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Sticky Arbitration Clauses - the Use of Arbitration Clauses after Concepcion and Amex

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ARTICLES

"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After *Concepcion* and *Amex*

*Peter B. Rutledge**
*Christopher R. Drahozal***

We present the results of the first empirical study of the extent to which businesses have switched to arbitration after AT&T Mobility LLC v. Concepcion. *The Supreme Court's decision in* Concepcion *led commentators to*

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We appreciate the excellent research assistance of Michael Albani, Jean Ménager, and Julia Drahozal, as well as helpful comments on the paper from participants in faculty workshops at Columbia Law School, the University of Florida School of Law, and the University of Kansas School of Law. Thanks also to participants at the annual meeting of the Midwestern Law & Economics Association at Washington University in St. Louis Law School; the AALS Works-In-Progress Conference at Moritz College of Law, Ohio State University; and the University of Georgia/Emory 2013 summer workshop. We also appreciate very helpful discussions with Kent Barnett, Beth Burch, Nathan Chapman, Brian Fitzpatrick, Mitu Gulati, Laura Hines, Michael Helfand, Jason Johnston, Florencia Marotta-Wurgler, Sandy Meiklejohn, Christina Mulligan, Archis Parasharami, Usha Rodrigues, Catherine Rogers, and Steve Ware.

predict that every business soon would use an arbitration clause, coupled with a class arbitration waiver, in their standard form contracts to avoid the risk of class actions. We examine two samples of franchise agreements: one sample in which we track changes in arbitration clauses since 1999, and a broader sample focusing on changes since 2011, immediately before Concepcion *was decided. Our central finding is consistent across both samples of franchise agreements: the use of arbitration clauses in franchise agreements has increased since* Concepcion, *but not dramatically. Most franchisors have not switched to arbitration. Our results necessarily are limited to franchise agreements and may not be generalizable to consumer and employment contracts. But they are consistent with the Consumer Financial Protection Bureau's preliminary results on changes in arbitration clause use in credit card and checking account agreements since* Concepcion.

We then consider why only a handful of franchisors have switched to arbitration clauses since Concepcion. *Those predicting a switch to arbitration assume both that there is no reason for a business not to use an arbitral class waiver and that businesses readily and costlessly can and will modify their form contracts. In our view, both assumptions are subject to question. First, some businesses have good reasons not to use an arbitration clause. By using an arbitration clause, businesses contract for a bundle of dispute resolution services, including, for example, a very limited right to appeal. If a business perceives itself as unlikely to be subject to a class action, these "bundling costs" may discourage the business from using an arbitration clause. Second, standard form contracts, like negotiated contracts, might be resistant to change even if change might be in the business's best interest—in other words, standard form contracts might be "sticky." We find empirical evidence to support both possible explanations. The Article concludes by considering how the Court's subsequent decision in* American Express Co. v. Italian Colors Restaurant *might affect the future use of arbitration clauses, as well as the use of class action waivers that are not part of an arbitration clause.*

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I. INTRODUCTION

The Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[1] has been described as a "crushing blow to consumers,"[2] a "disaster for consumer protection,"[3] and "one of the most important and favorable cases for businesses in a very long time."[4] In

1. 131 S. Ct. 1740, 1753 (2011).

2. Bob Sullivan, *After High Court Ruling, Firms Divide and Conquer in Consumer Cases*, http://perma.cc/6MCH-HCJY (nbcnews.com, archived Mar. 9, 2014) (quoting Ed Mierzwinski, U.S. Public Interest Research Group).

3. Bruce D. Greenberg, *A Poor Judicial Product and a Disaster for Consumer Protection: A Lengthy Analysis of* AT&T v. Concepcion, http://perma.cc/WXP-864B (appellatelaw-nj.com, archived Mar. 9, 2014); *see also* Ian Millhiser, *The Supreme Court's One Thousandth Cut Against Consumers*, http://perma.cc/6W68-WD4Z (thinkprogress.org, archived Mar. 10, 2014) ("[I]f *Concepcion* turns out badly it will be a disaster for millions of American consumers and a green light for corporate America to scam us all a few dollars at a time.").

4. Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration*, http://perma.cc/6N5W-W4K8 (nytimes.com, archived Mar. 10, 2014) ("The decision basically lets

Concepcion, the Court held that the Federal Arbitration Act ("FAA") preempts state court decisions invalidating class arbitration waivers as unconscionable.[5] After *Concepcion*, commentators predicted that every business soon would use an arbitration clause, coupled with a class arbitration waiver, in their standard form contracts to avoid the risk of class actions.[6] A "tsunami"[7] of these arbitral class waivers was coming such that, "[a]fter *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action."[8]

More recently, a similar chorus of criticisms followed the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* ("*Amex*").[9] In *Amex*, the Court rejected the argument that an arbitral class waiver was unenforceable because it precluded the plaintiffs from vindicating their federal statutory rights, even though the lack of class relief arguably made proving the federal antitrust claim not economically feasible.[10] This decision ended most if not all remaining uncertainty over the enforceability of arbitral class

companies escape class actions, so long as they do so by means of arbitration agreements . . . . This is a game-changer for businesses." (quoting Brian Fitzpatrick, Vanderbilt University Law School)).

5. 131 S. Ct. at 1753.

6. *See, e.g.*, Jean Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 718 (2012) ("In the future we can expect that far more companies will impose arbitral class action waivers as a means to insulate themselves from class actions . . . ."); Steven Berk, *EBay Offering Rare Chance to Opt-Out of Forced Arbitration*, http://perma.cc/DAN4-DX8E (thecorporateobserver.com, archived Mar. 10, 2014) ("At this point, nearly every company that provides consumer goods or services, from Amazon to Verizon, now requires users to agree to an arbitration clause. Companies are wasting no time in taking advantage of the opportunity to smother those pesky class action suits before they even have a chance to breathe."); Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, http://perma.cc/A7UG-M792 (sfgate.com, archived Mar. 10, 2014) ("Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to [arbitration agreements with class waivers]."); Nathan Koppel, *Will Federal Consumer Bureau Ride to the Rescue of Class Actions?*, http://perma.cc/533S-KA7G (blogs.wsj.com, archived Mar. 10, 2014) ("Class-action bans are already pretty common in certain industries, such as consumer credit and cell phones, and they are about to become much more common, lawyers say.").

7. Myriam E. Gilles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 629 (2012).

8. Ian Millhiser, *Supreme Court Nukes Consumers' Rights in Most Pro-Corporate Decision Since* Citizens United, http://perma.cc/QK52-NSGZ (thinkprogress.org, archived Mar. 10, 2014).

9. 133 S. Ct. 2304 (2013).

10. *Id.* at 2309–10.

waivers.[11] Reiterating the refrains about *Concepcion*, commentators quickly decried *Amex* as an "unmitigated disaster" and the "worst Supreme Court arbitration decision ever."[12] They predicted "a new rash of companies issuing arbitration clauses that preclude class actions."[13]

These empirical predictions are based on two seemingly self-evident assumptions. The first is that, after *Concepcion* and *Amex*, every business will benefit from using an arbitral class waiver to avoid class actions. Businesses want to avoid class actions, and on this view, there is no downside to using an arbitral class waiver to accomplish that end. The writings of Myriam Gilles exemplify this first assumption:

> I regard it as inevitable that firms will ultimately act in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class liability. Why wouldn't they? Once the [class] waivers gain broader acceptance and recognition, it will become malpractice for corporate counsel not to include such clauses in consumer and other class-action-prone contracts.[14]

The second assumption is that business parties can easily and unilaterally change consumer contracts. Consumer contracts are not like negotiated contracts between sophisticated parties, which may be "sticky" and resistant to change. Gilles makes this assumption explicit as well: "[M]ost companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop."[15]

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11. *But see infra* note 70.

12. Paul Bland, *Worst Supreme Court Arbitration Decision Ever*, http://perma.cc/AKS6-3UGR (publicjustice.net, archived Mar. 10, 2014); Jean Sternlight, American Express Co. v. Italian Colors Restaurant *Guts Enforcement of Federal Laws*, http://perma.cc/M95B-4T29 (indisputably.org, archived Mar. 10, 2014).

13. Matt Brownell, *Forced Arbitration: Killing the Right to Sue Big Companies, One TOS Agreement at a Time*, http://perma.cc/ET99-4QM6 (dailyfinance.com, archived Mar. 10, 2014) ("If the court does indeed rule in favor of American Express, look for even more businesses to find ways to shield themselves from lawsuits."); *In Court Rulings, Roberts Takes Long-Term Approach*, http://perma.cc/H5W5-G4YX (npr.org, archived Mar. 10, 2014) ("[A]ny smart business today puts in a clause that says you must arbitrate, and you can't join up with other people to do so, you can't do it in arbitration, you can't do it in court, you're on your own."); Sternlight, *supra* note 12.

14. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005); *see also* Myriam Gilles, *Gutting the Vindication-of-Rights Challenge to Arbitration Agreements*, 82 GEO. WASH. L. REV. (forthcoming 2014) (manuscript at 1) (predicting that "one day soon, some unfortunate transactional lawyer will be the first to be held liable for failing to insert an arbitration clause banning all aggregate claiming in a standard form agreement"); Gilles & Friedman, *supra* note 7, at 629 (same).

15. Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 846 (2012); *see also* Sternlight, *supra* note 6, at 718 ("For companies that fear being sued in class actions it

It has now been more than two years since the decision in *Concepcion*, long enough to evaluate, at least preliminarily, how contracting practices have changed in response to the decision. This paper is the first to study empirically the extent to which businesses switched to arbitration after *Concepcion*. As the basis for our study, we examine two samples of franchise agreements: one sample of leading franchisors in which we track changes in arbitration clauses since 1999 and one broader sample of franchisors focusing on changes since 2011, immediately before *Concepcion* was decided. Commentators have strongly urged franchisors, like consumer businesses and employers, to switch to arbitration clauses after *Concepcion*.[16] Indeed, franchisors were among the first businesses to use arbitration clauses as a "class action shield" back in the 1990s.[17] Moreover, franchise agreements exemplify a rare type of standard form contract. They are publicly available in a systematic way, and a reasonably lengthy history of the contracting practices is available. While our results are limited to franchise agreements and may not be generalizable to consumer and employment contracts, they

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will be quite easy to insert class action waivers into small-print documents or online provisions that they send or make available to their customers or employees."); Brownell, *supra* note 13 ("It's easy for tech companies, websites and wireless carriers to insert arbitration clauses into their contracts, because people are used to skipping the terms of service agreements and fine print that accompany these services.").

16. Judy Rost et al., *Comparative International Perspectives of Arbitration in the Franchising Context*, 31 FRANCHISE L.J. 124, 126 (2012) ("In the United States, one compelling reason for franchisors to include an arbitration provision is as a potential means to avoid class actions."); Anthony J. Calamunci, Concepcion v. AT&T*: Its Impact on Franchise Law*, http://perma.cc/5KF4-2AQX (lexology.com, archived Mar. 10, 2014) ("*Concepcion*, when applied to franchise agreements, grants franchisors the authority to draft much stronger language even when the agreement is offered as a 'take-it or leave-it,' . . . . Franchisors should contact counsel and sharpen their pencils. If there was ever a time to test the boundaries of the fine print, the time is now!"); Martin Fern, *Franchise Law Update: Protecting a Franchisor Against the Risk of System-Wide Class Actions*, http://perma.cc/4QRF-WW3R (foxrothschild.com, archived Mar. 10, 2014):

> [T]he AT&T decision ends this debate [over the pros and cons of arbitration], at least for franchisors and companies that provide contractual services to consumers, since it is now clear that a franchisor may both mandate arbitration of franchisor-franchisee disputes and preclude classwide arbitrations. This can effectively eliminate the risk of a class action by franchisees against a franchisor. The AT&T decision now makes a well-drafted arbitration clause an essential feature of every franchise agreement;

Kemp Sawers & Paul Russell, *Franchise Report: Avoiding Class Arbitrations*, http://perma.cc/9P2V-HGA4 (bakerbotts.com, archived Mar. 10, 2014) ("The prudent franchisor should not assume that the absence of express language authorizing class arbitration immunizes the franchisor from class treatment. Instead, the safe course of action for franchisors is to include a class arbitration waiver in franchise agreements.").

17. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).

nonetheless provide valuable evidence on how at least some businesses are responding to *Concepcion*.[18]

Our central finding is consistent across both samples of franchise agreements: the predicted tsunami of arbitral class waivers has not occurred. The use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration. The reason is not that all franchisors were already using arbitration before *Concepcion*.[19] Indeed, less than one-half or two-thirds of franchisors (depending on the sample) used arbitration clauses in their standard form contracts immediately prior to *Concepcion*.[20] Franchisors had plenty of room to switch to arbitration, but they have not done so in any substantial way.

Given our finding that only a handful of franchisors have switched to arbitration clauses since *Concepcion*, the next question is, "Why not?" We examine the two assumptions underlying the predictions of a tsunami of arbitration clauses and find reason to question both. First, by using an arbitration clause, businesses do more than simply contract out of class actions: they contract for a bundle of dispute resolution services, including a very limited right to appeal. For businesses that perceive themselves as unlikely to be sued in a class action, and hence to receive little benefit from an arbitral class waiver, the other services bundled with the waiver of class actions may discourage them from using an arbitration clause. We call

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18. Our findings are consistent with preliminary results released by the Consumer Financial Protection Bureau on changes in the use of arbitration clauses in credit card and checking agreements since *Concepcion*. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 54–57 (2013), *available at* http://perma.cc/Y244-5FTM (finding only a slight increase in the use of arbitration clauses); *see infra* text accompanying notes 154–58. Anecdotal evidence suggests that other industries might have shifted more strongly toward arbitration since *Concepcion*. Thus, Microsoft, Sony, and other software and online companies have announced since *Concepcion* that they were adopting arbitration clauses in their end-user license agreements. We seek to reconcile these anecdotal reports with our empirical findings later in the paper. *See infra* text accompanying notes 159–72.

19. By comparison, the limited empirical evidence on the use of arbitration clauses by mobile-wireless-services providers suggests that almost all facilities-based operators already use arbitration clauses, in which case of course one would not expect a major move toward arbitration by such businesses. *See* Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure*, 66 FLA. L. REV. (forthcoming 2014) (finding that 11 of 12 facilities-based operators used arbitration clauses).

20. *See supra* text accompanying notes 18–19; *see also* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 727 (finding that 45% of franchise agreements contained arbitration clauses in 1999); Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 95 (2008) (finding that 43.7% of franchise agreements contained arbitration clauses in 2007).

the costs resulting from these bundled services "bundling costs." Second, even standard form contracts might be "sticky"—that is, resistant to change even if change might be in the business's best interest. We find empirical support for both possible explanations for why many businesses have not switched to arbitration clauses after *Concepcion*.[21]

We then consider the potential implications of *Amex* for the future use of arbitration clauses. Of course, if all businesses switched to arbitration because of *Concepcion*, *Amex* likely would have little additional effect. But given our finding that such a switch has not occurred, the question then is, "How is *Amex* likely to affect contracting behavior?" If businesses have not switched to arbitration clauses because of post-*Concepcion* uncertainty over the enforceability of arbitral class waivers, *Amex* largely removes that uncertainty. The expected result would be an increased use of arbitration clauses. If, however, businesses have not switched to arbitration clauses for reasons other than legal uncertainty, *Amex* will not make arbitration more attractive. Other characteristics of arbitration (such as the limited right to appeal) might explain franchisors' decisions not to switch. To the extent these bundling costs deter the use of arbitral class waivers, businesses still might not switch to arbitration. Likewise, to the extent contract stickiness explains the limited switch to arbitration, *Amex* will have limited effect.

That said, *Amex* might actually make an alternative to arbitral class waivers—what we call nonarbitral class waivers—more attractive than before. Nonarbitral class waivers are waivers of class actions that are not part of an arbitration clause.[22] The parties remain in court but waive class actions by contract. Nonarbitral class waivers clauses are not as common as arbitral class waivers, but they do exist.[23] Although on its facts *Amex* addresses the enforceability of arbitral class waivers, much of the Court's reasoning applies as well to nonarbitral class waivers. Indeed, in our view, *Amex* might be better understood not as a case about arbitration clauses but as a case about class actions. Read broadly, *Amex* could be construed as making class actions waiveable even without the use of an arbitration clause. Nonarbitral class waivers are beneficial for businesses because they avoid the bundling costs of an arbitral class waiver: businesses can avoid class actions but can otherwise litigate in court (maintaining full

21. For another possible reason, see *infra* note 82.

22. We elaborate on the importance of this technical distinction in Part II.

23. *See infra* text accompanying notes 198–99.

appeal rights, for example). Of course, even after *Amex*, much legal uncertainty remains about the enforceability of nonarbitral class waivers, and we certainly do not predict a "tsunami" of such waivers. But on the margin, this broad interpretation of *Amex* makes nonarbitral class waivers more attractive and might increase their use (an increase that was occurring even before *Amex*, at least in franchise agreements).

