An Impossible Reconciliation? Understanding Class-Action Waivers and Arbitration after American Express v. Italian Colors

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I. INTRODUCTION

Increased litigation in recent decades created a need for alternative and more efficient dispute resolution. Procedural methods like class actions and arbitration aim to decrease litigation’s drain on judicial resources. Nevertheless, efficiency comes with a price, and both class actions and arbitration proved to be controversial procedural methods. Additionally, as litigation is costly, corporations will try every possible avenue to avoid the inconvenience of litigation. Some corporations have begun including a binding arbitration clause coupled with a class action waiver in their standard-form contracts, which threaten to deprive consumers of their legal rights.

Making matters worse are the parallel trends in court decisions that broaden arbitration

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1 See Larry J. Pittman, The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and A Proposal for Change, 53 ALA. L. REV. 789, 790 (2002) (“For the past thirty or more years, there has been a general movement in America supporting different types of alternative dispute resolution (ADR) processes.”).


3 For a summary of negative attitudes towards arbitration and class actions, see infra Part II.A.2. (evaluating the pros and cons of arbitration); infra Part.IV.C. (arguing how class actions may be problematic for both consumers and corporations).

4 Exact litigation costs are difficult to measure because data samples rely in part on attorney responses, to which attorneys often will not respond because of attorney-client confidentiality. COURT STATISTICS PROJECT, 20–1 CASELOAD HIGHLIGHTS 1 (2013), available at http://www.courtsstatistics.org/~media/microsites/files/csp/data%20pdf/cspf_online2.ashx. The Court Statistics Project estimates the median cost for civil contract disputes to be $91,000. Id. at 7. Additionally, for all civil cases, the study by the Project found the trial and discovery processes are the first and second most time-intensive aspects of litigation, respectively, and therefore the most costly. Id.


6 Donald R. Philbin, Jr., Litigators Needed to Advise Transaction Lawyers on Litigation Prenups, 56 ADVOC. (TEX.) 36 (2011) (noting commentators fear that all lawyers will instruct their corporate clients to include class-action waiver arbitration clauses in their standard-form contracts); see generally Catherine Cronin-Harris, Mainstreaming: Systematizing Corporate Use of ADR, 59 ALB. L. REV. 847 (1996) (detailing the corporate use of systematized ADR, including arbitration).
while restricting class actions. In the last thirty years, court decisions tend to favor the enforcement of arbitration agreements; simultaneously, courts are taking steps to prevent class certification.

In June 2013 in American Express v. Italian Colors, the Supreme Court of the United States overruled a Second Circuit Court of Appeals decision applying the effective vindication doctrine to a class-action waiver in an arbitration clause in a standard-form agreement between American Express (Amex) and various California and New York small merchants. The Supreme Court overruled the Second Circuit’s holding that the arbitration clause was invalid. The Court’s decision may allow corporations to make binding standard-form contracts with their monopolistic powers that deprive others of all legal recourse to challenge these powers. Nevertheless, despite this unfairness, the decision was justified in light of classic legal principles and recent

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7 See infra Part II.A.1. (detailing the expansive interpretation of the FAA and simultaneous limiting in the past three decades); infra Part II.C. (summarizing recent case law limiting class actions at the certification stage).
9 See infra Part II.C. (summarizing recent Supreme Court opinions that imposed unanticipated limitations on class certification).
10 Am. Express Co. v. Italian Colors Rest. (Italian Colors), 133 S. Ct. 2304 (2013). For more information on the effective vindication doctrine, see infra Part II.B. (detailing the history of the effective vindication doctrine leading up to the Italian Colors decision).
12 Italian Colory, 133 S. Ct. at 2314 (Kagan, J., dissenting) (speculating on the numerous ways in which a monopolist could devise ways to avoid antitrust liability in response to the Italian Colors ruling).
Supreme Court decisions on class arbitration clauses and class actions. The opinion is further supported by the fact that class actions and arbitration are two very distinct tools: the former is an available procedural mechanism outlined in federal civil code; the latter is an alternative to litigation regulated by federal law.

This Note supports the majority’s opinion and justifies its holding with further considerations. It argues the effective-vindication doctrine does not apply to class-action waivers, even inside arbitration clauses. This is because the primary issue for plaintiffs in Italian Colors—the lack of economic incentive to bring suit in light of the cost to prove the antitrust claim—is affected by the individuality aspect of bilateral arbitration, not the cost to arbitrate itself. However, this Note acknowledges that Italian Colors poses a real threat to consumer protection in adhesion contracts. Consumer interests must be safeguarded, but it must be done through Congressional reform that balances the interests of consumers and corporations.

13 See infra Part IV.A.2. (arguing the Court’s decision was supported by recent decisions on class arbitration like Stolt-Nielsen and Concepcion).
14 See infra Part IV.A.1. (describing the distinction between class actions and arbitration and how the Court was correct to only assess the impact of class actions).
15 See Fed. R. Civ. Pro. 23(a) (‘One or more members of a class may sue or be sued as representative parties on behalf of all members . . .’) (emphasis added).
16 The enforcement of arbitration agreements is specifically encouraged in 9 U.S.C. § 2 (2006): “A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable.”
17 See infra Part IV.A. (expanding on the majority opinion arguments such as the distinction between class actions and arbitration, the opinions in Stolt-Nielsen and Concepcion and the practical realities of an alternative holding).
18 See infra Part IV.A.2. (arguing the effective vindication doctrine does not apply because the effective vindication problem for plaintiffs was because of the class action, not arbitration, aspect of the clause).
19 See infra Part IV.A.1. (applying the analysis in the severability doctrine to distinguish class actions and arbitration within the clause).
20 See infra Part IV.B. (evaluating the dissenting opinion in Italian Colors and acknowledging the reality of the threats to consumer protection it prophesizes).
21 See infra Part V.C.3. (encouraging congressional reform that incorporates the interests of both corporations and consumers).
Part II discusses the background of arbitration, class actions, class arbitration and the effective vindication doctrine. It also explores aggressive Court efforts to limit class actions, especially in two recent Supreme Court cases on class-action waivers. Part III explains the procedural history of American Express v. Italian Colors, the arguments for both sides and the majority and dissenting opinions. Part IV expands upon the Note’s thesis, analyzing how the opinion was justified in light of prior case law and procedural and contract theories. Part V discusses the impact of this holding, such as how courts have responded and what questions the case left open. It also explores case law advising Congress to reform, what congressional efforts have occurred so far and how Congress must balance the interests of both consumers and corporations in order to progress arbitration and class action policy.

22 See infra Part II.A. (providing a brief history of arbitration as well as a summary of the attitudes towards arbitration).
23 See infra Part II.C. (summarizing recent Court opinions on class actions and their limits on class actions at the certification stage).
24 See infra Part II.D. (explaining the rise of class arbitration and summarizing recent decisions on this mechanism).
25 See infra Part II.B. (detailing the history of the effective vindication doctrine in cases prior to Italian Colors).
26 See infra Part II.C–D.2. (describing the impact of decisions on class actions and class arbitration).
27 See infra Part III.A–B. (recounting the facts and procedural background of the case, including the district court opinion and the case’s review four times in the Second Circuit).
28 See infra Part III.C.1. (summarizing the arguments presented by both parties in their briefs for the and various amici curiae).
29 See infra Part III.C.2. (explaining the main points of majority opinion)
30 See infra Part III.C.4. (detailing the relevant portions of the dissenting opinion).
31 See infra Part IV.A.1–2. (applying the contractual severability doctrine and the opinions in Stolt-Nielsen and Concepcion to support the majority’s decision in Italian Colors).
32 See infra Part V.A–B. (discussing the immediate impact of Italian Colors and evaluating any remaining questions arising by the outcome of the decision).
33 See infra Part V.A. (summarizing cases immediately following the Italian Colors decision).
34 See infra Part V.B. (detailing some recent but futile attempts at congressional reform).
35 See infra Part V.D. (suggesting options for congressional reform including non-binding arbitration and a categorical approach to class actions).
II. BACKGROUND

Crucial to understanding the opinion in *Italian Colors* is a comprehension of the judicial and social attitudes towards arbitration and class actions. First, this Part provides a brief history of arbitration, from pre-FAA policy to case law developments in the last three decades.\(^{36}\) Next, this Part describes the development of the effective vindication doctrine, from its introduction in *Mitsubishi Motors* to its refinement in *Randolph*.\(^{37}\) This Part then focuses on the recent history of class actions, particularly on the limiting efforts employed by the Supreme Court in recent decisions.\(^{38}\) Lastly, this Part discusses class arbitration, with a focus on rulings over class-arbitration waivers in two recent Supreme Court cases.\(^{39}\)

A. Arbitration: History, Attitudes and Applicability

1. A Brief History of Arbitration

Although implemented by Congress almost ninety years ago,\(^{40}\) the Supreme Court only began to significantly interpret and expand the FAA in the last three decades.\(^{41}\) Americans were traditionally suspicious towards arbitration, inheriting skepticisms from

\(^{36}\) See infra Part II.A.1. (detailing a brief history of attitudes towards arbitration since the enactment of the FAA in 1925).

\(^{37}\) See infra Part II.B. (summarizing case law in the Supreme Court on the effective vindication doctrine, and its application in lower courts).

\(^{38}\) See infra Part II.C. (explaining how recent Supreme Court decisions demonstrate a Court suspicion towards class actions).

\(^{39}\) See infra Part II.D. (discussing older class arbitration cases as well as the recent holdings in *Concepcion* and *Stolt-Nielsen*).


\(^{41}\) See Ellen Meriwether, *Class Action Waiver and the Effective Vindication Doctrine at the Antitrust/Arbitration Crossroads*, 26-SUM ANTITRUST 67, 67 (2012) (“The Supreme Court has shown growing attention to arbitration issues and enforcement of arbitration agreements in the last thirty years . . . .”); see also David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1028 (2012) (“[I]n the last three decades, the Supreme Court has dramatically expanded the statute’s scope . . . .”).
English common law. Arbitration was opposed for mainly two public policy reasons: one, that arbitration could provide an avenue for businesses to escape public regulation; and two, the process of creating arbitration agreements is prone to one-sidedness. Despite these suspicions, commercial arbitration expanded in the earlier twentieth century. Congress enacted the FAA to accommodate commercial arbitration and harmonize it with judicial hostility towards arbitration. However, judicial and academic skepticism towards arbitration persisted even after the enactment of the FAA. For example, Courts limited the scope of the FAA by finding that it did not preempt state law and that it did not apply in certain types of cases.

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42 See Horton, supra note 41, at 1034 (describing American inheritance of arbitration suspicions from common law English courts); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U.I.L.L. L. REV. 695, n.35 (2001) (attributing arbitration hostility at common law to the economic self-interest of the judges); but see MACNEIL, supra note 40, at 19 (asserting that the “pre-modern statutory law on arbitration” and common law was, “contrary to modern folklore,” supportive of arbitration).

43 See MACNEIL, supra note 40, at 59 (including the improper means by which businesses may escape public regulation as a “macro countercurrent” against arbitration); Amy J. Schmitz, Curing Consumer Warranty Woes Through Regulated Arbitration, 23 OHIO ST. J. ON DISP. RESOL. 627, 628 (2008) (arguing that contractual liberty in arbitration agreements allows companies to “essentially privatize justice”).

44 See MACNEIL, supra note 40, at 59–60 (referring to “one-sidedness” in the making of the contract with an arbitration clause the “micro countercurrent”); Drahozal, supra note 42, at 705 (describing how arbitration drafting in a one-sided manner may favor the corporation at the expense of the individual). These two public policy oppositions are still present in arbitration critiques today. Drahozal, supra note 42, at 705. There exist other criticisms of arbitration as well, including that it is “mandatory,” i.e. contained in adhesive contracts, and that the characteristics of an arbitration proceeding may unfairly disadvantage individuals. Id. For more information on these oppositions, see infra note 62.

45 Horton, supra note 41, at 1038 (“As the twentieth century began, commercial arbitration became more common”); Charles A. Sullivan & Timothy P. Glynn, Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution, 64 ALA. L. REV. 1013, 1034 (2013) (noting how the FAA was originally used to arbitrate commercial disputes).

46 See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (“The FAA was originally enacted in 1925 . . . . [I]t is purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . .”); Sullivan & Glynn, supra note 43, at 1034 (quoting Gilmer, 500 U.S. at 24).

47 See, e.g., MACNEIL, supra note 40, at 61–62 (noting that New Deal liberalism launched an attack against arbitration in academia); id. at 63–64 (citing Wilko v. Swan, 346 U.S. 427 (1953) (using Wilko as an example of judicial response to arbitration critics, where the Court held an arbitration agreement unenforceable under the policy concern of one-sidedness)); but cf. id. at 67 (asserting arbitration was subject to less criticism in the radical 1960s and 1970s, although other forms of alternative dispute resolution were attacked).

48 See Horton, supra note 41, at 1039–40 (listing cases exempted from court-compelled arbitration under the “non-arbitrability doctrine,” including cases of antitrust, securities, pension and patent disputes). Judges also refused to enforce arbitrators’ rulings on civil rights cases. See, e.g., McDonald v. City of W.
It wasn’t until the 1980s that courts began to substantially favor enforcement of arbitration clauses.\textsuperscript{49} In \textit{Moses H. Cone Memorial Hospital v. Mercury Construction Corp.},\textsuperscript{50} the Supreme Court announced a liberal “federal policy favoring arbitration.”\textsuperscript{51} The Court held this liberal policy was supported by the text of the FAA:\textsuperscript{52} “A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable.”\textsuperscript{53}

After \textit{Moses}, case law continued to broaden the types of legal disputes subject to arbitration.\textsuperscript{54} The only limitation on enforcing arbitration agreements remained in section 2 of the FAA, which states arbitration agreements are generally enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{55} In interpreting this caveat, the Court has imposed two main limitations: one, that an arbitration clause is unenforceable if a party is unable to effectively vindicate his claim

\footnotesize{\textsuperscript{49} See Horton, supra note 41, 1040–41 (describing the revolution of federal arbitration law beginning in the 1980s). Slight headway is also seen in \textit{Prima Paint Corp. v. Flood & Conklin Manufacturing Co.}, 388 U.S. 395 (1967), where the Court held arbitration agreements are severable from the main contract as a matter of law. Drahozal, supra note 42, at 702.}

\footnotesize{\textsuperscript{50} 460 U.S. 1 (1983).}

\footnotesize{\textsuperscript{51} Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 29 (1983); Meriwether, supra note 41, at 67 (quoting Moses, 460 U.S. at 29).}

\footnotesize{\textsuperscript{52} See Moses, 460 U.S. at 29 (describing section 2 as a “congressional declaration of a federal liberal policy favoring arbitration agreements” (emphasis added)); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483 (1989) (shifting the burden of proof to the party opposing arbitration to prove Congress intended a preclusion of judicial waiver of remedies pursuant to Section 2).}

\footnotesize{\textsuperscript{53} 9 U.S.C. § 2 (2006).}

\footnotesize{\textsuperscript{54} See e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 US. 20 (1991) (extending the FAA to federal statutory claims under the Age Discrimination Employment Act (ADEA)); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (extending the FAA to antitrust cases); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (extending the FAA to disputes under the Racketeering Influenced and Corruption Organizations Act (RICO)).}

\footnotesize{\textsuperscript{55} 9 U.S.C. § 2 (2006).}
through arbitration; and two, an arbitration clause is unenforceable if it conflicts with another existing federal statute.

2. Attitudes towards Arbitration: Weighing the Pros and Cons

Arbitration’s proponents claim it is generally cheaper, simpler and faster than litigation. Historically, arbitration’s speed and informality appealed to merchants. Upon judicial expansion of the FAA in the 1980s, companies began frequently incorporating mandatory arbitration in consumer and employee contracts. Arbitration is still useful today, especially in consumer-corporation interactions that are a short or one-time transaction.

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56 Mitsubishi Motors, 473 U.S. at 637 (stating “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum” the federal statute supporting a plaintiff’s claim will continue to serve its intended function); Meriwether, supra note 41, at 67 (quoting Mitsubishi Motors, 473 U.S. at 637). For other examples of limitations on arbitration taken by courts, see Drahozal, supra note 42, at 697–98 (including expensive arbitration fees, one-sidedness of the arbitral mechanism, statute of limitations shortening and other examples as instances when an arbitration clause may be invalidated by courts).

57 See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (requiring a “contrary congressional command” to override the FAA’s mandate); Horton, supra note 41, at 1034 (2012) (listing an “inherent conflict” with a federal statute as an instance where arbitration could be denied).

58 H.R. Rep. 97-542, 128 Cong. Rec. 765, 777 (“The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural . . . rules; it . . . is less disruptive of ongoing and future business dealings . . . it is often more flexible . . .”). Further, as James Henry writes:

Taken together, the seven features that follow make the arbitration process, in theory at least, a quicker, cheaper, and better alternative to adjudication: (1) priority of arbitration over lawsuits, (2) enforcement of an arbitrator’s award as if a judgment of a court, (3) nonappeability, (4) confidentiality, (5) time and place to suit the convenience of the parties, (6) informality of procedure, and (7) parties’ choice of arbitrator.

JAMES F. HENRY, THE MANAGER’S GUIDE TO RESOLVING DISPUTES 71 (1985). See also Philbin, supra note 6, at 38 (2011) (“Proponents have long claimed that arbitration is faster . . . , simpler . . . , and cheaper . . . than litigation.”); Cronin-Harris, supra note 6, 851 (1996) (discussing conversations at the Pound Convention, where ADR was discussed as a method of achieving justice in the courts efficiently and inexpensively).

59 See David Horton, supra note 41, at 1034 (2012) (describing arbitration’s “streamlined, informal” nature as useful for the in personam interactions between merchants). Arbitration also proved useful in probate matters, where less costly dispute resolution minimized collateral damage in will contests. Id. at 1036.

60 See e.g. Gerald Aksen, Assessing Arbitration Potential for Your Business, in CORPORATE DISPUTE MANAGEMENT 25 (1982) (encouraging businesses introduce arbitration requirements in a commercial relationship at the early stages, parties can lay the ground rules for dispute resolution).

61 See e.g. Justin P. Green, The Consumer-Redistributive Stance: A Perspective on Restoring Balance to Transactions Involving Consumer Standard-Form Contracts, 46 AKRON L. REV. 551, 556 (2013) (describing how large businesses engage in high volumes of small transactions and thereby devote in-house legal counsel resources to drafting the most economizing terms for the business). Some have argued that
However, arbitration has also evolved into something detrimental: for example, standard-form contracts trap consumers in non-negotiable arbitration clauses. Furthermore, little-to-no choice is provided for consumers in deciding the type of dispute resolution, arbitrators or forums. Critics of arbitration express concerns about arbitrators’ impartiality, confidentiality, the secrecy of arbitration and arbitration’s limitations on discovery. Arbitration is “losing its luster” among corporations as well: increased litigation over arbitration enforcement, the incorporation of trial-like procedures in arbitration and skepticism of due process under arbitration proceedings are making arbitration less cost-efficient for corporations.

_litigation can have adverse effects on the consumer as well; expensive discovery processes and forced preemptive settlements can lead to higher output costs on goods and services for consumers. See generally Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 91 (2001) (listing possible ways that arbitration results in cost-saving for consumers). Ware warns, however, that these cost-savings are mere speculations: there does not exist a publicly-available study proving that arbitration has in fact helped consumers in the long run. Id. at 91. But see Andrew A. Schwartz, Consumer Contract Exchanges and the Problem of Adhesion, 28 Yale J. on Reg. 313, 330 (2011) (describing how standard-form contracts “help reduce the incidence of scarcity and glut by providing insight into expected future market conditions”).

_Schmitz, supra note 43, at 628. Schmitz argues that these standard form contracts essentially allow companies to “privatize justice.” Id. Additionally, Drahozal lists three primary criticisms of binding arbitration clauses in consumer contracts: one, that they are mandatory; two, that arbitration is an unfair forum for consumers to vindicate legal rights; and three, that arbitration clauses are unfair as they limit forum selection and preclude recovery for damages and attorneys’ fees. Drahozal, supra note 42, at 697.

