

Individualized Injunctions and No-Modification Terms: Challenging “Anti-Reform” Provisions in Arbitration Clauses

MYRIAM GILLES*

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I. INTRODUCTION

Maybe you’ve heard, the United States Supreme Court has been on a bit of a pro-arbitration tear recently, upholding ever-more draconian dispute resolution clauses inserted in standard-form contracts against all sorts of legal and policy-based challenges. The most recent cases to arrive at the Court have involved class action bans embedded within arbitration clauses, which require the parties to surrender the right to bring a class or representative claim in either the arbitral or judicial fora. In *AT&T Mobility v. Concepcion*, a divided Court held that the Federal Arbitration Act (“FAA”) preempted the categorical use of state unconscionability doctrine to strike down class action bans in consumer adhesion contracts.¹ More recently, in *American Express v. Italian Colors*, the same five Justices again ruled that class action bans are broadly enforceable—even where proving the violation of a federal statute in an individual arbitration would be so costly that no rational claimant would undertake it, allowing some federal statutory rights to simply go unvindicated.²

* Professor of Law, Benjamin N. Cardozo School of Law. Many thanks to the *University of Miami Law Review* for inviting me to present a draft of this paper at the *Leading from Below* Symposium in honor of the great Judge Jack Weinstein, and special thanks to Judge Shira Sheindlin for her words of wisdom and her courage of conviction. Also, thanks to Symposium Editor McKillop Erlandson and the other panelists and presenters.

1. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

2. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (“[T]he fact that it

With the decisions in *Concepcion* and *Italian Colors*, the battle over class action bans in arbitration clauses appears to be over and corporate defendants appear to have won decisive—total—victories. Not surprisingly, scholars (myself included) have been gloomily forecasting the end of class actions and aggregate litigation in the wake of these decisions.³ Observers also predict that small-value individual claims are unlikely to be arbitrated—and certainly not in sufficient numbers to mirror the deterrent effects of a class action.⁴ Further, the individual claims that are brought in arbitration will be straightforward and simple disputes between the parties; “procedurally difficult” claims, to use Professor Jean Sternlight’s nomenclature, cannot realistically be brought by individuals in arbitration.⁵ So, by merely adding an arbitration clause (containing a class action ban and an anti-reform provision) to their contracts, corporate entities have seemingly won the right to cheaply and easily insulate themselves against many forms of privately-enforced legal liability, and with this, the right to continue engaging in practices that cause widespread harm, unless and until detected by a public enforcer.

But, thus far, the Supreme Court’s rulings have only considered whether class actions for *monetary damages* may be barred by arbitration clauses requiring individual adjudication.⁶ The Justices have not

is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

3. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–58 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012); Maureen A. Weston, *The Death of Class Action After Concepcion?*, 60 U. KAN. L. REV. 767, 767 (2012).

4. See, e.g., Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (finding only an “infinitesimal” number AT&T customers had filed arbitration claims), *rev’d on other grounds*, 673 F.3d 1155 (9th Cir. 2012); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 110–11 (2011) (reporting that between 2003 and 2007, only 170 consumers out of nearly 54 million subscribers entered AT&T’s inexpensive arbitration procedure). *But see* Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 468–83 (2014) (describing possible ways of bringing mass, serial arbitrations).

5. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 89 (2012).

6. Recall that *Concepcion* and *Italian Colors* were damages class actions under Rule 23(b)(3): in neither case did plaintiffs assert that their rights could only be vindicated if the defendant’s policies or practices were changed or if some other form of equitable relief were granted. See First Amended Complaint at 3–4, *In re Am. Express Merchants’ Litig.*, No. 1:03-cv-09592 (S.D.N.Y. Feb. 19, 2009) (“Plaintiffs bring this action . . . as a damages class action under Rule 23(b)(3).”); Class Action Complaint For: (1) Violation of California Code of Regulations, Section 1585(b)(6); and (2) Violation of California Business and Professions Code Section 17200 et. seq. at 14, *Laster v. T-Mobile*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005) (No. 05-cv-1167-JM) (plaintiff’s prayer for relief included “damages in an amount to be proven at trial”).

examined the enforceability of arbitration clauses or arbitral rules, which explicitly prohibit claimants from seeking or arbitrators from granting broad *injunctive relief* in an individual dispute. For example, if an individual small business owner sought to arbitrate its Clayton Act claim against American Express (“Amex”)—its only available option in the wake of *Italian Colors*—could an arbitrator award injunctive relief in the form of striking down the anti-competitive rules in the merchant’s contract with Amex? Section 16 of the Clayton Antitrust Act authorizes precisely this sort of equitable remedy,⁷ and the Supreme Court has long recognized the importance of equitable remedies in the enforcement of antitrust laws.⁸ Yet, the Amex arbitration clause explicitly provides that “[t]he Arbitrator shall have no power or authority to alter the Agreement or any of its separate provisions.”⁹

Alternatively, could our intrepid small merchant in an individual arbitration seek a broad injunction against future enforcement of Amex’s anticompetitive rules as against itself and *all market participants*? After all, equitable remedies available under the antitrust laws are generally intended to be forward-looking and market-wide—i.e., to generate price competition between and amongst business rivals going forward.¹⁰ Individualized injunctions rarely solve the problem of widespread antitrust injury. But here, again, Amex’s arbitration clause expressly bans broad injunctions “on behalf of” or “award[ed] to” merchants beyond the named claimant.¹¹

Taken together, these prohibitions and limitations on relief—what I

7. 15 U.S.C. § 26 (2012) (entitling “[a]ny person . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . .”). See also *California v. Am. Stores Co.*, 495 U.S. 271, 294 (1990) (“[A] fair reading of the entire legislative history supports the conclusion that § 16 . . . should be construed generously and flexibly pursuant to principles of equity.”).

8. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 133 (1969) (recognizing that a critical end to be served in equitable suits under the Clayton Act is that “they effectively pry open to competition a market that has been closed by defendants’ illegal restraints”) (quoting *Int’l Salt Co. v. United States*, 332 U.S. 392, 401 (1947)).

9. AMERICAN EXPRESS CARD ACCEPTANCE AGREEMENT § 7.d.vi (2012) [hereinafter CAA], available at http://www.evopayments.com/uploads/other/OnePoint_April2014wRates.pdf; see also *id.* § 7.d.iv (“The arbitrator’s authority to resolve Claims is limited to Claims between you and us alone, and the arbitrator’s authority to make awards is limited to awards to you and us alone.”).

10. Courts have routinely recognized that market-wide antitrust injunctions are appropriate, even in non-class cases, provided that the broad relief is necessary to redress antitrust injury. See *infra* text accompanying notes 64–70 (discussing *Wilk v. Am. Med. Ass’n*, 895 F.2d 352, 371 (7th Cir. 1990), *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1226 (9th Cir. 1997), and other cases).

11. CAA, *supra* note 9, § 7.d.iv; see also *id.* (there is no right to arbitrate “ON BEHALF OF THE GENERAL PUBLIC OR OTHER PARTIES”); *id.* § 7.d.iii (“YOU SHALL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY . . . PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.”).

term “anti-reform” provisions—prohibit an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to similarly-situated non-parties. And these sorts of provisions are now cropping up in the standard-form arbitration clauses of many major companies, including cellphone service providers and other consumer-oriented enterprises.¹² Yet, to date, neither the Supreme Court’s FAA decisions nor opinions by the lower federal courts have squarely addressed the question of whether such provisions are enforceable.¹³

Predictably, corporate drafters assert that these sorts of provisions are fully enforceable under the FAA and relevant case law. They argue that atomized, individual injunctions against unlawful conduct remain within the arbitrator’s authority to grant, and that the “no modification” language merely denies the arbitrator the ability to rewrite the underlying agreement.¹⁴ These legal arguments are serious and the stakes are high: if a single claimant could enjoin widespread injurious practices in arbitration, these defendants will have lost the advantages afforded them by the Court’s FAA jurisprudence, which effectively immunizes viola-

12. See, e.g., *Schatz v. Cellco P’ship*, 842 F. Supp. 2d 594, 597 (S.D.N.Y. 2012) (describing Verizon Customer Agreement, § 3, which provides that “[t]he arbitrator may award money or injunctive relief only in favor of the individual party and only to the extent necessary to provide relief warranted by that party’s individual claim”); *Riensch v. Cingular Wireless LLC*, No. 2:06-cv-01325, 2013 WL 951012, at *8 (W.D. Wash. Mar. 12, 2013) (stating that Cingular’s clause says “[t]he arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by the party’s individual claim”); AT&T, WIRELESS CUSTOMER AGREEMENT § 2.2(6), available at <http://www.att.com/legal/terms.wirelessCustomerAgreement.html> (last visited Nov. 5, 2014) (“The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party’s individual claim. YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.”). Other companies are beginning to insert anti-reform language into arbitration clauses found in employment agreements. See, e.g., *Cunningham v. Leslie’s Poolmart, Inc.*, No. 2:13-cv-02122, 2013 WL 3233211, at *8 (C.D. Cal. June 25, 2013) (“arbitration agreement [with employee] only extends to claims ‘that the Company may have against [plaintiff] or that [plaintiff] may have against [the Company]’”).

13. The Court did make passing reference to anti-reform clauses in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting employee’s argument that age discrimination claim is not arbitrable: “arbitration procedures cannot adequately further the purposes of [age discrimination law] because they [prohibit] broad equitable relief and class actions”); see also *In re Apple & AT&T Mobility Antitrust Litig.*, 826 F. Supp. 2d 1168, 1175 (N.D. Cal. 2011) (rejecting plaintiffs’ argument that arbitration clause is void because arbitration “forecloses [their] public injunction remedy”).