This Article and its findings are important for a number of reasons. First, and most obviously, the findings call into question some of the empirical predictions following *Concepcion* and *Amex*. So far, it is simply not true that all or even most businesses are switching to arbitration clauses after *Concepcion*. To be clear, however, whether businesses have broadly switched to arbitration clauses with class waivers is not the same question as whether courts have applied *Concepcion* to dismiss claims seeking class relief in court, or even whether *Concepcion* (and *Amex*) might result in the end of consumer and other contract-based class actions. We offer no views here on how courts have applied *Concepcion*, and we readily acknowledge that the businesses most likely to be subject to class actions, or at least that so perceive themselves, are the ones most likely to use arbitral class waivers.[24]

Second, the Article cautions against unquestioning acceptance of the common parade-of-horribles arguments marshaled in courtrooms around the nation, including the Supreme Court of the United States. At a high level of abstraction, this argument typically takes the following form: if the court decides the case in a certain manner, an avalanche of undesirable behavior will surely follow. In the specific context of contract cases, the argument unfolds in this manner: if the court enforces certain contractual terms in a firm's contract, similarly situated firms will flock to the approved language, often to the detriment of other constituencies like consumers or employees. In whatever context, though, arguments of this sort ultimately entail predictions about human (or firm) behavior. At the time those predictions are advanced, they *should* have some empirical foundation. Yet often they do not. Moreover, after the court decides the case, those predictions *should* be tested empirically. Yet often they are not. Not only does this state of affairs sully the quality of legal argument, it risks the court basing its decision on an invalid empirical premise.

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24. Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 540 (2012).

Third, the Article offers a first look at how the Supreme Court's recent decision in *Amex* might affect contracting behavior. Although on its facts *Amex* involves the enforceability of an arbitral class waiver, the Court's reasoning might extend as well to nonarbitral class waivers, at least as to certain federal statutory claims. There are, however, important differences between arbitral and nonarbitral class waivers that might affect firm behavior. Unlike arbitral class waivers, nonarbitral class waivers likely remain subject to state unconscionability challenges. That is because *Concepcion* is based on the FAA and therefore is limited to arbitral class waivers. But for businesses that want to avoid the bundling costs of arbitration (e.g., retain the right to appeal in court), nonarbitral class waivers would become more attractive after *Amex*. Thus, for a firm that favored the most airtight class waiver, an arbitral class waiver might make sense; for a firm that favored a greater opportunity to appeal an adverse decision, a nonarbitral class waiver might make more sense.

Fourth, this Article clarifies the nature of arbitration as a means of resolving disputes. An arbitration clause is an agreement to a bundle of dispute resolution services—a party-appointed judge, less discovery, a limited right to appeal, and the like. Litigation provides its own bundle of services. And while parties can modify the litigation and arbitration bundles by contract, there are limits. For some parties, all aspects of the arbitral bundle may be preferable to all aspects of the litigation bundle. For others, some arbitral characteristics may be advantageous while others are not, but the advantages may outweigh the disadvantages. For still others, the disadvantages of arbitration may outweigh the advantages—even if one of those advantages is avoiding class actions. Stated otherwise, one cannot assume that parties will choose arbitration on the basis of only one characteristic without considering the entire bundle.

Fifth and finally, this Article provides insights into the nature of contract change and innovation. Specifically, it draws on prior scholars' work about why, under certain circumstances, contract terms might be sticky. We examine several explanations for why contract terms might be sticky and consider how those explanations apply when the contracts involve parties occupying unequal bargaining positions. There certainly is reason to expect a degree of stickiness in franchise agreements, and we indeed find some evidence of stickiness in the contracts we studied. But the evidence does not exclude the possibility of other explanations for the lack of a shift to arbitration by franchisors, such as the bundling theory suggested above. This Article also gives reason to question whether a Supreme Court decision

upholding a particular contract provision necessarily is a sufficient "shock" to overcome contract stickiness.

Part II of the Article provides background on the use of arbitration clauses as class action waivers, as well as on the *Concepcion* and *Amex* decisions. Part III discusses the economics of arbitration and standard form contracts, considering both the bundle of dispute resolution services provided in arbitration and the "stickiness" of contract terms. Part IV describes our data and methodology, and presents our empirical analysis. Part V examines *Amex*'s possible implications for the use of arbitral and nonarbitral class waivers. Finally, Part VI summarizes our conclusions and sets out the implications of our empirical findings.

II. *CONCEPCION*, *AMEX*, AND THE USE OF ARBITRATION CLAUSES

We begin with terminology and some history. Although many of the cases and much of the commentary speak generically of "class action waivers," we use more precise labels. Technically, provisions addressing class relief in arbitration clauses are class *arbitration* waivers, not class action waivers.[25] The arbitration clause itself has the effect of avoiding class relief in court because the parties instead have agreed to arbitrate any dispute.[26] The additional waiver language precludes the arbitration from proceeding on a class basis, hence the term "class arbitration waiver."

In this Article, we refer to the combined effect of an arbitration clause and a class arbitration waiver as an "arbitral class waiver."[27] By comparison, we use the term "nonarbitral class waiver" to refer to contract provisions designed to waive the availability of a class action in court without using an arbitration clause. Nonarbitral class waivers

25. Although sometimes an arbitration agreement will include a nonarbitral class waiver in the event the arbitration clause is invalidated. *See* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. (forthcoming) (manuscript at 29–30), *available at* http://perma.cc/P84G-PGYE.

26. *See, e.g.*, Zawikowski v. Beneficial Nat'l Bank, No. 98 C 2178, 1999 WL 35304, at *6 (N.D. Ill. Jan. 11, 1999) ("Nothing prevents the Plaintiffs from contracting away their right to a class action." (citation omitted)); Collins v. Int'l Dairy Queen, Inc., 169 F.R.D. 690, 694 (M.D. Ga. 1997); Hunt v. Up North Plastics, 980 F. Supp. 1046, 1048 (D. Minn. 1997) (granting the defendant's motion to compel arbitration); *Ex Parte* Green Tree Fin. Corp., 723 So. 2d 6, 10 n.3 (Ala. 1998) ("[A] rule of civil procedure providing for class actions cannot overcome binding arbitration agreements.").

27. For examples of prior uses of the phrase, see Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 KAN. L. REV. 767, 786 (2012) (referring to a clause as an "arbitral class waiver"); *see also* Sternlight, *supra* note 6 ("arbitral class action waiver").

are much less common but do exist, particularly in the franchise setting.[28] Finally, we refer to both types of provisions collectively as class action waivers.[29]

Because the history of arbitral class waivers has been detailed at length elsewhere,[30] we provide only a brief overview here. We reiterate the highlights of the events leading up to *Concepcion* in Section II.A and then discuss *Concepcion* itself in Section II.B. Finally, in Section II.C, we consider the *Amex* case and its importance for the enforceability of class action waivers.

A. Arbitration Clauses and Class Actions

Franchise lawyers were among the very first to recognize that an arbitration clause could reduce their clients' risks of facing class actions.[31] In a 1997 article in the *Franchise Law Journal*, attorney

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28. *See infra* text accompanying notes 198–99.

29. Gilles uses the term "collective action waiver" to the same effect. Gilles, *supra* note 14, at 375–76; *see also* Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 276, 270–80 (2009) (explaining different usages).

30. *See, e.g.*, Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 51–56 (2012); Sternlight, *supra* note 15, at 705–07; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 53–78 (2000).

31. For other early publications making the same point, see Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 BUS. L. TODAY, May/June 1998, at 24, 26 ("Arbitration is a powerful deterrent to class action lawsuits against lenders because the great weight of authority holds that arbitrations cannot be conducted on a class basis unless the parties have agreed to do so."); Michael R. Pennington, *Every Health Insurer's Litigation Nightmare: A Case Study of How One Class Action Affected the Business of One Health Insurer*, 28 BRIEF 46, 52 (1999) ("In a further effort to limit litigation exposure in general, and exposure to class actions in particular, many insurance companies in Alabama are presently working to sustain the use of arbitration clauses in insurance policies."); J.T. Westermeir, *How Arbitration Clauses Can Help Avoid Class Action Damages: Strategies for Managing Risks of Litigation*, 14 COMPUTER L. STRATEGIST, Sept. 1997, at 1, 1. Kaplinsky describes himself as the "pioneer of class action waivers." Mickey Meece, *Arbitration Is Here to Stay and One Lawyer Says That Is Good for Consumers*, http://perma.cc/TLR8-V63P (forbes.com, archived Mar. 10, 2014).

Reported case law reveals a variety of class action risks faced by franchisors. For a sampling, see Southland Corp. v. Keating, 465 U.S. 1, 1 (1984) (common-law and disclosure claims under state franchise law); Awuah v. Coverall N. Am., Inc., 729 F.3d 22, 24 (1st Cir. 2013) (common-law claims and violations of state wage and labor laws); Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18, 19 (1st Cir. 2012) (breach of licensing agreements); Klosek v. Am. Express Co., 370 Fed. App'x 761, 762 (8th Cir. 2010) (common-law claims); Bridgefund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 999 (9th Cir. 2010) (common-law claims and violations of state franchise-investment law); *see also infra* note 59 (collecting post-*Concepcion* cases where class waivers are challenged in franchise agreements). We are grateful to Bob Scott for highlighting the importance of this proposition to our argument.

Jack Dunham explained that franchisors faced a heightened risk of class actions and concluded that "franchisors with an arbitration clause in their franchise agreements have an effective tool for managing these new class action risks."[32] The arbitration clause, according to Dunham, served as a "class action shield."[33]

At the time, many courts refused to order arbitration to proceed on a class basis. The arbitration clause itself thus "shield[ed]" franchisors from class actions.[34] Even so, some franchisors (and other businesses) began coupling their arbitration clauses with provisions precluding arbitration from proceeding on a class basis.[35] These class arbitration waivers became more important after the Supreme Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*.[36] The issue in *Bazzle* was whether the FAA preempted the South Carolina Supreme Court's decision compelling class arbitration.[37] The U.S. Supreme Court was sharply divided, with the plurality concluding that the issue of whether an arbitration clause permitted class arbitration was for the arbitrator to decide.[38]

In response to *Bazzle*, the American Arbitration Association ("AAA") promulgated rules for administering class arbitrations.[39] The

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32. Dunham, *supra* note 17, at 141.

33. *Id.*

34. *See, e.g.*, Iowa Grain Co. v. Brown, 171 F.3d 504, 510 (7th Cir. 1999) (holding that a class action was unavailable because arbitration is an agreement between the parties); Champ v. Siegel Trading Co., 55 F.3d 269, 274–77 (7th Cir. 1995) ("[T]he FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter."). *But see* Keating v. Superior Court, 31 Cal. 3d 584, 613 (1982) (granting deference to the trial court to consider a class-wide arbitration as it would a motion for class certification), *rev'd on other grounds sub nom.*, Southland Corp. v. Keating, 465 U.S. 1 (1984); Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002) ("[C]lass-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."), *vacated*, 539 U.S. 444 (2003).

35. *See* Drahozal, *supra* note 20, at 731–32.

36. 539 U.S. 444 (2003). It is not just parties or commentators that make empirical predictions. *See* Transcript of Oral Argument at 55, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562, at *53 ("Does this case have any real future significance, because isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?").

37. 539 U.S. at 447 (Breyer, J., plurality opinion). A companion case involved a decision by the arbitrator that arbitration could proceed on a class basis. *Id.* at 453–54 (Breyer, J., plurality opinion).

38. *Id.* at 452–53 (Breyer, J., plurality opinion). Justice Stevens concurred in the judgment vacating the South Carolina court's decision so that there would at least be a judgment of the Court. *Id.* at 454–55 (Stevens, J., concurring in judgment and dissenting in part).

39. Am. Arbitration Ass'n, *Supplementary Rules for Class Arbitrations*, http://perma.cc/3QBG-RQGP (adr.org, archived Mar. 10, 2014). JAMS has also promulgated class arbitration rules. *See* JAMS, *JAMS Class Action Procedures*, http://perma.cc/MZ5T-U37S (jamsadr.com, archived Mar. 10, 2014).

AAA indicated that it would administer a class arbitration as long as the parties had agreed to arbitrate under any set of AAA rules and the arbitration agreement was "silent" on class arbitration, consolidation, or joinder.[40] Following the *Bazzle* plurality, the AAA class arbitration rules specified that the arbitrator was to decide in a "clause construction award" "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[41] The arbitration proceedings would then be stayed to permit any party to seek court review of the clause construction award. Assuming the arbitrator construed the agreement as permitting class arbitration, subsequent steps in the process track Federal Rule of Civil Procedure 23 on class actions (i.e., the arbitrator would decide whether to certify a class[42] and then would proceed to adjudicate the merits).[43] Since promulgating its rules, the AAA has administered over 350 class arbitration proceedings.[44]

In only a handful of AAA clause construction awards (7 of 135, or 5%) did the arbitrators decide that the arbitration clause did not permit class arbitration.[45] In the vast majority, the arbitrators construed the clause as permitting class arbitration (95 of 135, or 70%), or the parties stipulated that it did so (33 of 135, or 24%).[46] Seeking to avoid class arbitration, businesses increasingly included class arbitration waivers in their contracts.[47] In turn, consumers, employees, and franchisees challenged the enforceability of those class arbitration waivers, most commonly (although not exclusively) on the ground that the class arbitration waiver was unconscionable.[48]

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40. Am. Arbitration Ass'n, *AAA Policy on Class Arbitrations*, http://perma.cc/HN5R-Q7TX (adr.org, archived Mar. 10, 2014):

> [T]he American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

41. Am. Arbitration Ass'n, *supra* note 39, R. 3.

42. *Id.* R. 4–5.

43. *Id.* R. 7–8.

44. *See* Gregory A. Litt & Tina Praprotnik, *After* Stolt-Nielsen, *Circuits Split, but AAA Filings Continue*, 27 MEALEY'S INT'L ARB. REP. 1, 1 (2012) (charting AAA class arbitrations filed between 2003 and 2012).

45. Brief for American Arbitration Association as Amicus Curiae Supporting Neither Party at 22, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

46. *Id.*

47. *See infra* text accompanying notes 147–48.

48. *See infra* text accompanying notes 50–54. In addition, arbitration clauses also were challenged on the ground that they precluded the claimant from vindicating his or her statutory rights. *See infra* text accompanying notes 60–62.

Businesses responded by arguing that the FAA preempted that argument. The issue reached the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*.[49]

B. Concepcion *and FAA Preemption*

The Concepcions were cell phone customers of AT&T Mobility ("AT&T") who were charged sales tax on what AT&T advertised as a "free" phone.[50] The AT&T cell phone agreement included an arbitration clause with a class arbitration waiver but also provided that AT&T was to pay all the customer's arbitration costs for nonfrivolous claims; AT&T could not seek to recover its attorney's fees from the customer; and if the customer recovered more in arbitration than AT&T's final written settlement offer, the customer would receive a minimum of $7,500 (a so-called bonus payment) plus double attorneys' fees.[51]

When the Concepcions filed a class action on behalf of all similarly situated cell phone customers, AT&T filed a petition to compel arbitration. The trial court and the Ninth Circuit held that, under California law, the class arbitration waiver was unconscionable and not severable from the rest of the arbitration clause.[52] The lower courts also concluded that the FAA did not preempt California's application of its unconscionability doctrine.[53]

The Supreme Court reversed, holding that the FAA preempted state court decisions invalidating arbitral class waivers as unconscionable. Applying state unconscionability doctrine so as effectively to require class arbitration, the Court concluded, "[i]nterfered with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[54]

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49. 131 S.Ct. 1740, 1744 (2011). Some of the groundwork for the Court's decision in *Concepcion* was laid by *Stolt-Nielsen*, in which the Court vacated a class arbitration award on the ground that the arbitrators exceeded their powers. *See generally* 9 U.S.C. § 10(a)(4) (2012) (permitting vacatur of arbitral award when arbitrators exceed their powers).

