

Credit Card Accountability

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Let's say you decide to sue your credit-card company because of outrageous interest rates and fees and deceptive marketing practices. Suddenly you discover you can't do it.¹

INTRODUCTION

Unsolicited credit card mailings are on the rise,² and consumer indebtedness has been increasing apace. Alongside the mounting levels of debt are fears that consumers misapprehend the consequences of cheap credit and that the marketing of credit cards preys on the inability of consumers to assess properly the likelihood that they will become prisoners of a compounding spiral of debt.³ A great deal of the critical commentary has focused on the initial inducement of consumers into dependence on credit cards through liberal solicitations, no annual charges on the cards, and initial low rates of interest. The primary claim here, as articulated by Professor Oren Bar-Gill, has focused on the pricing mechanisms used by credit card companies to lure consumers into a haven of debt, one whose back-end charges make it all too likely that debt levels will become all-consuming.⁴

In this Essay, we shift the focus from the mechanisms by which consumers are drawn to the world of credit cards to the perils that await them in the land of plastic. A survey of reported cases dealing

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¹ Robert Heady, *Credit Card Companies Push Consumers into Arbitration*, San Gabriel Valley Trib (California) (Dec 31, 2004).

² Solicitations reached approximately 4.9 billion (39 per household) in 2001, according to Julie Williams, First Senior Deputy Comptroller and Chief Counsel at the Office of the Comptroller of the Currency (OCC). Julie L. Williams, *Remarks before the Mid-Atlantic Bank Compliance Conference 1, 2* (Mar 22, 2002), online at <http://www.occ.treas.gov/ftp/release/2002-30a.doc> (visited Jan 6, 2006) (describing banks' recent efforts to create income from sources other than interest, and citing the recent large scale credit card solicitations as evidence of new marketing techniques).

³ See Oren Bar-Gill, *Seduction by Plastic*, 98 Nw U L Rev 1373, 1420–21 (2004) (arguing that “[i]ndividuals tend to make fewer mistakes when a decision involves higher costs,” and that the unsolicited nature of credit card offers suggests they are inexpensive, leading to less consumer vigilance).

⁴ See *id.* at 1401–08 (describing various credit card pricing techniques, such as use of teaser rates and no annual or per transaction fees, that tend to lure consumers into taking on credit card debt).

with consumer claims against credit card companies reveals a number of practices that exacerbate the effects of credit card indebtedness and frustrate consumers' efforts to disentangle themselves from bad credit card deals. We use these challenged practices as examples of the potential consequences of credit card debt, even if they arise after the initial contractual inducement.

The risks associated with the ever-enlarging amount of available credit have been compounded by the creation of effective barriers against deterrence-based oversight of the credit card market. In Part I, we look at one convenient source of protection: the federal banking laws. These laws have been interpreted to provide exclusive regulatory power to the handful of states that have emerged as friendly fora for credit card companies. Thus, Delaware, South Dakota, Nevada, Arizona, Rhode Island, and New Hampshire—states that combined have only 4 percent of the population—are now home to credit card issuing banks that, as of 2003, were owed more than \$350 billion of the \$490 billion outstanding debt on American credit cards.⁵

The major development, however, is the inclusion of binding arbitration clauses by most major credit card companies in their agreements, a move designed to thwart any sort of ex post accountability for credit card companies. In Part II, we turn to the question of ex post accountability for those who structure the terms of credit card debt. Our concern here is neither with the terms of credit card offerings nor with the actual levels of consumer debt. Rather, as in all markets characterized by large sellers and relatively atomized consumers, there is the risk of improper practices that impose small, almost inconsequential costs on individuals but yield significant returns in the aggregate.

Although the proliferation of these binding *individual* arbitration clauses has begun to draw the attention of consumer activists,⁶ only the most aware of consumer groups has entered the fray.⁷ Although the focus of these groups is often on the perceived fairness—or unfairness—of arbitration itself, in Part III we look instead at the effect

⁵ Mark Furletti, Comment, *The Debate over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temple L Rev 425, 443 (2004) (discussing the ramifications of liberalized state lending statutes).

⁶ For example, a coalition of consumer groups has started a “Give Me Back My Rights” campaign to encourage consumers to seek out the few credit card companies that do not compel arbitration and switch to their cards. See *Give Me Back My Rights Campaign*, online at <http://www.stopBMA.org/bma-about.htm> (visited Jan 6, 2006) (naming the founding members of the coalition that is working to eliminate binding mandatory arbitration clauses, and providing information on the issue).

⁷ See Michael D. Sorkin and Ed Ronco, *Consumer Groups Decry Growing Use of Arbitration*, St Louis Post-Dispatch A1 (Feb 25, 2005) (“Many have no idea they’ve ever agreed to binding arbitration, by passively accepting a densely worded agreement in tiny type.”).

of binding individual arbitration on the possibility of consumer class actions aimed at unscrupulous credit card practices, and on the reluctance of courts to look beyond contractual formalism in confronting one-sided imposition of these terms.

I. LOCATION, LOCATION, LOCATION

When Chief Justice John Marshall decided *McCulloch v Maryland*⁸ in 1819, the one fledgling national bank was weak and in danger of being smothered by taxes imposed by the individual states. Today, there are roughly 2,200 national banks,⁹ robust and growing due to the National Bank Act¹⁰ (NBA) and subsequent acts of Congress¹¹ that strengthened the federal banking system by capitalizing on the powerful ability, outlined by Marshall years before,¹² of the federal government to preempt rival state law.¹³

The core of the relevant preemption power is found in § 85 of the NBA, which permits national banks to charge “interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . and no more.”¹⁴ The term “located” proved to be a source of controversy, but in 1978 the Supreme Court significantly expanded its scope in *Marquette National Bank v First Omaha Service Corp.*¹⁵ Under the *Marquette* doctrine, a national bank is deemed to be located in the state in which it is chartered and is accountable to the laws of that state for its commercial activities, even if such activities are conducted elsewhere. This allows for the “exportation” of the laws

⁸ 17 US (4 Wheat) 316 (1819).

⁹ See Clyde Mitchell, *OCC Preemption: What's the Problem?*, 231 NY L J 3, 3 (Mar 17, 2004) (discussing the conflict that arises when state legislatures attempt to “regulate the activities of [] national bank[s] operating within [their] borders”).

¹⁰ See 13 Stat 99, 108 (1864), codified at 12 USC § 85 (2000) (authorizing banks to charge interest on loans that they make).

¹¹ See Riegle-Neal Interstate Banking and Branching Efficiency Act, Pub L No 103-328, 108 Stat 2338 (1994), codified at 12 USC § 1811 (2000) (establishing the Federal Deposit Insurance Corporation to insure the deposits of banks and savings associations); Gramm-Leach-Bliley Act, Pub L No 106-102, 113 Stat 1338 (1999) (providing a framework for the affiliation of various financial institutions to enhance competition).

¹² See *McCulloch*, 17 US (4 Wheat) at 427 (holding that a Maryland law imposing a tax on the Bank of the United States was unconstitutional because the states lacked the authority to impose such a burden on the federal government).

¹³ See Elizabeth R. Schlitz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 Minn L Rev 518, 521–22 (2004) (illustrating how the exportation doctrine’s application significantly increases the “participation of mainstream financial institutions . . . in the subprime loan market” because it allows federal rules to preempt state predatory lending laws).

¹⁴ 12 USC § 85.

¹⁵ 439 US 299 (1978) (holding that the NBA was enacted with the intent that banks be subject to the laws of the state in which they are chartered).

of one state to regulate conduct in some other state. As a result, banks are able to *choose* their interest rates by virtue of their location in one state, and then to export those rates to customers in other states. Moreover, under *Marquette*, other states are forbidden to and may be enjoined from attempting to apply their usury laws and other regulations to out-of-state banks.¹⁶

Marquette had a dramatic impact on the credit card industry.¹⁷ Suddenly, states that offered favorable legal sanctuary, such as freedom from usury regulations, could entice credit card companies to relocate.¹⁸ And, smaller states, with their impressionable legislatures, became prime candidates from which credit card companies could seek legal accommodations. *Marquette* allowed nationwide market gains from whichever state offered the most protective legal environment. To the contrary of Herbert Wechsler's famous invocation of the "political safeguards of federalism,"¹⁹ the ability of any state to capture federal preemption through the exportation of its home-state regulations resulted in small states being offered relatively large gains by imposing risks on out-of-state consumers. Any state with a small population would likely serve as an attractive candidate for being importuned with the promise of tax revenues and jobs, with the burden primarily shouldered by voiceless consumers in other states.

And so it came to be that, like Elvis impersonators to Las Vegas, credit card companies were drawn to South Dakota and Delaware. For

¹⁶ See *id.* at 318 n 31.

