

Rebuilding Antitrust Amidst Forced Arbitration

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The availability of a judicial forum is a “critically important predicate” to progressive legal change.² Yet today, companies regularly conscript employees and consumers into forced arbitration agreements that “eradicate access to court” and prevent individuals “from bringing class action suits” to vindicate key civil rights.³ In effect, people are stripped of the right to vindicate claims based on sexual harassment, racial discrimination, age discrimination, labor law, consumer protection laws, and more. Advocates have sought to fight against the wave of forced arbitration agreements through direct activism⁴ and legislative change.⁵ However, one oft-overlooked response to forced arbitration is to overhaul the substantive law that it erodes in order to deter corporate misconduct.

Antitrust law provides an ideal case study for this approach. Its quasi-common law status, its central orientation toward protecting consumers, and its long track record of providing collective-action solutions to diffuse harms make antitrust law a promising answer to the forced arbitration problem. This article outlines the legal justifications for rebuilding antitrust law via the courts and the executive branch in the face of forced arbitration. In doing so, it provides a roadmap for reconstituting other common law doctrines to better protect workers and consumers in the face of an all-out assault on their access to the courts.

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² Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 159 (2019).

³ *Id.* at 159, 177.

⁴ Maureen Mulligan, *Eliminating Mandatory Arbitration of Sexual Harassment Claims*, L. PRAC. MAG. (Mar. 2019) (discussing the Pipeline Parity Project at Harvard Law School), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/MA2019/MA2019Highlights, archived at <https://perma.cc/LZW6-9347>.

⁵ 2 HOWARD C. EGLIT, AGE DISCRIMINATION § 7A:2 (2d. ed. 2020).

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I. INTRODUCTION: THE BASICS

A. Basics of Class Actions

Class actions are lawsuits in which plaintiffs with similar claims sue a single defendant together as part of one action.⁶ They generally operate like normal lawsuits, although plaintiffs must clear a few hurdles to prove that their claims are well-suited to group adjudication.⁷

Class actions have substantial benefits to plaintiffs whose claims are too small to bring on their own. They allow injured parties with comparable grievances to work together, allowing a single lawyer or law firm to bring claims for the entire class, saving time and expense. The class action's ability to make small claims viable is one of the main reasons it was created.⁸

It is hard to overstate the importance of class actions to vindicating legal rights. In the decades since class actions formally entered the Federal Rules of Civil Procedure, many tens of thousands of claims have been filed, with thousands more filed every year.⁹ Each action can help vindicate the rights of a tremendous number of plaintiffs, like one class action represent-

⁶ Nicholas A. Rossini, *Lost in Dicta: The Curious Case of Nonstatutory Grounds of Vacatur in an Era of Ubiquitous Consumer Arbitration*, 52 SUFFOLK U. L. REV. 343, 361 (2019).

⁷ Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 871 (2006).

⁸ Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1881 (2008) ("One of the principal reasons why the class action form was created, after all, was precisely to make small claims viable . . .").

⁹ See *id.* at 1880 n.218.

ing over 100,000 children who were allegedly denied rights by the New York City child welfare system¹⁰ or another where over ten million contact lens wearers brought an antitrust class action against contacts manufacturers.¹¹

Class actions also allow public interest plaintiffs to successfully obtain broad, systematic remedies.¹² This is because class actions are uniquely able to circumvent certain procedural obstacles like standing by presenting a large group of people who may be injured in diffuse ways.¹³ The class device is an indispensable and commonplace vehicle for relief across a range of substantive legal areas from disability rights to antitrust and beyond.¹⁴ Class actions are “realistically the only tool citizens have to fight [many] illegal or deceitful business practices.”¹⁵

B. Basics of Forced Arbitration

Forced (or mandatory) arbitration clauses are the fine print provisions in contracts that require parties to arbitrate future claims instead of bringing cases in court. When a company puts a forced arbitration clause into an employee’s or customer’s standard-form contract, the company becomes immune from being sued in court. Consumers and employees are forced to raise any grievances in front of a professional arbitrator selected by the company rather than sue before a judge or jury.

These agreements have become staggeringly common as companies have realized that they can limit their exposure to liability just by adding a few terms into contracts of adhesion. The *2020 Class Action Survey* reports that 77 percent of companies include arbitration clauses in their agreements.¹⁶ The odds are very high that you and most people you know have unknowingly signed one of these agreements. “[I]t has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.”¹⁷

Arbitration is dramatically more favorable for companies than litigation. “Civil litigation in federal district courts is governed by extensive rules, including the Federal Rules of Civil Procedure, the Federal Rules of Evi-

¹⁰ See *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

¹¹ *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 529 (M.D. Fla. 1996).

¹² David Marcus, *The Public Interest Class Action*, 104 *Geo. L.J.* 777, 777 (2016).

¹³ See *id.* at 777, 782.

¹⁴ See, e.g., *id.* at 781.

¹⁵ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *N.Y. TIMES* (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>, archived at <http://perma.cc/R4YU-C3AA>.

¹⁶ CARLTON FIELDS 2020 CLASS ACTION SURVEY, CARLTON FIELDS (2020), <https://classactionsurvey.com>, archived at <http://perma.cc/2UCE-25PT>.

¹⁷ Silver-Greenberg & Gebeloff, *supra* note 15.

dence, and local court rules, as well as the judicial precedent interpreting all of these rules. Arbitration eliminates this intricate set of procedural protections.”¹⁸ Specifically, arbitration can place dramatic limitations on discovery, the arbitrators themselves can be systematically unsympathetic to plaintiffs’ claims, and the appeals process is limited if it exists at all.¹⁹

Most concerning, many forced arbitration clauses explicitly prohibit consumers and employees from bringing class actions or classwide arbitrations (another vehicle to join together small claims).²⁰ These “class-action waivers have become common in contracts offered by credit card companies, banks, cell phone providers, and providers of other common services.”²¹ More than half of forced arbitration agreements include class action waivers, and a third of companies that do not currently include such waivers in their contracts “definitely plan to add” them.²²

Defenders of forced arbitration clauses contend that the parties who signed the agreements consented (at least implicitly) to bring their claims in the arbitral forum.²³ By this logic, voiding those clauses after the ink has dried would be unfair and contrary to general contract principles. Additionally, companies claiming that they lowered prices to buy consent could argue that customers would be unjustly enriched if they escape the corresponding obligation.

There are a number of responses to these arguments. First, the notion that people freely consent to forced arbitration clauses blinks reality.²⁴ Second, “the empirical analysis that does exist suggests . . . that forced arbitration clauses do not lead to lower consumer prices.”²⁵ Third, avoiding antitrust scrutiny on the grounds of *individual* consent by consumers misunderstands the foundational premise of antitrust law. Antitrust law exists precisely because “buyers acting individually are willing to consent to anticompetitive conduct (such as agreeing to buy at cartel prices or with

¹⁸ Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 13–14 (2015).

¹⁹ *Id.* at 15–21.

²⁰ *Id.* at 37.

²¹ KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL’Y. INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 10 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf>, archived at <https://perma.cc/9YLB-SQ2M>.

²² CARLTON FIELDS, *supra* note 16, at 40–41.

²³ Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 849 (2003) (“[B]y assenting to the terms of the container contract, a party is also implied by law to have assented to the terms of the arbitration provision”).