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

51. *Id.*

52. Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008), *aff'd sub. nom.*, Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

53. *E.g.*, *Laster*, 584 F.3d at 857–59.

54. *AT&T Mobility LLC.*, 131 S. Ct. at 1748. According to the Court, class arbitration is "inconsistent with the FAA" because (1) "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; (2) "class

The decision in *Concepcion* has been extremely controversial and widely criticized.[55] Although a handful of courts have sought to limit the decision to its facts—in other words, to arbitration clauses with a bonus provision and other sorts of pro-consumer provisions that the AT&T clause had[56]—most have not done so.[57] On the first anniversary of *Concepcion* in April 2012, Public Citizen "reported that 76 court decisions had applied *Concepcion* to stay or dismiss a putative class action."[58] Courts have applied *Concepcion* to uphold arbitral class waivers in a variety of contracting contexts, including franchise agreements.[59]

After *Concepcion*, plaintiffs continued to challenge arbitral class waivers on the ground that the lack of class relief precluded the plaintiffs from vindicating their federal statutory rights (so-called effective-vindication challenges). Building on dicta in a number of Supreme Court arbitration cases, plaintiffs argued that arbitral class waivers amounted to impermissible prospective waivers of statutory rights and hence were unenforceable.[60] If parties cannot waive a

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arbitration *requires* procedural formality"; and (3) "class arbitration greatly increases risks to defendants." *Id.* at 1751–52.

55. *See supra* text accompanying notes 2–8.

56. *See, e.g.*, Feeney v. Dell Inc., 28 Mass. L. Rptr. 652, at *8 (Super. Ct. 2011) (distinguishing *Concepcion* on ground that, unlike the AT&T Mobility clause in *Concepcion*, "[t]he Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in controversy"), *rev'd*, 993 N.E.2d 329, 331 (Mass. 2013).

57. *See, e.g.*, Bellows v. Midland Credit Mgmt., Inc., No. 09CV1951, 2011 U.S. Dist. LEXIS 48237, at *11 (S.D. Cal. May 4, 2011) (applying *Concepcion* even when arbitration clause did not include "bonus provision"); Day v. Persels & Assocs., LLC, No. 8:10-CV-2463-T-33TGW, 2011 U.S. Dist. LEXIS 49231, at *15–16 (M.D. Fla. May 9, 2011) (same); Zarandi v. Alliance Data Sys. Corp., No. CV10-8309DSF(JCGx), 2011 U.S. Dist. LEXIS 54602, at *4–5 (C.D. Cal. May 9, 2011) (same).

58. CHRISTINE HINES ET AL., JUSTICE DENIED ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S CONCEPCION DECISION ARE PLAINLY EVIDENT 4 (2014), *available at* http://perma.cc/5WQ5-KL6K ("identify[ing] 76 potential class action cases where judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable").

59. *See, e.g.*, Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 180–81 (4th Cir. 2013) (upholding the validity of an arbitral class waiver in a franchise agreement); Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011) (same); Kairy v. SuperShuttle Int'l, Inc., No. C08-02993JSW, 2012 U.S. Dist. LEXIS 134945, at *10, *21–23 (N.D. Cal. Sept. 20, 2012) (same); Villano v. TD Bank, No. 11-CV-6714, 2012 U.S. Dist. LEXIS 123013, at *8 (D.N.J. Aug. 29, 2012) (same).

60. *E.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U. S. 79, 89–90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights . . . ."); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985) ("And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

statutory right directly,[61] they should not be able to do so indirectly by using an unfair arbitration clause. A common basis for an effective-vindication challenge is that that the up-front costs of arbitration are too high.[62] But that challenge has been made against other provisions in arbitration clauses as well, and after *Concepcion*, it became the primary basis for challenging arbitral class waivers.

C. Amex *and the Effective Vindication of Federal Statutory Rights*

The effective-vindication theory—as applied to arbitral class waivers—reached the Supreme Court in *American Express Co. v. Italian Colors Restaurant*.[63] The plaintiffs in *Amex* were merchants that accepted American Express charge cards. They brought a class action alleging that American Express's sales and pricing practices violated federal antitrust law. American Express's standard form merchant agreement included an arbitration clause with a class arbitration waiver, and American Express sought to compel individual arbitration of the merchants' claims. The merchants opposed individual arbitration on the ground that proof of the antitrust claim was so expensive that the claim could only be brought economically as a class action. Enforcing the arbitral class waiver would prevent them from effectively vindicating their statutory rights under the antitrust laws.

The district court granted the motion to compel arbitration, but the Second Circuit reversed, holding that the class arbitration waiver was unenforceable.[64] After reconsidering its decision in light of both *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and *Concepcion*, the Second Circuit reaffirmed its decision.[65] The Supreme Court granted certiorari and reversed.[66]

The Court's reasoning was twofold. First, the Court recited that the FAA requires enforcement of arbitration clauses, and it found "[n]o contrary congressional command [that] requires us to reject the waiver of class arbitration here."[67] Nothing in the antitrust laws

61. By a "direct" waiver of a statutory right, we mean a contract provision that says something like "the parties agree to waive any claim under the federal antitrust laws."

62. *E.g.*, *Green Tree*, 531 U.S. at 90.

63. 133 S. Ct. 2304, 2309–10 (2013).

64. *In re* Am. Express Merchs. Litig., 554 F. 3d 300, 315–16 (2d Cir. 2009).

65. *In re* Am. Express Merchs. Litig., 667 F.3d 204, 219 (2d Cir. 2012), *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304 (2013); *In re* Am. Express Merchs. Litig., 634 F.3d 187, 200 (2d Cir. 2011), *rev'd sub nom. In re Am. Express Merchs. Litig.*, 667 F.3d at 219–20.

66. *Am. Express Co.*, 133 S. Ct. at 2312.

67. *Id.* at 2309.

(which, the Court pointed out, were enacted before adoption of the Federal Rules of Civil Procedure) precludes the waiver of class actions. "Nor does congressional approval of Rule 23," the Court stated, "establish an entitlement to class proceedings for the vindication of statutory rights."[68]

Second, the Court noted that it had only recognized the effective-vindication doctrine in dicta. But even assuming that the argument was available, the Court found it unavailing:

> [T]he exception finds its origin in the desire to prevent "prospective waiver of a party's *right to pursue* statutory remedies." That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. Or, to put it differently, the individual suit that was considered adequate to assure "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.[69]

By rejecting the effective-vindication challenge, *Amex* resolved much of the remaining legal uncertainty over the enforceability of arbitral class waivers, at least pending future statutory or regulatory developments.[70] We discuss possible implications of the decision for nonarbitral class waivers below.[71]

III. BUNDLED DISPUTE RESOLUTION AND STICKY CONTRACTS

Predictions that most or all businesses will begin using arbitration clauses after *Concepcion* and *Amex* depend on two key assumptions: (1) that there is no reason for businesses not to use arbitration clauses, and (2) that businesses can and do readily change their standard form contracts in response to favorable court decisions.[72] In this Part, we evaluate those assumptions by examining both the bundle of dispute resolution services that arbitration provides and the stickiness of contract terms.

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68. *Id.*

69. *Id.* at 2310–11.

70. Congress might enact legislation restricting the enforceability of arbitral class waivers, although the prospects of any statutory change are slight. In addition, the Consumer Financial Protection Bureau has authority to regulate arbitration clauses in consumer financial-services contracts under section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, after it completes its statutorily mandated study. *See* 12 U.S.C. § 5518(b) (2012).

71. *See infra* Part V.A.

72. *See supra* text accompanying notes 14–15.

A. The Decision Whether to Use an Arbitral Class Waiver: Arbitration as a Bundle of Dispute Resolution Services and the Risk of Class Actions

The first assumption is that there is no reason for a business not to switch to an arbitration clause. Businesses want to avoid class actions, and they can do so at essentially no cost by using an arbitral class waiver. On this view, in other words, the only meaningful consequence of using an arbitral class waiver is getting rid of class actions.

But an arbitration clause does more than simply reduce the risk of class actions; it removes the case altogether from a judicial forum. By using an arbitration clause, parties agree to use a bundle of dispute resolution services—a bundle that includes avoiding class actions but has other features as well.[73] These features range from decisionmakers selected by the parties and procedures paid for by the parties to, importantly, a very limited appeals process.[74]

For franchisors, the lack of an appeals process is a very serious cost of using an arbitration clause—and an arbitral class waiver.[75] As franchise lawyer Martin Fern explains:

> There has long been a debate among lawyers regarding the pros and cons of arbitration in general and in the franchise context in particular. The principal advantages of arbitration include informality, lower costs, greater efficiency and speed, and the ability to choose expert arbitrators to resolve specialized disputes. The principal disadvantage

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73. *See, e.g.*, Drahozal & Wittrock, *supra* note 29, at 300 (explaining that "arbitration clauses bundle a variety of characteristics—including but not limited to acting as a class action waiver—into a single means of dispute resolution. Not all drafting parties will agree to arbitration, even if they might prefer individual arbitrations to class actions.").

74. Drahozal & O'Hara O'Connor, *supra* note 19. In *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576, 577 (2008), the Supreme Court held that parties could not, by agreement, expand the grounds under section 10 of the FAA for judicial review of arbitral awards. The Court left open the possibility that such agreements might be enforceable in state court under state arbitration laws, and a few states such as California and Texas have enforced these sorts of agreements. *See, e.g.*, NAFTA Traders, Inc. v. Quinn, 339 S.W.3d 84, 101 (Tex. 2011) (relying on *Hall St. Assocs.* to say the FAA does not preempt enforcement of agreements for expanded judicial review of arbitration awards); Cable Connection Inc. v. DirecTV, Inc., 190 P.3d 586, 599 (Cal. 2008) (explaining that the California Arbitration Act's provision for the enforcement of agreements for merits review is consistent with the FAA policy guaranteeing the enforcement of private contractual agreements and that the FAA does not require state law to conform with its limitations).

75. Arguably, such costs are another cost of *Concepcion*, although alternatively, one might characterize them as costs of court decisions refusing to enforce nonarbitral class waivers—which result in parties having to choose instead the less efficient arbitral class waiver. *See* Drahozal & O'Hara O'Connor, *supra* note 19 (explaining that use of class waivers to avoid class actions imposes additional costs on parties that are separate from any benefits or costs of eliminating class relief).

> of arbitration is the absence of the availability of multi-layered appeal which can normally be filed to rectify erroneous court decisions, but not arbitration awards. In other words, in arbitration, the principal tradeoff against the many advantages is the inability of the losing party to correct erroneous decisions by the arbitrator.[76]

This cost gives franchisors a very good reason not to use an arbitration clause, which at least reduces, if not offsets entirely, any benefit from avoiding class actions.[77]

By comparison, a nonarbitral class waiver avoids the bundling costs of an arbitral class waiver. A party that prefers to have disputes resolved in court can do so while still avoiding class actions if it uses a clause that affects only the availability of class actions.[78] The parties still can use public court judges, take advantage of the government subsidy to courts, and appeal on much broader grounds than if their contract contained an arbitral class waiver. And while nonarbitral class waivers are much less common than arbitral class waivers, they do exist.[79]

Using a nonarbitral class waiver, however, poses greater risks of court invalidation. After *Concepcion*, the FAA provides a substantial degree of protection for arbitral class waivers; nonarbitral class waivers have no such federal law backing. As a result, a number of courts—although certainly not all—have refused to enforce nonarbitral class waivers.[80] We discuss the possibility in Part V that

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76. Fern, *supra* note 16. Franchisors can mitigate some of the costs of an arbitral class waiver by using carve-outs, excluding claims for which arbitration is particularly ill-suited from arbitration such that the claims will be resolved instead in court. Drahozal & O'Hara O'Connor, *supra* note 19. But using carve-outs has its own costs. *See id.* (explaining that parties incur drafting costs to include carve-outs when they must specify courts in which relief for particular claims is to be sought).

77. We acknowledge here the self-evident point that the consequences of bundling cut both ways. The limited appellate right also affects the franchisees' ability to appeal an adverse award. We do not attempt to disaggregate the actual impact of the incidence of the limited appellate right. Rather, our more modest goal is to identify an explanation for why a certain set of franchisors might prefer not to use arbitration clauses despite the appeal of the class waiver. We thank participants in the Columbia University Law School workshop on the Law and Economics of Contracting for their observations on this point.

78. Assuming, of course, that a court will enforce the nonarbitral class waiver. *See infra* text accompanying notes 139–48.

79. *See infra* text accompanying notes 198–99.

80. *See In re* Yahoo! Litig., 251 F.R.D. 459, 469–70 (C.D. Cal. 2008) (refusing to hold nonarbitral class waiver enforceable as a matter of law in commercial case and denying motion for summary judgment pending "more developed evidentiary record"); *cf.* Doe 1 v. AOL LLC, 552 F.3d 1077, 1085 (9th Cir. 2009) (per curiam) (refusing to enforce forum-selection clause when forum selected does not permit class actions); Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 712 (Cal. Ct. App. 2001) (same); Am. Online, Inc. v. Pasieka, 870 So. 2d 170, 171–72 (Fla. Dist. Ct. App. 2004) (same); Dix v. ICT Grp., Inc., 161 P.3d 1016, 1024 (Wash. 2007) (same). *Compare* Martrano v. Quizno's Franchise Co., No. 08-0932, 2009 U.S. Dist. LEXIS 52025, at *87 (W.D. Pa. June 15, 2009) (invalidating nonarbitral class waiver), *and* Elhilu v. Quizno's

Amex might make nonarbitral class waivers more enforceable. If so, nonarbitral class waivers would become more attractive, at least for those businesses that have other reasons for not using arbitration clauses.

We are not suggesting that all franchisors will avoid arbitration because of the limited right to appeal (or other bundling costs of arbitration). But the limited availability of appeals from arbitration awards certainly is a consideration on the margin. Nor is the limited right to appeal the only reason why a business might not use arbitration. Other possible reasons include less effective interim measures, the lack of summary adjudication, inefficiencies in collection cases, and added uncertainty in the application of otherwise-certain legal remedies.[81] Instead, our point is simply that, because of the bundled nature of arbitration, there are costs to using an arbitral class waiver, and these costs provide a reason for some businesses not to use an arbitral class waiver even after *Concepcion* and *Amex*.[82]

At the same time, not all businesses are equally susceptible to class actions. As one illustration, a study by the Searle Civil Justice Institute found that, while all of the credit card issuers and cell phone companies in a sample of AAA consumer arbitrations included class arbitration waivers in their arbitration clauses, none of the real estate

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Franchising Co., No. 2:06-cv-07855-FMC-CTx, 2008 U.S. Dist. LEXIS 109435, at *15 (C.D. Cal. Apr. 3, 2008) (same), *with* Bonanno v. Quizno's Franchise Co., No. 06-cv-02358-CMA-KLM, 2009 U.S. Dist. LEXIS 37702, at *69 (D. Colo. Apr. 20, 2009) (enforcing nonarbitral class waiver). *But cf.* Koch v. Am. Online, Inc., 139 F. Supp. 2d 690, 695 (D. Md. 2000) (concluding that unavailability of class actions in chosen forum is no reason to refuse to enforce forum-selection clause) Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1012 (D.C. 2002)(same); Am. Online, Inc. v. Booker, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (per curiam) (same); Gilman v. Wheat, First Sec., Inc., 692 A.2d 454, 464–65 (Md. 1997) (same).

81. *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 453–57 (2010). This latter point is exacerbated by, but not coextensive with, the limited right to appeal.

82. Reputational constraints provide another possible reason businesses might not use arbitration clauses with class arbitration waivers, even after *Concepcion* and *Amex*. *See* Gregory C. Cook, *Why* American Express v. Italian Colors *Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After* Concepcion, 2 U. MICH. J.L. REFORM 104A, 109 (2013):

> It is also a mistake to assert that corporate America will uniformly modify contracts to include arbitration. Making changes to an existing contract is not simple or costless. Corporate defendants make such changes cautiously and the marketplace can be a discipline on contract changes. In other words, corporations may decide not to include an arbitration clause for marketing reasons or may decide not to amend their contracts because amendment may have a marketing impact.