14. See, e.g., Reply Memorandum of Law in Further Support of Defendants’ Motion to Dismiss the Proceedings in Favor of Arbitration, or Alternatively, Dismiss Count III and Compel the Remaining Claims to Arbitration at 2, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 11-md-02221 (NGG) (RER) (E.D.N.Y. Aug. 20, 2011) [hereinafter Reply Memorandum in Support of Defendants].

tive actions from legal review. Moreover, defense-side advocates are deeply discomfited by the idea of arbitrators wielding unchecked authority to issue broad and diverse injunctions in individual arbitrations, given the limited rights of appeal to the courts.¹⁵ As such, questions surrounding the enforceability of anti-reform clauses are just as important to putative defendants as the class action bans they have spent years defending; depending on the context, divesting individual claimants of the power to enjoin or reform a market-wide policy or practice may be even more critical than the threat of monetary liabilities.

Take an extreme but illustrative case: in 2011, three law firms sought to challenge the proposed merger between AT&T Mobility and T-Mobile, alleging it violated the Clayton Act.¹⁶ The firms filed more than 2,000 demands for arbitration on behalf of individual AT&T subscribers, each seeking injunctive relief in the form of blocking the merger.¹⁷ If even one of these arbitrations had succeeded, the many, many millions of dollars that AT&T and T-Mobile had invested in this proposed deal would have been undone by just a single subscriber. Not surprisingly, AT&T reacted swiftly and successfully enjoined the arbitrations on the grounds that the injunctive demand exceeded the scope of the subscriber agreement.¹⁸

This essay is the first to consider the enforceability of anti-reform provisions that are beginning to appear in contemporary arbitration clauses in the wake of the Court's major pro-arbitration decisions in *Concepcion* and *Italian Colors*. I believe, and this essay will seek to

15. See, e.g., *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994) (“Our review of the arbitrator’s award itself, however, is very deferential. We must sustain an arbitration award even if we disagree with the arbitrator’s interpretation of the underlying contract as long as the arbitrator’s decision ‘draws its essence’ from the contract. In other words, we must affirm the arbitrator’s decision if it is rationally inferable from the letter or the purpose of the underlying agreement. In deciding whether the arbitrator exceeded its authority, we resolve all doubts in favor of arbitration.”) (citations omitted).

16. In June 2011, AT&T announced a \$39 billion takeover of T-Mobile that was immediately controversial. The Department of Justice (“DOJ”), the Federal Communications Commission (“FCC”), and various state regulators objected to the merger, and in August 2011, the DOJ filed suit alleging the proposed merger violated Section 7 of the Clayton Act. See Complaint at 4, *United States v. AT&T Inc.*, No. 1:11-cv-01560 (D.C. Cir. Aug. 31, 2011).

17. See Scott A. Bursor, *Victory!*, <http://www.fightthemerger.com> (last visited Nov. 5, 2014).

18. See, e.g., *AT&T Mobility LLC v. Fisher*, No. DKC 11-2245, 2011 U.S. Dist. LEXIS 124839, at *15–16 (D. Md. Oct. 28, 2011) (holding under same clause that claim to block merger cannot proceed in arbitration, and cautioning that AT&T Mobility’s interpretation that “customers also waived any right to bring this type of action anywhere, including in court,” may well “violate public policy and be unenforceable”); *AT&T Mobility LLC v. Gonnello*, No. 1:11-cv-05636, 2011 U.S. Dist. LEXIS 116420, at *11–12 (S.D.N.Y. Oct. 7, 2011) (stating that consumer’s individual claim seeking to block merger was outside scope of arbitration agreement where the arbitration clause specifically “withheld from the arbitrator the power to decide questions that would necessarily affect the rights of more than the parties to the dispute through the grant of declaratory or injunctive relief”).

show, that these provisions should be held unenforceable, as they render arbitration a farcical and toothless imitation of adjudication.

Part II considers the argument made by corporate drafters that individualized injunctions can serve as an adequate remedy for a claimant's injury. Claimants seeking broad equitable relief in non-class cases have traditionally been put to the test of proving the "necessity" of the requested relief as remedying their specific harm. This is a highly fact-specific, context-dependent claim: in some cases, an individual, narrowly-tailored injunction will be all that is necessary to remedy a claimant's injury, while in others, broader relief may be required.¹⁹ It is therefore impossible to determine *ex ante* at the time of contracting whether a claimant may subsequently suffer injury entitling her to broad injunctive relief. As such, across-the-board, contractual prohibitions on non-individualized injunctions are unenforceable, as these constitute "a prospective waiver of a party's right to pursue statutory remedies."²⁰

Part III considers the corporate claim that no-modification clauses—which prohibit an arbitrator from changing, modifying, or altering provisions of the underlying agreement—are valid and enforceable. Advocates of no-modification clauses are careful to explain that no-modification clauses do not severely impinge an arbitrator's authority to adjudicate a claim but merely prevent the arbitrator from rewriting substantive terms in the underlying contract. Again, however, where a claimant can prove an entitlement to equitable relief in the form of striking a contractual term or changing an underlying rule, denying the arbitrator authority to grant such relief hinders the claimant's ability to vindicate her statutory rights. As such, no-modification clauses are exculpation clauses in sheep's clothing, permitting defendants to ward off liability by precluding claimants from seeking appropriate relief for their injuries.

In conclusion, this essay directs our collective attention to the serious policy implications of enforcing anti-reform provisions in arbitration clauses. As the war over arbitration moves into the injunctive arena, judges and arbitrators will be asked to determine the enforceability of clauses which deny claimants the right to change policies and practices—to decide, in other words, whether claimants may engage in a form of public law litigation within the confines of arbitration. This raises fundamental questions concerning the suitability of arbitration for resolving issues that affect broadly-held rights, and ultimately, whether

19. See *infra* text accompanying notes 35–47 (describing differences in statutory violations that might account for variation in remedies, from narrowly-tailored, individualized relief to broader forms of relief).

20. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985).

the private attorney general can effectively operate in these private, adjudicative arenas.²¹

II. INDIVIDUALIZED INJUNCTIONS

Anti-reform provisions are inserted into arbitration clauses to prohibit an individual arbitral claimant from obtaining broad injunctive relief benefitting herself and other similarly-situated non-parties. To achieve this goal, corporate drafters use forceful and explicit language demanding that only claims for individual injunctive relief may be sought in the arbitral forum. The Amex clause provides a good working example of an anti-reform clause that is both explicit and reiterative in its prohibition against broad equitable relief:

“The arbitrator’s authority to resolve Claims is limited to Claims between you and us alone, and the arbitrator’s authority to make awards is limited to awards to you and us alone”;²²

There is no right to arbitrate “ON BEHALF OF THE GENERAL PUBLIC OR OTHER PARTIES”;²³ and

“YOU AND WE SHALL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY . . . PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.”²⁴

Corporate drafters insist that contractual language such as this, authorizing only individualized, bespoke injunctions, is entirely permissible under the FAA; and, further, that such narrowly-tailored remedies are all that is necessary to make a claimant whole.²⁵ Just as each claimant must arbitrate her specific claim for individualized monetary damages, each must singularly prove an entitlement to individualized injunctive relief. Any relief beyond that which is necessary to make the individual plaintiff whole would therefore be impermissibly over-

21. See, e.g., Gilles & Friedman, *supra* note 3, at 625–26 (“Over the past fifty years . . . we have come to assume, quite correctly, that private actors will be the frontline enforcers in actions redressing broadscale securities fraud, consumer fraud and deceptive trade practices, antitrust violations . . . , civil rights violations and many other areas.”); see also Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 725–26 (2011) (“[T]he traditional conception of private enforcement as serving a dual public and private role is now being fundamentally challenged by this new generation of procedural contracting, as parties can create provisions that . . . decreas[e] overall enforcement.”).

22. CAA, *supra* note 9, § 7.d.iv.

23. *Id.*

24. *Id.* § 7.d.iii.

25. See, e.g., Reply Memorandum in Support of Defendants, *supra* note 14, at 4–5 (“[O]btaining an individualized injunction would grant the merchant the very right he seeks . . . and his relief would be complete. That the merchant may not seek relief for additional non-parties is irrelevant.”); *id.* at 5 (“Thus, even if a plaintiff in bilateral arbitration could not obtain the same broad, injunctive relief that might be available in litigation, the arbitration provision must still be enforced according to its terms.”).

broad.²⁶ This view finds support in traditional rules mandating that injunctive relief be narrowly tailored to remedy specific harms rather than seek to “enjoin all possible breaches of the law,”²⁷ and that an injunction “should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs.”²⁸

For many legal violations, individualized injunctions are a sufficient—indeed, paradigmatic—remedy for the harm suffered. For example, in cases involving libel and defamation,²⁹ domestic violence,³⁰ noncriminal detention,³¹ public nuisance,³² patent,³³ and a variety of other rights violations, an individual victim will often seek a narrowly-tailored injunction against future injury. Important statutory and common law rights of private individuals are secured through customized injunctions of these sorts, often coupled with monetary damages to remedy past misconduct.³⁴ But there are many other types of legal rights which are best, or perhaps only, safeguarded by a broader remedial structure.

A. *Broad Equitable Relief and Statutory Enforcement*

There are a number of areas in which broad equitable relief is the rule—for example, rights guaranteed by federal antitrust,³⁵ employ-

26. *Id.* at 6 (while “the Clayton Act entitles [plaintiffs] to broad, market-wide injunctive relief to remedy the alleged ‘harm to competition,’” plaintiffs must nonetheless “allege a specific, personal injury-in-fact,” which “forms the predicate for a private antitrust claim”).

27. *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974) (quoting *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945)).

28. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

29. *See, e.g., Retail Credit Co. v. Russell*, 218 S.E.2d 54, 56 (Ga. 1975) (noting the trial court “entered a narrowly-drawn order enjoining [the defendant] from the further publication of the adjudicated libel”).

30. In this context, injunctions are termed ‘restraining orders.’

31. *But see Aziz Z. Huq, Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 236 (2009) (describing *ex ante* grants of injunctive relief to individual detainees as “vanishingly rare”); *Munaf v. Geren*, 553 U.S. 674, 692 (2008) (reversing grant of injunctive relief to a detainee who challenged his transfer to Iraq based on fears of torture).

32. *See, e.g., DAN B. DOBBS ET AL., THE LAW OF TORTS* § 404, at 644 (2d ed. 2014) (“[C]ourts often issue injunctions compelling the defendant to abate private as well as public nuisances. Injunctions may be tailored narrowly to fit the nuisance. If a factory operation is a nuisance because of noise, it may be that an injunction closing the factory is unnecessary and that the nuisance can be remedied by an injunction that bars or limits the noise. Such an approach would properly match the remedy to the wrong.”).

33. *See, e.g., John M. Golden, Injunctions as More (or Less) than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1449–50 (2012) (an empirical study of injunctions issued in patent infringement cases finding one-third were “specifically tailored” to the individual plaintiff).

34. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972) (“While . . . any individual threatened with injury by an antitrust violation may . . . sue for injunctive relief . . . one injunction is as effective as 100 . . .”).

35. *See, e.g., Clayton Act* § 15, 15 U.S.C. § 25 (2012) (“The several district courts of the

ment,³⁶ civil rights,³⁷ and copyright and trademark legislation.³⁸ These statutory rights are defined at a higher level of generality than injury to one, specific individual: they seek to protect publicly-held, group-based rights deemed critical to the proper functioning of the economy, labor markets, social programs, education, and property ownership. Where an injunction issues in these areas, it “will necessarily affect all persons subject to the statute.”³⁹

For example, in the antitrust area, the Supreme Court has repeatedly declared that the statutory remedies exist to protect “competition, not competitors,”⁴⁰ the “right of freedom to trade,”⁴¹ “equality of opportunity,”⁴² and “consumer welfare and price competition”⁴³—using

United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.”).

36. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2012) (“[T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter”); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1) (2012) (“If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint . . . [the court may grant] any other equitable relief as the court deems appropriate.”).

37. See Voting Rights Act of 1965, 42 U.S.C. § 1973a(a) (2012) (allowing courts to grant equitable relief if a Fourteenth or Fifteenth Amendment violation is found); Fair Housing Amendments Act of 1988, 42 U.S.C. § 3612(g)(3) (2012) (“If [an] administrative law judge finds that a respondent has engaged . . . in a discriminatory housing practice, such administrative law judge [may] promptly issue . . . equitable relief.”); Americans with Disabilities Act of 1990, 42 U.S.C. § 12188(b)(2)(A) (2012) (a court “may grant any equitable relief that such court considers to be appropriate”).

38. See Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1146 (2005) (“Some substantive legal areas may warrant broad relief, even where the party’s individual injury might be remedied by a narrower injunction.”).

39. Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973).

40. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969) (observing that a critical end to be served in equitable suits under the Clayton Act is that “‘they effectively pry open to competition a market that has been closed by defendants’ illegal restraints’”) (quoting Int’l Salt Co. v. United States, 332 U.S. 392, 401 (1947)).

41. See, e.g., United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

42. Charles A. Ramsay Co. v. Associated Bill Posters of the U.S. & Can., 260 U.S. 501, 512 (1923).

43. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (noting “antitrust laws’ traditional concern for consumer welfare and price competition”); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107, 104 n.27 (1984) (stating that “Congress designed the Sherman Act as a ‘consumer welfare prescription,’” and describing the federal antitrust laws as “‘a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade’”) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979), and N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958)); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (declaring the freedom for each business “to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster”).

decidedly anti-individualistic, communal language to underscore the “fundamental importance [of antitrust law] to American democratic capitalism.”⁴⁴ There is a similar recognition of the public’s interest in the values protected by employment⁴⁵ and civil rights legislation, and the remedies provided by those statutory enforcement regimes.⁴⁶ In many of these contexts, an individualized injunction benefiting only one victim would make little sense given far-reaching statutory goals of remedying group-based harms.⁴⁷

Concomitantly, the judicial authority to craft appropriate remedies in these sorts of cases matches the scope and diversity of the interests at stake,⁴⁸ which generally exceed any individual’s specific harm or even the narrow scope of the right itself.⁴⁹ As the Supreme Court observed nearly eighty years ago, “[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”⁵⁰ For instance, courts have changed policies, rewritten rules, reformed practices, imposed new duties, and otherwise found ways of

44. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634 (1985); *see also* *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968) (“A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public’s interest.”).

45. *See, e.g.*, *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 374 (5th Cir. 1981) (stating that Title VII allows individual claimants to seek broad injunctive relief to remedy violations); *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 633–34 (9th Cir. 1972) (suggesting that in Title VII actions, relief benefiting nonparties might be proper under the statute’s unusually broad remedial scheme, while further observing that injunctive relief often “may incidentally benefit” others not before the court); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32–33 (5th Cir. 1968) (stating that the claim to remedy class-wide discriminatory employment practices “has extreme importance with heavy overtones of public interest.”).

46. *See, e.g.*, *Prof’l Ass’n of College Educators v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 274 (5th Cir. 1984) (finding that an injunction benefiting nonparties is permissible “if such breadth is necessary to give prevailing parties the relief to which they [individually] are entitled”).

47. *See, e.g.*, *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (stating that “racial discrimination is by definition class discrimination”); *see also* 7 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1771, at 663–64 (1972) (reporting that injunctive relief typically benefits “not only the claimant but all other persons subject to the practice or the rule under attack”).

48. *See* *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) (observing that “breadth and flexibility are inherent in equitable remedies”) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

49. *See* *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 90 (1950) (stating that “relief, to be effective, must go beyond the narrow limits of the proven violation”); *see also* *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968) (declaring that a remedies decree in an antitrust case should “terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future”).

50. *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937).

fully restoring an injured plaintiff via equitable remedies.⁵¹

B. *The “Necessity” of Broad Equitable Relief*

Despite these long-standing principles, which allow individuals to seek broad injunctive relief in appropriate cases, putative defendants, nonetheless, insist that anti-reform provisions are enforceable because narrowly-tailored remedies are all that is necessary to make an individual claimant whole in a non-class case. These advocates point out that, in order to avail herself of broad injunctive relief, the plaintiff must generally prove that such relief is “necessary” to remedying *her* specific injury.⁵² If the plaintiff could be made whole by a different remedy—e.g., monetary damages—then equitable remedies are not required.⁵³ Furthermore, if a narrow injunction would render her fully whole, then she lacks standing to seek a broader remedy on behalf of others.

At its core, this is a claim that injunctive relief is overbroad—even where statutorily authorized—whenever such relief benefits similarly-situated non-parties. But this argument rests on two faulty propositions: first, that broad injunctive relief is unavailable in non-class cases; and, second, that an injunctive remedy which benefits similarly-situated non-parties is unnecessary or overbroad.

1. BROAD RELIEF IN NON-CLASS CASES

Corporate defendants generally assert that broad injunctive relief is not available in non-class cases. Rather, it is only where a class is certified and liability established that a court may enter “appropriate final injunctive relief or corresponding declaratory relief with respect to the

51. *See, e.g.*, *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 557 (8th Cir. 1991) (asserting that courts are “empowered to fashion appropriate restraints on [the defendant’s] future activities both to avoid a recurrence of the violation and to eliminate its consequences,” and, therefore, “the district court may consider both the ‘continuing effects of past illegal conduct,’ and the possibility of ‘lingering efforts’ by the conspirators to capitalize on the benefits of their past illegal conduct”) (citations omitted).

52. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (“The purpose of an injunction is to prevent future violations But the moving party must satisfy the court that relief is needed.”); *Law v. NCAA*, No. 94-2053-KHV, 1996 WL 104328, at *1 (D. Kan. Jan. 5 1996) (“In seeking injunctive relief, plaintiffs carry the burden of proving that such relief is necessary.”).

53. Courts often recite the maxim that equity will not grant relief when there exists “an adequate remedy at law.” *See, e.g.*, *Lewis v. S.S. Baune*, 534 F.2d 1115, 1123–24 (5th Cir. 1976) (parties whose injuries can be rectified by means other than a injunction have an adequate remedy at law, and injunctive relief may be inappropriate); *see also* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 *GEO. WASH. L. REV.* 382, 393 (1982) (“[A]re there other non-injunctive proceedings that are likely to repair, in a rough sense, the harm plaintiff seeks to avert by injunction?”).

class as a whole.”⁵⁴ Thus, where an arbitration clause contains *both* class action bans and anti-reform provisions, drafters have in essence barred an individual claimant from seeking any form of broad relief.

A handful of cases have revealed discomfort with individual plaintiffs seeking broad equitable remedies in non-class cases. In *Zepeda v. INS*, for example, the Ninth Circuit reversed the district court’s pre-class certification grant of a preliminary injunction as overbroad, reasoning that the injunction should “apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs.”⁵⁵ According to the *Zepeda* court, until a class is certified, the district judge simply had no authority to “determine the rights of persons not before the court.”⁵⁶ In the dissent in *Zepeda*, Judge Norris forcefully asserted that “[w]hether or not a class was certified is irrelevant to the question whether the scope of the injunction . . . was necessary to protect the constitutional rights of these individual plaintiffs.”⁵⁷ In the dissenting judge’s view, an order prohibiting the Immigration and Naturalization Service (“INS”) from violating the rights of all Hispanic people was “necessary to protect” the individual plaintiffs—a proposition he found amply supported by precedent.⁵⁸

A handful of cases have followed the formalism of the *Zepeda*

54. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004) (citing FED. R. CIV. P. 23(b)(2)); *see also* *Zepeda v. INS*, 753 F.2d 719, 730 n.1 (9th Cir. 1983) (observing that if “any individual plaintiff suffer[ing] injury . . . could merely file an individual suit as a pseudo-private attorney general and enjoin” wrongful conduct, “there would be no need for class actions”); *id.* (“But our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a ‘self-chosen representative’ and ‘volunteer champion’ . . . must qualify under Rule 23.”) (citation omitted).