²⁴ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 415 (2005); see also Lemley & Leslie, *supra* note 18, at 44 (“These assumptions, however, do not correspond to reality. Arbitration clauses are often imposed on unwilling or unaware consumers. Contracts of adhesion that include mandatory arbitration provisions are quite common. The *American Safety* court argued that antitrust plaintiffs should not lose their day in court because of contracts of adhesion.”).

²⁵ Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 509 n.49 (2017).

exclusionary conditions).”²⁶ Antitrust provides a collective remedy to a problem impervious to individual solution. Even if it is beneficial for each individual to consent to the anticompetitive conduct, “the net effect of many buyers doing so is to significantly harm all buyers in the market.”²⁷

Scholars, lawmakers, and advocates across a wide range of disciplines have raised alarms that forced arbitration presents a dire threat to consumers and workers.²⁸ This paper explores the ways that forced arbitration is uniquely capable of hobbling antitrust law and how advocates of robust competition policy can effectively respond.

C. *Basics of Antitrust Law*

1. *What Is Antitrust?*

Antitrust law, otherwise known as competition law, regulates markets to ensure that companies are vigorously competing to deliver low-cost and high-quality goods and services. When markets are dominated by one or two companies or “trusts,” they are incentivized to reduce supply, increase price, and reduce quality.²⁹ Companies in concentrated markets also gain the ability to coordinate with one another, leading to the same negative outcomes as if there were only one dominant entity.³⁰

To guard against the tendency of markets to become less competitive, antitrust laws were passed to constrain concentration and anticompetitive behavior.³¹ Federal agencies were created to prevent direct competitors from merging with one another, and private parties were endowed with the ability to sue companies for anticompetitive behavior like price fixing.³² Private parties were even incentivized to be on the lookout for anticompetitive behavior with the prospect of recovering treble damages from the monopolists if they brought successful suits.³³

2. *Where Does Antitrust Law Come from?*

Antitrust law is massive in scope. U.S. federal antitrust law governs nearly all corporate conduct in America and a substantial proportion of corporate behavior abroad. It occupies an entire division of the Department of Justice (“DOJ”) and a bureau of the Federal Trade Commission (“FTC”).³⁴

²⁶ EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 33 (3d ed. 2018).

²⁷ *Id.*

²⁸ *See infra* Section II.C.

²⁹ ELHAUGE & GERADIN, *supra* note 26, at 2.

³⁰ *Id.* at 3.

³¹ 15 U.S.C. §§ 1–2.

³² ELHAUGE & GERADIN, *supra* note 26, at 12.

³³ *Id.*

³⁴ *Id.*

Yet in spite of this impressive scope, the bedrock statute governing federal antitrust law has only two sections, each of which contains less than 100 words.³⁵ They would fit on an average postcard. The texts of the Sherman and Clayton Acts themselves say little more than “don’t harm competition.” While Congress has subsequently passed a few supplementary statutes,³⁶ these statutes pale in comparison to the hundreds of thousands of pages of judicial opinions that give life to the laws on the page. With little guidance from Congress, judges have been left to construct detailed antitrust doctrines from scratch.

From its earliest days, antitrust law was structured to constantly evolve. Judge Easterbrook writes that the original antitrust law “set up a common law system in antitrust. The statute and its legislative history authorize the ongoing transition to an efficiency-oriented approach.”³⁷ Other titans of the field, including Justice Lewis Powell and Judge Richard Posner, agree.³⁸ While there is still some reference to legislative intent and the text of the statutes, in antitrust, “the judiciary enjoys an especially wide authority to fill statutory gaps.”³⁹

The flexible, common-law nature of antitrust explains why *stare decisis* (which is especially strong in statutory cases) does not bind the Court in antitrust cases.⁴⁰ In fact, the functionalist approach that predominates antitrust law has led the law to evolve dramatically over time as industry practice and consumer needs change. These changes, as well as evolving economic understandings, have led the Supreme Court to reverse long-standing doctrines with some frequency.⁴¹ Conduct that may be illegal in one year may be legal the next, and a *per se* rule that dominates during one decade might be amended during a subsequent one. The flexibility of antitrust law makes it uniquely well equipped to respond to the perils of forced arbitration.

3. *How Do Judges Develop Antitrust Law?*

The project of creating antitrust law has been a collaborative effort. Judges develop antitrust law in an ongoing conversation with economists,⁴²

³⁵ 15 U.S.C. §§ 1–2.

³⁶ *See, e.g.*, 15 U.S.C. §§ 12–27.

³⁷ Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1705 (1986).

³⁸ Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 287 (1990) (noting that antitrust “has been left almost entirely to ‘common law’ development in the courts.”); *see also* Ian Shapiro, *Richard Posner’s Praxis*, 48 OHIO ST. L.J. 999, 1036 (1987) (“Antitrust is a ‘quasi’ common law field in Posner’s terms.”).

³⁹ Charles S. Dameron, *Present at Antitrust’s Creation: Consumer Welfare in the Sherman Act’s State Statutory Forerunners*, 125 YALE L.J. 1072, 1075 (2016).

⁴⁰ *See* Powell, Jr., *supra* note 38, at 287.

⁴¹ *See, e.g.*, *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

⁴² Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2243 (2012).

government agencies,⁴³ industry experts,⁴⁴ and others. Expert witnesses are a staple of the field, and their testimony often stretches beyond the facts of the case to focus on what the antitrust laws do and should protect based on academic analysis. This is necessary to keep current law in tune with actual practice and evolving understandings of what it means to “not harm competition.”

Take, for example, the case of *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*⁴⁵ Broadcast Music, Inc. (“BMI”) and the American Society of Composers, Authors and Publishers (“ASCAP”) both sold licenses to copyrighted music for use on television programs.⁴⁶ The two companies collaborated to sell a blanket license for tens of thousands of compositions at a set price without having to individually negotiate each license. The Court reasoned that, while this might technically qualify as price fixing (which is per se illegal), it represents a “productive business collaboration” that allows networks to access a huge amount of content without the cost of individualized negotiations and monitoring (which would have been prohibitive in 1979).⁴⁷ The outcome of this case was by no means written in stone in the Sherman and Clayton acts. But its pragmatism and sophisticated evaluation of the needs of the industry is emblematic of seminal antitrust decisions.

More recently, the Court led with economic functionalism to allow a class of consumers to sue Apple for excessive commissions on app sales.⁴⁸ The Court chose to narrowly interpret a doctrine from the 1960s that made it harder for base-level consumers to sue because of the importance of “ensur[ing] an effective and efficient litigation scheme in antitrust cases.”⁴⁹ In particular, the majority decried rules focused on “form” over “substance” and stated clearly that when a monopolist “cause[s] a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.”⁵⁰

The guiding light in the evolution of antitrust law appears to be striking an optimal balance between “over-deterrence” and “under-deterrence.”⁵¹ One seminal antitrust casebook “emphasized [repeatedly] . . . that any rule that regulates conduct optimally cannot eliminate underdeterrence, but rather

⁴³ U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 1 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>, archived at <https://perma.cc/T5Z4-XAFZ> (stating that agency guidelines may “assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.”).

⁴⁴ Callie D. Brister, Sali v. Corona Regional Medical Center: *Evidence Submitted in Support of Class Certification*, 42 AM. J. TRIAL ADVOC. 473, 479 (2019).