_HENRY, supra note 58, at 71–72 (asserting that professional arbitrators have an interest in being hired in the future; therefore they may subtly favor the party more likely to require arbitration again).

_NAT’L CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 5–8 (2004) [hereinafter CONSUMER ARBITRATION AGREEMENTS] (explaining the potential disadvantages to consumers when forgoing their right to a jury trial for arbitration); see also Cronin-Harris, supra note 6, at 856 (describing the lax rules of evidence and discovery in arbitration can make it a “trial by ambush”).


3. Severance of the Arbitration Clause

The Supreme Court has emphasized that pursuant to the FAA, arbitration is a matter of contract. Therefore, arbitration clauses should be enforced by courts upon their terms “save upon such grounds as exist at law or in equity for the revocation of any contract.” In addition, typical contract defenses have been applied to invalidate arbitration clauses, including unconscionability, fraud and duress. These defenses raise questions about what happens when courts invalidate an arbitration clause: if the contract is unenforceable, is the arbitration clause as well; if a portion of an arbitration clause is unenforceable, is the entire clause; and are courts permitted any severance?

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71 See Buckeye, 546 U.S. at 444 (identifying the two types of validity challenges to an arbitration agreement: one, a challenge to the contract as a whole; and two, specific challenge to the agreement to arbitrate).
72 For information on courts’ policies on severance in the instances of unconscionability prior to Rent-A-Center and other cases in this Note, see generally CONSUMER ARBITRATION AGREEMENTS, supra note 64, at 75–78 (2005) (describing different federal courts policies on dealing with unconscionable aspects of arbitration clauses). Courts have reasoned that because the “primary purpose” of the FAA is to ensure “that parties agreements to arbitration are enforced according to their terms.”... if an agreement to arbitrate can not be enforced according to its terms, a court should refuse to enforce it.” Id. at 75, quoting Volt Info., 489 U.S. at 479 (1989). Additionally, courts typically disfavor corporations who draft unenforceable adhesion contracts, and will “refuse to aid a party who has taken advantage of his dominant bargaining power.” Id.
Courts are generally split on whether an entire arbitration clause should be thrown out when it contains some “offending” parts.\textsuperscript{73} Some courts throw out the entire clause,\textsuperscript{74} some sever the offensive clause\textsuperscript{75} and others choose a middle ground.\textsuperscript{76} Recently, in \textit{Rent-A-Center v. Jackson},\textsuperscript{77} the Supreme Court supported the availability of severance by holding that an arbitration agreement is severable from an unconscionable employment agreement.\textsuperscript{78} The Court sought support in \textit{Prima Paint}, speculating that if the contractual challenge had been fraud in the inducement of the arbitration agreement, the court would

\begin{itemize}
\item \textsuperscript{73} \textit{Consumer Arbitration Agreements}, supra note 64, at 77 (detailing case law on how interdependent aspects of arbitration clauses are severed or not). \textit{Prima Paint} is considered the cornerstone of the severability (or separability) doctrine for arbitration clauses. \textit{See} Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding that a claim of fraudulent inducement on the contract was for the arbitrators to decide unless it was a direct challenge to a fraudulent arbitration agreement itself); Stipanowich, \textit{supra} note 70, at 344–45 (discussing \textit{Prima Paint} and its impact on separability). The issue was further discussed in \textit{Buckeye}. \textit{See} Buckeye, 546 U.S. at 447 (extending the severability doctrine to state courts); Stipanowich, \textit{supra} note 70, at 346–47 (explaining \textit{Buckeye}'s furtherance of the severability doctrine).
\item \textsuperscript{74} \textit{See e.g.} Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1248 (9th Cir. 1994) (eliminating an entire arbitration clause that was “highly integrated” throughout three different legal provisions); Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1059 (11th Cir. 1998) (determining invalidating entire arbitration clause precludes invalidating entire agreement, which is favorable to FAA policy); Torrance v. Aames Funding Corp., 242 F. Supp. 2d 862, 876 (D. Or. 2002) (invalidating an entire arbitration agreement because the agreement was deeply imbedded with unconscionability).
\item \textsuperscript{75} \textit{See e.g.} Fuller v. Pep Boys—Manny, Moe & Jack of Del., Inc., 88 F.Supp.2d 1158, 1162 (D. Colo. 2000) (permitting severance of a fee-splitting provision and ordering arbitration pursuant to the remaining contract); Jones v. Fujitsu Network Communications, Inc., 81 F.Supp.2d 688, 693 (N.D. Tex. 1999) (enforcing the remaining contract after severance of one clause); Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 85 (D.C. Cir. 2005) (declining to follow \textit{Graham Oil} because removing arbitration clause from “discrete remedial provision” was appropriate).
\item \textsuperscript{76} \textit{See, e.g.}, Armendariz v. Found. Health Pyschcare Services, Inc., 24 Cal.4th 83, 124 (2000) (allowing severance of the unlawful portions but invalidating the arbitration agreement because there was an “unlawful purpose” to forming the agreement); Little v. Auto Stiegler, Inc., 29 Cal.4th 1064, 1074–75 (Cal. 2003) (following \textit{Armendariz} and holding severance is not permitted when it would require court mandated reformation of the contract); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 896 (9th Circ. 2002) (denying severance when the objectionable provisions infiltrated the entire contract); Pitchford v. Oakwood Mobile Homes, 124 F.Supp.2d 958, 965–66 (W.D. Va. 2000) (distinguishing between “severance” and “blue penciling”); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 171 (5th Cir. 2004) (refusing to sever a clause from an agreement because the severance would require substantial re-drafting).
\item \textsuperscript{77} 130 S. Ct. 2772 (2010)
\item \textsuperscript{78} \textit{See id.} at 2778, quoting Buckeye Check Cashing v. Cardegna, 546 U.S. at 445. (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”)
have considered the validity of the arbitration agreement. Furthermore, the agreement to arbitrate will not be invalidated solely because aspects unrelated to arbitration are found to be unconscionable or invalid. If a party desires to challenge the validity of the arbitration clause, the challenges must be specific to the arbitration clause itself. Therefore, the Court’s opinion indicates that the validity of an arbitration agreement within a contract is evaluated separately and under the guidance of the FAA.

B. The Effective Vindication Doctrine

Despite Courts’ policy strongly enforcing arbitration agreement upon their terms, the Court created a narrow limitation to this policy in the effective vindication doctrine—or the “Doctrine.” The Doctrine was first introduced in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., where the Court held that “by agreeing to arbitrate a


80 Rent-a-Ctr., 130 S. Ct. at 2778 (“a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate”)

81 Rent-A-Center, 130 S. Ct. at 2779 (holding that unless a plaintiff directly challenges the arbitration agreement, it will be held valid under Section 2).

82 Id. at 2778 (interpreting Section 2’s saving clause to apply solely to the arbitration agreement, not the validity of the contract itself). The relevance of this section is elaborated on in the Analysis section of this note. See infra Part V.A.1. (arguing that the ability to sever the arbitration agreement from a contract makes it a distinct and separate entity from the class-action waiver in Italian Colors).

83 The majority and dissenting opinions in the Italian Colors decision disagree over whether this is the effective-vindication “rule” or “doctrine.” See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (referring to the Mitsubishi Motors statement as dicta); Brief for Petitioners at 18, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133) (same) [hereinafter Brief for Petitioners]; cf. Italian Colors, 133 S. Ct. at 2313 (Kagan J., dissenting) (calling the mechanism for protecting plaintiffs against “choking” arbitration agreements the “effective vindication rule”); David Garcia & Leo Casoria, Opinion Analysis: A Class Action Waiver in an Arbitration Agreement will be Strictly Enforced under the Federal Arbitration Act, SCOTUSBLOG (Jun. 21, 2013, 10:45 AM), http://www.scotusblog.com/2013/06/opinion-analysis-a-class-action-waiver-in-an-arbitration-agreement-will-be-strictly-enforced-under-the-federal-arbitration-act (noting the dissent’s use of the word “rule” instead of “doctrine”). This Note will continue to refer to the Mitsubishi Motors statement as a “doctrine,” but from a neutral standpoint, as the purpose of this Note is to argue the inapplicability of the Doctrine, not the (il)legitimacy of the rule/doctrine.

statutory claim, a party does not forgo the substantive rights afforded by the statute.”

The Doctrine was affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, where the Court asserted that the only limitation for arbitrating a federal statutory claim is that the party must be able to “effectively vindicate” the claim.

In *Green Tree Financial Corp.-Alabama v. Randolph*, the Court created an additional hurdle for a party seeking to invalidate an arbitration clause under the effective vindication doctrine. The United States Court of Appeals for the Eleventh Circuit decision held that because there was a risk of barring vindication of the plaintiff’s federal claim, the contract was unenforceable. The Supreme Court overruled this decision, and added a burden of proof that must be met: a party seeking to invalidate an agreement on grounds that arbitration would be prohibitively expensive bears the burden of proving the likelihood of incurring such costs.

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85 Id. at 628, 637; Meriwether, supra note 41, at 67. (“So long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to service both its remedial and deterrent function.”).
87 Id. at 28 (stating claims under the Age Discrimination in Employment Act are appropriate for the arbitral forum so long as the parties can effectively vindicate their rights under the *Mitsubishi Motors* doctrine); Meriwether, supra note 41, at n.5 (explaining *Gilmer*’s application of the Doctrine).
90 *Randolph*, 531 U.S. at 84 (detailing the Eleventh Circuit’s review and reversal of the district court’s decision granting Green Tree’s motion to compel arbitration); Malveaux, supra note 89, at 21 (“The Eleventh Circuit . . . conclude[ed] that the arbitration agreement was unenforceable because it failed to provide the minimum guarantees that Ms. Randolph could vindicate her statutory rights.”).
91 *Randolph*, 531 U.S. at 92 (“[W]e believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs”); Meriwether, supra note 41, at 69 (describing courts’ applications of the Doctrine to require more than a mere speculation that arbitration costs would be prohibitively expensive).
this burden because the record indicated that the supposed inhibitive costs to arbitrate were merely speculative.\textsuperscript{92}

Although the Court in \textit{Randolph} enforced the arbitration clause under the effective vindication doctrine,\textsuperscript{93} various appellate court decisions continued to apply the \textit{Randolph} standard to find such an arbitration clause invalid.\textsuperscript{94} For example, in \textit{Kristian v. Comcast Corp.},\textsuperscript{95} the First Circuit analyzed whether the parties could effectively vindicate their federal antitrust claim under the arbitration agreement when the agreement contained certain restrictions, including a class-arbitration waiver.\textsuperscript{96} The court invalidated the clause, holding that the class-arbitration waiver would threaten arbitration’s purpose as a “fair and adequate mechanism for enforcing statutory rights.”\textsuperscript{97}

\textsuperscript{92} \textit{Randolph}, 531 U.S. at 92 (finding Randolph did not meet the required burden of proof demonstrating arbitration fees would be prohibitively expensive); Michael A. Rosenhouse, \textit{Construction and Application of Federal Arbitration Act–Supreme Court Cases}, 28 A.L.R. Fed. 2d 1 (2008) (“[The Court] said that the record did not show that [Randolph] would bear such costs if she goes to arbitration.”).

\textsuperscript{93} \textit{Randolph}, 531 U.S. at 92 (holding the court of appeals erred in deciding the arbitration agreement was unenforceable); Rosenhouse, supra note 92 (“The court of appeals therefore erred in deciding that the arbitration agreement’s silence with respect to costs and fees rendered it unenforceable.”).

\textsuperscript{94} Meriwether, supra note 41, at 69 (observing how Courts of Appeals have followed “similar logic” to \textit{Randolph} and found arbitration clauses invalid for practical reasons including cost). \textit{See}, e.g., Blair v. Scott Specialty Gases, 283 F.3d 595, 607 (3d Cir. 2002) (remanding to allow claimant the opportunity to prove her inability to vindicate her statutory rights due to the costs of arbitration); Murray v. United Food & Commercial Workers Int’l Union, 289 F.3d 297, 303–04 (4th Cir. 2002) (finding the arbitration clause in an employment contract invalid under \textit{Randolph} because the agreement’s “one-sidedness” prevented employees from effectively vindicating their statutory rights); McCaskill v. SCI Mgmt. Corp., 298 F.3d 677, 680 (7th Cir. 2002) (invalidating an arbitration agreement denying the plaintiff recovery of attorneys’ fees).

\textsuperscript{95} 446 F.3d 25 (1st Cir. 2006).

\textsuperscript{96} \textit{Kristian}, 446 F.3d at 37 (outlining plaintiffs’ five arguments on how the arbitration agreement prevents them from effectively vindicating their rights); \textit{see generally} James E. McGuire & Bette J. Roth, \textit{Class Action Arbitrations: A First Circuit Update}, 52-APR B. B.J. 17, 18 (outlining the \textit{Kristian} analysis).

\textsuperscript{97} Id. at 54–55 (holding “because the denial of class arbitration in the pursuit of antitrust claims has the potential to prevent Plaintiffs from vindicating their statutory rights” the arbitration agreement with a class-action ban was unenforceable); Kenyon D. Harbison, \textit{Are Contingent-Fee Attorneys Deterred? How Courts Can More Effectively Police Adhesive Arbitration Agreements}, 7 APPALACHIAN J.L. 207, 285 (2008) (stating how \textit{Kristian} applied the statutory vindication analysis to invalidate a class action waiver).
Courts presume that an arbitration forum will sufficiently serve the congressional purpose behind a particular federal statute. Therefore, the effective vindication doctrine exists to ensure the purpose of a federal statute is upheld when an arbitration forum threatens to prevent a plaintiff from effectively vindicating her rights.

C. A Recent History on Class Actions

Scholarly criticisms of class actions exploded in the recent decades. Judicial response created two major impediments to class actions: aggressive decertification that prevents class actions from forming; and, most relevant to this Note, the enforcement of contractual class-action waivers that affect consumers and employment contracts.

Recent Supreme Court cases are preventing class actions at the certification stages. For example, in Wal-Mart Stores, Inc. v. Dukes, the Supreme Court

98 See, CONSUMER ARBITRATION AGREEMENTS, supra note 64, at 90 (stating federal claims will be subject to mandatory arbitration “out of the belief that arbitration will serve the purposes of the particular statute as well as a court proceeding.”).

99 Id. at 106. See also Brief for Respondents at 2, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133) (referencing Randolph as a basis for “harmonizing” the antitrust and FAA federal statutes) [hereinafter Brief for Respondents].

100 See Gilles, supra note 8, at 373–75 (listing the types of class action oppositions, including the doctrinal, moralist and law and economics standpoints); see, e.g., Drahozal, supra note 42, at 754 (“In practice, however, class actions too often may not achieve their theoretical benefits.”).

101 Robert H. Klonoff, The Decline of Class Actions, 90 WASH. U.L. REV. 729, 746–47 (2013) (observing that although Rule 23(a) and (b) have not changed substantially since 1966, case law indicates courts have become “increasingly skeptical” to certify a class under its requirements). See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) (emphasizing class certification requires a “rigorous” analysis of Rule 23); Livingston v. Associates Fin., Inc., 339 F.3d 553, 558 (7th Cir. 2003) (“[C]lass certification requires a rigorous investigation into the propriety of proceeding as a class . . .”); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) (requiring more than a mere “threshold showing” to certify a class).

102 Gilles, supra note 8, at 375 (prophesizing the extinction of class actions due in part to the rise of class-action waivers).

103 See Klonoff, supra note 101, at 731 (arguing that aggressive certification prevention efforts have led courts to evaluate certification at “virtually every element” of the process). Anderson & Trask describe the certification stage in a class action as the “main event.” BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK 148 (2d ed., 2012); see also Klonoff, supra note 101, at 746 (calling class certification the “defining moment” in the class action litigation). In order to certify a class, plaintiffs’ attorney must show: an adequate number of plaintiffs, a common and typical injury among plaintiffs, that the attorney will be an adequate representative of the purported class, that the class action is the superior method of resolving the controversy, and most challengingly, predominance, i.e. that the common issue among plaintiffs would predominantly be resolved by the suit. See FED R. CIV. P. 23 (including the mentioned
overruled the Ninth Circuit’s decision permitting certification of a sex discrimination case brought by 1.5 million women because the class did not satisfy Federal Rule of Civil Procedure (“Rule”) 23(a)’s commonality requirement.\textsuperscript{105} Similarly, in \textit{Comcast Corp. v. Behrend},\textsuperscript{106} the Court held that the district court’s class certification of over 2 million plaintiffs was improper because plaintiffs failed to show that damages could be measured on a class-wide basis.\textsuperscript{107} The \textit{Behrend} holding confirmed other Supreme Court rulings requiring district courts to rigorously analyze the predominance requirement of Rule 23(b)(3).\textsuperscript{108}

The second bar to class actions, class-action waivers, was popularized in the 1990s when trade-journal articles began to recommend that corporate contract drafters

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\textsuperscript{104} 131 S. Ct. 2541 (2011).
\textsuperscript{105} \textit{Id.} at 2552 (finding it would be impossible for all plaintiffs to commonly answer the crucial question of why they were disfavored); see Mollie A. Murphy, \textit{Rule 23(b) After Wal-Mart: (Re) Considering A “Unitary” Standard}, 64 BAYLOR L. REV. 721, 757 (2012) (noting that the bulk of the Court’s opinion focused on the commonality issue); Klonoff, \textit{supra} note 101, at 774 (describing the holding in \textit{Dukes} as giving “new meaning to commonality” although courts had infrequently scrutinized commonality before). Rule 23(a)’s commonality rule requires a plaintiff to prove “there are questions of law or fact common to the class” for class certification. \textit{Fed. R. Civ. P.} 23(a)(2).
\textsuperscript{106} 133 S. Ct. 1426 (2013).
\textsuperscript{107} \textit{Id.} at 1432–433 (holding the plaintiffs’ claim was improperly certified under Rule 23(b)(3) because the plaintiffs’ expert was unable to measure damages on a classwide basis); Jason M. Halper & Ryan J. Andreoli, \textit{Class-Action Issues in the Supreme Court: Comcast Corp. v. Behrend}, 34-4 CLASS ACTION REP. ART 1 (2013) (describing the Court’s opinion as deciding the plaintiffs failed to establish that damages could be measured on a classwide basis).
\textsuperscript{108} \textit{See Fed. R. Civ. P.} 23(b)(3) (“A class action may be maintained if … the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members…”); Halper & Andreoli, \textit{supra} note 107 (speculating that the “rigorous analysis” affirmed by the Court in relation to the predominance requirement could make it more expensive and difficult for plaintiffs to certify a class action); Klonoff, \textit{supra} note 101, at 753 (claiming \textit{Comcast} sends a message to lower courts to be skeptical to class actions and rigorous in evaluating expert testimony). The Court used its opinion in \textit{Dukes} for guidance in making its decision. \textit{Comcast}, 133 S. Ct. at 1432 (citing \textit{Dukes}, 131 S. Ct. at 2551–552).
insert a class action waiver or group arbitration waivers. In 1999, the waiver trend accelerated when the National Arbitration Forum (“NAF”) released materials cautioning corporate lawyers to insulate their clients from Y2K class action liability through class-action waivers. Since then, larger corporations have expanded their use of arbitration clauses with class-action waiver provisions in adhesion contracts with consumers.

Despite these contract clauses, many of the companies imposing mandatory arbitration agreements have found themselves in putative class actions. This is due to the fact that many appellate courts and state supreme courts have found these waivers to be unconscionable, determining that class actions waivers are substantially one-sided against consumers and “would have the practical effect of providing Defendants immunity.” However, some courts have also rejected the argument that a class-action

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109 Gilles, supra note 8, at 396 (recounting the birth of the collective-action waiver and its origins in a trade-journal article). However, class-action waivers may have been employed by businesses much earlier, see Laetitia L. Cheltenham, The Consumer Financial Protection Bureau and Class Action Waivers After AT&T v. Concepcion, 16 N.C. BANKING INST. 273, 280 (2012) (indicating that businesses have been employing class-action waivers in contracts since World War II).

