

# INEFFECTIVE VINDICATION OF ANTITRUST RIGHTS

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## ABSTRACT

This Article considers the retrenchment of antitrust rights brought about by an overly broad reading of the Federal Arbitration Act as another step in the trend of judicial curtailment of rights through inconspicuous means. It analyzes the Supreme Court decision that effects this curtailment of antitrust rights and provides an alternative analysis of the problem of arbitration agreements that functionally insulate a party from liability through mechanisms, such as class action waivers, that make a lawsuit too costly to pursue. It then puts this decision in the context of ongoing efforts by the Supreme Court to retrench substantive rights and highlights the particular problems that attach to such retrenchment in the antitrust area that particularly relies on private enforcement to achieve the goal of maximizing consumer welfare. It concludes that this anti-democratic practice is particularly socially harmful in the antitrust context because decreases in private enforcement can be expected to translate into large decreases in deterrence of anticompetitive conduct.

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## INTRODUCTION

The policy of antitrust law in the United States is to increase consumer welfare, and this policy is undermined by the Supreme Court's most recent interpretation of the principle of effective vindication. In this paper, I argue that a dynamic interpretation of the principle of effective vindication advances the policy goal of antitrust. Without a robust principle of effective vindication, it becomes far too easy for potential antitrust defendants to use arbitration agreements to shield themselves from antitrust liability. This is particularly problematic in the antitrust context given the large amount of enforcement that occurs through private suits.

The efficacy of the principle of effective vindication depends upon the interpretation of the principle as a dynamic concept. If a court is able to invalidate an arbitration agreement only under very narrow circumstances, then the principle's purpose is undermined. The vitality of this doctrine is conditioned on the ability of a court to consider whether someone is functionally precluded from vindicating his federal statutory right regardless of whether an agreement precludes vindication on its face. The majority decision in the case of *American Express Company v. Italian Colors Restaurant* undermines the doctrine of effective vindication by conceptualizing the doctrine as static.<sup>1</sup> This decision undermines the antitrust policy of maximizing consumer welfare by obstructing the private enforcement of antitrust rights.

### I. THE PRINCIPLE OF EFFECTIVE VINDICATION

The Federal Arbitration Act<sup>2</sup> (FAA) made arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>3</sup> This language has been interpreted by the Court as creating a strong policy in favor of arbitration agreements.<sup>4</sup> The savings clause of this provision indicates that an

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1. 570 U.S. 228 (2013).

2. Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. § 1 et seq. (2012)).

3. 9 U.S.C. §2 (2012).

4. See THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 78 (2d ed.

arbitration agreement can be invalidated on contract common law grounds.<sup>5</sup> However, in *AT&T Mobility LLC v. Concepcion*, the Court held that a state policy against class waivers in arbitration agreements on the basis of unconscionability was invalid because “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>6</sup> This decision preempting state contract policy weakened the savings clause insofar as unconscionability is a reason, rooted in common law, for invalidating a contract.

Assuming that *Concepcion* reduces the ability of courts to invalidate arbitration agreements, the decision makes the federal policy in favor of arbitration much stronger. This decision left some uncertainty regarding the situations under which a court could invalidate an arbitration agreement that included a class action waiver.<sup>7</sup> One possible answer is using the effective vindication principle to invalidate such agreements, which “might prove more like the eye of a needle through which claimants must pass to gain refuge from class action waivers” rather than an open floodgate for arbitration agreement invalidation.<sup>8</sup>

The Court first articulated the effective vindication principle in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, saying that the federal policy in favor of arbitration agreements applies “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>9</sup> The Court was explicit: “By agreeing to arbitrate a

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2007) (stating that the Federal Arbitration Act is considered to provide legitimacy to arbitration as an alternative remedial mechanism). See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (emphasizing that 9 U.S.C. §2 “embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts”); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 41 (1983) (stating that the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary”).

5. See Ellen Meriwether, *Class Action Waiver and the Effective Vindication Doctrine at the Antitrust/Arbitration Crossroads*, 26 ANTITRUST 67, 68 (2012) (noting that the savings clause provides that arbitration agreements may be void because of fraud, duress, or unconscionability, as opposed to arbitration-specific defenses).

6. 563 U.S. 333, 351 (2011).

7. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–40 (2012) (asking what factual scenarios would allow a court to invalidate an arbitration agreement with a class action waiver).

8. *Id.* at 647.

9. 473 U.S. 614, 637 (1985); see also *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 765–66 (2000) (adopting a robust view of the principle of effective vindication, which according to this court means that a plaintiff cannot be required to bear

statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>10</sup> It stands to reason that under the principle of effective vindication an arbitration agreement would be invalidated if it resulted in a party forgoing its substantive rights.

## II. THE *ITALIAN COLORS* CASE

The effective vindication principle was examined and all but rejected in *Italian Colors*.<sup>11</sup> In this case, the Court held that an arbitration clause that made a suit prohibitively expensive was valid under the effective vindication principle because, “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.”<sup>12</sup> This decision undermines the principle of effective vindication and limits its ability to be of any use by making a meaningless distinction.

The dispute in *Italian Colors* arose from an agreement between American Express and various merchants, which accept American Express cards as payment from their customers.<sup>13</sup> The agreement in question contained an arbitration clause in which the merchants waived their right to bring suit as a class.<sup>14</sup> Importantly, the agreement also foreclosed potential plaintiffs from “joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.”<sup>15</sup> The merchants claimed that American Express violated §1 of the Sherman Act<sup>16</sup> by a tying arrangement between their charge cards and credit cards.<sup>17</sup>

Proving a violation of the antitrust laws is expensive because of the economic experts that have to be contracted to provide analysis of the

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any cost in the arbitral forum which he would not be required to bear in court).

10. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

11. 570 U.S. 228, 236–37 (2013).

12. *Id.*

13. *Id.* at 231–32.

14. *Id.*

15. *Id.* at 250 (Kagan, J., dissenting); see also *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 307 (2d Cir. 2009), *rev’d sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (mentioning that “the Card Acceptance Agreement not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis”).

16. 15 U.S.C. §1 (2012) (stating that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”).

17. *Italian Colors*, 570 U.S. at 231.

market and the anticompetitive effects of the challenged behavior.<sup>18</sup> In this case, “the cost of an expert analysis necessary to prove the antitrust claims would be at least several hundred thousand dollars, and might exceed \$1 million, while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled.”<sup>19</sup> The key is that this assessment is in regards to an individual plaintiff. However, bringing the suit through some sort of joinder device would overcome the difficulty of prohibitive costs because the various plaintiffs would be able to share the cost of the proceedings.<sup>20</sup>

#### A. *Narrowing Effective Vindication*

The majority opinion in *Italian Colors* limits the principle of effective vindication through narrowing the circumstances under which the principle applies. The Court confirmed the existence of the principle, and notes that the principle “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>21</sup> The Court does not say in which situations—other than an agreement that forbids the right to pursue a statutory right—the principle will apply.<sup>22</sup> It is notable that the majority also qualifies the application of the principle in the situation of prohibitive court fees by saying that the principle “perhaps” applies in this situation. Although the Court indicates otherwise, it seems like it is only affirming the principle insofar as the arbitration clause explicitly forbids a potential

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18. See HERBERT HOVENKAMP, *PRINCIPLES OF ANTITRUST* 46 (2017) (describing that “[t]he New Deal period saw substantial inroads of economic theory into antitrust policy”); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (“[A]ntitrust discovery can be expensive.” (citation omitted)).

