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The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law

Okezie Chukwumerije*

INTRODUCTION

This Article evaluates the role of the effective-vindication doctrine in U.S. arbitration law. Conceived as a means of ensuring that arbitration is an effective mechanism for vindicating federal statutory rights, the doctrine has played an important role in promoting access to justice. However, the Supreme Court's recent decision in *American Express Co. v. Italian Colors Rest.*¹ has severely restricted the availability of the doctrine. This article examines the broad policy implications of the Court's narrow interpretation of the doctrine.

Over the years, the Court has adopted an expansive interpretation of the Federal Arbitration Act (FAA).² As a result, it has broadened the reach and scope of the Act beyond what was intended by its drafters. The Court has interpreted the Act as reflecting both the "fundamental principle that arbitration is a matter of contract,"³ and a "liberal federal policy favoring arbitration."⁴ Consequently, the Court has sought to put arbitration

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1. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), 186 L. Ed. 2d 417, 2013 U.S. LEXIS 4700, 81 U.S.L.W. 4483, 163 Lab. Cas. (CCH) P10,607, 2013-1 Trade Cas. (CCH) P78,432, 24 Fla. L. Weekly Fed. S 337, 2013 WL 3064410 (U.S. 2013).(2013).

2. 9 U.S.C. §§ 1-16, 201-08, 301-07 (2006).

3. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

4. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24 (1983). It should be noted that some observers have observed that the FAA was not intended to favor arbitration but

agreements “on an equal footing with other contracts.”⁵ Consistent with what it perceives as the pro-arbitration policy of the FAA, the Court has liberalized the availability of arbitration by narrowly construing the grounds under which arbitration agreements can be invalidated under the FAA’s “savings clause”⁶ and by transferring an increasing array of gateway issues to arbitrators.

The effect of the Court’s expansive interpretation of the FAA is particularly felt in consumer and employment transactions. Claims arising from these transactions often implicate statutory rights that afford vital protections to consumers and employees. Additionally, the monetary value of many of these claims is so small as to make individual prosecution economically unfeasible. As a result, there is the question of whether these claims, which implicate vital statutory rights, should be arbitrable, and if so, whether there should be safeguards to ensure that arbitration is a fair arena for resolving these disputes.

At the time the FAA was drafted, there were some indications that it was intended to facilitate the arbitration of commercial disputes between businesses.⁷ Arbitration was infrequently used outside the commercial context during this period. In fact, some commentators felt that the FAA was intended to have limited application with respect to employment disputes⁸ and was not envisaged to apply to the resolution of consumer disputes. As one commentator has noted, the “FAA was intended to facilitate self-regulation within commercial communities, not to regulate relationships between consumers and large corporations in arm’s length, anonymous transactions.”⁹ Nonetheless, the Court has made it clear that the

to prohibit discrimination against arbitration agreements. See Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 395-96 (2012).

5. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

6. Section 2 of the Act provides that an arbitration agreement may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2.

7. See, e.g., Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 466-67 (1996) (arguing that “[t]he un rebutted legislative history created prior to the FAA’s passage establishes that only disputes arising out of commercial contracts were to be arbitrable.”).

8. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Has Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 100 (2006) (arguing that the Court has interpreted the FAA “to cover worker agreements, which had been expressly excluded by Congress.”).

9. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 942 (1999).

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Act applies to the arbitration of employment and consumer disputes, even where these disputes implicate statutory rights.

On the issue of appropriate safeguards, the “savings clause” of the FAA allows the invalidation of arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁰ To a large extent, state courts have used the unconscionability doctrine for ensuring the fairness of the arbitral process in these transactions. Recognizing that class actions are sometimes the only effective means of prosecuting low-value claims by consumers and employees, some state courts have used unconscionability to regulate the enforceability of class action waivers in arbitration agreements. However, the Court in *AT&T Mobility LLC v. Concepcion*¹¹ severely limited the availability of this mechanism. *Concepcion* held that the FAA precludes states from conditioning the enforceability of arbitration agreements on the availability of class proceedings. It held that this is the case even if “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.”¹²

Post-*Concepcion*, the effective-vindication doctrine was the remaining avenue open to prospective claimants for resisting the enforcement of arbitration agreements that practically immunize defendants from liability for violating federal statutory rights. Prospective claimants sought to avoid the effect of the Court’s decision in *Concepcion* by arguing that class action waivers should not be enforced where their enforcement would prevent a party from vindicating his or her statutory rights.¹³

Amex has now narrowed the availability of the effective-vindication doctrine as grounds for invalidating arbitration agreements. In *Amex*, the Court reaffirmed its view that the FAA’s “command to enforce arbitration agreement trumps any interest in ensuring the prosecution of low-value claims.”¹⁴ The Court limited effective-vindication challenges to situations

10. 9 U.S.C. § 2.

11. 131 S. Ct. at 1745.5.

12. *Id.* at 1753.

13. See Andrew J. Pincus & Archis A. Parasharami, Supreme Court Rejects Challenge to Arbitration Agreements, Class Defense Blog, (June 20, 2013), <http://www.classdefenseblog.com/2013/06/20/supreme-court-rejects-challenge-to-arbitration-agreements/>.

14. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2312 n.5.

where an arbitration agreement precludes the assertion of certain statutory rights and cases where filing and administrative fees in arbitration “are so high as to make access to the forum impracticable.”¹⁵ The Court interpreted the doctrine as protecting only a notional “right to pursue” statutory claims,¹⁶ a right that is not implicated either by the prohibitive costs of “proving a statutory remedy” or by the waiver of class action proceedings.

The practical consequence of the Court’s severely restrictive interpretation of the doctrine is to make the doctrine less relevant in ensuring access to justice. This effect will be particularly felt by consumers, employees, and other small-value claimants. For these claimants, the doctrine was one of a diminishing range of options for resisting the enforcement of arbitration agreements that inhibit effective redress for violations of statutory rights. *Amex* has narrowly delineated the nature and extent of inquiry a court can make when considering an effective-vindication challenge. By reducing the scope of the doctrine, the Court made it easier for carefully drafted arbitration agreements to be used to deprive prospective claimants of the opportunity to vindicate their statutory rights.