¹⁷ Federalism concerns compound the problem of the prohibition on class actions, as will be discussed throughout. Although class action mechanisms are available under the deceptive business practices statutes of most states, federal preemption threatens to eviscerate this procedural device based on the home state law of a chartered bank. See John A. Marold, *Third Circuit's Decision in Roberts v. Fleet Bank: Thinking Outside of the "Schumer Box" or "Consumerism Gone Berserk"?*, 8 NC Banking Inst 399, 412 (2004) (describing *Roberts* decision as requiring federal preemption of Rhode Island's Unfair Trade Practices and Consumer Protection Act).

¹⁸ There exists an enormous literature on the extent of the competition for corporate reorganizations among states, which attract corporations by offering more favorable legal regulations. See for example Robert K. Rasmussen and Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 Nw U L Rev 1357, 1363 (2000) (arguing that forum shopping in bankruptcy cases provides an incentive for jurisdictions to craft better legal rules). The extent of such competition is mitigated by the unwillingness of sophisticated capital markets to limit the amount of exploitation that any particular legal regime may offer. In all likelihood, the competition for credit card companies is more direct than that for corporations, because there are not sophisticated financial institutions monitoring the impact of various incorporation regimes on the investment quality of securities based on different state laws.

¹⁹ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543, 546-47 (1954) (arguing that the independence of state governments is an integral component of our federalist system). See also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum L Rev 215, 233-34 (2000) (reassessing Wechsler's argument in light of the role of national political parties).

example, by 1982, ten banks had a new, major presence in Delaware, and today, “lenders in Delaware hold 43 percent of total credit card loans made by insured depository institutions.”²⁰ This movement proved quite lucrative to those states with permissive regimes and limited usury laws (if any). After deregulation, South Dakota’s tax revenue from credit card issuing banks increased from \$3.2 million in 1980 to \$27.2 million in 1987; Delaware’s went from \$2.4 million to \$40 million in the same time period.²¹ For those states with more stringent regulations, the job flow has waned as companies leave. In 1997, North Carolina’s Deputy Commissioner of Banks, estimated that the state had “experienced a loss of several thousand jobs over the years as state legislators refused to loosen credit card regulations.”²²

In 1996, the Supreme Court again expanded the exportation doctrine in *Smiley v Citibank*.²³ Adopting a definition suggested by the Office of the Comptroller of the Currency (OCC), the Court held “interest” to include any charges attendant to credit card usage.²⁴ As promulgated in OCC regulations, this would include, “numerical period rates, late fees, creditor-imposed not sufficient funds (NSF) fees . . . , overlimit fees, annual fees, cash advance fees, and membership fees,” among other things.²⁵ Despite ongoing efforts by some states to test credit card immunity from regulation outside their chartering states,²⁶ the predictable effect was to allow the most pliable states to serve as safe havens from regulation.

Thus, late fees went the way of interest rates, and states with permissive regimes continued to hold sway over the rest of the country. After 1996, credit card companies changed their pricing strategies, incorporating a wider variety of fees²⁷ and using variable interest rates.²⁸

²⁰ Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and in the Personal Bankruptcy Rate*, Bank Trends 98-05 (FDIC, Mar 1998), online at http://www.fdic.gov/bank/analytical/bank/bt_9805.html (visited Jan 6, 2006).

²¹ *Small Us Usurious*, Economist 26 (July 2, 1988) (discussing the massive increase in credit card debt in South Dakota and Delaware on account of usury ceiling deregulation).

²² Amanda K.S. Hill, Note, *State Usury Laws: Are They Effective in a Post-GLBA World?*, 6 NC Banking Inst 411, 427 (2002) (discussing the tradeoff between protecting the state’s citizens by maintaining strict usury limits and causing other citizens to lose jobs in the credit card market as companies move to states that have looser regulations).

²³ 517 US 735 (1996).

²⁴ *Id.* at 747 (holding that the statutory interpretation of 12 USC § 85 supported by the OCC was not unreasonable, and was thus entitled to deference).

²⁵ 12 CFR 7.4001(a) (2005).

²⁶ These states include, among others, California, Illinois, Indiana, New York, and Vermont. See Nicole Duran, *OCC: States’ Enforcers Subject to Preemption*, Am Banker 1 (Dec 3, 2002) (describing the OCC’s attempts to intervene when certain states investigate or threaten to bring actions against banks).

²⁷ One often cited example is the “currency-conversion fee,” which is a charge for “the benefit of using the card” abroad, according to a spokesman for Visa. Christopher Elliott, *A Fee*

The relaxation of state regulation on ancillary charges for credit cards provided an important new source of revenue for credit card issuers that was not as transparent and not as subject to competitive pressures as fixed charges or specified interest rates. Thus, it seems more than coincidental that the significant rise in late fee revenue has occurred at the same time as the fall—and for many, the eradication—of the highly transparent annual charge.²⁹ Beyond the possibilities for sharp dealing, such as having an unpublished cutoff time for payments (for example, 1 p.m. on the relevant day³⁰), or holding payments received on the due date and crediting them the next day, credit card companies are also able to take advantage of consumer behavior that shows a high sensitivity to yearly fees and an overoptimistic attitude towards compliance with payment dates.

Behavioral literature suggests that companies should be expected to design contractual offers in anticipation of the predictable decisional heuristics of consumers, such as overconfidence.³¹ Consumers appear highly attuned to annual charges, and those have largely passed from the scene in a highly competitive market. Similarly, the increasing salience of interest rates has given rise to a generation of “flippers,” or, more colorfully, “rate tarts”—savvy consumers willing to switch their credit cards or swap their debt from credit card to credit card to take advantage of lower rate offerings.³² In response, credit

Even the Card Issuers Cannot Explain, NY Times C8 (June 14, 2005) (arguing that the currency-conversion fee is unjustifiable and providing anecdotes regarding the author's inability to obtain explanatory information about the fees from credit card companies).

²⁸ See *The Profitability of Credit Card Operations of Depository Institutions*, An Annual Report by the Board of Governors of the Federal Reserve System (Aug 1997), online at <http://www.federalreserve.gov/boarddocs/rptcongress/creditcard/1997/default.HTM> (visited Jan 6, 2006) (“[M]any issuers have also moved to variable-rate pricing that ties movements in their interest rates to a specified index such as the prime rate.”).

²⁹ For example, only 13 percent of cardholders are subject to annual charges. See James J. Daly, *Smooth Sailing*, 17 *Credit Card Mgmt* 30, 34 (May 2004).

³⁰ See *Discover Bank v Superior Court*, 36 Cal 4th 148, 30 Cal Rptr 3d 76, 78 (2005) (“The credit cardholder . . . alleges that Discover Bank had a practice of representing to cardholders that late payment fees would not be assessed if payment was received by a certain date, whereas in actuality they were assessed if payment was received after 1:00 p.m. on that date.”).

³¹ See Jon D. Hanson and Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *NYU L Rev* 630, 654–66, 722 (2002) (discussing common consumer behavioral tendencies, such as “false self-confidence” and the “optimistic bias,” in addition to a larger set of heuristics, and suggesting that manufacturers should be able to prey on these biases to influence consumer preferences); Stefano Della Vigna and Ulrike Malmendier, *Overestimating Self-Control: Evidence from the Health Club Industry* 5 (Stanford Graduate School of Business Research Paper 1880, 2003), online at <http://gsbapps.stanford.edu/researchpapers/library/RP1800.pdf> (visited Jan 6, 2006) (finding evidence of consumer time inconsistency and overconfidence in the market for three U.S. health clubs and positing that health clubs exploit these tendencies via their contractual offerings).

³² In the United Kingdom, such consumers are called “rate tarts.” Jim Stanton, *Why Moneyquest is in Love with Rate Tarts*, *Evening News* (Edinburgh) 4 (Nov 3, 2005).

card companies have shifted their focus to increasingly less visible pricing schemes to achieve similar results and to forestall the normal profit contractions of a mature market.³³ Oddly, from the vantage point of a credit card holder, the older regime of an annual fee may well have been the better option. The average late fee in 2003 was \$32. The average annual fee, on those few accounts subject to one, was \$44.30.³⁴ Late fees, however, cost much more than the \$32 payment. They trigger penalty rates—often considerable hikes in the cardholder’s annual percentage rate (APR)—and they usually are tiered, with higher fees for higher balances overdue.³⁵ Consumer groups have suggested that this combination of late fees and penalty rates is convincing evidence of “anti-consumer policies employed by credit card companies to force cardholders to slide deeper into debt.”³⁶ Some have even called for the return of the annual fee: “[I]ssuers wouldn’t have such a scruffy image today if they had held the line of upfront annual fees instead of becoming so reliant on dinging their customers every time they disobeyed the increasingly strict rules.”³⁷

Regardless of the advocacy of consumer groups, late fees have tripled in the past decade,³⁸ and when coupled with related fees (such as overlimit fees) presently constitute a third of the income stream for credit card companies.³⁹ Controlling the late fee explosion through regulation is proving beyond the regulatory capacity of individual states. In

³³ Penalty fees contributed to only 16.1 percent of total revenue in 1996. By 2003, fees made up 33.4 percent of total revenue. In the same time period, the disclosure statements have grown from an average of one page to an average of twenty, with some cardmember agreements running as long as seventy pages. See Mitchell Pacelle, *Growing Profit Source for Banks: Fees from Riskiest Card Holders*, Wall St J A1 (July 6, 2004) (“Instead of cutting these people off as bad credit risks, banks are letting them spend—and then hitting them with larger and larger penalties for running up their credit, going over their credit limits, paying late and getting cash advances from their credit cards.”). Robert McKinley, CEO of CardWeb.com, is quoted as saying, “As competitive pressure builds on the front-end pricing, it has pushed a lot of the profit streams to the back end of the card—to these fees.” Id.

