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ARBITRATION INNUMERACY

Christopher R. Drahozal*

Innumeracy, an inability to deal comfortably with the fundamental notions of number and chance, plagues far too many otherwise knowledgeable citizens.¹

I. INTRODUCTION

Both sides in the public policy debate over consumer and employment arbitration have recognized the importance of empirical research to making sound policy.² Even Public Citizen, a vocal critic of consumer arbitration, has stated that it “agree[s]” that “congressional scrutiny of arbitration ‘can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.’”³ According to Professor Peter B. Rutledge, “it now appears to be common ground that the policy debate over the Arbitration Fairness Act should focus on empirical data.”⁴

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¹ JOHN ALLEN PAULOS, *INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES* 3-4 (2001). With the exception of the quote from First Lady Michelle Obama, *see infra* text accompanying note 61, the quotes that begin each part of this article are either from Paulos’s book or from MICHAEL BLASTLAND & ANDREW DILNOT, *THE NUMBERS GAME: THE COMMONSENSE GUIDE TO UNDERSTANDING NUMBERS IN THE NEWS, IN POLITICS, AND IN LIFE* (2009). Blastland and Dilnot originated the BBC radio program “More or Less,” which “explains — and sometimes debunks — the numbers and statistics used in political debate, the news and everyday life.” *See* BBC, *More or Less*, <http://www.bbc.co.uk/programmes/b006qshd> (last visited Jan. 25, 2012); and BBC, *About More or Less*, http://news.bbc.co.uk/2/hi/programmes/more_or_less/1628489.stm (last visited Jan. 25, 2012).

² Given the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that debate is likely to move even more firmly into the legislative and regulatory arenas. *See, e.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2(3) (2011); Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1028(a) (2010) (requiring the Consumer Financial Protection Bureau to study pre-dispute arbitration clauses in consumer financial services contracts). Courts likely will continue to play a role in regulating consumer and employment arbitration agreements, as other papers in this symposium have demonstrated, but that role will be a reduced one after *Concepcion*.

³ PUBLIC CITIZEN, *THE ARBITRATION DEBATE TRAP: HOW OPPONENTS OF CORPORATE ACCOUNTABILITY DISTORT THE DEBATE ON ARBITRATION 2* (2008) (quoting Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. PUB. POL’Y 549, 589 (2008)), [http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf).

⁴ Peter B. Rutledge, *The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4; *see also* Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ARB. & MEDIATION 1, 8 (2009) (“[T]here now appears to be a consensus that the future of arbitration should be decided by data, not anecdote.”) (emphasis omitted).

If so, that is an important and valuable development. Anecdotes alone do not provide a solid basis for legislative or regulatory action.

But of course one must be cautious in evaluating empirical data. Even the best empirical studies have limits or are subject to qualifications. And numbers can be misleading if misinterpreted. As Michael Blastland and Andrew Dilnot have written: “[Numbers] can bamboozle not enlighten, terrorize not guide, and all too easily end up abused and distrusted.”⁵ So empirical studies must be used thoughtfully as a basis for making policy, recognizing both their value and their limitations.

Arbitration innumeracy, as I use the phrase here, is the “inability to deal comfortably with the fundamental notions of number and chance” in evaluating arbitration, particularly consumer and employment arbitration. This article discusses a number of examples of possible arbitration innumeracy — cases in which statistics about arbitration are incomplete or outdated, misunderstood or misused. In particular, it examines empirical studies on:

- The use of arbitration clauses in credit card agreements;
- Outcomes in consumer arbitration;
- Arbitrator selection by the National Arbitration Forum;
- Class arbitration waivers in consumer arbitration clauses;
- The incentives of arbitrators and repeat-player bias; and
- Unintended consequences of restrictions on consumer and employment arbitration clauses.

Each of these topics illustrates a different issue of arbitration innumeracy, ranging from samples that are not representative of the population as a whole to comparisons that do not compare like cases. The sections of this Article put the issue in more complete empirical context and discuss briefly how the arbitration innumeracy impacts the policy debate over consumer and employment arbitration.

⁵ BLASTLAND & DILNOT, *supra* note 1, at x-xi.

II. “WHAT TO COUNT”: THE USE OF ARBITRATION CLAUSES IN CREDIT CARD AGREEMENTS

It is, for a start, a fundamental of almost any statistic that, in order to produce it, something somewhere has been defined and identified. Never underestimate how much nuisance that small practical detail can cause.⁶

A central theme in criticisms of consumer arbitration is that consumers do not have any choice if they want to avoid arbitration.⁷ But how to measure the extent of consumer choice — *i.e.*, what to count?