Brownell, *supra* note 13 ("If the court does indeed rule in favor of American Express, look for even more businesses to find ways to shield themselves from lawsuits. 'Companies would only be restrained either by their own good conscience, or by their fear that consumers would get mad,' says [Jean] Sternlight.").

brokerage firms did.[83] Presumably real estate brokerages are less subject to class actions than mass contracting firms like credit card issuers and cell phone companies, and so have less incentive to include a class arbitration waiver.

The same is true even among businesses that use mass contracts. Our previous research on the use of arbitration clauses in credit card agreements (prior to *Concepcion*) predicted that, while "on the margin, issuers likely will respond to *Concepcion* . . . by increasing their use of arbitration clauses," "the significance of other factors in explaining the use of arbitration clauses" suggests that "predictions that all issuers will begin using arbitration clauses are unsupported."[84] Other explanatory factors included the riskiness of the issuer's credit card portfolio, the size of the issuer, whether the issuer specialized in credit card loans, and whether the issuer was mutually owned (i.e., was a credit union).[85]

When potential bundling costs of arbitral class waivers are taken together with the relatively low risk of class actions some businesses face, it is plausible that some businesses might rationally decide not to use an arbitral class waiver in their standard form contracts. At the very least, this reasoning provides a theoretical explanation for the possibility that not all businesses will switch to arbitration after *Concepcion* and thus presents an empirically testable proposition.

B. Arbitration Clauses and Sticky Contracts

The second assumption underlying predictions of a widespread switch to arbitration after *Concepcion* is that businesses can—and do—quickly and readily amend their form contracts in response to court decisions. Here we consider the possibility that this assumption might not hold. In other words, we examine whether contract terms might be sticky.

The notion of sticky contract terms is hardly new. Numerous scholars have examined why parties may be reluctant to alter contract

83. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 349–50 (2011) (publishing results from Searle Civil Justice Institute's March 2009 Preliminary Report).

84. Drahozal & Rutledge, *supra* note 24, at 540. Various considerations, such as the size of the issuer and the riskiness of the issuer's credit card portfolio, in addition to the enforceability of class arbitration waivers, were important in explaining an issuer's use of an arbitration clause. *Id.*

85. *Id.* at 559.

terms, even when the law might (or clearly does) allow alterations that would benefit the parties. This Section reviews that literature and examines how it bears on the contracting practice relevant here—namely, standard form contracts presented on a take-it-or-leave-it basis. We find that several of the traditional explanations for the stickiness of contract terms likely do not apply in this particular context. We try, therefore, to isolate the likeliest explanations. From there, we generate hypotheses in order to ascertain whether (and why) franchisors do not always adapt their contract terms to the extent permitted or encouraged by Supreme Court decisions.

1. Possible Explanations for Contract Stickiness

We do not write on a blank slate. Contracts scholars have offered various explanations for the possible stickiness of contract terms, and some have provided helpful syntheses of existing explanations.[86] The literature reveals at least eleven different explanations. These include (1) endowment effects, (2) satisficing, (3) negative signaling, (4) interpretive risk, (5) overhang, (6) herd effects, (7) contract routines, (8) uncertainty, (9) free riders, (10) learning externalities, and (11) network externalities. All of these theories, moreover, are assessed against the null hypothesis that contracts are *not* sticky. This section explains why several of these theories seem unlikely to apply in the adhesive setting, briefly summarizes the remaining theories, and then introduces the null hypothesis.

The first three theories—endowment effects,[87] satisficing,[88] and negative signaling[89]—do not have much explanatory value in the

86. For especially helpful syntheses, see MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 33–44 (2013); Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655–60 (2006). For other scholarship on the topic, not cited below, see Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1158 (2006) (discussing reasons why sticky contract terms exist); W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 658–60 (2007) (discussing arbitration contract stickiness as a possible reason for why certain clauses include one-sided terms and conflicting providers rules); Gus De Franco et al., *Sticky Covenants* 1–3 (Chicago Booth Research Paper No. 13-61, Rotman School of Management Working Paper No. 2288723, 2013), *available at* http://perma.cc/9XFJ-UG94 (analyzing the stickiness of bond-covenant restrictiveness). See also the articles published by the *N.Y.U. Law Review* from a *Conference on Contractual Innovation*, 88 N.Y.U. L. REV. 1–285 (2013).

87. The theory of "endowment effects" postulates that individuals "often place a higher value on retaining the goods that they already possess (their endowments)." *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1584 (1998) (discussing how the initial

franchise context. Each of these theories rests on a premise about the behavior of the party in the weaker bargaining position that would not appear to be valid with franchise contracts. The endowment effect, for example, presupposes that the other party attaches a value to a contract term in excess of its actual market value (an unlikely proposition when a party cannot dicker over the terms). Likewise, both satisficing and negative signaling rest on the assumption that the parties are actively dickering over the terms of the contract. Consequently, these theories appear unlikely to explain stickiness of franchise contracts,[90] and we do not explore them further.

The remaining eight theories (as well as the null hypothesis), however, might have some explanatory value. Unlike the three just discarded, these theories depend on the incentives of a single contracting party, even when that party occupies a far superior bargaining position. We briefly review the broad contours of these theories.

Interpretive risk. Contracts scholarship tends to conceptualize transactional lawyering as a process of identifying and addressing risk

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allocation of legal entitlements can affect preference). It might, of course, be the case that endowment effects work in the opposite direction. That is, the franchisor (or, more abstractly, the party in the superior bargaining position) attaches significance to the chosen form of dispute resolution even where, as a matter of rational-choice theory, another option would be in the franchisor's interest.

88. The theory of satisficing argues that any individual party has an outcome (or set of outcomes) that would be optimal from the party's individual perspective, but achieving that optimal outcome may be especially (perhaps prohibitively) costly. *See* Patrick Bolton & Antoine Faure-Grimaud, *Satisficing Contracts*, 77 REV. ECON. STUD. 937, 938 (2010) (discussing how agents write satisficing contracts that do not fully exploit all gains from trade that would be available if they faced no deliberation costs).

89. This theory postulates that contracting parties are reluctant to propose changes to contract terms because such proposals might convey information to their contract partner. *See* Ben-Shahar & Pottow, *supra* note 86, at 651–52 (discussing how parties will not draft out of default contract provisions even when better alternatives exist because they fear what it will signal to their contracting partner); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 616 (1990) (discussing "penalty" default rules, where the default contract rules force a party to reveal information they may not wish to reveal to their contracting partner); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 136 (1956).

90. There may be exceptions. In some cases, well-organized associations represent groups of franchisees in their relations with franchisors. Under those circumstances, the parties may have relatively more equal bargaining positions, and some of the explanations for sticky contracts (such as negative signaling) might have more resonance. We thank Victor Goldberg for his observations on this point. Moreover, changes may be subject to regulatory oversight. Even if the franchisor does not need to dicker with the franchisee, it may incur costs placating a regulator.

through the design of appropriate contract terms.[91] Interpretive risk is premised on the idea that the counterparty to a transaction will resist changes from preferred language in an industry norm.[92] Like endowment effects, the notion of interpretive risk assumes that the counterparty prefers familiar contract language to unfamiliar language. Unlike endowment effects, though, the preference stems not from some irrational attachment to the familiar but from the relative lower uncertainty that attaches to using a term with an accepted meaning in the industry.

Overhang. Overhang bears a close relationship to interpretive risk. It reflects a belief that changes in contract terms will affect the interpretation of *prior* contracts. For example, suppose that a contract term *X* is generally understood to mean that risk passes to the buyer once the relevant goods are loaded onto the ship. Suppose further that a court later interprets *X* to mean that the risk passes to the buyer only after the goods reach their port of destination. In reaction to this judicial decision, the seller considers changing its contracts to replace term *X* with term *Y*. Term *Y* somehow makes clearer that risk passes to the buyer at the earlier point in the shipment. The buyer proposing the inclusion of term *Y* might imply that preexisting contracts (all of which use term *X*) were understood by the seller, as drafted, to reflect the judicial interpretation.[93] Ideas of overhang thus are especially salient in industries that involve high volumes of contracting whereby subtle changes in *new* contracts could have significant impact on the interpretation of a large number of *preexisting* contracts.[94] In situations of overhang, as opposed to interpretive risk, the concerns over interpretation stem from the party contemplating the change, as opposed to the party to whom the change is proposed.

Herd effects. Closely related to the idea of interpretive risk and overhang is the concept of herd effects. This notion stems from the insights of psychological research suggesting that certain individuals

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91. *See* Weidemaier, *supra* note 86, at 661, 674 (discussing arbitration providers as suppliers of risk management).

92. *See* Lisa Bernstein, *Social Norms and Default Rule Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 71–72 (1993) (discussing how changes from default rules can lead to transaction breakdowns).

93. *See* Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1115 (2006) (discussing how insurers retain language that is unclear to policyholders as long as it has become clear to the courts, even if the court's interpretation is different from the insurer's original intended meaning).

94. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

tend to be risk averse.[95] Translated into the context of contracting practices, the idea of herd effects suggests that lawyers, particularly in-house counsel, engage in risk-averse behavior by repeating what their predecessors have done.[96] In doing so, lawyers reduce the likelihood that they will be blamed for proposed changes that prove contrary to the client's interests. Innovation isolates the entrepreneurial lawyer from the herd and thus makes him peculiarly vulnerable to blame. Consequently, contract terms remain sticky—not because of the costs to the firm (such as with overhang or endowment effects) but instead due to agency problems stemming from the lawyer's selfish incentives.

Contract routines. Mitu Gulati and Robert Scott systematically articulate the concept of contract routines.[97] This idea begins from the premise that agents, such as lawyers, are working within a complex set of contractual structures. No single agent may fully understand the relationship between a particular contract provision and the larger contractual or commercial structure. Consequently, they are reluctant to change a particular term for fear of unwittingly upsetting other contractual provisions that may, unbeknownst to the lawyer, have some actual (or potential) relationship to the particular term. Like the notion of herding, the idea of contract routines roots the explanation in the incentives of the firm's agent. But unlike herding, the agency problem lies not in blame avoidance but instead in a simple reaction to uncertainty over a complex model and a desire to avoid unintended costs to the firm.

Uncertainty. Gulati and Scott also suggest that contract stickiness may be attributable to simple uncertainty.[98] Boilerplate contracts may have been drafted with a particular allocation of risk in mind. As time passes, the original drafter's intentions are forgotten as the drafters themselves move on. So the successors at the firm inherit the clauses without the understanding behind them. Successors are reluctant to change the clauses not for fear of blame (as with herding). Rather, they simply do not know the consequences of the change. Therefore, they "leave well enough alone" and do not question the continued use of a contract clause. The theory closely resembles that of contract routines with one critical difference: the account grounded

95. GULATI & SCOTT, *supra* note 86, at 39; *see* Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 354–55 (1996) (discussing risk aversion in lawyers).

96. GULATI & SCOTT, *supra* note 86, at 39, 197 n.23.

97. *Id.* at 38–39.

98. *Id.* at 42–43.

in uncertainty focuses on the passage of time and the consequent loss of personnel who can explain the background risk allocation behind a boilerplate term.

Free riders. Free riding traces to Mancur Olson's idea of collective action problems.[99] Firms would prefer not to undertake the cost and investment of innovation if another firm will undertake that cost first. If a competing firm does so, then the free-riding firm can take advantage of whatever benefits accrue from the innovation without having to bear the cost itself. In the contracting context, the theory of free riders would explain stickiness on the ground that firms are unwilling to themselves assume the costs of contract innovation. Instead, they wait for another firm to do so. They then wait and see how that other firm's innovation holds up in court. If the new term is interpreted in a manner favorable to the firm, then other firms will employ the new formulation as well.

Learning externalities. Pioneered by Marcel Kahan and Michael Klausner, the theory of learning externalities (sometimes referred to as "learning effects" or "learning benefits") explains contract-term stickiness in terms of the costs associated with change.[100] To use a noncontract example, a company incurs costs when it has used PCs for many years and then shifts its IT department to Macs. These learning effects arise from past use of a particular norm within a firm. In the context of contracting practices, the consistent use of the same contract terms locks in certain benefits to a party. These may derive from efficiency in drafting, reduced uncertainty in the ambiguity over the judicial interpretation of the term (interpretive risk and overhang) and the reduced need to incur attorney's fees.[101] Accordingly, if "lock-in effects" have formed around a regularly used contract term, switching terms surrenders those savings and thus forces firms to incur new "switching costs" as they develop similar synergies from the new term.[102] When the lock-in effect's utility exceeds the new term's utility, the theory of learning externalities suggests that the contract term will remain sticky.

Network externalities. Kahan and Klausner also hypothesize that network externalities may cause some contract stickiness.

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99. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

100. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "the Economics of Boilerplate")*, 83 VA. L. REV. 713, 719–25 (1997).

101. *See* Ben-Shahar & Pottow, *supra* note 86, at 659–60 (discussing how externalities might be the cause of stickiness in default terms).

102. Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 246 (2013).

Network externalities capture savings that accrue due to the use of a common term within an industry or network. To take a noncontract example, the use of compatible telephones yields benefits to individual firms within an industry.[103] In contrast to learning effects, network effects derive from the contemporaneous use of an industry norm. In the contractual setting, the use of a familiar term may reduce the costs of legal representation, since companies need not invest in educating a lawyer about a familiar term.[104] Industry-wide standardization can also result, thereby reducing contracting costs for repeat players within the industry. Unlike learning externalities, which result from costs attributable to changes within the firm, network externalities result from costs attributable to departure from accepted terms within the "network" or industry.

Null hypothesis. Finally, these existing accounts must be tested against the null hypothesis—also identified by Scott and Gulati—that stickiness is a myth.[105] The null hypothesis, in other words, states that firms do in fact innovate and respond to changes in the legal landscape. Under this account, change may not occur instantaneously. Instead, in what is sometimes described as the "shock model," contract terms evolve as a result of shocks, such as a judicial interpretation of a contract term, or some other innovation.[106] After "a series of exogenous shocks," firms experiment with new terms.[107] David Hoffman explains: "What would such shocks look like? A Supreme Court decision making terms salient—and explicitly approving their enforceability—would be exemplary. Decisions like *AT&T v. Concepcion* (validating class-arbitration waivers) . . . could have spurred attorneys to consider clauses that they previously would have left unused."[108] In response to

103. Ben-Shahar & Pottow, *supra* note 86, at 660.

104. Sometimes, contracting agents can ameliorate these effects. For example, underwriters and law firms can undertake the front-end investment to change a particular norm within the industry. Not only do these agents absorb these costs (which can then be spread across industry players), but they can serve to bridge the disparate interests of firms within the industry and roll out a new industry standard which firms then replicate.

105. GULATI & SCOTT, *supra* note 86, at 43.

106. Stephen J. Choi et al., *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 3 (2013); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 929–30 (2004).

107. Hoffman, *supra* note 25 (manuscript at 41) (citing Choi et al., *supra* note 106). In the first phase, "the standard form dominates" and established contract drafters will resist any change. *Id.* Only after the exogenous shocks of the second phase does "innovation become standardized" in a third phase. *Id.*

108. *Id.* (manuscript at 43–44). Hoffman notes, however, that "proceduralists should expect that even if the Supreme Court were to validate particular new forms of bespoke

those shocks, contract terms will change over a period of time when the shock works its way through a firm's information network.

This section has reviewed the prevailing accounts for why contracts are sticky, stripped away those theories least likely to apply in the franchise context, and introduced the null hypothesis—that contracts are not sticky but respond, albeit sometimes slowly, to systemic shocks. In the next Section, we map these accounts onto the particular types of contracts in our study.

2. Stickiness and Franchise Contracts

In the preceding Section, we explained why certain theories of the stickiness of contracts are less likely to apply in the adhesive setting. In this Section, we both explain why franchise contracts might be stickier than other standard form contracts and how consideration of a Supreme Court decision like *Concepcion* permits us to test the proposition.

Franchise contracts might be stickier than other standard form contracts for several reasons.[109] First, franchise agreements have higher stakes than virtually all consumer contracts.[110] The higher stakes may induce franchisees to read franchise agreements more carefully and invest more in understanding the agreement's terms.[111]

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procedure . . . many contracts would still remain silent about what should happen if the parties go to court." *Id.* (manuscript at 44).