55. *Zepeda*, 753 F.2d at 727; *see also id.* at 728 n.1 (quoting Nat’l Ctr. for Immigrants Rights, Inc. v. INS, 743 F.2d 1365, 1371 (9th Cir. 1984)) (“The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree.”).

56. *Id.* at 727; *see also id.* at 728 (citing *Hollon v. Mathis Indep. School Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam)) (noting that an injunction restraining enforcement of school regulation as to similarly-situated students was an abuse of discretion and not necessary to preserve the status quo in the absence of a class certification); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) (“Relief cannot be granted to a class before an order has been entered determining that class treatment is proper.”).

57. *Id.* at 734 (Norris, J., dissenting).

58. *Id.* (citing *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974)) (“We find it unnecessary to determine the answer to this question [whether the district court abused its discretion in denying class action treatment], however, for whether or not appellants are entitled to class action treatment, the decree to which they are entitled is the same. . . . [T]he very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of the named plaintiffs but also for all persons similarly situated.”); *see also* *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979) (stating that denial of class certification was not an abuse of discretion because the relief sought by individual plaintiffs “will, as a practical matter, produce the same result as formal class-wide relief”), *rev’d on other grounds*, 451 U.S. 355 (1981).

majority opinion, denying broad injunctive relief in the absence of class certification.⁵⁹ But the vast majority of courts have been untroubled by the absence of a class certification order, reasoning that any relief sought by an individual litigant will unavoidably benefit all similarly-situated non-parties, class or no class.⁶⁰ In *Davy v. Sullivan*, for example, the court recognized that any equitable relief granted the plaintiff “will nec-

59. See, e.g., *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying an injunction to apply only to the named plaintiff until the district court certifies a class); *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (narrowing a broad injunction against sex discrimination so that it protected only the plaintiff); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1331 (9th Cir. 1977) (holding that “denial of class certification foreclose[d] the broad injunctive relief sought on behalf of the class”); *Schultz v. Armstrong*, No. 3:12-cv-00058, 2012 WL 3201223, at *3–4 (D. Idaho Aug. 2, 2012) (quoting *Zepeda*, 753 F.2d 719) (“[W]ithout a properly certified class, a court cannot grant relief on a class-wide basis.”); *United States v. Cipinko*, No. C-93-4236-VRW, 1994 WL 589455, at *1 (D. Nev. Oct. 14, 1994) (same); *Wagner v. Duffy*, 700 F. Supp. 935, 948 (N.D. Ill. 1988) (stating that “[r]elief for the plaintiffs may be accomplished on a very individual level,” and “such relief is not inevitably identical to class-wide relief”).

60. See, e.g., *Washington v. Reno*, 35 F.3d 1093, 1104 (6th Cir. 1994) (“Because relief for the named plaintiffs in this case would also necessarily extend to all federal inmates, the district court did not err in granting wide-ranging injunctive relief prior to certifying a nationwide class of plaintiffs.”); *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990) (remarking that “[c]ertifying a class for the plaintiffs' [Freedom of Information Act (“FOIA”)] claims . . . would serve no purpose because information released . . . under FOIA is equally available to any [other] person who requests it”), *rev'd on other grounds*, 502 U.S. 164 (1991); *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) (concluding that “a court may properly take into account . . . the fact . . . that the same relief can, for all practical purposes, be obtained through an individual injunction without the complications of a class action”); *Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (“Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary in order to give the plaintiffs the injunctive relief they requested through class certification, assuming the facts of the case were sufficiently flagrant to support that relief.”) (citation omitted); *United Farmworkers of Fla. Hous. Project, Inc.*, 493 F.2d at 812 (“Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants and the nonprofit corporation but all other persons subject to the practice under attack.”); *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) (“[A]n action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality”); *United States v. Hall*, 472 F.2d 261, 266 (5th Cir. 1972) (“The judgment in a school case, as in other civil rights actions, inures to the benefit of a large class of persons, regardless of whether the original action is cast in the form of a class action.”); *Hall v. Burger King Corp.*, No. 1:89-cv-00260, 1992 WL 372354, at *11–12 (S.D. Fla. Oct. 26, 1992) (quoting *Lucky v. Bd. of Regents*, No. 79-2420-civ-JWK, 1981 WL 234, at *8 (S.D. Fla. June 29, 1981)) (observing that “class certification is unnecessary when an individual can obtain injunctive or declaratory relief which would benefit the other class members because ‘the relief ordered in connection with an individual’s claim or action insofar as the Court may direct the defendant to make changes of such criteria or practices would of necessity inure to the benefit of others’”); *Gray v. Int’l Bhd. of Elec. Workers*, 73 F.R.D. 638, 640 (D.D.C. 1977) (citing *D.C. Podiatry Soc’y v. District of Columbia*, 65 F.R.D. 113, 115 (D.D.C. 1974) (stating that “there exists no need for this case to be certified as a class action. . . . [W]hen . . . ‘the relief being sought can be fashioned in such a way that it will have the same purpose and effect as a class action,’ the certification of a class action is unnecessary and inappropriate”).

essarily affect all persons subject to the statute—whether formally combined as a class or not.”⁶¹ Similarly, the Ninth Circuit held in *Bresgal v. Brock* that “an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.”⁶² And the court in *Perez-Funez v. INS* directly rejected *Zepeda*, finding that a determination that INS procedures had violated the constitutional rights of the individual plaintiffs would automatically render “the continued implementation of those procedures with respect to all the class [and non-class] members . . . prohibited as violative of their constitutional rights as well.”⁶³

Even in areas far afield from civil rights and anti-discrimination law, courts have generally authorized broad injunctive relief in non-class cases.⁶⁴ In *Wilk v. American Medical Ass’n*, for example, four chiropractors successfully sued the American Medical Association (“AMA”) for engaging in an unlawful, multi-decade group boycott, and sought an injunction, under § 16 of the Clayton Act, requiring broad publication and mailing of the court order to all member physicians.⁶⁵ The AMA

61. *Davy v. Sullivan*, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973).

62. *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987).

63. *Perez-Funez v. INS*, 611 F. Supp. 990, 998–99 (C.D. Cal. 1984). The *Perez-Funez* court went further yet, asserting that “there must be some necessity for class certification: where the relief, if granted to the plaintiff in his individual capacity only, would inure to the benefit of the entire proposed class, the class need not be certified.” *Id.* at 995. See also *Alliance to End Repression v. Rochford*, 565 F.2d 975, 980–81 (7th Cir. 1977) (affirming denial of class certification, but observing that “it is important to note whether the suit is attacking a statute or regulation as being facially unconstitutional. If so, then there would appear to be little need for the suit to proceed as a class action.”); *United States v. Bexar Cnty.*, 484 F. Supp. 855, 858 (W.D. Tex. 1980) (denying motion for class certification on the grounds “certification was unnecessary, in that the very nature of the rights plaintiffs sought to vindicate required that the decree run to the benefit of plaintiffs as well as all persons similarly situated”).

64. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (enjoining NCAA rules regarding damage caps for coaches); *Image Technical Servs. v. Eastman Kodak Co.*, No. 87-cv-01686, 1996 WL 101173, at *3 (N.D. Cal. 1996) (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987)) (similarly rejecting the argument that an injunction was overbroad insofar as there was no class action. Instead, it followed established precedent that “an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.”), *aff’d in relevant part*, 125 F.3d 1195 (9th Cir. 1997).

65. *Wilk v. Am. Med. Ass’n*, 895 F.2d 352, 366–70 (7th Cir. 1990). The plaintiffs alleged that the defendant “engaged in a conspiracy to eliminate the chiropractic profession by refusing to deal with” chiropractors and prohibiting member physicians from associating with “chiropractors by labeling them unscientific practitioners.” *Id.* at 355. The injunction required the AMA to publish the court’s order in the *Journal of the American Medical Association*, mail the order to each of the AMA’s members, and revise the current opinions of the AMA’s Council on Judicial and Ethical Affairs to state the group’s present position on chiropractic care. *Id.* at 371. In issuing

appealed, in part, on the ground that the injunction was overbroad: the case had been brought by only four plaintiffs, yet the injunctive relief would benefit “some 30,000 chiropractors in the nation . . . who were not parties to this case.”⁶⁶ The Seventh Circuit disagreed, finding that the AMA’s argument ignored “the public interest served by private antitrust suits” as a means of “effectively opening competition to a market that was previously closed by illegal restraints.”⁶⁷ While the injunctive relief might inure to the benefit of those beyond the four plaintiff chiropractors, including “all consumers of health care services,”⁶⁸ the appeals court deemed such relief necessary to remedy the harm.⁶⁹ Other courts have followed this logic in the antitrust context.⁷⁰

2. COLLATERAL BENEFICIARIES AND THE INDIVISIBILITY OF EQUITABLE RELIEF

A second claim made by advocates of anti-reform provisions is that an injunctive remedy which benefits similarly-situated non-parties is unnecessary or overbroad. A claimant can only seek relief as to her individual, specific injury—not the injuries of others.⁷¹ On this view, a con-

the injunction, the court found the AMA had “never made any attempt to publicly repair” the injury to chiropractors’ reputations as a result of the boycott, such that broad publication and notice were required to remedy the full extent of plaintiffs’ injury. *Id.* at 369.