Credit card agreements are commonly cited as a type of contract as to which consumers have no choice but to agree to arbitration.⁸ Thus, commentators have asserted both that “[i]n the fine print [of credit card agreements], almost always, is an arbitration clause”⁹ and that “[n]early every credit card issuer includes an arbitration agreement in [its] ... contracts with cardholders.”¹⁰ In fact, those are not the same thing — the number of credit card agreements is very different from the number of credit card issuers — and neither assertion, at present, is accurate.

⁶ *Id.*, at 5. Blastland and Dilnot focus on the difficulty of classifying things before counting them. *Id.* I recognize that difficulty, but am concerned here with the preliminary question of what should be counted at all.

⁷ *E.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Cong., § 2(3) (2011).

⁸ Other studies of the use of arbitration clauses in consumer contracts include Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) (“Across the industries studied, fifty-seven of the 161 sampled businesses (35.4%) included arbitration clauses in their consumer contracts.”); Florencia Marotta-Wurgler, *Unfair Dispute Resolution Clauses: Much Ado About Nothing?*, in BOILERPLATE: THE FOUNDATIONS OF MARKET CONTRACTS 45, 50 (Omri Ben-Shahar ed., 2007) (finding that only 6.0% of software license agreements studied included arbitration clauses, although noting that some of the contracts studied were commercial rather than consumer contracts); and Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 tbl.2 (2008) (finding that 20 of 26, or 76.9%, of sample of consumer contracts included arbitration clauses; sample included consumer financial services and telecommunications contracts).

⁹ Yuki Noguchi, *Credit Card Arbitration Trumps Lawsuits, Court Says*, NPR, Jan. 11, 2012, <http://www.npr.org/2012/01/11/144990644/credit-card-arbitration-trumps-lawsuits-court-says>; *see also* PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 3 (Sept. 14, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (reporting that “the use of forced arbitration remains rampant,” citing credit card agreements as an example); *see also* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 747 (2009) (“A binding arbitration clause is a staple of credit card agreements....”).

¹⁰ *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?*: Hearing Before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 1-2 (2009) (statement of Congressman Cohen), available at http://judiciary.house.gov/hearings/printers/111th/111-39_49475.PDF; *see also* *Memo to Elizabeth Warren: How to Protect Consumers*, REUTERS, Sept. 17, 2010 (quoting David Arkush, director, Public Citizen's Congress Watch division), <http://blogs.reuters.com/reuters-wealth/2010/09/17/memo-to-elizabeth-warren-how-to-protect-consumers> (“Nearly every consumer lender puts a clause in the standard-form contract saying that the consumer can never sue the company, for anything.”).

It has never been the case that “[n]early every credit card issuer” used arbitration clauses. As of December 31, 2009, over 80 percent (247 of 298, or 82.9%) of credit card issuers did *not* use arbitration clauses in their cardholder agreements.¹¹ Many, but not all, of those issuers were credit unions that offered credit cards to their members. Barely 17 percent (51 of 298, or 17.1%) of issuers used arbitration clauses in their credit card agreements.¹²

The reason for the perception that consumers have limited choice as to credit cards is that until recently almost all of the very large credit card issuers used arbitration clauses. But even that has changed. As of December 31, 2009, just over 95 percent of credit card loans outstanding were by issuers that used arbitration clauses in their cardholder agreements.¹³ One year later, as of December 31, 2010, that percentage had declined to 48 percent.¹⁴ The most recent data thus suggest that consumers have a much larger degree of choice (and, indeed, always have had a much larger degree of choice) than commonly perceived. And the extent of that choice depends very much on what is counted: credit cards or credit card issuers.

III. “IS THAT A *BIG* NUMBER?”: OUTCOMES IN CONSUMER ARBITRATION

The best prompt to thinking is to ask the question that at least checks our presumptions, simple-headed though it may sound: “Is that a *big* number?”¹⁵

Critics of consumer arbitration have cited what they see as excessively high win rates for businesses as evidence that arbitration is unfair to consumers. For example, a letter in support of the creation of the Consumer Financial Protection Bureau, signed by over eighty professors of Banking and Consumer Law, stated that “[s]tudies have found the arbitrators find for companies

¹¹ The Credit CARD Act of 2009 required credit card issuers to supply their credit card agreements to the Federal Reserve, which in turn was to make them available to the public via the Federal Reserve web page. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, §204(a), 123 Stat. 1734, 1746-47 (May 22, 2009) (codified at 15 U.S.C. § 1632(d)(3) (2012)). The data described in the text were collected from credit card agreements available on the Federal Reserve web page. The Consumer Financial Protection Bureau now maintains the database of credit card agreements on its web site. *See* Consumer Financial Protection Bureau, Credit Card Agreement Database, <http://www.consumerfinance.gov/credit-cards/agreements/> (last visited May 25, 2012).