Amex is best understood in the broader context of the Court’s continuing efforts to interpret statutes and regulations in a manner that essentially insulates corporations from liability risks.¹⁷ *Amex* is one of several recent decisions of the Court that consolidates this project. For example, the decisions of the Court in its last session included one that put new restrictions on lawsuits claiming on-the-job harassment¹⁸ and another that held that two million cable customers who filed an antitrust suit against Comcast had not established a common method to determine monetary damages.¹⁹ With these decisions, the Court continues a pattern of narrowing “the avenues available to employees and consumers seeking to take their grievance before a judge.”²⁰ Furthermore, the Court continues to reduce the grounds for challenging class action waivers affecting consumers, employees, and other small-value claimants. Justice Kagan views *Amex* as part of this latter trend. According to her, the majority focused narrowly on the class action waiver instead of concentrating on the broader effect of the

15. *Id.* at 2310–11.

16. *Id.*

17. See Paul M. Barrett, *The Supreme Court: Corporate America’s Employees of the Month*, BLOOMBERG BUSINESSWEEK, July 1, 2013, at 21, <http://www.businessweek.com/articles/2013-06-27/the-supreme-court-corporate-americas-employees-of-the-month>.

18. See *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

19. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

20. Barrett, *supra* note 17.17.

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entire arbitration agreement on the ability of the claimants to vindicate their statutory rights, because “[t]o a hammer, everything looks like a nail.”²¹ In her view, “to a Court bent on diminishing the usefulness of Rule 23,²² everything looks like a class action, ready to be dismantled.”²³

The Court’s decision in *Amex* was informed by an expansive reading of the scope of the FAA. The Court has interpreted the Act as embodying an almost irrefutable preference for arbitration, even when this preference is at odds with the realities of the difficulties of vindicating statutory rights. This is even so when enforcement of an arbitration agreement would undermine the realization of the policies enshrined in other federal statutes. In this context, *Amex* intensifies the Court’s fetishizing of arbitration. Its sweeping declaration that “[t]he FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims” would have surprised even the most ardent advocates of the enactment of the Act.²⁴

Amex affords an opportunity for the evaluation of the effective vindication doctrine and an assessment of the potential import of the decision on access to justice. This article explains how the doctrine serves the important role of reconciling the FAA’s mandate to enforce arbitration agreements with the need to ensure the vindication of statutory rights embodied in federal command statutes. It argues that the Court’s restrictive interpretation of the doctrine in *Amex* would inhibit the redress of legitimate statutory claims and suggests that a legislative response is required so that arbitration continues to be an effective means of resolving disputes. Without such a solution, the Court’s continuous weakening of challenges to the

21. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2320.

22. FED. R. CIV. P. 23.1.

23. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2320.

24. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2320, n.5. Critiquing the Court’s expansive interpretation of the scope of the FAA, Justice Stevens has observed that “[t]here is little doubt that the Court’s interpretation of the [FAA] has given it a scope far beyond the expectations of Congress in enacting it.” Myriam Gilles, *Opting Out of Liability: the Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 430 n.115. In a similar vein, Justice O’Connor has noted that “[t]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.” *Id.* The Court had adopted this broad interpretation of the FAA, often without taking into account the substantive considerations of consent and the contractual context. See Amy J. Schmitz, *Considerations of “Contracting Culture” in Enforcing Arbitration Provision*, 81 ST. JOHN’S L. REV. 123 (2007).

fairness of the arbitral process would put the legitimacy of the process into question.

Part I of this Article traces the evolution of judicial and legislative attitude towards arbitration. In this part, I discuss how the FAA was intended to reverse the traditional judicial hostility toward arbitration by promoting the enforcement of arbitration agreements in commercial transactions. I argue that the Court's subsequent expansive interpretation of the FAA is inconsistent with the policy considerations that informed the enactment of the Act. The extreme pro arbitration posture adopted by the Court is compelled neither by the context nor the text of the Act. In reading the Act so expansively, the Court has significantly enlarged the scope of the Act, practically eliminated the ability of states to regulate the availability of arbitration agreements where necessary to protect the weak, and severely limited the grounds for resisting enforcement of arbitration agreements. Part II examines the development of the effective vindication doctrine. It situates this discussion in the context of the Court's approval of the arbitration of statutory claims and the attendant need to reconcile the FAA's policy promoting the enforcement of arbitration agreements with the need to ensure the vindication of rights embodied in other federal statutes. I discuss the policy considerations informing the doctrine and examine how it has been used to address the problems of expenses associated with arbitration, structural bias in arbitration, and class action waivers. Part III evaluates both the Circuit and Supreme Court decisions in *Amex*. The discussion focuses on the weaknesses in the arguments used by the majority to support its narrow interpretation of the doctrine. I argue that the Court's narrow interpretation is at odds with the policy considerations underlying the doctrine and cannot easily be reconciled with the Court's prior teachings on the role of the doctrine. Part IV explores the implication of the decisions, particularly on the prosecution of small value claims and on the effective vindication of rights embodied in state laws. Part V argues that a legislative response has become necessary to assure the continued legitimacy of arbitration as a fair and effective mechanism for resolving disputes.

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I. TRACING THE EVOLUTION IN JUDICIAL ATTITUDE TOWARDS
ARBITRATION

Although arbitration has existed in various forms over the centuries,²⁵ there was an initial judicial hostility towards the process. This hostility was explained in part by a fear that arbitration ousted the jurisdiction of the courts and a suspicion that arbitrators may not be as vigilant in protecting the interests of justice as judges are. The judicial suspicion of arbitration in the common law tradition arose in England and spread to other common law jurisdictions. In England, the court's traditional cautious attitude towards arbitration is reflected in Lord Coke's dictum in the *Vynior's Case*, where he ordered the enforcement of an arbitration award but noted that a party may countermand a predispute agreement to arbitrate.²⁶ He compared predispute arbitration agreements to revocable powers of attorney or revocable provisions of a will. In his view, to bar the revocation of a predispute arbitration agreement would be tantamount to making "not countermandable [that] which is by law and of its own nature countermandable."²⁷ Under this view, either party could renege on its promise to arbitrate if the promise was made before an actual dispute arose between the contracting parties. The consideration underlying this restrictive view of the enforceability of arbitration agreements was made evident in *Kill v. Hollister*²⁸, where the court held that "the agreement of the parties [to arbitrate their dispute] cannot oust [the jurisdiction of] this court."²⁹ Jealous of their jurisdictions and afraid that arbitration was a means of whittling it down, courts used the dictum in *Kill* as justification for refusing to enforce predispute arbitration agreements.³⁰ Ultimately, a contrary stream of authority, culminating in

25. Jean R. Sternlight, *Panacea or Corporate Tool? Debunking The Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 680 (1996).