66. *Id.* at 371. According to the AMA, “an injunction in a private antitrust suit should award a plaintiff injunctive relief ‘only to the extent necessary to protect it from future damage likely to occur if the defendant continues the unlawful antitrust conduct.’” *Id.* at 370 (citing *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 495 (7th Cir. 1982)). As such, it argued that the injunction should be “limited to the four communities in which the individual plaintiffs practiced,” rather than a nationwide, industry-wide publication campaign. *Id.* at 371.

67. *Id.* at 371 (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 698 (1978)); *see also Int’l Salt Co. v. United States*, 332 U.S. 392, 401 (1947) (stating that equitable suits under the Clayton Act “effectively pry open to competition a market that has been closed by defendants’ illegal restraints”).

68. *Wilk*, 895 F.2d at 370–71. The court also rejected defendant’s argument that the broad injunction was improper in the absence of a class action. *Id.* at 371 n.6.

69. *Id.* at 370.

70. *See Cont’l Airlines, Inc. v. United Air Lines, Inc.*, 136 F. Supp. 2d 542, 550 (E.D. Va. 2001), *vacated on other grounds*, 277 F.3d 499 (4th Cir. 2002) (citing *Wilk*, 895 F.2d at 371) (“[B]ecause the harm to be prevented here—as in all private antitrust cases—goes beyond the harm occasioned on the individual plaintiff and extends to the harm to open, unfettered competition as a whole, the injunctive relief granted in this case should ‘effectively pry open competition to a market that was previously closed by illegal restraints’ and should not myopically focus solely on Continental’s harm.”); *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1226 (9th Cir. 1997) (observing that “injunctive relief covering nonparty” beneficiaries is proper to prevent harm to competition).

71. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (“The purpose of an injunction is to prevent future violations But the moving party must satisfy the court that relief is needed.”); *Law v. NCAA*, No. 94-2053-KHV, 1996 WL 104328, at *1 (D. Kan. Jan. 5, 1996) (“In seeking injunctive relief, plaintiffs carry the burden of proving that such relief is necessary.”).

tractual prohibition against seeking such broad remedies comports with existing justiciability requirements. But, as many courts have held, the fact that an injunctive remedy benefits others does not, in and of itself, render it unnecessary or overbroad. Indeed, in many cases, it is inevitable that an injunctive remedy necessary to make an individual plaintiff whole will also inure to the benefit of similarly-situated nonparties.

A leading case is *Bailey v. Patterson*, where individual African-American plaintiffs successfully enjoined the enforcement of statutes and practices permitting unconstitutional segregation in transportation facilities; defendants challenged the injunctive decree as overbroad because it granted relief to all African-Americans—which was not “necessary” to remedy the specific plaintiffs’ injuries.⁷² The court disagreed, finding that “[t]he very nature of the rights appellants [sought] to vindicate requires that the decree run to the benefit[,] not only of appellants[,] but also for all persons similarly situated.”⁷³ In other words, the only way to ensure that plaintiffs could ride on desegregated buses was to desegregate the *entire* transportation system: these plaintiffs did not want to be the only African-Americans riding in the white section of the bus, they wanted an end to a “white section” altogether. An extensive desegregation order which benefited other similarly-situated African-Americans was therefore necessary to remedy the specific harm to plaintiffs.⁷⁴

In cases such as *Bailey*, it is impossible or undesirable to tailor injunctive relief so narrowly as to benefit only the named plaintiffs in a suit—but this is not an argument against awarding the necessary relief. For example, in *Bresgal v. Brock*, the Ninth Circuit upheld an injunction requiring the Secretary of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act against forestry labor contractors nationwide.⁷⁵ Though the plaintiffs were individual migrant laborers, the court could not order enforcement of the act “only against those contractors who have dealings with named plaintiffs.”⁷⁶ The same court upheld a statewide injunction requiring the California Highway Patrol to alter

72. *Bailey v. Patterson*, 323 F.2d 201, 205 (5th Cir. 1963).

73. *Id.* at 206; *see also* *Potts v. Flax*, 313 F.2d 284, 289 n.5 (5th Cir. 1963) (citing *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 499 (5th Cir. 1962)) (observing that “a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a class as a class, and this is assuredly appropriate for class relief.”).

74. *See Potts*, 313 F.2d at 289 (observing that to issue an individualized injunction requiring “a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively” to the illegal conduct sought to be enjoined).

75. *See Bresgal v. Brock*, 843 F.2d 1163, 1172 (9th Cir. 1987).

76. *Id.* at 1171.

its ticketing policy for motorcycle helmet infractions.⁷⁷ The court held that an injunction limited to the fourteen named plaintiffs in the case would not afford them complete relief because “it is unlikely that law enforcement officials . . . would inquire before citation into whether a motorcyclist was among the named plaintiffs”⁷⁸

Subsequently, courts have widely adopted these rationales in a wide range of contexts.⁷⁹ And, while “necessity” may remain a litigable issue—one that is highly dependent on the statutory enforcement authority and the facts of an individual case⁸⁰—an *ex ante*, across-the-board proscription against even seeking broad injunctive relief cannot be enforceable under the Supreme Court’s interpretation of the FAA.

C. Challenging Individualized Injunction Provisions

The primary challenge to individualized injunction language in anti-reform provisions would contend that where a plaintiff can show a statutory entitlement to broad injunctive relief—for example, under Section 16 of the Clayton Act or Section 706 of Title VII—the inability even to *pursue* such a remedy constitutes a prospective waiver of statutory rights. As the Supreme Court held thirty years ago in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, prospective litigants must be afforded an opportunity to vindicate their statutory rights in an arbitral forum; otherwise, statutes will cease to “serve both remedial and deterrent function[s].”⁸¹ Under *Mitsubishi* and its progeny, an arbitration clause is unenforceable where it “operat[es] . . . as a prospective waiver

77. See *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996).

78. *Id.* at 1502.

79. See 7 WRIGHT & MILLER, *supra* note 47, at 663–64 (observing that injunctive relief typically benefits “not only the claimant but all other persons subject to the practice or the rule under attack”). See generally *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979) (upholding a law that allowed only landowners to vote to elect directors of a water district, saying that the lower court did not abuse its discretion in “refusing to certify the suit as a class action” because “the relief sought [would have] . . . produce[d] the same result as formal class-wide relief”), *rev’d on other grounds*, 451 U.S. 355 (1981); *Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (“Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary in order to give the plaintiffs the injunctive relief they requested . . . , assuming the facts of the case were sufficiently flagrant to support that relief.”); *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (“Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants . . . but all other persons subject to the practice under attack.”).

80. See, e.g., *Zepeda v. INS*, 753 F.2d 719, 728–30 n.1 (9th Cir. 1983) (“Such broad relief is not necessary to remedy the rights of the individual plaintiffs; if the scope of the injunction is narrowed, there is no question that the individual plaintiffs will be protected from the INS’s former practices. That is all the relief to which they are entitled. They are not entitled to relief for people whom they do not represent.”).

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

of a party's right to pursue statutory remedies"⁸²

This vindication-of-rights/prospective-waiver challenge was rendered less robust by the Supreme Court's decision in *Italian Colors*, where five Justices rejected the plaintiffs' cost-based challenge to a class action ban embedded within an arbitration clause.⁸³ But the *Italian Colors* majority did not overrule *Mitsubishi*, nor did it repudiate the vindication-of-rights challenge.⁸⁴ Indeed, the Court reiterated its long-held view that an arbitration clause that would require a "prospective waiver of a party's right to pursue statutory remedies" is unenforceable, and specifically observed that a vindication of rights challenge would sound in the case of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights."⁸⁵ This comports with decisions in the lower federal courts finding that arbitration provisions that forbid the assertion of statutory rights may constitute an unenforceable waiver.⁸⁶

So, back to our individual, small merchant seeking to enjoin

82. *Id.* at 637 n.19; see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–74 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (finding arbitration clause which prohibited claimant from pursuing a § 1983 claim in court unenforceable because, "in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) ("[Fair Labor Standards Act ("FLSA")] rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute . . ."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

83. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.").

84. Rather, the majority in *Italian Colors* conceded the force of the vindication-of-rights challenge, but found it had not been met in a case where the plaintiffs alleged that their inability to fund litigation via the class action device constituted a waiver of their federal statutory rights. *Id.* at 2311 ("[T]he 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.") (emphasis in original).

85. *Id.* at 2310. He continued: "And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310–11.

86. See, e.g., *AT&T Mobility LLC v. Fisher*, No. DKC 11-2245, 2011 WL 5169349, at *5 (D. Md. Oct. 28, 2011) (cautioning that AT&T's interpretation that "customers also waived any right to bring this type of action anywhere, including in court," may well "violate public policy and be unenforceable"); *Kristian v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir. 2006) (severing waiver of treble damages); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (noting that waiver of exemplary and punitive damages is unenforceable); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1059–60 (11th Cir. 1998) (holding that an arbitration agreement cannot force a party to arbitrate a statutory right and at the same time bar it from being awarded damages in the arbitral forum); *EEOC v. Townley Eng'g. & Mfg. Co.*, 859 F.2d 610, 615–17 (9th Cir. 1988) (stating that prospective waiver in an employment contract "would undermine Title VII's policy of eradicating discrimination in employment"); *Schwartz v. Fla. Bd. of Regents*, 807 F.2d 901, 906 (11th Cir. 1987); *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 456 (5th Cir. 1986) ("The release executed by [plaintiff] did not prospectively waive Title VII claims."); *Williams v. Vukovich*, 720 F.2d 909, 926 (6th Cir. 1983) (stating that "prospective waiver of [Title VII] right would defeat the purpose behind Title VII").