¹² *See* Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. ____ (forthcoming 2012).

¹³ *See id.* at ____ . Credit card loans outstanding are not the same as the number of credit card accounts, but the two are highly correlated, and better data is available on credit card loans outstanding.

¹⁴ Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. ____ (forthcoming). Most of the decline appears to be due to two factors: (1) the decision of the National Arbitration Forum to cease administering new consumer arbitrations in settlement of the Minnesota Attorney General’s consumer fraud suit against the NAF; and (2) the decision of four large issuers to settle an antitrust suit against them by agreeing to remove arbitration clauses from their cardholder agreements for three-and-one-half years. *Id.* at ____ . Whether those issuers will resume use of arbitration clauses after that period expires is unknown.

¹⁵ BLASTLAND & DILNOT, *supra* note 1, at 30.

against consumers 94 to 96% of the time, suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts.”¹⁶ While I applaud the letter’s reliance on data rather than anecdotes, the conclusion it draws from that data is incorrect.

A win rate of 94 to 96 percent sounds really high. Surely a forum that rules in favor of businesses such a high percentage of the time must be biased — or at least that seems to be the intuition underlying statements such as the one cited above. But while 94 to 96 percent sounds high, we still need to ask the question: “Is that a big number?” And to answer that question we need to ask further: “as compared to what?”

Evaluating whether a win rate is too high (or too low) cannot be done in the abstract. It must be based on a comparison to a base line — or, in other words, you need to have a control group. The obvious control group to use here is courts: outcomes in arbitration cases need to be compared to outcomes in comparable cases in court in order to draw any conclusions about how consumers fare.¹⁷ This is easier said than done, of course. It is hard to control for differences across types of cases. Important differences, such as the legal and factual strength of the case, are difficult to observe. That said, there is one type of case in which the characteristics of the cases seem likely to be at least roughly comparable in arbitration and in court: debt collection cases brought by businesses — which happens to be the exact type of case cited by the critics as showing a high business win rate in arbitration.¹⁸

So how do consumers fare in debt collection cases? In arbitration, as the data cited above suggest, businesses win the vast majority of the cases. The Searle study, for example, found that “[c]reditors won some relief in 86.2 percent of the individual AAA debt collection arbitrations and 97.1 percent of the AAA debt collection program arbitrations that went to an award.”¹⁹ But the study found that creditors won some relief at an even higher rate (ranging from 98.4 percent to 100.0 percent of the cases) in debt collection cases in court.²⁰ Likewise, while prevailing creditors were awarded from 92.9 percent to 99.2 percent of the amount sought in AAA

¹⁶ *E.g.*, Letter from Professors of Consumer Law and Banking Law to Senators Dodd and Shelby and Congressmen Frank and Bachus, Statement in Support of Legislation Creating a Consumer Financial Protection Agency 6 (Sept. 29, 2009), <http://law.hofstra.edu/pdf/Media/consumer-law%209-28-09.pdf>. (citing PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), <http://www.citizen.org/publications/release.cfm?ID=7545>; Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCIENCE MONITOR, July 16, 2007, <http://www.csmonitor.com/2007/0716/p13s01-wmgn.html>).

¹⁷ *E.g.*, Memorandum from William N. Lund, Superintendent, Bureau of Consumer Credit Protection, Department of Professional and Financial Regulation on Report to Committee: Compilation of Information Reported by Consumer Arbitration Providers to Senator Peter Bowman, Senate Chair; Representative Sharon Anglin Treat, House Chair of the Joint Standing Committee on Insurance and Financial Services 7 (Apr. 1, 2009), <http://www.maine.gov/pfr/consumercredit/documents/ArbitrationProvidersReport.rtf> (“[A]lthough credit card banks or assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers. The fact is that the primary alternative to arbitration (a civil action in court) also commonly results in judgment for the plaintiff.”).