109. Prior scholarship has demonstrated that credit card agreements can be modified through the simple act of conveying the modification by means of a bill stuffer or electronic communication followed by some period for the consumer to opt out (or, alternatively, accept the proposed modification by conduct through the use of the card). *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605, 609 (2010) (discussing the factors that prevent consumers from opting out of contract amendments). Insofar as this is true—again, we do not independently test the validity of the proposition in this Article—this premise too casts doubt on several theories. In particular, overhang theory lacks much explanatory value under this condition of easy modification. Under conditions where contracts are easily modified, the bank can simultaneously alter the terms for future transactions as well as the terms governing the repayment of debts for prior transactions. (Again, while overhang risk can be reduced, it cannot be eliminated entirely. Consider a company that is in litigation over the meaning of term *A*. If, during the litigation, it proposes to modify that term, the proposed modification still carries overhang risk in the pending litigation.)

110. *See* Adam B. Badawi, *Relational Governance and Contract Damages: Evidence from Franchising*, 7 J. EMPIRICAL LEGAL STUD. 743, 753 tbl.3 (2010) (reporting average start-up cost in sample of franchise agreements of $571,170, with range across types of franchise from low of $55,150 for home-care franchises to high of $5,459,643 for lodging franchises).

111. By comparison, some scholarship, including empirical research, suggests that consumers often do not read their contracts. *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 3 (Law and Economics Research Paper Series, Working Paper No. 09-40, 2009), *available at* http://perma.cc/N34E-DE3Z (examining the extent to which buyers read standard form

Second, franchise agreements tend to have longer terms than consumer contracts.[112] The ability to turn over only a fraction of the total stock of contracts in any given year necessarily affects the franchisor's incentives to modify its contracts. Not only does it take time for the parties (or the franchisor) to realize fully the benefits of the new contract terms, but during the interim, the franchisor faces the prospect of nonuniform contract terms, which elevates other risks (e.g., overhang).[113] Third, franchise agreements are more heavily regulated than many consumer contracts. State franchise laws provide for disclosure requirements, substantive regulation, and agency oversight, which may increase the stickiness of franchise agreement terms.[114] (This last feature of franchise agreements may impose a form of network externality, albeit one created by public regulation rather than a privately developed industry norm.)

Evaluating the impact of a Supreme Court decision like *Concepcion* enables us to test the relative stickiness of contracts like franchise contracts. This feature affects several of the explanations described in the preceding section. The free rider explanation offers a good example. By definition, if a matter has reached the Supreme Court (or any court at all, for that matter), at least one firm has chosen to innovate its contract terms. Thus, at least some of the incentive for other firms to retain "sticky" terms has diminished—they can now free ride on the investment of the innovating firm.

Even after one firm innovates, however, follow-on firms might remain reluctant to change their contract language. The innovating

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contracts). For a literature survey, see Clayton P. Gillette, *Standard Form Contracts* 5–7 (N.Y.U. Law Sch. Law & Economics Research Paper Series, Working Paper No. 09-18, 2009), *available at* http://perma.cc/F5DB-L5XJ?type=pdf (papers.ssrn.com, archived May 8, 2014). Assuming this is valid (we do not attempt to make an original contribution on that question), this phenomenon suggests that several other explanations described in the previous section lack much explanatory value here. For example, there would not be much of a concern about negative signaling because the consumer would not perceive the "signal" communicated by a change in the contract language. For similar reasons, interpretive risk, endowment effects, and satisficing again lose some explanatory value. In short, the "unread" nature of many consumer contracts—again assuming the validity of this proposition—casts doubt on the explanatory value of theories that assume parties have symmetrical information and actually perceive the signal sent by a proposed modification. *See* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 824 (2006). Franchise agreements seem likely to differ from consumer contracts in that the stakes are much higher, and franchisees are more sophisticated contracting parties than consumers.

112. *See* Badawi, *supra* note 110, at 753 tbl.3 (reporting average term in sample of franchise agreements of 12.3 years).

113. *See supra* text accompanying notes 93–94 (discussing overhang).

114. *See generally* Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193 (2013).

firm bears not only the cost of altering its contract language but also the risk that, in litigation, the language may actually harm its interests. Consider, for example, the arbitral class waiver: a court might find that the FAA does not preempt a state law rule invalidating the class waiver.

But once the Supreme Court rules, the free rider account suggests that firms should adapt. At this point, much—though admittedly not all—of the residual litigation risk has dissipated.[115] Consequently, follow-on firms should be more inclined to adopt the innovating firm's new contract language. On the other hand, if contract terms *remained* sticky even after the intervening Supreme Court decision, this would cast doubt on the validity of the free rider theory (at least for the class of cases we are studying). Thus, our focus on *Concepcion* carries force for a variety of explanations that explain stickiness in terms of agency problems or risk avoidance. These include not only the free rider theory but also theories like uncertainty, contract routines, and herd effects. We are interested less in what particular explanation for stickiness does or does not apply than in at least some explanation for stickiness possibly holding, which certainly is the case. We leave distinguishing among these and other possible explanations for contract stickiness for future research.

To summarize the preceding two sections, the salience of the accounts for contract stickiness depends critically on the sort of contract under study. For the type of contract we are studying (adhesive contracts) and the phenomenon we are studying (the effect of intervening Supreme Court decisions), theories that presuppose parties of equal bargaining power (or at least parties in a position to react to changes in contract language) largely drop out. These include theories like endowment effects, satisficing, and negative signaling. By contrast, theories that depend on firm-specific behavior—like free riders, herd effects, learning externalities, contract routines, and

115. We acknowledge that there will be residual litigation risk over the scope of the Supreme Court's holding. This residual risk might have a factual or legal basis. Consider, for example, the AT&T arbitration clause at issue in *Concepcion*. A follow-on firm might adopt some but not all of the incentives contained in the AT&T clause; in that case, it bears a residual risk that a lower court, even after *Concepcion*, would conclude that this lack of incentives distinguishes the instant clause from the AT&T clause. Alternatively, a follow-on firm in another state might mimic completely the AT&T clause. In that case, it still bears a residual risk that a lower court could construe the applicable unconscionability doctrine in a manner differently from California's *Discover Bank* rule (the rule at issue in *Concepcion* holding that the presence of the class waiver in the arbitration clause rendered the clause *per se* unconscionable). It might thereby conclude that the state's unconscionability doctrine did not sweep as broadly as the *Discover Bank* rule and, therefore, was not preempted by the FAA. *See infra* text accompanying notes 184–86.

uncertainty—remain more relevant. And of course, all of these theories are tested against the null hypothesis. With this theoretical background, we turn to our hypotheses.

C. Hypotheses

The first set of hypotheses targets the prediction that *Concepcion* will result in most or all businesses using arbitration clauses in their standard form contracts. Those predictions are subject to question both because using an arbitration clause does more than contract out of class actions and because contracts may be sticky. Accordingly, the first set of hypotheses tests the basic assumptions about firm behavior that animate criticisms of decisions like *Concepcion*:

> *Hypothesis 1.* Many or most firms that did not use arbitration clauses prior to *Concepcion* will not switch to arbitration after the decision.
>
> *Hypothesis 1A.* The firms most likely to switch to arbitration clauses are ones that previously switched away from arbitration or otherwise are on the margin between arbitration and litigation.

If the data support these hypotheses, the next question is, "Why have firms not switched to arbitration?" The second set of hypotheses considers the two possible explanations we have suggested:

> *Hypothesis 2.* Using arbitral class waivers is not costless because arbitration is a bundle of dispute resolution services, not just a class action waiver. To the extent this is true, firms will not switch to arbitration after *Concepcion*, especially firms that face little risk of class actions or place a high value on court procedures, such as the right to appeal.
>
> *Hypothesis 3.* The use of a dispute resolution clause (or lack of one) is sticky. The accounts of stickiness suggest that if a firm previously does not use an arbitration clause, then they would not be affected by a Supreme Court decision, even if the Supreme Court decision might encourage the use of such a clause.

Hypothesis 3A. A modified version of this hypothesis, building on Stephen Choi and Mitu Gulati's theory of "shock effect," suggests that the use of arbitration clauses should increase over time. As Supreme Court decisions like *Concepcion* filter through a firm's network, the firm will eventually invest the resources necessary to make a change.[116]

IV. METHODOLOGY AND FINDINGS

In this part, we present the results of our empirical study of changes in the use of arbitration clauses since *Concepcion*. Examining two samples of franchise agreements, we find evidence of at most a slight shift to arbitration following *Concepcion* and certainly not the tsunami predicted by some commentators. We begin by describing our data and methodology. We then present our basic findings and seek to reconcile those basic findings with other reports about the use of arbitration clauses after *Concepcion*. We conclude with evidence on whether the limited move to arbitration can best be explained by the stickiness of franchise agreements or by the nature of arbitration as a dispute resolution process.

A. Data and Methodology

A number of states—including Minnesota, which is the source for the franchise agreements studied here—require franchisors to file Franchise Disclosure Documents ("FDDs") annually before they can sell franchises in the state.[117] The standard form franchise agreement

116. Possible questions for future research include, to the extent stickiness appears to be playing a role, which theoretical explanations for contract stickiness seem to be at play. For franchise agreements, our discussion of the literature suggests limited explanatory value of several theories in the context of franchise contracts (including negative signaling, interpretive risk, endowment effects, network externalities, and satisficing). This leaves learning externalities, overhang, herding, free riders, contract routines, and uncertainty. These varying theories give rise to possible hypotheses, such as the following: if free rider theory or herding explained stickiness, we would expect to see more change after the Supreme Court blessed a clause than beforehand; if learning externalities explained stickiness, then we would expect to see more change among larger firms than smaller ones; and if contract routines or uncertainty explained the stickiness of terms within arbitration clauses, then we would expect to see more change among agreements that had simpler (i.e., shorter) clauses.

117. *Franchise Registration Information*, http://perma.cc/APZ5-UDUM (mn.gov, archived, Mar. 10, 2014). For discussion of the representativeness and other uses of the *Franchise 500* as a source of data for research on franchises, as we do here for the cross-section sample, refer to Drahozal, *supra* note 20, at 723–24; Drahozal & O'Hara O'Connor, *supra* note 19.

(typically redlined to indicate any changes from the previous year)[118] is attached to the FDD. In almost every case, the franchisor used a standard form franchise agreement with state-specific addenda to address differences in state law. Accordingly, the fact that we obtained the franchise agreements from Minnesota should not affect the terms of the agreements we studied.

We used two samples of franchise agreements. The first consists of franchisors that were among the top franchise opportunities listed in Entrepreneur Magazine's 1999 *Franchise 500* (the "panel sample").[119] The sample originally consisted of seventy-five franchisors; due to business attrition, our current sample now is sixty-seven franchisors.[120] For these franchisors, we collected the dispute resolution clauses from their franchise agreements in 1999, 2007, 2011, 2012, and 2013,[121] which enables us to track changes in the dispute resolution clauses over time—including before and after *Concepcion*.

In addition, we collected franchise agreements from a random sample of franchisors that filed an FDD with the Minnesota Department of Commerce both before and after *Concepcion* (the "cross-section sample").[122] The cross-section sample consists of 214 franchisors and does not overlap with the panel sample; none of the franchisors in the panel sample is in the cross-section sample.[123] For

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118. N. AM. SEC. ADMIN. ASS'N, INC., 2008 FRANCHISE REGISTRATION AND DISCLOSURE GUIDELINES pt. II(C)(1) (July 1, 2008), *available at* http://perma.cc/7JP8-6WWH (nasaa.org, archived Mar. 10, 2014).

119. *2013 Franchise 500*, http://perma.cc/WG5W-DVSE (entrepreneur.com, archived Mar. 10, 2014).

120. The franchisors no longer in the sample include ones that went out of business, merged into other franchisors, or apparently stopped doing business in Minnesota.

121. For a description of the data collection for the 1999 agreements, see Drahozal, *supra* note 20, at 722–26; for a description of the data collection for the 2007 agreements, see Drahozal & Wittrock, *supra* note 20, at 90–94.

122. We began with a sample 239 franchises and then excluded 25 franchisors that did not make filings in Minnesota in 2013. Of the excluded franchisors, one switched to arbitration between 2011 (i.e., before *Concepcion*) and 2012 (i.e., after *Concepcion*), and one switched away from arbitration.

123. The proportion of arbitration clauses in our cross-section sample might be affected by our sampling of agreements filed with the Minnesota Department of Commerce. If, for example, we had instead selected a random sample of franchisors that filed in California, where courts have been less willing to enforce arbitration clauses, we might find a smaller proportion of franchise agreements with arbitration clauses before *Concepcion*. But that bias should decrease, if not largely disappear, after *Concepcion* and *Amex*. Moreover, as noted above, while California also makes FDDs available online, exemptions from the California franchise-registration statute exclude most established franchisors from the filing requirement, thus biasing the sample in a different way. By comparison, our panel sample was selected from a national list of franchisors and should not be subject to significant geographic biases.

the cross-section sample, we collected the dispute resolution clause as it was immediately before the decision in *Concepcion* (i.e., prior to April 27, 2011) and the dispute resolution clause in franchise agreements filed after *Concepcion*.[124] This dataset gives us a broader view of how franchisors are responding to *Concepcion*, but without the historical context.

As indicated, for both samples, the dispute resolution clauses were collected from the franchise agreements filed with the Minnesota Department of Commerce.[125] Prior to 2010, franchise agreements were only available on paper from the Minnesota Department of Commerce. For 2011 through 2013, we collected the FDDs online from the Department's website and then extracted information about the franchise agreement from the FDD.[126] The FDD also serves as the data source for the number of franchised units of the franchise.[127] We give little emphasis to the number of franchised units in our analysis, however, because of various uncertainties in that data.[128] The franchise agreement in the FDD typically is redlined to show changes from the prior year, so we are able to examine the extent to which franchisors change their franchise agreements.[129]

As noted above, using franchise agreements as a source of data has advantages over other form contracts. The agreements are publicly available and have been for a number of years, making

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124. For simplicity in data collection, we treated franchise agreements filed with the Minnesota Department of Commerce on or before April 30, 2011, as filed before *Concepcion*. But we also verified that the dispute resolution clauses in those agreements had not changed since the previous version, usually sometime in 2010.

125. On a handful of occasions, when the agreement was not available from the Minnesota Department of Commerce, we obtained a copy of the franchise agreement from a database maintained by the California Department of Corporations. *California Electronic Access to Securities & Franchise Information*, http://perma.cc/Q5DC-2SN6 (corp.ca.gov, archived Mar. 10, 2014). While including more years' worth of agreements, the California database has limited coverage of franchisors because established franchisors are generally exempted from filing in California. *Id.*

126. *Welcome to CARDS—Commerce Actions and Regulatory Documents Search*, http://perma.cc/S35J-RK64 (cards.commerce.state.mn.us, archived Mar. 10, 2014).

127. Item 20 of the FDD reports this information. For 1999, the data were derived primarily from the *Franchise 500*, and occasionally we used the *Franchise 500* as the source for more recent years to maintain consistency or to fill gaps.

128. First, it is not clear that the number of franchises is an appropriate proxy for size of the franchise chain because number of units does not necessarily correlate with total sales. Second, some franchisors may report in the FDD only the number of units of the type of franchise they are selling at the particular time, not the total number of units of any type in the chain. Third, franchisors report the number of units as of the end of their fiscal year, which varies by franchisor.

129. *See infra* text accompanying notes 179–80.

available a reasonable degree of historical information.[130] We recognize the limitations of using franchise agreements, however, which we discuss at length below.[131] Because of those limitations, our findings here may not be generalizable to other settings in which standard form contracts are used, such as consumer and employment contracts. In Section IV.B.3 below, we attempt to reconcile our findings here with other reports of changes in arbitration clause usage following *Concepcion*.[132]

B. Changes in the Use of Arbitration Clauses After Concepcion*: Empirical Findings*

In this Section, we report our empirical findings on changes in the use of arbitration clauses in franchise agreements following *Concepcion*. We find:

- In the panel sample, the use of arbitration clauses increased from 40.3% of franchisors immediately before *Concepcion* to 44.8% by 2013 (Hypothesis 1). Of the four franchisors that have switched to arbitration since *Concepcion*, three had used arbitration clauses at some point prior to the decision and switched back afterwards, while the fourth used arbitration to resolve some disputes before *Concepcion* and expanded its use to all disputes afterwards (Hypothesis 1A).

- In the cross-section sample, the net use of arbitration clauses increased only slightly after *Concepcion*, with 62.6% of franchisors using arbitration clauses before *Concepcion* and 63.6% after the decision. Five franchisors actually switched to arbitration after *Concepcion*, but four others switched away from arbitration, resulting in a net increase of one (Hypothesis 3).