Amex’s anticompetitive rules in the arbitral forum: that plaintiff, upon successfully proving that the complained-of rules restrained trade, would only be entitled to an individualized injunction under Amex’s anti-reform provisions. That injunction might allow that individual small merchant to escape Amex’s rules, but it would do nothing to reduce prices across the board, lower barriers to entry, or destroy the defendant’s monopoly power. Indeed, even if ten-thousand individual small merchants brought the identical claims in arbitration, all seeking to enjoin the exact same anticompetitive rules, anti-reform provisions in each of their card acceptance agreements would limit each to an individualized injunction. No single merchant—no matter how big or small or determined—could achieve across-the-market relief.

But what if our individual small merchant sought to first challenge Amex’s anti-reform provisions on the grounds that prohibitions against broad injunctive relief constitute a prospective waiver of statutory rights?⁸⁷ What if this claimant argued that the only way it could be made whole was to level the playing field by knocking out Amex’s rules across the board? If broad injunctive relief is “necessary” to remedy this claimant’s injury, then the anti-reform provision operates as an unenforceable prospective waiver of rights.

This challenge is available to a wide range of claimants seeking to remedy violations of antitrust, employment, civil rights, and other statutes, which provide for broad equitable relief, and where a showing of “necessity” can be made.⁸⁸

III. NO-MODIFICATION TERMS

In addition to individualized injunctions, anti-reform provisions demand that arbitrators, in granting relief, refrain from changing, modifying, or altering the underlying agreement. Again, the Amex clause is illustrative: “the Arbitrator shall have no power or authority to alter the

87. Indeed, it may be possible for a small merchant claimant to mount a substantive challenge to anti-reform provisions on the grounds that prohibitions against broad injunctive relief constitute, in and of themselves, anticompetitive rules in violation of the Sherman Act. *See Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting) (“Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”).

88. A successful challenge to the individualized injunction language would result in either severance of these provisions from the arbitration clause or a declaration that the entire arbitration clause is void. Corporate drafters might prefer the latter, which would at least provide them procedural protections in court, rather than leaving them vulnerable to the vagaries of unregulated arbitration. Defendants’ unease with being relegated to arbitration without the protection of anti-reform provisions is expressed in accompanying “blow-up” clauses, which contend that, in the event an anti-reform clause is deemed unenforceable, the entire arbitration clause becomes inoperative and the parties may bring their all claims in court. *See, e.g., AT&T Mobility LLC*, 2011 WL 5169349, at *5–6 (describing AT&T’s blow-up provision).

Agreement or any of its separate provisions.”⁸⁹ Under this no-modification clause, should an individual small merchant seek rescission of Amex’s anti-competitive rules, the arbitrator would be barred from granting such relief because it would require modification of the underlying terms of the card acceptance agreement. Nonetheless, corporate drafters contend that these provisions are valid and enforceable, and that the provisions do not significantly impinge upon arbitral authority to grant necessary relief to an individual claimant; rather, they argue that no-modification provisions merely prevent an arbitrator from grafting new provisions onto the contract or rewriting the contract to add new terms.⁹⁰

Advocates of this view draw heavily from labor cases, where no-modification clauses have been standard in collective bargaining agreements for decades,⁹¹ and where defendant employers have long relied on such clauses to ensure that arbitrators do not exceed their contractually-defined authority.⁹²

A. *No-Modification Clauses in Labor Agreements*

The traditional concern in labor cases was that an arbitrator might impose a substantive “condition not bargained for by the parties” or might nullify “sections of the collective bargaining agreement.”⁹³ Defen-

89. CAA, *supra* note 9, § 7.d.vi.

90. *See, e.g.,* Vera v. Saks, 335 F.3d 109, 112 (2d Cir. 2003) (per curiam) (quoting arbitration agreement in Saks’ collective bargaining agreement, which provided that, “in any arbitration, the arbitrator shall be bound by the terms of this agreement and shall have no authority to add to, subtract from, change or modify any provision of the agreement”); Cleveland Wrecking Co. v. Iron Workers Local 40, 136 F.3d 884, 889 (2d Cir. 1997) (finding a ‘no-modification’ clause “simply cautions that the general arbitration provisions should not be interpreted to ‘qualify’ or ‘change’ any other aspect of the [collective bargaining agreement (“CBA”)]” because, “notwithstanding the informal, often freewheeling, nature of arbitration, arbitrators are not at liberty to depart from or to vary the terms of the agreement”).

91. *In re* Kraft Foods Co., 6 Lab. Arb. Rep. (BNA) 962, 964 (1947) (observing that these clauses commonly provide that the arbitrator shall not “change, alter, modify, or add to any of the terms or provisions of [the] agreement”); Torrington Co. v. Metal Prods. Workers Union Local 1645, 362 F.2d 677, 680 (2d Cir. 1966) (finding that no-modification clauses in labor agreements must be carefully scrutinized to determine restraints on arbitrator authority).

92. *See, e.g.,* United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (no-modification clauses remind arbitrators that their duty is to interpret and apply the agreement as negotiated, and that they may not reform the contract to do “industrial justice”); Harry Hoffman Printing v. Graphic Comm. Int’l Union, Local 261, 950 F.2d 95, 100 (2d Cir. 1991) (“Arbitrators may imply terms or fill gaps in an agreement, but a ‘no modification’ clause prohibits them from creating entirely new terms.”); Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 186 (7th Cir. 1985) (finding that “emphatic ‘no modification’ provision in the arbitration clause” precluded the arbitrator from modifying the underlying contract).

93. Andrew M. Campbell, *Construction and Application of § 10(a)(4) of Federal Arbitration Act (9 USCS § 10(a)(4)) Providing for Vacating of Arbitration Awards Where Arbitrators Exceed or Imperfectly Execute Powers*, 136 A.L.R. FED. 183, § 16(c) (1997).

dant-employers generally worried that labor arbitrators with too-broad authority might grant too-broad relief, altering the terms of a carefully-negotiated union deal. No-modification clauses, operating in conjunction with explicit limitations on available remedies, provided contractual control over arbitral authority to fashion remedies.⁹⁴

When a labor arbitrator's award is challenged on the grounds that she violated the no-modification clause,⁹⁵ courts apply an extremely deferential standard of review, adhering to the Supreme Court's admonition to avoid second-guessing the merits of an arbitrator's performance.⁹⁶ Often, courts in this posture simply examine the terms of the no-modification clause to determine whether the arbitrator exceeded the bounds of the agreement to arbitrate.⁹⁷ Not all courts agree, however, as to what constitutes overstepping these bounds.⁹⁸ For example, in the landmark

94. See, e.g., Jeffrey D. Ubersax, *Arbitration for the Trial Lawyer*, 40 *LITIG.* 37, 43 (2013) (defendants "argue that the relief being sought in the arbitration is so inconsistent with the plain terms of the contract that to grant it would be to change the contract—something that the arbitrators are without power to do").

95. Under § 10(a)(4) of the FAA, courts may vacate arbitration awards "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4) (2012).

96. See, e.g., *Misco*, 484 U.S. at 38 ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," a court may not disturb his judgment even if it is "convinced he committed serious error"); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (saying the proper role of the judiciary in labor arbitration cases is not "to review the merits of an arbitration award," but to determine whether it exceeded the limits of the arbitrator's contractual authority); see also *Haw. Teamsters & Allied Workers Union, Local 966 v. United Parcel Serv.*, 241 F.3d 1177, 1184 (9th Cir. 2001) ("[W]e have no grounds to upset [the arbitrator's] conclusions. We decline to opine whether the arbitrator 'misinterpreted' the [collective bargaining agreement]; that is simply not our role. Recognizing the extreme deference owed to a labor arbitrator's decision, we affirm"); *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 595 (9th Cir. 1992) ("[I]t is the keystone of the national labor policy announced in the *Steelworkers* trilogy, that skilled labor arbitrators, rather than judges, are better positioned and equipped to identify and to apply the common law of the shop."); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (reaffirming the view that courts are not to "second guess an arbitrator's resolution of a contract dispute"). The phrase "*Steelworkers* Trilogy" refers to three Supreme Court decisions from 1960. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

97. See, e.g., *Delta Queen Steamboat Co. v. Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989) ("[F]ederal courts are free to scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement."); *Gueyffier v. Ann Summers, Ltd.*, 184 P.3d 739, 743 (Cal. 2008) (analyzing whether the no-modification clause was sufficiently "explicit[] and unambiguous" to bar the arbitrator from reforming the contract's notice-and-cure provision); *S.F. Hous. Auth. v. SEIU Local 790*, 107 Cal. Rptr. 3d 62, 72 (Cal. Ct. App. 2010) (stating that "the dispositive question before us is whether the remedy imposed by the arbitrator was 'even arguably based on the contract' or, stated otherwise, whether the award 'conflicts with express terms of the arbitrated contract'") (citing *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 381 (Cal. Ct. App. 1994)).