³⁴ Daly, 17 Credit Card Mgmt at 34 (cited in note 29) (citing many statistics collected from credit card companies in 2004, including cost of funds, net chargeoffs, and average annual fee, which had increased from \$43.73 in 2002).

³⁵ *Credit Card Late Fees Rising*, 3 Cardline No 49, 1 (Dec 5, 2003) (describing the results of a recent survey).

³⁶ *New Credit Card Survey Uncovers Increases in Anti-Consumer Practices*, Ascribe Newswire (May 24, 2004) (describing a 2004 Consumer Action study detailing a number of questionable credit card company practices, including high late fees and high interest rates).

³⁷ James J. Daly, *Mourning the Annual Fee*, 17 Credit Card Mgmt 4, 4 (Sept 2004) (describing recent public upheaval regarding high credit card fees).

³⁸ Megan Johnston, *Stop Getting Nicked by Late Fees*, 34 Money 45, 45 (Mar 2005).

³⁹ Miles Rapoport and Andrew Fleischmann, *Yes, Virginia, There Is a Credit Card Late Fee*, The Record (Bergen County, NJ) L15 (Dec 23, 2003) (showing that in 2003, credit card companies were expected to reap approximately \$40 billion in fees versus approximately \$80 billion in interest charges). Income from late fees has grown by almost 400 percent in the past decade. See id.

early 2005, for example, Maine legislators tried to put together a bill that would protect consumers from “excessive” late fees. The effort was short-lived, and even the bill’s sponsor recognized its inherent weakness: “[T]he bill [] would unfairly affect Maine-based banks because national credit card issuers would not be affected.”⁴⁰ This suggests that the key to effective regulation is the ability to regulate the practices of national banks operating within the several states, rather than any individual state trying to regulate the small number of credit card issuers within its jurisdiction, as the Maine example demonstrates.

More significant, therefore, was the effort in California to alter the practices of all credit card offerings in that state with regard to one method credit card issuers have used to increase their revenues: the extension of the time necessary to pay off loans by reducing the monthly minimum payments.⁴¹ For the substantial segment of the population that pays only the monthly minimum,⁴² the reduction in the minimum payment produces an increase in indebtedness and associated interest charges, regardless of whether it improves the welfare of the cardholder. Professor Bar-Gill suggests this is an area in which credit card companies take advantage of and actually target “consumers’ underestimation of the period it will take them to repay their credit card debt.”⁴³ To that end, companies often design credit card bills so as to highlight the minimum payment rather than the total balance due.⁴⁴ In order to counteract the inducement to carry greater debt by paying only the minimum amount due, the California legislature passed a statute designed to require companies to warn credit card users about the length of time required and total cost incurred if the outstanding balance were to be repaid only by minimum balance

⁴⁰ Deborah Turcotte, *State Begins Looking into Credit Card Fees*, Bangor Daily News A5 (Jan 26, 2005) (summarizing the state legislature’s proceedings on possible credit card regulations and suggesting that consumers simply need to treat contractual negotiations with credit card companies more carefully, as the bills are unlikely to pass).

⁴¹ See California Credit Card Payment Warning Act, Cal Civ Code § 1748.13 (West 2001) (requiring credit card bills to provide information regarding the length of time consumers have to pay off their balances by paying the minimum), declared unconstitutional in *American Bankers Association v Lockyer*, 239 F Supp 2d 1000, 1020 (ED Cal 2002) (holding the California law preempted by federal law). See also Bar-Gill, 98 Nw U L Rev at 1394 (cited in note 3) (arguing that although at first blush it might seem that low minimum monthly payments benefit consumers, they actually benefit card issuers because it “increase[s] the time it takes to repay the loans and hence the total interest eventually paid”).

⁴² See Bar-Gill, 98 Nw U L Rev at 1394 n 108 (cited in note 3) (“Paying the minimum is a common phenomenon.”).

⁴³ See *id.* at 1408 (explaining that this is compounded by their further underestimation of their future borrowing).

⁴⁴ *Id.* (“For instance, the ‘minimum payment’ box is often closer to the ‘actual payment’ box and emphasized with a distinct color or font size, while the total payment figure is the only figure appearing on the payment stub.”).

incrementals.⁴⁵ This regulatory endeavor was quickly shut down under challenge by the American Bankers Association, with a court finding that the home laws of the issuing banks, operating with the national mandate of the NBA, preempted the California regulations.⁴⁶

The combined effect of these decisions was understood to “immunize credit card issuers from state consumer protection regulation.”⁴⁷ Other than the likely captured home state regulators of the chartered banks, this leaves only the OCC with any potential regulatory oversight. Unfortunately, there is little evidence that the OCC either by design or operation is set up to be a consumer watchdog. Although the OCC has been taking a more proactive approach to policing the credit card industry, that is simply not its mandate: “Congress never granted to the OCC the authority to substitute what *it* believed best protected consumers for what duly elected legislatures believed best.”⁴⁸ The OCC is not meant to be focused on consumer rights—just on strengthening the national banking industry.

In the era leading up to and just after *Swift v Tyson*,⁴⁹ a case that was intended to create national rules for the credit market, commentators bemoaned the fact that law had become “a science of *geography*, almost as much as of *justice*.”⁵⁰ Justice Story’s attempt to nationalize commercial law had unintended legal consequences that resulted in inconsistencies and inequalities among different states.⁵¹ The return, after *Erie Railroad Co v Tompkins*,⁵² of control to state law has not,

⁴⁵ Cal Civ Code § 1748.13 (mandating that credit card issuers include a number of written statements on credit card bills that notify the consumer of the potential ramifications of making only the minimum payment, such as describing exactly how long it will take a consumer to pay off balances of varying amounts).

⁴⁶ *Lockyer*, 239 F Supp 2d at 1018 (deferring to the opinion of the OCC, which deemed Cal Civ Code § 1748.13 to be overly burdensome to card issuers and a “significant interference with the national banks’ powers”).

⁴⁷ Furletti, Comment, 77 Temple L Rev at 446 (cited in note 5) (arguing that *Lockyer* is an important decision because it was one of the first cases in which a state’s “effort to enforce a non-price-related consumer protection” was preempted).

⁴⁸ Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 NYU L Rev 2274, 2309 (2004) (arguing that the OCC’s justification of its regulatory preemption of state predatory lending laws is misfounded partly because Congress never granted such authority to the OCC, but also because it has never been proven that state predatory lending laws are in fact “more costly than beneficial”).

⁴⁹ 41 US (16 Pet) 1 (1842).

⁵⁰ John William Wallace, *The Want of Uniformity in the Commercial Law between the Different States of Our Union*, Discourse Delivered before the Law Academy of Philadelphia 1, 28 (Nov 26, 1851).

⁵¹ See *Black and White Taxicab and Transfer Co v Brown and Yellow Taxicab and Transfer Co*, 276 US 518, 535 (1928) (Holmes dissenting) (arguing that Justice Story’s opinion placed too great a constraint on state laws).

⁵² 304 US 64 (1938).

however, solved the problem.⁵³ State law in small states like Delaware and South Dakota, through their policies on interest rates, late fees and, increasingly, no-class action clauses, now provides the rules for the credit industry.⁵⁴ In *McCulloch*, Chief Justice Marshall suggested that the people of one state should not be required to entrust the operations of the national bank to the people of another state; one can only marvel at how *McCulloch* has laid the foundation for individual states to set the terms of the national credit market.⁵⁵

II. “GET OUT OF JAIL FREE”⁵⁶

Parties who rely on others are, in all circumstances, imperfectly able to monitor the work of their agents. Thus, every principal-agent relationship is ripe for the exaction of agency costs; hopefully, market pressures will impose a competitive brake on their escalation as information spreads and other potential agents offer arrangements more profitable to the principal. However, the democratization of markets and their transformation into mass markets strains this simple contractarian story. Increasingly, the relations between large sellers and multiple small buyers becomes a world of contracts of adhesion, with terms and conditions set by the seller with no realistic prospect of negotiation. When markets prove not to have price competition, or when information is difficult to obtain and the transactional barriers to leaving one seller to find another are high, the risk of seller misbehavior is heightened. This is the story of many areas of consumer law, as the proponents of “asymmetric paternalism” have outlined.⁵⁷ The democratization of markets and the repeat nature of the seller’s transactions give rise to the prospect of the incremental extra charge, the marginal

⁵³ For a further discussion of this point, see generally Samuel Issacharoff and Catherine M. Sharkey, *Backdoor Federalization: Grappling with “Risk to the Rest of the Country,”* 53 *UCLA L Rev* (forthcoming 2006).