19. *Italian Colors*, 570 U.S. at 231.

20. *Id.* at 248–50 (Kagan, J., dissenting); see also RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICSON, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 199 (6th ed. 2015) (explaining that “[class actions are] especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims,” citing *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014)).

21. *Italian Colors*, 570 U.S. at 236.

22. See Thomas J. Lilly, Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine after American Express v. Italian Colors Restaurant?*, 61 *WAYNE L. REV.* 299, 318–338 (2016) (examining the various circumstances under which the principle of effective vindication might be applied in light of the decision in *Italian Colors*).

plaintiff from making a claim for a given statutory right. It is difficult to see under what other circumstances the principle would apply when even prohibitive administrative fees are only “perhaps” covered.

The decision to narrow the effective vindication principle is defended in two ways, the first is through an appeal to pre-class action jurisprudence and the second is through a formalistic view of the principle. First, the opinion argues that antitrust suits existed before class action proceedings, and “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.”<sup>23</sup> But, this case was not only about the class action waiver, instead it had to do with all of the provisions in the agreement that prevented a claim from being economically feasible.<sup>24</sup> The class action waiver by itself does not render the vindication of this right ineffective, rather the result of ineffective vindication stems from the agreement as a whole.

It is because the Court looks narrowly at the agreement solely in terms of the class action waiver that it can make the argument based on the history of class action procedures. The dissent indicates the root of the majority’s argument: “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.”<sup>25</sup> In fact, the majority opinion does not address whether the provisions in the agreement that prevent fee shifting or sharing of the expert report have any impact on the matter.<sup>26</sup> These provisions must be of great import to the case because had either of them not existed, the plaintiffs would have been able to proceed and vindicate their rights.<sup>27</sup>

The majority opinion fails to consider the bearing that the other provisions foreclosing economical adjudication have on the matter. Instead of seriously addressing these, the Court decided to assert that the other provisions were not important because they were not part of the holding in the court below.<sup>28</sup> However, the second circuit decided the case based upon

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23. *Italian Colors*, 570 U.S. at 236–37.

24. *See id.* at 249 (Kagan, J., dissenting) (underscoring that “[n]o single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open”).

25. *Id.* at 252.

26. *See id.* at 249 (stating that “[b]ut that notion, first of all, rests on a false premise: that this case is only about a class-action waiver”).

27. *See supra* text accompanying notes 15–20 (describing how a joinder device could allow individual plaintiffs to overcome otherwise prohibitive costs).

28. *See Italian Colors*, 570 U.S. at 237 n.4 (commenting that “[p]etitioners denied that

the notion that there was no way that the suit could be brought in a way that was economically rational. This rationale necessitates taking into account the provisions in the agreement that foreclosed other means of cost sharing.<sup>29</sup> Therefore, the first defense for narrowing the effective vindication principle rests on a failure to take into account the entire agreement.

Moreover, the appeal to the pre-class action era ignores the fact that the cost of proving an antitrust claim has increased dramatically ever since the introduction of sophisticated economic analysis into antitrust doctrine. Not only is the cost of experts higher, but also the increased costs of discovery in the digital age militate toward a reconceptualization of the scope of the effective vindication principle.<sup>30</sup> The cost of litigation and expert testimony in a modern antitrust case is another factor that the majority fails to consider in its first argument defending its position.

The second defense for the narrow view of the effective vindication principle is based on formalism. It rests on the distinction that the majority makes in the holding between “proving a statutory remedy [and] . . . the right to pursue that remedy.”<sup>31</sup> According to this distinction, the economic feasibility of proving a statutory remedy is not what the effective vindication principle guarantees.<sup>32</sup> This turns on the idea that the effective vindication principle only regards the “right to pursue,” which is entirely distinct from the ability or willingness to pursue.<sup>33</sup> In other words, according to the majority, making a course of action uneconomical is different from preventing that course of action from being taken.

If administrative costs are prohibitively high for the plaintiff, then it

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[the agreement foreclosed other avenues of cost sharing], and that is not what the Court of Appeals decision under review here held”). *But see* *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 318 (2d Cir. 2009), *rev’d sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (commenting that “any proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*”).

29. *See In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 318 n.14 (2d Cir. 2009), *rev’d sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (concluding that “the plaintiffs have demonstrated to our satisfaction that neither an individual arbitration, *nor* an individual litigation would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action”).

30. *See generally* *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (noting the substantial costs that modern discovery presents for both sides).

31. *Italian Colors*, 570 U.S. at 236.

32. *Id.*

33. *Id.*

seems that the effective vindication principle would invalidate the arbitration agreement. Indeed, this is the one circumstance that the majority opinion points to where the principle as they see it might apply.<sup>34</sup> This is consistent with effective vindication precedent that considers “whether [an] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide [the plaintiff] protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum.”<sup>35</sup> The Court in *Randolph* indicates that arbitration costs that serve to preclude effective vindication of federal statutory rights can lead to the arbitration agreement being invalidated under the effective vindication principle.<sup>36</sup> When this scenario is juxtaposed to the one in *Italian Colors*, it is difficult to draw a line separating them. Prohibitive costs—whether administrative costs or expert and litigation costs—are ultimately costs that serve to make the prosecution of a claim uneconomical. Looking at the matter from this perspective illustrates not only that the formal distinction (ability versus right to pursue) is meaningless, but furthermore that another distinction (between administrative costs and other costs) must be made for the argument to remain intact given the existing precedent.

The distinction between ability to pursue and right to pursue is dubious, and this interpretation of the effective vindication principle cannot be squared with the purported purpose of the principle. Parties cannot agree to waive substantive antitrust rights altogether, and “[t]he opposite ruling would probably result in releases contained in every distributorship or franchise agreement, as well as numerous other sales agreements; before a prospective franchisee could obtain a franchise he would have to agree to hold the franchisor harmless from all antitrust violations.”<sup>37</sup> The point of the effective vindication doctrine is to protect substantive rights by preventing arbitration agreements from being a way for a contracting party to waive out of liability for the violation of a substantive statutory right.<sup>38</sup>

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34. *Id.* at 234–37.

35. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000).

36. *Randolph*, 531 U.S. at 90 (mentioning that “[i]t may well be that the existence of large arbitration costs could preclude a litigant such as *Randolph* from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that *Randolph* will bear such costs if she goes to arbitration.”).