¹⁸ *See* PUBLIC CITIZEN, THE ARBITRATION TRAP, *supra* note 16, at 5.

¹⁹ Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 80 (2011).

²⁰ *See id.*

arbitrations, they were awarded from 96.2 percent to 99.5 percent of the amount sought in debt collection cases in court.²¹

I certainly do not claim that these data show that arbitration is better for consumers than litigation. But likewise the data provide no support for the view that consumers fare worse in arbitration than they do in comparable cases in court.²² And the data show definitively that high business win rates in arbitration do not in and of themselves prove that arbitration is unfair to consumers. For the types of cases studied, a win rate of 94 to 96 percent is not big enough to suggest that arbitrators are biased in favor of businesses.

IV. “IS THE COMPARISON OF LIKE WITH LIKE?”: ARBITRATOR SELECTION AND THE NATIONAL ARBITRATION FORUM

[P]olitics has precisely that bad habit of ... overlooking definitional differences. To detect this, the principle to keep in mind is one everyone knows, but has grown stale with overuse. It is true and relevant as ever, ... and it is this: is the comparison of like with like?²³

The poster child for all that is seen as wrong with consumer arbitration is the National Arbitration Forum. Although the criticisms of the NAF are multiple,²⁴ here I address only the striking finding by Public Citizen that the twenty-eight arbitrators appointed most often by the National Arbitration Forum (the “Top 28 NAF arbitrators”) ruled in favor of businesses at a much higher rate than other NAF arbitrators.²⁵ The Top 28 NAF arbitrators, Public Citizen reported, handled 89.5% of NAF’s cases and ruled in favor of the business in those cases 95% of the time. By comparison, the next 120 arbitrators handled only 10% of the cases, and ruled in favor of businesses only 86% of the time.²⁶ According to Public Citizen, this finding shows that “the busiest arbitrators produce the results corporations seek.”²⁷ The implication of Public Citizen’s

²¹ See *id.* at 80-81. Controlling for confounding factors using multiple regression analysis did not change the results. See *id.* at 98-101.

²² For evidence on comparative outcomes in employment cases in arbitration and court, see, e.g., Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov.2003-Jan. 2004, at 44, 53 (“The results are consistent with arbitrators, at least those participating in AAA-sponsored arbitration, not acting in a materially different fashion than in-court adjudicators.”). However, it is much more difficult to be confident that the cases being compared are actually comparable in the employment setting than in the debt collection setting.

²³ BLASTLAND & DILNOT, *supra* note 1, at 162.

²⁴ See, e.g., Complaint, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18559 (Minn. Dist. Ct. July 14, 2009), available at www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf.

²⁵ See PUBLIC CITIZEN, ARBITRATION TRAP, *supra* note 16, at 2.

²⁶ See *id.* at 15.

²⁷ *Id.* at 2 (capitalization and boldtype omitted).

finding, according to Paul Bland, is that the NAF was “steering a vast majority of cases to a handful of people for reliable votes.”²⁸

But comparing outcomes in the cases decided by the Top 28 NAF arbitrators with outcomes in other NAF arbitrations is not “the comparison of like with like.”²⁹ Public Citizen’s finding disregards an important difference between the cases: the Top 28 NAF arbitrators apparently decided almost exclusively cases in which the consumer failed to appear (at least based on the NAF’s classification of those cases), while the remaining NAF arbitrators only rarely decided default cases. Law Professor David Sorkin, who served as an NAF arbitrator, suggested this possibility at a Roundtable on debt collection litigation and arbitration conducted by the FTC:

I have handled about ... 60 collection cases for National Arbitration Forum over about eight years. I didn’t get any of the default cases. My understanding is that the forum will send out default cases in bulk to an arbitrator, and an arbitrator might get a stack of 50 or 100 or 200 cases, all of which had very similar files with no response by the respondent/consumer, and those cases probably went to a very small number of arbitrators consistent with the experience in California³⁰

An examination of the data used by Public Citizen confirms this understanding.³¹ Of the 16,330 cases that were decided by the Top 28 NAF arbitrators (and not settled or dismissed), 15,890, or 97.3% were classified by the NAF as default cases — *i.e.*, cases in which the consumer did not show up. By comparison, only 166 of the 1745 cases (or 9.5%) decided by the remaining NAF arbitrators were default cases. The Top 28 NAF arbitrators decided 99.0% of all default cases administered by the NAF.