⁵⁴ See Barry Friedman, *Valuing Federalism*, 82 *Minn L Rev* 317, 407 (1997) (showing that policies of some states will affect other states and using the example of a loose environmental policy of one state causing pollution in bordering states).

⁵⁵ See 17 *US (4 Wheat)* at 431 (arguing that because citizens of one state would not trust those of another with even the “most insignificant operations of their state government,” it only follows that they would not trust another state to “control the operations of a government to which they have confided their most important and most valuable interests”).

⁵⁶ This quotation comes from *Szetela v Discover Bank*, 97 *Cal App 4th* 1094, 118 *Cal Rptr 2d* 862, 868 (2002), in which the court describes the arbitration prohibition against class actions, the subject of this section, as in effect “granting Discover a ‘get out of jail free’ card while compromising important consumer rights.”

⁵⁷ Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, and Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 *U Pa L Rev* 1211, 1230–37 (2003) (discussing a number of potential regulatory policies that could help prevent consumers from falling prey to sellers’ attempts at framing their products in ways that take advantage of consumers’ behavioral tendencies).

defect in goods, the sleight of hand of the bait-and-switch, all of which are not worth the transactional headaches for the consumer to challenge. But when these small and seemingly insignificant market misbehaviors are spread over a broad consumer base, small charges mount into sizeable yields.

The credit card market is a perfect example of a democratized market. Once the sole purview of the wealthy and entrepreneurial classes, credit cards have brought the enhanced powers of leveraged debt to the masses. Credit cards may stimulate consumption and smooth intertemporal fluctuations in wages, but they also bring the specter of crushing debt. Critically, credit cards provide misbehaving sellers with the capacity for simple exploitation in a highly asymmetric market with little consumer bargaining power for those already on the hook.

The question is therefore what can be done to check misbehavior in circumstances where market mechanisms may prove to be insufficient. It would perhaps be possible to impose a strong form of regulation on credit card markets: terms and conditions could be fixed; the amount of credit to individuals limited; the general availability of credit cards curtailed. Cass Sunstein has described this sort of command-and-control regulation as “hard paternalism.”⁵⁸ Although some issues may be successfully addressed via this option, major dislocations for a significant part of the economy would be created and the availability of credit for those who need it reduced. The goal of asymmetric paternalism is to find less intrusive forms of regulation that focused on the areas of decisionmaking where biases and deeply flawed heuristics might control, while leaving a broad range of decisionmaking to individuals cognizant of the consequences of their conduct.⁵⁹ This, per Professor Sunstein, is the domain of soft paternalism. In effect, soft paternalism searches for mechanisms to improve decisionmaking without having the state assume responsibility for all decisions, most typically on a one-size-fits-all basis.

Credit cards are a difficult area for this form of mildly paternalistic regulation because the most preferred of the weak regulatory options—disclosure—is likely to be insufficient. Most remedial efforts, such as the federal Truth in Lending Act (TILA) regulations, are

⁵⁸ Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U Chi L Rev 249, 268 (2006) (arguing against broad-sweeping hard paternalism because of private heterogeneity and potential government errors, but admitting that hard paternalism might be desirable if applied to particular practices, like late fees and teaser rates).

⁵⁹ See Camerer, et al, 151 U Pa L Rev at 1221–23 (cited in note 57) (“An attentiveness to minimizing costs to rational actors while maximizing benefits to boundedly rational actors fits well within a richer conception of efficiency.”).

aimed at providing more information about the potential pitfalls of credit. As one commentator has noted,

[W]hether consumer behavior is influenced by the historical APR disclosure has no empirical confirmation. The consumer's decision to incur the cash advance fees was certainly not affected by this disclosure that took place well after those transactions, possibly by as much as a month. In short, the value of periodic aggregation and disclosure of finance charge fees, and computation of them into an historical APR, is considerably attenuated.⁶⁰

A. Ex Post Accountability

Assuming the standard weak regulatory responses, such as disclosure, may have only slight utility, the question is what to do. At this point, it may be necessary to expand the arsenal of soft paternalistic responses to include mechanisms that offer protections ex post rather than ex ante. Focusing on ex post mechanisms—such as knowledge gained through repeat play or the availability of agents with incentives to counteract imperfect spot judgments—highlights a shortcoming in the behavioral literature. The behavioral critique of individual decisionmaking does not readily acknowledge how institutions and markets may mediate between cognitive error and irrational behavior. Thus, Richard Epstein writes:

Over time, individuals will seek out others who have better knowledge than themselves to make critical decisions, at least as long as they have some recourse against fraud and other forms of misappropriation. Markets then are rational to the extent that, on average, the decisions to cede control or to share authority replace worse decision makers with better, leaving both sides to the deal better off than before. Perfection of outcome is simply too strict a condition to have any descriptive or normative relevance.⁶¹

One such possible institutional actor is the self-designated ex post agent, the entrepreneurial lawyer willing to aggregate claims of small disadvantaged consumers. In much of consumer law, such an agent, either from the private bar or through the *parens patriae* power or regulatory power of the state, is the sole potential agent for consumers

⁶⁰ Ralph J. Rohner and Thomas A. Durkin, *TILA "Finance" and "Other" Charges in Open-End Credit: The Cost-of-Credit Principle Applied to Charges for Optional Products or Services*, 17 *Loyola Consumer L Rep* 137, 145 (2005).

⁶¹ Richard A. Epstein, *Second-Order Rationality*, in Edward J. McCaffery and Joel Slemrod, eds, *Behavioral Public Finance: Toward a New Agenda* 355, 365 (Russell Sage forthcoming 2006) (arguing that markets can be rational even if no individual actor is perfectly rational).

“to seek out”—even if the seeking party is inverted. The question is whether ex post learning or access to an agent to challenge misbehavior ex post may be thought of as a companion mechanism to soft paternalism. Potential legal representatives armed with doctrines such as unconscionability may well provide sufficient smoothing in a market characterized by asymmetric bargaining power and access to information. But this assumes the availability of such legal representatives to provide ex post remedial assistance. Between the preemptive powers of captured state authority and prohibitions on collective action, the credit card companies have worked mightily to insulate themselves from corrective market actors.

Our concern, as we explain below, is the increased use of contractual terms in credit card offerings that require all disputes to be submitted to arbitration rather than litigation and that further prohibit any aggregated representation regardless whether the challenge goes forward in court or through arbitration. Accordingly, we may focus more directly on the question of compelled arbitration, in general, and compelled individual arbitration, in particular, in light of their relation to the ability to acquire agents capable of correcting consumer error ex post. It is of course possible to posit, as did Justice Blackmun in *Carnival Cruise Lines, Inc v Shute*,⁶² a case concerning a forum selection clause in a contract of adhesion, that any contractual provision imposed by a seller in a form contract will be priced into the ultimate bargain realized by the consumer, through the mechanisms of market efficiencies.⁶³ Indeed, Professor Clayton Gillette offers this form of joint welfare gain as a major defense of the use of arbitration for dispute resolution in commercial ventures.⁶⁴ But these arguments assume precisely what is contested in the accounts of price insensitivity presented by Professor Bar-Gill, and disregard the bait-and-switch and lock-in problems that are often at issue in these cases.⁶⁵ Not only are these second-order considerations unlikely to capture consumer interest, they are also unlikely ever to become the source of market competition: “[N]o seller is likely to call attention to possible problems with its own product by telling consumers that ‘if it explodes you can

⁶² 499 US 585 (1991).

⁶³ See *id.* at 594 (“It stands to reason that passengers who purchase tickets . . . benefit in the form of reduced fares.”).

⁶⁴ See Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis L Rev 679, 700 (arguing that arbitration clauses do not evince sellers’ exploitation of consumers, but rather divide consumers into different categories—those who are willing to pay higher prices for contracts without arbitration clauses and those who are not).

⁶⁵ See Part II.B.

sue us in court, not just through an arbitration.’”⁶⁶ In addition, Professor Gillette properly notes the distinct vulnerability of the low value claimant faced with repeat players using arbitration as a shield:

Even low-cost arbitration may be too expensive to justify initiation of a claim against a seller unless the expected recovery is significant. Thus, consumers who fear that they will be unable to resolve postsale disputes with the seller may want to reserve a right to join a low-cost class action, or at least an opportunity to pursue low-cost small claims actions and actions under consumer protection laws, which commonly permit recovery of attorneys’ fees.⁶⁷

Yet the development of the credit card market has made the prospects of low-cost challenge to improper practices increasingly remote. The credit card companies have shown themselves to be agile and have moved more quickly than consumer accountability could anticipate in ways designed to forestall the emergence of agents of the sort Professor Epstein anticipates.