37. See 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 311 at 264 (4th ed. 2014) (commenting on *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247 (7th Cir. 1994), *cert. denied*, 516 U.S. 1159 (1996)).

38. See *supra* notes 9–10 and accompanying text (describing the principle of effective vindication).



The majority opinion in *Italian Colors* seems to agree with this proposition.<sup>39</sup> A substantive right is “[a] right that can be protected or enforced by law.”<sup>40</sup> So the question is whether one *can* protect a right when it is economically infeasible to provide proof that this right was violated.

### B. Rational Actors

The majority opinion assumes that one can always protect a right as long as the agreement does not waive the substantive right in itself, but this assumption is incorrect. Perhaps those individuals that are wealthy can vindicate negative value claims, but it is doubtful that they will do so. Moreover, individuals that do not have a million dollars laying around actually cannot pursue the vindication of their statutory rights when an arbitration agreement leaves them in the position of the merchants in *Italian Colors*. The majority seems to boast about “the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.”<sup>41</sup>

In the antitrust context, this decision will mostly affect businesses, such as franchisees or distributors, that have agreements with potential antitrust defendants. Even assuming that these businesses can bear the cost, rational actor theory indicates that, as a business decision, a suit will not be pursued where the best-case scenario entails a million-dollar loss as is the case in *Italian Colors*.<sup>42</sup> People and companies will usually act in a way that maximizes their wealth by making decisions based upon cost-benefit analyses.<sup>43</sup> They will take the course of action that provides the highest benefit for the lowest cost. As a result, these companies will not pursue the vindication of their rights in a situation similar to *Italian Colors*.

39. *Italian Colors*, 570 U.S. at 236–37.

40. *Substantive Right*, BLACK’S LAW DICTIONARY (2d pocket ed. 2001).

41. ANATOLE FRANCE, *THE RED LILY* 87 (Robert Arnot trans., Current Literature Publishing Company 1910).

42. See Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 672 (2013) (explaining that “an expectation of a positive, rather than a negative, economic outcome will typically be a precondition to the choice to sue, even if there are other political or psychological reasons for proceeding”).

43. See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 10 (2d ed. 1989) (describing the assumptions made in the economic analysis of the law which include the ability to measure costs and benefits, the stability of the measurements of these factors, and the utility maximization based upon these factors as the objective of firms and individuals); see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 42 (1983) (stating that “human beings act as rational maximizers of their satisfactions in all spheres of life”).

It would be unreasonable for them to do so.

Even if the directors, executives, or controlling shareholders wanted to pursue the suit, pursuing such a negative value claim may be forbidden under the corporate waste doctrine. This doctrine says that corporations cannot trade “corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.”<sup>44</sup> It appears that an expenditure of one million dollars in exchange for forty thousand dollars is corporate waste. Another way to formulate the exchange is: an expenditure of \$960,000 in exchange for nothing. Although the doctrine of corporate waste typically is unsuccessful, this could be a situation where it would be able to succeed. It might be argued that the exchange is for the intangible benefit of defending the company’s rights in the abstract. Maybe the shareholders benefit greatly from the knowledge that the harm has been acknowledged in a court of law, and that is worth \$960,000. However, it is possible that the company will not be able to pursue the lawsuit because it would be corporate waste.

In the vast majority of cases, a right cannot be protected when it is economically infeasible to prove the violation of the right. Indeed, the ability to pursue a lawsuit “is closely related to expected benefits [and when] an individual can bring suit only in his or her individual capacity, litigation may frequently be unattractive.”<sup>45</sup> In a case such as *Italian Colors*, it may actually be impossible for the individual or company that has been harmed to afford to pursue such a claim. If pursuing such a claim is affordable, it likely will not be pursued anyway because doing so would represent a major loss, even in the best-case scenario. Assuming that it is a company that can afford to pursue the claim and the directors are willing to incur the loss which pursuing the claim entails, it might still be barred from doing so due to the corporate waste doctrine. This leaves one narrow circumstance in which a right can be protected despite the economic infeasibility of proving the right: the harm has occurred to a wealthy individual, and she is willing to incur the loss of pursuing the claim.

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44. *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997).

45. Jason Rathod and Sandeep Veheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H.L. REV. 303, 314 (2016).

### III. THE EFFICIENCY OF DYNAMIC EFFECTIVE VINDICATION

The majority in *Italian Colors* views the principle of effective vindication as a static concept while the correct view of the principle is dynamic. The static view is based on policy considerations. The policy behind the static view is one that sees arbitration as an efficient mechanism for adjudication of disputes. That is to say, the static view considers the efficiency of effective vindication, through what might be seen as economic analysis of the law. However, applying this analysis to the principle of effective vindication, the majority in *Italian Colors* reaches the wrong conclusion.

Instead, the dissent's view of the principle, treating it as a dynamic concept, is correct under an economic analysis. The policy rationale for the dynamic view is that the majority's view creates perverse incentives. A dynamic conception is therefore more efficient because the costs of perverse incentives are avoided. Ultimately, regardless of the inconsistencies of the majority's view, the dissent's view is more desirable because applying a flexible standard for effective vindication is more efficient.

#### A. *Economic Framework and Analysis*

The framework for an economic analysis of the law is a straightforward cost-benefit analysis, and the benefits of a given principle of law are weighed against the costs of that principle in order to determine what is efficient. In the analysis of legal concepts, efficiency is the maximization of the overall wealth of society from the adoption of a legal principle such that costs are minimized and benefits are maximized; the ultimate question is whether aggregate welfare is maximized by the effect of the legal rules on individual preferences.<sup>46</sup>

The economic analysis of the law is undertaken through the construction of hypothetical markets for goods and an evaluation of whether a particular law maximizes acquisition of those goods. This inquiry requires an analysis of individual behaviors which is done with indifference curves in an analysis that "implicitly classifies all factors affecting consumer behavior into three categories: (1) goods—these are the

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46. See POSNER, *supra* note 43, at 60–61, 115 (explaining "wealth maximization" as a method of legal analysis focused on whether "acts and institutions" maximize "aggregate satisfaction" of preferences, or in other words, the use of economic analysis to evaluate legal concepts on the basis of providing the greatest net benefit for society as a whole).

axes of the indifference curves, (2) factors determining opportunities—these are summarized in the budget line, and (3) factors determining tastes—these are summarized in the indifference curves.”<sup>47</sup> The contents of the classifications “are to be determined by the problem at hand, so that the same factor may for one purpose be treated as a good and measured along the axes, for another as an opportunity factor, for another as a taste factor.”<sup>48</sup> Utility is then measured by the distance of the indifference curves from the axis, with further curves implying more utility because one can obtain a greater combination of goods.