It is not surprising, then, that the win rate for businesses in cases decided by the Top 28 NAF arbitrators is higher than the win rate for businesses in cases decided by the remaining NAF arbitrators. Parties tend to do less well when they default than when they show up and defend themselves.³² That is true both in arbitrations administered by providers other than the NAF as well as cases in court.³³

When like cases are compared to like, the disparity between the two groups of arbitrators looks very different, as can be seen in Table 1. In default cases, the Top 28 NAF arbitrators ruled

²⁸ Federal Trade Commission, *Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion*, transcript at 59 (Aug. 6, 2009) [hereinafter FTC Roundtable] (remarks of Paul Bland), available at <http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90806.pdf>.

²⁹ For an alternative analysis of the NAF data, see Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051 (2009).

³⁰ FTC Roundtable, *supra* note 28, at 71-72 (statement of David Sorkin).

³¹ See PUBLIC CITIZEN, NAF CALIFORNIA DATA, <http://www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls> (last visited May 21, 2012). The calculations in the text are by the author.

³² See *infra* Table 1. Alternatively, some consumers might default because they believe they are likely would lose even if they show up, either because of some belief about arbitration or because they know they have a weak case.

³³ See Drahozal & Zyontz, *supra* note 19, at 91.

overwhelmingly in favor of businesses. But so did the other NAF arbitrators, albeit addressing a much, much smaller number of cases. And in cases decided after a hearing, the Top 28 NAF arbitrators actually ruled in favor of consumers slightly more often than the other NAF arbitrators, although the difference is not statistically significant.

**Table 1. Outcomes in National Arbitration Forum Arbitrations
(California data, Jan. 2003-Mar. 2007)³⁴**

	Top 28 NAF Arbitrators	All Other NAF Arbitrators	Total
Cases Decided on Default			
Business prevailed	15,889 (100.0%)	165 (99.4%)	16,054
Consumer prevailed	1 (0.0%)	1 (0.6%)	2
Total	15,890	166	16,056
Cases Decided After Hearing			
Business prevailed	432 (98.2%)	1559 (98.7%)	1991
Consumer prevailed	8 (1.8%)	20 (1.3%)	28
Total	440	1579	2019
Total Cases	16,330	1745	18,075

To be clear, I am not defending the NAF from any of the other claims of wrongdoing to which it has been subjected. And, of course, these data do not answer the question of why the NAF sent almost all of its default cases to the same group of arbitrators. Perhaps it was because those arbitrators more reliably ruled in favor of the business, or perhaps it was for another reason.³⁵ My point is a narrower one: that to attempt to answer that question statistically requires one to compare like cases to like, and Public Citizen did not do so.

³⁴ See PUBLIC CITIZEN, ARBITRATION TRAP, *supra* note 16, at 15. This table does not include cases classified by the NAF as “dismissed” (772 cases), “settled” (422 cases), or resolved by “award by settlement” (25).

³⁵ The data might support a different “steering” explanation — that the NAF sent default cases to one group of arbitrators because they ruled more reliably in favor of businesses in that type of case, and contested cases to a different group of arbitrators because they ruled more reliably in favor of businesses in that type of case. But the differences between the groups are not statistically significant.

V. ARE THOSE COUNTED REPRESENTATIVE OF THE REST?: ARBITRATION CLAUSES AND CLASS ARBITRATION WAIVERS

This is the sample, the essence of a million statistics, like the poet's drop of water containing an image of the world in miniature — we hope. It is wonderful, when it works. But if the few that are counted don't mirror the others, the whole endeavor fails. So which few? Choose badly and the sample is skewed, the mirror flawed, and for a great many of the basic facts about us,... all that is multiplied is the size of the error.³⁶

An important and as yet unanswered question is the effect of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*³⁷ on the use of arbitration clauses. It is too soon after the decision in *Concepcion* to be able to evaluate empirically its effects, but some inferences can be drawn from existing empirical studies — to the extent the samples in those studies are “representative of the rest.”