B. Gotcha!

A significant number of cases, brought for rather obvious reasons as class actions, bring to light practices that expose credit card holders to obligations arguably well beyond the initial contractual terms. The bait-and-switch technique is a frequent subject of litigation involving credit cards; for example, banks may use the “change in terms” clause in the Cardmember Agreement to change what at the outset were seemingly fixed terms.⁶⁸ It should be stressed that all of the fact patterns that we describe arise from relatively routine consumer cases in which purchasers assert that they did not obtain the benefit of the bargain into which they entered. These fact patterns also are typical of consumer cases in that they involve similarly situated recipients of uniform goods or services who find their claims joined through entrepreneurially-inspired class actions. What is the subject of concern,

⁶⁶ Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash U L Q 637, 692 (1996) (countering the argument espoused by “free marketeers” that sellers might start to compete on arbitration clauses).

⁶⁷ Gillette, 2004 Wis L Rev at 700 (cited in note 64). In addition, even for actions of sizeable claims, “the degree to which prohibitions on class relief result in lower costs to consumers is an empirical question, and, so far, no empirical data exists.” Thomas Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla St U L Rev 1005, 1028 (2004).

⁶⁸ See, for example, *Roberts v Fleet Bank*, 342 F3d 260, 268 (3d Cir 2003) (finding defects in the original solicitation letter to the consumer); *Rossmann v Fleet Bank*, 280 F3d 384, 398 (3d Cir 2002) (finding that as a result of the bait and switch tactic, the plaintiff “entered the agreement without the benefit of disclosure” of what the bank intended to charge).

however, is the way in which the introduction of mandatory, individual arbitration changes the landscape significantly.

Consider, for example, the claim of Joseph Bellavia against First USA Bank for charging an undisclosed fee whenever cardholders exceeded their credit limit.⁶⁹ The underlying legal issue was whether such a practice would be unlawful if the “overlimit fee” were deemed part of the mandatory disclosure of finance charges.⁷⁰ Or consider the facts in the most recent case from the California Supreme Court involving the Discover card: unbeknownst to consumers, payments not credited by 1:00 p.m. on the due date were deemed late and subject to a \$29 late fee plus finance charges.⁷¹ The question there was whether the imposition of the hour limitation for the acceptance of payments was proper within the terms of the underlying card agreement. Each of these cases presented a straightforward question of law that would, if heard on the merits, apply equally to all similarly situated cardholders.

Perhaps even more typical among cases testing various credit card practices are challenges to unilateral changes in the terms of a credit card arrangement. In one illustrative case, an individual opened an account with Fleet which promised her a 7.99 percent fixed APR. The mandatory federal disclosure, known as the “Schumer Box” for the manner in which the information in the initial disclosure is presented,⁷² strongly implied that the bank would only change the rate under two specific circumstances: “[F]ailure of the prospective cardholder to meet any repayment requirements, or closure of the account.”⁷³ Here the challenge was whether unilateral changes in effective rates violated the federal TILA by “fail[ing] to . . . disclose that the fixed-rate APR that it was offering was limited in duration and subject to its asserted contractual right to change the interest rate at

⁶⁹ *Bellavia v First USA Bank*, 2003 US Dist LEXIS 18907, *3 (ND Ill) (“[The plaintiff] allege[d] that First USA violated the Truth in Lending Act . . . by failing to disclose on his credit card statements that the ‘overlimit fees’ that First USA assessed were part of the finance charges.”).

⁷⁰ See *id.* The issue litigated was the motion to compel arbitration over the claim. The underlying question of whether an overlimit fee constitutes a finance charge was resolved in the negative by the Supreme Court in 2004. See *Household Credit Services, Inc v Pfennig*, 541 US 232, 242 (2004) (holding that Regulation Z’s exclusion of overlimit fees from the term “finance charge” is in no way contrary to § 1605 of TILA).

⁷¹ *Discover Bank v Superior Court*, 36 Cal 4th 148, 30 Cal Rptr 3d 76, 78 (2005).

⁷² See Fair Credit and Charge Card Disclosure Act, Pub L No 100-583, 102 Stat 2960, 2967 (1980), codified in part at 15 USC §§ 1610(e), 1637(c) (2000) (describing the disclosure requirements that credit card companies must follow when soliciting applications).

⁷³ *Roberts*, 342 F3d at 263, 266 (describing the instances in which the defendant could alter the fixed interest rate that the parties had agreed to).

any time,”⁷⁴ a claim with sufficient apparent merit to survive summary judgment.

But, before the merits of the overlimit fee, the 1:00 p.m. cutoff, or the change in interest rates could be reached, the courts had first to confront the practical realities of whether these kinds of cases would ever be brought given the transaction costs barriers to any single person ever assuming the cost of individual prosecution. Not surprisingly, all the cases were brought as class actions. The key, however, to the overlimit and time-of-day cases was a second change made by First USA and Discover, pursuant to the amendment provisions in their cardmember agreements, which created a new agreement to arbitrate all credit card disputes.⁷⁵

In the case of *Bellavia*, the requirement of individual arbitration created a perfect bind. Had *Bellavia* tried to reject the imposition of new fees by either refusing to accept the new arrangement or canceling his card, he would have been subject to another provision inserted by First USA. If the cardmember rejected the agreement, his “charge privileges would have been terminated and he would be required to pay off any unpaid balance, at which point the parties’ relationship would cease.”⁷⁶ Because many consumers presumably have unpaid balances because of a lack of liquidity, this particular provision put indebted consumers in a mild lockhold. Not surprisingly, *Bellavia* did not reject the new term, perhaps because of the inability to afford the right of exit.

As a result of failing to bail out of the new contract terms, *Bellavia*’s only recourse was to bring legal challenge to the new charges. But here he became immediately subject to the First USA arbitration clause, which the court found—in conjunction with the company’s offer to pay all arbitration costs—to be a prohibition on proceeding on a classwide basis.⁷⁷ The result is that a consumer complaining of

⁷⁴ Id at 262. The appellate court accepted the change-in-terms provision: “Fleet clearly had the right to change the APR under the terms of the Cardholder Agreement.” Id at 270 (finding “nothing ambiguous” in Fleet’s statement that it reserved the right to alter the interest rate). The court, however, held that the provision failed “to cure any of the TILA defects in the initial mailing.” Id at 268.

⁷⁵ See *Bellavia*, 2003 US Dist LEXIS 18907 at *2 (“The Cardmember Agreement . . . contains a provision that allows First USA to make amendments to the parties’ agreement at any time . . . [Pursuant to this provision,] First USA amended the terms of the Cardmember Agreement to include a new arbitration provision.”); *Discover Bank*, 30 Cal Rptr at 79.

⁷⁶ *Bellavia*, 2003 US Dist LEXIS 18907 at *3 (stating that because of the existence of this additional provision, the plaintiff “declined to reject the amended terms [of the agreement] and instead continued to use his credit card” until he filed his action alleging violations of TILA).

⁷⁷ Id at *6–7 (“[The plaintiff] points to no precedent suggesting that the substantive right he seeks to vindicate—adequate disclosure of credit terms—is not arbitrable, and to the contrary,

mounting charges either is left to pay off immediately all outstanding charges on his account, or is given the opportunity to arbitrate a claim worth at most a few hundred dollars.

As the Bellavia case indicates, there is every reason to believe that consumers will both fail to comprehend the significance of these kinds of changes and will have no realistic prospect of acting upon this type of disclosure.⁷⁸ As cogently expressed by Professor Sternlight:

[E]ven to the extent that consumers might read and understand an arbitration clause imposed on a predispute basis, psychologists have shown that predictable irrationality biases will prevent them from properly evaluating the costs and benefits of accepting such a clause. For example, because people tend to be overly optimistic, they will often underpredict the need they might have to bring a claim against a company and thus undervalue what they are losing by giving up a right to sue. Similarly, psychologists have shown that people are risk-seeking with respect to certain prospective losses. Given the motivation for profit maximization, it seems inevitable that, absent regulation, companies will seek to take advantage of consumers' irrational behavior by manipulating arbitration clauses together with other aspects of consumer contracts.⁷⁹

Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies. For example, in the first two years in which its contracts featured mandatory arbitration clauses, credit card issuer First USA filed 51,622 arbitration claims against card users, while only four consumers made a claim against the company.⁸⁰ As one defense counsel quipped in the parallel context of franchising agreements, “[A]n arbitration

courts have consistently found that there is no legal impediment to arbitration agreements covering statutory claims arising under the TILA.”).

