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FEAR AND LOATHING OF CLASS ACTION ARBITRATION, OR HOW TO DISMISS THE EFFECTIVE VINDICATION DOCTRINE

*Mark Bolin**

I. INTRODUCTION

Civil claims have long served a dual role of compensating consumers while deterring wrongful conduct.¹ Some federal claims are so important as a deterrent that courts consider them to be an integral part of the government's enforcement regime.² For example, the Sherman Act has long provided for private enforcement of antitrust claims in order to supplement the Department of Justice's (DOJ) efforts.³ However, the courts cannot fulfill either of these roles if consumers lack incentives to bring their claims in the first place. This issue is common with small and negative value claims,⁴ in

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1. *See* *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979))).

2. *See, e.g., Reiter*, 442 U.S. at 344.

3. 15 U.S.C. § 1 (2012); *see also Reiter*, 442 U.S. at 344 ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. Indeed, nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice.").

4. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting). "Negative value claims" are claims in which plaintiffs must spend more to prevail than they could potentially receive if they prevail.

which the defendant seeks to profit by targeting many individuals for small sums of money.⁵

In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court held that American Express could require customers to arbitrate claims individually even if the cost of arbitration was far more than what any individual plaintiff could expect to recover.⁶ However, in reaching that conclusion, the Court paid little attention to the central issue of the case: whether the arbitration clause violates the effective vindication doctrine by denying the plaintiffs any means at all to pursue their claims. Instead, the Court focused narrowly on whether an arbitration clause can ban class action arbitration, a question it had already decided.⁷ Consequently, the Court has further limited the ability of customers to successfully bring small and negative value claims against creative corporate wrongdoers. Simply put, the Court's holding is a betrayal of its precedent, becoming the most recent addition to a long line of cases aimed at limiting the availability of class actions to plaintiffs.⁸

This Comment argues that *Italian Colors* allows corporations to effectively insulate themselves from liability for wrongful conduct that results in only small-dollar claims through creative use of class action arbitration waivers. Part II describes the procedural history of the case and the Court's analysis. Part III discusses the rationale behind the Court's holding and explores its implications for private enforcement. Finally, Part IV concludes with a summary of the realities of class action arbitration waivers in light of *Italian Colors*.

II. STATEMENT OF THE CASE

A. Lower Court History

In 2006, Italian Colors Restaurant and a number of other New York and California businesses ("Plaintiffs") filed a lawsuit against American Express for violating Sections 1 and 2 of the Sherman

5. See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.").

6. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

7. *Id.* at 2312 (citing *Concepcion*, 131 S. Ct. at 1743).

8. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429 (2013); *Concepcion*, 131 S. Ct. at 1753.

Act.⁹ Plaintiffs alleged that American Express used its monopoly power to impose certain terms on them in its Card Acceptance Agreement (the “Agreement”).¹⁰ One of the provisions of the Agreement that Plaintiffs alleged violated the Sherman Act was its collective action waiver arbitration clause.¹¹ The clause required all claims related to it to be arbitrated on an individual—not class-wide—basis.¹²

Plaintiffs argued that the clause was unenforceable because it insulated American Express from liability by prohibiting Plaintiffs from sharing their arbitration costs.¹³ Plaintiffs submitted testimony from a professional economist with substantial experience in individual and class action antitrust litigation that stated that proving their claims would cost somewhere between hundreds of thousands and a million dollars.¹⁴ Individually, however, Plaintiffs could not expect to recover more than \$5,000 each on average.¹⁵ Plaintiffs argued that the substantial cost of proving their antitrust claims in relation to the small sum recoverable meant that no individual plaintiff would pursue its case against American Express.¹⁶

The district court rejected this argument and required Plaintiffs to submit to arbitration.¹⁷ The court reasoned that the alleged high cost of proving Plaintiffs’ claims did not insulate American Express from liability because Plaintiffs could potentially recover much more than the \$5,000 they claimed.¹⁸ The court pointed out that Section 4 of the Clayton Act allows plaintiffs with antitrust claims to recover

9. *In re Am. Express Merchs. Litig.*, 03 CV 9592 (GBD), 2006 WL 662341, at *1 (S.D.N.Y. Mar. 16, 2006), *rev’d and remanded sub nom. In re Am. Express Merchs. Litig.*, 554 F.3d 300 (2d Cir. 2009), *rev’d sub nom. Italian Colors*, 133 S. Ct. at 2304.