First, prior to *Concepcion*, not all consumer arbitration clauses included class arbitration waivers, suggesting that businesses use arbitration clauses for reasons other than only avoiding class actions.³⁸ Studies finding widespread use of class arbitration waivers prior to *Concepcion* focused on mass contracting businesses such as credit card issuers and telecommunications companies.³⁹ But the use of class arbitration waivers varied widely by type of business, and many consumer arbitration agreements did not include class arbitration waivers at all. The Searle study found that of the arbitration clauses giving rise to AAA consumer arbitrations during the time period studied, only 36.5 percent (109 of 299) included class arbitration waivers.⁴⁰ All of the cell phone contracts included class arbitration waivers, as did all of the credit card contracts. But none of the insurance contracts and none of the real estate brokerage agreements included class arbitration waivers. And somewhat over half of the car sale contracts (53.1%) and home builder contracts (64.7%) included class arbitration waivers.⁴¹ Studying only credit card or cell phone contracts can provide important information about those types of contracts, but in this case generalizing from those types of contracts to consumer contracts as a whole is not appropriate.

Second, even after *Concepcion*, it is unlikely that all consumer contracts — or even all credit card contracts, which ordinarily include class arbitration waivers when they include

³⁶ BLASTLAND & DILNOT, *supra* note 1, at 111-12.

³⁷ 131 S. Ct. 1740 (2011).

³⁸ See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (and not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 470-74 (2010).

³⁹ *E.g.*, Eisenberg, Miller & Sherwin, *supra* note 8, at 891-92.

⁴⁰ See Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 349 (2012).

⁴¹ *Id.* One implication of this data is that making all consumer arbitration clauses unenforceable because of concerns about the availability of class relief would be overbroad. See Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG, Sep. 13, 2011, <http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/>.

arbitration clauses — will begin using arbitration clauses. As Professor Rutledge and I conclude in a forthcoming paper:

Our finding that issuers are less likely to use arbitration clauses when located in states that (prior to *Concepcion*) had held class arbitration waivers unenforceable suggests that the use of arbitration clauses will increase as a result of *Concepcion*. But the significance of other variables in the model (the riskiness of the credit card portfolio, the degree of specialization in credit card loans, the size of the issuer, and the issuer's organizational form) suggests that not all credit card issuers are likely to use arbitration clauses following the decision in *Concepcion*.⁴²

To illustrate the point: very few credit card issuers (5 of 97, or 5.2%) located in states that had held class arbitration waivers unenforceable prior to *Concepcion* used arbitration clauses. But even in states that had held class arbitration waivers enforceable prior to *Concepcion*, only a minority of credit card issuers (23 of 103, or 22.3%) used arbitration clauses.⁴³ That percentage likely will increase after *Concepcion*. But given the other factors that seem to explain the use of arbitration clauses by credit card issuers, these data suggest that the use of arbitration clauses will not become ubiquitous after *Concepcion*, even in the credit card industry.⁴⁴ Central to this finding is the fact, described earlier, that the substantial majority of credit card issuers do not include arbitration clauses in their credit card agreements. A sample consisting only of large credit card issuers, almost all of which until recently used arbitration clauses in their credit card agreements, would not have been representative of credit card issuers as a whole.

VI. CORRELATION DOES NOT PROVE CAUSATION: INCENTIVES OF ARBITRATORS AND REPEAT-PLAYER BIAS

Correlation and causation are two quite different words, and the innumerate are more prone to mistake them than most. Quite often, two quantities are correlated without either one being the cause of the other.⁴⁵

⁴² Drahozal & Rutledge, *supra* note 12, at ____.

⁴³ *Id.* at ____.

⁴⁴ As discussed previously, *see supra* text accompanying notes 8-10, an important question here is what to count: is the relevant measure the number of credit cards (or dollar value of credit card loans) or the number of credit card issuers?

⁴⁵ PAULOS, *supra* note 1, at 159.

This is the oldest fallacy in the book, that correlation proves causation, and also the most obdurate.... Do not rest on the first culprit, the explanation nearest at hand or most in mind.... Keep the instinct for causation restless in its search for explanations and it will serve you well.⁴⁶

A common concern about outcomes in arbitration is that the structure of the arbitration process results in decisions that are biased in favor of businesses. Because arbitrators get paid only when they are selected to serve, rather than being paid salaries like judges are, critics assert that arbitrators will tend to favor “repeat players” — parties that will likely appear in arbitration on multiple occasions and so have more opportunities to appoint arbitrators than non-repeat players.