⁴⁵ 441 U.S. 1, 10 (1979).

⁴⁶ *Id.* at 5.

⁴⁷ See ELHAUGE & GERADIN, *supra* note 26, at 111–12.

⁴⁸ Apple Inc. v. Pepper, 139 S. Ct. 1514, 1514–15 (2019).

⁴⁹ *Id.* at 1522.

⁵⁰ *Id.* at 1523.

⁵¹ See ELHAUGE & GERADIN, *supra* note 26, at 100–01.

can only minimize the sum of harm from under- and overdeterrence.”⁵² The Supreme Court is not always explicit about the balancing act when laying out new rules, but this concern weighs heavily on the Court nonetheless. As the Court summarized in *Eastman Kodak Co.*, “we weigh the risk of deterring procompetitive behavior . . . against the risk that illegal behavior will go unpunished.”⁵³ Optimal deterrence ensures that most desirable conduct is not deterred while most undesirable conduct is deterred. Deterring anticompetitive conduct is important to protect consumers. But what’s the big deal with deterring conduct that isn’t anticompetitive?

Antitrust differs from other areas of law in that a lot of the condemned conduct is recognized to be affirmatively good depending on context. Take the example of predatory pricing in the seminal case of *Matsushita*. Plaintiffs alleged that defendants had kept prices artificially low so they could kill off the competition and then drive up prices.⁵⁴ The Court took the allegations seriously, but because “cutting prices in order to increase business often is the very essence of competition,” the Court was concerned that “mistaken inferences” would be “especially costly” and would “chill the very conduct the antitrust laws are designed to protect.”⁵⁵

The Court is especially concerned about possible over-deterrence when it comes to establishing rules regulating large swathes of the economy. In one case, the dissent cautioned that “the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts[;] the Court’s opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good.”⁵⁶

Other procompetitive behavior like exclusive dealing can become anticompetitive after a sufficient number of other market participants have adopted the same practice.⁵⁷ Other behavior can be either procompetitive or anticompetitive depending on the results of a fact-specific economic analysis.⁵⁸ These types of considerations are potent in antitrust law, where deter-

⁵² *Id.* at 1211.

⁵³ *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 479 (1992).

⁵⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578 (1986).

⁵⁵ *Id.* at 594.

⁵⁶ *Eastman Kodak Co.*, 504 U.S. at 489 (Scalia, J., dissenting).

⁵⁷ *Fed. Trade Comm’n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 395 (1953) (“[D]ue to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States. It is, we think, plain from the Commission’s findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an ‘unfair method of competition’ within the meaning of §5(a) of the Federal Trade Commission Act.”).

⁵⁸ This is the foundation for the rule of reason, which applies to almost all potentially anticompetitive behavior in the U.S. *See, e.g.*, Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 761 (2012) (“Many courts assert that when evidence of both adverse and procompetitive justifications are presented, the court must as a final step engage in ‘balancing’ to determine whether the restraint is reasonable.”).

ring too much procompetitive conduct can cause companies to, in one case, “close[] accounts with nearly one thousand retailers . . . [and lose] millions of dollars of [sales].”⁵⁹ The importance of getting the deterrence balance right explains why the Supreme Court has relied on it so heavily when restructuring antitrust law in recent decades.⁶⁰

4. *Where Is Antitrust Going?*

In the past half-decade, many have called for a foundational re-evaluation of antitrust law in the U.S.⁶¹ Most recently, the House Subcommittee on Antitrust, Commercial, and Administrative Law published a report addressing the myriad ways that antitrust law in the U.S. should evolve (including reform of forced arbitration).⁶² Some have justified these calls by pointing to the rise of corporate concentration in the American economy in recent decades.⁶³ Others have focused on the increasing need to rein in big tech⁶⁴ or protect workers from monopsony.⁶⁵ These calls are in line with other seismic shifts in antitrust law that have been triggered by changes in regulated industries. For example, consider the breakup of AT&T in 1982, which was the “the largest corporate reorganization in American history.”⁶⁶ This regulatory breakup happened after the telecommunications industry had become both indispensable and monopolized.⁶⁷ This article recognizes another seismic shift and suggests a path forward.

⁵⁹ Brief for PING, Inc. as Amicus Curiae Supporting Petitioner at 15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480).

⁶⁰ “Because competitive and exclusionary conduct often look alike, courts and enforcers need to be concerned with both underdeterrence and overdeterrence.” U.S. DEP’T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 9 (2008), https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter1.pdf, archived at <https://perma.cc/LJ2F-MSWZ>; see also William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 ANTITRUST 85, 86–87 (2008).

⁶¹ See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 746 (2017); Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html>, archived at <https://perma.cc/NGR5-KVBC>.

⁶² STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 19–21 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf, archived at <https://perma.cc/6LGP-J39F>.

⁶³ Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 554 (2012). “[T]here has been a rise in sales concentration . . . across the vast bulk of the U.S. private sector.” David Autor et al., *The Fall of Labor Share and the Rise of Superstar Firms* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23396, 2017), <https://www.nber.org/papers/w23396.pdf>, archived at <https://perma.cc/GZ6K-UPPL>.

⁶⁴ Khan, *supra* note 61, at 717.

⁶⁵ Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537–38 (2018).

⁶⁶ Thomas A. Piraino, Jr., *An Antitrust Remedy for Monopoly Leveraging by Electronic Networks*, 93 NW. U. L. REV. 1, 29–30 (1998).

⁶⁷ See D. Daniel Sokol, *Barriers to Entry in Mexican Telecommunications: Problems and Solutions*, 27 BROOK. J. INT’L L. 1, 33 (2001) (“AT&T prevented rivals from interconnecting to AT&T’s telecom system, which allowed AT&T to create a telecom monopoly in the United

II. CENTRAL THEORY

A. *Brief Overview of the Theory*

The explosion of forced arbitration constitutes a major threat to current antitrust law. It has already changed the fundamental contours of American law and it has the potential to dramatically scale back private antitrust enforcement in the U.S. In response to the changing landscape, this article suggests a sweeping review of antitrust law.

Specifically, as plaintiffs are prevented from bringing cases, regulators and judges should recalibrate standards to ensure that anticompetitive behavior is deterred. Plaintiffs should use the growth of forced arbitration to argue for the recalibration of doctrine in their favor (especially where the underlying doctrine was based on a belief that Plaintiffs could readily vindicate their rights).

B. *A Seismic Shift: The Move from American Safety to Italian Colors*

How has this balance of deterrence been affected by the rise of forced arbitration clauses? For a long time, it wasn't. Even as arbitration clauses began to receive increasingly favorable treatment from courts in most areas of law,⁶⁸ antitrust claims were untouched. In 1968, in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, the Second Circuit held that antitrust claims could not be subject to arbitration.⁶⁹ The court's reasoning focused on two areas. First, the court was clear that "[a] claim under the antitrust laws is not merely a private matter."⁷⁰ Antitrust law exists to defend the public interest in a fair and competitive economy.⁷¹ This suggests that any practice that deprives the antitrust plaintiff of successfully litigating its claims would be an injury to the public as well.