10. *Id.*

11. *Id.* at *2. Plaintiffs also argued that American Express imposed a tying arrangement upon them whereby merchants who chose to accept American Express charge cards had to also accept American Express credit cards. *Id.*

12. *Id.*

13. *Id.* at *4–5.

14. *Id.* at *5.

15. *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 308 (2d Cir. 2009), *cert. granted, judgment vacated sub nom. Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

16. *In re Am. Express Merchs. Litig.*, 2006 WL 662341, at *5.

17. *Id.* at *10.

18. *Id.* at *5.

treble damages and the costs of suit, which would presumably include the cost of any expert opinion.¹⁹

On appeal to the Second Circuit, Plaintiffs renewed their argument that the arbitration clause was unenforceable because it effectively insulated American Express from liability.²⁰ This time, the court agreed.²¹ First, the court noted that the district court's reasoning that Section 4 of the Clayton Act provides for the compensation of Plaintiffs' litigation costs failed to account for an important limiting principle.²² In awarding litigation costs to plaintiffs under the Clayton Act, courts are severely limited by federal statute.²³ The applicable statute currently allows for a mere \$40 per diem award, which would not be nearly enough to cover the expert's fees.²⁴ Furthermore, the district court's reasoning did not take any account of what would happen if Plaintiffs *lost*. In such a case, Plaintiffs would recoup none of their costs.²⁵ Relying on the effective vindication doctrine first articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁶ the court held that the arbitration clause was unenforceable because it effectively denied Plaintiffs the opportunity to vindicate their claims.²⁷

The Supreme Court granted certiorari and vacated the Second Circuit's judgment in light of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,²⁸ remanding for further consideration.²⁹ On reconsideration, the Second Circuit held that *Stolt-Nielsen S.A.* did not change its analysis and again reversed the district court's judgment.³⁰ However, the Second Circuit placed a hold on its mandate in order to allow American Express to file a petition seeking

19. *Id.*; see also 15 U.S.C. § 15 (2012) (stating that any person injured by violation of antitrust law shall recover threefold damages and the cost of suit, including a reasonable attorney's fee).

20. *In re Am. Express Merchs. Litig.*, 554 F.3d at 311.

21. *Id.* at 319.

22. *Id.* at 317–18.

23. *Id.*

24. *Id.* at 318 (citing 28 U.S.C. § 1821(b) (2012)).

25. *Id.*; see also 15 U.S.C. § 15 (2012) (providing recovery for only successful litigants).

26. 473 U.S. 614 (1985).

27. *In re Am. Express Merchs. Litig.*, 554 F.3d at 319.

28. 559 U.S. 662 (2010).

29. *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401, 2401 (2010).

30. *In re Am. Express Merchs. Litig.*, 634 F.3d 187, 200 (2d Cir. 2011), *rev'd sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

writ of certiorari.³¹ While its mandate was on hold, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*,³² which held that the Federal Arbitration Act (FAA) preempted a California judge-made law that class action arbitration waivers were per se unconscionable.³³ In light of *Concepcion* both parties filed additional briefing with the Second Circuit.³⁴ It subsequently reconsidered its opinion and again affirmed its judgment, finding that *Concepcion* did not affect its analysis.³⁵

On November 9, 2012, the Supreme Court granted certiorari.³⁶ The question the Court posed to the parties was whether a contractual waiver of class arbitration is enforceable under the FAA when the plaintiffs' cost of individually arbitrating a federal statutory claim exceeds the potential recovery.³⁷

B. Supreme Court Decision

1. The Majority Opinion

Justice Scalia's brief majority opinion began with a description of the FAA's mandate to "rigorously enforce" arbitration agreements according to their terms" absent a contrary congressional command.³⁸ He then concluded that there was no contrary congressional command, either in the FAA or Federal Rule of Civil Procedure 23—which establishes the requirements for class action treatment—that compelled the Court to invalidate the Agreement's arbitration clause.³⁹ He noted that neither Rule 23 nor the FAA entitled Plaintiffs' claims to class action treatment and in fact imposed stringent requirements on class action certification.⁴⁰ This observation did not end his analysis, however, because even without

31. *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 206 (2d Cir. 2012), *rev'd sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

32. 131 S. Ct. 1740 (2011).

33. *Id.* at 1753; *In re Am. Express Merchs. Litig.*, 667 F.3d at 206.