26. Steven J. Burton in *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 474 (2006); see also 8 Co. Rep. 80a.

27. *Id.* at 81b-82a.

28. 18 Geo. 2, 1 Wils 129.

29. *Id.*

30. See David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67-SPG LAW & CONTEMP. PROB. 5, 1652 (2004).

Hamlyn & Co. v. Talisher,³¹ did hold that predispute arbitration agreements were enforceable.³²

The judicial attitude in the United States towards arbitration took the same trajectory as in England, initial suspicion and gradual, if grudging, acceptance. The traditional judicial suspicion of arbitration was exemplified in early New York decisions which viewed Coke's dictum as an articulation of a settled principle of English law and used it as justification for holding predispute arbitration agreements unenforceable.³³ However, with time, judicial attitude towards arbitration became more relaxed and several states enacted legislation permitting the enforcement of predispute arbitration agreements.³⁴ This more relaxed attitude towards arbitration came to be embodied in the FAA. Enacted in 1925, the Act was designed to promote the enforcement of arbitration agreements by making them "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁵

The FAA has played an important role in the increasing use of arbitration in resolving a broad range of disputes. The Court's interpretation of its scope, reach, and command has significantly affected access to justice in the United States and constrained the ability of states to respond to access and fairness issues in arbitrations. *Amex* illustrates how the Court's expansive interpretation of the FAA has led to the privileging of the pro-arbitration mandate of the Act over other competing public policy considerations.

In its decision in *Amex*, the majority of the Supreme Court justified its rejection of the applicability of the effective vindication defense by reference to key insights it gleaned from the FAA. According to the Court, the FAA "reflects the overarching principle that arbitration is a matter of

31. William Schofield, *Hamlyn & Co. v. Talisker Distillery: A Study in the Conflict of Laws*, 9 HARV. L. REV. 371 (1896).

32. In fact, the English Arbitration Act of 1889 had provided a framework for a more congenial judicial attitude towards arbitration. The Act made arbitration and submission agreements irrevocable, provided for the finality of arbitral awards, and empowered arbitrators to summon witnesses and examine them under oath.

33. For a review of these early New York cases, see *Current Legislation*, 25 COLUM. L. REV. 822 (1925).

34. *Id.* at 823 (citing legislation in New York, New Jersey, Oregon, and Massachusetts providing for the enforcement of agreements to arbitrate). The New York legislation, whose enactment was spearheaded by Julius Cohen and Charles Bernheimer, is considered the first modern state arbitration statute. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNALIZATION* 28, 34–37 (1992).

35. 9 U.S.C. §2.

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contract” and requires courts to “‘rigorously enforce’ arbitration agreements according to their terms.”³⁶ Unless Congress otherwise indicates, courts must enforce arbitration agreements even where a violation of a federal statute is alleged.³⁷ The central purpose of the FAA “is the enforcement of arbitration agreements on their terms.”³⁸ To the Court, there is an overriding interest in realizing this purpose with the result that “the FAA’s command to enforce arbitration agreement trumps any interest in ensuring the prosecution of low-value claims.”³⁹

It is remarkable that what began as a judicial suspicion of arbitration has transformed into a judicial veneration of arbitration, a transformation that has practical consequences for access to justice. This paper argues that while the FAA compels a more favorable attitude towards arbitration, the Court’s expansive reading of its reach and mandate would have surprised even the most ardent proponents of the Act.⁴⁰ The Court’s expansive interpretation of the Act has been based largely on a contextual reading of the text. As a result, the Court has not paid sufficient heed to the legislative history and historical context of the legislation, both of which would suggest a more restrained reading of the Act, not the expansive reading that now privileges the pro-arbitration mandate of the Act above other competing public policy considerations.⁴¹

The major proponents of the FAA had in mind a bill of limited scope.⁴² Julius Cohen and Charles Bernheimer, both of whom played major roles in

36. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2309. *See also* § 2 of the FAA, which provides that:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

37. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2309.

38. *Id.* at 2312 n.5.

39. *Id.*

40. *See, e.g., Moses, supra* note 88, at 99. (arguing that “a simple procedural statute enacted to require enforcement of arbitration agreements in federal courts has become unrecognizable as the law Congress adopted in 1925.”).

41. *Id.* at 111. Instead the Court has, as one commentator has aptly observed, “built a house of cards that has almost no resemblance to the structure envisioned by the original statute.” *Id.* at 113.

42. *Id.* at 105.

the enactment of the first New York Arbitration Law, were instrumental in the passage of the FAA.⁴³ The original FAA, which was modeled on the New York statute, was drafted principally by Julius Cohen.⁴⁴ The testimonies by Cohen and Bernheimer during the Senate and Subcommittees' hearings for the bill illuminate the considerations that motivated the passage of the bill. Of primary concern to them and others who testified during the hearings was the need to move away from the traditional judicial suspicion of arbitration towards a legislative and judicial attitude that was more receptive to the arbitration of disputes between merchants. They argued that businesses should be provided access to a simple, expeditious, and cheap method of resolving disputes, in contrast to the judicial system that was often congested, protracted, and expensive.⁴⁵ In a brief submitted to Congress, Cohen emphasized that arbitration served the public interest as it provided a solution to some of the problems plaguing the legal system.⁴⁶

In a piece written shortly after the passage of the Act and substantially based on his brief to Congress, Cohen emphasized three key features of arbitration that informed the drafting process of the FAA: that arbitration was founded on the free consent of the contracting parties;⁴⁷ that arbitration

43. *Id.* at 102. Julius Cohen, a lawyer, was the general counsel of the New York State Chamber of Commerce and Charles Bernheimer was the chair of the chamber's arbitration committee. *Id.*

44. *Id.* at 102.

45. *Id.* at 103. In his testimony during the hearings, Bernheimer noted that "[A]rbitration saves time, ... saves money . . . preserves business friendships . . . raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay in relieving our courts." Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 7-8 (1924). [Hereinafter *Joint Hearings*].

46. See *Joint Hearings*, *supra* note 45, at 34-35.

47. Cohen noted that arbitration agreements are entirely voluntary and that the FAA "is merely a new method for enforcing a contract freely made by the parties thereto." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 279 (1926). It is instructive to note that during his congressional testimony, he had suggested that the proposed act would not apply to adhesion contracts, suggesting that aversion to such contracts was one of the reasons for the traditional judicial suspicion of arbitration. According to him:

[T]he real fundamental cause was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the courts said, "If you let the people sign away their rights, the powerful will come in and take away the rights of the weaker ones." And that still is true to a certain extent.