Second, the court was concerned that antitrust plaintiffs would be disadvantaged if they were forced to bring their claims in arbitral forums. The court noted that "it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest."⁷² Additionally, the complex nature of antitrust cases could make it hard to fairly adjudicate disputes without the resources of the judicial system. Overall, the court was clearly concerned about the risk of defendants self-dealing by forcing claims into arbitral fo-

States until AT&T's breakup during the 1980s."); *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 139 (D.D.C. 1982).

⁶⁸ *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26–27 (1983).

⁶⁹ 391 F.2d 821, 828 (2d Cir. 1968).

⁷⁰ *Id.* at 826.

⁷¹ *Id.*

⁷² *Id.* at 827.

rums. The Second Circuit suggested that Congress would not have approved of “contracts of adhesion between alleged monopolists and their customers [determining] the forum for trying antitrust violations.”⁷³ Other circuits found the Second Circuit’s reasoning to be persuasive and “[b]y the mid-1980s, the *American Safety* rule prohibiting arbitration of antitrust claims was well-established and not particularly controversial.”⁷⁴

Everything began to change when the Supreme Court rejected the *American Safety* doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁷⁵ But all was not lost (yet). The balance of deterrence was insulated by a backstop provided in the *Mitsubishi* opinion. The Court noted that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function.”⁷⁶ This “effective vindication” doctrine is profound in its power and simplicity. In short, it says that the legal system should be workable for plaintiffs with valid claims. It is easy to see why the Court thought it was creating the best of all worlds. Innocuous arbitration clauses would be undisturbed. But courts could still intervene if they were concerned (based on the reasoning in *American Safety*) that a particular arbitration clause would quash plaintiffs’ hopes of recovery. Courts used the effective vindication doctrine language in *Mitsubishi* to invalidate arbitration agreements that prevented plaintiffs from vindicating their antitrust claims.⁷⁷

The Court changed its tack, however, in *Italian Colors*. In that case, a group of merchants brought antitrust claims against American Express that were each too small to be effectively vindicated in individualized arbitration.⁷⁸ As discussed above, it is often only possible to litigate small dollar claims within class actions. Dividing those claims into individualized arbitrations is like dividing a centipede into 100 smaller units and still expecting it to crawl.

But a new majority at the Supreme Court rejected the effective vindication language in *Mitsubishi* as dicta.⁷⁹ Justice Scalia’s opinion stated that “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.”⁸⁰

⁷³ *Id.*

⁷⁴ Lemley & Leslie, *supra* note 18, at 7.

⁷⁵ 473 U.S. 614, 632–34 (1985).

⁷⁶ *Id.* at 637.

⁷⁷ Lemley & Leslie, *supra* note 18, at 8.

⁷⁸ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240–41 (2013) (Kagan, J., dissenting).

⁷⁹ *Id.* at 235–36.

⁸⁰ *Id.* at 236.

With no safeguards left from either *American Safety* or *Mitsubishi Motors*, the door was officially opened for an explosion of forced arbitration clauses that could foreclose antitrust claims.

C. *Why Are These Doctrinal Changes So Impactful?*

1. *The Stakes*

The *Italian Colors* decision constituted a major shift towards underdeterrence because “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”⁸¹ Losing the ability to effectively punish companies for small-dollar claims is not a minor concern. First, the unjust enrichment that companies can accrue is astronomical. To use the Court’s example of 17 million claims for \$30, a company that was able to avoid recourse in such a matter would be left sitting with half a billion dollars that doesn’t belong to them. This amounts to theft, plain and simple.

Second, the consumer harm is not trivial, even on an individual level. While an illegal \$30 fee won’t cause most customers significant financial harm, that isn’t true for everyone. More broadly, a system that allows companies to extract additional dollars without repercussion is likely to encourage repetition of the bad conduct. A \$30 fee is one thing. A regulatory environment that allows that fee to be increased, repeated, and regularly imposed by numerous other companies taking advantage of consumers in similar ways is quite another.

Third, these concerns are unlikely to be remedied by the free market. Diffuse consumer harms are unlikely to generate backlash and market discipline, even in the most optimistic scenario. Antitrust violations are often very hard to identify and prove. It is implausible to expect consumers to uncover elaborate price fixing schemes on their own without a dedicated legal team funded by the possibility of recovery. That is the very reason why the antitrust laws include treble damage provisions. If we want to stop widespread corporate malfeasance, incentives and collective action matter.⁸²

2. *The Procedural Inadequacy of Arbitration*

The rise of forced arbitration may be the largest threat to accessing civil rights in America today. Scholars, policymakers, consumer advocates, student activists, and others have raised alarms around the rise of forced arbitration. Commentators have surmised that “continued progress towards justice is currently in jeopardy due to companies’ imposition of mandatory arbitra-

⁸¹ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁸² In this spirit, at least one article has recommended providing “an ‘arbitration multiplier’: a bounty for winning a case in arbitration.” Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 2 (2019).

tion.”⁸³ One federal judge observed that “this trend is ‘among the most profound shifts in our legal history.’”⁸⁴ Justice Ginsburg noted that “[t]he inevitable result” of allowing the proliferation of arbitration “will be the underenforcement of federal and state statutes designed to advance” the public welfare.⁸⁵ “[C]ompanies across sectors have modified their contracts with employees and consumers to include these terms, blocking access to courts[.] . . . Practically, this means that businesses can sidestep swaths of law.”⁸⁶

Arbitration provides a systematically inadequate forum to air and litigate antitrust claims. First, arbitration limits discovery. Arbitral forums prevent antitrust claimants from using the full arsenal of discovery mechanisms that are often necessary to precisely define and prove the existence of anticompetitive conspiracies and misconduct. In particular, there are often limitations on interrogatories, document discovery, motions practice, third-party discovery, pre-arbitration discovery, and foreign discovery in arbitration.⁸⁷

Second, arbitrator selection and capacity can pose substantial issues. The company that instituted the arbitration clause is also generally able to select the arbitral forum.⁸⁸ Evidence suggests that companies select arbitration forums in order to engineer the outcomes they seek and that arbitration companies respond to the incentives by favoring the repeat players that bring them cases and pay their bills.⁸⁹ “[S]everal studies have found and several courts have held that a party’s repeated appearance ‘before the same group of arbitrators conveys distinct advantages over the [one-time participant].’”⁹⁰ Overall, “[t]his risk of consumers being forced to have their antitrust claims decided by an arbitrator who is either unqualified or biased is ever present.”⁹¹

Third, the right to appeal is dramatically curtailed. The arbitration statute essentially confines the appeal of awards to cases of corruption and fraud.⁹² Incorrect or misguided decisions largely leave claimants without recourse. Results are not even appealable if the arbitrator got the law wrong or

⁸³ Sternlight, *supra* note 2, at 156.

⁸⁴ Gupta & Khan, *supra* note 25, at 500.

⁸⁵ Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting).

⁸⁶ Gupta & Khan, *supra* note 25, at 499–500.

⁸⁷ Lemley & Leslie, *supra* note 18, at 14.

⁸⁸ See Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RESV. L. REV. 341, 411 (2014) (“The corporate defendant chooses the arbitral provider, appoints and pays for the arbitrator, and establishes the rules of the game. The arbitrator has a perverse incentive to rule in favor of the SNS because the SNS pays his salary. Arbitrators who rule against repeat players are unlikely to be selected by the provider in the future.”).