This hypothetical market formula can be applied to questions regarding the efficiency of legal principles. Applying the indifference curve formula to the principle of effective vindication requires identifying the factors affecting behavior in the situation where one’s rights have been infringed and categorizing these factors into the three categories described above: (1) goods, (2) opportunities, and (3) tastes. The goods (axes) are (a) bringing suit to vindicate the right, or (b) literally any other good that can be purchased with the money that could have been used to purchase the lawsuit, such as a piano. The opportunities (budget line) are determined by (a) the opportunity to litigate as determined by the cost-based realities of bringing the suit and (b) the opportunity to buy any other good based on its cost. The tastes are (a) the desire to litigate to vindicate rights and (b) the desire to acquire any other good.

The consideration of the effects that a legal principle has on these factors as applied to individuals provides guidance for the effects of the principle in the aggregate. This is because effects to these factors will alter incentives and the “basic function of law in an economic or wealth-maximization perspective is to alter incentives.”<sup>49</sup> Thus, by looking at how the principle changes the desire to litigate and the opportunity to litigate, it will lead to conclusions about incentives that such a rule creates. Once the incentives have been ascertained, the analysis must look at both the costs and the benefits of such incentives. A complete economic analysis of a legal principle must consider both the benefits and the costs—in terms of incentives and of administering the principle—of the given principle.

Applying this analysis to the problem of defining the principle of effective vindication, it is clear that a static definition of effective vindication makes lawsuits less likely. A static principle of effective

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47. MILTON FRIEDMAN, PRICE THEORY 46 (2007).

48. *Id.*

49. POSNER, *supra* note 43, at 75.

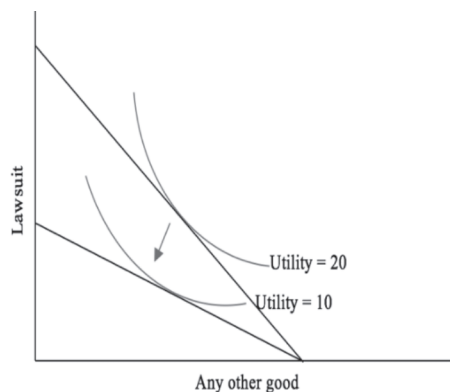
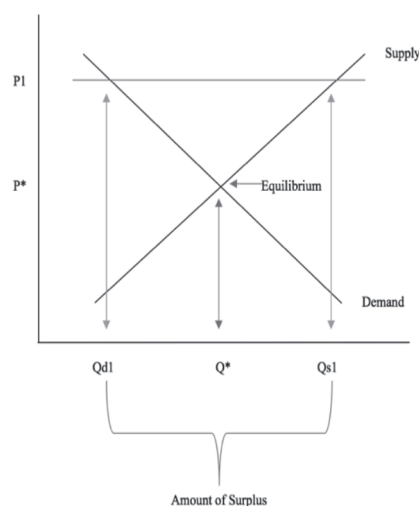
vindication decreases the budget line (i.e. makes bringing suit costlier) for individuals who wish to sue for the violation of a federal statutory right. The hypothetical market, where the effect of a static conception of the principle of effective vindication on individual behavior is analyzed, is shown below in Figure 1 by a downward shift in the budget line. The existence of an arbitration agreement like the one in *Italian Colors* quite literally will prevent some suits from being filed at all. In addition to this disincentive for potential plaintiffs, the static principle creates an incentive for potential defendants to make arbitration agreements that make lawsuits too costly to pursue.

Whereas under a dynamic principle of effective vindication, potential defendants would have to make sure that there was at least one avenue where it would be economically rational for a suit to be brought, under the static principle the only requirement appears to be that the right to pursue the claim not be expressly forbidden. These perverse incentives lead to a surplus of violations of federal statutory rights (shown in Figure 2) due to the decline in enforcement.<sup>50</sup> Such a surplus indicates an inefficient legal system.<sup>51</sup> The costs of incentive-created inefficiency should be weighed against the administrative costs to the judiciary of implementing the dynamic principle of effective vindication. Instead, the majority in *Italian Colors* ignores the costs of perverse incentives caused by the narrow view of the effective vindication principle.

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50. The available statistics do not show that there has been a decrease in private antitrust suit filings in the time after the *Italian Colors* decision. See Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table C-2, 2008–2017 (displaying antitrust litigation statistics from 2007–2017). However, there may be other explanations for these numbers such as changes in substantive antitrust law that led to an increase in private suits. See, e.g., *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (rejecting per se antitrust immunity in the pharmaceutical patent area). Ultimately, this paper does not make any causal claim, and it is probably impossible to do so with litigation statistics, particularly with such a small data set. See STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 227–28 (2017) (noting the difficulty in drawing empirical conclusions from litigation statistics).

51. Cf. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 58 (1992) (arguing that procedural tactics in federal diversity litigation that stymied the bringing of suits “provide[d] corporations with a kind of subsidy and, at the same time, helped prevent the substantive rules of the common law from achieving efficient social results”).

Figure 1<sup>52</sup>Figure 2<sup>53</sup>

### B. *The Cost of Effective Vindication*

The principle of effective vindication as articulated by the majority only makes sense if one is looking exclusively at the administrative costs of applying the dynamic principle and ignoring the costs that result from

52. Indifference curves that are further away from the axis provide more utility. Here the trade off on the axes can be between paying for a lawsuit to vindicate one's rights and anything else that the individual may purchase instead (e.g. paying a lawyer to conduct a lawsuit on the y axis and buying a house on the x axis). Even if the cost of the other good does not increase, an increase in the cost of bringing a lawsuit will lead to less utility for that individual. An increase in costs for any desired good will lead to less utility for the individual. Thus, any individual whose antitrust rights have been violated will have less utility in the case of the increased costliness of bringing the litigation, which will occur whenever the antitrust violator is able to obtain a class action waiver along with a waiver of other plaintiff cost-sharing measures in an arbitration agreement.

53. If we take the supply curve to denote potential meritorious claims and the demand curve the claims pursued, then it can be seen how an increase in the cost of pursuing the claims will lead to a surplus of federal statute violations. Take the *Italian Colors* case as a concrete example. Assuming that the merchants had a meritorious case, American Express will have gotten away with violating the antitrust laws. Thus, companies like American Express that can obtain these waivers in arbitration agreements will be free to violate the antitrust laws without consequence (at least from the private sector) and on average will violate the laws more as individuals that are harmed do not seek redress due to the prohibitive costs of doing so.

perverse incentives of the static principle. As detailed above, the majority decision in *Italian Colors* sees the principle of effective vindication as only applying when an arbitration agreement explicitly prohibits the pursuit of a claim for the violation of a statutory right.<sup>54</sup> Although the majority says that there are other situations in which the principle could apply (e.g. possibly in the case of prohibitively high administrative costs), the Court does not specify what situations would lead to an appropriate use of the principle under its view.<sup>55</sup> The language of the opinion indicates that where an agreement expressly forbids a party from bringing a suit for a federal statutory right, the effective vindication principle applies.<sup>56</sup> Accordingly, the majority takes a static approach to the principle of effective vindication by indicating only one situation where the principle applies.