Joint Hearings, *supra* note 455 at 15.

It was, therefore, envisaged that the Act would apply to genuinely consensual transaction, not agreements offered on a "take-it-or-leave-it basis to captive customers or employees. See *Prima*

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was well suited for resolving disputes between merchants; and that arbitration, even though useful in resolving business disputes, was “not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.”⁴⁸ He argued that arbitration was mostly relevant to:

the disposition of the ordinary disputes between merchants as to questions of fact – quantity, quality, time of delivery, compliance with terms of payment, excuse for non-performance, and the like. It has a place also in the determination of the simpler questions of law – the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or [similar] questions of law.⁴⁹

A then primary objective of the protagonists of the FAA was to provide an effective private mechanism for merchants to resolve business disputes. The drafters did not envisage the FAA as placing the interest in the enforcement of arbitration agreements, even those that arise from adhesion contracts, ahead of competing public interests enshrined in other statutes. Their intent was more limited and they demonstrated a more nuanced understanding of the limits of arbitration as a method of resolving disputes. As one of those who testified during the congressional hearings noted, the FAA was “purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.”⁵⁰ In fact, there were indications that the Act was not intended to cover workers.⁵¹

It was probably because of the modest intent of its proponents that the bill did not receive much opposition during the legislative process. It passed

Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 407, 414 (1967) (Black, J., dissenting) (citing *Joint Hearings*, *supra* note 45, at 9–11).

48. Cohen & Dayton, *supra* note 47, at 281.

49. *Id.*

50. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 40 (1923)* [hereinafter *Sales and Contracts*] (statement of W.H.H. Piatt). He testified in his capacity as the chairman of the Committee of Trade and Commercial Law of the American Bar Association. *Id.*

51. *Sales and Contracts*, *supra* note 50, at 9. After reviewing the legislative history of the Act, Margret Moses noted that “the supporters of the legislation did not believe that it would apply to any workers at all.” Moses, *supra* note 8, at 106. “Under the view of the Commerce Clause at that time, the Act did not apply to contracts of most workers.” *Id.* “It only applied to contracts of workers actually engaged in interstate or foreign commerce, such as seamen or railroad employees, and those workers were specifically excluded.” *Id.*

in both houses of Congress without a negative vote. The proposed bill would probably have been subject to contentious debate and opposition had those who voted for it foreseen what it would become several decades after its passage.

Instructively, at the time the Act was passed, the use of arbitration was largely confined to commercial transactions between merchants. There had not yet been the proliferation of the use of arbitration in consumer transactions. In fact, commentators originally considered the Act as applying only to transactions involving interstate commerce. Few transactions between large businesses and consumers would have implicated interstate commerce interests at the time the Act was passed.⁵² Consequently, some commentators believed that the FAA was not envisaged to apply to such transactions.⁵³

Alabama adopted this restrictive interpretation of the FAA. Alabama courts routinely limited the application of the FAA to cases where the parties to the transaction actively contemplated substantial interstate activity.⁵⁴ However, in consonance with its expansive view of the scope of the FAA, the Supreme Court subsequently rejected this narrow reading of the FAA, holding that the Act applied to the full extent of the modern commerce clause.⁵⁵ In the same vein, it also held that the FAA applies broadly to transactions affecting interstate commerce in the aggregate, even where the

52. Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?* 21 HOFSTRA L. REV. 385, 459 (1992).

53. *Id.* at 459. The author suggests that Congress may have felt that the regulation of consumer disputes was outside the scope of its powers under the Commerce Clause. *Id.* at 460 n.34. Accordingly, the phrase "contracts evidencing a transaction involving commerce" [in § 2 of the Act] was considered as implicating foreign or interstate commerce in a narrow sense and not in the broad sense in which interstate commerce is understood contemporary constitutional doctrine. See Aaron-Andrew P. Bruh, *The Unconscionability Game: Strategic Judging and the Evolution of the Federal Arbitration Law* 83 N.Y.U. L. REV. 1420, 1430 (2008). The relevant portion of the Act provides as follows: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . ." *Id.* at 1426.

54. Bruh, *supra* note 53, at 1430. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 628 So.2d 354, 355 (Ala. 1993); *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 603-04 (Minn. 1982). For other decisions adopting this approach, see *Burke County Public Schools Bd. of Ed. v. Shaver Partnership*, 279 S.E.2d 816 (N.C. 1981); *R.J. Palmer Const. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. 1982); *Lacheney v. Profitkey Intern, Inc.* 818 F. Supp. 922 (E.D. Va. 1993). There was, however, a contrary stream of authority that held that § 2 reached the limits of Congress' power under the Commerce Clause. See, e.g., *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984); *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986).

55. *Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. at 268.

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particular transaction at issue may not have substantially affected interstate commerce.⁵⁶ This substantially affected the reach of the FAA.

Furthermore, most commentators initially believed that the Act was intended by Congress to apply to disputes concerning the enforcement of arbitration agreements in federal courts.⁵⁷ As one commentator observed, “[f]or years, courts and commentators agreed that the statute applied only in the federal courts and so governed only the few contract suits that happened to involve diversity or admiralty jurisdiction.”⁵⁸ On this view, the Act would have been inapplicable to most consumer transactions at the time it was enacted.⁵⁹ The Supreme Court subsequently rejected this view.⁶⁰ According to the Court, “[a]lthough the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.”⁶¹ This enlargement of the scope of application of the Act to state courts led to its application to a broad range of consumer transactions handled by state courts.

Even though the Court adopted an expansive interpretation of the scope of the Act, its decisions on the mandate of the Act to enforce arbitration agreements were measured and demonstrated an appreciation of the historical context for the enactment of the statute. It was only with time that it adopted the extreme pro-arbitration posture that has led it to severely limit the avenues for challenging the enforceability of arbitration agreements.

This Court’s more nuanced approach to the enforcement of arbitration agreements is exemplified by *Wilko v. Swan*.⁶² The Court had to decide the arbitrability of a claim brought by a customer of a securities brokerage firm

56. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 55-57 (2003) (citing, *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

57. *See, e.g.*, Strickland, *supra* note 52, at 391.

58. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1315 (1985).

59. Sternlight, *supra* note 25, at 693. As Jean Sternlight has noted, “assuming for the moment that the FAA was only intended to apply in federal court, and even assuming the parties were from diverse states, few large merchant/small consumer transactions could have met the federal court amount in controversy requirement in effect in 1924 of \$3,000.” *Id.* at 712 n.44.