110 Gilles, supra note 8, at 398 (2005) (detailing the “brain trust” development of class-action waivers by lawyers and business executives in the credit card industry). Seemingly foreshadowing Italian Colors, Gilles specifically references Amex as an immediate responder to this NAF pitch. Id. According to Gilles, Amex sent notice to approximately two million small merchant Amex service providers requiring agreements to include arbitration provisions with express class-action waivers. Id.; see Amex I, 554 F.3d 300, 306 (2nd Cir. 2009) (stating that since 1999 the Amex agreements have contained the mandatory arbitration clause).

111 See Klonoff, supra note 101, at 816 (describing how companies are now including arbitration clauses barring class action litigation and arbitration in a “variety of contexts”). For an example of these types of clauses, see e.g. Sample Preventative Maintenance Services Agreement, at https://www.ahspm.com/pm/pdf/All%20States%20Sample%20Preventative%20Maintenance%20Services %20Agreement%20012113.pdf (containing mandatory arbitration and class action waiver clauses in an agreement with American Home Shield).

112 Gilles, supra note 8, at 399–406 (explaining how “first-wave” challenges to class-action waivers have resulted in class actions against corporations employing the waivers in agreements).

113 See Ting. v. AT&T, 319 F.2d 1126, 1150 (9th Cir.) (discussing how because AT&T is unlikely to bring a class action against its customers, the waiver does not meet the “bilateral” benefit required under California law); see also CONSUMER ARBITRATION AGREEMENTS, supra note 64, at 72 (summarizing Ting as turning on the fact that the class-action waiver was one-sided and therefore substantially unconscionable and disfavored only consumers).

114 Jenkins v. First Am. Cash Advance of Ga., 313 F. Supp. 2d 1370, 1375 (S.D. Ga. 2003); CONSUMER ARBITRATION AGREEMENTS, supra note 64, at 73 (quoting Jenkins, 313 F. Supp. 2d at 1375); see also
waiver itself renders an arbitration agreement unconscionable. This rejection is supported by courts’ reluctance to recognize a right to bring class actions. Generally, case law on class-action waivers prior to Italian Colors was conflicting.

D. An Overview of Class Arbitration

1. The Rise of Class Arbitration

Southland Corp. v. Keating provides one of the earliest instances of Supreme Court review of class-action arbitration. Although the Supreme Court did not address the issue on whether the FAA precludes class action arbitration, defendant Southland presented important arguments to both the California Court of Appeals and the Supreme Court on how class arbitration violates due process. This argument was popular for

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115 CONSUMER ARBITRATION AGREEMENTS, supra note 64, at 73 (stating some courts have rejected the notion that a class-action waiver alone renders the arbitration clause unconscionable). See e.g. Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002) (rejecting the argument that parties’ Arbitration Agreement is unconscionable because of there is no available class action vehicle because plaintiffs may recover attorneys’ fees under the RICO statute and the Agreement); Taylor v. Citibank USA, 292 F. Supp. 2d 1333, 1345 (M.D. Ala. 2003) (determining that because the class-action waiver does not limit plaintiffs’ rights to attorneys’ fees the clause is not unconscionable); Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) (holding the surrender of the class action “right” is not unconscionable alone when it was clearly articulated in the arbitration agreement).

116 CONSUMER ARBITRATION AGREEMENTS, supra note 64, at 73–74 (observing courts’ general reluctance to acknowledge a right to bring class actions, even when the statute the claims fall under expressly provides for class actions). See, e.g., Johnson v. W. Suburban Bank, 225 F.3d 366 (3d Cir. 2000) (holding that although the Truth in Lending Action (TLA) includes statutory provisions for class actions, this does not create a “right” to such procedures); Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1338 (11th Cir. 2000) (following Johnson and extending its application to deny a “non-waivable right” to class actions). See also Livingston v. Associates Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003) (remanding the case on the issue of the class action waiver because “a decision to certify a class should not be made based solely on the arguments of one party”).

117 See Stipanowich, supra note 70, at 336 (describing the case law on substantive unconscionability of class action waivers to be “conflicting”).


119 Southland, 465 U.S. at 17 (declaring a decision on whether the FAA precludes class action arbitration would be inappropriate in the instance of the case).

120 Id. 8–9 (summarizing Southland’s argument that neither case nor California state law authorized arbitrators to govern class proceedings). Southland’s important impact was holding the FAA was
businesses that argued arbitration clauses in standard-form contracts automatically prevent consumers from asserting class-action procedures in the arbitral forum.\textsuperscript{121}  

It wasn’t until \textit{Green Tree Financial Corp. v. Bazzle} that the Supreme Court officially addressed the arbitration-class proceedings relationship.\textsuperscript{122}  In \textit{Bazzle}, the plurality opinion held that where a contract is silent on classwide arbitration, the arbitrator may decide whether class arbitration was consented to by the parties and whether to certify the class.\textsuperscript{123}  Despite \textit{Bazzle}’s fragmented opinion, the ruling solved an important outstanding issues: that the FAA does not presumptively prohibit class proceedings in arbitration.\textsuperscript{124}  

2. Recent Opinions on Class Arbitration Waivers

Two recent Supreme Court cases addressed class arbitration waivers: \textit{Stolt-Nielsen v. AnimalFeeds Int’l Corp.},\textsuperscript{125}  and \textit{AT&T Mobility v. Concepcion}.\textsuperscript{126}  \textit{Stolt-Nielsen} and \textit{Concepcion} are significant for three reasons: first, they further the body of substantive case law interpreting the FAA in the recent decades;\textsuperscript{127}  second, they further

\begin{footnotesize}
\textsuperscript{121} \textit{CONSUMER ARBITRATION AGREEMENTS}, supra note 64, at 144 (explaining businesses’ “aggressive” argument that binding arbitration automatically precludes class arbitration). This likely spurred the use of class-action waivers in arbitration clauses.

\textsuperscript{122} 539 U.S. 444 (2003). \textit{See} Jay W. Waks \& Carlos L. Lopez, \textit{Stolt-Nielsen, Silence and Class Arbitration: “Same As It Ever Was”}, 29 ALTERNATIVES TO HIGH COST LITIG. 193, 193 (2011) (stating the \textit{Bazzle} Court was the first to address the class arbitration ambiguity \textit{CONSUMER ARBITRATION AGREEMENTS}, supra note 64, at 145 (summarizing the opinion in \textit{Bazzle} as the seminal opinion addressing class arbitration); Strong, supra note 118, at 206 (referring to \textit{Bazzle} as the first case to provide Court approval of class arbitration).

\textsuperscript{123} \textit{Bazzle}, 539 U.S. at 451 (“Under the terms of the parties’ contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.”). \textit{See also} Randall D. Quarles, \textit{Courts Disagree: Is Arbitration A “Class” Act?}, 68 ALA. L. REV. 476, 477 (2007) (explaining the \textit{Bazzle} holding).

\textsuperscript{124} \textit{CONSUMER ARBITRATION AGREEMENTS}, supra note 64, at 145 (describing how the \textit{Bazzle} opinion is helpful for consumers, such as how it rejects corporations’ arguments that arbitration agreements presumptively prohibit class proceedings).

\textsuperscript{125} 559 U.S. 662 (2010).

\textsuperscript{126} 131 S. Ct. 1740 (2011).

\textsuperscript{127} \textit{See} Stipanovich, supra note 70, at 333 (observing the majority opinion’s application of the “the body of substantive law of arbitrability that has grown up around the FAA in the last quarter-century”).
\end{footnotesize}
the Court’s apparent dislike for class actions;\(^{128}\) and third, they set the stage for the *Italian Colors* opinion that followed shortly thereafter.\(^{129}\)

First, in *Stolt-Nielsen*, the Court analyzed whether an arbitration clause that was silent on class arbitration indicated the clause allowed class arbitration.\(^{130}\) In its analysis, the Supreme Court emphasized that there is a “fundamental rule” that holds “arbitration is a matter of consent, not coercion.”\(^{131}\) The Court held that a party cannot be compelled to participate in class arbitration unless there is an express contractual basis demonstrating the parties agreed to do so.\(^{132}\) This is because “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”\(^{133}\)

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\(^{128}\) See *id.* at 337 (describing *Stolt-Nielsen* as laying the “siege lines” against unconscionability and class-action waivers); AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (expressing concern that class actions pressure defendants into settling questionable questions).

\(^{129}\) See infra Part IV.A.2. (explaining why the majority opinion was justified in light of *Stolt-Nielsen* and *Concepcion*).


\(^{131}\) *Stolt-Nielsen*, 559 U.S. at 681; see also Stipanovich, *supra* note 70, at 333 (explaining the Court’s reliance on the “contractual foundation of arbitration”). For further support, the Court cited Volt Info. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (“Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”).

\(^{132}\) *Stolt-Nielsen*, 599 U.S. at 684 (finding the arbitrator’s decision that silence meant the parties did not agree to preclude arbitration “fundamentally at war” with foundational FAA principles). See Stipanovich, *supra* note 70, at 333 (stating the majority opinion found, as a matter of federal law, that the dispute cannot be resolved under class arbitration when there has been “no agreement” on the matter); Sullivan & Glynn, *supra* note 45, at 1037 (interpreting the holding in *Stolt-Nielsen* to mean the arbitrators who had imposed class arbitration on shipping companies exceeded their power).

\(^{133}\) *Stolt-Nielsen*, 599 U.S. at 685; see Stipanovich, *supra* note 70, at 333 (quoting *Stolt-Nielsen*, 599 U.S. at 685).
striking differences between class arbitration and bilateral arbitration supported the assertion that the parties could not be compelled to participate in class arbitration.\textsuperscript{134}

Subsequently, in \textit{AT&T Mobility v. Concepcion}, the Supreme Court addressed whether federal law preempts California case law finding class-action waivers unconscionable and therefore invalid.\textsuperscript{135} The Court first held that when in conflict, the FAA displaces the state law.\textsuperscript{136} The Court thus proceeded to analyze the issue under federal law, not state law unconscionability rules.\textsuperscript{137} Similar to \textit{Stolt-Nielsen}, the Court reiterated arbitration is a matter of contract, and thus the discretion parties made in deciding arbitration procedures will be upheld.\textsuperscript{138} The court reasoned, “requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration . . . inconsistent with the FAA.”\textsuperscript{139}

\textsuperscript{134} \textit{Stolt-Nielsen}, 599 U.S. at 687. For more detail on these differences, see generally Stipanowich, \supra note 70, at 333 (elaborating on the ways in which class arbitration changes arbitration, including how the arbitrator must resolve many disputes, how the presumption of privacy is lost, how the arbitrator’s award affects the rights of absent parties and how the commercial stakes are particularly high and thus not suited for arbitration).

\textsuperscript{135} \textit{Id.} at 1746 (examining California law on unconscionability and class action waiver policy). The Ninth Circuit held that the FAA does not expressly or impliedly preempt California law. Laster v. AT&T Mobility LLC, 584 F.3d 849, 857–59 (9th Cir. 2009). The California law is referred to as the “Discover Bank rule”, which classifies consumer class-action waivers as unconscionable. Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005). \textit{See also} Philip J. Loree Jr., \textit{More FAA: Why AT&T Mobility Makes Sense and Why It Likely Isn’t the End of Class Arbitration}, 29 ALTERNATIVES TO HIGH COST LITIG. 145, 150 (2011) (explaining the issue in \textit{Concepcion} and the Court’s consideration of the \textit{Discover Bank} rule).

\textsuperscript{136} \textit{AT&T Mobility L.L.C. v. Concepcion}, 131 S. Ct. 1740, 1747 (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA”); Sullivan & Glynn, \textit{supra} note 45, at 1037 (interpreting \textit{Concepcion} as holding the FAA preempted California state law). \textit{See also} Stipanowich, \textit{supra} note 70, at 375–76 (explaining the majority’s “sweeping” opinion “aimed straight at the heard of the doctrine of unconscionability,” and holding that any discriminatory state laws against arbitration agreements are preempted by the FAA).

\textsuperscript{137} \textit{Concepcion}, 131 S. Ct. at 1748 (beginning an analysis of the FAA’s purpose and policy after determining that the FAA preempts state law).

\textsuperscript{138} \textit{Concepcion}, 131 S. Ct. at 1748 (interpreting Section 2 to encourage rigorous enforcement of contracts to their terms to “facilitate streamlined proceedings”); \textit{see} Stipanowich, \textit{supra} note 70, at 376 (“Scalia portrays the central policy of the FAA as enforcing the arbitration agreements as written.”).

\textsuperscript{139} \textit{Concepcion}, 131 S. Ct. at 1748; Stipanowich, \textit{supra} note 70, at 376–77 (examining the majority opinion’s critique of the \textit{Discover Bank} rule and how it interferes with the fundamental attributes of arbitration law and purpose).
Most notable in these cases are the Court’s commentaries on class arbitration.\(^{140}\) The Court’s opinions demonstrate its view that class arbitration is complex and thus cannot be compelled without express consent.\(^{141}\) The Court further affirms that because bilateral arbitration is typically informal, class arbitration “sacrifices” the informal advantages of arbitration because class procedures are inherently more costly and time consuming.\(^{142}\) Classwide arbitration also requires heightened formalities because an arbitrator must determine class certification before evaluating the merits of the claim.\(^{143}\)

### III. DISCUSSION

This Part details the factual background of *Italian Colors*, including the nature of, and the circumstances that gave rise to the plaintiffs’ claims.\(^{144}\) Next, this Part recounts a

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140 See *e.g.* *Stolt-Nielsen*, 599 U.S. at 685–86 (observing the potential benefits of class arbitration are “much less assured”); *Concepcion*, 131 S. Ct. at 1752 (“Arbitration is poorly suited to the higher stakes of class litigation.”).

141 See *Stolt-Nielsen*, 599 U.S. at 685–86 (reasoning that since the benefits of class arbitration are much less assured, a court cannot assume the existence of parties’ mutual consent to engage in class arbitration). Further:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. *Concepcion*, 131 S. Ct. at 1750. See also, *Stipanowich*, supra note 70, at 377 (describing Scalia’s application of *Stolt-Nielsen* to *Concepcion*, where *Stolt-Nielsen*’s opinion was also supported by the fundamental differences between bilateral and classwide arbitration).

142 See *Stolt-Nielsen*, 599 U.S. at 686 (observing how class arbitration requires the arbitral panel to undergo more challenging dispute resolution, deciding cases involving hundreds or thousands of parties); *Concepcion*, 131 S. Ct. at 1751 (“the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”); see *Stipanowich*, supra note 70, at 377 (listing *Concepcion*’s majority opinion’s three fundamental differences between bilateral and classwide arbitration: one, that the classwide shift sacrifices the fundamental advantages of arbitration as speedy and inexpensive dispute resolution; two, classwide arbitration requires additional procedural formalities; and three, classwide arbitration potentially create enhanced risk to corporate defendants in high-staked cases); Sullivan & Glynn, *supra* note 45, at 1036–37 (2013) (“[T]he Court emphasized that class arbitration sacrifices the principal benefits of private dispute resolution.”).

143 See *Concepcion*, 131 S. Ct. at 1751 (arguing class procedures required heightened formality to justify binding otherwise absent parties in the judgment). The Court also fears class arbitration sacrifices the “presumption of privacy and formality” that is one of the intended purposes of arbitration. *Stolt-Nielsen*, 599 U.S. at 686.

144 See *infra* Part III.A. (explaining the circumstances that gave rise to the suit against Amex)
detailed procedural history of the case before it reached the Supreme Court. Finally, this Part analyzes the opinions in the final *Italian Colors* decision by discussing the arguments in the parties’ briefs and the majority, concurring and dissenting opinions.

A. Factual Background

The relevant events of *Italian Colors* began with an agreement between small business merchants contracting with American Express for charge and credit card services. Defendant Amex is one of the leading issuers of charge and credit cards for consumers. It also provides charge or credit card services to merchants. The plaintiffs are small merchants incorporated in California and New York (the “Merchants”) who contracted with Amex for charge or credit card services.

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145 See infra Part III.B. (detailing the procedural history through the Amex’s in the Second Circuit leading up to the final Supreme Court decision).
146 See infra Part III.C. (summarizing the arguments for both sides, the majority opinion, concurring opinion and dissenting opinion).
147 Thus far, this Note has addressed issues concerning “consumers” in arbitration and class action contexts. See supra Part II. (providing brief summary of arbitration, the effective vindication doctrine, class actions, class-action waivers and class arbitration and their impact on consumer-corporation relationships). Although plaintiffs in *Italian Colors* consist of business owners, the contrast between Amex’s status as a multinational corporation versus the small business owners is comparable to a consumer-corporation relationship, and will be treated as such throughout this Note. See also Amex I, 554 F.3d 300, 321 (2d. Cir. 2009) (concluding that the court’s decision does not rely on the fact that these are “small” merchants). The small business-consumer distinction is only relevant in predicting further applications of the *Italian Colors* decision, see infra text accompanying note 317 (suggesting that the *Italian Colors* decision may be distinguished in future cases because it involved small businesses rather than regular consumers).
149 See Amex I, 554 F.3d at 305 (“[Amex] is also the leading provider of charge card services to merchants.”); Complaint, supra note 148, at 1 (“[Amex] is also the leading provider of payment card transaction acquiring services to merchants.”).
150 See Amex I, 554 F.3d at 305 (naming the parties as “California and New York corporations which operate businesses which have contracted with Amex”); Samuel E. Buffaloe, *Sweet Vindication: The Second Circuit Strikes A Blow to Companies That Use Class-Action Waivers in Arbitration Agreements to
Traditionally, Amex offered charge cards only to affluent corporations and consumers. Merchants offering these charge card services paid higher fees to Amex, but this was offset by the fact that charge card users typically spent more money than other customers. In recent years, however, Amex created new credit card products, expanding its market to college students, young adults and other purchasers less likely to conduct high per-transaction spending typical to traditional Amex charge card holders. Despite the introduction of these new products, the high rates of charge card services remained the same under the contract and, as a result, merchants were burdened

Avoid the Law, 2010 J. DISP. RESOL. 175, n.9 (2010) (“The plaintiffs in the suit included California and New York corporations that operated businesses that have contracted with Amex.”).

In order to understand the Merchants’ allegations, the distinction between “charge cards” and “credit cards” must be explained. In re American Express Merchants Litig., 2006 WL 662341, at *1 n. 6 (prefacing the court’s decision with a discussion of “charge cards” versus “credit cards”). “The credit card is a method of financing purchases, while the charge card is a method of payment.” Amex I, 554 F.3d at 307, citing In re Am. Express Merchants Litig., 2006 WL 662341, at *1 n. 6; see also Arbitration/antitrust, 25-10 BUS. TORTS REP. 282, 282 (2013) (“A charge card requires its holder to pay the full outstanding balance of the card at the end of a billing cycle; a credit card requires payment of only a portion, with the balance subject to a set interest rate.”).

See Amex I, 554 F.3d at 307 (stating Amex typically centered its business on accepting charge cards used by affluent customers and corporate clients who were more likely to spend more per purchase); Buffaloe, supra note 150, at 176 (same).

When a customer uses an Amex card at one of the Merchants’ restaurants, Amex later reimburses the customer but deducts a “merchant discount fee.” Complaint, supra note 148, at 6. This same fee is charged across “all Amex-branded Personal Charge, Corporate, Small Business and personal credit cards.” Id. at 6–7. Allegedly, this fee was 2.7% of the amount of each transaction for all types of Amex cards, whereas competing card companies Visa and MasterCard have an average fee of 2%. Id. at 7.