⁸⁹ *Id.*

⁹⁰ Schnuerle v. Insight Commc’ns Co., 376 S.W.3d 561, 579 (Ky. 2012) (second alteration in original) (quoting Mercurio v. Superior Ct., 116 Cal. Rptr. 2d 671, 678 (Cal. Ct. App. 2002)).

⁹¹ Lemley & Leslie, *supra* note 18, at 20.

⁹² 9 U.S.C. § 10(a).

made a mistake.⁹³ Additionally, arbitrators are not required to, and often do not, write opinions or explain themselves.⁹⁴

Furthermore, antitrust remedies can be sorely curtailed in the context of arbitration. Staples of effective antitrust law have been subverted by express language in arbitration clauses. Remedies such as treble damages, injunctive relief, and fee shifting are often unavailable in forced arbitration.⁹⁵

Overall, arbitration is a paltry echo of the robust protections provided by the state and federal judiciaries.

3. *The Dramatic Empirical Effects of Forced Arbitration*

Forced arbitration has eliminated hundreds of thousands, if not millions, of claims that would have been brought in its absence. A seminal paper quantified the “missing” cases that never come into existence because of forced arbitration in the employment law context.⁹⁶ The author compared (1) data on federal employment lawsuits by the fraction of employees who are not bound by forced arbitration agreements with (2) data on the number of arbitrations brought by the remainder of the population.⁹⁷ After adjusting to fit the available data, the paper concludes that if arbitration did not deter plaintiffs from bringing claims, one would expect between 320,000 and 727,000 employment claims in arbitration per year.⁹⁸ In contrast, the actual observed number of claims is less than 6,000.⁹⁹ That suggests that between 315,000 and 722,000 claims go “missing” because of the barriers presented by arbitration.¹⁰⁰ These claims are abandoned before their inception because of the procedural and practical deficiencies of arbitration. Arbitration “dramatically reduces an employee’s chance of securing legal representation, as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf.”¹⁰¹ Even if a claimant was still interested in bringing a case, the attorney’s fees available (if any) would still be non-viable for most attorneys.¹⁰²

A more recent report focused specifically on wage theft claims.¹⁰³ The report found that \$12.6 billion of wage theft claims go un-pursued because

⁹³ Lemley & Leslie, *supra* note 18, at 20–21.

⁹⁴ *Id.* at 21.

⁹⁵ *Id.* at 22–31.

⁹⁶ See generally Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

⁹⁷ *Id.*

⁹⁸ *Id.* at 696.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 703.

¹⁰² *Id.* at 702.

¹⁰³ HUGH BARAN, NAT’L EMP. L. PROJECT, FORCED ARBITRATION ENABLED EMPLOYERS TO STEAL \$12.6 BILLION FROM WORKERS IN LOW-PAID JOBS IN 2019 (2020), <http://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Enabled-Wage-Theft-Losses.pdf>, archived at <http://perma.cc/435S-RHLL>.

they are subject to forced arbitration.¹⁰⁴ Other analyses paint a similarly stark picture of the money that plaintiffs never recover when they are boxed into arbitration.¹⁰⁵ These results are the predictable outcome of the “liability-free zone[s]” that the Supreme Court has allowed companies to create by way of arbitration clauses.¹⁰⁶

While there has yet to be a thorough empirical analysis of the effect of forced arbitration on antitrust claims, there is every reason to believe, based on the procedural bars addressed throughout this paper, that the numbers would be equally stark. Other scholars agree that antitrust is “especially vulnerable” to having claims suppressed by forced arbitration.¹⁰⁷

4. *The Consequences of Banning Class Actions*

As described above, the vast majority of forced arbitration clauses also ban class actions. Banning class actions is particularly effective at eliminating successful vindication of low-dollar-value claims. Class action settlements regularly provide compensation to *thousands* of consumers, awarding \$400 million per year.¹⁰⁸ In contrast, the most comprehensive study available of arbitration claims found that, in 2010 and 2011 combined, “of [claims worth] \$1,000 or less, arbitrators . . . [granted] relief to consumers in four such disputes.”¹⁰⁹ Not four thousand disputes.¹¹⁰ Not even four hundred. Just four.

Arbitration is likely to be even less effective for plaintiffs in complex areas of law like antitrust. While a plaintiff arguing a more straightforward case (like a clear contractual breach) might be able to do so without complex evidence, that is not the case in antitrust. Proving an antitrust claim is almost always wrapped up in questions like “what would the price be but-for the conspiracy?” These questions are inherently empirical and involve dozens or

¹⁰⁴ *Id.* at 1.

¹⁰⁵ Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 338 (2015) (“Studying the settlements of approximately 420 consumer financial class actions between 2008 and 2012, the CFPB found gross relief totaling \$2.7 billion going to thirty-four million consumers. . . . [By contrast, in cases where] an arbitrator reached a decision on the merits, consumers received a combined total of less than \$175,000 in damages”).

¹⁰⁶ Koenig & Rustad, *supra* note 89, at 342 (“Our empirical research on SNS arbitral clauses demonstrates that providers systematically foreclose consumer rights.”).

¹⁰⁷ Gupta & Khan, *supra* note 25, at 515.

¹⁰⁸ *Id.* at 513 (“Between 2008 and 2012, 422 consumer financial class action settlements garnered more than \$2 billion in cash relief for consumers and more than \$600 million in in-kind relief.”).

¹⁰⁹ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at 12 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf, archived at <https://perma.cc/SL4Y-MDPT>.

¹¹⁰ It would have been impossible for 4,000 claims to be vindicated because only 52 claims in this category were filed during that period. *Id.* This demonstrates that the crisis lies in the fact that many claims are not even brought in the first place.

hundreds of other variables that need to be controlled for, e.g., was there an economic crash or other shock that would have changed the price even in the but-for world? An entire industry of economic experts has developed to prove these types of claims, and expert reports often cost upwards of a million dollars each.¹¹¹ Given the nature of antitrust injuries (which are often small but spread out among millions of people, no individual person is ever harmed enough to justify the expense of even the most paltry expert report.¹¹² Plaintiffs bear the burden of proving these complex claims, meaning that the claims can only be feasibly developed in the context of class actions. Yet, the rise of forced arbitration clauses, and acquiescence by the Supreme Court have led some scholars to fear that “class action lawsuits could be all but dead in a decade or less.”¹¹³

To understand the impact of this, it is worth taking a look back at the way that class actions (formalized in Rule 23 of the Federal Rules of Civil Procedure) changed the deterrence balance by making it easier for plaintiffs to bring claims. First, class actions enabled new antitrust litigation that would otherwise have been untenable. One 1977 survey attempted to quantify the corresponding change in deterrence by asking whether various parties believed that “Rule 23 deters violations of antitrust, securities, consumer protection, and civil rights laws.”¹¹⁴ Fifty-seven percent of circuit judges, 64 percent of district judges, 87 percent of plaintiffs’ lawyers, and even 57 percent of defense attorneys agreed with the statement.¹¹⁵ Second, and relatedly, class actions increase the litigating capacity of plaintiffs. Increasing capacity dovetailed with the rise of computing power and the surge of the expert report writing industry.¹¹⁶ These changes systematically empowered plaintiffs to bring more sophisticated and more successful claims.