60. *See Southland v. Keating*, 465 U.S. 1 (1984), where the Supreme Court held, in a majority decision, that the FAA applied in both federal and state courts.

61. *Id.* at 12.

62. 346 U.S. 427 (1953).

who sought to recover damages under the Securities Act.⁶³ The suit alleged that as a result of “misrepresentations and omission of information” by the brokerage firm, the customer bought stock that he subsequently sold for a loss.⁶⁴ When the brokerage firm moved to stay the action pending arbitration, the District Court denied the request on the grounds that to enforce the arbitration agreement would deprive the customer “of the advantageous court remedy afforded by the Securities Act.”⁶⁵ On appeal, the Court of Appeals held that the Securities Act did not bar enforcement of the arbitration agreement. The Supreme Court granted certiorari to decide whether the Act’s language prohibiting the purchaser of any security from waiving any provision of the Act⁶⁶ meant that agreements to arbitrate disputes arising from the Act were unenforceable. The Court had to reconcile the language of the Securities Act with that of § 2 of the FAA making arbitration agreements “valid, irrevocable and enforceable.”⁶⁷

In denying the petition to stay the action, the Supreme Court held that enforcement of the arbitration agreement would deny the plaintiff the protection afforded him by the Securities Act, which prohibited “waiver of judicial trial and review.”⁶⁸ The Court’s decision was influenced by what it perceived as the inferiority of the arbitration forum for the vindication of statutory rights. Even though the arbitrators would apply the Securities Act, the Court felt that it would be inappropriate to send the parties to arbitration. This was because the “effectiveness in application” of the Securities Act provisions would be “lessened in arbitration as compared to judicial proceedings.”⁶⁹ In the Court’s view, “the protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness.”⁷⁰ The Court was swayed by what it perceived as some of the weaknesses of arbitration in this context: the fact that arbitrators are “without judicial instruction in the law,” that arbitrators could render awards

63. 48 Stat. 84, 15 U. S. C. § 77n.

64. *Wilko v. Swan*, 346 U.S. at 428–29.

65. *Id.* at 430.

66. Section 14 of the Act provided that “[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.” 9 U.S.C. § 14.

67. *Supra* note 6.

68. *Wilko v. Swan*, 346 U.S. at 437–38. In a subsequent decision, the Court refused to extend this finding to the Securities Exchange Act. *See Shearson/Am Exp., Inc. v. McMahon*, 482 U.S. 220 (1987).

69. *Id.* at 435.

70. *Id.* at 437.

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without explaining their reasons, and that there were limited grounds for vacating arbitral awards.⁷¹ It is instructive to note that the Court acknowledged that a similar arbitration clause would be enforceable in a commercial contract.⁷² Nonetheless, it felt that Congress's intent in the Securities Act was better served by refusing to enforce arbitration agreements against individuals.

Although *Wilko* dealt with a provision of the Securities Act specifically prohibiting "waiver of judicial trial and review,"⁷³ the Court's decision is nonetheless important in illustrating the Court's initial nuanced attitude towards the interpretation of the FAA's mandate to enforce arbitration agreements. In reaching its decision, the Court found it necessary to consider the relative effectiveness of the arbitral forum in vindicating the plaintiff's statutory rights. Instead of merely relying on the Securities Act's prohibition of "waiver of judicial trial and review" as grounds for denying the stay, it went further to assess the relative disadvantage of arbitration as a forum for vindicating the protections afforded to the plaintiff by the Securities Act.

Three years after *Wilko*, the Court reaffirmed its critique of arbitration.⁷⁴ In deciding on the reach of the FAA,⁷⁵ the Court noted that "[t]he change from a court of law to an arbitration panel may make a radical difference in ultimate results."⁷⁶ This was because in the Court's view, "[a]rbitration carries no right to trial by jury. . . . [a]rbitrators do not have the benefit of judicial instruction on the law need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court

71. *Id.* at 436. It should be noted that in a strong dissent, Justice Frankfurter, in a decision that presages the future attitude of the court, stated that "[t]here is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled." *Id.* at 439.

72. *Id.* at 438.

73. *Id.* at 437.

74. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

75. The Court held that the provision of § 3 of the United States Arbitration Act for stay of the trial of an action until arbitration does not apply to all arbitration agreements, but only to those covered by §§ 1 and 2 of the Act (specifically, those relating to maritime transactions and those involving interstate or foreign commerce).

76. *Bernhardt v. Polygraphic Co. of American*, 350 U.S. at 203.

trial; and judicial review of an award is more limited than judicial review of a trial . . .⁷⁷

The point here is not that the Court's critique of the arbitration process in these cases was necessarily compelling,⁷⁸ but that these cases illustrate a period when the Court had a healthy skepticism for the use of arbitration and felt the need, in deciding the reach of the FAA, to balance its pro-arbitration mandate against competing policy considerations.

Some of the Court's subsequent decisions on arbitration continued to take into account the effectiveness of the arbitral forum in redressing the rights of claimants, especially individuals. For example, in *Alexander v. Gardner-Denver Co.*,⁷⁹ the Court balanced the public policy underlying Title VII against the federal policy favoring arbitration of labor disputes. In the Court's view, the balancing of the two interests was vital because the policy against discrimination was of "the highest priority."⁸⁰ In allowing the plaintiff who had arbitrated a claim under a collective bargaining agreement to litigate a Title VII claim, the Court discussed the limitations of vindicating statutory claims in arbitration proceedings. The Court's discussion of the limitations of arbitration is particularly striking in light of its subsequent liberal attitude towards the arbitrability of public law claims and its restrictive interpretation of what is required effectively to vindicate statutory rights:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. . . . But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

77. *Id.*

78. See W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 334-54 (1990), for a critique of the use of public policy grounds for striking down arbitration agreements.

79. 415 U.S. 36 (1974).

80. *Id.* at 47.

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Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . And as this Court has recognized, “arbitrators have no obligation to the court to give their reasons for an award.” . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.⁸¹

The court reached a similar result in *Barrentine v. Arkansas-Best Freight System, Inc.*,⁸² where it held that arbitrating a claim under a collective bargaining agreement did not preclude an individual from bringing a suit under the Fair Labor Standards Act.⁸³ According to the Court, an arbitrator whose duty is to effectuate the intent of the parties might issue an award that is “inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.”⁸⁴ Although the Court subsequently narrowed its decision in *Alexander* and *Barrentine*,⁸⁵ those decisions are nonetheless relevant in illustrating a period in which the Court adopted a more nuanced and cautious attitude in analyzing issues relating to the scope and enforcement of arbitration agreements.