This treatment is based on policy considerations regarding the costs that would be incurred by having a dynamic principle of effective vindication. The majority acknowledges this by noting:

The Court rejected the argument that the ‘inconvenience and costs of proceeding’ abroad ‘lessen[ed]’ the defendants’ liability, stating that ‘[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.’ Such a ‘tally[ing] [of] the costs and burdens’ is precisely what the dissent would impose upon federal courts here.<sup>57</sup>

This reasoning is the driving force behind the Court’s narrowing of the effective vindication principle to the point of making it static. The Court does not find it appropriate “that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success.”<sup>58</sup> It proclaims that “[s]uch a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in

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54. See *supra* text accompanying notes 21-22 (assessing the Supreme Court’s explanation of when the effective vindication principle applies).

55. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234–37 (2013).

56. *Italian Colors*, 570 U.S. at 234–37.

57. *Id.* at 237–38 (alteration in original) (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 536 (1995)).

58. *Italian Colors*, 570 U.S. at 238–39.

particular was meant to secure.”<sup>59</sup> Thus, the majority is considering the efficiency of the principle, albeit incompletely.

Proponents of a static principle of effective vindication may argue that “[the dissent’s] effective vindication principle would enable plaintiffs to challenge virtually every arbitration agreement with a class waiver.”<sup>60</sup> However, the dissent’s rule provides an incentive to challenge the arbitration agreement only if there is no way to economically pursue the claim. It is important that the arbitration agreement in this case included the other provisions that foreclosed an economical pursuit of the claim, and not just the class action provision. There is also an argument that “plaintiffs’ attorneys will almost always be able to find an expert to state that plaintiffs’ costs exceed their expected recovery.”<sup>61</sup> But this stops too short. That argument is only coherent if there is always an expert to claim that costs exceed expected recovery *and* that there is absolutely no way to structure the proceeding such that expected recovery is greater than cost. This is the contention that is to be made under a correct characterization of the dissent’s effective vindication principle.

With this argument in mind, the view of the majority seems inconsistent with considerations of efficiency. Plaintiffs will always challenge agreements that absolve defendants from liability through making the pursuit of the claim too expensive. In other words, plaintiffs will always challenge arbitration agreements that contain class waivers, joinder waivers, and a number of other provisions that lead to making the pursuit of a claim uneconomical. If it is true that it is unacceptable to allow arbitration agreements to serve as waivers of liability for violations of federal statutes, then this is a desirable incentive. A majority opinion that takes seriously the costs of construing effective vindication a certain way would more likely opt for a dynamic view of the principle.

The retort could be that the costs of administering a dynamic principle are so astronomical that they eclipse any possible benefit. That is that “courts would be back to performing an extraordinarily difficult analysis about how different levels of spending by each party might affect the plaintiffs’ expected outcome at trial.”<sup>62</sup> But the principle of effective vindication is not about providing the most cost-effective means of proving a claim. Rather, the concern is with the ability to bring a claim at all. The

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59. 570 U.S. at 239.

60. *The Supreme Court, 2012 Term – Leading Cases*, 127 HARV. L. REV. 278, 285 (2013).

61. *Id.*

62. *Id.* at 286.



issue is having at least one cost-effective means of proving a claim. It is only by neglecting the provisions in the agreement that foreclose *any* route of bringing the claim in a way that is economical that this concern arises. Because the only task is finding one economically feasible way the plaintiff could pursue the claim, there does not have to be an analysis about different levels of spending by each party. Thus, the inquiry is not extraordinarily difficult.

Alternatively, the majority could have argued the efficiency point more forcefully for their conception by appealing to the benefit of a robust policy in favor of freedom of contract. This argument was not explicitly made, and indeed, the majority relied mostly on the cost of administering a dynamic effective vindication principle. However, a more complete economic analysis would include this as a benefit of the static conception. The majority probably failed to consider this point because the freedom of contract rationale does not justify the static conception under a complete cost-benefit analysis. For one, freedom of contract is curtailed in various circumstances for public policy reasons, such as unconscionability. But further, the entire doctrine of effective vindication is about the limitation of freedom of contract. That is, this case is about how to determine when a contract that was freely entered into will be invalidated. And of course, there is the problem of unequal bargaining power in cases where the effective vindication principle would apply, making the proposition that there was complete freedom of contract dubious in the first place. Due to all of these problems with the freedom of contract contention, and since the majority did not seriously advance it, the discussion of it will be left here.

The main point behind the majority's arguments against the principle as the dissent saw it is that "a robust effective vindication principle would greatly increase the cost of enforcing arbitration agreements."<sup>63</sup> In other words, it would be inefficient to have a functional view of the effective vindication principle. However, the validity of this speculation rests on an assumption that the administrative costs of enforcing a functional view of the principle outweighs the benefits of having a principle that repels arbitration agreements that act as a shield from liability for violations of federal statutory rights. This assumption is incorrect, and therefore renders the analysis of the majority opinion inconsistent with valid economic analysis of the law.

This assumption is incorrect for two reasons. First, the administrative costs of applying the principle would not be so great. As just explained,

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63. *Id.*

the cost of a dynamic effective vindication principle would not require complicated analysis that would dramatically increase the administrative costs of applying it. That erroneous conclusion only follows from ignoring that the point of the principle is to allow any *one* method of bringing suit in a way that is economically feasible. And second, even if applying the dissent's version of the principle is costlier than the majority's, the efficiency gains through the incentives created by the dissent's view outweigh the administrative costs.<sup>64</sup> Therefore, even if the majority opinion did not have the internal inconsistency garnered by the incorrect characterization of administrative costs, the dynamic conception of the principle is superior in its own right. Ultimately, the dissent's interpretation of the principle of effective vindication is more efficient than the majority's because of efficiency gains in the enforcement of federal statutory rights.<sup>65</sup> This efficiency gain will be considered under the next section.

### C. *The Benefits of Private Enforcement*

A static view of the effective vindication principle hinders the ability of private plaintiffs to bring suit and therefore undermines private enforcement of federal statutory rights. This is the main reason that an economic analysis points to a dynamic conception of the principle of effective vindication. To everyone except wealthy individuals who do not mind incurring the guaranteed loss of the suit, an exorbitant cost of proving the violation of the antitrust right means that the suit *cannot* be pursued.<sup>66</sup> And many meritorious claims already go without being pursued due to the lack of available resources.<sup>67</sup> This indicates suboptimal adjudication of disputes, and therefore inefficiency in the judicial system, because the goal of the legal system is “to facilitate the crafting of a remedy ideally suited to

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64. See discussion *infra* Part IV (describing how private enforcement of antitrust law is more efficient than public enforcement and thereby maximizes consumer welfare).