- In the panel sample, the use of class arbitration waivers by franchisors using arbitration clauses has increased substantially since 1999, with most of the increase coming before 2011. In 1999, 51.6% of franchisors with arbitration clauses also used class arbitration waivers. By 2011,

130. *See supra* text accompanying notes 121–24.

131. *See infra* text accompanying notes 149–52.

132. *See infra* text accompanying notes 153–72.

immediately before *Concepcion*, that percentage had increased to 77.8%, with an additional increase to 86.7% by 2013 (Hypothesis 3A).

1. Changes in the Use of Arbitration Clauses in Franchise Agreements

Contrary to the predictions that all businesses would soon use arbitration clauses in their standard form contracts after *Concepcion*, we find only a slight change in the use of arbitration clauses in both samples of franchise agreements.

In the panel sample, as shown in Table 1, the percentage of franchisors using arbitration clauses increased slightly, from 40.3% in 2011 immediately before *Concepcion* to 41.8% in 2012 and 44.8% in 2013.[133] As a percentage of total franchises, the amount of the shift was similar (from 50.4% of franchises in 2011 to 52.5% of franchises in 2012 and 53.7% of franchises in 2013).[134] One franchisor switched to arbitration in mid-2012, two more in late 2012 and mid-2013, and a fourth later in 2013. Interestingly, in all four cases, the franchisor had had prior experience with arbitration. In 1999, GNC included an arbitration clause in its franchise agreement but by 2007 had switched to a forum-selection clause. It then switched back to arbitration after *Concepcion*, and indeed, many provisions in its current arbitration clause were identical to those in the 1999 agreement. The pattern for the Rent-A-Wreck franchise agreement is similar—switching from an arbitration clause in 2007 to a forum-selection clause in 2011 and then back to arbitration in late 2012. Although not identical, the Rent-A-Wreck arbitration clause in 2012 bears many similarities to the one from 2007. Hungry Howie's switched to arbitration in 2013 for all disputes; prior to 2013, it used arbitration for some disputes and not others. And Kahala Corp. (the franchisor for Blimpie sub shops) switched back to arbitration in 2013 after having switched away from

133. Because *Concepcion* was decided in April 2011, we measure each year after the decision as beginning in April. So when we refer to 2012, we mean the year from April 2011 to April 2012, 2013 is the year from April 2012 to April 2013, and so on. At the time this article went to press, only very partial data for the year April 2013 to April 2014 were available because most franchisors file their FDDs at the end of March. As a result, we do not include data for 2013–2014 in the tables. We do note in the text, however, that one additional franchisor switched to arbitration between April 2013 and when the article went to press. If we calculated the percentage of franchisors using arbitration clauses by assuming that all franchisors that had not yet filed their FDDs would keep their dispute resolution clause unchanged, the percentage of franchisors using arbitration clauses would have increased to 46.3% (31/67) for 2013–2014.

134. Data for 2013–2014 are largely unavailable as yet, as discussed above, so we do not include those data here. *See supra* note 133. Also, data for one franchisor are missing for 2010–2011.

arbitration in 2008.[135] Stated otherwise, these franchisors were all on the margin between arbitration and litigation—they either had switched away from arbitration or used it for some disputes—and so were among the most likely to switch to arbitration following *Concepcion*.

Table 1: Change in the Use of Arbitration Clauses in Franchise Agreements After *Concepcion*: Panel Sample

	2010–2011 Pre-*Concepcion*	2011–2012 Post-*Concepcion*	2012–2013 Post-*Concepcion*
Arbitration Clause	27 (40.3%)	28 (41.8%)	30 (44.8%)
No Arbitration Clause	40 (59.7%)	39 (58.2%)	37 (55.2%)

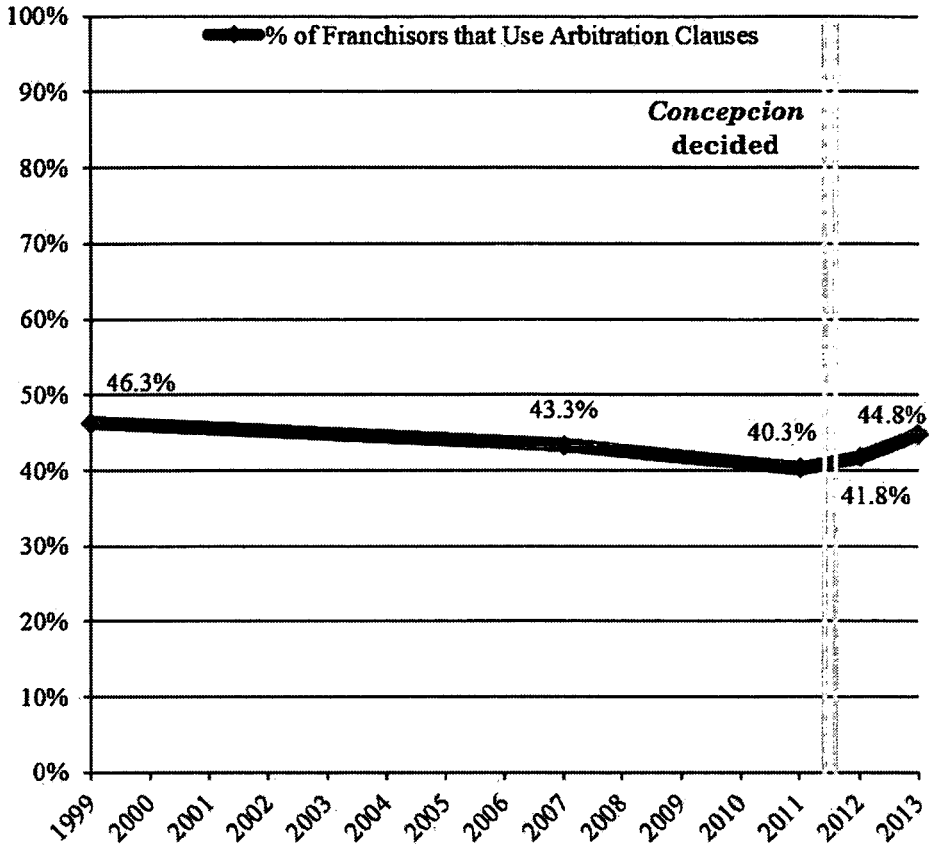
The panel sample also permits us to examine changes in the use of arbitration clauses over a longer period of time—beginning in 1999. Figure 1 summarizes the results.[136] It reveals a slight, long-term decline in the use of arbitration clauses by franchisors from 1999 through 2011, which apparently reverses after the decision in *Concepcion*.[137] Our findings thus might understate the effect of *Concepcion* on the use of arbitration clauses, because without *Concepcion*, the downward trend might have continued. Stated otherwise, *Concepcion* not only might have induced some franchisors to switch to arbitration, but it also might have induced some franchisors to continue using arbitration who otherwise might have switched away from arbitration. That distinction, however, is immaterial for the predictions we test here.

135. *See* Drahozal & Wittrock, *supra* note 20, at 97 n.124 (noting the removal of the arbitration clause from Kahala's 2008 franchise agreement).

136. As discussed *supra* note 133, one additional franchisor switched to arbitration at the end of the third quarter of 2013. We do not report overall percentages for the year 2013–2014 in Figure 1 because most of the data for that period was not available at the time this article went to press. Given the one switch to arbitration, however, and assuming the franchise agreements for which data are missing remain unchanged, the percentage of franchise agreements using arbitration clauses is now up to 46.3% (i.e., back to its level in 1999).

137. The percentages differ slightly from those reported for 2007 by Drahozal & Wittrock, *supra* note 20, at 95, for two reasons: first, because our sample has declined to 68 franchisors from the 71 in that study; and second, because we were able to add one franchisor (which switched away from arbitration) for that year which previously was unavailable.

Figure 1: Use of Arbitration Clauses in Franchise Agreements, 1999–2013



In the cross-section sample, the overall percentage of franchisors using arbitration clauses was higher than in the panel sample, as shown in Table 2,[138] but that percentage changed only slightly between 2011 and 2013. In 2011, before *Concepcion*, 134 of 214 franchise agreements, or 62.6%, included arbitration clauses. In 2013, after *Concepcion*, 136 of 214 franchise agreements, or 63.6%, included arbitration clauses. The very slight shift in the aggregate masks some reshuffling among franchisors: five franchisors in fact switched to arbitration by 2013, but those changes were largely offset

138. These findings are consistent with William L. Killion, *An Informal Study of Arbitration Clauses Reveals Surprising Results*, 22 FRANCHISE L.J. 79, 79 (2002) (finding higher rate of arbitration clauses by franchisors ranked lower in *Franchise 500*).

by three franchisors that switched away from arbitration during the same period.

Table 2: Change in the Use of Arbitration Clauses in Franchise Agreements After *Concepcion*: Cross-Section Sample

	2010–2011 Pre-*Concepcion*	2011–2012 Post-*Concepcion*	2012–2013 Post-*Concepcion*
Arbitration Clause	134 (62.6%)	133 (62.1%)	136 (63.6%)
No Arbitration Clause	80 (37.4%)	81 (37.9%)	78 (36.4%)

Finally, Figure 2 shows the percentage of franchisors using arbitration clauses that also use class arbitration waivers.[139] In 1999, barely half (51.6%) of franchisors using arbitration clauses also used class arbitration waivers. By 2011, the percentage had increased to 77.8% and then to 86.7% in 2013. The use of class arbitration waivers (in franchise agreements, at least) has therefore increased significantly in the past fifteen years.[140]

But even so, not all franchise agreements with arbitration clauses include class arbitration waivers. This result is surprising because the costs of adding a class arbitration waiver to a contract with an arbitration clause would seem much lower than the costs of adding both an arbitration clause and a class arbitration waiver to a franchise agreement that has neither. Although the benefits of avoiding class actions would be the same as we described before, the

139. In other words, the denominator for the calculations in Figure 2 differs from the denominator in Figures 1 and 3. Both Figures 1 and 3 present the percentage of franchisors, including those that use arbitration clauses and those that do not. Figure 2 presents the percentage of only those franchisors that use arbitration clauses.

140. Gilles also reports "a clear increase in the popularity of [class arbitration waivers] over the past decade." Gilles, *supra* note 15, at 853. She reaches this conclusion by comparing the use of class arbitration waivers in a nonrandom sample of recent arbitration clauses to the use of class arbitration waivers reported by studies examining consumer contracts across a range of industries. *Id.* at 853 n.104. Although the conclusion she reaches is consistent with our findings here, her methodology is problematic because she is not comparing the same types of contracts. For example, the Searle study (one of the studies to which she compares her data) found that all or almost all credit card and cell phone contracts in the sample included class arbitration waivers but that no real estate brokerage contracts did. Drahozal & Zyontz, *supra* note 83, at 349–50. Gilles does not examine any real estate brokerage contracts, so her results might simply be due to her comparing different types of contracts rather than any change over time.

bundling costs identified previously do not apply to the decision to include a class arbitration waiver in an existing arbitration clause.

We can identify at least three explanations for this less-than-ubiquitous use of class arbitration waivers.[141] First, it may be evidence of contract stickiness (Hypothesis 3). Franchisors simply may not have revised their franchise agreements to include class arbitration waivers even though it would seem beneficial for them to do so. Second, franchisors may fear, even after *Concepcion*, that using a class arbitration waiver might result in the invalidation of their arbitration clause. Given the Supreme Court's decision reversing the Second Circuit in *Amex*, though, any such risk has declined substantially.[142] But during the time period studied, there remained some risk that a court would invalidate an arbitration clause with a class arbitration waiver on an effective-vindication theory.[143] Third, given the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[144] franchisors might believe that using a class arbitration waiver is not necessary. In *Stolt-Nielsen*, the Court held that a clause that was "silent" on class arbitration could not be construed as authorizing class arbitration.[145] That said, arbitral tribunals continued construing clauses without class arbitration waivers as authorizing class arbitration even after *Stolt-Nielsen*,[146] and franchise lawyers continued to recommend that franchisors use class arbitration waivers.[147] Accordingly, we find this third possible explanation unlikely.

The explanations explored in the foregoing paragraph all treat franchisors as interchangeable. Another set of explanations might differentiate among franchisors, either with respect to their resources or their interests.[148] For example, large franchisors (measured by sales

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141. By comparison, 93.6% of credit card issuers using arbitration clauses covering 99.9% of credit card loans outstanding used class arbitration waivers as of December 31, 2010. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 39.

142. 133 S. Ct. 2304, 2312 (2013).

143. *See supra* text accompanying notes 119–29.

144. 559 U.S. 662 (2010); *see also* Oxford Health Plans v. Sutter, 133 S. Ct. 2064, 2069–70 (2013) (limiting *Stolt-Nielsen* to its facts).

145. *Stolt-Nielsen*, 559 U.S. at 687 & n.10.

146. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1157–58 (2011).

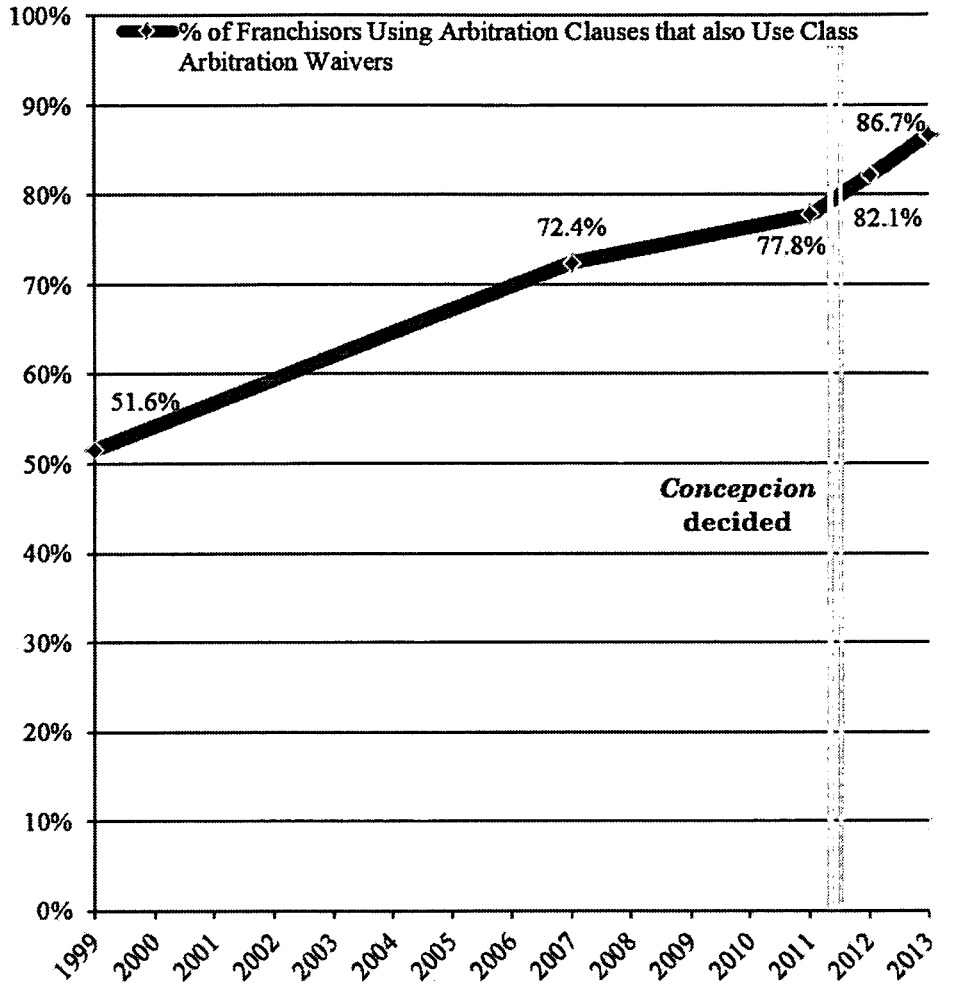
147. Sawers & Russell, *supra* note 16 ("The prudent franchisor should not assume that the absence of express language authorizing class arbitration immunizes the franchisor from class treatment. Instead, the safe course of action for franchisors is to include a class arbitration waiver in franchise agreements.").