See Amex I, 554 F.3d at 307 (describing a holder of an Amex charge card an attractive customer because of his affluence status); Buffaloe, supra note 150, at 176 (same). See also Complaint, supra note 148, at 11 (indicating that some merchants believed the cards attract “incremental customers” or generate “larger purchases”). The Second Circuit acknowledged that Amex is “certainly not unaware of this attraction” which is what allowed Amex to get away with charging higher fees for services. Amex I, 554 F.3d at 307.

Amex I, 554 F.3d at 308 (detailing Amex’s recent emergence in the credit card market); Buffaloe, supra note 150, at 176 (describing plaintiffs’ resentment to Amex’s higher fees because cards were issued to those “who perhaps did not justify the higher fees charged by Amex.”). In the past couple of decades, Amex has shown signs of making its cards more accessible. See Complaint, supra note 148, at 8 (describing the launch of Blue and the Costco card as Amex’s emergence in the standard consumer credit card market). In a recent instance as well, Amex partnered with other banks to issue credit cards with Amex’s logo. See Wells Fargo and American Express Join Forces on Credit Cards, WALL ST. J., Aug. 7, 2013, available at http://blogs.wsj.com/moneybeat/2013/08/07/wells-fargo-and-american-express-join-forces-on-credit-cards. This action, however, allegedly furthered Amex’s tying arrangement. See Brief and Special Appendix for Plaintiffs-Appellants at 5, In re Am. Express Merchs. Litig. 2006 WL 662341 (S.D.N.Y.) (No. 06-187-CV) 2006 WL 6198567 (“American Express has commenced soliciting banks to issue Amex-branded revolving credit cards. . . . [And s]ooring the banks with fees that significantly exceed those paid to issuing banks in connection with Visa and MasterCard transactions.”).
with heavy costs for offering Amex services.\textsuperscript{156} The Merchants had no option to limit the Amex services to only charge cards because the original agreement with Amex required the merchants to “Honor All Cards.”\textsuperscript{157} Therefore, because the Merchants were required to accept credit cards not originally agreed to when they contracted with Amex, the Merchants alleged Amex created an illegal “tying arrangement” in violation of the Sherman Act.\textsuperscript{158}

The Card Acceptance Agreement (“Agreement”) between Amex and the Merchants in \textit{Italian Colors} is a standard-form contract issued by Amex for merchants offering Amex services.\textsuperscript{159} The text of the relevant portion of Agreement states:

\textbf{IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY AS A MEMBER OR ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR’S DECISION WILL BE FINAL AND BINDING . . . THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS . . . FURTHERMORE, CLAIMS BROUGHT BY OR AGAINST A SERVICE ESTABLISHMENT MAY NOT BE JOINED OR CONSOLIDATED IN}

\textsuperscript{156} Amex I, 554 F.3d at 308 (detailing the Merchants’ situation and how they were forced to pay the costly merchant discount fee, or lose customers that are typical Amex card users, losing business and money regardless); Complaint, supra note 148, at 13 (stating the merchants are paying more for the bundled services than they do for the same services of competitors). And these costs trickle down to harm to the consumers as well. See id. (“As merchants pass these costs along, prices rise and consumers are injured.”).

\textsuperscript{157} Amex I, 554 F.3d at 308 (describing the “Honor all Cards” provision as an element of Amex’s compulsion to overcharge plaintiffs); Buffaloe, supra note 150, at 176 (“Due to the nature of the agreement between the merchants and Amex, the plaintiffs were compelled to honor all cards issued by Amex and to pay the same high fees for each purchase”); Complaint, supra note 148, at 10 (stating the Agreement required merchants to accept all cards bearing Amex’s trademarked logo); Zachary M. Sugarman, \textit{In Re American Express Merchants’ Litigation}, 27 OHIO ST. J. ON DISP. RESOL. 711, 712 (2012) (claiming the Merchants’ “substantive dispute” with Amex was over the “Honor All Cards” provision).

\textsuperscript{158} 15 U.S.C. § 1 (2004). A “tying arrangement” is when a seller of goods or services with more economic control than the buyer supplies a good or service on the condition that the buyer purchase or lease an additional product. 2 CALLMANN ON UNFAIR COMP., TR. & MONO. § 10:18 (4th Ed.).

\textsuperscript{159} Amex I, 554 F.3d at 305 (“The Card Acceptance Agreement is a standard form contract issued by Amex”); Complaint, supra note 148, at 10 (referring to the “Agreement For American Express Card Acceptance” as “standard form”). It can be terminated or altered at any time by either party sending a written notice. Amex I, 554 F.3d at 305 (quoting the Agreement’s terms of termination).
THE ARBITRATION WITH CLAIMS BROUGHT BY OR AGAINST ANY OTHER SERVICE ESTABLISHMENT(S), UNLESS OTHERWISE AGREED TO IN WRITING BY ALL PARTIES.\(^{160}\)

Problems of expensive arbitral discovery coupled with minimal potential recovery made bilateral arbitration unrealistic for any one of the Merchants trying to bring a claim for antitrust violation against Amex under this Agreement.\(^{161}\) The plaintiffs collectively provided an affidavit by an expert\(^{162}\) predicting about $38,549 in maximum damages for plaintiffs, even once trebled under the Clayton Act.\(^{163}\) According to the expert, proving the claim is so complex that it requires extensive expert work.\(^{164}\)

B. Procedural History: The Amex’s

Litigation began in the District Court for the Southern District of New York when Italian Colors and other merchants from California and New York brought suit against Amex for the tying arrangement.\(^{165}\) In response, Amex filed a motion to compel

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\(^{160}\) Amex I, 554 F.3d. at 306–307 (including the above quoted portion of the Agreement); Gilles, supra note 8, at n.127 (same).

\(^{161}\) In re Am. Express Merchs. Litig., 2006 WL 662341, *4 (stating plaintiffs’ discovery costs would be hundred thousands of dollars, with average recovery $5,000 in damages); Buffaloe, supra note 150, at 176–77 (“[T]he costs associated with bringing a lawsuit would far outweigh the potential reward.”).

\(^{162}\) This expert is Dr. Gary L. French with Nathan Associates Inc., expert economist in litigation and regulatory proceedings. Amex I, 554 F.3d at 316; see also Dr. French’s online biography, available at http://www.nathaninc.com/company/staff/gary-l-french (last visited October 4, 2013).

\(^{163}\) Amex I, 554 F.3d. at 317 (quoting the expert Dr. French’s calculations from his affidavit); Buffaloe, supra note 150, at n.18 (referencing the expert’s range of costs from hundreds of thousands of dollars to one million dollars); Arbitration/antitrust, supra note 151, at 283 (characterizing the experts report as describing litigation to be “economically impossible”).

\(^{164}\) Amex I, 554 F.3d. at 316 (quoting the expert’s affidavit describing an antitrust economic study as “complex” because it requires lengthy determinations of various complex issues), Buffaloe, supra note 150, at n.92 (quoting the experts description of economic analytic “intensity” in an antitrust study). The expert declared “it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation.” Amex I, 554 F.3d at 316. The opinion in Amex I lists determinations of what an expert would make in proving plaintiffs’ claim, including evaluations of the relevant tied market products, whether defendant exercise monopoly power in the tying product market and in making the arrangement and what the merchants fees would have been but for the tying agreement. Id.

\(^{165}\) In re Am. Express Merchs. Litig., 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006) (listing the plaintiffs in the consolidated case to include New York merchants, the National Supermarket Association and California merchants).
arbitration pursuant to the Agreement.\textsuperscript{166} The district court considered the Court mandated favoring of arbitration and the fact that the Agreement was “paradigmatically broad,” to determine the arbitration clause should be upheld.\textsuperscript{167} The court further decided that plaintiffs did not present enough evidence to demonstrate that litigation would be less costly than arbitration.\textsuperscript{168} As a result, the district court granted Amex’s motion to compel arbitration.\textsuperscript{169}

The Merchants appealed to the Second Circuit Court of Appeals in \textit{Amex I}.\textsuperscript{170} The court addressed whether the class-action waiver was enforceable, beginning with a brief choice of law analysis to determine the issue fell under federal law.\textsuperscript{171} Then the court addressed the effective vindication doctrine and its place as “part of the body of general substantive law of arbitration.”\textsuperscript{172} Reversing the district court, the Second Circuit held the plaintiffs sufficiently met the burden of proof required by the Supreme Court’s ruling in \textit{Randolph} by demonstrating that they had no means of bringing suit because of

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\textsuperscript{166} In re Am. Express Merchs. Litig., 2006 WL 662341, at *1 (“American Express . . . move[s] to compel arbitration of plaintiffs’ claims and to dismiss these related actions consolidated for pretrial purposes or stay them pending arbitration”).
\textsuperscript{167} In re Am. Express Merchs. Litig., 2006 WL 662341, at *4 (“The arbitration provision in the merchant plaintiffs’ card acceptance agreements is also a paradigmatically broad clause, thereby justifying a presumption of arbitrability.”); Sugarman, supra note 157, at 713 (interpreting the “paradigmatically broad” agreement to indicate the court found it applied to the dispute between the parties).
\textsuperscript{168} In re Am. Express Merchs. Litig., 2006 WL 662341, at *4 (citing Ball v. SFX Broadcasting, Inc., 165 F.Supp.2d 230 (N.D.N.Y. 2001) and Bradford v. Rockwell Semiconductor, 238 F.3d 549 (4th Cir.2001) to assert the effective vindication doctrine applies when the clause causes significant arbitrators’ fees that would not be incurred in the regular course of litigation). In arguing that the costs of individual arbitration would exceed the amount of possible recovery, the district court found plaintiffs ignored the statutory provision under the Clayton Act would affords treble damages for antitrust violations. \textit{Id.} at *5.
\textsuperscript{169} In re Am. Express Merchs. Litig., 2006 WL 662341, at *10 (dismissing all claims in the case except for Amex’s motion to compel arbitration); Klonoff, supra note 101, at 822 (2013) (summarizing the procedural history of \textit{Italian Colors}, including the district court’s decision).
\textsuperscript{170} \textit{Amex I}, 554 F.3d 300 (2nd Cir. 2009).
\textsuperscript{171} \textit{Amex I}, 554 F.3d. at 311 (beginning its analysis of the enforceability of the class action waiver through general considerations). The court also applied \textit{Gay v. CreditInform}, 511 F.3d 369, 396–95 (3d Cir. 2007). \textit{Amex I}, 554 F.3d at 312. In \textit{Gay}, the Third Circuit found the class action waiver to be unconscionable pursuant to state law, but the court enforced it under the federal law of the FAA. \textit{Gay}, 511 F.3d at 395–96.
\textsuperscript{172} \textit{Amex I}, 554 F.3d at 312.
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the cost of the expensive economics expert. Additionally, since there was no way to pursue the antitrust claims without a class action to fund the expensive expert, the class action waiver must be invalidated so that the plaintiffs can effectively vindicate their federal claims.

The opinion ends with two caveats: one, that the decision is not based on the plaintiffs’ status as merchants, their size as merchants or the size of recovery for the individual plaintiffs. And two, that class action waivers are not per se unenforceable, and not unenforceable specifically in instances of antitrust actions.

On May 3, 2010 the Supreme Court granted certiorari to petitioners Amex, but also vacated and remanded the case for reconsideration in light of Stolt-Nielsen. The court in Amex II examined the holding and reasoning of Stolt-Nielsen, but affirmed its decision from Amex I in reversing the District Court. As Stolt-Nielsen did not hold that

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173 Amex I, 554 F.3d. at 315 (finding the “record abundantly supports the plaintiffs’ argument that they would incur prohibitive costs if compelled to arbitrate” sufficient to meet the requisite burden of proof). For more information on this standard, see supra Part II.B. (summarizing the effective vindication doctrine and its application in Supreme Court case law).

174 Amex I, 554 F.3d at 315–319 (examining the expert report and the indications in the record that plaintiffs would be unable to afford litigation); Klonoff, supra note 101, at 822 (summarizing the Second Circuit’s holding to find the arbitration clause unenforceable because of the “practical effect” of enforcement would preclude the plaintiffs from vindicating their federal claims).

175 Amex I, 554 F.3d. at 320 (“our decision in no way rests upon the status of the plaintiffs as “small” merchants.”)

176 Amex I, 553 F.3d at 321 (refusing to establish a per se rule and instead requiring each case be evaluated for enforceability on the merits). The majority opinion in the Supreme Court for Italian Colors later rejected this notion of a case-by-case inquiry. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); Klonoff, supra note 101, at 822 (noting the majority opinion’s rejection of the case-by-case analysis): infra text accompanying notes 214–215 (describing the majority’s disinclination to allow a case-by-case analysis because of policy considerations, such as negating the speedy resolution benefits that arbitration intends).


178 Amex II, 634 F.3d 187, 193–94 (2nd Cir. 2011) (reviewing the decision in Stolt-Nielsen but affirming the decision in Amex I, finding Stolt-Nielsen did not affect whether a class action waiver is enforceable);
a contractual clause barring class arbitration is *per se* enforceable, the court found there was no reason to change their decision.\(^{179}\)

Following *Amex II*, the Second Circuit’s mandate was put on hold while the Supreme Court issued its opinion on *AT&T Mobility v. Concepcion*.\(^{180}\) In *Amex III*, the court reviewed the case for a third time in light of *Concepcion*; however, the court found that the opinion in *Concepcion* still did not change its analysis.\(^{181}\) Without a Supreme Court mandate that class-action waivers are *per se* enforceable, the Second Circuit refused to overrule its original holding in *Amex I*.\(^{182}\)

C. *The Opinions in American Express v. Italian Colors*

1. The Arguments

In their brief to the Supreme Court, the plaintiffs’ main argument was the applicability of the effective vindication doctrine.\(^{183}\) Plaintiff-respondents argued that the doctrine is a tool to “harmonize the FAA with other federal statutes.”\(^{184}\) The doctrine,

\[\text{\textit{see} Sugarman, supra note 157, at 711 (2012) (describing the court’s decision in Amex II as claiming to be unaffected by Stolt-Nielsen).}\]

\(^{179}\) *Amex II*, 634 F.3d at 193 (“[Stolt-Nielsen] does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* enforceable.”); *see* Doneff, supra note 177, at 91 (quoting *Amex II*, 634 F.3d at 193).

\(^{180}\) *Amex III*, 667 F.3d 204, 206 (2nd Cir. 2012). *Amex II* had based its decision on the policy argument in *Discover Bank* rule, which was discussed in *Concepcion*. *See* Doneff, supra note 177, at 93 (speculating pre-*Amex III* that the *Discover Bank* policy argument denied in *Concepcion* would make *Amex II*’s victory over large corporations “short-lived”).

\(^{181}\) *Amex III*, 667 F.3d at 206 (“*Concepcion* does not alter our analysis, and we again reverse the district court’s decision and remand for further proceedings.”). This decision was affirmed in *Amex IV*, 681 F.3d 139 (2nd Cir. 2012) where a rehearing *en banc* was denied. *Id.* at 139.

\(^{182}\) *Amex III*, 667 F.3d at 214 (finding neither *Stolt-Nielsen* or *Concepcion* establish a rule that class-action waivers are *per se* enforceable); *Amex II*, 634 F.3d at 187 (declining to find class-action waivers *per se* enforceable in this case or the context of any antitrust actions); *see also* Sugarman, supra note 157, at 717 (indicating the courts explicit statement that class-action waivers are not *per se* unenforceable nor enforceable).

\(^{183}\) *Brief for Respondents*, supra note 99, at 17 (arguing the effective vindication doctrine was “critical” to the Court’s holding in *Mitsubishi Motors*).

\(^{184}\) *Id.* at 13. Additionally, Respondents asserted that the Doctrine promotes arbitration because it incentivizes parties to negotiate agreements that benefit both parties. *Id.* at 41.
however, is narrow in scope; and the burden required to satisfy the effective-vindication doctrine is “daunting.” Therefore, argued Respondents, the Court should continue to apply the doctrine because the narrow scope and high burden of proof will not lead to a widespread invalidation of arbitration agreements. Further, respondents argued that in this case plaintiffs have “carried that burden” and proven that without the costly expert evidence the plaintiffs cannot effectively vindicate their federal statutory rights on an individual basis.

Respondents additionally sought other avenues besides class arbitration for parties to engage in cost sharing to vindicate their statutory rights. Respondents argued that the plaintiffs are not seeking class arbitration, they are simply seeking “the ability to vindicate their federal antitrust claims in some forum.” Respondents suggested class

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185 Id. at 28 (describing the Doctrine as “rightly very narrow”).
186 Id. at 28–29 (detailing the demanding evidentiary showing for the Doctrine based on the Randolph limitation).
187 Id. at 33 (“the effective-vindication doctrine has been the law of the land for over twenty years, and still the conjured flood is just a trickle”). Respondents further assert that the “future doom” as warned by Petitioners is misconstrued, and the “heavy evidentiary burden” required to satisfy the effective vindication doctrine will prevent any negative backlash due to overuse. Id. at 4, 15.
188 Id. at 2 (referring to the facts as a “rare care” where the plaintiffs managed to carry the burden of proof required by the FAA and the Randolph court). And, these costs are real and supported by an affidavit, not speculative like the cost risks in Randolph. Id. at 52–53 (comparing this case to Randolph and concluding there is more than a mere “risk” of prohibitive costs).
189 Id. at 35–38 (arguing the Respondents “plain and simple” are not seeking class arbitration).

Justice Scalia: But he wants a class. What he wants in the arbitration is the ability to sue on behalf of a class, doesn’t he?
Paul D. Clement: That might be what they most want, but they don’t get that. They just get some way to vindicate the claim. And if this had a cost-shifting provisions that the expert costs were shifted, that would get the job done, that’s the Sovereign Bank example we talked about in our brief. There are[sic] more than one way. We’re not trying to get a guarantee for class treatment in one form or the other.
action litigation as a potential mechanism; but would concede at least some other cost-sharing mechanism through arbitration if the Court preferred to uphold arbitration.\(^\text{191}\)

Alternatively, petitioners Amex argued that the Court should follow existing Congressional mandate to enforce arbitration clauses,\(^\text{192}\) not the Court of Appeals own “pro-class-action policy judgments.”\(^\text{193}\) Further, a decision enforcing the arbitration clause decision was supported by Concepcion, which held that conditioning the enforcement of arbitration clauses on the availability of class actions “frustrates” the FAA.\(^\text{194}\) Additionally, argued petitioners, without any Congressional intention to preclude the arbitration clause, the Court should follow precedent and uphold arbitration agreements.\(^\text{195}\)

Petitioners also asserted policy considerations, observing “Congress knows how to limit arbitration when it wants to do so.”\(^\text{196}\) Petitioners cited numerous articles and studies supporting its argument that arbitration is the most cost-efficient and resourceful

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\(^{191}\) Brief for Respondents, supra note 99, at 18 (suggesting Petitioners offer to share or shift Respondents’ cost as an alternative to class arbitration). Additionally, Respondents refer to Concepcion where AT&T offered to pay for attorneys’ fees. Id. at 16. Respondents argue that if petitioners Amex had offered to do something similar, then the recoverable damages issue would have effectively been solved through bilateral arbitration. Id. at 37–38.

\(^{192}\) Brief for Petitioners, supra note 84, at 16 (arguing that nothing in the text of the Sherman Act or the FAA indicates a congressional intent to demand class proceedings).

\(^{193}\) Id. at 18 (criticizing the Second Circuit for imposing pro-class-action policy judgments “rather than adhering to Congress’ mandate”).

\(^{194}\) Id. at 17 (“[C]onditioning the enforcement of arbitration agreements on the availability of class actions frustrates the FAA no less than actually requiring it.”).

\(^{195}\) Id. at 22 (describing the fundamental principles enforcing parties’ choice of bilateral over class procedures); Brief of Distinguished Law Professors in Support of Petitioners at 14, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133) 2012 WL 6762284 (arguing the decision in Amex III has no basis in a congressional command, rather it is a manifestation of the Second Circuit’s judicial hostility towards arbitration) [hereinafter Brief of Distinguished Law Professors].