65. *Id.*

66. See *supra* text accompanying notes 43-47 (explaining how the pursuit of some antitrust claims by individuals is irrational from a cost-benefit perspective).

67. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 143 (2010) (explaining that “the vast majority of the legal problems faced by (particularly poor) Americans fall outside of the ‘rule of law,’ with high proportions of people—many more than in the U.K., for example—simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics, and other dynamics in our complex society”).

redress the infringement of right and thus to restore the social ideal to a condition of equilibrium.”<sup>68</sup> A dynamic principle of effective vindication is a more efficient principle regardless of administrative costs because the private enforcement of rights is facilitated by this conception of the principle and thus socially costly behavior is deterred.

As described above,<sup>69</sup> in narrowing the “effective vindication principle, the Court definitively foreclosed one of the last plausible judicial limits on the enforceability of class waivers.”<sup>70</sup> As a result, this decision “will significantly impede the private enforcement of many federal statutes.”<sup>71</sup> This is because “the suit which might not be brought at all because the demands on legal skill and time would be disproportionate to the original client’s stake can, when turned into a class suit, be brought and handled in a manner commensurate with its magnitude.”<sup>72</sup> The devices such as joinder, which the other provisions foreclosed, would likewise allow a suit to be brought that could not be brought otherwise.

By making it more difficult for private plaintiffs to bring class action suits—or any suits at all—the power of private enforcement is reduced. This is likely to lead to inefficiency because “[p]rivate enforcement regimes multiply prosecutorial resources.”<sup>73</sup> The benefits of deterring illegal conduct through private enforcement must either be lost or provided for through increased costs of public enforcement. More specifically,

private enforcement regimes can: (1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; (3) take advantage of private information to detect violations; (4) encourage legal and policy innovation; (5) emit a clear and consistent signal that violations will be prosecuted, providing insurance against the risk that a system of administrative implementation will be subverted; (6) limit the need for direct and visible intervention by the bureaucracy in the economy and society; and (7) facilitate participatory and democratic governance.<sup>74</sup>

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68. Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1031 (2013).

69. *Supra* Part II.A.

70. *The Supreme Court*, *supra* note 60, at 284.

71. *Id.*

72. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

73. Burbank et al., *supra* note 42, at 662.

74. *Id.*

All of these advantages are lost by interpreting the principle of effective vindication in a way that undermines the ability of private enforcement to operate.

More concretely, the ability of federal statutes to deter socially harmful conduct is diminished by having a static conception of the principle of effective vindication. An individual will be deterred from conduct when the cost of engaging in the conduct is greater than the benefit. Deterrence is a function of the penalty imposed and probability of detection.<sup>75</sup> Economic analysis suggests that a “combination of high probabilities of punishment with only moderately severe penalties makes economic sense.”<sup>76</sup> This scheme works because individuals will be reluctant to break the law even if the punishment is not that large when they consistently will be punished. The problem with this scheme is that the high probability of detection of violations requires a large expenditure for detection resources (e.g. investigators) in enforcement. Thus,

[e]conomic analysis suggests that a combination of low probabilities with very severe penalties frequently is optimal because, so long as the costs of collecting fines or damages are low, a reduction in the probability of punishment, which enables a saving of resources devoted to investigation and prosecution, can be offset at low cost by increasing the severity of the punishment for those (few) offenders who are caught.<sup>77</sup>

Thinking about cost of enforcement by itself leads to the conclusion that there should be high fines (such as treble damages) and the level of enforcement can be low (thus not needing much if any private enforcement). However, “if individuals are risk averse and if it is optimal for some of them to engage in the activity, or if there are mistakes,” then analyzing the scheme of deterrence requires considering risk preferences.<sup>78</sup> Individuals are typically risk averse, there are certainly mistakes made by enforcers, and it may be wealth maximizing for individuals to violate federal statutes. Taking these assumptions as given, when risk preferences are taken “into account [this] generally increases the optimal probability of

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75. POLINSKY, *supra* note 43, at 77–78; *see also* RICHARD A. POSNER, ANTITRUST LAW 269 (2d ed. 2001) (“Concealability drives the probability of being punished for committing the violation below 100 percent, and the prospective violator will discount (that is, multiply) the punishment cost by the resulting probability in determining the expected punishment cost for the violation.”).

76. POSNER, *supra* note 43, at 198.

77. *Id.* at 198–99.

78. POLINSKY, *supra* note 43, at 86.

detection and decreases the optimal fine.”<sup>79</sup> This is because at a certain point increasing an already huge fine even more does not make people any more reluctant to violate the law. However, increasing the likelihood that the violation will be detected will greatly influence those that are risk averse because even a small change in likelihood of being caught can make a significant difference. The static conception of the principle of effective vindication lowers the likelihood of detection by undermining private enforcement.

Private enforcement fits into this analysis in an unconventional manner as an enforcement mechanism because it internalizes the cost of enforcement into the market. This was realized by reformers in the “early 1970s, . . . [when they] were urging Congress to include private rights of action and fee-shifting provisions in new statutes across the entire domain of social regulation.”<sup>80</sup> This course of action was purposely taken to fill in the gaps left by public enforcement in areas such as employment law.<sup>81</sup> The purpose of this legislative initiative was “to facilitate impact litigation by law reform organizations, and, critically, to cultivate a for-profit bar to achieve day-to-day enforcement of ordinary claims—a function beyond the capacity of small non-profit groups.”<sup>82</sup> This movement was successful in creating an infrastructure that raised the amount of private enforcement and the likelihood of federal statutory violations being detected, thereby deterring the violations in the first place.<sup>83</sup> The success of the movement is likely due in large part to the low public cost of this version of enforcement. It is unlikely that an expansion of the DOJ of a similar size would have been met with this same enthusiasm, even if it were fiscally possible.

Class action suits played a role in the expansion of private litigation as an enforcement mechanism for federal statutory rights. Although the facilitation of suits for negative value claims was not the main purpose of Rule 23, the drafters “recognized that this provision would enable some claimants for whom the individual litigation would be economically

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79. *Id.*

80. BURBANK & FARHANG, *supra* note 50, at 8 (citation omitted).

81. Kalven & Rosenfield, *supra* note 72, at 721 (explaining “[t]hat such an arrangement . . . has already been shown [to be workable and valuable] by the experience with co-enforcement of the provisions of the wage and hour law by the Wage and Hour Division and by the private class suit”).

82. BURBANK & FARHANG, *supra* note 50, at 8.

83. *See* BURBANK & FARHANG, *supra* note 50, at 2 (stating that “[t]here was an unmistakable ‘litigation explosion’ of private suits to enforce federal rights during this period”).

irrational (those with ‘negative value claims’) to band together in group litigation against a common adversary.”<sup>84</sup> Class litigation thus served as another tool in the arsenal of private enforcement, to increase deterrence of statutory violations.