D. *How Antitrust Law Is Poised to Respond*

The emergence of class actions arguably shifted the balance of deterrence towards *over*-deterrence. This change immediately preceded the court’s move towards creating standards that hinder plaintiffs (like moving

¹¹¹ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 245 (2013) (Kagan, J., dissenting).

¹¹² See generally Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT’L L.J. 771, 771–72 (2015).

¹¹³ BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 16–17 (1st ed. 2019). See generally Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 388 (2005).

¹¹⁴ David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 617 (2013).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1263 (2012) (“[T]he rise of standards in antitrust analysis represents a delegation of authority from law and judges to economics and economists who can more finely tune legal norms to market realities.”).

away from rules of per se illegality).¹¹⁷ The Court's reaction to the rise of class actions makes sense because increased capacity of plaintiffs may have necessitated a change in the underlying rules to prevent over-deterrence. But as the opposite trend emerges in the wake of forced arbitration, a reversion to rules and regulations that deter more antitrust conduct are needed.

While the antitrust statutes were passed in their original forms before 1966, because they are malleable common law rules, every time the Supreme Court releases a doctrine-shifting decision, it is effectively passing a new law. These new formulations of antitrust law are dependent upon factual predicates, like the prevalence of class actions. Changing this factual predicate by undermining class actions disturbs the careful balance that went into the current set of antitrust rules when they were set down by the Court.

The rise of forced arbitration and class action bans means that the deterrence mix is at risk of shifting back towards pre-1966 levels. While it is outside the scope of this article to precisely quantify the impact of forced arbitration clauses on antitrust class actions, it remains an important premise that class actions are (or will soon be) at risk of substantial decline because of forced arbitration.

If reform of forced arbitration is not possible or likely,¹¹⁸ decline of the class action demands a re-evaluation of antitrust standards. New standards would account for the changed circumstances brought on by a new mix of under- and over-deterrence, and faithfully follow carefully calibrated Supreme Court decisions from the past decades.¹¹⁹ Many have pointed out the potential danger of the *Italian Colors* decision, and some have applied the broad strokes of my argument to specific areas of antitrust law, but no work has thus far called for a wide-ranging recalibration of antitrust law because of forced arbitration.¹²⁰ I apply my approach to core areas of antitrust that are ripe for reform.

III. SOLUTIONS

This paper proposes two solutions, both of which are within reach. The first identifies ways that judges can shape doctrine to be faithful to the underlying antitrust statutes and precedent. The second highlights the ability of executive agency enforcement to combat the crisis of under-deterrence caused by forced arbitration.

¹¹⁷ George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S7 (2014).

¹¹⁸ The best path forward is to pass the FAIR Act or overturn *Italian Colors*. However, this article looks for solutions under the contingency where those changes do not occur.

¹¹⁹ Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115, 2132 (2015) (“[H]ad the Court that wrote *Illinois Brick* confronted the facts of antitrust as it now exists, it would have come to a very different conclusion about the suitability of indirect purchasers as plaintiffs.”).

¹²⁰ *Id.*

A. Judicial Solutions

1. Vertical Price Fixing Agreements

The standard that courts use to evaluate vertical price fixing is one area that is ripe for reform amidst the rise of forced arbitration. Vertical price fixing agreements occur when upstream firms illegally demand that downstream counterparts sell merchandise for a specified price (without offering sales or discounts).¹²¹ For example, a television manufacturer that demands that big box stores sell their televisions for exactly \$1,000 is engaged in vertical price fixing. Vertical price fixing can harm consumers by preventing competition between downstream retailers (e.g. preventing a big box store from drawing customers by selling the TVs at a price barely above the price it paid for them).¹²² One way for manufacturers to enforce vertical price fixing agreements is to cut off downstream retailers who start selling the product at a price that is lower than the agreed-upon price.

It used to be fairly straightforward for plaintiffs to win vertical price fixing cases.¹²³ But in the 2000s, the Court replaced the relaxed standard with a much higher bar for plaintiffs to meet.¹²⁴ Deterrence considerations were paramount to the Court's move.¹²⁵ The rise of forced arbitration threatens to shift this deterrence balance in favor of defendants as plaintiffs are unable to bring cases as class actions. As a result, courts should consider reinstating the old, lower bar approach to faithfully adhere to the reasoning behind the Supreme Court's decisions.

In *Monsanto Co. v. Spray-Rite Service Corp.*,¹²⁶ the Court changed the standard for bringing vertical price fixing cases. Previously, downstream retailers (plaintiffs) could merely show that (1) they had defected from an alleged vertical price fixing scheme (for example, by offering products at a discount), (2) other downstream retailers had complained to the manufacturer about being undercut, and (3) the manufacturer had cut off the defector's supply contract.¹²⁷ However, the Court was concerned that those three allegations could be consistent with legal behavior.¹²⁸ For example, (3) could have been explained by legitimate reasons to end the contract and (1) and (2) could have been mere coincidences. Pre-*Monsanto*, plaintiffs' allegations could be presumed to indicate an illegal vertical price fixing scheme even if the facts alleged were consistent with legal behavior.¹²⁹ *Monsanto* reversed this presumption: "[i]n *Monsanto*, the Court required that antitrust

¹²¹ ELHAUGE & GERADIN, *supra* note 26, at 759.

¹²² *Id.*

¹²³ See *supra* Section II.A.1.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 465 U.S. 752 (1984).

¹²⁷ *Id.* at 761.

¹²⁸ *Id.* at 762.

¹²⁹ *Id.*

plaintiffs alleging a § 1 price-fixing conspiracy must present evidence tending to exclude the possibility [that] a manufacturer and its distributors acted in an independent manner.”¹³⁰

The Court was explicitly concerned about the deterrence balance being tilted in favor of plaintiffs when it raised the evidentiary standard that plaintiffs had to meet. The court noted that “expos[ing] the defendant to treble damage liability would both inhibit management’s exercise of independent business judgment and emasculate the terms of the statute.”¹³¹ The danger of over-deterrence by the private bar was not simply a possible consideration, it was *necessary* to the court’s ultimate decision. Referring to the danger of treble damage actions referenced above, the court noted that “[t]he flaw in the evidentiary standard adopted by the Court of Appeals in this case is that it disregards this danger.”¹³²

Taking the Court’s reasoning seriously might suggest reverting back to the lower evidentiary standard that prevailed before *Monsanto* was decided—one far more generous to plaintiffs. While an increased evidentiary burden on plaintiffs may have been justifiable at the time of *Monsanto*, the subsequent proliferation of forced arbitration clauses and the diminished power of class actions have likely tilted the balance back in defendants’ favor. This seems even more plausible given the outsized effect of forced arbitration and the fall of class actions on evidence collection in particular. It is reasonable to presume that plaintiffs today are less capable of investigating and collecting evidence of conspiracies (likely requiring experts and broad discovery) than they were at the time of *Monsanto*.