\(^{196}\) Brief for Petitioners, supra note 84, at 49. Petitioners further argue that this is why the Bureau of Consumer Financial Protection Bureau (CFPB) exists. Id. As Amex’

Michael Kellogg: And in addition, to the extent that there does need to be some sort of safety valve, of course Congress can deal with that question. Congress recently in the Dodd-Frank Act said, in certain circumstances we’re going to allow the Consumer Financial Protection Board to determine whether class action waivers will be permitted. But obviously there’s nothing either in the FAA or in the Sherman Act that would justify such an inquiry here.

Transcript of Oral Argument, supra note 190, at 15–16.
option for everyone. For example, the expensive expert supposedly required for plaintiffs to prove their claims in this case may not have been necessary in the arbitral forum if so decreed by the arbitrator. Additionally, Petitioners argue that class action litigation should be limited because it increases the risk of “questionable or frivolous claims” that give plaintiffs attorneys “unbounded leverage” and force “corporate defendants to pay ransoms” in the form of settlements.

2. The Majority Opinion

Although the Second Circuit had adamantly upheld its decision four times, the majority opinion’s decision overruling the decision in favor of Amex was unsurprising. The opinion was delivered by Justice Scalia, and joined by Justices Kennedy, Thomas and Alito and Chief Justice Roberts. In its analysis of the case, the opinion first asserts that there is no “congressional command” that would compel the Court to find the class-action waiver unenforceable. Congress has already demonstrated that it will go beyond the normal bounds of the law to help facility consumer protection claims, writes Justice Scalia, for example, by allowing treble damages in antitrust claims. Nevertheless Congress has not indicated that antitrust law is intended to preclude a class-

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197 Brief for Petitioners, supra note 84, at 49–52 (listing the “proven” economic benefits of arbitration).
198 Id. at 50 (“Whether each claimant would have to submit a complex and costly economics expert report is a decision for the arbitrator.”).
199 Id. at 53. There is also a fear of plaintiffs’ attorneys who specialize in class actions and may have incentives that do not align precisely with the consumer interests. Id. at 54 (citing to the Class Action Fairness Act to demonstrate congressional fear that class-action lawyers attract frivolous litigation).
200 See Garcia & Caseria, supra note 84 (referring to the Court’s opinion as continuing its “recent trend of strictly enforcing the terms of arbitration agreements.”).
201 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2307 (2013) (“Justice Scalia delivered the opinion of the Court”); Arbitration/antitrust, supra note 151, at 282 (listing the Justices included in the majority opinion).
202 Italian Colors, 133 S. Ct. 2304, 2309 (2013) (finding no “contrary congressional command” requires the Court to override the arbitration agreement in this case); David Herr & Steve Baicker-McKee, Class Action Arbitration Waivers and the Federal Arbitration Act, 28-9 FED. LITIGATOR 13 (2013) (stating the court found “no contrary congressional intent exists”).
203 Italian Colors, 133 S. Ct. at 2309 (designating Congress’ enactment of treble damages as going beyond the limits of “deterring and remedying unlawful trade practice”).
action waiver. Antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Nor do they guarantee financial incentives to assert these claims. Additionally, Congress has not established an entitlement to class proceedings “for the vindication of statutory rights.” The opinion further relied on its holding Concepcion to support its argument. The opinion affirmed Concepcion’s refusal to find that federal law guarantees the opportunity to vindicate federal rights via class procedures in Rule 23 or some other informal class mechanism. Concepcion also supported the Court’s rejection of the assertion that class arbitration is a necessity to prosecute claims. In sum, according to the Italian Colors opinion, there is no

204 Id. (“But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational.”).
205 Id. See also Herr & Baicker-McKee, supra note 202 (explaining the opinion to say that “antitrust laws do not guarantee an affordable procedural path to adjudicate every claim.”).
206 Italian Colors, 133 S. Ct. at 2311 (“But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”). See also Sutherland v. Ernst & Young LLP, 2013 WL 4033844 *1 (2d Cir. 2013) (quoting Italian Colors, 133 S. Ct. at 2311) (interpreting Italian Colors to mean class action waivers will not be invalidated solely because the plaintiffs lack economic incentive to assert their claims individually).
207 Italian Colors, 133 S. Ct. at 2309. See also, Quarles, supra note 123, at 477 (2007) (“there is no nonwaivable right to bring class proceedings”). The majority opinion additionally argues that allowing an entitlement to class actions would violate 28 U.S.C. § 2072(b) (1990), because it would be “an “abridg[ment]” or “modif[ication]” of a “substantive right” forbidden to the Rules.” Id. at 2309–310; see 28 U.S.C. § 2072(a)–(b) (1990) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . [s]uch rules shall not abridge, enlarge or modify any substantive right.”).
208 See e.g. Italian Colors, 133 S. Ct. at 2312 (2013) (“Truth to tell, our decision in AT&T Mobility all but resolves this case.”); Herr & Baicker-McKee, supra note 202 (describing the majority’s opinion to “rely heavily” on the Court’s holding in Concepcion).
209 Italian Colors, 133 S. Ct. at 2310 (noting the Court already rejected the proposition that federal law provides a non-waivable opportunity to vindicate a federal claim); Klonoff, supra note 101, at 822 (observing the majority opinion’s rejection of the Second Circuit’s attempt to distinguish Concepcion).
210 Italian Colors, 133 S. Ct. at 2312 (citing AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1751 (2011)) (“[T]he switch from bilateral to class arbitration,” we said, “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”); Garcia & Caseria, supra note 84 (detailing the majority opinion’s reliance on Concepcion to support that class-action waivers will not be rendered unenforceable due to the high cost to litigate individual claims).
congressionally authorized guarantee that all statutory rights can be vindicated through class-action procedures.\footnote{211}{\textit{Italian Colors}, 133 S. Ct. at 2309–310 (“No contrary congressional command requires us to reject the waiver of class arbitration here.”).} Furthermore, the majority opinion briefly applied the facts of the case to the effective vindication doctrine, referring to the doctrine as a “judge-made exception” to the FAA.\footnote{212}{\textit{Id.} at 2311–12 (referring to the Doctrine as “dictum”); Herr & Baicker-McKee, \textit{supra} note 202 (referring to the Doctrine as a “judicially created exception”).} The Court draws a distinction for the application of the Doctrine: the Doctrine allows potential litigator’s the \textit{right to pursue} a statutory remedy, but it does not ensure the \textit{right to prove} such a remedy.\footnote{213}{\textit{Italian Colors}, 133 S. Ct. at 2311; Brief of Distinguished Law Professors, \textit{supra} note 195, at 12 (“Respondents’ inability to employ class procedures is likewise irrelevant under \textit{Randolph}.”). See also Damato v. Time Warner Cable, Inc., 2013 WL 3968765 (E.D.N.Y. 2013) (interpreting \textit{Italian Colors} to hold that “the prohibitive cost of proving a case in individual arbitration did not render the class action waiver in an arbitration clause unenforceable”).}

Lastly, the opinion concluded with brief policy considerations.\footnote{214}{\textit{Italian Colors}, 133 S. Ct. at 2312 (speculating on the “regime” that may have been established by Second Circuit’s opinion if the Court didn’t decide to overrule the decision); Garcia & Caseria, \textit{supra} note 84 (summarizing the Court’s “brief, but important, glimpse into policy concerns”).} If the Court were to establish a pre-arbitration, case-by-case determination of the evidence necessary, the cost to develop such evidence and the recoverable damages, this would “undoubtedly destroy the prospect of speedy resolution” that the arbitral forum purports to provide.\footnote{215}{\textit{Italian Colors}, 133 S. Ct. at 2312 (declaring that the FAA does not sanction this sort of complex and inefficient judicially created structure); Garcia & Caseria, \textit{supra} note 84 (describing the Court’s refusal to preliminarily litigate the costs to prove their claims in the arbitral forum).}

3. The Concurring Opinion

Justice Thomas’s brief concurring opinion supports the majority opinion, but does so through the plain meaning of the FAA.\footnote{216}{\textit{Italian Colors}, 133 S. Ct. at 2312, (Thomas, J., concurring) (“I write separately to note that the result here is also required by the plain meaning of the Federal Arbitration Act.”); Mike Gottlieb, \textit{Details: American Express v. Italian Colors Restaurant, SCOTUSBLOG} (Jun 20, 2013, 11:39 AM), http://www.scotusblog.com/2013/06/details-american-express-v-italian-colors-restaurant (stating Justice Thomas wrote his concurring opinion to “underscore” the result’s support in the plain meaning of the
Concepcion, Thomas affirms his belief that the FAA expressly directs a court to allow arbitration unless the agreement was made under fraud or duress.  

4. The Dissenting Opinion

Justice Kagan’s powerful dissent is joined by Justices Ginsburg and Breyer, and criticizes the majority’s specified attack on class actions and its likelihood of permitting de facto immunity for corporations from antitrust claims. Justice Kagan summarizes the majority’s unsympathetic opinion in three words: “Too darn bad.” The dissent argued that the purpose of the effective vindication doctrine is to invalidate arbitration clauses that cut-off a potential plaintiff’s ability to bring a federal right, and was designed for situations exactly like this one. Additionally, the effective vindication doctrine exists to uphold the fundamental purposes of the FAA. Furthermore, there is no reason for some special exemption for class-arbitration

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217 Italian Colors, 133 S. Ct. at 2312–313 (Thomas, J., concurring) (reiterating the concurring opinion in Concepcion that the only ground for invalidation of the contract are based on issues at the time of contract formation); Garcia & Caseria, supra note 84 (remarking that a party interested in challenging a class-action waiver must prove duress or fraud at the formation of the contract, a rule supported by Thomas’s concurring opinion). Justice Thomas’s concurring opinion in Concepcion is more fleshed out than the one in Italian Colors, see AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1753–755 (2011) (applying a textual interpretation of the case in evaluating the plain meaning of Section 2). Additionally, Justice Thomas argued: “Italian colors voluntarily entered into a contract . . . it cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible.” Italian Colors, 133 S. Ct. at 2313 (Thomas J., concurring).

218 Italian Colors, 133 S. Ct. at 2313 (Kagan, J., dissenting). Justice Sotomayor recused herself because she sat on the Second Circuit panel that originally decided the case. Amex I, 554 F.3d 300 (2nd Cir. 2009); Garcia & Caseria, supra note 84.

219 Italian Colors, 133 S. Ct. at 2313 (Kagan, J., dissenting)

220 Id. (Kagan, J., dissenting). Kagan also calls the opinion a “betrayal of our precedents.” Id.

221 See id. (Kagan, J., dissenting) (declaring the Doctrine prevents contractual agreements from “confer[ring] immunity from potentially meritorious federal claims”); id. at 2316 (“And this is just the kind of case the [Doctrine] was meant to address.”).

222 Id. at 2313 (Kagan, J., dissenting) (describing the Doctrine as reconciling the FAA with other federal statutes, like antitrust law).
waivers. Additional, Justice Kagan expressed that courts and Congress should not fear that this rule would render every arbitration agreement unenforceable, as there have been several cases where an arbitration clause was upheld under the application of the doctrine.

The dissent additionally criticizes Amex for using its monopoly power to shield itself from any antitrust claims challenging its monopolistic practices. The effective vindication doctrine is especially important in the antitrust context, because antitrust law exists to prevent monopoly, but monopoly can be used to eliminate antitrust liability. It is important that a party agreeing to arbitration does not forgo the rights afforded by the statute; so if the provision operates as to prevent the pursuing of the statute, then the court may invalidate it under the effective vindication doctrine.

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223 Id. (Kagan, J., dissenting) (criticizing the majority’s “concoction” of a special exception to class arbitration).
224 Id. at 2314 (Kagan, J., dissenting) (“An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result.”); Mitsubishi Motors, 473 U.S. at 637 (“And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”). It is argued as well that the dissent also feared the majority opinion essentially renders the effective vindication doctrine “toothless.” Garcia & Caseria, supra note 84.
225 Italian Colors, 133 S. Ct. at 2316 (Kagan, J., dissenting) (observing that the Doctrine has operated for years without undermining the purported benefits that arbitration affords).
226 Id. at 2313 (Kagan, J., dissenting) (describing Amex’s use of its monopoly power in this case to shield itself from antitrust liability).
227 Id. at 2314 (Kagan, J., dissenting) (“Without the [Doctrine], a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability”); Garcia & Caseria, supra note 84 (reporting on the dissent’s view that the majority approach may allow for de facto prohibitions, such as arbitration agreements that may impose high filing fees, one-day statute of limitations or prohibit economic testimony).
228 Italian Colors, 133 S. Ct. at 2314 (Kagan, J., dissenting) (stating no matter how it “achieves that result”, an arbitration agreement that prevents a party’s ability to pursue statutory remedies should be invalidated); Alissa Piccione, Class Warfare: Preventing Investor Casualties by Importing England’s Glo into America’s Class Action Arbitrations, 12 J. INT’L BUS. & L. 417, 420 (2013) (explaining Justice Kagan’s dissent as supporting invalidating the mandatory, bilateral arbitration clause through the effective vindication doctrine).
Lastly, the dissent specifically targets the faults in the majority opinion.\textsuperscript{229} For one, the dissent urges a consideration (which the majority did not) that this Agreement precluded any cost shifting to other parties, as a joinder was not allowed and there was a confidentiality requirement so information could not be shared among suits.\textsuperscript{230} In addition and most significantly, Justice Kagan concludes by expressing her belief that this is just the Court’s attempt to dismantle a class action.\textsuperscript{231}

\textbf{IV. Analysis}

This Part discusses the strengths and weaknesses of the majority and dissenting opinions.\textsuperscript{232} It supports the majority opinion’s denial of the effective vindication doctrine in this case, and supplements it with other considerations such as the distinction between class actions and arbitration,\textsuperscript{233} the holdings in \textit{Stolt-Nielsen} and \textit{Concepcion}\textsuperscript{234} and repercussions of adverse class actions.\textsuperscript{235} Lastly, this Part evaluates the dissent, acknowledges the strong arguments in the dissenting opinion, but nevertheless supports the majority’s decision in \textit{Italian Colors}\.\textsuperscript{236}

\\textsuperscript{229} See \textit{Italian Colors}, 133 S. Ct. at 2317 (Kagan, J., dissenting) (criticizing the majority opinion for having too little to say on why the effective vindication doctrine does not apply).
\textsuperscript{230} Id. at 2316 (Kagan, J., dissenting) (addressing the fact that the agreement prevents any aggregation of claims such as regular joinder procedures); Klonoff, supra note 101, at 822 (quoting the dissenting opinion to find that preventing class arbitration was “only part of the problem”); see also Brief for Respondents, supra note 99, at 18 (requesting the Court order or defendants offer some alternative to class proceedings in order to share or alleviate costs to plaintiffs).
\textsuperscript{231} \textit{Italian Colors}, 133 S. Ct. at 2320 (Kagan, J., dissenting) (“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.”); Klonoff, supra note 101, at 822 (quoting Justice Kagan’s dissent).
\textsuperscript{233} See infra Part IV.A–D. (expanding on the majority opinion and evaluating the dissent).
\textsuperscript{233} See infra Part IV.A. (arguing the distinction between class actions and arbitration means the effective vindication doctrine does not apply).
\textsuperscript{234} See infra Part IV.B. (comparing the majority opinion against the holdings in \textit{Stolt-Nielsen} and \textit{Concepcion}).
\textsuperscript{235} See infra Part IV.C. (describing the repercussions of class actions and class arbitration and how they support the majority’s decision).
\textsuperscript{236} See infra Part IV.D. (agreeing with the dissent in some regards but disagreeing on the point that this case is not about class actions).
A. Evaluation of the Majority Opinion: Inapplicability of the Effective Vindication Doctrine

The Court in *Italian Colors* did not overrule the effective-vindication doctrine: it chose not to apply it.237 This Note argues that the majority opinion’s ruling is the proper application of the doctrine because the Merchants’ inability to effectively vindicate their claims was due to the class-action waiver element of the clause, not the binding arbitration requirement.238

1. Alternatives and Severance

In order to establish an understanding of why the effective vindication doctrine does not apply, this Note analyzes theoretical options if the Supreme Court decision had affirmed the Second Circuit’s rulings in the *Amex*’s.239 The options show that in reality, the case cannot go forward unless litigated as a class action, either in class arbitration or class-action litigation.240

This Note will not attempt to expand on the severability doctrine in cases like *Rent-A-Center*.241 Rather, this Note applies the conceptual understanding of the

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237 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (declining to apply the Doctrine to invalidate the arbitration agreement at issue).
238 See infra Part IV.A.2. (arguing that the effective vindication doctrine does not apply because class actions and arbitration are two distinct entities which must be evaluated for their effect separately, even within the same clause).
239 For a review on severability, see supra Part II.A.3. (explaining arbitration’s relation to contract doctrines including severance).
240 See Transcript of Oral Argument, supra note 190, at 10:
   Michael Kellogg: I think we have to return to the fact that the only provision at issue here was the class action waiver. That was the only issue that they raised below. It was the issue decided by the Court. It was the issue on which this Court granted certiorari, and it’s directly contrary to this Court’s decision in *Concepcion*.

See also Erwin Chermerinsky, *The Court Affects Each of Us: Supreme Court Term in Review*, 16 GREEN BAG 2d 359, 376 (2013) (“*Italian Colors* said that the suit simply could not go forward except as a class action.”).
241 See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *Rent-A-Center*, 130 S. Ct. at 2778 (“[A] party’s challenge to another provision of the contract, or to the contract as
severability doctrine in *Rent-A-Center* to theoretically sever the class-action waiver and the arbitration agreement in *Italian Colors*.242 If the opinion had been able to sever the clause in *Italian Colors*, the Court could either invalidate the binding arbitration aspect but uphold the class or collective action waiver or uphold the binding arbitration but invalidate the class-action waiver.243

First, a court could sever the arbitration portion of the clause from the contract, allowing plaintiffs to take the case to court.244 However, the class action bar would still be upheld and the expensive expert would still be unaffordable for individual plaintiffs.245 Second, the court could sever the class action waiver and uphold binding arbitration.246 The parties would the engage in class arbitration—but in light of *Concepcion*, this may

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242 See Gilles, *supra* note 8, at n.181 (“Courts have traditionally severed unconscionable or unenforceable provisions in agreements to arbitrate disputes, thereby allowing the dispute to go to an arbitral panel without the offensive terms”). See, e.g., Felts v. CLK Mgmt., Inc., 2011-NMCA-062, 149 N.M. 681, 697, 254 P.3d 124, 140 (2011) (denying severance of the class-action waiver because removing the waiver “would excise major portions of the arbitration provision”); Puleo v. Chase Bank USA, N.A., 605 F.3d 172, 186 (3d Cir. 2010) (finding severance of the class-action waiver possible on the condition that the waiver deemed severable); Cooper v. QC Fin. Servs., Inc., 503 F. Supp. 2d 1266, 1292 (D. Ariz. 2007) (severing the class-action waiver provision after finding it was unconscionable).

243 However, it is questionable whether a court would sever the arbitration clause at all and instead find the whole agreement invalid. See generally, *CONSUMER ARBITRATION AGREEMENTS*, *supra* note 64, at 75–78 (2005) (describing different federal courts policies on dealing with unconscionable aspects of arbitration clauses). Since the “‘primary purpose’” of the FAA is to ensure “that parties agreements to arbitration are enforced according to their terms’ . . . . [I]f an agreement to arbitrate can not be enforced according to its terms, a court should refuse to enforce it.” *Id.* at 75 (quoting *Volt Info. Sciences Inc. v. Bd. Of Trustees, 489 U.S. 468, 479 (1989)*). Additionally, courts typically disfavor corporations who draft unenforceable adhesion contracts, and will “refuse to aid a party who has taken advantage of his dominant bargaining power.” *Id.*

244 This could be done under a combination of the effective vindication doctrine and the severance doctrines. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985) (presuming arbitration agreements are enforceable unless the potential claimant cannot effectively vindicate her rights); *RESTATEMENT (SECOND) OF CONTRACTS* § 184 (1981) (“A court may treat only part of a term an unenforceable . . .”).