This more nuanced attitude towards arbitration was to transmute into an unqualified preference for the enforcement of predispute mandatory arbitration agreements. Part of the impetus for this change was the recognition that arbitration was one of the vital solutions to the problem of congested courts and the overburdened judicial system, a system that Chief Justice Warren Burger, in 1976, characterized as in a “near crisis situation.”⁸⁶ Burger stressed the role of arbitration in addressing this problem:

81. *Id.* at 56–58.

82. 450 U.S. 728 (1981).

83. *Id.* at 745.

84. *Id.* at 729.

85. See *Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

86. *Addresses Delivered At the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 88 (1976) [hereinafter *Addresses Delivered At the National Conference*] (statement of Chief Justice Warren E. Burger). The conference was named “The Pound Conference.” See Hal Neth, *The Federal Arbitration Act and How it Grew* (May 2011) (unpublished Master of Science thesis, University of Oregon), available at

As the work of the courts increases, delays and costs will rise and the well-developed forms of arbitration should have wider use. Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes. I submit a reappraisal of the values of the arbitration process is in order, to determine whether, like the Administrative Procedure Act, arbitration can divert litigation to other channels.⁸⁷

This call received broad support, including from a member of the ABA's Pound Conference Follow-up Task Force⁸⁸ who argued that "[a] substantial body of experience with compulsory arbitration procedure in limited contexts suggests that broader application of this process – perhaps to civil claims in broad categories and under certain jurisdictional amounts – is warranted."⁸⁹ He stated that "[c]ompulsory arbitration has been effective in disputes that involve specialized fields of law and a degree of expertise not generally possessed by a judge in a court of general jurisdiction."⁹⁰ Further, he suggested that cases involving simple and routine issues may be amenable to expedient resolution by arbitration.⁹¹ Along the same lines, Attorney General Griffin Bell, who was the Chairman of the Pound Conference Follow-up Task Force, suggested that "a carefully structured arbitration system" would be beneficial "by providing faster and less expensive resolution of some actions brought in the federal courts."⁹²

The shift in the Court's attitude towards the interpretation of the FAA began in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*,⁹³ where it first articulated the pro-arbitration policy that has since guided its decisions.⁹⁴ There the Court stated that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive law or procedural policies to the

<http://adr.uoregon.edu/files/2012/01/federalarbitrationact.pdf>. Neth has suggested that the conference and its aftermath "shed light on the powerful forces that may have shaped the Court's FAA jurisprudence." *Id.*

87. *Addresses Delivered At the National Conference*, *supra* note 86, at 88. See also Neth, *supra* note 86, at 24.

88. Colorado Supreme Court Justice William H. Erickson. See 64 A.B.A.J. 47 (1978).

89. *Id.* at 51.

90. *Id.*

91. *Id.*

92. *Id.* at 54.

93. 460 U.S. 1 (1983).

94. *Id.* at 23. There was, however, earlier indication of judicial willingness to broaden the scope of applicability of the FAA. See, e.g., Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 773-75 (2004) (discussing the gradual growth of FAA in this period during the 1960s and 1970s).

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contrary.”⁹⁵ The Court did not discuss the contours or limits of this pro-arbitration policy, but this statement has been much cited as justification for an expansive reading of the FAA.⁹⁶

Moses H. Cone Memorial marked a shift in the Court’s attitude towards arbitration and helped establish a liberal attitude towards the arbitrability of disputes. According to the Court, “[t]he Arbitration Act establishes that, as matter of federal law, any doubts concerning the scope of abatable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability.”⁹⁷

The shift in attitude intensified in *Southland Corp. v. Keating*,⁹⁸ where in a controversial decision, the Court held that § 2 of the FAA was a substantive rule under the Commerce Clause, that the Act was binding on states, and that it preempted state laws invalidating arbitration agreements.⁹⁹ According to the Court, “[i]n enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”¹⁰⁰

Moses H. Cone Memorial and *Southland* were crucial in establishing the basic architecture of the modern attitude of the Court towards arbitration. *Moses H. Cone Memorial* established, and *Southland* reinforced, the view that with the FAA, Congress declared a liberal policy favoring arbitration. Although neither case articulated the boundaries of this liberal policy, subsequent decisions of the Court would use this “policy” as justification for

95. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24.

96. *Id.* Commentators have lamented the full import of the pro-arbitration policy articulated by the court. See, e.g., Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

97. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24–25.

98. 465 U.S. 1 (1984).

99. *Id.* Justice O’Connor, drawing on a careful reading of the legislative history of the Act, strongly disagreed with the decision of the majority, noting that “Congress intended to require federal, not state, courts to respect arbitration agreements.” *Id.* at 24. In her view, the decision of the majority was “unfaithful to congressional intent, unnecessary, and, in light of the FAA’s antecedents ... inexplicable.” *Id.* at 36. She concluded that “[a]lthough arbitration is a worthy alternative to litigation, today’s exercise in judicial revisionism goes too far.” *Id.* at 36.

100. *Id.* at 10.

severely limiting challenges to the enforceability of arbitration agreements and empowering arbitrators to decide more “gateway” issues of arbitrability. Additionally, *Moses H. Cone Memorial* stated, and *Southland* amplified, the position that § 2 of the Act establishes a rule of substantive law that preempted inconsistent state laws limiting the enforceability of arbitration agreements. These decisions, and their progeny, have had the radical consequence of expanding the reach of the FAA, while practically eliminating the ability of states to regulate the availability of arbitration, even where regulation is necessary to protect consumers or to enhance the vindication of state statutory rights. Few of the proponents of the Act could have foreseen the radical consequences it has had on access to justice in the United States. As Justice Stevens aptly observed, “[t]here is little doubt that the Court’s interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it.”¹⁰¹

In the next section, we examine how the effective-vindication doctrine emerged in the context of the Court’s enlargement of the arbitrability of statutory claims and how the doctrine continued to evolve until the *Amex* decision severely restricted its ambit.

