loop. Fed up with what they saw as stifling judicial regulation, they began to use “delegation clauses” to allow arbitrators to resolve any dispute relating to the arbitration.<sup>134</sup> Initially, most courts refused to permit arbitrators to decide whether the agreement to arbitrate the merits of the lawsuit was unconscionable. For example, in *Ontiveros v. DHL Express (USA), Inc.*,<sup>135</sup> the California Court of Appeals found that the delegation clause *itself* is unconscionable under those circum-

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128. *See id.* at 946.

129. *See id.*

130. *See id.*

131. *Id.* at 945.

132. *See supra* text accompanying notes 78–82.

133. *See supra* text accompanying notes 86–92.

134. *See Horton, supra* note 13, at 393.

135. *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471 (Ct. App. 2008), *abrogated* by *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621 (Ct. App. 2014), *and* *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241 (Ct. App. 2014).

stances, reasoning that “the arbitrator has a unique self-interest in deciding that a dispute is arbitrable.”<sup>136</sup> Likewise, a federal district court in Washington held that delegation clauses are “contrary to fundamental notions of fairness and basic principles of contract formation.”<sup>137</sup>

However, in 2010, the Court threw its weight behind delegation clauses in *Rent-A-Center, West, Inc. v. Jackson*.<sup>138</sup> Rent-A-Center, a rent-to-own company, required its employees to sign an arbitration agreement that gives an arbitrator the “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [arbitration] Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”<sup>139</sup> Antonio Jackson, a former Rent-A-Center employee, sued the business for race discrimination.<sup>140</sup> When Rent-A-Center moved to compel arbitration, Jackson argued that the arbitration clause was unconscionable.<sup>141</sup> The Ninth Circuit held that Jackson could pursue his unconscionability theory in federal district court, rather than through arbitration, because any arbitration clause that might be unconscionable cannot pass the clear-and-unmistakable test from *First Options*.<sup>142</sup> According to the appellate panel, this was because an allegation of unconscionability translates into a claim that a party “did not meaningfully assent to the [a]greement.”<sup>143</sup>

The Supreme Court reversed.<sup>144</sup> Justice Scalia’s majority opinion began by describing delegation clauses in a new way. Recall that section 2 of the FAA states that “[a] written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable.”<sup>145</sup> The Court held that a delegation clause is its own “written [arbitration] provision” within the meaning of the statute:

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. . . . An agreement to arbitrate

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136. *Id.* at 481.

137. *Luna v. Household Fin. Corp.* III, 236 F. Supp. 2d 1166, 1174 (W.D. Wash. 2002).

138. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

139. Mutual Agreement to Arbitrate Claims at 2–3, *Jackson v. Rent-A-Center, W., Inc.*, No. 3:07-cv-00050-LRH-RAM, 2007 WL 7140327 (D. Nev. Mar. 14, 2007).

140. *Jackson v. Rent-A-Center, W., Inc.*, 581 F.3d 912, 914 (9th Cir. 2009).

141. Opposition to Motion to Compel Arbitration and for Attorney Fees, *Jackson v. Rent-A-Center, W., Inc.*, No. CV07–00050 LRH (RAM), 2007 WL 7031087 (D. Nev. Mar. 20, 2007).

142. *Rent-A-Center*, 581 F.3d 912 at 917.

143. *Id.*

144. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–70 (2010).

145. 9 U.S.C. § 2 (2012).

a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.<sup>146</sup>

By deeming delegation clauses to be industrial-strength arbitration clauses, *Rent-A-Center* extended the parity assumption from arbitration about the *merits* of a lawsuit to arbitration about *arbitration*.<sup>147</sup> Under *Rent-A-Center*, no rule can be “based on the notion that arbitration is inferior to litigation in court”<sup>148</sup>—even if it merely allocates jurisdiction between judges and arbitrators to decide whether arbitration is warranted. For example, as noted, before *Rent-A-Center*, several courts did not allow arbitrators to decide unconscionability challenges because of their “self-interest in deciding that a dispute is arbitrable.”<sup>149</sup> After *Rent-A-Center*, these same courts have reluctantly acknowledged that their previous rulings “discriminate[] against arbitration, putting agreements to arbitrate on a lesser footing than agreements to select any judicial forum for dispute resolution.”<sup>150</sup> Thus, they have “reject[ed] the argument, however practical it may be, that an arbitrator will be unable to determine the question of arbitrability because he or she may potentially be driven by an ulterior interest in keeping the case in arbitration to generate fees.”<sup>151</sup>

In sum, although the test for distinguishing matters of substantive and procedural arbitrability has long been obscure, the Court has gradually given arbitrators more power. At the same time, arbitration clauses have become common in consumer and employment contracts, partially privatizing the civil justice system. Accordingly, as I discuss next, the tug of war between courts and arbitrators has now spread into one of the most divisive areas in American civil justice—the relationship between the FAA and class actions.

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146. *Rent-A-Center*, 561 U.S. at 68–70 (citations omitted).

147. See Horton, *supra* note 13, at 373–76 (criticizing this maneuver).

148. THI of N.M. at Hobbs Ctr., LLC v. Patton, 741 F.3d 1162, 1165 (10th Cir. 2014).

149. Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 481 (Ct. App. 2008), *abrogated by* Tiri v. Lucky Chances, Inc., 171 Cal. Rptr. 3d 621 (Ct. App. 2014) and Malone v. Superior Court, 173 Cal. Rptr. 3d 241 (Ct. App. 2014); see also *supra* text accompanying notes 138–39.

150. *Malone*, 173 Cal. Rptr. at 255.

151. Phillips v. Bestway Rental, Inc., No. 4:12CV48, 2013 WL 832306, at \*3 (N.D. Miss. Mar. 6, 2013), *aff'd*, 542 F. App'x 410 (5th Cir. 2013) (per curiam); accord Tiri, 171 Cal. Rptr. 3d at 635 (reasoning that fairness concerns over outcome-interested arbitrators would ultimately lead to the conclusion “that delegation clauses in employment arbitration agreements are categorically unenforceable”).

*B. Arbitration About Class Actions*

Recently, in *AT&T Mobility LLC v. Concepcion*,<sup>152</sup> *American Express Co. v. Italian Colors Restaurant*,<sup>153</sup> and *Epic Systems Corp. v. Lewis*,<sup>154</sup> the Court made class-arbitration waivers enforceable in almost all circumstances. These opinions have inspired an ongoing policy debate.<sup>155</sup> From a doctrinal perspective, though, their holdings are “both broad and clear”: no court can “impose class arbitration despite a contractual agreement for individualized arbitration.”<sup>156</sup> Yet, *Concepcion*, *Italian Colors*, and *Epic Systems* only govern *express* class-arbitration waivers. In a closely related area—where an arbitration clause does not mention class actions—the law is a tangled mess. As this Section explains, jurisdictions disagree over whether judges or arbitrators should decide if a silent arbitration provision permits class actions.

In the 1990s, most courts held that unless a contract affirmatively authorized class arbitration—which, of course, none did—plaintiffs needed to arbitrate on an individual basis.<sup>157</sup> As the Seventh Circuit explained, the FAA mandates that judges enforce arbitration clauses “in accordance with the[ir] terms.”<sup>158</sup> Thus, it “forbids . . . class arbitration where the parties’ arbitration agreement is silent on the matter.”<sup>159</sup>

But matters became far more complex in 2003, when the Court decided *Green Tree Financial Corp. v. Bazzle*.<sup>160</sup> Green Tree’s loan agreement mandated that “[a]ll disputes, claims, or controversies arising from or relating to this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.”<sup>161</sup>

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152. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

153. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

154. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

155. *See supra* text accompanying notes 17–18.

156. *Litman v. Cellco P’ship*, 655 F.3d 225, 231 (3d Cir. 2011).

157. *See* *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1034 (S.D. Miss. 2000); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); *Gammara v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993); *Med. Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998) (“[T]o require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration.”). *But see* *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998) (allowing classwide arbitration); *Dickler v. Shearson Lehman Hutton, Inc.* 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (same).

158. *Champ*, 55 F.3d at 274 (quoting 9 U.S.C. § 4 (2012)).

159. *Id.* at 275.

160. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

161. *Id.* at 448 (emphasis and citation omitted).



Two groups of plaintiffs filed class actions against Green Tree for violating a state consumer protection statute.<sup>162</sup> An arbitrator awarded one class \$10,935,000 and the other \$9,200,000.<sup>163</sup> Green Tree appealed, but the South Carolina Supreme Court held that class arbitration was permissible because the contracts did not expressly prohibit such procedures.<sup>164</sup> The Court granted certiorari to consider whether the FAA “prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.”<sup>165</sup>

The result was a highly fractured plurality opinion that did not break along classic ideological lines. Justice Breyer, joined by Justices Scalia, Souter, and Ginsburg, held that the arbitrator—not the state trial court—should decide whether class arbitration is authorized.<sup>166</sup> Justice Breyer rested this conclusion entirely on the expertise theory of arbitrability, reasoning that arbitrators are well situated to interpret the arbitration clause:

The question here . . . concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. . . . Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.<sup>167</sup>

Because the arbitrator had never formally interpreted the arbitration clause, Justice Breyer remanded the cases to allow the parties to “obtain[] the arbitration decision that their contracts foresee.”<sup>168</sup>

Justice Stevens joined the judgment but wrote separately.<sup>169</sup> As he saw it, “[t]here is nothing in the [FAA] that precludes” a finding that a silent arbitration clause allows class actions.<sup>170</sup> He conceded that “[a]rguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator, rather than the

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162. *Id.* at 448–49.

163. *Id.* at 449.

164. *Id.* at 450.

165. Brief of Petitioner at \*i, *Green Tree Fin. Corp. v. Bazzle*, No. 02-634, 2003 WL 721716 (Feb. 24, 2003).

166. *See Bazzle*, 539 U.S. at 454.

167. *Id.* at 452–53 (emphasis and citation omitted).

168. *Id.* at 453.

169. *Id.* at 454–55 (Stevens, J., concurring in the judgment and dissenting in part).

170. *Id.*

court.”<sup>171</sup> Nevertheless, “[b]ecause the decision to conduct a class-action arbitration was correct as a matter of law,” he would have preferred to affirm the award rather than remand to the arbitrator.<sup>172</sup>

In dissent, Chief Justice Rehnquist, joined by Justices O’Connor and Kennedy, noted that the plurality had moved the goalposts.<sup>173</sup> Chief Justice Rehnquist reasoned that *First Options* had established that the distinction between substantive and procedural arbitrability hinges on the significance of the disputed issue to the parties, not on the comparative competence of courts or arbitrators.<sup>174</sup> Because he believed that few issues are more consequential than whether a case can proceed as a class action, Chief Justice Rehnquist would have classified clause construction as a matter of substantive arbitrability for judges.<sup>175</sup> Moreover, Chief Justice Rehnquist accused the South Carolina Supreme Court of misunderstanding the contract.<sup>176</sup> Noting that the agreements mentioned the use of “one arbitrator selected *by us* with the consent of *you*,”<sup>177</sup> Chief Justice Rehnquist opined that class-wide arbitration denied Green Tree its “contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members.”<sup>178</sup>

*Bazze* seemed to signal the dawn of the class-arbitration era. The plurality and Justice Stevens only disagreed about whether to remand the case, not about the overarching law.<sup>179</sup> As a result, there were five votes for two related propositions: (1) class arbitration is a viable method of dispute resolution, and (2) if an arbitration clause says nothing about class actions, its interpretation is a matter of procedural arbitrability for arbitrators.<sup>180</sup> Thus, shortly after the case came down, the

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171. *Id.* at 455.

172. *Id.*

173. *See id.* at 455–57 (Rehnquist, J., dissenting).

174. *See id.* at 456–57.

175. *See id.*

176. *See id.* at 455.

177. *Id.* at 458 (emphasis added) (citation omitted).

178. *Id.* at 459. Justice Thomas also dissented to reassert his longstanding view that the FAA does not apply in state courts. *See id.* at 460 (Thomas, J., dissenting).

179. *See supra* text accompanying notes 166–71.

180. *See* Joshua S. Lipshutz, Note, *The Court’s Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1702 (2005) (“[W]hether an arbitration agreement prohibits (or is silent on) class arbitration by its terms is a procedural gateway issue to be decided by the arbitrator.”).