⁷⁸ See Linda J. Demaine and Deborah R. Hensler, “Volunteering” to Arbitrate through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L & Contemp Probs 55, 57 (2004) (examining “the frequency with which the average consumer encounters arbitration clauses, the key provisions of these clauses and the implications of these clauses for consumers who subsequently have disputes with the businesses they patronize”). “This study provides little basis for believing that consumers are making informed decisions when they ‘agree’ to arbitrate More than a third of the clauses obtained fail to inform consumers that they are waiving their right to litigate disputes in court.” Id at 73.

⁷⁹ Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 Stan L Rev 1631, 1649 (2005).

⁸⁰ Id at 1655 (countering the argument that mandatory arbitration clauses actually benefit the consumer by making it easier for them to file claims against issuers).

clause may not be an invincible shield against class action litigation, but it is surely one of the strongest pieces of armor available.”⁸¹

The effect of the mandatory arbitration clause on class-wide consumer claims is evident in a variety of contexts. Regardless whether the challenge is to undisclosed costs of rolling over repeat borrowings (so-called “loan-flipping”),⁸² an undisclosed extra charge of \$15 for “vendor’s single interest insurance” on the purchase of a cell phone,⁸³ or the “credit life insurance” provisions of a home loan agreement (running to thousands of dollars of extra charges),⁸⁴ the result is often the same. As one court stated in refusing a consumer request to disallow the imposition of binding individual arbitration, the plaintiff had failed to “carry her burden of showing either that Congress intended to create a non-waivable right to bring TILA claims in the form of a class action, or that arbitration is ‘inherently inconsistent’ with the TILA enforcement scheme.”⁸⁵

The ability of credit card companies to insert mandatory arbitration provisions into their cardmember agreements is not completely unfettered. In a challenge brought under the Fair Debt Collection Practices Act, one court held that “the type of change to cardholders’ legal rights represented by the addition of an arbitration clause simply does not come within the bounds of that narrowly drawn” change-in-terms provision.⁸⁶ Some courts have held differently and supported

⁸¹ Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 Franchise L J 141, 142 (1997) (summarizing class action cases that have arisen over the past decade in the context of mandatory arbitration agreements). See also Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action* 30 (Cardozo L Sch Working Paper No 100, 2004), online at <http://ssrn.com/abstract=624002> (visited Jan 6, 2006) (“[C]orporate lawyers created the collective action waiver and wrapped their newborn in the cloak of an arbitration clause, protecting it against attack with the now-sacrosanct policies of the [Federal Arbitration Act].”).

⁸² See *Livingston v Associates Finance, Inc.*, 339 F3d 553, 554, 558 (11th Cir 2003) (remanding a dispute to arbitration on the basis of an arbitration agreement signed with the last of a series of loans).

⁸³ See *Randolph v Green Tree Financial Corp.*, 991 F Supp 1410, 1415 (MD Ala 1998), revd, 178 F3d 1149 (11th Cir 1999), revd in part, affd in part, 531 US 79 (2000). The plaintiff brought an action contesting the imposition of “an extra charge for insurance each year in the approximate amount of \$15.00,” but the Supreme Court held that her claim was subject to the mandatory arbitration agreement that she had previously signed. See 531 US at 92.

⁸⁴ See *Gras v Associates First Capital Corp.*, 346 NJ Super 42, 786 A2d 886, 888 (2001) (holding that a provision directing that any disputes proceed through arbitration was valid).

⁸⁵ *Randolph v Green Tree Financial Corp.*, 244 F3d 814, 818 (11th Cir 2001).

⁸⁶ *Stone v Golden Wexler & Sarnese*, 341 F Supp 2d 189, 198 (ED NY 2004) (denying the defendant’s motion to stay the proceedings on the plaintiff’s allegations in favor of arbitration because the plaintiff never consented to the arbitration clause). A “change-in-terms” provision is a provision in the terms of a credit card agreement allowing the issuing bank to change the terms of the contract. See *id.* at 192. See also *Discover Bank v Shea*, 362 NJ Super 200, 827 A2d 358, 366 (2001) (holding that the arbitration clause at issue was unconscionable by virtue of the unequal bargaining power evinced by both sides and the clear purpose of the provision to prevent litiga-

mandatory individual arbitration requirements under the change-in-terms provisions of consumer agreements;⁸⁷ moreover certain states have enacted statutes that allow arbitration clauses to be added through these change-in-terms provisions.⁸⁸ For example, all companies chartered in Delaware benefit from such a statute.⁸⁹ The role of an individual state in assisting credit card companies through state law is a critical aspect of the complicated overlay between federal and state law in providing refuge for credit card companies.

III. FUNCTIONAL UNCONSCIONABILITY

Although some “no-class-action arbitration clauses” have been successfully challenged on grounds of unconscionability⁹⁰ and of cost-

tion against the bank); *Badie v Bank of America*, 67 Cal App 4th 779, 79 Cal Rptr 2d 273, 287–88 (1998) (“[T]here is nothing about the original terms that would have alerted a customer to the possibility that the Bank might one day invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer.”).

⁸⁷ See *Bank One v Coates*, 125 F Supp 2d 819, 831 (SD Miss 2001), affd 2002 US App LEXIS 7759 (5th Cir) (“Given, then, that the original cardholder agreement permitted amendments, the arbitration provision is not rendered unenforceable simply by virtue of the fact that Bank One undertook to add the arbitration provision via amendment.”); *Stiles v Home Cable Concepts, Inc.*, 994 F Supp 1410, 1418 (MD Ala 1998) (rejecting the plaintiff’s request to invalidate an arbitration provision because the contract he signed allowed the defendant to change terms, the arbitration clause was not improper, and Alabama law authorizes such changes); *South Trust Bank v Williams*, 775 So 2d 184, 190–91 (Ala 2000) (“Amendments to the conditions of unilateral-contract relationships with notice of the changed conditions are not inconsistent with the general law of contracts. Federal law prohibits this Court from subjecting arbitration provisions to special scrutiny.”); *Hutcherson v Sears Roebuck & Co.*, 342 Ill App 3d 109, 793 NE 2d 886, 894 (2003) (finding that the addition of an arbitration provision was not unconscionable, because the agreement “contained a conspicuous paragraph, in capital letters, notifying card holders that they were relinquishing their rights to bring claims in court” and because card holders had the opportunity to “opt out of the amendments without causing their balances to become due”).

⁸⁸ It is perhaps instructive to contrast the deference given to states in allowing arbitration clauses to be more easily included in contracts, and the inability of the same states to force companies to highlight them more clearly to protect consumers. See *Doctor’s Associates, Inc v Casarotto*, 517 US 681, 687 (1996) (holding that a Montana law invalidating arbitration agreements was in direct conflict with the Federal Arbitration Act, and was thus preempted by federal law).

⁸⁹ See 5 Del Code Ann § 952(a) (2001) (authorizing banks in Delaware to amend an agreement governing a revolving credit plan, so long as the agreement does not expressly forbid such changes). See also *Stone*, 341 F Supp 2d at 193 (noting that, although the addition of an arbitration provision has precedent in other jurisdictions, those cases often rely on explicit statutory authorization for such changes, authorization that Virginia lacks); Gilles, *Opting Out of Liability* at 30 (cited in note 81) (arguing that the number of class action lawsuits will dwindle in coming years because of contractual waiver agreements that instead submit disputes to arbitration).

⁹⁰ See *Ingle v Circuit City Stores, Inc.*, 328 F3d 1165, 1171–74 (9th Cir 2003) (finding that the parties’ unequal bargaining power made the contract procedurally unconscionable, and the one-sided terms made it substantively unconscionable); *Ting v AT&T*, 319 F3d 1126, 1150 (9th Cir 2003) (finding the arbitration agreement to be unconscionable because it did not meet California’s “bilateralism” requirement); *Acorn v Household International, Inc.*, 211 F Supp 2d 1160, 1171 (ND Cal 2002) (rejecting the defendant’s argument that “it could not be unconscionable to prohibit class-wide arbitration in an agreement whose substantive terms are governed by the [Federal Arbitration Act]”); *Discover Bank v Superior Court*, 36 Cal 4th 148, 30 Cal Rptr 3d 76,

spreading,⁹¹ this remains a minority view.⁹² Despite the fact that the arbitration clauses are imposed in a more or less take-it-or-leave-it fashion and are often accompanied by punitive provisions for attempting to exit the contract, courts have inquired only whether the terms are clearly stated somewhere in the cardholder agreement. For these courts, it is enough that there be an aura of informed consent around the prohibition on aggregation of claims.⁹³ Other courts have rejected unconscionability analysis based on the view of a class action as merely a procedural right.⁹⁴ The minority view, however, has looked beyond the formal symmetry of the deal to demand that legal redress for misbehavior be realistically available.⁹⁵ For example, in a West Vir-

87 (2005) (stating that when there are allegations that the party with superior bargaining power deliberately cheated many consumers out of “individually small sums of money,” an arbitration provision effectively exempts that party “from responsibility for [its] own fraud, or willful injury to the person or property of another”) (internal quotation marks omitted); *Dunlap v Berger*, 567 SE2d 265, 278–79 (W Va 2002) (finding that allowing a contract to “include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable”); *Szetela v Discover Bank*, 97 Cal App 4th 1096, 118 Cal Rptr 2d 862, 868 (2002) (“[S]uch a practice contradicts the California Legislature’s stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public.”); *Powertel, Inc v Bexley*, 743 S2d 570, 576 (Fla App 1999) (“[O]ne indicator of substantive unconscionability is that the agreement requires the customers to give up other legal remedies.”).