II. THE DEVELOPMENT OF THE EFFECTIVE-VINDICATION DOCTRINE

A. *Mitsubishi and the Origin of the Doctrine*

With the Court’s broadening of the scope of arbitrable matters and the transfer of many gateway issues to arbitrators, it was only a matter of time before the Court would reverse its view that arbitration was an inappropriate forum for resolving federal statutory claims. The Court in *Wilko* first cogently articulated its case against the arbitrability of federal statutory claims.¹⁰² As indicated above, *Wilko* dealt with the arbitrability of a dispute under the Securities Act, an Act that contained an anti-waiver provision.¹⁰³ In that case, the Court expressed the view that “the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act.”¹⁰⁴ Lower courts read the decision broadly, with several of them relying on it to support the denial of motions to compel arbitration of disputes under the

101. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001).

102. *Wilko v. Swan*, 346 U.S. 427 (1953).

103. 9 U.S.C. § 14.

104. *Wilko*, 346 U.S. at 438.

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Sherman Act.¹⁰⁵ This was despite the fact that the Sherman Act, unlike the Securities Act, does not contain an anti-waiver provision. For example, in *American Safety Equipment Corporation v. Maguire & Co.*,¹⁰⁶ the Second Circuit relied on *Wilko* in reaching the conclusion that “the antitrust claims raised [in the suit] were inappropriate for arbitration.”¹⁰⁷ In reaching this decision, the Court was swayed by the public interest embodied in the Sherman Act to promote a competitive economy.¹⁰⁸ As the Court began to articulate the view that the FAA embodied a liberal pro-arbitration policy and as it continued to transfer the decision of more gateway issues to arbitrators, it became necessary for the Court to reconcile its emerging view of congressional, liberal pro-arbitration intent under the FAA with its reluctance to permit the arbitration of federal statutory rights.¹⁰⁹

The Court was squarely faced with this issue in *Mitsubishi*.¹¹⁰ The Court had to decide whether to enforce an agreement to resolve antitrust disputes by arbitration in an international transaction.¹¹¹ An allied issue before the Court was whether the choice of a foreign governing law affected the enforceability of such an agreement.¹¹² The Court held that the parties’ arbitration agreement was broad enough to encompass the arbitration of antitrust disputes, and found “no warrant in the Arbitration Act for implying

105. 15 U.S.C. §§ 1–7.

106. *Am. Safety Equip. Corp. v. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

107. *Id.* at 825. *Overruled*, by *Rodriguez de Quinjas v. Shearson/Am. Express, Inc.* 490 U.S. 477 (1989).

108. According to the Court:

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. Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage.

Id. at 826.

109. As David Horton has noted, the reluctance to permit the enforcement of statutory claims “created confusion about the relationship between the non-arbitrability rule that courts had created and congressional intent” because “it was hard to square the reflexive non-arbitrability rule that courts had created with the fact that the FAA’s text does not categorically exempt federal statutory claims.” David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 732 (2012).

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

111. *Id.* at 624.

112. *Id.* at 637.

in every contract within its ken a presumption against arbitration of statutory claims.”¹¹³

In contrast to its earlier views, the Court stated that arbitration was not an inferior forum for resolving claims relating to statutory rights. According to the Court, a party who agrees to arbitrate a statutory claim “does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”¹¹⁴ In so doing, the party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”¹¹⁵ Further, in the Court’s opinion, neither the text nor the legislative history of the FAA evinced a Congressional intent to preclude the waiver of the right to a judicial forum.¹¹⁶ A party who contracts to arbitrate should be held to that promise “unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”¹¹⁷

An important aspect of the Court’s decision in *Mitsubishi* was the availability of the arbitral forum to vindicate the statutory claims in question. Having found that there was “no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism” for resolving the statutory claim,¹¹⁸ the Court stated an important caveat. It indicated that the FAA “will continue to serve both its remedial and deterrent function” only “so long as the prospective litigant effectively may vindicate its statutory claim.”¹¹⁹ In this sense, arbitration is a suitable forum for resolving claims involving statutory rights so long as the arbitral process does not prevent a party from vindicating its federal statutory rights. To buttress the importance of a claimant having the opportunity to vindicate statutory claims, the Court noted that “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy.”¹²⁰ By permitting the arbitration of the federal statutory claim while introducing the important caveat that there is still an opportunity to vindicate

113. *Id.* at 625.

114. *Id.* at 628.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 636.

119. *Id.* at 637.

120. *Id.* at 637 n.19.

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statutory rights, the Court reconciled the pro-arbitration policy it found in the FAA with the interest in ensuring the vindication of statutory rights.

The Court's caution that the FAA would require the enforcement of an arbitration agreement involving statutory claims so long as "the prospective litigant effectively may vindicate its statutory claim" marked the origin of the effective-vindication doctrine. Although the Court's statement was made in the context of a discussion of the need for the arbitrators to apply mandatory U.S. statutory law despite the party's choice of a foreign governing law, the principle it enunciated was not limited to the application of mandatory rules. Further, there is little sound reason, as we shall see, for so limiting the principle.

In fact, a review of the first sentence of the paragraph of the judgment that deals with the effective-vindication issue¹²¹ indicates that the Court's primary concern was whether arbitration provided an "adequate mechanism" for resolving the dispute involving a statutory claim. In the Court's view, arbitration was "an adequate mechanism" because it allowed the prospective claimant the opportunity to vindicate its rights. Central to the Court's finding that the antitrust dispute was arbitrable was its statement that in agreeing to arbitrate a dispute, a prospective litigant "does not forgo the substantive rights afforded by [a] statute."¹²² As the Court stressed, the prospective litigant merely "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹²³ Consequently, the prospective litigant does not bargain away the right to the effective vindication of its statutory rights, but merely chooses what would usually be a relatively simple, informal, and expeditious forum for vindicating those claims. The principle in *Mitsubishi* then appears to be that the FAA permits the arbitrability of federal statutory claims in so far as the particular arbitration does not prevent a party from vindicating statutory rights. Nonetheless, the ambit of the effective-vindication doctrine remained unclear, even as subsequent decisions of the Court reaffirmed its importance.

In *Gilmer v. Interstate/Johnson Lane Corp.*¹²⁴ the Court compelled the arbitration of a dispute alleging wrongful firing under the Age

121. *Id.* at 636.

122. *Id.* at 628

123. *Id.*

124. *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991).