AAA announced that it would administer class arbitrations.<sup>181</sup> Tracking *Bazzle*, the institution mandated that an arbitrator decide in a “clause construction award” whether a silent arbitration clause permitted class claims.<sup>182</sup> Because class actions bind absent parties who are entitled to notice of proceedings that impact their rights, the AAA established rigid rules for clause-construction awards.<sup>183</sup> Rather than permitting them to be unwritten and confidential, the AAA directed arbitrators to explain their reasoning and publish their holdings on its website.<sup>184</sup> According to data released by the company, its arbitrators issued 135 clause-construction awards between 2004 and 2009, 95 of which (70 percent) held that the contract involved did permit class arbitration.<sup>185</sup>

But in 2010, the winds shifted with *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>186</sup> Stolt-Nielsen, a shipping company, entered into a maritime contract with AnimalFeeds, one of its customers.<sup>187</sup> The agreement required “[a]ny dispute arising from [its] making, performance or termination” to be arbitrated.<sup>188</sup> After the Department of Justice discovered that Stolt-Nielsen had been illegally fixing prices, AnimalFeeds filed an antitrust class action against the firm.<sup>189</sup> The parties agreed to submit clause construction to a three-arbitrator panel.<sup>190</sup> In its brief, AnimalFeeds contended that class arbitration was permissible for two main reasons: “(a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle* [and] (b) the clause should be construed to permit

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181. See generally AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS *supra*, note 40. JAMS followed suit. See generally JAMS, JAMS CLASS ACTION PROCEDURES, <https://www.jamsadr.com/rules-class-action-procedures/>. [<https://perma.cc/NZQ8-FZVE>].

182. AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, *supra* note 40, r. 3, at 3.

183. See Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1768–78 (2006).

184. AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, *supra* note 40, r. 3, at 3; *id.* r. 9, at 7 (“The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations.”).

185. See Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 22, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2896309. Another 33 (24 percent) involved stipulations that class arbitration was allowed. *Id.*

186. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

187. *Id.* at 666.

188. *Id.* at 667.

189. *Id.*

190. *Id.* at 668.

class arbitration as a matter of public policy.”<sup>191</sup> At the hearing, AnimalFeeds’ counsel elaborated on the first point, stating that “the parties agree that when a contract is silent on an issue there’s been no agreement that has been reached on that issue, [and] therefore there has been no agreement to bar class arbitrations.”<sup>192</sup>

The panel held that the agreement permitted class claims.<sup>193</sup> The panel began by noting that most arbitrators in previous cases had interpreted silent arbitration provisions to authorize class actions.<sup>194</sup> In addition, the panel observed that the awards “rel[ie]d on the same type of broad wording” as could be found in the contract’s arbitration clause.<sup>195</sup> The award did not mention public policy, although during oral argument, one arbitrator expressed concern about whether numerous individual arbitrations are an adequate substitute for the class device.<sup>196</sup>

The case then wound its way up to the Court, which took the extraordinary step of reversing the panel’s decision.<sup>197</sup> Justice Alito’s majority opinion began by acknowledging that courts rarely overrule arbitrators.<sup>198</sup> Nevertheless, the Court held that the panel had exceeded its powers under section 10 of the FAA by “impos[ing] its own view of sound policy regarding class arbitration.”<sup>199</sup> Recall that AnimalFeeds’ lawyer had contended before the arbitral tribunal that there was “no agreement” about the permissibility of class actions, and thus that the contract *did not ban them*.<sup>200</sup> Seizing on the first part of this argument and ignoring the second, the Court reasoned that AnimalFeeds had

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191. *Id.* at 672. (emphasis and citation omitted). AnimalFeeds also claimed that “the clause would be unconscionable and unenforceable if it forbade class arbitration.” *Id.* The arbitrators did not address this issue. *Id.*

192. Joint Appendix at 77a, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2777896.

193. *See Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006), *rev’d*, 548 F.3d 85 (2d Cir. 2008), *rev’d and remanded*, 559 U.S. 662 (2010).

194. *See Stolt-Nielsen*, 559 U.S. at 669.

195. *See Reply Brief for Respondent-Appellant* at 12, *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008) (No. 06-3474-cv), 2006 WL 6837690.

196. *Stolt-Nielsen*, 559 U.S. at 675 n.7.

197. *Id.* at 672.

198. *See id.* at 671.

199. *Id.* at 672.

200. *See supra* note 192 and accompanying text.

conceded that “there was ‘no agreement’” *either* to permit *or* to preclude class arbitration.<sup>201</sup> In turn, because there was no shared understanding on the topic, the panel *could not have* grounded its ruling in the language of the contract.<sup>202</sup> Instead, it must have “rested its decision on AnimalFeeds’ public policy argument.”<sup>203</sup> According to the Court, this violated the axiom that “the task of an arbitrator is to interpret and enforce a contract, not to make public policy.”<sup>204</sup>

The Court then explained why the award could not be defended on the ground that the arbitrators had applied a default rule that authorizes class arbitration.<sup>205</sup> Namely, there is a great chasm between class arbitration and traditional two-party arbitration:

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.<sup>206</sup>

Therefore, the Court announced that “[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.”<sup>207</sup>

*Stolt-Nielsen* caused enormous confusion about judicial review of arbitral clause-construction awards. The opinion lent itself to two diametrically opposed readings. On the one hand, it is filled with rhetoric

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201. *Stolt-Nielsen*, 559 U.S. at 687.

202. *Id.* at 676.

203. *Id.* at 672–73.

204. *Id.* at 672.

205. *Id.* at 687.

206. *Id.* at 686.

207. *Id.* at 685. *Stolt-Nielsen* also undercut the conventional view that *Bazze* held that clause construction was a matter of procedural arbitrability. *See id.* at 679–80. The Court focused on the fifth vote in *Bazze* for that perspective: Justice Stevens’s concurrence and dissent. *See id.* at 679. As Justice Alito observed in *Stolt-Nielsen*, Justice Stevens “did not take a definitive position on the [clause-construction] question [in *Bazze*], stating only that ‘[a]rguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator.’” *Id.* (quoting *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 455 (2003) (Stevens, J., concurring in the judgment and dissenting in part)); *see also supra* notes 169–72 and accompanying text. However, *Stolt-Nielsen* did not involve the question whether courts or arbitrators should presumptively engage in clause construction because the parties had expressly assigned the task to the arbitrators. 559 U.S. at 680; *supra* text accompanying note 188.

about the incompatibility of class actions and arbitration.<sup>208</sup> This suggests that class arbitration is so aberrant that the only way to authorize it is to include a provision that says something like “class procedures are permissible.”<sup>209</sup> Reinforcing this view, the Court appeared to dispose of the case by applying a clear statement rule. It held that the contract’s expansive arbitration clause—which covered “[a]ny dispute arising from [its] making, performance or termination”<sup>210</sup>—was not a sufficient textual hook to justify the arbitral award.<sup>211</sup> As a result, some courts have asserted that *Stolt-Nielsen* invalidates any arbitral award that interpreted a silent contract to permit class claims.<sup>212</sup>

But seen through another prism, *Stolt-Nielsen* does not extend beyond its unusual facts. Arguably, the case hinged on AnimalFeeds’ admission that the contract was silent in the sense that “there was ‘no agreement’” with respect to class arbitration.<sup>213</sup> Indeed, the Court explained that this concession made it *impossible* for the arbitrators to conclude that the parties had consented to class procedures. As Justice Alito put it, the panel’s efforts to discern the parties’ intent from the language of the clause were irrelevant because there was “no room for

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208. See *supra* notes 205–06 and accompanying text.

209. See *Stolt-Nielsen*, 559 U.S. at 685–87 (reasoning that class arbitration is slower and more formal than two-party arbitration).

210. *Id.* at 667.

211. See *id.* at 685 (reasoning that an “agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate”).

212. See, e.g., *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 642–43 (5th Cir. 2012), *abrogated by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) (holding that an arbitrator exceeded his powers by interpreting an arbitration provision that governed “any dispute” and allowed “any remedy” to authorize class claims); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 405 (S.D.N.Y. 2011), *rev’d on other grounds sub nom. Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013) (holding that the mere existence of an arbitration clause “operates as an implied waiver of the plaintiff’s class claims”); *Goodale v. George S. May Int’l Co.*, No. 10 C 5733, 2011 WL 1337349, at \*2 (N.D. Ill. Apr. 5, 2011) (holding that *Stolt-Nielsen* “squarely foreclose[d] the possibility that the class claims are arbitrable”); cf. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011), *rev’d on other grounds*, 726 F.3d 290 (2d Cir. 2013) (permitting class claims to proceed in court because “[i]n accordance with *Stolt-Nielsen*, class arbitration may not be imposed on parties whose arbitration agreements are silent on the permissibility of class proceedings”); *Drahozal & Rutledge*, *supra* note 41, at 1155 (“A general arbitration clause, according to the *Stolt-Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration.”); Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration in Light of Stolt-Nielsen*, 23 LOY. CONSUMER L. REV. 265, 270 (2011) (“*Stolt-Nielsen* seems to signal the end of inferred class arbitration . . .”).

213. *Stolt-Nielsen*, 559 U.S. at 687.

an inquiry . . . into that settled question.”<sup>214</sup> Yet, what if a litigant did not repeat AnimalFeeds’ mistake? Plaintiffs began to probe this soft spot by arguing that their arbitration clauses were silent in a different way. Rather than stipulating that the parties’ minds had not met, they argued that their contracts had merely failed to memorialize a shared understanding that class arbitration was permissible.<sup>215</sup> This theory gained traction; the First, Second, and Third Circuits affirmed arbitral awards allowing class claims even where the agreement did not “incant[] ‘class arbitration’ or otherwise expressly provide[] for aggregate procedures.”<sup>216</sup>

In 2013, the Court tried to dispel some of this haze with *Oxford Health Plans LLC v. Sutter*.<sup>217</sup> John Sutter, a doctor, filed a class action against Oxford Health Plans LLC, alleging that it had failed to timely reimburse doctors for their expenses.<sup>218</sup> The contract between the parties provided, in part: “No civil action concerning any dispute arising under this [a]greement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration . . . .”<sup>219</sup> Sutter and Oxford agreed to submit the clause-construction question to an arbitrator, who held that the contract authorized class arbitration.<sup>220</sup> In

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214. *Id.* at 676. Likewise, in a footnote, Justice Alito seemed to limit *Stolt-Nielsen* by remarking that “[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration” because “the parties stipulated that there was ‘no agreement on [this] issue.’” *Id.* at 687 n.10.

215. *See, e.g.,* *Amerix Corp. v. Jones*, Nos. JFM-11-2844, JFM-05-3028, JFM-11-2192, JFM-09-1498, 2012 WL 141150, at \*7 (D. Md. Jan. 17, 2012) (noting that the party seeking class treatment argued that “silence” did not “constitute lack of intent to agree, but” rather a clandestine “agreement to submit to class arbitration”).

216. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 222 (3d Cir. 2012), *aff’d*, 569 U.S. 564 (2013); *accord* *Fantastic Sams Franchise Corp. v. FSRO Ass’n Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012) (“We thus reject the . . . precept . . . that there must be express contractual language evincing the parties’ intent to permit class or collective arbitration.”); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011) (“*Stolt-Nielsen* . . . did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration.”); *see also* *Rame, LLC v. Popovich*, 878 F. Supp. 2d 439, 448 (S.D.N.Y. 2012) (holding that *Stolt-Nielsen* only controls if the parties “stipulate that there was no explicit or implicit intent to submit to class arbitration”); *La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 762, 768 (W.D. La. 2010) (affirming an arbitral clause-construction award allowing class arbitration despite the fact that the “arbitration agreement was silent on class arbitration just as the arbitration clause considered by the Court in *Stolt-Nielsen*”); *Truly Nolen of Am. v. Superior Court*, 145 Cal. Rptr. 3d 432, 450 (Cal. Ct. App. 2012) (“[C]lass action arbitration is not prohibited if both parties have agreed to the procedure explicitly or implicitly.”).

217. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

218. *See id.* at 566.

219. *Id.* (citation omitted).