245 See *Amex I*, 554 F.3d 300, 317 (2d Cir. 2009) (finding even trebled recovery damages for plaintiffs would make the $1 million expert too expensive for plaintiffs to afford individually).

246 E.g., *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1102 (2002) (striking the class action waiver from the arbitration clause and allowing the parties to engage in classwide arbitration).
not be favorable for either party.\textsuperscript{247} Also, according to \textit{Stolt-Nielsen}, a party could not be compelled to class arbitration without an indication of consent.\textsuperscript{248}

Even if the Court did not “sever” the clause or invalidate the entire agreement, respondents requested that if class action relief was not plausible, then Amex could at least create “a better arbitration agreement” that would allow for cost-shifting for prevailing parties.\textsuperscript{249} By allowing joinder, cost shifting or by removing the confidentiality agreement, respondents argued, the agreement would at least allow the plaintiffs to effectively vindicate their legal rights.\textsuperscript{250} However, this would require the Court to either “blue-pencil” the agreement,\textsuperscript{251} or for AmEx to change their standard-form agreements, neither of which are likely.\textsuperscript{252} Additionally, allowing other procedural tools like joinder would not cover the costs anyway. If the price of an expert to prove the case is close to $1 million, and maximum possible damages are around $30,000, then an

\textsuperscript{247} See AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1751–752 (2011) (describing the three major distinctions between bilateral and class arbitration). Both \textit{Concepcion} and \textit{Stolt-Nielsen} address concerns for the impact on plaintiffs in class arbitration. See \textit{Concepcion}, 133 S. Ct. at 1751 (affirming that even in class arbitration “class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class”); Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 682 (2010) (expressing concern that the benefit to plaintiffs of privacy and confidentiality presumed in arbitration for is sacrificed in a class action). For a more detailed discussion on privacy in arbitration, see generally Amy J. Schmitz, \textit{Untangling the Privacy Paradox in Arbitration}, 54 U. KAN. L. REV. 1211 (2006).

\textsuperscript{248} \textit{Stolt-Nielsen}, 559 U.S. at 685 (ruling that it cannot be assumed that parties consented to class arbitration).

\textsuperscript{249} Brief for Respondents, \textit{supra} note 99, at 4 (referencing the cost-shifting agreement offered by AT&T in \textit{Concepcion} as an example of a favorable compromise for plaintiffs and defendants).

\textsuperscript{250} \textit{Id.} (“All that Respondents desire is the ability to effectively vindicate their federal antitrust rights in some forum”).


\textsuperscript{252} For Amex to change its standard-form contract, there must be some financial impetus. For suggestions on creating such an impetus, see \textit{infra} Part V.C.3. (balancing interests of consumers and corporations in considering suggestions of congressional reform).
efficient joinder of claims would still not establish enough financial incentive to file suit.253

2. Distinction between Class actions and Arbitration

Further supporting the inapplicability of the Doctrine is the assertion that arbitration and class actions are inherently different: arbitration is a statutory right, whereas class actions are a codified procedural option.254 Federal law governs arbitration;255 unlike class actions, which are procedural mechanisms through which parties may seek collective redress.256 Further, class actions are tools that increase judicial efficiency and regulate and deter corporate malfeasance.257 They are not law;

253 See Amex I, 553 F.3d 300, 316–17 (excerpting the expert’s affidavit calculating cost of an expert to be between $300,000 to $2 million, while recoverable damages from the largest volume plaintiff would equal $38,549 when trebled under the Clayton Act). Additionally, the higher the number of aggregated claims, the more likely a court would sever the case into separate suits, see ANDERSON & TRASK, supra note 103, at 5–6 (observing how courts may sever claims aggregated under joinder procedures because the case would be too complicated with so many plaintiffs). Even the original Complaint acknowledges that a class action is necessary and joinder would be futile. See Complaint, supra note 148, at 4 (“The members of the Class are so numerous that joinder of all members is impracticable.”).


256 See e.g. ANDERSON & TRASK, supra note 103, at 3–4 (describing how lawsuits are expensive, and sometimes difficult to prove; therefore it makes more sense for the suit to be brought collectively rather than individually).

257 See id. at 13–15 (listing the benefits of class actions to include: leveling the playing field against larger corporations; holding corporations accountable for their actions; limited waste of judicial resources that would occur if all claims were tried individually; inter alia); MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 1 (2009) (describing the substantial potential benefits of class actions such as “achiev[ing] justice without overwhelming the judicial system”). The most common type of class action even requires “efficiency” and proof that the class action is a superior form of adjudication. See Fed. R. Civ. P. 23(b)(3) (requiring for certification “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”).
they are a procedural option, and their existence depends on judicial approval, not a federal requisite.\footnote{258} Because of the distinction between class actions and arbitration, in Italian Colors, the effective-vindication doctrine does not apply.\footnote{259} It was the class action waiver that made the agreement unfair, not the requirement that the parties arbitrate.\footnote{260} And because the effective-vindication doctrine exists to further the purpose of the FAA, it applies only to arbitration and not to class actions.\footnote{261}

B. Evaluation of the Majority Opinion: Support in Stolt-Nielsen and Concepcion

The majority opinion’s reliance on its holdings in Stolt-Nielsen and Concepcion signifies that these cases paved the way for the decision in Italian Colors.\footnote{262} Both Stolt-Nielsen and Concepcion held that absent qualifying language, arbitration must be bilateral.\footnote{263} In Italian Colors, the contract specifically precluded class arbitration.\footnote{264} It is

\footnote{258} See REDISH, supra note 257, at 2–3 (2009) (emphasizing that lawsuits do not “arise” under Rule 23, rather the rights to be adjudicated are granted under other substantive federal law).

\footnote{259} But see Myriam Gilles, Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 827 (2012) (proposing the “liberal pragmatist” view that the Doctrine should apply to any instance of arbitration even if it affects class actions).

\footnote{260} See Amex I, 554 F.3d 300, 315–16 (2d. Cir. 2009) (observing that even in arbitration, the class-action waiver would cause plaintiffs to incur “prohibitive costs”); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311 (2013) (“the individual suit that was considered adequate to assure “effective vindication” of a federal right before adoption of class-action procedures did not suddenly become “ineffective vindication” upon their adoption”); Brief of Distinguished Law Professors, supra note 195, at 12 (arguing that respondents’ inability to bring class procedures is irrelevant under the Randolph standard because the court in Randolph, 531 U.S. at 92 n.7, did not consider the existing class-action waiver in its application of the Doctrine).

\footnote{261} See Italian Colors, 133 S. Ct. at 2313 (Kagan, J., dissenting) (indicating the purpose of the Doctrine is to reconcile the FAA with all other federal law); Brief for United States as Amicus Curiae Supporting Respondents at 10, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (No. 12-133) 2013 WL 367051 (demonstrating the Doctrine was created from the body of federal substantive law governing arbitration) [hereinafter Brief for United States].

\footnote{262} See Italian Colors, 133 S. Ct. at 2309 (citing Stolt-Nielsen, 559 U.S. 662 (2010) to support its assertion that courts much enforce contracts according to their terms, including with whom the parties agreed to arbitrate with); id. at 2312 (“Truth to tell, our decision in [Concepcion] all but resolves this case.”).

\footnote{263} See Sullivan & Glynn, supra note 45, at 1036 (interpreting Concepcion and Stolt-Nielsen to mean that absent qualifying language, arbitration must be exclusively bilateral). See also id. at 1036–37 (“[T]he Court emphasized class arbitration sacrifices the principal benefits of private dispute resolution.”).
reasonable to infer that if class arbitration cannot be compelled without express consent when the contract is silent, it certainly cannot be compelled when the contract expressly states class arbitration is unpermitted.\textsuperscript{265}

Furthermore, the Court’s rejection of the financial incentive argument is supported by the opinion in \textit{Concepcion}.\textsuperscript{266} The Second Circuit in all of the \textit{Amex}'s reasoned that class actions are the only economically feasible means for plaintiffs to “press” their class action claims.\textsuperscript{267} However, the decision in \textit{Concepcion} bars courts from “conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”\textsuperscript{268} Therefore, the decision in \textit{Italian Colors} is further justified by the holdings in \textit{Stolt-Nielsen} and \textit{Concepcion}.

\textbf{C. Evaluation of the Majority Opinion: Adverse Effects of Class Actions}

The opinion in \textit{Italian Colors} is further supported by trends in the Roberts Court to clamp down on class actions, especially at the certification stage.\textsuperscript{269} The fear of the adverse effects on defendants through class actions is especially prominent in Supreme

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\textsuperscript{264} Unlike \textit{Stolt-Nielsen}, the Agreement with Amex specifically precluded class arbitration. \textit{See Amex I}, 554 F.3d at 306 (2d Cir 2009) (quoting the agreement portion stating: “FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION . . . .”).

\textsuperscript{265} This is because class arbitration “interferes with fundamental attributes of arbitration,” and it is therefore inconsistent with the FAA. \textit{AT&T Mobility LLC v. Concepcion}, 131 S. Ct. 1740, 1748 (2011); Sullivan & Glynn, \textit{supra} note 45, at 1038 (quoting \textit{Concepcion}, 131 S. Ct. at 1748). \textit{See also Stolt-Nielsen}, 559 U.S. at 684 (emphasizing that pursuant to the FAA, arbitration is a matter of consent).

\textsuperscript{266} \textit{Italian Colors}, 133 S. Ct. at 2312 (“Truth to tell, our decision in [\textit{Concepcion}] all but resolves this case”).

\textsuperscript{267} \textit{See Amex I}, 554 F.3d at 312 (focusing on the economic realities that certain claims are only justified if brought as a class action); \textit{Amex II}, 634 F.3d 187, 194 (2d. Cir. 2011) (same); \textit{Amex III}, 667 F.3d 204, 214 (2nd Cir. 2012) (same).

\textsuperscript{268} \textit{Concepcion}, 131 S. Ct. at 1744; \textit{see also Brief of Distinguished Law Professors, supra} note 195, at 4–5 (interpreting \textit{Concepcion} to indicate that “financial incentives do not bear on access, that is, whether the doors to the arbitral forum are open to a particular claimant in the first place.”).

\textsuperscript{269} \textit{See text accompanying notes} 103–108 (including \textit{Wal-Mart v. Dukes} and \textit{Comcast v. Behrend} as recent Supreme Court cases preventing class actions at the certification stages); A. E. Dick Howard, \textit{Now We Are Six: The Emerging Roberts Court}, 98 VA. L. REV. IN BRIEF 1, 11 (2012) (observing the holdings in \textit{Dukes} and \textit{Concepcion} indicate the majority of the Roberts Court is not fond of class action litigation); \textit{but see}, Klonoff, \textit{supra} note 101, at 827–28 (arguing that the Court is not uniformly anti-class actions by listing four recent cases where the Court upheld a class certification).
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Court decisions. However, many consumer advocates fear that a complete bar on class actions will remove all opportunity for legal remedies for consumers. The benefits or detriments of class actions have been a long-standing source of legal debate.

There are legitimate adverse effects of class actions, however, which have affected the United States’ legal reputation throughout the world. Aggregation of claims can sometimes simplify the litigation such that individualized issues are not addressed. Uncertainty in factual situations and increased risk of errors may also arise in a class action suit. Additionally, although class actions are often considered more cost-efficient, there are instances where a class action was more of a drain on judicial resources than a series of individualized claims might have been. And lastly, courts

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270 See AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”).
271 See Klonoff, supra note 101, at 815 (expressing concerns that arbitration clauses could allow a company or individual to cause mass harm to a group of persons who would individually have no financial resources or incentive to hire an attorney). But see, Howard, supra note 269, at 11 (concluding that the Roberts court is not exclusively pro-business).
272 ANDERSON & TRASK, supra note 103, at 16 (observing that legislators and legal scholars have debated the potential adverse consequences of class action for years); Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”, 92 HARV. L. REV. 664 (1979) (describing the class action conflict as “a philosophical, social, and economic debate over the merits and demerits of the class action”); see generally Chris H. Miller, The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation, 72 ALB. L. REV. 117 (2009) (detailing a history of class action developments and social attitudes towards class actions throughout time).
273 See e.g. Communication from the Commission of the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (EC) 3, No. COM (2013) 401/2 of 11 June 2013 (referring to the United States as an example of instances of the “adverse effects” that result from collective redress that has not been properly safeguarded).
274 ANDERSON & TRASK, supra note 103, at 16 (asserting that in cases where the claims of thousands of people may turn on the proof of a single litigant, courts may simply the litigation and ignore the “inherently individualized issues”).
275 See id. at 16 (“Uncertainty costs can be particularly acute where large numbers of potential plaintiffs may have similar claims”); Sergio J. Campos, Proof of Classwide Injury, 37 BROOK. J. INT’L L. 751, 757 (2012) (“the lack of proof of classwide injury arises mainly from uncertainty as to the counterfactual world.”).
276 See e.g. Klonoff, supra note 101, at 831 (reminding courts that class actions can be “a useful and efficient device”); Drahozal, supra note 42, at 743 (detailing the theoretical benefits of class actions, including saving the costs of adjudicating the same claims repeatedly).
277 ANDERSON & TRASK, supra note 103, at 17–18 (citing cases where a court speculated the cost of a lengthy trial and hearing of all issues would put a strain on judicial resources); Cronin-Harris, supra note 6, at 855 (listing the increased volume of class actions as one of the delays in the court system in the 1960s and 70s).
and lawmakers particularly fear the potential for abuse through the class action mechanism.\textsuperscript{278} The aggregation of small claims against a defendant corporation may threaten the defendant’s reputation, forcing it to choose settlement over continued publicity before any finding of actual liability has been determined.\textsuperscript{279}

Because class actions are still controversial, and there exists no federal statute guaranteeing a right to class action, the Supreme Court was correct in refusing to establish a right to vindicate claims through a class action, although there exists no financial incentive to bring the case without one.\textsuperscript{280} This Note has attempted to demonstrate that it is the class-action waiver aspect of the Agreement that rendered effectively vindicating the plaintiffs’ rights effectively impractical. Therefore, the Supreme Court’s focus on class actions, and hesitancy to open opportunity to class action rights makes sense in light of the controversial status of, and recent Supreme Court stance on, class actions.\textsuperscript{281}

\textsuperscript{278} See Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985) (“Rule 23 class actions accomplish many salutary goals; at the same time, they can cause great mischief.”); ANDERSON & TRASK, supra note 103, at 18 (acknowledging the costs of abusive class actions). Often plaintiffs’ attorneys are viewed with suspicion towards them and their “entrepreneurial litigation.” See Gilles, supra note 8, at 373–74 (commenting on the reputation that plaintiffs’ counsel in class actions are viewed as “immoral”); ANDERSON & TRASK, supra note 103, at 18 (examining the plaintiffs’ counsel issues as an agency problem, where attorneys are agents the dispersed plaintiffs’ have no control over).

\textsuperscript{279} See ANDERSON & TRASK, supra note 103, at 98–99 (explaining how media coverage of a potential class action can hurt a defendant corporation’s sales, stock prices and public image and can motivate a defendant to settle claims related to the litigation quickly); see, e.g., In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (reversing the district court’s class certification because a class action would put defendants in a $25 billion bankruptcy-inducing lawsuit that would put them under “intense pressure to settle”).

\textsuperscript{280} See, e.g., Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–2310 (2013) (refusing to find a congressional mandated entitlement to class actions); Johnson v. W. Suburban Bank, 225 F.3d 366, 377 (3d Cir. 2000) (denying the existence of an unwaivable right to class actions); In re Checking Account Overdraft Litig., 734 F. Supp. 2d 1294, 1300 (S.D. Fla. 2010) (“a class action mechanism does not confer any additional substantive rights”).

\textsuperscript{281} The majority opinion’s main commentary in \textit{Italian Colors} on class actions is:

Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights . . . . The Rule imposes stringent requirements for certification that in practice exclude most claims. And we have specifically rejected the assertion that one of those requirements (the class-notice requirement) must be dispensed with because the “prohibitively high cost” of compliance would “frustrate [plaintiff’s]
D. Evaluation of Dissent

Justice Kagan’s dissent predicted legitimate negative repercussions of the *Italian Colors* opinion, as well as accurately identifies the opinion’s failure to fully address some of its central arguments.\(^282\) For one, the decision in *Italian Colors* may pose a real threat of monopolistic dominance: antitrust law exists to prevent monopoly, but monopoly can be used to eliminate antitrust liability.\(^283\) Although the dissent agreed the FAA encourages courts to enforce arbitration, it argued the FAA does not encourage arbitration to create *de facto* immunity from litigation.\(^284\) Furthermore, the dissent insisted that the effective vindication doctrine actually furthers the goals of the FAA because it ensures companies adopt fair arbitration policies that will result in the efficient and accurate handling of claims, which in turn encourages the enforcement of more arbitration claims.\(^285\)

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\(^{282}\) It is also a more interesting read: even adamant supporters of the majority opinion agree the dissent outshines the majority opinion. *See* Walter Olson, American Express v. *Italian Colors*: arbitration waiver of class actions, OVERLAWYERED (Jun. 20, 2013), http://overlawyered.com/2013/06/american-express-v-italian-colors-arbitration-waiver-class-actions (referring to Justice Kagan’s dissent as “both longer and more spirited than Justice Scalia’s majority opinion”).

\(^{283}\) *Italian Colors*, 133 S. Ct. at 2314 (Kagan, J., dissenting) (asserting that without the effective vindication doctrine “a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability.”); *see also* Brief for the United States, supra note 261, at 20 (reiterating that parties may not waive their right to bring antitrust claims).

\(^{284}\) *Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting) (stating the FAA “prefers” arbitration to litigation, but does not confer shields against liability and allow corporations to impose “backdoor” waivers of federal statutory rights).

\(^{285}\) *Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting) (arguing the Doctrine supports federal liberal policy favoring arbitration); *see also* Brief for Respondents, supra note 99, at 3 (“But when the FAA is in tension with another federal statute . . . . *Randolph* provides the basis for harmonizing the two federal statutes.”); Brief for the United States, supra note 261, at 16–17 (observing that the FAA policy favoring arbitration does not support instances where a plaintiffs must drop his claim entirely). Justice Kagan further explains:

With the [Doctrine], companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every
Moreover, the dissent correctly identified holes in and unexplained portions of the majority opinion. For one, the dissent criticized the majority opinion for providing little explanation to justify its “right to prove” and “right to pursue” distinction.\textsuperscript{286} Secondly, as the dissent correctly observes, the majority opinion barely addresses why the effective-vindication does not apply.\textsuperscript{287} Although this Note argues the majority opinion’s decision is correct,\textsuperscript{288} it agrees with the dissent’s criticisms towards the majority for its short and severely lacking explanations.

Where this Note disagrees the most with the dissent is on its major point: that the majority’s opinion is just another attempt to dismantle a class action. Justice Kagan argues that this case is not about class actions,\textsuperscript{289} it is about whether a plaintiff can effectively vindicate his rights in arbitration.\textsuperscript{290} Additionally, Justice Kagan claims that the Doctrine looks at the agreement as a whole to determine if the plaintiff can effectively vindicate his rights: “No single provision is properly viewed in isolation.”\textsuperscript{291} However, as this Note frequently asserts, this case is about class actions because the unavailability incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless. So down one road: More arbitration, better enforcement of federal statutes. And down the other: Less arbitration, poorer enforcement of federal statutes. Which would you prefer? Or still more aptly: Which do you think Congress would?