34. *In re Am. Express Merchs. Litig.*, 667 F.3d at 206.

35. *Id.*

36. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

37. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

38. *Id.* at 2309 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985)).

39. *Id.*

40. *Id.* at 2310.

a contrary congressional command, the clause would have been unenforceable if it had violated the effective vindication doctrine.⁴¹

Justice Scalia began his discussion of the effective vindication doctrine that originated in *Mitsubishi* by noting that it was not a part of that case's holding and was therefore dicta.⁴² *Mitsubishi* concerned a sales agreement between Mitsubishi Motors Corporation ("Mitsubishi") and a Puerto Rican corporation, Soler Chrysler-Plymouth, Inc. ("Soler").⁴³ The sales agreement mandated that Soler sell a certain number of Mitsubishi automobiles every month while requiring all claims arising out of the sales agreement to be settled by arbitration in Japan.⁴⁴ After Soler's sales of its Mitsubishi automobiles began to decline, it told Mitsubishi it would not accept the number of vehicles required by the sales agreement.⁴⁵ Mitsubishi subsequently moved to compel Soler to appear before arbitration proceedings in Japan based on its claim that Soler had violated the terms of the agreement.⁴⁶

Soler also counterclaimed for violations of the Sherman Act.⁴⁷ In its opposition to Mitsubishi's motion to compel arbitration, Soler argued that its antitrust claims were inappropriate for arbitration abroad.⁴⁸ According to Soler, private antitrust claims are too important to entrust to arbitrators abroad who have no exposure to American laws or values.⁴⁹ The Court in *Mitsubishi* rejected this argument, but noted that if Soler had established that it could not vindicate its rights because of the arbitration clause it would be unenforceable.⁵⁰ According to Justice Scalia, the Court's qualifying statement was not a part of its holding, and was therefore dictum.⁵¹

Furthermore, Justice Scalia argued that since *Mitsubishi*, the Court has interpreted the doctrine as giving plaintiffs only the right

41. *Id.*

42. *Id.*

43. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616–17 (1985).

44. *Id.* at 617.

45. *Id.*

46. *Id.* at 618–19.

47. *Id.* at 619–20.

48. *See id.* at 632.

49. *Id.*

50. *Id.*

51. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

to pursue their claims, not an affordable means of proving them.⁵² For example, in *Green Tree Financial Corp.-Alabama v. Randolph*,⁵³ the Court concluded that a filing fee that was so onerous that it effectively prevented plaintiffs from bringing their case at all would violate the effective vindication doctrine.⁵⁴ In *Randolph*, Larketta Randolph brought a claim for violation of the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA) against the lienholder of her mobile home loan, Green Tree Financial Corporation (“Green Tree”).⁵⁵ Green Tree then moved to compel arbitration of Randolph’s claims in accordance with the parties’ loan installment contract.⁵⁶ In response, Randolph argued that the agreement’s arbitration clause was unenforceable because it failed to protect her from potentially high arbitration costs.⁵⁷

The Court rejected this argument, holding that an arbitration clause is not unenforceable merely because it is silent on the issue of arbitration costs and fees.⁵⁸ In order to render an arbitration clause unenforceable, the Court stated, a movant would have to establish that it faced more than a mere “risk” of prohibitively costly arbitration.⁵⁹ According to Justice Scalia, a filing fee like the one in *Randolph* would implicate the effective vindication doctrine because it would prohibit Plaintiffs from even accessing the courts.⁶⁰ This, he contended, is materially different from an arbitration clause that merely makes *proving* a claim unaffordable but leaves a plaintiff at least ostensible access to the courts.⁶¹

Justice Scalia cited two cases in further support of his argument that the FAA’s preference for arbitration means the Agreement’s collective action arbitration waiver should be enforced. First, he noted that in *Gilmer v. Interstate/Johnson Lane Corp.*,⁶² the Court upheld an arbitration clause even though the relevant statute, the Age

52. *Id.* at 2310–11.

53. 531 U.S. 79 (2000).

54. *Id.* at 90.

55. *Id.* at 82–83.

56. *Id.* at 83.

57. *Id.* at 89.

58. *Id.* at 91.

59. *Id.*

60. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

61. *Id.* at 2311.

62. 500 U.S. 20 (1991).