98. See *Loveless v. E. Airlines, Inc.*, 681 F.2d 1272, 1277 n.10 (11th Cir. 2001) (reviewing

case, *Torrington Co. v. Metal Products Workers Local 1645*, an arbitrator tasked with resolving a labor dispute determined that, despite the absence of any express provision in the agreement, the employer was obligated to provide employees a paid day off to vote.⁹⁹ The employer challenged the award on the grounds that it violated the no-modification clause, and both the district and circuit courts agreed, finding the arbitrator had surpassed his contractually delimited authority in granting relief not contemplated by the agreement.¹⁰⁰

In contrast, many other courts have been reluctant to vacate arbitral awards, which are grounded, however minimally, in the “essence” of the underlying agreement.¹⁰¹ These courts accord arbitrators broad authority to consider extrinsic sources in order to clarify ambiguous contract provisions and great flexibility in fashioning appropriate remedies.¹⁰²

B. *Altering Substantive Provisions vs. Crafting Remedies*

A number of early decisions reviewing labor arbitrations involved contracts that did not explicitly limit the remedies available.¹⁰³ In this

precedent on whether a “standard ‘no modification’ clause restricts the authority of the arbitrator to go beyond the express terms of the contract”); *United Steelworkers of Am. v. U.S. Gypsum Co.*, 492 F.2d 713, 731 (5th Cir. 1974) (explaining that standard no-modification clauses do not restrict arbitrator’s authority); *Dall. Typographical Union, No. 173 v. A.H. Belo Corp.*, 372 F.2d 577, 583 (5th Cir. 1967) (*Torrington* should be “carefully confined lest, under the guise of the arbitrator not having ‘authority’ to arrive at his ill-founded conclusions of law or fact, or both, the reviewing-enforcing court takes over the arbitrator’s function.”); *Lodge No. 12, Dist. No. 37, Int’l Ass’n of Machinists v. Cameron Iron Works, Inc.*, 292 F.2d 112, 118 (5th Cir. 1961) (no-modification clause does not prevent an arbitrator from finding rights implied though not expressed in the collective bargaining agreement).

99. 362 F.2d 677, 679 (2d Cir. 1966). The arbitrator looked to the industrial common law—the practices of the industry and the shop—in finding that “the benefit of paid time off to vote was a firmly established practice at Torrington.” *Id.*; see also *Warrior & Gulf Navigation*, 363 U.S. at 580 (“Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement.”).

100. *Torrington*, 362 F.2d at 679 (noting that the district court had determined that “the arbitrator had gone outside the terms of the contract and thus had exceeded his authority by reading the election day benefit into the new contract”).

101. See, e.g., *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (finding that courts are obliged to enforce an arbitral award, even when they disagreed with it, so long as it found its “essence in the collective bargaining agreement” that gave the arbitrator his or her authority); *Mut. Redevelopment Houses, Inc. v. Local 32B-32J, Serv. Emps. Int’l Union*, 700 F. Supp. 774, 778 (S.D.N.Y. 1988) (finding that the remedy fashioned by the arbitrator was within the contemplated scope of the agreement and drawn from the essence of that agreement, which provided broadly that the arbitrator had the power to award appropriate remedies).

102. See, e.g., *Boise Cascade Corp. v. United Steelworkers of Am., Local Union No. 7001*, 588 F.2d 127, 130–31 (5th Cir. 1970) (no-modification clause does not prevent an arbitrator from being able to look at extrinsic evidence); *Holly Sugar Corp. v. Distillery Workers Int’l Union*, 412 F.2d 899, 905 (9th Cir. 1969) (finding a no-modification clause places no additional limits on an arbitrator’s powers).

103. See, e.g., *Sverdrup/ARO, Inc. v. Int’l Ass’n of Machinists*, 532 F. Supp. 143, 146–47

context, it was arguably simpler for reviewing courts to grant arbitrators greater flexibility in fashioning appropriate remedies that may not have been *contemplated* by the agreement, but were also not explicitly barred. Contemporary anti-reform provisions do, however, impose significant limitations on remedies—i.e., the prohibitions against broad injunctive relief discussed in Part II—forcing courts to consider whether an arbitrator’s exercise of remedial authority in contravention to these specified terms violates a no-modification clause.

This inquiry implicates policy-based challenges to anti-reform clauses. Specifically, where a claimant can prove an entitlement to equitable relief in the form of striking a contractual term or changing an underlying rule, denying the arbitrator authority to grant such relief thwarts the claimant’s ability to vindicate her statutory rights. At minimum, fair adjudication requires a decisionmaker with the authority to issue statutorily-authorized remedies because “[b]road declarations of statutory rights are meaningless absent effective remedies for the violation of those rights.”¹⁰⁴ As such, no-modification clauses operate to exculpate the defendant from liability by precluding claimants from seeking appropriate relief for their injuries.

Some courts have implicitly concurred with this view in deciding that “the fashioning of an appropriate remedy is *not* an addition to the obligations imposed by the contract.”¹⁰⁵ On this view, where an arbitrator orders remedies to “vindicate a violated right”—even where such remedies are explicitly prohibited by the underlying agreement—this exercise of remedial authority does not violate the no-modification clause.¹⁰⁶ Confirming this view, the Fourth Circuit held in *Tobacco Workers Int’l Union, Local 317 v. Lorillard Corp.* that “[p]art of what

(E.D. Tenn. 1980) (holding that although a collective bargaining agreement did not expressly authorize compensation as an award, it did not expressly prohibit it either, and therefore the arbitrator did not exceed his authority by fashioning a remedy requiring overtime compensation for work that was done in violation of the original agreement); *S.D. Warren Co. v. United Paperworkers’ Int’l Union, Local 1069*, 845 F.2d 3, 8 (1st Cir. 1988) (vacating arbitral award where the unambiguous language of the agreement’s management rights clause prohibited the arbitrator from determining remedies for violations of the agreement and contained a no-modification clause); *Collins & Aikman Floor Coverings Corp. v. Froehlich*, 736 F. Supp. 480, 484 (S.D.N.Y. 1990) (vacating arbitral award of past commissions where the employment agreement specifically stated that no post-termination commissions were to be awarded and contained a no-modification clause).

104. Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 665 (1995).

105. *Tobacco Workers Int’l Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 956 (4th Cir. 1971) (emphasis added).

106. *Norfolk & W. Ry. Co. v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 657 F.2d 596, 601 (4th Cir. 1981) (citing *Bhd. of R.R. Signalmen of Am. v. S. Ry. Co.*, 380 F.2d 59, 68 (4th Cir. 1967)) (stating that an arbitration panel is not restricted to the strict language of a collective bargaining agreement in crafting remedies).

the parties bargain for when they include an arbitration provision in a labor agreement is the ‘informed judgment’ that the arbitrator can bring to bear on a grievance, especially as to the formulation of remedies.”¹⁰⁷ This approach allows courts to uphold the arbitration clause while denying its remedy-stripping capacity.

For example, in *United Steelworkers of America v. United States Gypsum Co.*, the arbitrator found an employer had violated a CBA that required the employer to negotiate a wage increase with the union and, as a remedy, ordered the defendant to pay the increase based on the arbitrator’s own calculation of what a fair negotiation *would have* produced.¹⁰⁸ On review, the court held that the ordered wage increase did not violate either the no-modification or the liability-limiting clauses because the arbitrator did not “add[] terms to the contract. In the context present here, [the arbitrator’s] action merely represent[ed] an attempt to make the union whole for the damage suffered as a result of Gypsum’s breach of the collective bargaining agreement.”¹⁰⁹ Some courts have followed *Lorillard* and *United States Gypsum* in reviewing challenges to arbitral awards based on no-modification clauses.¹¹⁰

In contrast, other courts have held that an arbitrator does act beyond the scope of his authority as defined by a no-modification clause when ordering relief that is specifically prohibited by the agreement.¹¹¹ These

107. *Tobacco Workers Int’l Union, Local 317*, 448 F.2d at 956 (citing *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

108. 492 F.2d 713, 728–29 (5th Cir. 1974).

109. *Id.* at 730. *See also* *Local 879, Allied Indus. Workers of Am. v. Chrysler Marine Corp.*, 819 F.2d 786, 788–90 (7th Cir. 1987) (despite no-modification clause, arbitrator’s imposition of a severance plan not provided for in the CBA to compensate for Chrysler’s failure to hold required negotiations prior to the plant closing was valid under the arbitrator’s power to determine breach, which “implies the authority to prescribe a remedy which can be said reasonably to cure the breach”).

110. *See, e.g., Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1006–08 (Cal. 1994) (reviewing arbitral award of a permanent, royalty-free license to a claimant who proved breach of warranty of good faith, the California Supreme Court rejected the defendant’s argument that “arbitrators may not award a party benefits different from those the party could have acquired through performance of the contract,” and concluded that the permanent license remedy was “rationally drawn from the arbitrator’s conception of the contract’s subject matter and the effects” of the breach on the claimant); *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, 713 F.3d 797, 801–03, 807 (5th Cir. 2013) (reversing and remanding a district court’s determination that an arbitrator’s creation of a perpetual license remedy was not rationally rooted in a given contract, and finding that despite the no-modification clause, the perpetual license remedy was a rational remedy that furthered the general aims of the agreement).

111. Under the FAA, an arbitration award may be vacated when “arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.” 9 U.S.C. § 10(a)(4); *Amanda Bent Bolt Co. v. UAW, Local 1549*, 451 F.2d 1277, 1280 (6th Cir. 1971) (holding that the FAA “provides for the vacating of an arbitration award if the arbitrator exceeds his powers”); *see also* *Local 1837, Int’l Bhd. of Elec. Workers, Local 175 v. Thomas & Betts Corp.*, 182 F.3d 469, 472 (6th Cir. 1999) (citing *Sears, Roebuck & Co. v. Teamsters, Local Union No. 243*, 683 F.2d 154, 155 (6th Cir. 1982)) (“When a collective

decisions essentially find that no-modification provisions can effectively limit the arbitral power to fashion remedies, drawing from Supreme Court guidance in the *Steelworkers* trilogy:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.¹¹²

C. *Challenging No-Modification Terms*

In addition to defending arbitral awards against vacatur, claimants may also directly challenge no-modification terms for lack of intent to arbitrate—i.e., the parties could not have intended to submit their statutory claim to an arbitrator who is without authority to resolve the claim or remedy the injury.¹¹³ Under the FAA, “arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.”¹¹⁴ The parties must therefore consent to having particular claims decided in the alternative forum—and no rational party would willingly elect to have an equitable claim resolved in arbitration if the claim cannot in fact *be* resolved in arbitration because of a no-modification clause.¹¹⁵

bargaining agreement prohibits the addition of contract terms, the arbitrator may not proceed to [add such terms].”); *Local 1837, Int’l Bhd. of Elec. Workers v. Me. Pub. Serv. Co.*, 579 F. Supp. 744, 753 (D. Me. 1984) (“[I]t must be presumed that the parties . . . would not intend to empower an arbitrator to disregard their collective bargaining agreement in fashioning a remedy for its breach.”).

112. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

113. *See, e.g., Transit Mix Concrete Corp. v. Local Union No. 282, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 809 F.2d 963, 967 (2d Cir. 1987) (quoting *AT&T Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986)) (“[S]ince ‘arbitration is a matter of contract . . . a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’”); *Alcaez v. Avnet, Inc.*, 933 F. Supp. 1025, 1027 (D.N.M. 1996) (“If, by terms of the Agreement, the arbitrator has no authority to award any [back-pay and other statutory] damages under Title VII or the ADEA, then the parties did not intend to submit Title VII or ADEA claims to arbitration.”).

114. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (FAA § 2 demands that arbitration agreements be enforced according to their terms).

115. Gorman, *supra* note 104, at 665 (stating that claim-resolution requires a decisionmaker with the authority to issue injunctive remedies because “[b]road declarations of statutory rights are meaningless absent effective remedies for the violation of those rights”). *But see United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960) (“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”).

On this view, the only reasonable interpretation of a no-modification clause is that the parties agreed that any claim seeking alteration of contract terms would *not* be subject to resolution by arbitration. Rather, only a court of law would be entrusted with claims seeking to reform or alter underlying contract terms, which might carry substantial potential to affect a defendant's business practices. For example, in *Paladino v. Avnet Computer Technologies*, the defendant argued that she was entitled to have "any claim" sent to arbitration, including plaintiff's Title VII claim, notwithstanding a provision that the arbitrator shall have "no authority" to award relief other than "damages for breach of contract."¹¹⁶ The Eleventh Circuit refused to enforce the no-modification clause, finding that an arbitration agreement cannot force a party to arbitrate a statutory right and, at the same time, bar it from being awarded full remedies in the arbitral forum.¹¹⁷

Other circuits have handled issues involving no-modification clauses and remedy-restricting provisions in arbitration agreements differently: for example, some courts require the arbitrator to decide in the first instance whether remedial limitations are permissible,¹¹⁸ while others sever the offending provisions and then compel arbitration.¹¹⁹ Still other courts have held that anti-reform provisions that forbid the assertion of statutory rights constitute unenforceable waivers of liabil-

116. 134 F.3d 1054, 1056–57 (11th Cir. 1998).

117. *Id.* at 1062 ("This clause defeats the statute's remedial purposes because it insulates Avnet from Title VII damages and equitable relief.")

118. *See, e.g., Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) ("Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement, these challenges must first be considered by the arbitrator."); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp.*, 334 F.3d 721, 726 (8th Cir. 2003) ("[T]he party seeking to void the provisions [in an arbitration agreement] waiving punitive damages and other relief ha[s] to address those arguments to the arbitrator."); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001) (declining to follow *Paladino*, and stating that "[w]hether federal public policy prohibits an individual from waiving certain statutory remedies is an issue that may be raised when challenging an arbitrator's award"); *MCI Telecomms. Corp. v. Matrix Commc'ns Corp.*, 135 F.3d 27, 33 n.12 (1st Cir. 1998) (holding that an argument that an arbitration agreement is invalid because it forecloses certain remedies otherwise available "must be brought to the arbitrator because it does not go to the arbitrability of the claims but only to the nature of available relief"); *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 232 (3d Cir. 1997) ("The availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard. Thus, availability of punitive damages cannot enter into a decision to compel arbitration.")

119. *See, e.g., Ex parte Thicklin*, 824 So. 2d 723, 734–35 (Ala. 2002) (severing provision in an arbitration clause prohibiting punitive damages and then sending the case to arbitration); *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766, 768–69 (Ala. 2002) (explaining that there is a "general 'duty of the court to preserve so much of a contract as may properly survive its invalid and ineffective provisions,'" and enforcing the arbitration agreement minus the invalid provision excluding punitive damages) (internal citations omitted).

ity.¹²⁰ For example, the Second Circuit recently held in *Parisi v. Goldman, Sachs & Co.* that the anti-reform language in an arbitration clause “insulating a [defendant] from damages and equitable relief renders the clause unenforceable.”¹²¹

Challenges to no-modification clauses based on lack of intent may prove difficult in some cases, as claimants face a “substantial hurdle” in seeking to rebut the presumption that *all* disputes not specifically excluded are subject to arbitration.¹²² But, importantly, this challenge does not implicate the cost-based concerns that were rejected by the majority of the Supreme Court in *Italian Colors*: the argument here is not that arbitration costs too much as compared to litigation, but rather, that arbitration cannot provide equivalent (or any) remedies for violations of statutory rights.¹²³ Whatever else the vindication of rights doctrine may entail, according to Justice Scalia’s opinion, it “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.”¹²⁴

IV. CONCLUSION

This essay has taken a first look at anti-reform provisions in arbitration clauses, which have emerged in two complementary forms: (1) prohibitions against broad injunctive relief, and (2) limitations on arbitral authority to modify the underlying contract. Working together, these provisions block an individual arbitral claimant from ending a practice, changing a rule, or enjoining an act that causes widespread injury.

The central question is whether anti-reform provisions are enforceable under current law—a critical issue with serious implications for

120. See *supra* note 86.

121. See *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013) (quoting *Paladino*, 134 F.3d at 1062); see also *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 1000–01 (S.D. Fla. 2000) (finding that prohibitions against damages in arbitration agreement prevents claimant “from obtaining any meaningful relief for his statutory claims”).

122. *Transit Mix Concrete Corp. v. Local Union No. 282, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 809 F.2d 963, 969 (2d Cir. 1987) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584–85 (1960)) (stating that absent an “express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration” will satisfy a party’s “substantial hurdle” to rebut this “presumption of arbitrability”).

123. 133 S. Ct. 2304, 2309 (2013) (“[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”); *id.* at 2311 (“[T]he 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.”).

124. *Id.*; see also *In re Am. Express Merchants’ Litig.*, 681 F.3d 139, 147–48 (2d Cir. 2012) (Jacobs, C.J., dissenting) (describing cases which “involved an arbitration agreement that entirely foreclosed a *remedy* to which one of the parties was otherwise entitled to seek at law,” but which did not invalidate arbitration “on the ground that the claims were costly to litigate individually”).

statutory law enforcement and public policy. I have argued that provisions which allow for only individualized injunctions and impose no-modification language cannot be enforceable, as these clauses deny claimants the right to vindicate their federal statutory rights in the arbitral fora. But, in the wake of *Concepcion* and *Italian Colors*, one can hardly be faulted for worrying that a majority of the Supreme Court might find otherwise. And, in a world in which class action bans are per se enforceable and every company now has the option to exempt itself from class action liability, the significance of equitable claims is only magnified, as these individually-sought remedies may be the only remaining means of vindicating broadly-held statutory rights.

Courts are just beginning to hear arguments concerning the enforceability of anti-reform clauses in arbitration agreements, and the firepower that is being brought to bear by both sides reveals the significant stakes.¹²⁵ For corporate defendants, overcoming the legal challenges to anti-reform clauses may prove to be the final and decisive battle in the long war over class actions.¹²⁶ But, for claimants—consumers, employees, small businesses, and society at large—the battle over anti-reform provisions implicates the very foundations of the American legal system. The inability to secure broad equitable relief as provided by hundreds of federal statutes signals the demise of the private attorney general concept, which underlies so much of the American statutory enforcement regime. In this country, we assume “that private actors will be the frontline enforcers in actions redressing broadscale securities fraud, consumer fraud and deceptive trade practices, antitrust violations . . . , civil rights violations, and many other areas.”¹²⁷ That assumption depends entirely upon the ability of the private attorney general to ferret out and enjoin widespread wrongdoing. Anti-reform provisions in

125. Note that a challenge to the Amex anti-reform provisions was lodged by the plaintiff class in the wake of the Supreme Court decision in *Italian Colors*; the parties settled before the district court ruled on the validity of the provisions. See Press Release, Am. Express, Am. Express Agrees to Settle Class Action Litigs. (Dec. 19, 2013), available at <http://about.americanexpress.com/news/pr/2013/amex-agrees-to-settle-class-action.aspx> (“American Express . . . said today that it has agreed to settle two putative antitrust class actions filed by U.S. merchants that challenged the company’s Card acceptance agreements. The settlement agreement will address certain merchant concerns, while helping to ensure that American Express Card Members are treated fairly at the point of sale. It will also limit the Company’s exposure to future legal claims.”).

126. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 391 (2005) (describing the war over class actions, in which “entrenched corporate interests and equally entrenched plaintiffs’ lawyers and interest groups have pursued competing legislative reform agendas, have pressed competing doctrinal arguments in court and have offered competing policy justifications in the scholarly and popular literature to support their positions”).

127. Gilles & Friedman, *supra* note 3, at 625–26; *id.* at 626 (“Private involvement in public civil law enforcement is deeply embedded in our politics and culture.”).

arbitration undermine that assumption, raising fundamental questions concerning the suitability of arbitration for resolving issues that affect broadly-held rights, and ultimately, whether the private attorney general can effectively operate in these private, adjudicative arenas.