The evidence on whether repeat players have a higher success rate in arbitration is mixed. Business claimants do have a higher win rate in arbitration than consumer claimants, but that is likely due to the different types of claims businesses assert.⁴⁷ The usual test for the existence of a repeat-player effect has been to compare win rates for repeat businesses in arbitration to win rates for non-repeat businesses in arbitration.⁴⁸ The Searle study, for example, found that under this usual approach, repeat businesses had a slightly higher win rate against consumers than non-repeat businesses, but that the difference was not statistically significant. Under an alternative definition of repeat business, the study found a greater repeat-player effect, albeit even then one that was only weakly statistically significant.⁴⁹ Other studies, usually of AAA employment arbitrations, also have found that repeat businesses have a higher win rate in arbitration than non-repeat businesses.⁵⁰

But bias is not the only, or even the most likely, explanation for such a repeat-player effect. Correlation is not causation. We must keep our “instinct for causation restless in its

⁴⁶ BLASTLAND & DILNOT, *supra* note 1, at 182-83.

⁴⁷ For example, the Searle study found that consumer claimants won some relief in 53.3 percent of the AAA consumer arbitrations studied, and that, in those cases, consumers were awarded 52.1 percent of the amount they sought. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 897-99 (2010). By comparison, business claimants won some relief in 83.6% of the AAA arbitrations studied, and in those cases recovered 93.0% of the amount sought. *Id.* at 898-99. The reason for the difference, as stated in the study, is not that arbitration is biased in favor of businesses but rather that businesses bring different types of claims than consumers. *Id.* at 901 (“Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved *ex parte*, with the consumer failing to appear. By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.”).

⁴⁸ E.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 189-90 (1997). An alternative test would be to compare win rates for repeat businesses in arbitration to win rates for repeat businesses in court.

⁴⁹ Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 47, at 909-11.

⁵⁰ Bingham, *Employment Arbitration: The Repeat Player Effect*, *supra* note 48, at 213; Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRRA 50TH ANN. PROC. 33, 38-39 (1998); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223 (1998); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD. 1, 11-16 (2011).

search for explanations.”⁵¹ An alternative explanation for the higher win rate of repeat businesses is that repeat businesses are likely to be more sophisticated at screening cases and settling disputes than non-repeat businesses. As such, one would expect them to be more likely than non-repeat businesses to settle the strong claims against them and arbitrate only the weak claims. If so, one would expect to find exactly the pattern described above: that repeat businesses have higher win rates than non-repeat businesses. One implication of this alternative theory is that repeat businesses will likely settle cases at a higher rate than non-repeat businesses. And that is exactly what the Searle study found: “that repeat businesses are more likely to settle or otherwise close cases before an award than non-repeat businesses.”⁵² Accordingly, the study concludes, “the repeat-player effect is more likely due to case screening by repeat businesses than arbitrator (or other) bias.”⁵³

It may be that there is some other explanation for the higher settlement rate for repeat businesses than non-repeat businesses — that correlation is not causation in that context either. But at present, at least, the available empirical evidence suggests that arbitrator bias is not the cause of higher win rates for repeat businesses.

VII. TRADEOFFS: UNINTENDED CONSEQUENCES OF RESTRICTIONS ON CONSUMER AND EMPLOYMENT ARBITRATION CLAUSES

There is no such thing as a free lunch, and even if there were, there'd be no guarantee against indigestion.⁵⁴

After teaching contract law for seventeen years, it is clear to me that when parties face restrictions on one type of contract term, such as an arbitration clause, they often respond by changing other terms of their contract. And, in some cases, they might even respond by refusing to enter into a contract altogether. The obvious benefits of a restriction for one group may turn into hidden costs for another. Too often decision makers do not consider these sorts of tradeoffs, or unintended consequences, in evaluating the costs and benefits of proposed laws. There is no such thing as a free lunch — that is, all regulations have costs that offset, at least in part, their benefits.

⁵¹ BLASTLAND & DILNOT, *supra* note 1, at 182-83.

⁵² Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 47, at 913.

⁵³ *Id.* at 916. Lisa Bingham likewise concludes that the repeat-player effect in her studies was likely due, not to bias, but rather to better case screening by businesses. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in *ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR* 303, 323 tbl.2 (Samuel Estreicher & David Sherwyn eds. 2004).

⁵⁴ PAULOS, *supra* note 1, at 147. The phrase “there is no such thing as a free lunch” also is used to refer to the economic concept of opportunity cost — that by choosing to eat a “free” lunch, one incurs the cost of forgoing the opportunity to eat lunch elsewhere.

Several such unintended consequences might result from restrictions on the use of pre-dispute arbitration clauses in consumer and employment contracts.