Discrimination in Employment Act,⁶³ expressly allowed for collective actions.⁶⁴ The Court also upheld the arbitration agreement at issue in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,⁶⁵ in spite of the plaintiff's argument that it violated the Carriage of Goods by Sea Act by lessening the liability of carriers for damaged goods.⁶⁶ According to Justice Scalia, these cases stand for the proposition that a class action arbitration waiver does not deny any party the opportunity to effectively vindicate their claims merely by virtue of the fact that it limits arbitration to the two contracting parties.⁶⁷

Finally, Justice Scalia argued that the Court's recent decision in *AT&T Mobility LLC v. Concepcion* all but decides the case in American Express's favor.⁶⁸ *Concepcion* held that the FAA preempted a California judicial doctrine that considered class action arbitration waivers per se unconscionable.⁶⁹ The Court concluded that the purpose of the FAA was to encourage the speedy resolution of claims through an informal arbitration process and that any requirement that arbitration be able to proceed on a class-wide basis was contrary to that intent.⁷⁰

In his *Italian Colors* concurrence, Justice Thomas affirmed the position he took in *Concepcion* that the FAA only allows arbitration clauses to be invalidated when there was some defect in their formation, such as fraud or duress.⁷¹ Justice Thomas contended that Plaintiffs argued the arbitration clause was invalid on two grounds: (1) it "would contravene the policies of the antitrust laws," and (2) it would prevent the effective vindication of their statutory rights.⁷² He concluded that the Court must, therefore, enforce the arbitration clause because Plaintiffs did not even allege a defect in the formation of the clause.⁷³

63. 29 U.S.C. § 621 (2006).

64. *Am. Express Co.*, 133 S. Ct. at 2311.

65. 515 U.S. 528 (1995).

66. *Am. Express Co.*, 133 S. Ct. at 2311 (citing *Vimar Seguros y Reaseguros, S.A.*, 515 U.S. at 530).

67. *Id.*

68. *Id.* at 2312.

69. *Id.*

70. *Id.*

71. *Id.* (Thomas, J., concurring).

72. *Id.* at 2312–13.

73. *Id.* at 2313.

2. The Dissent

Justices Ginsburg and Breyer joined Justice Kagan's dissent.⁷⁴ The dissent rested on the argument that the Agreement's arbitration clause is invalid because it prevented the effective vindication of Plaintiffs' claims.⁷⁵ According to the dissent, the practical effect of the Court's ruling is to require Italian Colors Restaurant to bear all of the costs of arbitration by itself despite the fact that its individual claims cost far more to prove than it could possibly collect in damages.⁷⁶ This can only mean that American Express altogether eludes liability for antitrust violations relating to the Agreement because not only would no reasonable plaintiff pursue such a claim, but no reasonable attorney would take it.⁷⁷

Justice Kagan's dissent first took aim at the majority's statement that the effective vindication doctrine "originated as dictum."⁷⁸ The dissent stated that the effective vindication doctrine as applied in *Mitsubishi* was a central part of its holding and has subsequently been referenced in cases such as *Randolph* and *Gilmer*.⁷⁹ Therefore, while it may have originated as dictum in *Mitsubishi*, it has since become a principle the Court has consulted when a party alleges that another party has insulated itself from liability.⁸⁰

The dissent next addressed the majority's contention that the effective vindication doctrine did not apply to the Agreement's arbitration clause because it did not prevent Plaintiffs from accessing the courts altogether, but merely made it "not worth the expense."⁸¹ The dissent argued that this distinction is a betrayal of the principles of the effective vindication doctrine articulated in *Mitsubishi* and *Randolph*.⁸² While the dissent acknowledged that the arbitration clause was different from those the Court discussed in *Mitsubishi* and *Randolph*, it was the same in one important respect: it effectively

74. *Id.* (Kagan, J., dissenting). Justice Sotomayor took no part in the consideration of the case. *Id.* at 2312 (majority opinion).

75. *Id.* at 2313 (Kagan, J., dissenting).

76. *Id.* at 2316.

77. *Id.*

78. *Id.* at 2317.

79. *Id.*

80. *Id.*

81. *Id.* at 2318.