One could argue that *Monsanto* was not a class action, and that many similar vertical price fixing cases are successful without class actions. This response misses the fact that antitrust succeeds or fails as a matter of degree. Cutting down the number of actual or possible antitrust suits that could succeed can have a significant effect on the affected retailers, their customers, and the economy as a whole. Downstream retailers (not just consumers) can also act as a class, just as they did in *Italian Colors*. Imagine a situation where an upstream wholesaler used vertical price maintenance to change the price of the product so that it was just a few cents more than it would be in a but-for world (a world without the anticompetitive behavior). A retailer that only has a turnover of tens or hundreds of thousands of dollars each year might not be injured sufficiently to fund an expert report or garner high enough damages to entice a legal team to bring the challenge. This explains why companies band together in class to pursue vertical price fixing claims,

¹³⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007) (citing *Monsanto*, 465 U.S. at 764).

¹³¹ *Monsanto*, 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980)).

¹³² *Id.* at 763.

as occurred in a recent contact lens class action.¹³³ Removing the possibility of class actions via forced arbitration tilts the deterrence balance towards under-deterrence of vertical price fixing. Large-scale antitrust violations can affect consumers all over the world, meaning that a stymied American antitrust landscape has an impact on a global scale. As a result of these major implications and the changed deterrence balance from forced arbitration, the *Monsanto* rule should be reconsidered.

Analyzing the effect of retailer class actions in vertical price fixing law is illustrative of a reframing that may be necessary for forced arbitration advocates. Much of the attention of forced arbitration advocacy has focused on consumer contracts where it is clear that the individuals involved have no control over contract terms. But it would be a shame to miss out on the fact that the perils of forced arbitration can infiltrate business relationships between unequal business partners. A corner store in Toledo, for example, does not have bargaining leverage against a national wholesaler with tremendous market power. The Italian Colors restaurant that was the named plaintiff against American Express is a perfect example of this dynamic.

a. Vertical Minimum Price Fixing

Courts should also adjust the underlying legal rule for vertical minimum price fixing, a specific type of vertical price fixing. This is the more dangerous form of price fixing because it sets a price floor that retailers must adhere to, often raising prices for consumers.

The Supreme Court established in 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹³⁴ that vertical minimum price fixing was per se illegal. But upon review in 2007, after the rise of class action litigation, the Court in *Leegin Creative Leather Products v. PSKS, Inc.* changed the standard to a rule of reason.¹³⁵ While analyzing the question at issue, the Court was very concerned about overdeterrence of potentially pro-competitive behavior:

The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability. Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate long-

¹³³ Brigette Honaker, *Contact Lens Makers Want to Escape Price-Fixing Class Action*, TOP CLASS ACTIONS (Oct. 18, 2018), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/861097-contact-lens-makers-want-escape-price-fixing-class-action>, archived at <https://perma.cc/6NKA-PWY8>.

¹³⁴ 220 U.S. 373, 384 (1911).

¹³⁵ 551 U.S. 877, 907 (2007).

standing distributors for minor violations without seeking an explanation. The increased costs these burdensome measures generate flow to consumers in the form of higher prices.¹³⁶

Reverting back to a per se rule may be necessary as class action liability becomes less of a concern. Briefs and amici in the case repeatedly referred to concerns like the “specter of treble damages.”¹³⁷ The only non-governmental amicus brief cited by the majority, put forward by PING, Inc., explicitly mentioned the litigation “risk” created by *Dr. Miles* five times in the cited pages.¹³⁸ Reducing the litigation risk should change the calculus of those similarly situated to PING. After all, the rule they were advocating for (the rule of reason) is not the same as per se legality. It doesn’t bless the conduct, it simply lowers the risk that they will be punished for said conduct. Forced arbitration has lowered vertical price fixers’ litigation risks all on its own. Therefore, it is prudent for the Court to revisit whether this external development would have adequately accounted for the 2007 Court’s concerns about creating “traps for the unwary.”¹³⁹

2. *An Objection*

One limitation may dampen excitement about the above proposals and underscores the need for direct reform of forced arbitration practices. Changing the antitrust law enforced by courts of law may, ironically, fail to help individuals who are forced to bring their claims in arbitration. Companies have been able to stipulate rules governing arbitrations that conflict with existing law.¹⁴⁰ For example, “antitrust defendants have sought to detreble antitrust damages through arbitration. In drafting mandatory arbitration clauses, potential antitrust defendants often try to nullify the Sherman Act’s treble damage provision.”¹⁴¹

But this limitation is not crippling. First, while “the arbitrator is not bound by the law in the same manner as a federal judge,”¹⁴² the prevailing law in the relevant jurisdiction still acts as the baseline for their decisions.¹⁴³ Significant changes to prevailing law in federal courts should steer arbitrators in the same direction.

Second, companies that injure a wide swath of plaintiffs can have their behavior constrained if only some of those plaintiffs are bound by forced

¹³⁶ *Id.* at 903 (citations omitted).

¹³⁷ Brief in Opposition at 12, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 562 U.S. 1217 (2011) (No. 10-653).

¹³⁸ Brief for PING, Inc. as Amicus Curiae Supporting Petitioner, *supra* note 59, at 9–18.

¹³⁹ *Leegin*, 551 U.S. at 904.

¹⁴⁰ *Lemley & Leslie*, *supra* note 18, at 22.

¹⁴¹ *Id.* at 24.

¹⁴² *Id.* at 37 n.225.

¹⁴³ It has yet to be determined whether courts will uniformly reject de-trebling provisions. “[Some courts] have held that it is up to arbitrators rather than judges to determine whether a damage-limitation provision is unenforceable on public policy grounds.” *Id.* at 26.

arbitration agreements. Companies are more likely to conform their behavior to the law to avoid liability from the plaintiffs who are not bound by forced arbitration and who benefit from the new plaintiff-friendly laws.

Third, there is always a chance that arbitration agreements will be invalidated. Arbitration agreements can still be invalidated if, for example, they are not voluntarily entered into.¹⁴⁴ Therefore some companies (even those that seek to impose arbitration agreements) may be marginally deterred by harsher substantive law in courts. Alternatively, those companies (and others that were not planning to impose arbitration agreements) might be incentivized to double down on imposing enforceable arbitration agreements.

Fourth, plaintiffs that are still able to bring cases in open court will benefit from more favorable substantive law. Therefore, the overall level of deterrence in the economy will still be nudged upward.

B. Antitrust Agency Solutions

1. Stricter Merger Review to Account for Post-Merger Misconduct

The rise of forced arbitration warrants increased merger control. In a world where forced arbitration renders plaintiffs unable to police antitrust misconduct after a merger, the threshold for allowing the merger in the first place should be raised.

Scrutinizing mergers between companies is of paramount importance to antitrust law. Concentration is the enemy of competition, meaning that when two companies that used to be competitors join forces, they can profitably raise prices and exert dominance over the industry. Once companies have merged, there is (almost) no going back—it is near-impossible to “unscramble the eggs” once a merger has been consummated.¹⁴⁵ Many academics and policymakers suggest that under-aggressive merger enforcement is the cause of a wide range of social and economic ills.¹⁴⁶

There is an important distinction to be made between legal and illegal post-merger conduct. Most of the criticism of lackluster merger enforcement focuses on the ability of companies to legally take actions that harm consumers after they merge. Larger firms, and more concentrated industries, have a range of maneuvers that can worsen conditions for consumers without violating existing law. For example, two companies can merge and then raise prices under current law. Once a merger is approved, the merged entity

¹⁴⁴ *Kernahan v. Home Warranty Adm’r of Fla., Inc.*, 199 A.3d 766, 781 (N.J. 2019).