220. *Id.*

particular, the arbitrator noted that the clause mandated arbitration of “any dispute.”<sup>221</sup> In turn, the arbitrator reasoned that “the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions,” which must include class claims.<sup>222</sup> Oxford moved to vacate the award, arguing that it flouted *Stolt-Nielsen* by holding that the parties had “authorize[d] the use of class procedures simply by agreeing to arbitrate their disputes.”<sup>223</sup>

Writing for the Court, Justice Kagan upheld the arbitrator’s ruling.<sup>224</sup> Like Justice Alito in *Stolt-Nielsen*, Justice Kagan began by emphasizing just how much deference judges must give to arbitrators, observing that “the sole question for us is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.”<sup>225</sup> Justice Kagan then explained that the arbitrator’s ruling cleared this low hurdle because it “focused on the arbitration clause’s text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration.”<sup>226</sup> In addition, the Court distinguished *Stolt-Nielsen* on the grounds that the parties there had failed to agree one way or the other about whether class arbitration was permissible:

We overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked . . . a “sufficient” one. The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. In that circumstance, we noted, the panel’s decision was not—indeed, could not have been—“based on a determination regarding the parties’ intent.” . . . Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration.<sup>227</sup>

Thus, the Court held, an arbitral decision that “arguably construe[s]” the contract survives, “however good, bad, or ugly.”<sup>228</sup>

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221. Joint Appendix at 31, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) (No. 12-135), 2013 WL 275685.

222. *Id.* at 17.

223. Brief for Petitioner at 13, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) (No. 12-135), 2013 WL 244026.

224. *See Oxford Health Plans*, 569 U.S. at 568–73.

225. *Id.* at 569.

226. *Id.* at 570.

227. *Id.* at 571 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 673 n.4 (2010)) (citations omitted).

228. *Id.* at 572–73 (quoting *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist.



Although *Oxford Health* resolved one split in authority, it quietly caused another. By endorsing the narrow reading of *Stolt-Nielsen*, it stemmed the tide of courts aggressively second-guessing arbitral clause-construction awards. Now, as long as the plaintiff does not concede that silence means “no agreement,” an arbitrator’s ruling will survive judicial review if it is rooted in the contract’s text. But *Oxford Health* also implies that clause construction might no longer be a matter of procedural arbitrability.<sup>229</sup> Recall that there were five votes in *Bazzle* for the proposition that arbitrators—not courts—should decide whether a silent arbitration clause allows class actions.<sup>230</sup> Nevertheless, in a footnote, Justice Kagan observed that the Court would likely revisit the issue.<sup>231</sup>

Since then, jurisdictions have splintered over whether clause construction is a matter of procedural or substantive arbitrability. Judges in the Second and Ninth Circuits have held that *Bazzle* remains good law; accordingly, they continue to allocate clause construction to the arbitrator.<sup>232</sup> For instance, in *Sandquist v. Lebo Automotive, Inc.*,<sup>233</sup> the

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17, 531 U.S. 57, 62 (2000)).

229. *Id.* at 569–70 n.2.

230. *See supra* notes 166–71 and accompanying text.

231. *See Oxford Health Plans*, 569 U.S. at 569–70 n.2. To be fair, it was *Stolt-Nielsen* that undermined *Bazzle*. *See supra* text accompanying notes 197–207. Justice Kagan simply pointed out that Justice Alito’s opinion for the majority “made clear that this Court has not yet decided whether the availability of class arbitration is a question of [substantive] arbitrability.” *Oxford Health Plans*, 569 U.S. at 569–70 n.2. As in *Stolt-Nielsen*, *Oxford Health* did not tee up the issue because the parties had expressly agreed to allocate clause construction to the arbitrators. *See id.*

232. *See Wells Fargo Advisors, L.L.C. v. Tucker*, 195 F. Supp. 3d 543, 549 (S.D.N.Y. 2016) (“In the absence of Supreme Court precedent expressly disavowing *Bazzle*[,] . . . the Court finds that the availability of class arbitration under the arbitration provisions at issue should be decided by the arbitrator . . . .”); *see also In re A2P SMS Antitrust Litig.*, No. 12 CV 2656(AJN), 2014 WL 2445756, at \*10 (S.D.N.Y. May 29, 2014) (reasoning that “the availability of class arbitration does not concern . . . either the general enforceability of an arbitration agreement or . . . which substantive claims may be subject to an arbitration clause”); *Lee v. JPMorgan Chase & Co.*, 982 F. Supp. 2d 1109, 1112 (C.D. Cal. 2013) (explaining that *Bazzle* provides “useful guidance”). *But see Anwar v. Fairfield Greenwich, Ltd.*, 950 F. Supp. 2d 633, 639 (S.D. N.Y. 2013) (stating that when parties do not clearly agree to arbitrate the question of arbitrability, the issue is subject to judicial review). Likewise, arbitrators sometimes resolve the “who decides” question. Not surprisingly, they invariably seem to rule that they have jurisdiction to determine whether class arbitration is permissible. *See, e.g.*, Partial Final Clause Construction Award at 6–9, *Savaria v. Steiner Leisure Ltd.*, Case No. 12-460-454-12 (Am. Arb. Ass’n Emp’t & Class Action Arbitration Tribunal 2013) (Dinneen, Arb.) [hereinafter *Savaria Award*]; Partial Final Clause Construction Award at 3–4, *McCullough v. Terminal Trucking Co.*, Case No. 31 160 00371 12 (Am. Arb. Ass’n Emp’t & Class Action Arb. Tribunal 2013) (Dinneen, Arb.) [hereinafter *McCullough Award*].

233. *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506 (Cal. 2016).

California Supreme Court invoked *Wiley*'s efficiency theory of arbitrability; it reasoned that a "presumption that arbitrators decide the availability of class arbitration is more consistent with the desire for 'expeditious results' that motivates many an arbitration agreement."<sup>234</sup> In addition, the court rejected the argument that arbitrators' "incentives in the form of potential higher fees . . . cause them to favor contract interpretations allowing for class arbitration."<sup>235</sup> As the California justices explained, the parity assumption "requires that we treat arbitration as a coequal forum for dispute resolution."<sup>236</sup>

Conversely, the Third, Fourth, Sixth, Seventh, and Eighth Circuits have predicted that the Court is just "a short step away from the conclusion that whether an arbitration agreement authorizes class arbitration . . . requires judicial review."<sup>237</sup> Invoking the intent theory, these courts reason that judges, not arbitrators, should decide the bet-the-company issue of whether a silent arbitration clause allows class procedures:

Unlike the question whether, say, one party to an arbitration agreement has waived his claim against the other—which of course is a subsidiary question—the question whether the parties agreed to class-wide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would "forc[e] parties to arbitrate" not merely a single "matter that they may well not have agreed to arbitrate"[,] but thousands of them.<sup>238</sup>

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234. *Id.* at 518 (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 633 (1985)).

235. *Id.* at 522.

236. *Id.*

237. *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 507 (7th Cir. 2018) ("The availability of class or collective arbitration involves a foundational question of arbitrability: whether the potential parties to the arbitration agreed to arbitrate."); *Dell Webb Cmty., Inc. v. Carlson*, 817 F.3d 867, 875 (4th Cir. 2016); *see also Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013) (reasoning that "recently[,] the Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question [of substantive arbitrability] rather than a subsidiary one" of procedural arbitrability).

238. *Reed Elsevier*, 734 F.3d at 598–99 (alterations in original) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)); *accord Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017) ("The answer to this question will change the very nature of the underlying controversy."); *Dell Webb Cmty.*, 817 F.3d at 875–76 ("[I]n bilateral arbitration, the lack of rigorous procedural rules greatly increases the speed and lowers the cost of the dispute resolution, but in class arbitration, procedural formality is required, reducing—or eliminating altogether—these advantages."); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334 (3d Cir. 2014) ("Traditional individual arbitration and class arbitration are so distinct that a choice between the

Yet, here, the Court's recent expansion of arbitral power muddies the waters. Recall that after *Rent-A-Center*, parties can "clearly and unmistakably" assign matters of substantive arbitrability to arbitrators.<sup>239</sup> As a result, even in jurisdictions where judges presumptively resolve clause construction, the widespread use of delegation clauses passes the torch back to arbitrators. For example, in *Robinson v. J & K Administrative Management Services, Inc.*,<sup>240</sup> a business required its workers to arbitrate disagreements relating to "the applicability of the [arbitration clause] . . . to a particular dispute or claim."<sup>241</sup> The Fifth Circuit cited this "sweeping language concerning the scope of the questions committed to arbitration" to hold that the arbitrator should perform clause construction.<sup>242</sup> Likewise, a handful of district courts have held that "even if the issue of classwide arbitration is classified as a gateway issue [for courts], the parties clearly and unmistakably delegated the question of class arbitration to an arbitrator."<sup>243</sup> Thus, until drafters exempt clause construction from their delegation clauses, arbitrators will continue to interpret silent arbitration provisions.

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Jurisdictions disagree about whether courts or arbitrators should decide whether an arbitration clause that does not mention class actions nevertheless permits them. The next Part uses this doctrinal chaos to examine how judges and arbitrators perform clause construction.

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two goes, we believe, to the very type of controversy to be resolved."'). Likewise, in an unpublished opinion, the Ninth Circuit has affirmed a district court order striking class claims from a complaint that would be sent to arbitration, thereby implying that the judge had jurisdiction to decide whether the contract permitted class arbitration. *See Eshagh v. Terminix Int'l Co.*, 588 F. App'x 703, 704 (9th Cir. 2014).

239. *See supra* notes 147–48 and accompanying text.

240. *Robinson v. J&K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193 (5th Cir. 2016).

241. *Id.* at 194.

242. *Id.* at 196. (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003)).

243. *Rossi v. SCI Funeral Servs. of N.Y., Inc.*, No. 15 CV 473 (ERK) (VMS), 2016 WL 524253, at \*13 (E.D. N.Y. Jan. 28, 2016); *accord Hedrick v. BNC Nat'l Bank*, 186 F. Supp. 3d 1189, 1195–96 (D. Kan. 2016) ("However, even assuming that the availability of class arbitration is a question of [substantive] arbitrability, the Court finds that the arbitrator must determine this question because the Employment Agreement provides clear and unmistakable evidence that the parties intended the arbitrator to determine questions of arbitrability." (quotations omitted)). *But see Dish Network, L.L.C. v. Ray*, 226 F. Supp. 3d 1168, 1172 (D. Colo. 2016) ("As to the parties' broad agreement regarding matters to be submitted to arbitration, there is nothing in the language used expressly delegating authority to the arbitrator to decide issues of [substantive] arbitrability.").

## II. EMPIRICALLY ASSESSING CLAUSE CONSTRUCTION

This Part uses an original dataset to examine how courts and arbitrators resolve clause construction. It begins by explaining how I conducted my research and by describing the benefits and limitations of my approach. It then demonstrates that the identity of the decisionmaker has a profound impact on clause-construction results.

### A. *Methodology and Caveats*

The modern clause-construction era began in June 2010, immediately after the Court decided *Stolt-Nielsen*. Previously, under *Bazzle*, arbitrators enjoyed a monopoly on determining whether a silent arbitration provision permitted class actions.<sup>244</sup> But *Stolt-Nielsen* prompted many courts to rebrand clause construction as a matter of substantive arbitrability, sparking the current jurisdictional split.<sup>245</sup> Since then, both judges and arbitrators have regularly weighed in on the topic.

To compare the handiwork of these two species of decisionmakers, I searched the AAA website, Westlaw, Lexis, and PACER for clause-construction opinions and awards decided between June 1, 2010, and February 15, 2019. To focus in narrowly on interpretations of silent arbitration clauses, I cut out any ruling that dealt with a satellite issue, such as whether a plaintiff had met her burden of demonstrating that a class action was feasible or whether a court should confirm a previous arbitral award.<sup>246</sup> This left me with 150 documents: 44 judicial opinions and 106 arbitral awards.

Using clause construction to assess judges and arbitrators has several advantages. First, most empirical research on arbitration operates at a high level of generality. Scholars usually rely on information reported by the AAA under Section 1281.96 of the California Code of Civil Procedure.<sup>247</sup> This statute requires arbitration providers to disclose overarching facts about *all* the cases they administer—not just

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244. See *supra* notes 178–80 and accompanying text.

245. See *supra* notes 231–42 and accompanying text.

246. I also dropped cases that applied state arbitration law (rather than the FAA), as well as those that dealt with express waivers of class action rights.