82. *Id.* at 2317.

prohibited Plaintiffs from vindicating their claims.⁸³ Furthermore, the dissent argued that the majority's holding directly contradicted its opinion in *Randolph*, which stated that agreements that make arbitration prohibitively expensive violate the effective vindication doctrine.⁸⁴

The dissent also argued that the majority incorrectly focused on the fact that the arbitration agreement prohibited class actions.⁸⁵ The relevant question was not whether the Agreement's arbitration clause was unenforceable because it prohibits Plaintiffs from proceeding as a class, but whether it was unenforceable because it deprived Plaintiffs of any effective means to vindicate their claims.⁸⁶ The dissent contended that the Agreement as a whole prevented any and all alternatives to class action arbitration that might otherwise be available to Plaintiffs.⁸⁷ For example, the arbitration clause's collective action waiver prevented the joinder or consolidation of claims.⁸⁸ The Agreement's confidentiality clause also prevented informal coordination among claimants who might otherwise collaborate on expert testimony.⁸⁹ As such, the Agreement prohibited any form of cost sharing and effectively robbed Plaintiffs of any opportunity to vindicate their claims.

Finally, Justice Kagan's dissent challenged the majority's contention that *Concepcion* "all but resolves this case."⁹⁰ *Concepcion* did not in any way address the effective vindication doctrine.⁹¹ Instead, it addressed whether the FAA preempts a judge-made rule about the per se unconscionability of class action waivers.⁹² This rule applied regardless of whether a plaintiff had some other means of effectively vindicating its rights. Furthermore, *Concepcion* involved a *state* law, to which the effective vindication doctrine simply does

83. *Id.* at 2317–18.

84. *Id.* at 2318.

85. *Id.* at 2318–19.

86. *Id.* at 2318.

87. *Id.* at 2316.

88. *Id.*

89. *Id.*

90. *Id.* at 2319.

91. *Id.* at 2319–20.

92. *Id.* at 2320.

not apply.⁹³ To claim that *Concepcion* resolves this case is to fundamentally misunderstand its dispositive issue.

III. ANALYSIS

The Court's holding effectively allows businesses to insulate themselves from liability for federal statutory violations through the use of burdensome arbitration agreements. By improperly focusing on the class action aspect of the Agreement's collective action arbitration waiver, the Court reached a holding that renders the effective vindication doctrine hollow and weakens the country's private enforcement regime. First, the effective vindication doctrine itself is a central part of *Mitsubishi* and is not dicta in that case.⁹⁴ Second, the Court's holding contradicts both its own jurisprudence and the purpose of the effective vindication doctrine.⁹⁵ This has implications not just for plaintiffs' ability to prove their claims and be compensated but for federal enforcement regimes.⁹⁶ This leaves potential plaintiffs with only three options. The first two are suggested in *Italian Colors* itself.⁹⁷ Ultimately, however, businesses will be able to immunize themselves from liability by creatively utilizing arbitration clauses until Congress amends the FAA.⁹⁸

A. *Is the Effective Vindication Doctrine Dicta?*

Justice Scalia began his analysis of the effective vindication doctrine by implicitly minimizing its importance, claiming that the doctrine originated as dictum.⁹⁹ Justice Kagan flatly denied this, noting that *even if* the doctrine was dictum in *Mitsubishi*, it has since become a principle that the Court has relied upon in its holdings.¹⁰⁰ Although the line between dictum and holding is not always clear, the principle that a contract clause preventing the effective vindication of a party's right is unenforceable is not dictum in

93. *Id.*

94. *See infra* Part III.A.

95. *See infra* Part III.B.

96. *See infra* Part III.C.

97. *See infra* Part III.D.

98. *See infra* Part III.D.

99. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

100. *Id.* at 2317 (Kagan, J., dissenting).

Mitsubishi.¹⁰¹ On the contrary, it is, in the words of Justice Kagan, an “essential condition of the decision’s holding.”¹⁰²

In *Mitsubishi* the Court rejected Soler’s argument that arbitration clauses that require antitrust disputes to be arbitrated abroad are per se unenforceable.¹⁰³ The Court found Soler’s argument that foreign arbitrators are incapable of fairly adjudicating American antitrust claims unpersuasive.¹⁰⁴ In its holding, however, the Court stated that if Soler had actually established that its claims could not be effectively vindicated abroad, then the arbitration clause would be unenforceable.¹⁰⁵ In other words, if the Court had concluded that Soler *had* established that the arbitration clause prevented the effective vindication of its claims, it would have held in favor of Soler instead of *Mitsubishi*. Therefore, the effective vindication doctrine is an “essential condition of the decision’s holding”¹⁰⁶ and is not dictum.