\textit{Italian Colors}, 133 S. Ct. at 2315.\textsuperscript{286} \textit{Italian Colors}, 133 S. Ct at 2317 (Kagan J., dissenting) (arguing the Doctrine “forecloses” on the distinction drawn by the Court between the right to prove and the right to pursue); see also Brief for United States, supra note 261, at 18 (foreshadowing the Court drawing a distinction and arguing against the interpretation that the Doctrine only applies to fees unique to arbitration).\textsuperscript{287} \textit{Italian Colors}, 133 S. Ct at 2317 (Kagan J., dissenting) (“The majority is quite sure that the effective-vindication rule does not apply here, but has precious little to say about why”).\textsuperscript{288} See supra, Part IV.A–B. (supporting the majority opinion’s holding based on the distinction between class actions and arbitration and the adverse potentials of class actions).\textsuperscript{289} \textit{Italian Colors}, 133 S. Ct at 2320 (Kagan J., dissenting) (“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.”).\textsuperscript{290} \textit{Id.} at 2319 (Kagan J., dissenting) (observing plaintiffs are not arguing class-actions are necessary, they are seeking a way to effectively vindicate their rights).\textsuperscript{291} \textit{Id.} at 2318 (dismissing the majority’s premise that this case is solely about class-action waivers, arguing instead the agreement should be viewed as a whole).
of aggregating claims made vindicating the Merchants rights impossible, not the requirement that disputes be conducted in an arbitral forum. Additionally, the arbitration agreement and the class-action waiver can and should be viewed separately, and therefore their specific laws and doctrines should be applied to them only respectively.

V. IMPACT

This Part discusses the immediate impact of the Italian Colors ruling. This section also argues that courts should be aware that opportunities to invalidate arbitration agreements still exist in a narrow context. Additionally, it explores unanswered questions, including judicial attitude towards arbitration and the FAA and the future of class actions. Lastly, this Part establishes avenues for congressional reform based on balancing consumer and corporate interests.

A. Immediate Response

Courts have immediately responded to the Italian Colors decision. In Sutherland v. Ernst & Young LLP, the Second Circuit applied Italian Colors to a class-

292 See supra, Part IV.A. (explaining why the effects of the class-action waiver, not the arbitration requirement, impact the situation in Italian Colors).

293 See supra, Part IV.A.1 (applying the severability doctrine to distinguish class actions from arbitration within a single clause).

294 See infra Part V.A. (detailing how courts have already begun applying and changing decisions based on the Italian Colors ruling).

295 See infra text accompanying notes 308–310 (emphasizing that because the Court did not overrule the effective vindication doctrine it may still be applicable in narrowed instances).

296 See infra Part IV.B.1. (discussing whether there will be restored judicial hostility towards the FAA).

297 See infra Part IV.B.2. (speculating on the future of class actions and class-action waivers).

298 See infra Part IV.C. (summarizing congressional efforts to reform the FAA and suggesting specific mechanisms and approaches that could be employed by congress to reform both class actions and the FAA).

299 For more examples of immediate cases applying the ruling in Italian Colors, see; Morris v. Ernst & Young LLP, CV C-12-04964 RMW, 2013 WL 3460052 *7 (N.D. Cal. July 9, 2013) (finding the plaintiff’s financial abilities not outcome-determinative in applying the effective vindication doctrine); Feeney v. Dell Inc., 993 N.E.2d 329, 330 (2013) (overruling its own prior interpretation of Concepcion to invalidate a class action waiver in light of Italian Colors).

300 726 F.3d 290 (2d Cir. 2013).
action waiver provision that removes the incentive for a potential litigator to bring a claim under the Fair Labor Standards Act of 1938 (FLSA).\textsuperscript{301} The court solidified a common analysis to review the enforceability of an arbitration agreement, asking: (1) Is there a congressional command against enforcing the arbitration clause?;\textsuperscript{302} and (2) Is the potential litigator prevented from effectively vindicating her federal statutory right on an individual basis?\textsuperscript{303} After \textit{Italian Colors}, the second question in the analysis includes an extra limitation: if the claim is not worth vindicating individually, this alone will not justify a court’s finding that the party could not effectively vindicate her claim.\textsuperscript{304}

However, courts may be confused moving forward, as indicated in \textit{In re A2P SMS Antitrust Litigation}, where the Southern District of New York found that the filing fees and administrative costs do not constitute the elimination of the plaintiffs right to pursue their claims; therefore the arbitration clause was held enforceable.\textsuperscript{305} This situation, however, is exactly the kind of scenario that \textit{Randolph} and \textit{Italian Colors} consider an instance where an arbitration clause may be unenforceable.\textsuperscript{306} Additionally,

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\item \textsuperscript{301} \textit{Id.} at 292–93 (“[the plaintiff] argued that the costs and fees associated with prosecuting her claims on an individual basis would dwarf her potential recovery of less than $2,000”).
\item \textsuperscript{302} \textit{Id.} at 296. Other cases also consider this contrary congressional command, see e.g. \textit{Shetiwy v. Midland Credit Mgmt.}, 2013 WL 3530524 *3 (S.D.N.Y. July 12, 2013) (evaluating whether there is a contrary congressional command in the RICO and FDCPA context); \textit{but cf. A2P SMS Antitrust Litig.}, 2013 WL 5202824 *24–25 (S.D.N.Y. Sept. 16, 2013) (quoting the Supreme Court’s search for a “contrary congressional command” but declining to apply the inquiry to the case at hand).
\item \textit{Sutherland}, 726 F.3d at 298 (addressing whether the plaintiff can effectively vindicate her rights pursuant to \textit{Italian Colors} after finding there was no contrary congressional command); \textit{Shetiwy}, 2013 WL 3530524 *3 (S.D.N.Y. July 12, 2013) (concluding “that a generalized congressional intent to vindicate statutory rights cannot override the FAA’s mandate that courts enforce arbitration clauses”).
\item \textit{Id.} (quoting \textit{Am. Express Co. v. Italian Colors Rest.}, 133 S. Ct. 2304, 2310 (2013)) (“plaintiffs cannot use the doctrine to invalidate class-action waiver provisions by showing that “they ha[d] no economic incentive to pursue their [FLSA] claims individually in arbitration”).
\item \textit{Id.} (quoting \textit{2013 WL 5202824 *25 (S.D.N.Y. 2013) (holding filing fees and administrative costs for arbitration did not constitute the elimination of the plaintiffs’ right to pursue their claim).}}
\item \textit{See Green Tree Fin. Corp.-Alabama v. Randolph}, 531 U.S. 79, 90 (2000) (“[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum”); \textit{Italian Colors}, 133 S. Ct. at 2310 (noting the “right to pursue” may be prohibited by “filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable”).
\end{itemize}
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in a Seventh Circuit decision deciding whether to compel arbitration pursuant to a contract clause, the court references *Italian Colors* but declines to apply the Supreme Court’s analysis in its decision.\(^{307}\)

Courts, attorneys and policymakers should remember that the Court did not overrule the effective vindication doctrine; it declined to apply it.\(^{308}\) For plaintiffs attempting to invalidate an arbitration agreement, it would be best to focus on costs and inconvenience in the arbitration process itself.\(^{309}\) Economic incentive should not be addressed in the complaint because *Italian Colors*’ strongest assertion is that lack of this incentive is not sufficient to invalidate an arbitration clause.\(^{310}\)

\(^{307}\) Green v. U.S. Cash Advance Illinois, L.L.C., 724 F.3d 787, 792 (7th Cir. 2013) (interpreting *Italian Colors* to preclude adding requirements to the FAA which could prevent arbitration from being a fast and economical process).

\(^{308}\) *See Italian Colors*, 133 S. Ct. at 2311 (reasoning the class-action waiver limits arbitration to two parties, but does not deny plaintiffs their right to pursue their federal claims). *But see*, Garcia & Caseria, *supra* note 84 (contemplating whether the Court’s narrow construction of the Doctrine will render it completely “non-useful” going forward).

\(^{309}\) *See Italian Colors*, 133 S. Ct. at 2310 (suggesting that the Doctrine would “perhaps” cover the filing and administrative fees attached to arbitration); Damato v. Time Warner Cable, Inc., 2013 WL 3968765 n.10 (E.D.N.Y. 2013) (finding the claim falls under the *Randolph* standard because the plaintiff’s complaint about costs of arbitration focuses on costs to access the arbitral forum, not cost to prove the claim). Additionally, claims of unconscionability may hold, especially in a California courtroom. *See, e.g.* Sonic-Calabasas A, Inc. v. Moreno, 2013 WL 5645378 *28* (Cal. 2013) (declining to apply *Italian Colors*, reasoning the Court’s decision does not affect the unconscionability analysis at issue). *But see* Andrade v. P.F. Chang’s China Bistro, Inc., 2013 WL 5472589 *13* (S.D. Cal. 2013) (granting defendant’s motion to compel arbitration even after an unconscionability analysis).

\(^{310}\) *Italian Colors*, 133 S. Ct. at 2311 (“But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”); *see also* Sutherland v. Ernst & Young LLP, 726 F.3d 290, 298 (2d Cir. 2013) (following *Italian Colors* to find lack of economic incentive not sufficient to prove the plaintiffs lacks the right to pursue their remedy). Additionally:

If you want to undo a class arbitration waiver, you’ll need to do one of the following: (1) show that there was no actual agreement or that the terms are so unfair or one-sided that they will not be enforced under state law; (2) find a statute that guarantees your right to class proceedings for a particular claim; or (3) petition Congress.

Garcia & Caseria, *supra* note 84.
B. Unanswered Questions

1. Will Italian Colors Cause Restored Hostility towards the FAA?

As observed earlier, arbitration was traditionally opposed for mainly two public policy reasons: one, that arbitration could provide an avenue for businesses to escape public regulation; and two, the process of creating arbitration agreements was prone to one-sidedness.311 Indeed, the decision in Italian Colors may allow Amex and other large monopolistic corporations to “privatize justice” and use its monopoly power to establish “de facto immunity.”312 Additionally, today, very little if any consumer contracts undergo actual bargaining.313 Binding-arbitration is typically used in employment and consumer contracts provided for less sophisticated buyers or employees.314 Therefore, it appears probable that the hostility towards arbitration may be revived in light of Italian Colors.315

311 See supra text accompanying notes 43–45 (detailing the traditional oppositions to arbitration inherited from English common-law suspicions).
312 See Italian Colors, 133 S. Ct. at 2314 (Kagan, J., dissenting) (speculating a “company could use its monopoly power to protect its monopoly power” because of the majority’s decision); Brief for Respondents, supra note 99, at 4 (speculating that the enforcement of the arbitration clause would grant Amex “de facto immunity” from millions of dollars worth of antitrust liability).
313 See Green, supra note 61, at 560 (“scholars in the legal field have widely accepted the fact that traditional bargaining in consumer contracts is dead”). After Concepcion, some commentators wondered if now all attorneys will be expected to advise their clients to use class arbitration waivers. Philbin, supra note 6, at 36 (2011).
314 Additionally, consumers and lower-grade employees typically may not be able to “attract the counsel necessary for meaningful access to court.” Philbin, supra note 6, at 39. Even “sophisticated” consumers and employees may be trapped in arbitration agreements. See e.g. Pittman, supra note 1, at 791 (speculating that in the future, attorneys will be forced to sign arbitration agreements with their law firms, similar to stock brokers).
315 See e.g., Stephanie Mencimer, The Supreme Court Just Made It Easier for Big Business to Screw the Little Guy, MOTHERJONES (Jun. 20, 2013 at 9:19 AM) http://www.motherjones.com/politics/2013/06/consumers-get-screwed-scotus-american-express-decision-small-biz (speculating that if Amex can use arbitration to escape antitrust liability, then large companies could prevent people from filing sex discrimination or consumer fraud cases).
Nevertheless, there are some positive considerations: for one, the use of unfair arbitration clauses may not be as widespread as anticipated. Additionally, it is possible the holding in *Italian Colors* could be fact specific: this case is different from typical consumer-corporation adhesion contracts because both parties involved businesses. Perhaps, in the future, *Italian Colors* will be distinguished because it was a contract between two businesses, not a business and a consumer. And lastly, this could incentivize the arbitration system to revitalize itself by balancing the needs of consumers and corporations and following the Court’s liberal federal policy favoring arbitration.

2. **Will *Italian Colors* Bring Forth the End of Class Actions?**

Published commentators feared the end of modern class actions even prior to the *Italian Colors* decision. For example, one commentator warned of the adverse effects

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316 *See* Drahozal, *supra* note 42, at 721 (observing that there is little information on how common are unfair arbitration clauses, stating “criticisms of arbitration clauses . . . generally rely on anecdotal reports”). Drahozal argues that a systemic study is necessary in order to evaluate the actual extent and frequency of abuse in arbitration clauses. *Id.* at 721. Therefore, it may be difficult to ascertain exactly how hazardous and negative arbitration clauses actually are. *Id.*

317 Therefore, a certain level of sophistication is assumed, and some of the concerns usually present in a consumer/corporation standard-form contract may not be present. *See e.g.* Green, *supra* note 61, at 558–59 (expressing concern over the level of literacy of the average American consumer and how it affects standard-form contract relationships); Alan Schwartz, *How Much Irrationality Does the Market Permit?*, 37 J. LEGAL STUD. 131 (2008) (exploring the assumption that consumers are generally considered “naïve” whereas transactions between business firms are “sophisticated”).

318 The court in *Amex I* asserts its decision was not influenced by the small businesses status of the plaintiffs. *Amex I*, 554 F.3d 300, 320 (2d Cir. 2009). Considering the Supreme Court in *Italian Colors* reversed the *Amex I* decision, maybe the small business owner distinction was overruled as well.

319 *See infra* Part V.C.3. (suggesting a mutually corporate and consumer friendly mentality in congressional reform efforts). Additionally, the American Arbitration Association is frequently changing its rules and procedures for arbitration to address the demands of arbitration users to be provided with efficient dispute resolution. *See e.g.*, American Arbitration Association Launches Updated Commercial Rules (Sept. 9, 2013), [available at](http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7Bab1ff406-ad8f-45b0-bdfe-f7b47ac1bea7%7D_CommRulesPressRelease082813Cln.pdf) (announcing revisions to the commercial arbitration rules to ensure “streamlined, cost effective, and tightly-managed arbitration process[es]”). Further, the CFPB is a federal agency that will review consumer complaints. For more information, visit [http://www.consumerfinance.gov/complaintdatabase](http://www.consumerfinance.gov/complaintdatabase).

320 *See e.g.*, Gilles, *supra* note 8, at 375 (“I believe it is likely that, with a handful of exceptions, class actions will soon be virtually extinct.”); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 512 (2013) (quoting Kenneth R. Feinberg, Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges, Address Before the Faculty of the University of Texas School of Law (Oct. 3, 2011)) (“Class actions are dead.”).
of class-action waivers in particular: “Assuming the collective action waiver emerges more or less unscathed from the current round of judicial challenges, it is only a matter of time before these waivers metastasize throughout the body of corporate America and bar the majority of class actions as we know them.”\footnote{Gilles, supra note 8, at 377.} The \textit{Italian Colors} decision will likely welcome a new wave of fear that class-action waivers will destroy class actions, permitting corporate America to run recklessly.\footnote{See Garcia & Caseria, supra note 84 (describing the Court’s opinion as making class action waivers as “ironclad” absent congressional intent or direction from the savings clause in Section 2 of the FAA); Philip Bump, The Problem with the Supreme Court’s AmEx Decision, Class Action, and You, ATLANTIC WIRE, Jun. 20, 2013, http://www.theatlanticwire.com/national/2013/06/supreme-court-american-express-italian-colors/66443 (reporting the \textit{Italian Colors} decision with worry about its impact on consumers inability to assert class actions).} However, there are some positive realities despite these Supreme Court mandated restrictions on class actions that hint class actions will survive.\footnote{See generally Brian J. Murray, \textit{I Can’t Get No Arbitration: The Death of Class Actions That Isn’t, at Least So Far}, FED. LAW., September 2013, at 62 (observing that class actions will survive despite the \textit{Concepcion} decision). It is likely that Murray’s reasoning can extend to \textit{Italian Colors} as well. See id. at 74–75 (describing the impact of \textit{Italian Colors} couples with \textit{Concepcion}).}

For one, the Court in \textit{Italian Colors} did not adopt a \textit{per se} rule barring class actions.\footnote{Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–310 (2013) (acknowledging that Rule 23 is congressionally approved). In reality, class actions are “hard to kill off.” Mullenix, supra note 320, at 512. See, id. (arguing the repeated reports that class actions are “dead” are “highly exaggerated” as they have been recurring since the 1970s).} Some types of class actions will easily persevere the Italian Colors holding, such as securities fraud cases and wage and hour cases.\footnote{See Klonoff, supra note 101, at 824–26 (noting that a court is more likely to certify cases where commonality is readily apparent and damages are easily calculated, such as cases of securities fraud and wage and hour issues). Klonoff additionally suggests filing class actions in federal circuits, where judges are generally more receptive to class actions. Id. at 823. \textit{But cf. Italian Colors}, 133 S. Ct. at 2310 (“Rule [23] imposes stringent requirements for certification that in practice exclude most claims).} Secondly, methods still exist for the federal government to police antitrust violations; and bringing mass attention to

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\footnote{See generally Brian J. Murray, \textit{I Can’t Get No Arbitration: The Death of Class Actions That Isn’t, at Least So Far}, FED. LAW., September 2013, at 62 (observing that class actions will survive despite the \textit{Concepcion} decision). It is likely that Murray’s reasoning can extend to \textit{Italian Colors} as well. See id. at 74–75 (describing the impact of \textit{Italian Colors} couples with \textit{Concepcion}).}
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Amex’s agreements may result in federal charges. And lastly, with congressional intervention, class actions may be prevented from extinction altogether.

C. Recommended Congressional Efforts to Reform

The combination of Stolt-Nielsen, Concepcion, and Italian Colors threaten to severely limit consumers’ abilities to bring class actions or fight the enforceability of arbitration clauses. At this point, any change in these decisions requires a “congressional command” for courts to rule differently. In fact, case law has been seeking such congressional reform since the introduction of the effective-vindicatio doctrine. Legislators have attempted some reform measures; however, concrete and effective arbitration and class action legislation requires a more thorough balancing of interests, consumer and corporation alike, to seek common ground in upholding the benefits of arbitration.

326 Besides private parties, the Federal Trade Commission (FTC), the Department of Justice (DOJ) and state governments may all bring actions to enforce antitrust laws. See e.g. 15 U.S.C. §§ 4, 25 (granting the DOJ authority to obtain injunctions, divestitures, rescission and forfeitures); 15 U.S.C. § 45 (giving the FTC authority to seek remedies for charges of unfair competition). See also Brief of Amici Curiae American Bankers Association, American Financial Services Association and Consumer Bankers Association in Support of Petitioners at 16–17, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013), (No. 12-133), 2012 WL 6755150 (arguing that reversing the Second Circuit would not establish “de facto immunity” for corporations because there exist government enforcement options to police antitrust behavior).

327 See infra Part V.C.2–3. (suggesting possible avenues for congressional reform).


329 See Pittman, supra note 1, at 812 (explaining the Court’s unwillingness to overrule itself because Congress has the authority to statutorily overrule the Court); Klonoff, supra note 101, at 829 (“[W]ith respect to arbitration and the FAA, congressional action is necessary.”).