247. See, e.g., Colvin, *supra* note 39, at 3; Horton & Chandrasekher, *After the Revolution*, *supra* note 39, at 88. Admittedly, there are exceptions. See CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY §§ 5.4, 5.6 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/CY97-MWX2>] (surveying 341 awarded cases in financial-services arbitrations by pulling them directly from AAA case files); SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION: BEFORE THE AMERICAN ARBITRATION ASSOCIATION xii (2009), [https://www.adr.org/sites/default/files/document\\_repository/Searle%20](https://www.adr.org/sites/default/files/document_repository/Searle%20)

those in California—such as the filing and ruling dates and the identities of the company, the arbitrator, and the plaintiffs’ lawyers.<sup>248</sup> Although these facts can be helpful, they reveal nothing about the arbitral decision-making process.<sup>249</sup> Conversely, the AAA’s policy of publicizing all filings in potential class arbitrations paints a vivid picture of what happens in private dispute resolution. Because I can base my analysis on the actual clause-construction awards in these disputes, I can determine which side prevailed and why.

Second, focusing on clause construction minimizes selection biases. Even if one were able to obtain results from both arbitration and litigation, juxtaposing them would not necessarily shed light on the Court’s parity assumption because complaints that are arbitrated diverge from those that are litigated.<sup>250</sup> Suppose a researcher determined that employees win more often in court than in private tribunals. This would not necessarily prove that arbitration is less hospitable to plaintiffs. Instead, it could reflect systemic differences in the case streams that feed the two spheres. For instance, arbitration might feature weaker claims because low-level employees, who have few rights, are more likely to be subject to arbitration clauses than executives, who often enjoy contractual protections against being fired.<sup>251</sup>

However, examining clause construction limits these distortions. This unique context—where both judges and arbitrators decide matters *about arbitration*—features a single case stream: those that arise from contracts that contain arbitration clauses. Moreover, whether these matters end up on the desk of a judge or an arbitrator has nothing

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Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf [https://perma.cc/3VU9-9QVW] (surveying 301 awards using a similar technique).

248. See CAL. CODE CIV. PROC. § 1281.96(a)(1)–(11) (2018) (listing the information that arbitration institutions must provide).

249. In addition, the lack of information makes it hard to determine which side “won” an award. See, e.g., Colvin, *supra* note 39, at 5 (considering a plaintiff recovery of one dollar or more as a “win”); Horton & Chandrasekher, *After the Revolution*, *supra* note 39, at 99 (same). This is both overinclusive (because it deems a trivial recovery a victory) and underinclusive (because it treats awards of equitable relief as a loss). Fortunately, clause-construction rulings suffer from no such ambiguity.

250. See, e.g., Schwartz, *supra* note 39, at 1290–91 (enumerating reasons why “it seems very likely that there are systematic differences between arbitrated and litigated cases”).

251. See, e.g., Colvin, *supra* note 39, at 5 (noting that “higher overall employee win rates” may reflect “the greater likelihood of success under individually negotiated contracts”). Likewise, the quality of advocacy in arbitration might not equal its counterpart in litigation. After all, “arbitrated disputes tend to involve lower financial stakes,” which means that plaintiffs “will invest less in legal research.” Weidemaier, *supra* note 37, at 1135–36.

to do with the power dynamics between the parties. Instead, the determinant is a particular jurisdiction's view on whether reading a silent arbitration provision is a question of substantive or procedural arbitrability.<sup>252</sup> Because this doctrinal split is so pronounced, these cases have almost been randomly assigned to each species of decisionmaker.

Statistical analyses of arbitration results also suffer from another selection bias. Variations in win rates between arbitration and litigation may not be instructive because fully litigated and fully arbitrated matters are not representative of all matters. As George L. Priest and Benjamin Klein famously argue, case outcomes do not show that the law favors one side or the other.<sup>253</sup> Priest and Klein note that adversaries should be able to value, and therefore settle, most disputes.<sup>254</sup> Accordingly, only close, boundary-straddling matters, where the parties disagree on the range of potential outcomes, should progress all the way to a final judgment.<sup>255</sup> In turn, this means that no matter how the applicable rules are calibrated, plaintiffs and defendants should each prevail about half of the time.<sup>256</sup> Moreover, any deviation from these coin-flip win rates does not necessarily demonstrate that the law is slanted. Rather, it merely reveals that one cohort has more at stake or is better informed than the other about the likelihood of success.<sup>257</sup>

Clause-construction awards are less likely to suffer from this flaw. Parties have little motivation to settle before the clause-construction stage. Until someone interprets the arbitration clause, nobody knows whether a case is a mammoth class action or an individualized small-dollar lawsuit. Thus, most cases with silent arbitration clauses are probably going to end up in clause construction.<sup>258</sup>

Third, clause construction is the perfect vehicle for isolating the impact of *decisionmakers*—rather than some other variable—on outcomes. Even putting aside the selection biases mentioned above, there are any number of reasons why parties might perform better in one

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252. In addition, as noted above, even in jurisdictions that treat clause construction as a matter of substantive arbitrability, drafters can assign the issue to arbitrators through delegation clauses. *See supra* notes 238–42 and accompanying text.

253. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5 (1984) (studying the results of litigated and settled disputes).

254. *See id.* at 12–15.

255. *See id.* at 15.

256. *See id.* at 15–17.

257. *See id.* at 24–25.

258. *See* King, *supra* note 41, at 1070 (“The lack of docket activity after clause construction awards are issued suggests that they are often de facto dispositive.”).

forum. Perhaps it is more difficult to substantiate a cause of action without full-fledged judicial discovery. Alternatively, it might be easier to introduce powerful testimony or a “smoking gun” document in arbitration because traditional evidentiary rules do not always apply. Yet, as further discussed below, parties argue about *clause construction* under identical conditions in both court and arbitration.<sup>259</sup> In fact, interpreting a silent arbitration clause is an inkblot of an issue that gives the adjudicator extraordinary discretion.<sup>260</sup> Thus, it allows the decisionmaker’s underlying predispositions to shine through.

Admittedly, my research is also subject to a few caveats. For one, clause-construction orders may not be representative of other types of awards. Arbitral rulings normally never see the light of day. But when an arbitrator reads a silent arbitration clause, she knows that the AAA will publish her work product. This additional scrutiny might push her to grapple with the issues in greater detail. Similarly, there may be no link between how a judge or an arbitrator reads an arbitration provision and how she resolves, say, allegations under a consumer protection statute or Title VII. Thus, as made apparent in Part III, I do not contend that patterns in clause-construction rulings cast light on the parity assumption *in general*; rather, I confine my analysis to the discrete topic of how courts and arbitrators resolve disputes about *arbitration*.

Finally, my data only includes one state trial court decision.<sup>261</sup> As far as I know, there is no reliable way to search opinions at this level. Nevertheless, this blind spot may not actually be very large. Under the Class Action Fairness Act, federal district courts have jurisdiction over most major class actions.<sup>262</sup> Accordingly, there are probably not many state trial clause-construction orders in the first place.

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259. *See infra* Part II.B.

260. *See infra* Part II.B.

261. The exception is a California Superior Court case that is available on Westlaw. *See* Petition for an Order to Compel Arbitration at \*9, Gray v. Select Temps. Inc., No. BC514799, 2015 WL 10734850 (Cal. Super. Ct. July 1, 2015).

262. *See* Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)–(5)(B) (2012) (giving federal courts jurisdiction over class actions as long as at least one plaintiff and defendant are from different states, the class consists of at least 100 members, and the alleged damages exceed \$5 million).

## B. Results

There is a vast difference in how courts and arbitrators decide clause construction. Just 4.5 percent of judges interpreted a silent arbitration clause as permitting class claims.<sup>263</sup> Conversely, 54.7 percent of arbitrators reached the opposite conclusion, a difference that is statistically significant ( $p = 0.000$ ). This discord occurred even though both the judge and arbitrator subsamples include cases from many of the same jurisdictions.

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263. Three recent judicial opinions—*McElrath v. Uber Techs., Inc.*, No. 16-cv-07241-JSC, 2017 WL 1175591 (N.D. Cal. Mar. 30, 2017), *Gonzalez v. Ceva Logistics U.S., Inc.*, No. 16-cv-04282-WHO, 2016 WL 6427866 (N.D. Cal. Oct. 31, 2016), and *Mims v. Adecco USA, Inc.*, No. 1-16-3366, 2017 WL 5202949 (Ill. Ct. App. Nov. 9, 2017)—involve unusual circumstances. They were decided shortly after the Seventh and Ninth Circuits held that waivers of the right to collective redress in employment contracts violate the NLRA. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989–90 (9th Cir. 2016), *rev'd*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018). The three opinions feature express class-arbitration waivers that were illegal under the NLRA. See *Gonzalez*, 2016 WL 6427866, at \*7; *McElrath*, 2017 WL 1175591, at \*4; *Mims*, 2017 WL 5202949, at \*1–2. Thus, these courts grappled with whether an arbitration clause permitted class claims after its class-arbitration waiver had been invalidated and stricken—a bizarre form of “silence.” See *McElrath*, 2017 WL 1175591, at \*4 (“[E]xcising the class action waiver does not cure the . . . NLRA problem because . . . if the class action waiver is found unenforceable, the Agreement is silent as to whether Plaintiff can arbitrate on behalf of a class.”); *Gonzalez*, 2016 WL 6427866, at \*7 (“[I]f the class waiver is found unenforceable, the court cannot compel arbitration of the class claims under the Supreme Court’s holding in *Stolt-Nielsen* . . .”); *Mims*, 2017 WL 5202949, at \*5 (noting that striking the class-arbitration waiver “renders the Agreement silent as to class action proceedings and absent an express provision, the parties cannot submit to class action arbitration”). I nevertheless included both rulings, because—like the other cases in my sample—they purport to interpret the arbitration provision.



Table 1. Clause Construction: Raw Data

	N	Class Actions Allowed	Consumer Cases	Employment Cases
Judge	44	2 (4.5%)	12 (27.2%)	32 (72.7%)
Arbitrator	106	58 (54.7%)	39 (36.7%)	67 (63.2%)

Notes:  
The sample of judicial decisions includes the following number of cases from each state: California (19); Ohio (5); Illinois and Missouri (3 each); New York and Pennsylvania (2 each); and Alabama, Florida, Massachusetts, Michigan, Minnesota, North Carolina, Tennessee, Texas, Washington, and West Virginia (1 each).  
The sample of arbitral awards includes the following number of cases from each state: California (39); New York (7); Florida and New Jersey (5 each); Illinois, Louisiana, Missouri, and Texas (4 each); Colorado, Massachusetts, and Pennsylvania (3 each); Georgia, Minnesota, Nevada, North Carolina, and Washington (2 each); Alabama, Connecticut, Kentucky, Maryland, Michigan, Nebraska, Ohio, Puerto Rico, South Carolina, and Vermont (1 each). Five awards do not identify the governing jurisdiction.

The gulf between judges and arbitrators comes into sharp relief when one compares the opinions and awards. For the tremendous majority of courts, clause construction was straightforward. These judges cited *Stolt-Nielsen* for the bright-line rule that “‘silence’ in an agreement regarding class arbitration . . . indicates that it is not authorized by the agreement.”<sup>264</sup> Although they acknowledged that the stipulation in *Stolt-Nielsen* meant that the contract was silent in a unique way, they dismissed this distinction as “split[ting] the finest of hairs.”<sup>265</sup> Ultimately, they saw no difference between a stipulation that there was “no

264. *JPay, Inc. v. Kobel*, No. 16-20121-CIV-GAYLES/TURNOFF, 2017 WL 3218218, at \*4 (S.D. Fla. July 28, 2017) (quoting *Opalinski v. Robert Half Int’l Inc.*, 677 F. App’x 738, 741 (3d Cir. 2017)), *vacated*, 904 F.3d 923 (11th Cir. 2018); *see also* *Robinson v. Home Owners Mgmt. Enters., Inc.*, 549 S.W.3d 226, 241 (Tex. App. 2018) (“[B]ecause the [contract] has not one word about class arbitration, the trial court correctly found that the parties did not agree to arbitrate any claims on a classwide basis.”).