⁹¹ See *Leonard v Terminix International Co*, 854 S2d 529, 535 (Ala 2002) (acknowledging that it is much easier for plaintiffs with small claims and little resources to obtain adequate counsel when the suit is brought as a class action). Gilles refers to the cost-spreading angle as being part of “second wave” challenges, which are more subtle than unconscionability challenges. “[C]reative plaintiffs’ lawyers are arguing that the collective action waiver’s implicit prohibition against cost-spreading across multiple claimants precludes plaintiffs from vindicating federal statutory rights in complex matters that would be expensive to litigate, at least where each plaintiff has relatively little at stake.” Gilles, *Opting Out of Liability* at 5 (cited in note 81).

⁹² See Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 *Quinnipiac L Rev* 737, 773 (2004) (“It thus seems likely that inconsistent results will persist, with outcomes possibly depending more on a particular judge’s sympathies or understanding of the [Federal Arbitration Act] than on whether the plaintiffs’ claims are economically viable in individual arbitration.”).

⁹³ This is particularly true in Delaware, whose law has wide-ranging effect. See *Edelist v MBNA America Bank*, 790 A2d 1249, 1261 (Del 2001) (“The surrender of that class action right was clearly articulated in the arbitration agreement.”). See also *Pick v Discover Financial Services, Inc*, 2001 US Dist LEXIS 15777, *12–16 (D Del) (finding that the plaintiff received adequate notice of the arbitration agreement).

⁹⁴ See text accompanying notes 117–21.

⁹⁵ See, for example, *Knepp v Credit Acceptance Corp*, 229 BR 821, 842 (ND Ala 1999) (recognizing that class action lawsuits are an efficient and effective mean by which consumers can obtain legal relief and refusing to bar these suits on account of arbitration clauses); *Powertel*, 743 S2d at 576 (holding that the arbitration clause at issue was unconscionable, in part because it forced the plaintiffs to “waive important statutory remedies” that they ought to be able to avail themselves of under Florida’s Deceptive and Unfair Trade Practices Act). See also Jean R. Sternlight and Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Effi-*

ginia case about credit liability insurance, the court found the arbitration provision unconscionable, explaining:

[I]n the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable.⁹⁶

The key to this decision is finding unconscionability not in the substantive terms of the exchange but in the procedures realistically available for policing misconduct after the fact. Under the facts presented, the court had to be attuned to the reality that the individual seeking to act as class representative was suing for a grand total of \$8.44.⁹⁷ No matter how cost effective arbitration might be, such small claims simply are not viable as a matter of individual arbitration and stand as effective buffers against any kind of accountability for practices perceived to be unfair.⁹⁸ And these low-cost claims—termed “negative value” claims in the class action argot⁹⁹—which in the aggregate could equal hundreds of thousands (if not millions) of dollars, are precisely the type of claims that class action litigation was designed to facilitate.¹⁰⁰

cient Business Practice or Unconscionable Abuse?, 67 L & Contemp Probs 75, 82–83 (2004) (reviewing the West Virginia Supreme Court’s decision in *Dunlap* and noting the significance that the court placed on the availability of class action relief as a realistic means of legal redress).

⁹⁶ *Dunlap*, 567 SE2d at 278–79.

⁹⁷ *Id* at 270.

⁹⁸ See Dunham, 16 Franchise L J at 141 (cited in note 81) (arguing that most consumers will be very reluctant to take an individual claim where little money is at stake to arbitration). See also Alan S. Kaplinsky and Mark J. Levin, *Excuse Me, But Who’s the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 Bus L Today 24, 26–28 (May/June 1998) (discussing recent case law that has led to an increase in arbitration clauses intended to defend against class action lawsuits). “Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.” *Id* at 28.

⁹⁹ See, for example, *Castano v American Tobacco Co.*, 84 F3d 734, 748 (5th Cir 1996) (“[The] most compelling rationale for finding superiority in a class action . . . [is] the existence of a negative value suit.”). Negative value claims are typically defined as those claims in which the costs of enforcement in an individual action would exceed the expected individual recovery. See also *Inter-Op Hip Prosthesis Liability Litigation*, 204 FRD 359, 377 (ND Ohio 2001) (granting class certification based in part on the existence of a negative value suit).

¹⁰⁰ See *Eisen v Carlisle & Jacquelin*, 417 US 156, 161 (1974) (“[P]etitioner’s individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all.”). See also *Amchem Products, Inc v Windsor*, 521 US 591, 617 (1997), quoting *Mace v Van Ru Credit Corp.*, 109 F3d 338, 344 (7th Cir 1997):

The legal landscape has been altered most significantly by the recent decision of the California Supreme Court in *Discover Bank v Superior Court*.¹⁰¹ The key insight here is to tie the substantive acceptability of a contract term to the comparative ability of the parties to enforce their contractual expectations. Accordingly, the court held, “[C]lass action waivers found in [adhesion] contracts may [] be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy.”¹⁰²

Although most courts to date have found such mandatory individual arbitration clauses to be procedural by nature and therefore not subject to unconscionability analysis,¹⁰³ the California Supreme Court focused on the distinct combination of a contract of adhesion and the unlikelihood that any consumer claim could be enforced absent a collective prosecution. In fact, the court stated clearly that “class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights.”¹⁰⁴ Accordingly, the court concluded, “Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.”¹⁰⁵

The key insight of the California Supreme Court is to view arbitration clauses from a functional perspective, one that assesses both the vulnerability of consumers in particular contractual relations (such as through credit cards) and the availability of meaningful means of redress. The court neither holds all class action waivers unconscionable nor condemns the voluntary arbitration of consumer claims. Rather, the court focuses on the procedural means through which the waiver of collective enforcement is obtained (the “bill stuffer” notice

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

¹⁰¹ 36 Cal 4th 148, 30 Cal Rptr 3d 76 (2005).

¹⁰² Id at 85–86.

¹⁰³ See, for example, *Blaz v Belfer*, 368 F3d 501, 504–05 (5th Cir 2004) (finding that there was no substantive right, but rather only a procedural right, to the plaintiff’s class action suit under the Securities Litigation Uniform Standards Act), cert denied 125 S Ct 97 (2004); *Johnson v West Suburban Bank*, 225 F3d 366, 369 (3d Cir 2000) (finding that a statutory right to class action is “merely a procedural one, arising under [FRCP 23], that can be waived by agreeing to an arbitration clause”); *Champ v Siegel Trading Co, Inc*, 55 F3d 269, 276 (7th Cir 1995) (describing the pursuit of a class action as a “procedural nicet[y]”); *Strand v US Bank National Association*, 693 NW2d 918, 926 (ND 2005) (“Merely restricting the availability of class action is not, by itself, a restriction on substantive remedies. The right to bring an action as a class action is purely a procedural right.”).

¹⁰⁴ *Discover Bank*, 30 Cal Rptr 3d at 86.

¹⁰⁵ Id at 85–86.

sent to consumers in bulk) and the likely consequence on the enforcement of substantive rights.

Revealingly, the prospect of classwide arbitration, now established under California law,¹⁰⁶ makes transparent that the concern of the credit card companies is about collective enforcement, not about the purported jointly beneficial savings from arbitration. There is some support by states,¹⁰⁷ to engage in classwide arbitration.¹⁰⁸ Credit card companies have shown themselves to be even less enthusiastic about classwide arbitration than about class action litigation. The “devil you know” phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a “renegade arbitrator” certifying a class and exposing a company to massive liability.¹⁰⁹ Thus,

Discover Card recently amended its clause to provide that “if the Class Action Waiver set forth above in the Arbitration of Disputes section is invalidated in any proceeding in which you and we are involved, then the Arbitration of Disputes section will be void with respect to that proceeding.” In other words, if Discover can’t compel individual arbitration, it doesn’t want to be in arbitration at all.¹¹⁰

¹⁰⁶ See *id.* at 95 (allowing the claim to proceed as a class-wide arbitration, because the two alternatives—not enforcing arbitration agreements and allowing companies to use arbitration agreements as a means to virtual immunity from class liability—were unacceptable). Some question whether the hybrid class actions provided in California are practical, given the large role the court must play and the fact that some of the problems in class actions (certification of the class, role of the class attorney, etc.) might be magnified in arbitration. See Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U Chi Legal F 631, 647–51 (arguing that class action suits and arbitration are too incompatible to be treated together, so the “only statutorily permissible solution is to interpret arbitration clauses to waive class actions”).