330 See infra Part V.C.1. (detailing prior case law seeking congressional command).

331 See infra Part V.C.2. (summarizing some attempts by Congress to enact the Arbitration Fairness Act).

332 See infra Part V.C.3. (explaining the “balance of interests” necessary for arbitration or class action reform to create tangible results).
1. Prior Case Law Supporting Congressional Reform

After the \textit{Italian Colors} decision, the best option to prevent unfair monopolization is Congressional reform for both class actions and the FAA.\textsuperscript{333} The majority opinion in \textit{Italian Colors} hints that Congressional reform is needed for the Court to rule alternatively.\textsuperscript{334} Additionally, case law before \textit{Italian Colors} sought congressional mandates in analyzing its effective vindication doctrine application.\textsuperscript{335}

Beginning in \textit{Mitsubishi Motors}, the Court found that it is within the scope of congressional power to specify which types of arbitrated claims should be held unenforceable.\textsuperscript{336} Further, in \textit{Gilmer}, the Court held that under the \textit{Moses} standard supporting a liberal “federal policy favoring arbitration,” it is presumed Congress intended to allow a statutory claim to be brought under compulsory arbitration, even if not expressly stated in the statute.\textsuperscript{337} Therefore the burden falls on the potential litigator to prove Congress intended otherwise.\textsuperscript{338} And lastly, in \textit{Randolph}, when the Court established a rule for determining when a statutory claim can be arbitrated, the Court

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\textsuperscript{333}“The obvious implication . . . is that statutory law, as well as judge-made liability rules, may need reform.” Michael Greve, Harm-Less Lawsuits 2. \textit{But cf.} Giles, supra note 8, at 391 (taking a pessimistic view on direct legislative reform in class actions). \textit{See also} Schmitz, \textit{supra} note 43, at 630 (2008) (discussing failed legislative efforts in banning pre-dispute arbitration). Schmitz also notes that bans on pre-dispute arbitration may not benefit consumers anyway, as arbitration is cheaper and faster than litigation and may provide higher recovery rates. \textit{Id.} at 629–30.
\textsuperscript{334} See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–310 (2013). The Court asserted: one, that there is no “congressional command” that would compel the court to reject the class waiver; and two, that Congress has taken some measures to “guarantee an affordable procedural path” for antitrust claims, such as by allowing treble damages under the Clayton Act. \textit{Id.} at 2309–310.
\textsuperscript{335} See \textit{infra} text accompanying notes 336–339 (describing instances in \textit{Mitsubishi Motors}, \textit{Gilmer} and \textit{Randolph} where the Court sought congressional reform).
\textsuperscript{336} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (“it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable”).
\textsuperscript{338} \textit{Gilmer}, 500 U.S. at 26 (noting the burden is on the potential claimant to prove Congress intended a preclusion of arbitration for claims under a particular statute).
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included an inquiry into whether there is a Congressionally evidenced intention to preclude a waiver of judicial remedies for that specific remedy at issue in its analysis.\textsuperscript{339}

2. Some Recent Attempts at Reform

There already has been some pushback in Congress in response to the Court’s formalistic FAA interpretations.\textsuperscript{340} For example, there have been multiple attempts to implement an Arbitration Fairness Act.\textsuperscript{341} The most recent attempt is a Proposed Bill to the 113th Congress which would amend the FAA to disallow pre-dispute arbitration agreements in an employment, consumer, antitrust or civil rights dispute.\textsuperscript{342} However, it is unlikely to progress because has received little co-sponsorship and faces the likely Republican opposition to class action lawsuits.\textsuperscript{343}

3. Suggestion: A Balance of Interests

This Note suggests that consumer advocacy groups, corporations and policymakers must come together and resolve the issues in class actions and

\textsuperscript{339} Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000). It seems likely that future analyses post-\textit{Italian Colors} will include a specific inquiry into contrary congressional commands. \textit{See e.g.}, Sutherland v. Ernst & Young LLC, 726 F.3d 290, 296–97 (2d Cir. 2013) (incorporating a clear-cut analysis of any “contrary congressional command” in its enforceability of the arbitration clause analysis).

\textsuperscript{340} \textit{See} Sullivan & Glynn, \textit{supra} note 45, at 1036 n.128 (referencing several (unsuccessful) Congressional actions to restrict to FAA, including the Arbitration Fairness Act, plus acts that will not permit whistleblowing to be diverted to arbitration, such as the Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act); \textit{see also} Thomas V. Burch, \textit{Regulating Mandatory Arbitration}, 2011 \textit{Utah L. Rev.} 1309, 1333 (2011) (observing that of the 139 arbitration reform bills introduced into Congress between 1995–2010, only five became law).

\textsuperscript{341} \textit{See} Turnbull, \textit{supra} note 66, at n.196 (listing the progression of the Arbitration Fairness Act in Congress: S. 1782, 110th Cong. (2007) re-introduced S.931, 111th Cong. (2009), S.987 112th Cong. (2011), H.R. 3010, 110th Cong (2007), re-introduced H.R. 1020, 111th Cong. (2009), re-introduced H.R. 1873, 112th Cong. (2011) (referred to committee May 12, 2011)). All of these bills are similar: all attempt to ban pre-dispute arbitration in some situations, and all have received little attention from Congress. \textit{See} Schmitz, \textit{supra} note 43, at 629 (“Such broad bans on pre-dispute arbitration agreements, however, have not enjoyed legislative success”).

\textsuperscript{342} S. 878, 113th Cong. (2013), available at http://www.gpo.gov/fdsys/pkg/BILLS-113s878is/pdf/BILLS-113s878is.pdf (“[N]o pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”).

\textsuperscript{343} Anant Raut, \textit{Antitrust in the 113th Congress}, 12-AUG Antitrust Source 1, 5 (summarizing the most recent attempt to bar pre-dispute arbitration especially in class-action waivers used in the antitrust context, but noting there is likely to be little headway as the bill has little co-sponsorship and the Republicans’ have a historical opposition to class action lawsuits).
There currently exists a mentality in consumer-advocates that corporations “force” consumers into arbitration clauses or class-action waivers in order to prevent consumers from exercising their legal rights. The realistic business model is this: corporations want to make money, do not want to get bogged down in costly and time-consuming litigation and are suspicious of plaintiff’s lawyers. Therefore drafting a clause that prevents costly and time-consuming litigation is their goal—it is not necessarily an attempt to deprive others of their legal rights, or to try to get away with doing “bad things.” Further, giving into the “evil corporation” mentality hinders

344 Other academics urge similar solutions, see, e.g., Schmitz, supra note 43, at 630 (2008) (urging “companies, consumers, and policymakers to join forces” and create procedural reforms that will help both consumers vindicate their legal rights and companies protect their interests); Burch, supra note 340, at 1345 (proposing a goal-oriented pragmatic approach to mandatory arbitration that is superior to the dogmatic approaches of both corporate and consumer advocates); Turnbull, supra note 66 (arguing that for reform to stand any chance, it must “address the concerns of both consumer and business advocates”).

345 See e.g. Public Citizen, The Costs of Arbitration 2, (2002), available at http://www.citizen.org/documents/ACF110A.PDF (accusing companies of wanting to use arbitration costs as a barrier to prevent consumers and others from asserting their legal rights); Schmitz, supra note 43, at 628 (noting arbitration allows corporations to “privatize justice”). Anderson and Trask describe the ideological divide on class actions perfectly:

There is a deep ideological divide between plaintiffs’ and defense lawyers. Given the high stakes and high visibility of aggregated litigation, it is not surprising that class actions are controversial. Advocates see class-action litigation as a way for large numbers of victimized “David’s” to collectively obtain justice from a misbehaving “Goliath” when individualized lawsuits are economically impractical. Opponents see class-action litigation as a means by which profit-motivated lawyers exploit the in terrorem nature of an aggregated case to extort windfall settlements from unpopular companies or industries. The primary reason for these different caricatures of class actions is that plaintiffs and defendants live in worlds that are structured differently.

Anderson & Trask, supra note 103, at xviii–xix. See also Turnbull, supra note 66 (describing business and consumer advocates as “vehemently opposed”).

346 See Green, supra note 61, at 554 (2013) (“Firms are encouraged, as wealth-maximizing engines, to increase profitability to the benefit of shareholders.”); Meredith R. Miller, Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process, 75 Tenn. L. Rev. 365, 365–66 (2008) (summarizing the “nexus contract model” of corporate law where the corporations relationships are all governed by contract); J. Maria Glover, Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 Vand. L. Rev. 1735, 1746 (2006) (observing that companies’ use class action waivers because they believe the class action procedure is motivated by plaintiffs attorneys aiming to “wrest large and unfair settlements from defendants”).

347 See Drahozal, supra note 42, at 742 (“the mere fact that arbitration clauses appear unfair does not, in itself, mean that corporations are taking advantage of individuals”). Drahozal additionally argues that business reputation and arbitration institutions exist to limit corporations from taking advantage of consumers in arbitration. Id. at 699.
policy reform: if consumer protection and alternative dispute resolution (or class action) reform is to progress, consumer advocates need to search for a fair middle ground.\textsuperscript{348}

In turn, corporations themselves should keep in mind interests of the consumers and take advantage of the fact that consumers may prefer arbitration in certain circumstances.\textsuperscript{349} For example, a Pew Research Study shows that checking account holders support the idea of arbitration.\textsuperscript{350} However, when these consumers begin to doubt arbitration, the components that constitute the actual arbitration procedure become disagreeable.\textsuperscript{351} Further, in some instances, businesses, and the lawyers preparing their contracts, are aware of their reputation for creating unconscionable arbitration contracts; as a result, companies have been making “plaintiff-friendly” arbitration clauses to withstand court scrutiny on issues of unconscionability.\textsuperscript{352} Additionally, media attention on repeating instances of corporate monopolization is more likely to incentivize legislators to regulate corporate behavior.\textsuperscript{353} It is also likely to harm the reputation of the

\textsuperscript{348} See Burch, supra note 340, at 1337 (criticizing Congress for giving in to the push from consumer advocates to eliminate, rather than regulate, arbitration). “The problem is not arbitration itself; rather, the problem is that companies have abused mandatory arbitration . . .” Id.

\textsuperscript{349} See Drahozal, supra note 42, at 749 (observing individuals may be inclined to give up their right to a jury trial in exchange for the ability to arbitration more small-dollar claims which are more likely to occur).


\textsuperscript{351} Id.; see also Cronin-Harris, supra note 6 (arguing that encouragement of regular and systemic uses of ADR will help all parties understand and utilize it properly).

\textsuperscript{352} Philbin, supra note 6, at 38 (2011); see also Drahozal, supra note 42, at 771 (concluding that if corporations do not make efforts to share benefits of arbitration with individuals, the arbitration system may increase costs to both parties).

\textsuperscript{353} See Drahozal, supra note 42, at 769 (“the threat of government regulation can spur the industry to self-regulate in an attempt to head off restrictive legislation.”) For example, the CFPB was established under Title X of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub.L. 111–203, §§ 1001–1100, 124 Stat. 2106 (2010). The financial crisis beginning in 2007 spurred legislative and presidential incentive to regulate consumer protection. Consumer Financial Protection Bureau,\textit{Creating the Consumer Bureau}, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited October 31, 2013). The CFPB has begun reviewing pre-dispute arbitration agreements, see Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Bureau of Consumer Financial Protection, April 25, 2012,
corporation, hurting profits that arbitration would presumably save.\textsuperscript{354} Therefore, it is in the best interest of corporations to seek compromises and keep consumer interests in mind.\textsuperscript{355} Only by working together can policymakers, consumer advocates and corporations begin to address tangible and progressive arbitration and class action reform.\textsuperscript{356}

D. Exploration of Some Suggestions

One option for class-action reform would be to statutorily expand class actions in the consumer and antitrust context, and limit it in another context, such as employment law. As the facts in \textit{Italian Colors} indicate, antitrust claims are expensive to prove.\textsuperscript{357} Therefore broadening class actions in antitrust claims makes sense: how else can consumers be protected when the cost of proving their claims is so expensive?\textsuperscript{358} Do

\url{http://files.consumerfinance.gov/f/201204_cfpb_rfi_predispute-arbitration-agreements.pdf} (issuing a notice and request for information on pre-dispute arbitration agreements).

\textsuperscript{354} Drahozal observes that business reputation is crucial to corporate profits. Drahozal, \textit{supra} note 42, at 765. ("A good reputation is valuable to a business."). A corporation with a reputation for "sharp dealing" and other unfair competition practices will suffer in the marketplace. \textit{Id}. Although this does not always deter corporations from making mistakes or "cutting corners," Drahozal criticizes arbitration critics for failing to consider the incentive corporations have to maintain good reputations. \textit{Id}. at 766.

\textsuperscript{355} See Turnbull, \textit{supra} note 66 (describing what motives businesses have to seek more efficient means of dispute resolution); Burch, \textit{supra} note 340, 1310 (2011) (stating that a compromise between consumer and corporate advocates is difficult, but seemingly “the only workable approach”).

\textsuperscript{356} For example, Turnbull argues that removing the privacy and confidentiality feature of arbitration would be a reasonable compromise that would require publication of group arbitration proceedings. Turnbull, \textit{supra} note 66. Additionally, Burch proposes legislation allow companies to mandate arbitration, but highly regulate the process to ensure fairness. Burch, \textit{supra} note 340, at 1310.

\textsuperscript{357} According to the expert used in \textit{Italian Colors}, an economic antitrust analysis is “necessarily complex and costly” because it requires, \textit{inter alia}, an analysis into the relevant markets, whether the defendants alleged antitrust violation has created an anticompetitive effect on those markets. \textit{Amex I}, 554 F.3d 300, 309 (2d Cir. 2009) (including relevant portions of the expert’s affidavit). Further, this knowledge that antitrust claims usually will not be brought on an individual basis is long-standing in Courts. \textit{See id}. at 312 (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974)) (“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.”).

\textsuperscript{358} Petitioners in \textit{Italian Colors} tout the benefits of deciding expensive cases in the arbitral forum, because “[w]hether each claimant would have to submit a complex and costly economics expert report is a decision for the arbitrator.” \textit{Brief for Petitioners, supra} note 84, at 50. \textit{See also} \textit{Brief of Distinguished Law Professors, supra} note 195, at 9 (stating that is “makes no sense” that an arbitrator would need a $1 million expert to decide a $5,000–$30,000 claim). \textit{But cf}. \textit{Brief for United States, supra} note 261, at 23 (asserting
expensive consumer claims indicate that antitrust violations should solely be a policing mechanism in the hands of the government? \(^{359}\) Alternatively, other claims, such as employment law disputes, may be better suited for arbitration or other forms of ADR. \(^{360}\) This categorical approach has been adopted in foreign countries, where class actions are mainly limited to consumer claims. \(^ {361}\) A categorical approach could maintain a check on corporate malfeasance while allowing corporations to shield themselves from frivolous lawsuits as well. \(^ {362}\)

Another option, in the arbitration context, would be a legislatively mandated preference for non-binding arbitration. \(^ {363}\) Non-binding arbitration has the reputation of

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\(^{359}\) For more information on government entities permitted to sue corporations for antitrust violations, see supra note 326. \(^ {360}\) See, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011) (finding “anecdotal evidence” of systematic sex-discrimination towards employees as too weak to satisfy the commonality requirement in a class action certification); Stephen Bough & Dirk Hubbard, *Issues in Employment Class Action Litigation*, 56 J. Mo. B. 37, 37 (2000) (observing most class-action lawyers avoid employment law disputes because they generally complex litigation). The United States Department of Employment encourages ADR (that meets reasonable standards of fairness) to assist employees and employers in resolving disputes in the most economically efficient matter. *See generally Special Report: IV. Employment Litigation and Dispute Resolution*, http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (Last visited Nov. 3, 2013). But see, Murray, supra note 323, at 63 (indicating that certain employment disputes require a right to collective action under the NLRA).

\(^{361}\) See e.g. Código Federal de Procedimientos Civiles [CFPC] [Federal Code of Civil Procedure] as amended, Diario Oficial de la Federación [DO], 09 de Abril de 2012 (Mex.) art. 578 (limiting class action proceedings to public or private consumption of goods or services and environmental actions); Department for Business Innovation & Skills, Impact Assessment, Private Actions in competition law: a consultation on options for reform – government response, BIS/13/501, at 32 (U.K.) (proposing reforms in competition law such that suits can be brought by businesses and consumers).

\(^{362}\) Other methods employed in foreign countries to promote class actions yet curb frivolous lawsuits include opt-in rather than opt-out procedures and limits on attorneys’ fees. *See Commission Recommendation (EC) No. C(2013) 3539/3 of 11 June 2013, 6 [hereinafter Recommendation] (directing European Union states to adopt opt-in procedures); id. at 9 (discouraging the EU member states from allowing contingency fees or punitive damages in collective actions in order to discourage frivolous and for-profit law suits); see generally Turnbull, supra note 66 (urging the United States to adopt the UK’s GLO rule for class actions because the opt-in proceedings coupled with broader law suits will lead to “more determinate classes”).

\(^{363}\) *See generally* Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, 61 DISP. RESOL. J. 22 (2006) (describing the underrated benefits of non-binding arbitration). The existence of this kind of
being inefficient.\textsuperscript{364} However, it may actually save judicial resources: in non-binding arbitration, parties either resolve their disputes and are saved a trip to the courtroom; or litigate anyway.\textsuperscript{365} The difference in the latter example is that there is no litigation about the arbitration itself: while parties in binding arbitration will first appeal issues such as the arbitrator’s bias, the arbitrator’s use of proper procedure or the arbitrator’s proper analysis of the facts, in non-binding arbitration, the case goes straight to the merits of the case.\textsuperscript{366} The increased litigation over the enforceability of arbitration clauses defeats the efficient purpose of arbitration; therefore non-binding arbitration may actually be the most efficient option.\textsuperscript{367}

VI. CONCLUSION

This Note discussed the majority and dissenting opinions in Italian Colors in light of prior case law and the history of attitudes towards arbitration and class actions. It

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\textsuperscript{364} See Bennett, supra note 363, at 24 (“On its face, non-binding arbitration may appear to be quite inefficient.”); Amy J. Schmitz, Nonconsensual Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs, 10 CARDOZO J. CONFLICT RESOL. 587 (2009) (arguing that non-binding arbitration programs have failed to serve arbitration’s intended purpose of efficiency and fairness).

\textsuperscript{365} See Bennett, supra note 363, at 24 (observing that non-binding arbitration eliminates the possibility of appealing the arbitrator’s decision, “thereby making it less costly in time, money and frustration.”). See also Charles B. Carter, Non-Binding Arbitration: Curse or Blessing?, TRIAL ADVOC. Q., Summer 2009, at 23, 24 (observing a decision by an arbitrator may “bring a party down to earth” and demonstrate the unreasonable expectations of a potential suit).

\textsuperscript{366} See Bennett, supra note 363, at 24 (noting that in non-binding arbitration, a dissatisfied party may still file suit, but will employ careful consideration of the potential costs in a businesslike way). Non-binding arbitration may even be more efficient than mediation, as Carter argues. See Carter, supra note 365, at 24–25 (“[N]on-binding arbitration using a single arbitrator may be viewed as cost effective when the overall cost is compared to mediation and in turn compared to the settlement value.”).

\textsuperscript{367} See Bennett, supra note 363, at 24–25 (“These advantages . . . make non-binding arbitration a highly practical process, especially for less complex commercial disputes that companies do not wish to mediate”). Bennett includes other advantages to non-binding arbitration: it is still flexible and private as for which arbitration is known, but it is still more formal than mediation. Id. at 23, 24. Additionally, non-binding arbitration can still be mandatory, which is potentially beneficial for businesses, but does not prohibit anyone’s right to litigate, and is therefore less likely to be detrimental to consumers. Id. at 25–26.
evaluated the strength and weaknesses of the opinions and ultimately sided with the majority.

Although the majority opinion put the small merchants at an unfair disadvantage, the decision is justified. Arbitration and class actions are entirely different entities. They are governed by different principles, statutes and judicial interpretations. Therefore, the majority opinion’s refusal to apply the effective vindication doctrine in *Italian Colors* is correct. The plaintiffs’ inability to afford legal recourse against Amex is because of the class-action waiver, not the costs of arbitration. The effective vindication doctrine does not apply to collective action waivers—it is a judicial doctrine that is derived from interpretations of Section 2 of the FAA, and has no connection with Rule 23.

Lastly, distinguishing class actions from arbitration is important in this case not just to reach a proper conclusion, but also to understand where courts and lawmakers go from here. Only by striking a balance between consumer and business interests can Congress safeguard against both the abuse and extinction of the arbitration and class action mechanisms.