265. *Goodale v. George S. May Int’l Co.*, No. 10 C 5733, 2011 WL 1337349, at \*2 (N.D. Ill.

agreement” about the permissibility of class actions and a clause that merely does not mention such procedures. In both scenarios, “[t]he result is still the same[; t]here is no ‘contractual basis’ for concluding the parties agreed to permit class arbitration.”<sup>266</sup> As a federal district court in Pennsylvania explained, “Our analysis on this point is necessarily abbreviated because the jurisprudence is abundantly clear.”<sup>267</sup>

Other judges went slightly further and bolstered their holdings with the contract’s text. The most common move here was to take a page from the *Bazzle* dissenters and find that language that “is written in the singular” means that the parties agreed to “individual or bilateral arbitration.”<sup>268</sup> For instance, the Sixth Circuit observed that an arbitration clause “limits its scope to claims ‘arising out of or in connection with any aspect of *this [a]greement,*’ as opposed to other . . . [plaintiffs’] agreements.”<sup>269</sup> Likewise, other provisions excluded potential class members by referring “to [the] plaintiff exclusively in terms of ‘I,’ ‘me,’ and ‘my,’ and . . . ‘differences [that] may arise between [the drafter] and me.’”<sup>270</sup>

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Apr. 5, 2011); *see also* Parvataneni v. E\*Trade Fin. Corp., 967 F. Supp. 2d 1298, 1303 (N.D. Cal. 2013) (“While it is true that ‘failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the ‘silence’ discussed in *Stolt-Nielsen,*’ here there is simply no basis to conclude that the parties intended to include class arbitration in their agreement.” (quoting *Vasquez v. ServiceMaster Glob. Holding Inc.*, No. 09-cv-05148-SI, 2011 WL 2565574, at \*3 (N.D. Cal. June 29, 2011))).

266. *Armenta v. Staffworks, LLC*, No. 17-cv-00011-BAS-NLS, 2017 WL 3118778, at \*5 (S.D. Cal. July 21, 2017) (citation omitted).

267. *Chesapeake Appalachia, L.L.C. v. Ostroski*, 199 F. Supp. 3d 912, 917 (M.D. Pa. 2016) (“Because the plain language of the arbitration clause in the Lease is silent as to class arbitration, we find that the Lease does not allow . . . it.”); *accord* *AlixPartners, LLP v. Brewington*, 836 F.3d 543, 553 (6th Cir. 2016) (“This arbitration clause is silent on the availability of classwide arbitration, and we may not presume from ‘mere silence’ that the parties consented to it.”); *Shore v. Johnson & Bell*, No. 16-cv-4363, 2017 WL 714123, at \*3 (N.D. Ill. Feb. 22, 2017) (“The plain language of the client engagement letter is silent as to class arbitration and cannot be construed to provide class arbitration was intended.”); *Baker v. Anytime Labor-Kan., LLC*, No. 4:16-cv-00447-RK, 2016 WL 9245464, at \*8 (W.D. Mo. Dec. 13, 2016) (“[T]he [a]rbitration [a]greement is silent regarding class arbitration and is therefore construed as not allowing class arbitration.”); *Univ. Toyota v. Hardeman*, 228 So. 3d 394, 400 (Ala. 2017) (“Hardeman and Roberts have no right to engage in class-action arbitration proceedings, because the arbitration agreements they entered into contain no provision authorizing the arbitration of class-action claims.” (emphasis omitted)).

268. *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC*, No. 4:14-CV-0620, 2017 WL 1541659, at \*5 (M.D. Pa. Apr. 28, 2017).

269. *AlixPartners*, 836 F.3d at 553.

270. *Martinez v. Leslie’s Poolmart, Inc.*, No. 8:14-CVcv-01481-CAS, (CWx), 2014 WL 5604974, at \*4 (C.D. Cal. Nov. 3, 2014); *see also* *Armenta*, 2017 WL 3118778, at \*5 (reasoning that “the language in the [a]greement suggests a presumption of individual arbitration” by insisting that conflict “between *myself* and [the drafter] . . . shall be submitted to and determined by binding arbitration” (emphasis and citation omitted)); *JP Morgan Chase Bank, N.A. v. Jones*, No.

In sharp contrast, most arbitrators held that *Stolt-Nielsen* did not control. Arbitrator after arbitrator distinguished that opinion on the grounds that the parties there had *agreed* that there was *no agreement* about whether class actions were permissible.<sup>271</sup> Accordingly, in that case, “there was nothing [for the arbitrators] to construe.”<sup>272</sup> In addition, because *Oxford Health* clarified that “[a]n express provision authorizing class arbitration is not required,”<sup>273</sup> arbitrators analyzed the contract’s language.

The arbitral awards that allowed class actions contained two common threads. First, they cited the breadth of the arbitration clause. Arbitrators were swayed by the fact that a provision covered “every possible claim,”<sup>274</sup> “‘any dispute’ and ‘any matter in controversy,’”<sup>275</sup>

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C15-1176RAJ, 2016 WL 1182153, at \*9 (W.D. Wash. Mar. 28, 2016) (“The agreements consistently refer to the Defendants in the singular . . . .”); *NCR Corp. v. Jones*, 157 F. Supp. 3d 460, 467 (W.D.N.C. 2016) (“[T]he court finds that the exclusively bilateral terms in the face of the contract weigh in favor of the [a]greement only covering bilateral disputes.”); *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 945 (N.D. Cal. 2015) (“The arbitration clause does not mention the possibility of class-wide arbitration, but instead focuses its scope on disputes that arise out of or are related to ‘services performed by the Contractor’ or the Agreement, which is specifically between Instacart and the individual Contractor.” (emphasis and citation omitted)); *Herzfeld v. 1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at \*8 (E.D. Pa. July 22, 2015) (“The . . . Agreement refers only to arbitration affecting ‘both parties.’ It does not mention other parties of any type.” (citation omitted)).

271. See, e.g., Clause Construction Award at 6, *Grande v. Lawrence Recruiting Specialists*, Case No. 57 160 00080 13 (Am. Arb. Ass’n Emp’t & Class Action Arbitration Tribunal 2013) (Christianson, Arb.) (“No such stipulation is present in this case . . . .”).

272. Opinion, Order and Partial Final Clause Construction Award at 8, *Gonzalez v. MMM Healthcare, Inc.*, Case No. 32-187-Y-000450-12 (Am. Arb. Ass’n 2013) (Dreier, Arb.) [hereinafter *Gonzalez Award*].

273. Partial Final Award on Clause Construction at 3, 9, *Baer v. TruGreen Ltd. P’ship*, Case No. 14 160 01482 12 (Am. Arb. Ass’n Class Action & Emp’t Arbitration Tribunal 2013) (Feliu, Arb.) [hereinafter *Baer Award*]; see also Clause Construction Under Rule 3 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association at 7, *Guzman v. AMICO River Club, LLC*, Case No. 18-526-Y-000120-13 (Am. Arb. Ass’n Class & Commercial Arbitration Tribunal 2013) (Picker, Arb.) (reasoning that *Stolt-Nielsen* “does not stand for the proposition that an arbitration provision in a contract requires affirmative and express authorization of class arbitration” (emphasis omitted)) [hereinafter *Guzman Award*]; *McCullough Award*, *supra* note 232, at 9–10, (“[T]he omission of the specific words ‘class’ or ‘class action’ is not necessarily determinative . . . .”); Partial Final Clause Construction Award at 9–10, *Her v. Club One Casino, Inc.*, Case No. 74 160 01109 12 (Am. Arb. Ass’n Class Action & Emp’t Arbitration Tribunal 2013) (Hemminger, Arb.) (“[A]n implied agreement may be sufficient to support class arbitration.”) [hereinafter *Her Award*].”)

274. Partial Final Clause Construction Award of Arbitrator at 13, *Price v. NCR Corp.*, Case No. 51 160 908 12 (Am. Arb. Ass’n Emp’t & Class Action Arbitration Tribunal 2013) (Colflesh, Jr., Arb.) [hereinafter *Price Award*]; see also *Her Award*, *supra* note 273, at 14 (noting that the arbitration agreement covers “any disputes concerning the employment relationship”).

275. *Gonzalez Award*, *supra* note 272, at 11 (citations omitted); see also Partial Final Clause

“disputes,’ ‘claims[,]’ . . . ‘demands,’ [and] also . . . ‘proceedings,’”<sup>276</sup> or “all legal and equitable claims . . . of whatever nature or kind.”<sup>277</sup> In turn, they reasoned that these “comprehensive commitment[s] to arbitrate”<sup>278</sup> demonstrated “that the parties agreed to submit *all* disputes to arbitration, including claims for class relief.”<sup>279</sup> Second, several arbitrators faulted the company—which almost always had complete dominion over the contract’s terms—for not clarifying whether aggregate proceedings were permissible. Invoking the doctrine of *contra proferentem*, they resolved this ambiguity against the drafter.<sup>280</sup>

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Construction Award at 7, *Harding v. Midsouth Bank, N.A.*, Case No. 69-516-Y-00219-12 (Am. Arb. Ass’n Commercial & Class Action Tribunal 2013) (Longhofer, Arb.) (“[T]he broad phrase ‘controversy or claim’ was chosen to encompass every kind of dispute that might arise.”).

276. *Guzman Award*, *supra* note 273, at 10–11.

277. *Baer Award*, *supra* note 273, at 5.

278. *Savaria Award*, *supra* note 232, at 12. Similarly, arbitrators in employment cases sometimes noted that a contract incorporated the AAA Rules by reference. *See McCullough Award*, *supra* note 232, at 12. In turn, they observed that AAA Employment Rule 39(d) expressly permits the arbitrator to “grant any remedy or relief that would have been available to the parties had the matter been heard in court.” AM. ARB. ASS’N, *supra* note 19, RULE 39(D). Accordingly, “[b]ecause a class action could . . . be brought in court,” selecting the AAA Rules demonstrated that the contract permitted class arbitration. Partial Final Clause Construction Award at 12–13, *Broach v. CK Franchising, Inc.*, Case No. 01-16-0000-2234 (Am. Arb. Ass’n 2017) (Dinneen, Arb.). Occasionally, arbitrators also relied on a party’s conduct, such as not objecting to a case’s status as a class action for years. *See Her Award*, *supra* note 273, at 17–24.

279. Order No. 2 Partial Final Award on the Construction of the Arbitration Clause at 4, *Betts v. Fastfunding the Co.*, Case No. 33-516-00012-13 (Am. Arb. Ass’n Class & Commercial Arbitration Tribunal 2013) (Zimmerman, Arb.) (emphasis omitted) [hereinafter *Betts Award*]. Some arbitrators disagreed. They noted that far-reaching language is common in arbitration clauses. *See* Partial Final Clause Construction Award at 11, *Beery v. Quest Diagnostics, Inc.*, Case No. 32 160 00323 13 (Am. Arb. Ass’n Class Action & Emp’t Arbitration Tribunal 2014) (Hemminger, Arb.). Thus, “[t]o interpret such language as manifesting an intent to include class arbitration would be to interpret most arbitration agreements as reflecting an intent to permit class arbitrations.” *Id.* at 13. Likewise, other arbitrators who denied class status relied on the individuated language in the agreement. For example, they cited the fact that the contract specified that the drafter “and I agree to use confidential binding arbitration for any claims.” Partial Final Clause Construction Award at 2, 11–12, *Hanna v. Pizza Hut, Inc.*, Case No. 33 160 00281 12 (Am. Arb. Ass’n Class Action Arbitration Tribunal 2013) (Sochynsky, Arb.); *see also* Order: Partial Final Clause Construction Award, *Alam v. Charter College, LLC* at 3 n.1, Case No. 73 160 00378 12 (Am. Arb. Ass’n 2013).) (Baird, Arb.) (refusing to allow class actions when the arbitration clause mentioned “the employee named below”). *But cf.* *Baer Award*, *supra* note 273, at 6 (allowing class actions because “[p]arty” was defined as “affected persons and/or entities,” rather than being defined “by name or . . . first person pronouns”).