148. Research on the use of arbitration clauses in credit card agreements suggests such firm-specific explanations, *see* Drahozal & Rutledge, *supra* note 24, at 539–40 (observing that

or number of franchised units) might display a greater tendency to favor arbitration clauses, coupled with class waivers, to the extent they perceive themselves to be litigation targets; by contrast, small franchisors might perceive a lower risk of litigation given that their pockets are not as deep. Along the same lines, larger franchisors might be more likely to have in-house legal counsel attuned to the most significant changes in the legal landscape (and thus more capable of responding quickly to shocks that result in changes in contract drafting); by contrast, smaller franchisors may lack the same personnel ranks and, consequently, be less likely to respond to these sorts of shocks. Future research might examine such firm-specific explanations.

operational differences among credit card companies explain their decisions whether or not to adopt arbitration clauses), as does prior research on the use of arbitration clauses in franchise agreements. *See* Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Agreements*, 32 J. LEGAL STUD. 549, 580–81 (2003) (observing that franchisors with large networks and high levels of repeat business are less likely to employ arbitration clauses).

Figure 2: Use of Class Arbitration Waivers in Franchise Agreements with Arbitration Clauses, 1999–2013



2. Caveats

We recognize and reiterate the limitations of our research. Initially, we have only two years of data since *Concepcion*. While that time period would seem to be long enough to detect changes to contracts if businesses could in fact quickly and costlessly change their contracts, to the extent contracts are sticky, implementing those changes may take longer. That may be particularly true for franchise

agreements, given their relatively long terms.[149] At a minimum, the relatively short time frame makes it difficult to distinguish between bundling and stickiness explanations for the limited switching to arbitration we have observed in franchise agreements.

Second, franchisors might have anticipated the outcome in *Concepcion* and so already changed their contracts before the case was decided. If so, we would not observe a change in the use of arbitration clauses after the decision. But our panel sample finds no evidence of increased arbitration clause use leading up to *Concepcion*; to the contrary, the use of arbitration clauses continued its slight, long-term decline up until 2010 and only began to increase after *Concepcion*.[150] Moreover, even if franchisors anticipated the outcome, fewer than half of the franchise agreements that we studied use arbitration clauses, despite the predictions that all would do so after *Concepcion*.

Finally, and more fundamentally, although often grouped together with consumer and employment contracts in policy discussions,[151] franchise agreements differ in a number of respects from those types of standard form contracts. As discussed above, franchise agreements have higher stakes, longer terms, and are subject to more regulation than the typical consumer or employment contract.[152] As a result, one must be cautious not to extrapolate too broadly from our findings here to other standard form contracts.

That said, our results at a minimum provide evidence that not all businesses have switched to arbitration after *Concepcion*—even businesses that commentators have argued should switch.

3. Reconciling Our Findings with Other Reports

As noted above, our findings necessarily are limited to franchise agreements, which differ in important ways from other form contracts, in particular consumer and employment contracts.[153] In this Section, we reconcile our findings with other reports of changes in the use of arbitration clauses since *Concepcion*.

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149. *See supra* text accompanying notes 112–13.

150. *See supra* text accompanying notes 136–38.

151. George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 669 n.20 (2013) ("Often, franchise agreements are lumped together with employment agreements and consumer contracts as problematic areas of adhesive bargaining, because franchisees are often small businesses dealing with large corporations, and thus lack the bargaining strength to negotiate arbitration clauses in advance.").

152. *See supra* text accompanying notes 109–14.

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

First, on December 12, 2013, the Consumer Financial Protection Bureau ("CFPB") issued a preliminary report on the results of its study, required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, of "the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."[154] The CFPB's findings on changes in credit card and checking account contracts since *Concepcion* are consistent with our findings here: the use of arbitration clauses has increased somewhat, but most institutions do not use arbitration clauses. The report found that "[t]he incidence of arbitration clauses in credit card contracts has increased since *Concepcion*, but only slightly"—with five credit card issuers adopting arbitration clauses after *Concepcion* and three switching away from arbitration.[155] At the end of 2012, only 17.0% of credit card issuers, covering 50.2% of credit card loans outstanding, used arbitration clauses.[156] A few more financial institutions have switched to arbitration for their checking account agreements: in a sample of large financial institutions, 47.7% used arbitration clauses as of summer 2013, up from 39.8% as of summer 2012.[157] As of summer 2013, however, the CFPB estimates that "only 7.7% of banks use arbitration clauses for their checking account contracts" and that "accounts representing some 44.4% of bank insured deposits are subject to arbitration."[158]

Second, anecdotal press reports identified various companies that have adopted arbitration clauses since *Concepcion*. The businesses typically reported as adopting arbitration clauses after *Concepcion* are computer software companies and online businesses, as shown in Table 3.[159]

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154. 12 U.S.C. § 5518(a) (2012); *see* CONSUMER FIN. PROT. BUREAU, *supra* note 18 (containing the text of the CFPB's report).

155. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 54. The Report found "no additional issuers switching to arbitration between December 31, 2012, and June 30, 2013." *Id.* at 54 n.125.

156. *Id.* at 22.

157. *Id.* at 56. The report states that "[e]ight banks and one credit union switched to arbitration during that one-year period, while two banks switched away from arbitration." *Id.* Because of data limitations, the study was unable to examine changes between the date of the *Concepcion* decision and summer 2012.

158. *Id.* at 25–26.

159. The one exception is Umpqua Bank, which revised its deposit-account agreement to include an arbitration clause after *Concepcion*. *See infra* text accompanying note 165. Professor Gilles reports that Regions Bank switched to arbitration after *Concepcion*. Gilles, *supra* note 15, at 853 n.105. By comparison, the *Wall Street Journal* reports that Regions Bank "strengthened the *existing* mandatory-arbitration provision contained in its deposit accounts" after *Concepcion*. Robin Sidel, *No Day in Court for Bank Clients*, http://perma.cc/8HL8-QBQN (wsj.com, archived

These businesses are notable because they are in industries that, prior to *Concepcion*, only rarely used arbitration clauses. Florencia Marotta-Wurgler found that almost no software license agreements used arbitration clauses or class arbitration waivers in her 2007 study,[160] a situation that had not changed much prior to *Concepcion*.[161] Moreover, at least some of the firms (both Sony and Netflix) had been subject to high-profile class action lawsuits shortly before they switched to arbitration.[162] Finally, the anecdotal reports only highlight the switch to arbitration of several large players in the market. Without more systematic data, there is no way to know whether arbitration clauses are used by most or all firms in the market, or whether these markets resemble the credit card market, in which small banks and credit unions often do not use arbitration clauses.[163]

Mar. 10, 2014). The CFPB's more systematic evidence on changes in the use of arbitration clauses in credit card and checking account contracts since *Concepcion* is described *supra* text accompanying notes 154–58.

160. *See* Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?*, *in* BOILERPLATE: FOUNDATIONS OF MARKET CONTRACTS 45, 47–48 (Omri Ben-Shahar ed., 2007) (finding that "only 6 percent of [observed] EULAs" contained an arbitration clause).

161. Marotta-Wurgler & Taylor, *supra* note 102, at 280.

162. Michael Liedtke, *Netflix Class Action Settlement: Service Pays $9 Million After Allegations Of Privacy Violations*, http://perma.cc/6J4D-PP7T (huffingtonpost.com, archived Mar. 10, 2014); Winda Benedetti, *Sony Sued, Could Bleed Billions Following PlayStation Network Hack*, http://perma.cc/FDA3-R3S4 (nbcnews.com, archived Mar. 10, 2014).

163. Drahozal & Rutledge, *supra* note 24, at 559–61.

Table 3: Press Reports of Firms Switching to Arbitration Clauses After *Concepcion*

Company	Product	Date Switch Reported
Sony[164]	Video games	September 2011
Umpqua Bank[165]	Deposit account	January 2012
Netflix[166]	Video rental and streaming	March 2012
Microsoft[167]	Video games and software	May 2012
Valve[168]	Computer games	July 2012
eBay[169]	Online auction	September 2012
PayPal[170]	Electronic payment service	October 2012
Instagram[171]	Online photo sharing service	December 2012
StubHub[172]	Online ticket market	February 2013

All told, the markets for online services and computer software may reflect a different contracting dynamic than the franchise market. The former markets were marked by a low initial usage of arbitration

164. Mark Milian, *Sony: Supreme Court Ruling Spurred Changes to PlayStation Terms* http://perma.cc/882Q-BQQZ (cnn.com, archived Mar. 10, 2014).

165. Brent Hunsberger, *Umpqua Bank Joins Wells Fargo and Chase in Requiring Customers to Arbitrate Disputes, Barring Class Actions*, http://perma.cc/7XLT-N4L9 (oregonlive.com, archived Mar. 10, 2014).

166. Jordan Crook, *Netflix Doesn't Want You to Sue Them, According to New Terms of Service*, http://perma.cc/U7B2-8CEL (techcrunch.com, archived Mar. 10, 2014).

167. Tim Fielden, *Microsoft on the Issues: Consumer Product and Service Agreement Updates*, http://perma.cc/D58D-NXFD (blogs.technet.com, archived Mar. 10, 2014).

168. Chris Morran, *Video Game Publisher/Seller Valve Now Forcing Customers into Mandatory Binding Arbitration*, http://perma.cc/XET8-CFKP (consumerist.com, archived Mar. 10, 2014).

169. Brian Wolfman, *New E-Bay Arbitration Agreements with Its Customers Include Class-Action Ban (but with an Opt-Out)*, http://perma.cc/H3B2-63GA (pubcit.typepad.com, archived Mar. 10, 2014); Steven Berk, *Ebay Offering Rare Chance to Opt-Out of Forced Arbitration: Nov. 9th Deadline*, http://perma.cc/LFW8-Q4R5 (thecorporateobserver.com, archived Mar. 10, 2014).

170. Greg Blankinship, *PayPal Adds Class Action Arbitration Waiver to Its Contract*, http://perma.cc/WTG9-TAB8 (classactionblog.mpnsb.com, archived Mar. 10, 2014).

171. Chris Morran, *Here's How to Opt Out of Instagram's New Arbitration Clause*, http://perma.cc/V9VW-EV4T (consumerist.com, archived Mar. 10, 2014).

172. Chris Morran, *Now You Can No Longer File Class-Action Suits Against StubHub; Here's How to Opt Out*, http://perma.cc/4LZP-K8C4 (consumerist.com, archived Mar. 11, 2014).

clauses, with a number of large firms switching to arbitration after both *Concepcion* and the filing of several high-profile class actions. By contrast, the franchise market had a much higher usage of arbitration clauses prior to *Concepcion* and a slight, but not dramatic, move to arbitration after that case. More research into the online services and computer software markets would be useful to help provide a better understanding of why firms in those markets behaved differently than those in the franchise market, both before and after *Concepcion*.

C. Are Arbitration Clauses Sticky?

Given our findings that, at least so far, the predicted switch to arbitration has not yet occurred in franchise agreements, the next question is, "Why not?" In our theoretical discussion, we identify two possible reasons. The first is that franchisors in fact have business reasons not to use arbitral class waivers. By agreeing to arbitrate, in other words, franchisors would agree to a bundle of dispute resolution services, at least some of which may be undesirable (Hypothesis 2).[173] The second is that form contracts may be sticky (Hypothesis 3).

As discussed above, there is reason to believe that franchise agreements may be somewhat sticky, albeit perhaps less sticky than negotiated contracts.[174] Our prior research has found evidence of stickiness in credit card agreements that continued to list the National Arbitration Forum ("NAF") as the sole provider of arbitration services several years after the NAF had ceased administering consumer arbitrations.[175] As a result, the agreements risked at best court appointment of arbitrators and at worst invalidation of the arbitration clause.[176] For end-user license agreements prepared by mass-market consumer software companies, Florencia Marotta-Wurgler and Robert Taylor reported that "[a]lmost forty percent of the contracts examined saw at least one standard term change over the period between 2003 and 2010; some changed more than ten terms."[177] They explain that, "[w]hile this number could be perceived as low, especially in an industry as dynamic as software, the results challenge

173. Or perhaps, for reputational reasons, they might decide not to use arbitration clauses. *See supra* note 82.

174. *See supra* text accompanying notes 14–15.

175. Rutledge & Drahozal, *supra* note 141, at 30.

176. *Id.*

177. Marotta-Wurgler & Taylor, *supra* note 102, at 274–75.

conventional views that a large fraction of consumer fine print is set in stone."[178]

Here, we develop a simple measure of change in franchise agreements using the redlined versions of the agreements included in the FDD.[179] For each franchise agreement for 2011–2012 and 2012–2013, we counted the number of provisions in the franchise agreements that were changed substantively. For example, expanding the parties subject to an arbitration clause (e.g., by expressly including affiliates) would count as a substantive change. Renumbering a provision because the parties inserted a new provision earlier in the agreement would not. We included changes to all types of provisions of the franchise agreement and counted the number of provisions with substantive changes rather than the number of substantive changes. If a single provision was changed in multiple ways, we counted it only as a single change. This measure of contract change necessarily is very approximate; it is most useful at the extremes. Nonetheless, it provides at least a rough measure of the extent to which franchisors changed their franchise agreements during the years studied.

Based on the data described above, we categorized each franchisor by the number of changes in any particular year and the number of years in which changes were made, as shown in Table 4. Franchise agreements with ten or more provisions with substantive changes in any given year were classified as having major changes. Franchise agreements with at least one but fewer than ten provisions with substantive changes in any given year were classified as having minor changes. If the agreement had changes in only one year, the changes were characterized as periodic; if in both years, they were characterized as regular. If there were no substantive changes in either year, we categorized the agreement as unchanged.

178. *Id.* at 275.

179. *See supra* text accompanying note 118. When a franchise agreement did not reflect any changes in redlining, we compared the agreement to the previous year's agreement to determine whether in fact it was unchanged from the prior year or whether the version of the franchise agreement we were using was not redlined.

Table 4: Categorizations for Changes to Franchise Agreements, 2011–12 & 2012–13

Category	Definition
Major, regular	Ten or more changed provisions in both years
Major, periodic	Ten or more changed provisions in one year
Minor, regular	Some but fewer than ten changed provisions in both years
Minor, periodic	Some but fewer than ten changed provisions in one year
Unchanged	No changes in either year

Table 5 summarizes our categorizations of the changes in the panel sample by the type of dispute resolution clause used in the franchise agreement in 2012.[180] Note first that 53 of the 67 franchisors (79.1%) changed at least one provision during the two years we examined, and 7 of the 67 franchisors (10.4%) changed ten or more provisions in both years. These are higher percentages than Marotta-Wurgler and Taylor found for the end-user license agreements they studied, but we use a more generous definition of change than their study, so our results are not directly comparable.[181]

Table 5: Changes in Franchise Agreements by Type of Dispute Clause, 2011-12 & 2012-13

Category	Arbitration Clause	No Arbitration Clause
Major, regular	4	3
Major, periodic	12	15
Minor, regular	7	6
Minor, periodic	1	5
Unchanged	6	8
Total	30	37

180. Two of the agreements switched to arbitration in 2013.

181. *See supra* text accompanying note 177.

No clear patterns emerge by type of dispute resolution clause (or at least none for which we can claim any statistical significance because of the small sample size). During the period studied, the percentage of unchanged franchise agreements was similar for both agreements with and without arbitration clauses. At the other extreme, a higher percentage of regular, major changes were made by franchisors using arbitration clauses. For those franchisors making major changes, either periodic or regular, it seems less likely that contract stickiness explains the failure to switch to arbitration. Indeed, almost half (18 of 37) of the franchisors not using arbitration clauses made major changes to their franchise agreements. Again, we cannot draw definitive conclusions, but our data at least suggests that something more than contract stickiness explains why some franchisors have not switched to arbitration after *Concepcion*.

An alternative possibility is that dispute resolution provisions are stickier than other contract provisions, so that the data above understate the degree of stickiness. We also separately counted the number of franchisors that made substantive changes to the dispute resolution clause itself, such as by switching to (or from) arbitration, or otherwise changing their dispute resolution clause. In 2012, 11 of 67 (or 16.4%) of franchisors changed their dispute resolution clauses. In 2011, 6 of 67 franchisors (or 9.0%) changed their dispute resolution clauses. Six of the 11 used arbitration clauses in 2012, while 5 of the 6 in 2011 did so. Not surprisingly, a smaller percentage of franchisors changed their dispute resolution clauses than changed some other provision in the franchise agreement. Also as expected, franchisors that used arbitration clauses were more likely to change their dispute resolution clause, because arbitration clauses tend to be longer and more complex than forum-selection clauses. That said, 6 of 17 (or 42.1%) of the franchisors that changed their dispute resolution clause used forum-selection clauses in their franchise agreements, suggesting that forum-selection clauses are not necessarily stickier than arbitration clauses.