First, consumers and employees without disputes — who have no complaint with their treatment by a business — likely will be made worse off by legal restrictions on the use of arbitration. The cost savings that businesses achieve through arbitration benefit consumers by enabling the businesses to reduce prices and employers to increase wages.⁵⁵ Removing those cost savings by restricting the use of arbitration will have the opposite effect. The effect is likely to be particularly pronounced for those least able to afford it. For example, the consumers most likely to be affected by restrictions on the use of arbitration clauses in credit card agreements are those with low credit ratings who have few alternative sources of credit. A statistical examination of the factors explaining the use of arbitration clauses by credit card issuers finds a strong correlation between the riskiness of the issuer's credit card portfolio and its use of arbitration clauses.⁵⁶ If credit card issuers can no longer include arbitration clauses in their cardholder agreements, they may become less willing to lend to those higher risk consumers.

Second, restrictions on the enforceability of arbitration agreements may reduce rather than enhance the ability of some consumers and employees to have their claims heard. The available empirical evidence suggests that for relatively low-dollar claims, arbitration may be a more accessible forum than court.⁵⁷ Employment lawyer Lewis Maltby makes the point in the context of employment arbitration: “[M]ost employees will not be able to secure their employer’s agreement to arbitrate once a dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. Therefore, outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice.”⁵⁸

Finally, some consumers will be less able to have their cases actually heard if the availability of arbitration is restricted. Very few court cases actually make it trial. Indeed, in 2009, only 1.2 percent of federal court dispositions were by either jury trial or bench trial.⁵⁹ Most court cases are resolved instead by dispositive motions or settlement. Consumers who bring those cases never have a “day in court” to tell their story to a judge or jury. By comparison, the Searle study found that over 50 percent of consumer claims in AAA arbitrations made it to a hearing before an arbitrator, and over 30 percent were resolved by the issuance of an award after

⁵⁵ See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-57 (2006).

⁵⁶ See Drahozal & Rutledge, *supra* note 12, at _____. Again, correlation is not causation. It may be, for example, that risk-taking consumers tend to prefer credit card agreements with arbitration clauses. That explanation seems unlikely, however.

⁵⁷ See Eisenberg & Hill, *Arbitration and Litigation of Employment Claims*, *supra* note 22, at 53.

⁵⁸ Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003).

⁵⁹ See ADMIN. OFFICE OF U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.4.10 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table410.pdf>.

a hearing.⁶⁰ To the extent there is value in consumers actually being able to present their claim to a neutral decision maker, restricting the availability of arbitration will deprive consumers of that value.

VIII. CONCLUSIONS

I'm a lawyer because I was bad at [math and science]. All lawyers in the room, you know it's true. We can't add and subtract, so we argue.⁶¹

First Lady Michelle Obama's assertion, at a recent National Science Foundation event, reflects a popularly held view that lawyers are not good at math. Perhaps that explains some of the prevalence of arbitration innumeracy.⁶² But avoiding arbitration innumeracy does not require sophisticated math skills. For consumers of empirical data, avoiding arbitration innumeracy requires a sensitivity to basic statistical concepts and a willingness to look skeptically at empirical research, even when it confirms one's previously held views. For producers of empirical data, avoiding arbitration innumeracy requires a willingness to apply proper empirical techniques and, importantly, to recognize the limitations of one's data. As empirical data becomes ever more important to the intensifying debate over consumer and employment arbitration, avoiding arbitration innumeracy is essential to making sound public policy.

⁶⁰ Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 47, at 881 fig.5. Of the hearings in the consumer cases studied, 62.1% were either in person or by telephone; the remaining cases involved document-only hearings. *Id.* at 893. But in the cases with document-only hearings, the consumer had the right to request an in-person or telephone hearing and evidently did not do so. *Id.* at 865 ("For claims seeking \$10,000 or less, the default rule is that the case will be resolved on the basis of documents only. Either party may request a telephone or in-person hearing, however. Likewise, the arbitrator may hold a telephone or in-person hearing if he or she decides one is necessary. For claims seeking over \$10,000, the default rule is that the arbitrator will hold either a telephone or in-person hearing unless the parties agree otherwise.").

⁶¹ Michelle Obama, Remarks at the National Science Foundation Family-Friendly Policy Rollout (Sept. 26, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/26/remarks-first-lady-national-science-foundation-family-friendly-policy-ro>.

⁶² A more cynical explanation would be that arbitration innumeracy sometimes might result not from ignorance but rather from knowing attempts to misuse the empirical record. I have no way to know whether that in fact is the case.