280. *Price Award*, *supra* note 274, at 12 (“[T]he Agreement was entirely drafted by [the defendant] and presented to [the plaintiff] as a condition of his being hired without opportunity for negotiation. As such, it is a contract of adhesion and must be construed against the draftsman.”); *Betts Award*, *supra* note 279, at 6. Likewise, in *Lamps Plus*, which is now pending before the Supreme Court, a federal district judge and the Ninth Circuit applied this logic to “find[] that the parties may proceed to arbitrate class claims.” *Varela v. Lamps Plus, Inc.*, No. CV 16-577-DMG

One of the most vivid illustrations of the discrepancy between judges and arbitrators is the fact that they occasionally disagreed about whether the same contract allowed class actions. For example, in 2012 and 2014, two separate groups of employees sued NCR Corporation, a Georgia software company, for allegedly violating the Fair Credit Reporting Act.<sup>281</sup> NCR's employment agreement included a short but extensive arbitration provision that "includes every possible claim . . . arising out of or relating in any way to my employment" with the intent of "allow[ing] arbitration of as many disputes as possible."<sup>282</sup> In one lawsuit, a federal judge in North Carolina held that the clause mandated individualized arbitration.<sup>283</sup> The court cited *Stolt-Nielsen* and observed that each employee had promised to arbitrate "claim[s] . . . arising out of . . . my employment"<sup>284</sup>:

The Agreement does not mention class arbitration. Despite the fact that the Agreement is intended to be as broad as legally possible, [the employee] cannot escape the fact that the Agreement is limited to disputes arising out of his, and only his, employment . . . [T]here is nothing in the terms of the Agreement . . . that allows this court to conclusively determine that the parties had an agreement or meeting of minds as to class arbitration, implicitly or otherwise.<sup>285</sup>

However, the second matter against NCR ended up in arbitration. The arbitrator seized on different passages in the provision to reach the opposite conclusion:

[The arbitration clause] cover[s] "every possible claim," "all disputes," and is "to be interpreted broadly to allow arbitration of as many disputes as possible."

These broad strokes clearly indicate inclusion of all claims [the employee] could have brought to court . . . [and] cannot rationally be read as excluding certain actions . . . on the ground they are not specifically mentioned.<sup>286</sup>

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(KSx), 2016 WL 9110161, at \*7 (C.D. Cal. July 7, 2016), *aff'd*, 701 F. App'x 670 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018).

281. *See* NCR Corp. v. Jones, 157 F. Supp. 3d 460, 461–62 (W.D.N.C. 2016); *Price Award*, *supra* note 274, at 2.

282. *Jones*, 157 F. Supp. 3d at 467.

283. *See id.* at 467–71.

284. *Id.* at 467 (emphasis added).

285. *Id.* at 470–71.

286. *Price Award*, *supra* note 274, at 13. Both judges and arbitrators sometimes expressed discomfort with the Court's FAA jurisprudence. For example, as one Florida judge observed,

In sum, the parity assumption is a myth in the context of clause construction. Indeed, the outcome of a dispute often depends on whether a judge or an arbitrator presides. The next Part explains how this insight informs the debate over judicial and arbitral power.

### III. POLICY IMPLICATIONS

This Part uses my data to prescribe policy. It first suggests a solution to the conundrum over whether clause construction is a matter of substantive or procedural arbitrability. It then examines the related and unsettled issue of whether a contract can delegate power to an arbitrator merely by incorporating the rules of an arbitration institution.

#### A. *Who Should Interpret Silent Arbitration Clauses?*

As noted, there is a massive split in authority over whether courts or arbitrators should engage in clause construction.<sup>287</sup> This Section explains why the matter should presumptively be for the courts.

Clause construction is hard to classify as either a matter of substantive or procedural arbitrability. Recall that the Court has used three separate approaches to make this distinction. First, *Wiley's* efficiency theory seeks to streamline dispute resolution.<sup>288</sup> Initially, these

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prohibiting the plaintiffs from aggregating claims seemed unjust:

The [c]ourt is mindful that its decision might have the unintended consequence of stifling a claimant's ability [to] find counsel to represent them for small claims in arbitration. Indeed, [c]laimants' alleged losses in this action, while not frivolous, are small when compared to the types of awards seen in class litigation.

*JPay, Inc. v. Kobel*, No. 16-20121-CIV-GAYLES/TURNOFF, 2017 WL 3218218, at \*5 (S.D. Fla. July 28, 2017). Nevertheless, the court ultimately held that “[t]hose concerns . . . are not a basis for adding a term to an arbitration agreement on which the parties did not clearly agree.” *Id.* At least one arbitrator who denied class status voiced similar concerns but concluded that “reasoned legal argument must prevail over emotional appeal.” Opinion, Order and Partial Final Clause Construction Award at 10, *Muhammad v. Del. Title Loans, Inc.*, Case No. 18-434-00804-13 (Am. Arb. Ass'n Commercial Arbitration & Class Action Tribunal 2014) (Dreier, Arb.).

287. See *supra* notes 231–42 and accompanying text; see also Liz Kramer, *Biggest Arbitration Stories of 2018*, ARB. NATION (Dec. 27, 2018), <https://www.arbitrationnation.com/biggest-arbitration-stories-2018> [<https://perma.cc/XG2Q-5AZF>] (noting that this circuit split “seems likely to pique the Justices’ interest”). As noted, the Court recently heard oral argument in *Lamps Plus*, which presents the question of “what standard a court should apply in determining whether an arbitration agreement authorizes class arbitration.” Transcript of Oral Argument at \*3, *Lamps Plus, Inc. v. Varela*, No. 17-988, 2018 WL 5447978 (U.S. Oct. 29, 2018); see also *supra* notes 28, 281. However, because the parties in *Lamps Plus* agreed to submit the interpretation of the arbitration clause to the court, the case does not raise the issue of whether clause construction is a matter of procedural or substantive arbitrability. See *id.* at \*30.

288. See *supra* notes 68–77 and accompanying text.

concerns militate toward allowing arbitrators to interpret silent arbitration provisions. One of the FAA's major goals is "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."<sup>289</sup> In the clause-construction context, the plaintiff and defendant do not dispute that they have agreed to arbitrate. Rather, the only source of friction is the *type of proceeding* to which they have agreed. Because the case is destined for arbitration, allowing the arbitrator to interpret the arbitration provision is an elegant solution that consolidates all disputes into one forum.

However, another branch of the efficiency tree points the opposite way. The *Wiley* Court reasoned that arbitral jurisdiction should be limited to scenarios where the arbitrability issue and the underlying lawsuit arise from the same facts.<sup>290</sup> This permits the parties to tell their stories once, in arbitration, rather than having to develop a record before two different decisionmakers.<sup>291</sup> But there is no danger of parallel proceedings in clause construction. Indeed, putative consumer and employment class actions revolve around a defendant's business practices, not the meaning of the arbitration provision. Indeed, it is difficult to imagine a topic that is *less* likely to overlap with the merits than filling the gap in a silent arbitration clause. In turn, because clause construction can be neatly compartmentalized, it can be assigned to courts without squandering the parties' resources. For these reasons, the efficiency theory is indeterminate.

Alternatively, the Court has suggested that arbitrators should hear matters that they are better equipped than judges to decide. *Bazzle*, the Court's initial foray into clause construction, relied heavily on this expertise rationale.<sup>292</sup> As noted, the plurality and Justice Stevens cited the fact that arbitrators are experts in "contract interpretation and arbitration procedures."<sup>293</sup> Since then, several courts have deemed clause construction to be a matter of procedural arbitrability on the grounds that arbitrators excel at determining the parties' intent.<sup>294</sup>

But my research tells a different story. Although contract interpretation often hinges on trade usage and industry norms—issues that

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289. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

290. *See supra* notes 74–76 and accompanying text.

291. *See id.*

292. *See supra* notes 166–68 and accompanying text.

293. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003); *id.* at 454–55 (Stevens, J., concurring in the judgment and dissenting in part).

294. *Jackson v. Home Team Pest Def., Inc.*, No. 6:13-cv-916-Orl-22TBS, 2013 WL 6051391, at \*2 (M.D. Fla. Nov. 15, 2013).

arbitrators are particularly good at evaluating—clause construction does not. Class actions invariably arise from adhesive consumer and employment contracts. In this milieu, there is no course of dealing for the arbitrator to analyze, and few plaintiffs will have even read or understood the disputed term. Therefore, as one arbitrator put it, the idea that the parties shared a common understanding of whether the agreement authorized class arbitration “is actually a fiction.”<sup>295</sup>

Instead, in clause construction, the dispositive issues are not *factual* but *legal*. Cases rise and fall on how the decisionmaker reconciles *Bazzle*, *Stolt-Nielsen*, and *Oxford Health*.<sup>296</sup> There is no reason to presume that arbitrators are better than courts at navigating this doctrinal thicket. If anything, the opposite is true; judges tend to be more pedigreed than arbitrators, and they have access to top-flight law clerks. Indeed, as the Supreme Court once put it, “the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”<sup>297</sup> Thus, seeing clause construction from the inside flips the conventional wisdom about which decisionmaker is best equipped to interpret a silent arbitration clause.

A final factor that influences whether a question is for courts or arbitrators is the parties’ likely intent.<sup>298</sup> Matters of substantive arbitrability—such as determining whether the arbitration clause is valid or broad enough to encompass a particular dispute—are important.<sup>299</sup> Arguably, litigants prefer to resolve such topics in the judicial system, where they enjoy the full panoply of discovery, evidentiary, and appellate rights.<sup>300</sup>

There is no consensus on how this rubric applies to clause construction. Several federal appellate courts have found that interpreting a silent arbitration clause is crucial because there is a “fundamental difference” between two-party and class arbitration.<sup>301</sup> Yet, other judges have observed that class actions are a mere procedural device

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295. Partial Final Award on Clause Construction at 6, *Chae v. W. Dental*, Case No. 11 160 424 11 (Am. Arb. Ass’n Emp’t & Class Action Arbitration Tribunal 2011) (LaMothe, Arb.).

296. *See supra* Part II.B.

297. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

298. *See supra* notes 131–132 and accompanying text.

299. *See id.*

300. *See id.*

301. *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876 (4th Cir. 2016); *see also Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013) (reasoning that matters of substantive arbitrability “are fundamental to the manner in which the parties will resolve their dispute,” and that the question “whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail”).



that leaves the “parties’ legal rights and duties intact and the rules of decision unchanged.”<sup>302</sup> These courts have therefore held that the “shift from multiple bilateral arbitrations to a single class arbitration does nothing to alter a defendant’s potential aggregate liability.”<sup>303</sup> Thus, the amorphousness of the class mechanism thwarts attempts to apply the intent theory to clause construction. For these reasons, none of the Court’s tests yields a clear answer.

Here is where my research can be helpful. It highlights a finding that should break the tie—the demonstrable failure of the parity assumption. As noted in Part II, for clause construction, the choice between litigation and arbitration is outcome determinative.<sup>304</sup> The odds are slim to none that a court will find that a silent arbitration clause permits class actions.<sup>305</sup> But it is more likely than not that an arbitrator will reach that result.<sup>306</sup> This belies the idea that “arbitration [is] a coequal forum for dispute resolution.”<sup>307</sup>

Of course, this apparent divergence between judges and arbitrators could stem from influences that are not obvious from the raw data. Thus, to take a closer look, I performed a multivariate logit regression analysis. This technique estimates the effect of several independent variables on the outcome of clause construction while holding other variables constant.<sup>308</sup> As Table 2 demonstrates, the odds of a class action being permitted are 63.7 times higher when an arbitrator performs clause construction than when a judge resolves the matter ( $p = 0.000$ ).

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302. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality opinion).

303. *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 520 (Cal. 2016).

304. *See supra* Part II.B.

305. *See supra* Part II.B.

306. *See supra* Part II.B.

307. *Sandquist*, 376 P.3d at 522.

308. As Table 2 elucidates, my independent variables include whether the decisionmaker is a court or an arbitrator, whether the plaintiff is a consumer or an employee, the jurisdiction, and the year of the ruling. I also conducted a regression analysis using a linear probability model, and the results were similar. The mere fact that an arbitrator—rather than a judge—performed clause construction increased the probability of class actions being permitted by 49.6 percentage points ( $p = 0.000$ ). Rerunning the linear probability regression using the applicable state, rather than the court of appeals, as a control variable generated substantially similar results.