Overall, we cannot reject the hypothesis that the stickiness of franchise agreements partially explains why many franchisors have not switched to arbitration since *Concepcion*. Half of the franchisors that do not currently use arbitration clauses made either no changes (8 of 37, or 21.6%), or only minor changes (11 of 37, or 29.7%), to their franchise agreements in 2011–2012 and 2012–2013. Those franchise agreements may be sticky. But a sizable proportion of franchisors that do not currently use arbitration clauses made major changes to their franchise agreements in one (15 of 37, or 40.5%) or both (3 of 37, or

8.1%) of those years. For those franchisors, contract stickiness alone does not fully explain why they have not switched to arbitration.

V. *AMEX* AND NONARBITRAL CLASS WAIVERS

Commentators have predicted that the Supreme Court's decision in *Amex* will result in a new "rash" of businesses switching to arbitration clauses to avoid class actions.[182] Of course, if all businesses already had adopted arbitration clauses after *Concepcion*, as some had predicted, then *Amex* would have no additional effect on contracting behavior. Given our finding that such a switch has not occurred, however, the likely effect of *Amex* remains open.

It is too soon to present empirical evidence on the extent to which businesses switched to arbitration after *Amex*. Instead, we offer some thoughts on the legal implications of the decision and how those implications might affect future contracting behavior.

A. Legal Implications of Amex *for Class Waivers*

In *Amex*, the Supreme Court held an arbitral class waiver enforceable even though the lack of class relief arguably made it uneconomical to pursue a federal antitrust claim.[183] By foreclosing what appears to be the last major avenue to challenge arbitral class waivers after *Concepcion*, the Court in *Amex* reduced, if not eliminated, any residual legal uncertainty about their enforceability.

In addition, the dissent in *Amex*, perhaps inadvertently, rejected a variation on the effective-vindication challenge. Some courts, typically state courts, had extended the theory to rights arising out of state statutes. For example, in *Feeney v. Dell, Inc.*, the Massachusetts Supreme Court refused to limit the effective-vindication doctrine to federal statutory rights, instead holding that it applied to state statutory rights as well.[184] Justice Kagan's dissent in *Amex*, however, made clear that such analysis is erroneous:

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182. *See supra* text accompanying note 13.

183. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–11 (2013).

184. Feeney v. Dell Inc., 989 N.E.2d 439, 455–56 (Mass. 2013), *rev'd on rehearing*, 993 N.E.2d 329, 331 (Mass. 2013); *see also* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 81 (D.C. Cir. 2005) (suggesting that effective vindication of state law is available as ground to challenge arbitration agreement); Kristian v. Comcast Corp., 446 F.3d 25, 29 (1st Cir. 2006) (same); Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091, 1101 (Ala. 2009) (same). *But see* Coneff v. AT&T Corp., 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) ("Plaintiffs assert primarily state statutory rights, but *Mitsubishi, Gilmer, Green Tree* and similar decisions are limited to federal statutory rights.")

> When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them.[185]

Given that even the *Amex* dissenters would have limited the effective-vindication doctrine to federal statutory rights, cases like *Feeney* would seem to be no longer good law.[186]

Finally, while on its facts *Amex* addresses arbitral class waivers, the decision might make courts more likely to enforce nonarbitral class waivers.[187] Stated otherwise, although the decision has been criticized as the "worst Supreme Court arbitration decision ever,"[188] it is arguably a class action decision more than an arbitration decision.

Most of the reasoning in *Amex* applies to nonarbitral as well as arbitral class waivers. Thus, as the *Amex* Court points out, the effective-vindication doctrine essentially is an application of the bar on prospective waivers of statutory rights.[189] If parties cannot directly waive a statutory right, they also cannot do so indirectly by using an unfair arbitration clause.[190] The Court then goes on to hold that an arbitral class waiver does not amount to a prospective waiver of a statutory right because "the class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938."[191] Nothing in that analysis depends in any way on whether a class

185. *Amex*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

186. Of course, *Feeney* would be inconsistent with the majority's decision in *Amex* even if it had involved federal statutory rights because the basis for the effective-vindication challenge was a class arbitration waiver. The Massachusetts court later acknowledged that its decision was incorrect under *Amex*. Feeney v. Dell, 993 N.E.2d 329, 331 (Mass. 2013).

187. As noted above, courts currently are split on the enforceability of nonarbitral class waivers. *See supra* text accompanying note 80.

188. Bland, *supra* note 12; Sternlight, *supra* note 6.

189. 133 S. Ct. at 2310.

190. As the Court explains in *Amex*: "That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310–11.

191. *Id.* at 2311. "Or, to put it differently, the individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id.*

waiver uses an arbitration clause. Rather, central to the Court's analysis seems to be that, at the time Congress enacted the antitrust laws, class actions under the Federal Rules of Civil Procedure had not yet been adopted. That argument, of course, applies equally to nonarbitral class waivers.[192]

Clearly, any application of *Amex*'s reasoning to nonarbitral class waivers would rest only on dicta because *Amex* on its facts involved an arbitral class waiver. Moreover, the Court relied on the FAA and its own prior arbitration cases at various points in the opinion. Thus, the Court later explained that "the FAA does, contrary to the dissent's assertion, favor the absence of litigation when that is the consequence of a class-action waiver, since its 'principal purpose' is the enforcement of arbitration agreements according to their terms."[193] And the framework the Court applied to reconciling the FAA and the antitrust laws is its usual one for analyzing whether a federal statute makes a particular statutory claim nonarbitrable.[194] That said, there is at least an argument that *Amex* enhances the enforceability not only of arbitral class waivers but also of nonarbitral class waivers.

B. Arbitral and Nonarbitral Class Waivers in Franchise Agreements: Predictions and an Empirical Baseline

As stated above, it is too early to evaluate empirically the effect of *Amex* on the use of arbitral and nonarbitral class waivers. Instead, we offer some predictions about how businesses are likely to respond to that case.

First, to the extent businesses refrained from switching to arbitration after *Concepcion* because of residual legal uncertainty about the effective-vindication doctrine, those businesses might switch after *Amex*. But to the extent businesses avoided arbitration because of its limited right of appeal or other bundling costs, one would not expect all or even most businesses to begin using arbitration, even

192. On this view, an open question after *Amex* is how to deal with a statutory right arising out of a federal statute enacted after the creation of class action procedures under the Federal Rules—particularly the adoption of the current version of Federal Rule of Civil Procedure 23 in 1966. For arbitral class waivers, the Court's analysis suggests that it would use its general framework for nonarbitrability. *See id.* at 2309–10. Presumably, that framework would not apply, at least not directly, to nonarbitral class waivers.

193. *Id.* at 2312 n.5 (citations omitted) (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011)).

194. *Id.* at 2309–10.

after *Amex*.[195] Likewise, *Amex* will have little effect on the stickiness of franchise agreements, although over time, the use of arbitration might nonetheless increase as firms slowly adopt contractual innovations.

Second, as suggested above, *Amex* might enhance the enforceability of nonarbitral class waivers. But because a nonarbitral class waiver does not use an arbitration clause, the FAA would not apply. There would be no federal law basis, therefore, for preempting state law regulation. As a result, even if *Amex* does apply to nonarbitral class waivers, states should still be able to invalidate them as unconscionable (or otherwise regulate those provisions by statute, regulation, or court decision).[196] Thus, one might expect to see varied state approaches to regulating nonarbitral class waivers, much as one saw with arbitral class waivers prior to *Concepcion*.[197]

Conversely, unlike arbitral class waivers, nonarbitral class waivers should have no bundling costs. The only change to the litigation process the parties are making is to waive class actions; other characteristics of litigation (such as the availability of appeals) stay the same. As such, businesses that want to waive class actions but also maintain their usual appeal rights would, all else equal, prefer nonarbitral class waivers.

Whether the legal uncertainty or the absence of bundling costs predominates is an empirical question, and it is difficult to make any definitive predictions. As Figure 3 indicates, prior to *Amex*, enforceability considerations appear to have predominated. More than twice as many franchisors in the panel sample used arbitral class

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195. Our hypothesis about arbitration and bundling costs dovetails with some of the arguments of Ted Eisenberg and Geoff Miller about the paucity of arbitration agreements in certain business-to-business contracts. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 368 (2007) ("The paucity of such clauses may partially reflect the view of corporate counsel that the decision whether to include binding arbitration in an agreement is not one that can be made across the board, but rather depends on the needs and circumstances of the parties."). Here, however, the bundling costs influence the behavior of a single party (the franchisor) as opposed to two equally sophisticated business parties (the subject of Eisenberg and Miller's research).

196. In addition, there might be arguments against the enforceability of nonarbitral class waivers in addition to state law unconscionability. *See, e.g.*, Martrano v. Quizno's Franchise Co., LLC, Civil Action No. 08-0932, 2009 U.S. Dist. LEXIS 52025, at *87 (W.D. Pa. June 15, 2009) (invalidating nonarbitral class waiver as inconsistent with the Federal Rules of Civil Procedure).

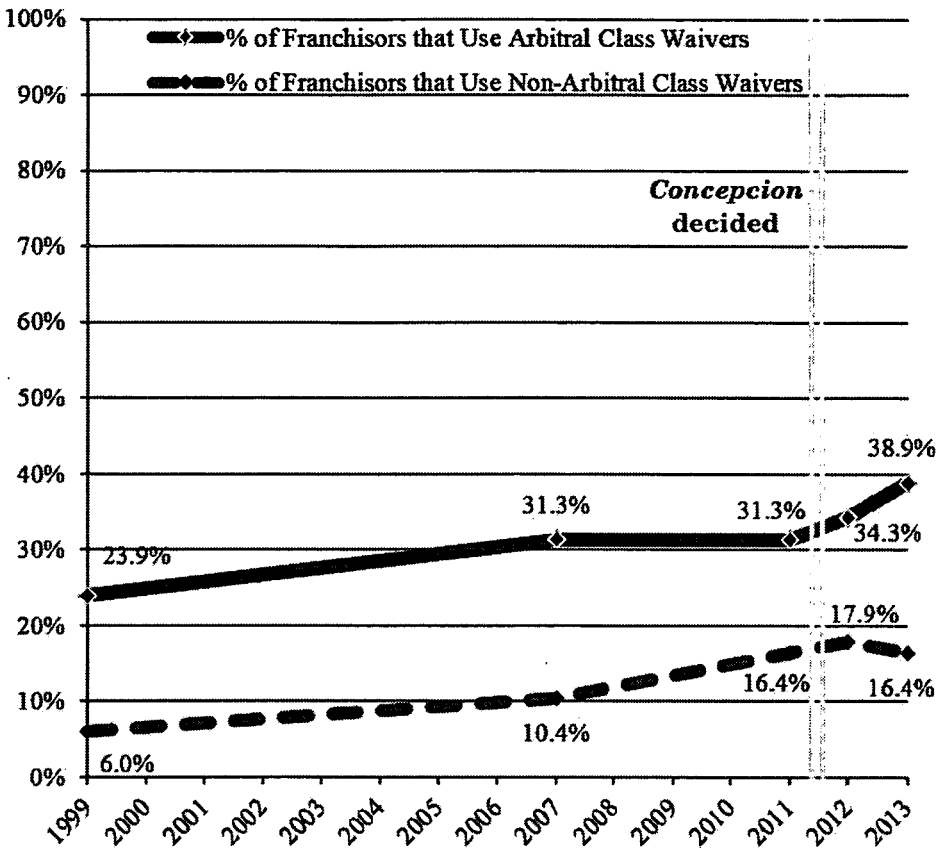
197. *Cf.* ALAN S. KAPLINSKY, SCORECARD ON WHERE FEDERAL AND STATE APPELLATE COURTS AND STATUTES STAND ON ENFORCING CLASS ACTION WAIVERS IN PRE-DISPUTE CONSUMER ARBITRATION AGREEMENTS 42–43 (2010), *available at* http://perma.cc/8E8Z-2GJW (summarizing "final tally" of different courts on enforceability of arbitral class waivers prior to *Concepcion*).

waivers over nonarbitral class waivers (38.9% versus 16.4% in 2013).[198] The ratio is similar for the cross-section sample, although the use of both arbitral (51.4%) and nonarbitral (18.7%) class waivers is higher there than in the panel sample. By comparison, in other standard form contracts (such as credit card and cell phone agreements), arbitral class waivers overwhelmingly predominate.[199] This result may be due to greater uncertainty about the enforceability of nonarbitral class waivers in those settings, or it may suggest that bundling costs are lower in those settings, so that there is less benefit to using nonarbitral class waivers instead of arbitral class waivers.

198. The increase in arbitral class waivers and the decline in nonarbitral class waivers in 2013 offset each other to some extent because of one franchisor that previously used a nonarbitral class waiver switching to an arbitral class waiver.

199. David Hoffman finds only a small number of nonarbitral class waivers in credit card agreements, all of which appeared in contracts with arbitration clauses. *See* Hoffman, *supra* note 25 (manuscript at 29–30). Arbitration clauses and class arbitration waivers clearly are dominant in cell phone contracts. *See* Drahozal & O'Hara O'Connor, *supra* note 19.

Figure 3: Use of Arbitral Class Waivers and Nonarbitral Class Waivers in Franchise Agreements, 1999–2013



Amex may enhance the enforceability of nonarbitral class waivers while leaving their bundling benefits unchanged, making them more attractive on the margin. Since 1999, the use of nonarbitral class waivers in the panel sample has increased at a faster rate than the use of arbitral class waivers. And in both samples, the overall use of nonarbitral class waivers is higher than one might expect given the limited attention to such waivers by courts and academics. Whether the enhanced enforceability as a result of *Amex* will be enough to result in a greater use of nonarbitral class waivers is as yet unknown.

VI. IMPLICATIONS AND CONCLUSIONS

After *Concepcion*, commentators predicted that all or most businesses would soon switch to arbitration clauses. This paper tests that prediction and finds it unsupported. Based on our samples of franchise agreements, we find only a small switch to arbitration, not the tsunami predicted. In the panel sample, the use of arbitration clauses increased from 40.3% of franchisors immediately before *Concepcion* to 44.8% in 2013. The four franchisors that have switched to arbitration after *Concepcion* all were on the margin between arbitration and litigation: three had used arbitration clauses at some point prior to *Concepcion* and switched back, while the fourth used arbitration to resolve some disputes and expanded its use. In the cross-section sample, the net use of arbitration clauses was virtually unchanged after *Concepcion*, with 62.6% of franchisors using arbitration clauses before the decision and 63.6% after. Five franchisors switched to arbitration after *Concepcion*, while three others switched away, leaving a net increase of one. We also find that the use of class arbitration waivers by franchisors already using arbitration clauses has increased substantially over time, with most of the increase coming before 2011 (from 51.6% of franchisors in 1999 to 77.8% in 2011, with a further increase to 86.7% in 2013).

These findings have a number of implications. First and most obviously, they call into question some of the empirical predictions following *Concepcion* and *Amex*. So far, at least, not all or even most businesses are switching to arbitration clauses after *Concepcion*. As we have noted before, however, one would expect those businesses most susceptible to class actions to be the most likely to switch. Second, the Article cautions against unquestioning acceptance of the common parade-of-horribles arguments often made in litigation. Third, the Article adds to our understanding of the nature of arbitration as a means of resolving disputes. An arbitration clause does more than waive class actions. It brings with it other characteristics of the arbitration bundle of dispute services, discouraging businesses from using arbitration even after *Concepcion* and *Amex*. Fourth, the Article provides insights into the nature of contract change and innovation. We find a significant degree of change in franchise agreements among franchisors in the panel sample, suggesting that contract stickiness is not the sole reason for the limited switching to arbitration clauses after *Concepcion*. Moreover, our findings as to franchise agreements suggest that Supreme Court

decisions may not always be the sort of systemic shock likely to result in contract change.

Finally, we offer a first look at how the Supreme Court's recent decision in *Amex* might affect contracting behavior. Although on its facts *Amex* involves the enforceability of an arbitral class waiver, the decision could be read as applying to nonarbitral class waivers as well, at least as to certain federal statutory claims. Businesses that want to avoid the bundling costs of arbitration, such as the limited right to appeal, would prefer to use nonarbitral class waivers. *Amex* might enhance the enforceability of those waivers, and thus to some degree increase their use.

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