¹⁰⁷ See Burch, 31 Fla St U L Rev at 1024 (cited in note 67) (providing justifications for states to accept classwide arbitration instead of allowing companies to escape all forms of class relief). Only “California, Pennsylvania and South Carolina have explicitly accepted classwide arbitration as an effective method of dispute resolution.” *Id.*

¹⁰⁸ But see Gilles, *Opting Out of Liability* at 45 (cited in note 81) (reporting that the AAA and NAF have announced that they “will not allow [their] arbitrators to entertain class-wide arbitrations, except in the rare case that an arbitration provision is explicitly called for in the contract”).

¹⁰⁹ See Wilson, 23 Quinnipiac L Rev at 778–79 (cited in note 92) (suggesting that companies should also be fearful of classwide arbitration because of unclear standards for judicial review on an arbitrator’s class certification decision and the possibility that class members will claim the decision is not binding on them).

¹¹⁰ *Id.* at 779–80.

Other companies have tried to effect similar results, though with less direct language.¹¹¹

The legal question then becomes whether the impediments to collective enforcement mechanisms are of sufficient consequence to invite exacting judicial scrutiny.¹¹² This claim is an uphill battle given that the U.S. Supreme Court has not only rejected the claim that inequality of bargaining power itself may doom a mandatory arbitration clause,¹¹³ but has repeatedly endorsed a strong preference for private dispute resolution. Nonetheless, even the Court's early exposition of the desirability of arbitration tied the preferability of the private forum to the ability to vindicate substantive rights:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.¹¹⁴

Subsequently, the Court further cautioned that the use of the arbitral forum must not impede the function of the substantive right at issue: "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."¹¹⁵ The question is what constitutes "effectiveness" for purposes of preserving core substantive rights. Thus it may be that, as Linda Demaine and Deborah Hensler suggest in their study of the "Average Joe" in California, the wording of predispute arbitration clauses and the paucity of in-

¹¹¹ See *id.* at 780 (discussing an arbitration clause used by Cingular Wireless that mandated that the parties "agree that no arbitrator has the authority to . . . order consolidation or class arbitration") (internal citation and quotation marks omitted).

¹¹² Punitive damages, statutory damages, or attorneys' fees are not usually awarded through arbitration, which when combined with the removal of the threat of a class action, weakens ex-post accountability. See Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 Ohio St J on Disp Resol 267, 285-86, 339 (1995) (discussing the differences between arbitration and judicial trials). See also Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DePaul L Rev 1191, 1234 (2001) (noting that consumers lose traditional remedies in arbitration hearings such as "punitive damages, statutory damages, emotional damages, and awards of attorneys fees," which creates "a disincentive for large companies to reform abusive practices . . . [and] for consumers to dispute the abusive practices").

¹¹³ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 632 (1985) (finding unjustified the conclusion that contracts of adhesion should "militate against automatic forum determination by contract"). See also *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20, 33 (1991) (discussing arbitration agreements in the context of labor relations and noting that "mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable").

¹¹⁴ *Mitsubishi*, 473 US at 628.

¹¹⁵ *Id.* at 637.

formation available to consumers on their meaning and import results in a playing field “strongly tilt[ed]... in the business’s favor.”¹¹⁶ But that alone does not appear to suffice to demonstrate a disqualifying lack of effectiveness of arbitration.

Some lower courts have seized upon the concept of “effectiveness” as a way of annulling arbitration clauses that preclude collective action. One district court in Delaware, for example, found that prohibiting a class action for a claim under the TILA would frustrate the purposes of the Act: “[W]ithout a guarantee that [the plaintiff] may ‘effectively ... vindicate his statutory cause of action in the arbitral forum,’ it is questionable that the ‘statute will continue to serve both its remedial and deterrent function.’”¹¹⁷ Some courts interpreting state law have also voided arbitration clauses in situations where the underlying statute expressly authorized the right to bring a class action.¹¹⁸

Yet these decisions have until recently been outliers. The decision by the Delaware district court was overturned by the Third Circuit on the basis that TILA had not created a substantive right to a class action.¹¹⁹ The Supreme Court’s decision in *Gilmer v Interstate/Johnson*

¹¹⁶ Demaine and Hensler, 67 *Law & Contemp Probs* at 74 (cited in note 78) (summarizing the results of an analysis of empirical data on arbitration clauses in a wide variety of consumer purchases). Other issues include repeat-player bias, discovery, deadlines, remedies and cost allocation. See Martin Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 *Ohio St J on Disp Resol* 589, 592 (2001) (suggesting a systematic approach for dealing with mandatory arbitration clauses, and the due process issues that they raise).

¹¹⁷ *Johnson v Tele-Cash, Inc.*, 82 F Supp 2d 264, 270 (D Del 1999), revd as *Johnson v West Suburban Bank*, 225 F3d 366, 374–75 (3d Cir 2000) (holding that TILA did not create a substantive right to a class action). See also *Jung v Association of American Medical Colleges*, 300 F Supp 2d 119, 154–56 (D DC 2004) (refusing the defendant’s requests to compel arbitration for various antitrust claims, because arbitration would “undermine the purposes of the Sherman Act”); *Walker v Ryan’s Family Steak Houses, Inc.*, 289 F Supp 2d 916, 924–26 (MD Tenn 2003) (“The most compelling reason that the [Employment Dispute Services, Inc.] forum is fundamentally unable to provide an effective substitute for the judicial forum is that the EDSI both exercises control over the pool of potential arbitrators and relies on the favor of its employer-clients for its livelihood.”), affd 400 F3d 370, 385 (6th Cir 2005) (holding that the employer’s practice of selecting the arbitrator to be fundamentally unfair to the employee).

¹¹⁸ See *Lozada v Dale Baker Oldsmobile, Inc.*, 91 F Supp 2d 1087, 1105 (WD Mich 2000) (“Under the Michigan Consumer Protection Act, the availability of class recovery is explicitly provided for and encouraged by statute ... [so] the arbitration agreement ... impermissibly waives a state statutory remedy.”); *Eagle v Fred Martin Motor Co.*, 157 Ohio App 3d 150, 809 NE2d 1161, 1183 (2004) (concluding that because the arbitration clause at issue precluded class actions, it “clearly invades the policy considerations of the [Consumer Sales Practices Act] ... is injurious to the interests of the state, is against public policy, and accordingly cannot, and will not, be enforced”); *Powertel*, 743 S2d at 576–77 (“[A]n arbitration clause is not enforceable if it would defeat the remedial purpose of [Florida’s Unlawful and Deceptive Trade Practices Act] upon which an action is based.”). See also Androski, Comment, 2003 U Chi Legal F at 642 (cited in note 106) (summarizing the holdings of *Powertel* and *Lozada*).

¹¹⁹ But see Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 *BU Pub Int L J* 366, 400–01 (2001) (providing various explanations as to why the Third Circuit misinterpreted legislative

Lane Corp.,¹²⁰ suggests the same is true about the Age Discrimination in Employment Act (ADEA): “Even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitration, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”¹²¹ The critical question, therefore, is whether there is any basis for including the ability to bring consumer claims collectively against credit card companies as a substantive right, per *Gilmer*.

As indicated by the California Supreme Court in the *Discover* litigation, this is now a key area of contention if *ex post* accountability is to remain a weak form of regulatory review of the burgeoning credit card market.

CONCLUSION

The ultimate question raised by this Essay is whether a guarantee of *ex post* review can be fitted within a soft paternalistic regime. Although not developed in *Discover*, the reasoning of the California Supreme Court fits comfortably with both the insights of Professor Bar-Gill, concerning the initial vulnerability of credit card consumers, and of Professor Epstein, extolling the ability of experience and agents to overcome initial heuristic errors. The California Supreme Court’s approach neither commands a particular form of consumer regulation nor leaves the matter entirely to contractual formalism. Instead, consistent with the approaches of soft paternalism, the regulatory response also facilitates effective after-the-fact responses. For those consumers who realized the benefit of the bargain, no credit card practices are deemed *per se* unacceptable. On the other hand, systematic misestimations of cost or propensity to late fees may be redressed, either by learning or by legal challenge if the practices are indeed beyond the scope of conscionability.

history, such as that the panel lacked integral components of the record, that the panel simply ignored the history, or that it scanned the history “through the wrong looking glass”).

¹²⁰ 500 US 20 (1991).

¹²¹ *Id.* at 32 (internal quotation marks omitted), quoting *Nicholson v CPC International Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker dissenting) (arguing that arbitrators still have the “power to fashion equitable relief,” even if it is not in a class action setting).