Table 2. Regression Analysis

Outcome Variable: Class Actions Permitted (Logit Coefficient) [Odds Ratio]	
Decisionmaker <sup>†</sup>	
Arbitrator	4.154***
	(1.157)
	[63.719]
Type of Case <sup>††</sup>	
Employment	0.439
	(0.562)
	[1.551]
Jurisdiction <sup>†††</sup>	
First Circuit	-0.008
	(1.424)
	[0.993]
Second Circuit	0.513
	(1.241)
	[1.670]
Third Circuit	1.338
	(1.336)
	[3.813]
Fourth Circuit	0.440
	(1.481)
	[1.553]
Fifth Circuit	1.108
	(1.196)
	[3.027]

Sixth Circuit	-0.498
	(1.556)
	[0.608]
Seventh Circuit	1.571
	(1.654)
	[4.811]
Eighth Circuit	1.055
	(1.350)
	[2.871]
Ninth Circuit	-0.381
	(1.031)
	[0.683]
Tenth Circuit	0.518
	(1.663)
	[1.678]
Eleventh Circuit	0.513
	(1.247)
	[1.670]
Constant	-3.368
	(2.175)
	[0.034]
<i>N</i>	150
<p>Notes:</p> <p>† The reference group for “decisionmaker” is judges.</p> <p>†† The reference group for “case type” is consumer.</p> <p>††† The reference group for “jurisdiction” is cases where the governing circuit is unclear.</p> <p>The regression contains dummy variables for the year of the decision.</p> <p>* <math>p &lt; 0.05</math>, ** <math>p &lt; 0.01</math>, *** <math>p &lt; 0.001</math></p>	

There are signs that this divergence stems from arbitrators furthering their own interests. First, as courts, scholars, and litigants have noted, arbitrators charge hundreds of dollars per hour and thus “have self-serving incentives to maximize the size, complexity and significance of the matters before them.”<sup>309</sup> Thus, it seems suspicious that arbitrators are prone to authorizing long, slow, and profitable class actions. Surprisingly, even some *arbitrators* acknowledge the possibility that clause-construction awards might be tainted. Indeed, as one arbitrator put it, the “financial conflict of interest when arbitrators are vested with the jurisdiction to determine their own jurisdiction is a serious problem.”<sup>310</sup> Likewise, in a different award, the same arbitrator voiced a concern that clause construction is “fraught with financial conflicts of interest for the arbitrator that most in the arbitration world either deny or are unwilling to discuss.”<sup>311</sup>

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309. Brower, *supra* note 24, at 51–52; *see also* Brief for Petitioner, *supra* note 223, at 37–38 (arguing that arbitrators “have a direct, inevitable, and significant financial interest in decisions concerning the availability of class arbitration because any determination to proceed on a class basis will substantially increase the length and scope of the proceedings”).

310. Partial Final Clause Construction Award at 6 n.1, *Schofield v. Delilah’s Den. of Phila., Inc.*, Case No. 03-15-0003-4601 (Am. Arb. Ass’n Commercial & Class Arbitration Tribunal 2016) (Matthews, Arb.). Even among arbitrators, there was a faint link between judicial experience and skepticism about whether a silent arbitration clause allowed class actions. 18 of the 106 clause-construction awards were rendered by arbitrators who are retired judges. This cohort held that class actions were authorized 44 percent of the time. Conversely, arbitrators who are merely practitioners reached the same conclusion 56.8 percent of the time (however, this difference was not statistically significant,  $p = 0.341$ ). Although more research is necessary to explore the issue, this suggests that judges who become arbitrators import a different set of norms about decision-making from their experience on the bench. One possibility is that former judges are more attuned to the possibility of being reversed by a higher court and thus are reluctant to read *Stolt-Nielsen* narrowly.

Thanks to an excellent suggestion from the editors at the *Duke Law Journal*, I also tried to determine whether there was any relationship between an arbitrator’s age and the decision to authorize a class action. As I have noted, arbitrators have dueling incentives when they perform clause construction. On the one hand, they have a short-term financial interest in allowing class proceedings. On the other hand, doing so might scare off future business from repeat-playing corporate defendants. Thus, one might wonder whether older arbitrators, who are closer to retirement, have fewer incentives to play the long game, and thus might be more prone to ruling in favor of plaintiffs. Accordingly, I googled all the arbitrators’ biographies and determined their approximate age at the time they issued their clause-construction orders. (For multiarbitrator panels, I averaged the age of the two or three decisionmakers). I discovered that the mean age of arbitrators who interpreted silent arbitration clauses to permit class actions, 67.8 years, was almost exactly the same as those who reached the opposite conclusion, 67.2 years.

311. Preliminary Award on Hobby’s Request to Allow Class Action (Clause Construction Award) at 12 n.5, *In re Anthony Hobby*, Case No. 11 114 01884 04 (Am. Arb. Ass’n Commercial & Class Action Arbitration Tribunal 2005) (Matthews, Arb.).

In addition, the arbitral awards allowing class actions seem results oriented. Recall that *Stolt-Nielsen* established that class arbitration is only permissible if the parties authorized it.<sup>312</sup> The idea that either party meant to authorize class actions is far-fetched. No corporate defendant would voluntarily subject itself to the specter of aggregate liability. Likewise, consumers and employees do not read fine print dispute-resolution provisions.<sup>313</sup> They are everyday people who have no expectations whatsoever about whether class claims are allowed. For these reasons, to hold that a broad arbitration clause showcases the parties' mutual desire to allow class actions is to ignore the realities of the transaction.<sup>314</sup>

Moreover, although there are compelling reasons to rule in favor of plaintiffs, *Stolt-Nielsen* forecloses them. First, when courts cannot divine the parties' intent, they sometimes imply reasonable terms based on "community standards of fairness."<sup>315</sup> Under ordinary circumstances, this might justify an arbitral award allowing class claims. After all, it seems inequitable to interpret a bare arbitration clause as a "get out of jail free" card for corporate liability.<sup>316</sup> Yet, even a cursory reading of *Stolt-Nielsen* reveals that these concerns—which try to level the playing field between corporations and individuals—cannot justify an arbitral award authorizing class actions. Indeed, the *Stolt-Nielsen* Court held, "[T]he task of an arbitrator is to interpret and enforce a contract, not to make public policy."<sup>317</sup>

Second, a decisionmaker might penalize the company for the ambiguity. Both before and after *Stolt-Nielsen*, arbitrators have often invoked the doctrine of *contra proferentem* to construe silence in a contract against the drafter.<sup>318</sup> Yet, *contra proferentem* "is not actually [a

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312. See *supra* notes 201–02 and accompanying text.

313. See, e.g., Jeff Govern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 47 (2015) (finding that only 59 of 668 individuals (9 percent) who read a credit card contract understood that it required the consumer to arbitrate).

314. See Rau, *supra* note 41, at 62–63 (2015) (examining a handful of arbitral clause-construction awards issued after *Oxford Health*, and asserting that "the putative interpretative path was one that would make a first year law student blush").

315. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981).

316. See *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002) (finding that adhesive class-arbitration waivers are substantively unconscionable and violate public policy because they deprive consumers of the ability to effectively litigate small claims and because they insulate corporate actors from impactful litigation of scale).

317. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 (2010).

318. See *supra* note 281 and accompanying text. In general, *contra proferentem* applies with special force to adhesion contracts. See, e.g., *Tahoe Nat'l Bank v. Phillips*, 480 P.2d 320, 327 (Cal.

rule] of interpretation’ as ‘its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used.’”<sup>319</sup> Instead, it is a policy-driven attempt to “favor[] the underdog.”<sup>320</sup> Accordingly, there is no meaningful difference between arbitral awards based on this doctrine and the improper arbitral award in *Stolt-Nielsen*.<sup>321</sup>

These dark glimmers of arbitral bias suggest that clause construction should be for the courts. None of the Court’s arbitrability touchstones support entrusting an issue to an unreliable decisionmaker. First, questionable rulings are the polar opposite of efficient. Indeed, as cases like *Oxford Health* illustrate, a shaky award may generate years of appeals.<sup>322</sup> Second, it is antithetical to the expertise theory to allow arbitrators to interpret silent arbitration clauses when some of them cannot do so evenhandedly. Finally, as a general principle, the parties would probably prefer to avoid erratic decisions on any topic. Therefore, presuming that they would want to roll the dice in arbitration does violence to their likely intent.

To be sure, this conclusion is a blow for consumers and employees who have benefitted from ad hoc arbitral clause-construction awards. However, as discussed in the next Subsection, my findings cut the other way on another important topic.<sup>323</sup>

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1971) (“Since the alleged ambiguities appear in a standardized contract, drafted and selected by the bank, which occupies the superior bargaining position, those ambiguities must be interpreted against the bank.”); see David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 440–46 (2009) (collecting pre-*Stolt-Nielsen* cases that invoke *contra proferentem*).

319. *Catlin Speciality Ins. v. QA3 Fin. Corp.*, 36 F. Supp. 3d 336, 342 (S.D. N.Y. 2014) (quoting 5 ARTHUR L. CORBIN & MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27 (rev. ed. 1998)).

320. CORBIN & KNIFFIN, *supra* note 319, § 24.27; see also Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435, 475 (2011) (“The one thing that this ‘rule’ is *not*, clearly, is an interpretive guide aimed at ferreting out what the true ‘intention’ or ‘meaning’ of the parties truly was.”).

321. See, e.g., *Drahozal & Rutledge*, *supra* note 41, at 1154 (“[C]onstruing the agreement against the party that drafted it . . . pretty clearly would not be sufficient to satisfy the standard adopted by the Supreme Court in *Stolt-Nielsen*.”).

322. See *supra* notes 217–28 and accompanying text.

323. The unreliable nature of the arbitral clause-construction rulings also cast doubt on the wisdom of the Court’s recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019); see also *supra* note 92; *infra* note 339. Archer and White and a company that eventually became Henry Schein entered into a distribution contract that delegated arbitrability to the arbitrator and excluded “actions seeking injunctive relief.” *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017), *vacated and remanded*, 139 S. Ct. 524. Archer

### B. “Ghost” Delegation Clauses

*First Options* requires parties to “clearly and unmistakably” convey their intent to allow arbitrators to decide matters of substantive arbitrability.<sup>324</sup> Yet, some courts have held that agreements can achieve this result without express delegation clauses. This Subsection criticizes that approach.<sup>325</sup>

Drafters often declare that arbitration must proceed under the internal regulations of a specific dispute-resolution service, such as the AAA or Judicial Arbitration and Mediation Services (“JAMS”).<sup>326</sup> Both institutions instruct arbitrators in potential class actions to “determine as a threshold matter whether the arbitration can proceed on behalf of or against a class.”<sup>327</sup> Likewise, they allow arbitrators to resolve “any objections with respect to the existence, scope or validity of the arbitration agreement.”<sup>328</sup> Jurisdictions are divided over whether a

and White then sued Henry Schein, seeking damages and an injunction. *See id.* Henry Schein responding by arguing that the arbitrator should decide whether the carve-out for “injunctive relief” applied. *See id.* at 490–91. The Fifth Circuit refused to enforce the delegation provision, holding that any argument that a request for an injunction fell within the scope of the arbitration clause was “wholly groundless.” *See id.* at 494–97. However, the Court granted certiorari and eliminated the “wholly groundless” exception. *See Henry Schein*, 139 S. Ct. at 531. The Court observed that the FAA “does not contain a ‘wholly groundless’ exception.” *Id.* at 528. In addition, the Court voiced concern that “[t]he exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless.” *Id.* at 531. Finally, in an odd passage, the Court seemed to inch back from the parity assumption:

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

*Id.* This may be truer than the Court knows. If the clause-construction rulings are any indication, arbitrators and judges likely see scope arbitrability very differently. By permitting arbitrators to resolve wholly groundless assertions that a claim falls within the ambit of an arbitration clause, *Henry Schein* opens the door for rogue arbitral rulings.

324. *See supra* notes 124–33 and accompanying text.

325. These arguments are intended to supplement Horton, *supra* note 13. In that piece, I draw similar conclusions based on (1) the historical difference between arbitration about the merits of a lawsuit and arbitration about the arbitrability of a lawsuit, (2) the text and legislative history of the FAA, and (3) prudential considerations. *See id.* at 399–413.

326. *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125, 1128 (9th Cir. 2015) (requiring arbitration to be conducted “in accordance with the Rules of the American Arbitration Association”); *Gould v. Japan Pulp & Paper (U.S.A.)*, No. 14 Civ. 7905, 2015 WL 631405, at \*1 (S.D.N.Y. Feb. 13, 2015) (“The Parties agree to submit any dispute, controversy or claim . . . to final and binding arbitration under the [JAMS] Commercial Arbitration Rules . . .” (alteration in original)).

327. JAMS, *supra* note 181, RULE 2; AM. ARB. ASS’N, *supra* note 40, RULE 3.

328. *See, e.g., AM. ARB. ASS’N, CONSUMER ARBITRATION RULES* r. 14(a) (2016),

contract that merely opts into AAA or JAMS rules thereby incorporates them, creating a “ghost” delegation clause.