B. The Importance of the Right to Pursue a Negative Value Claim

The majority’s assertion that the effective vindication doctrine only protects plaintiffs’ rights to pursue their claims, without assuring an affordable means of proving them, effectively renders the doctrine hollow and ignores the Court’s precedent. Justice Scalia’s reasoning is directly contradicted by *Randolph*, which holds that arbitration clauses that make it prohibitively expensive to bring a claim will not be enforced.¹⁰⁷ Moreover, a judicial doctrine that prohibits contracting parties from denying each other access to the courts, and makes proving their claims prohibitively expensive, is effectively meaningless.¹⁰⁸ The Court’s holding, therefore, both betrays its own precedent and the purpose behind the effective vindication doctrine.

101. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

102. *Am. Express Co.*, 133 S. Ct. at 2317.

103. *Mitsubishi Motors Corp.*, 473 U.S. at 635.

104. *Id.* at 632–35.

105. *Id.* at 637.

106. *Am. Express Co.*, 133 S. Ct. at 2317.

107. *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000).

108. *See Am. Express Co.*, 133 S. Ct. at 2314 (Kagan, J., dissenting) (noting that a monopolist could find many ways around an effective vindication doctrine that is “limited to [only] baldly exculpatory provisions”).

The Court's reasoning directly contradicts its holding in *Randolph*. This holding is important for two reasons. First, it establishes that if Randolph had carried her burden of establishing that prohibitively high arbitration costs prevented the effective vindication of her claims, she would have prevailed.¹⁰⁹ Second, it showed no signs of differentiating between costs that are imposed to gain access to the court, and costs that are imposed during litigation.¹¹⁰ Although the costs the defendant imposed upon Randolph were filing fees, the Court's analysis focused on the likelihood that Randolph would "be required to bear prohibitive arbitration costs" in general.¹¹¹ The costs of arbitration certainly include a plaintiff's costs in proving a claim, not merely filing fees associated with accessing the courts. As Justice Kagan pointed out, there is no rational basis for limiting the effective vindication doctrine to costs incurred by plaintiffs in pursuing a claim based on *Randolph*.¹¹²

Even if the majority's holding did not directly contradict *Randolph*, it did not comport with the purpose of the effective vindication doctrine. The effective vindication doctrine is meant to ensure that arbitration proceedings are "adequate to protect the rights [of the parties] in question so that arbitration, like the judicial resolution of disputes, will 'further broader social purposes.'"¹¹³ Without this doctrine, employers and businesses could evade basic federal protections, including anti-discrimination statutes.¹¹⁴ The Court's holding effectively allows creative businesses to completely evade these federal protections and therefore contradicts the doctrine's purpose.

C. *Why Lack of Private Enforcement Is a Problem*

The Court's holding also imposes further burdens on the country's private enforcement regime and contravenes congressional

109. *Randolph*, 531 U.S. at 91–92.

110. *Id.*

111. *Id.* at 90–92.

112. *Am. Express Co.*, 133 S. Ct. at 2316 (arguing that the expert report "counts as a 'prohibitive' cost, in Randolph's terminology, if anything does").

113. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

114. *See, e.g., id.*

intent. Numerous federal statutes include a private right of action designed to supplement agency enforcement.¹¹⁵ This is likely because agency officials simply do not have the resources to regulate all corporate conduct.¹¹⁶ The Supreme Court has described at length the importance of such private causes of action in ensuring the vindication of plaintiffs' rights.¹¹⁷ Moreover, the existence of a private cause of action serves as a strong deterrent to anticompetitive conduct.¹¹⁸ The Court's holding effectively ignores Congress's intent to supplement agency enforcement with private lawsuits in favor of the FAA's preference for arbitration agreements.

D. *The Options Left to Private Parties*

After *Italian Colors*, only three ways remain for plaintiffs to pursue their claims in the face of prohibitively burdensome arbitration clauses. The first is to establish that the arbitration clause denies the plaintiffs access to the courts entirely.¹¹⁹ The second is to prove that there was some error in the formation of the arbitration agreement, such as fraud or duress.¹²⁰ And the third is for Congress to amend the FAA with language explicitly proscribing arbitration agreements that make it prohibitively expensive to prove a claim. None of these options offer a viable alternative to class-based procedures, and as a result, many worthwhile small claims will likely go unvindicated.

Plaintiffs may be able to avoid class action waivers that make it prohibitively expensive to bring their claims if they can establish that the waivers prevent them from pursuing their claims altogether.