Private enforcement aids public enforcement in ensuring optimal deterrence of violations of federal statutory rights. These two systems can be seen as “competing methods of affording group redress.”<sup>85</sup> But they do not have to be in competition, rather it is best to “draw upon both systems of enforcement, permitting both to develop side by side to check and complement each other.”<sup>86</sup> By hindering private enforcement, the decision in *Italian Colors* undermines deterrence to a degree that must outweigh the costs of administering a dynamic effective vindication principle.

#### IV. PRIVATE ENFORCEMENT OF ANTITRUST LAW

The retrenchment of substantive rights through curtailing private enforcement mechanisms has a disproportionate impact in antitrust because the majority of antitrust enforcement occurs through private suits. Indeed, “[t]he Sherman Act provides a private right of action for not only compensating plaintiffs, but also promoting the public’s interest in effective enforcement of the antitrust laws.”<sup>87</sup> *Italian Colors* undermines this feature of antitrust law and does so through statutory interpretation that prioritizes one statute at the expense of the underlying policy of the other. Specifically, the Court chooses the policy in favor of arbitration over the policy in favor of maximizing consumer welfare through robust antitrust laws, and it does so inconspicuously and without specifically addressing this choice.

##### A. *The Role of Private Enforcement in Antitrust Law*

The vast majority of antitrust enforcement occurs through private lawsuits rather than through public mechanisms of enforcement. Indeed, Professor Herbert Hovenkamp notes, “The private antitrust action continues to be the principal mechanism by which the antitrust laws are enforced. As many as 95% of antitrust cases are brought by private

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84. Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1500 (2017).

85. Kalven & Rosenfield, *supra* note 72, at 715.

86. *Id.* at 721.

87. AREEDA & HOVENKAMP, *supra* note 37, at 257.

plaintiffs.”<sup>88</sup> This means that undercutting private enforcement in this area will lead to a proportionately large decrease in the possibility of detection. This is problematic because enforcement is key to achieving the purpose of the law, which is to maximize consumer welfare.

Antitrust law is supposed to increase consumer welfare through promoting competition that decrease prices, increases output, and increases the quality of goods. Indeed, “[t]he legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare.”<sup>89</sup> Consumer welfare is maximized by optimal deterrence of conduct that is anticompetitive. This requires striking a balance between over-enforcement and under-enforcement of antitrust because either of these situations leads to social cost.<sup>90</sup>

The amount of enforcement is a decision made by Congress, and it is anti-democratic for the Court to alter the balance struck in legislation, especially in a way that lacks transparency. It is difficult to determine whether there is optimal deterrence because it is unclear how much deterrence is optimal, and it is unclear how much deterrence exists. Therefore, the amount of enforcement is properly a policy choice, and, indeed, part of the statutory bargain is what enforcement mechanisms will exist. Even if there was currently over-enforcement of antitrust, the appropriate mechanism for changing this is through changes in the rules of liability, not changes to enforcement mechanisms that evade public feedback and have the effect of decreasing enforcement across all areas of substantive antitrust law.<sup>91</sup>

The potency of the private enforcement arsenal described above began to wane in the wake of efforts from the business community and its allies, such as the Chamber of Commerce. Despite the movement’s success, “as time went on, it was contested, and ultimately it gave rise to a countermovement” which sought “to leave substantive rights in place while retrenching the infrastructure for their private enforcement.”<sup>92</sup> The methods through which the countermovement attempted to retrench federal

88. HOVENKAMP, *supra* note 18, at 532 (2017).

89. ROBERT H. BORK, *THE ANTITRUST PARADOX* 61 (1978).

90. Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 2 (1989).

91. See BURBANK & FARHANG, *supra* note 50, at 192 (arguing “that the Court’s decisions on rights enforcement, because of their lower public visibility, are less constrained by public opinion and less tethered to democratic governance”). *But see* POSNER, *supra* note 75, at 266 (noting that antitrust doctrine could be improved by changes to enforcement mechanisms).

92. BURBANK & FARHANG, *supra* note 50, at 16.

statutory rights were legislative reform, changes to the Rules Enabling Act, and reinterpretation of laws through federal courts.<sup>93</sup> In assessing the success of these various strategies Professors Stephen B. Burbank and Sean Farhang note:

The counterrevolution's legislative strategy was largely a disappointment, and its efforts to change Federal Rules achieved only modest and sporadic success. In notable contrast, its campaign in the courts – we focus on the Supreme Court – has proved, by far, the most successful for the project of retrenching private enforcement legal infrastructure.<sup>94</sup>

*Italian Colors* is another iteration in the line of cases that retrench federal rights through inconspicuous judicial interpretation.

There is the distinct problem that class action litigation (or private enforcement more broadly) might lead to over-enforcement. This could be a legitimate problem because depending on the underlying substantive law, there is “the potential [for] the (b)(3) class action, the provision in Rule 23 most used by those seeking damages, to promote inefficient over-enforcement of substantive law.”<sup>95</sup> However, this is unlikely the case, because there is a large amount of under-enforcement of meritorious claims in the United States.<sup>96</sup> If there was such a problem of over-enforcement it would likely be more efficient to cut enforcement from the public enforcement side, because that is the costlier type of enforcement to administer. Moreover, it is unclear that the type of conduct which is typically the basis for liability in a consumer class action is conduct that can be over-deterred.<sup>97</sup> That is not to mention that these policy decisions

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93. See *id.* (investigating “the counterrevolution according to its three main institutional strategies: (1) amend existing federal statutes to reduce opportunities and incentives for private enforcement; (2) amend existing or fashion new Federal Rules of Civil Procedure to do the same; and (3) use litigation to elicit federal court interpretations of private enforcement regimes and Federal Rules that demobilize private enforcers”).

94. *Id.*

95. *Id.* at 42. See also MARCUS, SHERMAN & ERICHSON, *supra* note 20, at 210–11 (discussing the potential for abuse of class actions in creating immense settlement pressure and the potential for inefficient over-enforcement, but also noting the potential value of deterrence that this mechanism provides).

96. Hadfield, *supra* note 67.

97. Concerns of over enforcement are typically raised in contexts where socially desirable conduct can result in mistakes that lead to liability. For example, in the qualified immunity context where desirable vigorous law enforcement can lead to violations of rights. It is unclear what potentially procompetitive behavior is trying to be preserved in, for example, tying arrangement cases. The majority does not discuss this point, but it is a question the opinion—and this paper—leaves open.



regarding levels of enforcement should be left to Congress and not the courts.<sup>98</sup>

The retrenchment of antitrust rights indirectly through decisions that do not address substantive antitrust law is not new. This was also done by the change in the motion to dismiss standard through:

resuscitating the distinctions between ‘facts’ and ‘conclusions’ that the drafters of the Federal Rules had rejected and by transforming the motion to dismiss for failure to state a claim upon which relief can be granted from a vehicle for testing the plaintiff’s legal theory into a means to weed out complaints that, shorn of conclusions, do not set forth sufficient facts to make the plaintiff’s claim plausible.<sup>99</sup>

This change functionally stripped plaintiffs of their right to obtain discovery unless they had obtained sufficient information before filing the complaint.