This dilemma transcends the traditional battle lines between plaintiffs and defendants. When the arbitrability issue is clause construction, *corporations* argue that an oblique reference to AAA or JAMS rules cannot satisfy the test from *First Options*.<sup>329</sup> Courts are split. The Fifth Circuit and judges in California, Florida, New York, and Texas have found that selecting AAA or JAMS rules “delegate[s] the issue of class arbitration to the arbitrator.”<sup>330</sup> But other courts have refused to indulge in what the Third Circuit called “a daisy-chain of cross-references.”<sup>331</sup> Instead, they demand a conventional delegation

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<https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/6MQA-SRAX>] (permitting an arbitrator to resolve “any objections with respect to the existence, scope or validity of the arbitration agreement”); AM. ARB. ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES RULE 6(A) (2009), <https://www.adr.org/sites/default/files/Employment%20Rules.pdf> [<https://perma.cc/PZZ9-5VPP>] (same); JAMS, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES RULE 11(B) (2014), [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_comprehensive\\_arbitration\\_rules-2014.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf) [<https://perma.cc/YCB3-L59V>] (granting the arbitrator jurisdiction over “disputes over the formation, existence, validity, interpretation or scope of the agreement”).

329. See, e.g., *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1012 (N.D. Cal. 2011) (rejecting Yahoo’s position, and agreeing with the plaintiff that incorporating the AAA supplementary rules constituted an agreement to let the arbitrator decide class-arbitrability questions).

330. *Langston v. Premier Directional Drilling, L.P.*, 203 F. Supp. 3d 777, 789 (S.D. Tex. 2016); *accord Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 635–36 (5th Cir. 2012) (“The parties’ consent to the [s]upplementary [r]ules . . . constitutes a clear agreement to allow the arbitrator to decide whether [the] agreement provides for class arbitration.”), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *Spirit Airlines, Inc. v. Maizes*, No. 17-cv-61086-BLOOM/Valle, 2017 WL 4155476, at \*6 (S.D. Fla. Sept. 19, 2017) (same); *Guess?, Inc. v. Rusell*, No. 2:16-cv-00780-CAS(ASx), 2016 WL 2644297, at \*6 (C.D. Cal. May 9, 2016) (same); *Castaldi v. Signature Retail Servs., Inc.*, No. 15-cv-00737-JSC, 2016 WL 74640, at \*16 (N.D. Cal. Jan. 7, 2016) (same); cf. *Wells Fargo Advisors, L.L.C. v. Tucker*, 195 F. Supp. 3d 543, 551 (S.D.N.Y. 2016) (citing a contract’s incorporation AAA Securities Arbitration Rules, which allow arbitrators to hear challenges to their own jurisdiction, as additional evidence that “the arbitrator, rather than the [c]ourt, should determine the availability of classwide arbitration in the first instance,” but declining to find that the delegation was clear and unmistakable).

331. See *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 (3d Cir. 2016) (citation omitted) (holding that a bare reference to “the rules of the American Arbitration Association” is insufficient to delegate clause construction to the arbitrator (quotations omitted)); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (reasoning that a contract that mandated “binding arbitration under . . . the then-current [c]ommercial [r]ules and supervision of the American Arbitration Association . . . does not mention classwide arbitration at all”); *Herzfeld v. 1416 Chancellor, Inc.*, 14-4966, 2015 WL 4480829, at \*6 (E.D. Pa. July 22, 2015), *aff’d*, 666 F. App’x 124 (3d Cir. 2016) (“[W]e cannot find the three-word reference to AAA ‘rules and regulations’ incorporates a panoply of collective and class action rules . . . .”); *Shakoor v. VXi Glob. Sols.*, 35 N.E.3d 539, 550 (Ohio Ct. App. 2015) (“Although the AAA rules are referenced in general that is not sufficient to conclude that the parties agreed the arbitrator was authorized to determine if the agreement permits class arbitration.”).



clause in order “to wrest that decision from the courts.”<sup>332</sup> On the other hand, when the arbitrability issue is unconscionability, *plaintiffs* assert that delegation provisions must be explicit.<sup>333</sup> Most courts have rejected this argument when both parties are sophisticated.<sup>334</sup> Likewise, some judges have enforced ghost delegation clauses in adhesion contracts, including employment agreements,<sup>335</sup> video game subscriptions,<sup>336</sup> and payday loans.<sup>337</sup> But others have objected that “incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate”; these judges have held that mentioning an arbitration provider’s policies in the fine print is not a “clear and unmistakable” delegation of power.<sup>338</sup> Accordingly, “the impact of incorporating the AAA’s [or JAMS’s] model rules . . . appears far from clear.”<sup>339</sup>

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332. *Bird v. Turner*, No. 5:14CV97, 2015 WL 5168575, at \*8 (N.D. W. Va. Sept. 1, 2015) (quoting *Reed Elsevier*, 734 F.3d at 599).

333. *See, e.g.*, Plaintiff’s Opposition to Redfin’s Second Motion to Compel Arbitration at 4, *Galen v. Redfin, Co.*, No. 3:14-cv-05229 THE, 2015 WL 10719009 (N.D. Cal. May 1, 2015).

334. *See Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

335. *See, e.g.*, *Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 139 (D.D.C. 2015) (holding that the parties in an employment agreement clearly and unmistakably delegated arbitrability to an arbitrator); *Howard v. Rent-A-Ctr., Inc.*, No. 1:10-CV-103, 2010 WL 3009515, at \*4 (E.D. Tenn. July 28, 2010) (same); *Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 WL 1048700, at \*2-4 (N.D. Cal. May 4, 2005) (same); *cf. Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) (holding that incorporating AAA Employment Rules was a clear and unmistakable delegation in an employment contract between a bank and an executive).

336. *See, e.g.*, *Mendoza v. Microsoft Inc.*, No. 2:14-cv-00316-MJP, 2014 WL 4540225, at \*4 (W.D. Wash. Sept. 11, 2014) (granting a motion to compel arbitration based on the Terms of Use of Xbox LIVE).

337. *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, No. C 12-05797 SBA, 2014 WL 1868787, at \*1, \*4 (N.D. Cal. May 7, 2014).

338. *Allstate Ins. Co. v. Toll Bros.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016) (citation omitted); *see also Meadows v. Dickey’s Barbecue Rests. Inc.*, 144 F. Supp. 3d 1069, 1079 (N.D. Cal. 2015) (distinguishing between incorporation of AAA rules in a contract between sophisticated parties and an agreement for consumers); *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at \*11 (N.D. Cal. June 25, 2014) (same); *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016) (same).

339. Minutes of Motion Hearing at 9, *Guess?, Inc. v. Russel*, No. 2:16-cv-00780-CAS(ASx) (C.D. Cal. Apr. 18, 2016). This issue lurked in the background of *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). As mentioned *supra* notes 92 and 324, *Henry Schein* held that there is no “wholly groundless” exception to delegation provisions. *See id.* However, the contract in that case did not contain an express delegation clause; instead, it merely selected the AAA Rules. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017), *vacated and remanded*, 139 S. Ct. 524 (2019). The lower courts did not conclusively resolve

My analysis casts doubt on the wisdom of honoring ghost delegation clauses. For starters, in the clause-construction context, the difference in outcomes is so pronounced that it is perverse to link the choice of decisionmaker to a stray reference to the AAA or JAMS. Any rule that would blithely enlarge arbitral power over this topic is exactly backward.

By the same token, incorporating an institution's rules in an adhesion contract should not be enough to compel arbitration of unconscionability challenges. Admittedly, unlike clause construction, I have no evidence that arbitrators diverge from courts when they decide whether an arbitration clause is unfair. However, there are several similarities between clause construction and unconscionability. For one, each issue involves a question that is linked to an arbitrator's compensation. Indeed, if an arbitrator finds that the arbitration clause is unenforceable, she passes up an opportunity to charge thousands of dollars for deciding the merits. Also, as is the case with the interpretation of a silent arbitration clause, the question whether a provision is unconscionable gives the decisionmaker tremendous discretion. After all, "[u]nconscionability is an amorphous concept that evades precise definition."<sup>340</sup> As a result, it imposes few constraints on arbitrators who are hell-bent on deciding that the case must go on.

In fact, arbitral bias may be even more pronounced when the issue is the validity of the arbitration clause. Some arbitrators skew their clause-construction awards even though there are unique downsides to engaging in such conduct. For example, clause-construction rulings are published. Thus, an arbitrator who writes a disingenuous award gambles with her reputation. But there is no such check on unconscionability awards, which (like most awards) remain private. This privacy might

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whether incorporating the AAA rules functioned as a ghost delegation clause. *See id.* at 494–97. When the matter reached the Court, George A. Bermann, the chief reporter for the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, filed an amicus brief explaining why the opinions that recognize ghost delegation clauses are "incorrectly decided." Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent at 2, *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019). According to Bermann, the arbitration-institution rules that courts have interpreted to be delegation clauses were not intended to strip courts of jurisdiction over arbitrability; rather, they merely *permit* arbitrators to decide those matters. *See id.* at 11. At oral argument, this theory piqued the interest of Justices Ginsburg and Breyer. *See* Transcript of Oral Argument at \*8–9, \*49–50, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (No. 17-1272). Likewise, Justice Kavanagh's opinion concluded by "express[ing] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator." *Henry Schein*, 139 S. Ct. at 531. Accordingly, at least some Justices are skeptical about ghost delegations.

340. *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 164 (Wis. 2006).

provide a smoke screen for arbitrators who are guided by money. In addition, in the clause-construction milieu, arbitrators' short-term interests arguably differ from their long-term goals. Although a pro-plaintiff ruling pays dividends immediately by christening an expensive class action, it also could reduce the chances that a repeat-playing corporation will choose the arbitrator in the future. Therefore, even the most entrepreneurial arbitrator faces a conflict. Conversely, in unconscionability cases, both of these arrows point in the same direction. Ruling that the arbitration clause is enforceable both allows the arbitration to proceed and sends a pro-defendant signal. Thus, even if the arbitral process is unfair, and no matter what a court might hold, arbitrators are unlikely to exempt matters from arbitration.<sup>341</sup>

For these reasons, it is important that judges retain as much power as possible over unconscionability. To achieve this goal, courts should not enforce ghost delegation clauses in adhesion contracts. If a drafter wants to arm arbitrators with the power to decide whether the arbitral process is fair, she should be required to do so explicitly.

#### CONCLUSION

For decades, the Supreme Court has insisted that arbitrating, rather than litigating, does not impact the outcome of a case. This Article

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341. A lurking, related issue is whether arbitrators can decide the mother of all gateway questions—whether the FAA even applies. Section 1 of the FAA excludes employment contracts involving “transportation workers.” See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Likewise, section 2 requires an arbitration clause to be nested within “a contract evidencing a transaction involving commerce.” 9 U.S.C. § 2. In addition, federal lawmakers have passed several regulations that override the FAA. For example, Congress prohibits arbitration clauses in certain residential mortgages and loans made to members of the armed services. See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203 § 1414, 124 Stat. 1376 (2010); *Military Lending Act*, 10 U.S.C.A. § 987(e)(3) (2006); Horton, *supra* note 13, at 435–39 (collecting more examples); David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 684–87 & n.110 (2018) (same). Can delegation clauses allow arbitrators to rule on whether these antiarbitration rules apply?

As this Article was being edited, the Court filled in one piece of the puzzle by holding that arbitrators cannot determine whether an agreement qualifies for section 1's carve-out for employment contracts involving transportation workers. See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 534 (2019). The Court reached that result by focusing on the statute's text and structure, reasoning that “to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2.” *Id.* Because of this laser-like focus on the FAA, *New Prime* does not speak to whether external antiarbitration laws—such as federal bans on arbitration clauses in certain transactions—are delegable. My research suggests that there should be a thumb on the scale against allowing arbitrators to decide matters that determine whether the arbitration goes forward.

demonstrates that in one context—disputes over whether a silent arbitration clause allows class actions—the parity assumption is a fallacy. Even controlling for other variables, arbitrators are 63.7 times more likely than judges to interpret the provision as permitting class proceedings. Moreover, this Article presents circumstantial evidence that this disparity stems from arbitrators furthering their financial interests. By limiting arbitral jurisdiction over similar issues, the legal system can maintain the integrity of private dispute resolution.