115. See, e.g., Sherman Act, 15 U.S.C. § 1, 2 (2012).

116. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); Derek Black, *Picking Up the Pieces After Alexander v. Sandoval: Resurrecting A Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 357 n.7 (2002).

117. See, e.g., *Am. Express Co.*, 133 S. Ct. at 2313 (Kagan, J., dissenting) ("Congress created the Sherman Act's private cause of action not solely to compensate individuals, but to promote 'the public interest in vigilant enforcement of the antitrust laws.'" (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955))).

118. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

119. *Am. Express Co.*, 133 S. Ct. at 2310–11.

120. *Id.* at 2313 (Thomas, J., concurring).

Justice Scalia's majority opinion implied that under such circumstances, *Mitsubishi* and *Randolph* would be controlling, and the effective vindication doctrine would apply.¹²¹ For example, he noted that an arbitration agreement that imposes prohibitively expensive filing fees would presumably be unenforceable.¹²² Other costs imposed upon plaintiffs before litigation, including the cost of hiring an attorney, may also be included in this category. However, it is unlikely that plaintiffs will face such fees in the future, as corporate defendants can avoid this problem by simply imposing costs at a later stage. After all, according to *Italian Colors*, an arbitration agreement that does not prevent the pursuit of claims, but merely imposes prohibitive costs, will be deemed enforceable.¹²³

Plaintiffs could also render an arbitration agreement unenforceable if they can establish a defect in the formation of the agreement, such as fraud or duress. Justice Thomas's concurrence argued, in accordance with his opinion in *Concepcion*, that this is the only ground upon which the FAA allows arbitration agreements to be revoked.¹²⁴ However, the burden of establishing fraud or duress in the formation of a contract is a heavy one.¹²⁵ Most plaintiffs will not be able to meet this burden, in part because many jurisdictions presume that, by signing an agreement, a party has manifested that she has read and understood its provisions.¹²⁶ The difficulty of establishing this ground for revocation means that it is only an option in the most egregious of cases.¹²⁷

Finally, Congress could expand consumers' access to collective action procedures and address *Italian Colors*'s holding if it amends

121. *Id.* at 2310–11 (majority opinion).

122. *Id.*

123. *Id.* at 2317 (Kagan, J., dissenting).

124. *Id.* at 2312 (Thomas, J., concurring).

125. See, e.g., Lauren E. Miller, *Breaking the Language Barrier: The Failure of the Objective Theory to Promote Fairness in Language-Barrier Contracting*, 43 IND. L. REV. 175, 190 (2009) ("Fraud is a difficult defense to prove because it generally requires a party to show 'evidence of active or affirmative misrepresentation' on the part of the other party at the time of contracting.").

126. See, e.g., *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) ("[A] blind or illiterate party (or simply one unfamiliar with the contract language) who signs the contract without learning of its contents would be bound."); *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965) (holding that an Iranian citizen with limited English had a duty "to acquaint himself with the contents of the" contract).

127. See Miller, *supra* note 125, at 190; see generally Miller, *supra* note 125 (listing egregious cases in which courts still held that the arbitration agreement was enforceable).

the FAA. For example, the FAA currently states that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹²⁸ Congress could amend this section to allow for the invalidation of arbitration agreements on grounds that “exist at law or in equity for the revocation of any contract. *Under no circumstances will a collective action arbitration waiver that makes a claim prohibitively expensive to prove be enforced. This section is meant to overturn the Supreme Court’s holding in American Express Co. v. Italian Colors Restaurant.*” In order to convince Congress to take this step, stakeholders such as consumer advocate groups and bar associations will have to work together to convince their state Congress members. Such an amendment would effectively narrow the scope of what the Court considers to be the FAA’s “liberal policy in favor of arbitration” and allow plaintiffs to more effectively vindicate their rights.¹²⁹

IV. CONCLUSION

In the Court’s rush to limit the availability of class action procedures, it has immunized those businesses with the creativity to craft obstructionist arbitration clauses. Justice Kagan perfectly encapsulated the Court’s holding when she stated: “The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”¹³⁰ The Court has not only ignored its own precedent but also congressional intent, and has added a powerful weapon to the arsenal of corporate malfeasance.

128. 9 U.S.C. § 2 (2012).

129. *Campaniello Imps., Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 665 (2d Cir. 1997).

130. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013).