The motion to dismiss changes were effected on the basis of preventing the costly discovery that antitrust lawsuits entail.<sup>100</sup> The Court in the motion to dismiss case asserted that “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”<sup>101</sup> The argument that it is too costly to determine when pursuit of a suit for the violation of a federal statutory right has been foreclosed is strikingly similar to the argument made for changing the motion to dismiss standard. Both of these doctrinal changes consider costs—the effective vindication decision considers the costs to the court, the motion to dismiss decision considers the costs to the defendants, and conspicuously missing are any considerations about the costs to the plaintiff and society. A dynamic principle of effective vindication would consider the costs to the plaintiffs and result in a more efficient system.<sup>102</sup>

The Court in *Italian Colors* failed to consider the benefits of the

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98. See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (stating that “[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner”).

99. Burbank et al., *supra* note 42, at 658.

100. *Id.*

101. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation omitted).

102. See PURCELL, *supra* note 51, at 260–61 (noting that ignoring litigation costs to plaintiffs can greatly distort an economic analysis of the law because prohibitive costs for plaintiffs that allow defendants to avoid liability will result in an inefficient level of enforcement).

alternatives in their calculus of both the costs of the motion to dismiss standard and the costs of the effective vindication principle. In fact: “the social benefits of discovery in policy areas where Congress has sought to stimulate private enforcement include avoiding the large expenditures, higher taxes, and bureaucratic state-building that are essential to adequate public enforcement.”<sup>103</sup> None of these benefits are considered when the Court instituted the plausibility standard for motions to dismiss. Moreover, the benefits of private enforcement are not considered in the *Italian Colors* decision narrowing the effective vindication principle. Neglecting an element in a cost-benefit analysis is analytically unsound, and the Court should consider all of the factors when construing standards and principles.<sup>104</sup>

The decision to retrench antitrust rights through curtailment of private enforcement was ill-conceived because it is inefficient and anti-democratic. Not only did the Court falter in its cost-benefit analysis by neglecting the fact that private enforcement is a major factor toward achieving the policy goal of maximizing consumer welfare, but it also subverted Congressional policy in a hardly visible way.

#### *B. Legislative Intent for Antitrust Enforcement*

An argument might be made that joinder under antitrust law is improper because of the legislative history of the Sherman Act, but this argument falls apart upon careful examination of the legislative history of antitrust laws generally. It is true that in the legislative history for the Sherman Act there was a proposal for a joinder provision which was ultimately rejected.<sup>105</sup> However, the reason for the rejection of this provision is not detailed. It seems that the drafters did not have confidence in the efficacy of consumers as enforcers of the statutes, or perhaps even of private enforcement at all. In fact, “Senator Sherman himself paid little attention to the question of private enforcement, preferring to emphasize the power of the United States government to bring suit.”<sup>106</sup> And, “no one

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103. Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 651 (2015).

104. *See id.* at 652 (stating that “judges must resist the temptation to privilege costs over benefits, and private over public interests. The temptation is great because one naturally tends to focus on the interests of those who are present to the detriment of the interests of those who are absent, and on variables that appear quantifiable over those that do not.”).

105. 21 CONG. REC. 3147–51 (1890).

106. Hovenkamp, *supra* note 90, at 26.

defended the efficacy of consumer lawsuits.”<sup>107</sup>

To the extent that private enforcement of antitrust was contemplated by the framers of the Sherman Act, it seems to be private enforcement by competitors. This might be why treble damages was opted for instead of a joinder provision. Of course, the effective vindication principle to protect parties in arbitration agreements typically will not apply to private enforcement by competitors because competitors can rarely enter into agreements without violating the antitrust laws in the first place. Therefore, the legislative history indicates that it did not contemplate private antitrust enforcement as it exists today.

Regardless of what the Sherman Act framers thought of joinder in antitrust actions, the Clayton Act,<sup>108</sup> which was adopted afterward, shows a strong preference for private enforcement in antitrust. The Clayton Act makes no mention of the distinction between consumer suits and competitor suits, but rather advances private enforcement altogether.<sup>109</sup> Thus, legislative intent—at least with regard to the Clayton Act—militates toward a regime of robust private enforcement.

The argument against joinder provisions must then be that public enforcement is better than private enforcement.<sup>110</sup> But, “any argument that private antitrust enforcement should generally yield to public enforcement aborts in the face of one powerful historical fact: over time, the government has not done much better.”<sup>111</sup> Indeed, private enforcement works together with public enforcement to make enforcement of the laws more efficient overall.<sup>112</sup> This is not to mention that relying solely on public enforcement would be significantly more costly to the public because some of the cost of enforcement would not be shifted to the private sector. Therefore, there is no reason to curtail private enforcement of antitrust rights, and given the consumer welfare goal of antitrust, undermining the private enforcement

107. *Id.*

108. 15 U.S.C. §12 et seq.

109. 15 U.S.C. §15 (2012) (stating that “[e]xcept as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”). All of these provisions are clearly meant to encourage private enforcement.

110. POSNER, *supra* note 75, at 276 (noting that it would be a good idea to give the DOJ and FTC a right of first refusal on antitrust actions and that it might even be good to grant them a monopoly on enforcement).

111. HOVENKAMP, *supra* note 18, at 56.

112. Kalven & Rosenfield, *supra* note 72, at 721.

mechanism is inconsistent with antitrust doctrine.

#### CONCLUSION

A static concept of the principle of effective vindication runs contrary to antitrust law because curtailment of private enforcement lowers consumer welfare. There is no reason for narrowing the effective vindication principle to the point where it is a static concept. The only argument that is made for this decision is the cost of administering a dynamic conception of the principle. However, this argument fails in the face of an understanding of the dynamic concept of effective vindication as prohibiting only a foreclosure of *all* avenues for pursuing the claim in a way that is economically feasible.

Even if the cost of applying the dynamic principle is higher than the static principle, this cost is outweighed by the cost of decreased enforcement that results from a static conception. This is because the incentives that are created by the static conception tend to decrease the amount of private litigation and increase statutory violations. This will ultimately lead to a lower probability of detection of violations due to lower private enforcement. In turn, this results in suboptimal enforcement of federal statutory rights.

The problem is even more pronounced in antitrust law because of the enforcement scheme that is employed. Since most of the antitrust enforcement is private, the static conception of the principle of effective vindication lowers deterrence significantly. As a result, the goal of consumer welfare is undermined by the static interpretation of the principle of effective vindication. This follows a decades-old trend in the federal judiciary of retrenchment of substantive rights through decisions that do not directly implicate the substantive rights being retrenched. This trend is problematic because the appropriate level of enforcement is a public policy question for Congress to determine. As it stands, cases like *Italian Colors* serve to reduce consumer welfare.