¹⁴⁵ Cf. Nathan Chubb, *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, 18 *Geo. Mason L. Rev.* 533, 540 (2011).

¹⁴⁶ Tim Wu, *A Corporate Merger Cost America Ventilators*, *N.Y. Times* (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/opinion/ventilators-coronavirus.html>, archived at <https://perma.cc/D7VS-DTLE>.

is able to set profit-maximizing prices, even if that leads to prices that are higher than they would have been absent a merger.¹⁴⁷

But there is less explicit focus on *illegal* conduct that can occur after a merger. The U.S. agencies have, for example, “largely abandoned efforts to block mergers based on post-merger misconduct.”¹⁴⁸ After industries consolidate, illegal anticompetitive activity becomes easier. Fewer firms means fewer entities to defect from price fixing schemes.¹⁴⁹ Relatedly, concentration increases the likelihood that the firms will be able to successfully settle on and coordinate prices across the industry.¹⁵⁰

There is likely less focus on illegal post-merger conduct because there are ample mechanisms in place to police this conduct. An aggressive private bar exists to discover and punish this behavior if it occurs. Class actions and the private bar generally hold a special place in deterring post-merger misconduct and in U.S. antitrust law. “[T]he Supreme Court has long recognized that class actions serve a valuable role in the enforcement of antitrust laws.”¹⁵¹ While the federal government has the ability to bring criminal cases, the private bar can uniquely¹⁵² bring the sledgehammer of treble damages to bear on companies. That’s where forced arbitration muddles the standard assumptions.

Forced arbitration makes it harder to police illegal post-merger conduct. The private bar and class actions are indispensable to curtailing post-merger misconduct. As forced arbitration makes it harder to successfully bring cases, companies are less constrained to act within the bounds of the law. The combination of forced arbitration (gutting deterrence) and lax merger enforcement (making post-merger misconduct easier) is a dangerous step in the wrong direction. To change course in the context of diminishing class actions, U.S. merger enforcement agencies should consider heightening the scrutiny on merging parties.

Changes to merger review are governed almost exclusively by agency guidelines.¹⁵³ The DOJ and FTC could start considering post-merger misconduct without a single vote from a lawmaker or a favorable court ruling. I

¹⁴⁷ While agencies seek to avoid this outcome, “Section 7 of the Clayton Act is concerned ‘with probabilities, not certainties.’” Fed. Trade Comm’n v. Consol. Foods Corp., 380 U.S. 592, 594–95 (1965) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)). And once a merger is consummated, the agencies run into the “unscrambling” problem mentioned above or the even thornier prospect of directly regulating prices—also known as “sailing on the sea of doubt.” United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898).

¹⁴⁸ ELHAUGE & GERADIN, *supra* note 26, at 1210.

¹⁴⁹ “The small number of firms in an oligopoly will make illegal coordination easier both to accomplish and to hide.” Randall David Marks, *Can Conspiracy Theory Solve the “Oligopoly Problem”?*, 45 MD. L. REV. 387, 396 (1986).

¹⁵⁰ *Id.* at 394.

¹⁵¹ *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1179 (N.D. Cal. 2013).

¹⁵² Aside from rare *parens patriae* cases from state Attorneys General.

¹⁵³ See generally Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002).

suggest that they seriously consider doing so, assuming that the increase in forced arbitration agreements continues and that class action continues to be gutted.

Post-merger deterrence caused by forced arbitration can also be tailored based on the presence or absence of forced arbitration practices by the merging parties. If the parties were using forced arbitration clauses with their consumers before the merger, it could be assumed that they would continue to use them afterwards. Agencies would therefore be justified in blocking a merger because post-merger misconduct would not be deterred by class actions. However, companies that wish to remove post-merger misconduct considerations from the agencies' analyses could simply agree to an indefinite prohibition on the use of forced arbitration clauses and class action bans. Leslie and Lemley have even suggested that DOJ and FTC should place forced arbitration bans (or class action bans) into consent decrees they approve.¹⁵⁴

If strengthening merger review in response to reduced post-merger scrutiny seems inapt or confusing, consider the analogy of a concerned parent tasked with watching over a playdate. The parent might decide to let their child have a playdate in the playroom (out of sight) when the child turns five. A lot of factors go into this decision, including how well the parent can hear screams from the playroom. If the playroom were soundproof, the parent might decide to wait until the child turns seven to let them enjoy their playdate without supervision. The analogy is apt because children having a playdate out of sight are a lot like merged companies. Once they merge (go to the playroom), it can be difficult to keep tabs on their conduct. If it becomes harder to scrutinize post-merger misconduct (because the playroom is soundproof), then the regulator must raise the threshold at which they allow the merger (the age at which the child can play unsupervised). Forced arbitration functions as the soundproof playroom, making it harder for outside observers to intervene if post-merger conduct gets out of hand.

For those less inclined to playtime analogies, consider the real-world case-study of the EU's merger enforcement practices. The EU (like the U.S. in a post-forced-arbitration world) has a less robust private antitrust enforcement regime because of the absence of treble-damage antitrust class actions.¹⁵⁵ As a result, there is less scrutiny of post-merger misconduct in the EU than in the U.S.¹⁵⁶ To preemptively protect against this deficiency, European regulators take post-merger misconduct seriously when doing merger review analyses.¹⁵⁷

¹⁵⁴ Lemley & Leslie, *supra* note 18, at 54.

¹⁵⁵ Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 676 (2010).

¹⁵⁶ *Id.*

¹⁵⁷ ELHAUGE & GERADIN, *supra* note 26, at 1210.

As the U.S. reduces the power of the private bar by gutting antitrust class actions, it moves towards the European model of relying solely on government enforcement. In response, the U.S. should adopt a more European-style merger review process and start seriously considering the possibility of post-merger misconduct when it scrutinizes proposed mergers.

IV. CONCLUSION

Consumer protection lawyers and scholars should pay close attention to developments surrounding forced arbitration, because they have the potential to reshape the antitrust field for generations. Judges should view their antitrust cases through the lens of the more-or-less effective vindication doctrine to ensure that they faithfully apply the reasoning undergirding the relevant statutes and cases. And regulators should reconsider standards that were put in place before the rise of forced arbitration or that exist in regions with less robust private enforcement.

The solutions put forward in this article are illustrative of the dramatic rethinking of antitrust and consumer protection law that needs to happen. Supreme Court decisions between 1966 and 2013 should be scrutinized for language referring to class actions, treble damages, and other indications that the factual predicates of those decisions may be eroding. And the differences in antitrust and consumer protection law between the U.S. and Europe should be analyzed for hints of places where American agency enforcement needs to be strengthened as the private class action bar is downsized. If class actions really will get largely wiped out in the coming decade or two, then changes to the law are urgently needed.¹⁵⁸ At the same time, advocates of all stripes should be working towards legislative changes to combat the rise of forced arbitration.

If activists, litigators, legislators, judges, and scholars work deliberately, antitrust law can be strengthened against the threat of forced arbitration. At the same time, by adopting doctrines like the more-or-less effective vindication doctrine, advocates can defend against future challenges that haven't yet been imagined.

¹⁵⁸ See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 422–24 (2016) (outlining how doctrine may be stunted when certain cases stop coming before courts.).