Discrimination in Employment Act (ADEA),¹²⁵ even though it acknowledged that the ADEA furthered important social policies.¹²⁶ The Court held that the ADEA did not preclude the arbitration of claims arising from the statute and rejected arguments about the unsuitability of arbitration for resolving statutory disputes.¹²⁷ In the Court's view, there was no inherent inconsistency in enforcing a predispute arbitration agreement and advancing the vital social policies embodied in the ADEA:

We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but [we have held that] claims under those statutes are appropriate for arbitration. “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹²⁸

Here again, the opportunity for the prospective litigant to effectively vindicate its statutory claims was crucial to the Court's holding that the statutory claim was arbitrable. The social policies embodied in a federal statute would not preclude the arbitrability of claims arising from the statute in so far as the arbitral forum permitted the vindication of the statutory right. The Court reaffirmed this approach in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*,¹²⁹ a case involving a motion to stay judicial proceedings and to compel arbitration in Tokyo under a clause in a bill of lading. The petitioner resisted the motion on the grounds, *inter alia*, that the Carriage of Goods by Sea Act (COGSA) stipulated that the terms of a contract of carriage could not relieve a carrier from obligations or diminish the carrier's legal duties

125. 29 U.S.C.S. § 621 *et seq.*

126. *Gilmer*, 500 U.S. 20, 124 at 27.

127. *Id.* at 29–30. According to the Court, its recent decisions “have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims.” It noted that the “generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,” and as such, they are “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” *Id.* at 30.

128. *Id.* at 27–28, (citing *Mitsubishi*). The Court reaffirmed this approach in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–74 (2009), (holding that the arbitration of a claim under the ADEA may not prevent a claimant “from effectively vindicating” their “federal statutory rights in the arbitral forum.”)

129. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995).

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under the COGSA.¹³⁰ The petitioner expressed fear that the arbitrators may not apply the COGSA to the dispute.¹³¹ The Court held that the dispute was arbitrable, and noted that compelling the parties to arbitrate did not relieve the respondent from their obligations under the COGSA. Crucially, the court reaffirmed that it would have had “little hesitation in condemning the agreement as against public policy,” if it had been “persuaded that ‘the choice-of-forum and choice-of-law clauses operated in -tandem as a prospective waiver’” of the petitioner’s statutory claims.”¹³²

The Court was soon to be presented with the first opportunity to consider the applicability of the effective-vindication doctrine where arbitration expenses were alleged to prevent a party from vindicating its claims in an arbitration proceeding. In *Green Tree Financial Corp.-Alabama v. Randolph (Green Tree)*,¹³³ the respondent had financed the purchase of a home through the petitioner financial corporation. When the respondent sued for violations of the Truth in Lending Act (TILA),¹³⁴ the petitioner moved to stay the proceedings and compel arbitration. The district court granted the motion, but the Court of Appeals reversed, holding that the arbitration clause was unenforceable as the potential high costs of arbitration failed to provide the minimum guarantees required to ensure that respondents could vindicate their statutory rights.¹³⁵ According to the Court of Appeal, “forcing a plaintiff to bear the brunt of ‘hefty’ arbitration costs and ‘steep filing fees’ constitutes ‘a legitimate basis for a conclusion that the [arbitration] clause does not comport with [FAA’s] statutory policy.’”¹³⁶ On

130. Section 3(8) provided as follows:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

46 U.S.C. App. § 1303(8).

131. *Vimar*, *supra* note 129 at 540.

132. *Id.* at 540, (citing *Mitsubishi*).

133. 531 U.S. 79 (2000).

134. 15 U.S.C.S. § 1601.

135. *Randolph v. Green Tree Financial Corp. – Alabama*, 178 F.3d 1149 (1999), *aff’d in part, rev’d in part*, 531 U.S. 79 (2000).

136. *Id.* at 1157 (citing its decision in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir.1998)).

appeal, the Court reversed, noting that the record before the court did not contain sufficient information about the potential costs of arbitration to the respondent. In the Court's view, the risk that the prohibitive costs of arbitration would prevent the respondent from vindicating her rights was too speculative to justify invalidating the arbitration agreement.¹³⁷ According to the Court, "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration."¹³⁸

Instructively, the Court noted that the burden was on the party resisting the enforcement of an arbitration agreement on the grounds that the proceedings would be prohibitively expensive to demonstrate the likelihood of incurring such costs.¹³⁹ It was because the respondent did not discharge this burden that the Court held that the Court of Appeals "erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable."¹⁴⁰

Green Tree represents an important phase in the evolution of the effective-vindication doctrine because it marked the first time the Court recognized the applicability of the doctrine to issues relating to the costs of accessing the arbitral forum. While it acknowledged that the cost of access, "large arbitration costs," may preclude a party from effectively vindicating its rights, the record in the instant case was insufficient to establish those costs.

In light of the Court's subsequent restrictive reading of the effective-vindication doctrine in *American Express*,¹⁴¹ it is noteworthy that in its decision in *Green Tree* the Court had no hesitation in accepting that the doctrine would be applicable where the costs associated with arbitrating a statutory claim prevent a party from vindicating statutory rights. *Green Tree* could have interpreted *Mitsubishi* narrowly as concerned solely with the willingness and ability of arbitrators to apply the full strength of mandatory statutory law. However, by broadly interpreting the principle enunciated by *Mitsubishi* to include access issues, the Court implicitly recognized that the policy considerations underlying the effective-vindication doctrine ranged

137. *Green Tree*, *supra* note 133 at 91.

138. *Id.* at 90.

139. *Id.* at 92.

140. *Id.*

141. Discussed in Part III(b), *infra*.

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farther than the interest in ensuring that arbitrators enforce mandatory laws. It is to these policy considerations that we now turn.

B. Policy Considerations Informing the Doctrine

At a fundamental level, the effective-vindication doctrine represents an attempt to balance the pro-arbitration policy embodied in the FAA with the public interest in vindicating the statutory rights granted by other federal statutes. While the FAA reflects a policy of enforcing arbitration agreements as other contractual obligations,¹⁴² that policy often comes into conflict with the need to enforce statutory rights in cases where compelling the parties to arbitrate in a private forum may inhibit the vindication of their federal statutory rights. In *Mitsubishi*, the Court recognized that the pro-arbitration policy of the FAA does not trump the public interest in vindicating these statutory rights.¹⁴³

It would be recalled that the pro-arbitration policy of the FAA was informed by the recognition that the bases for the traditional judicial hostility to arbitration were no longer justifiable. Of particular importance in dissolving this attitude of hostility was the recognition of the benefits of arbitration both in providing a flexible and often expeditious forum for resolving private disputes and in decongesting the courts.¹⁴⁴ With time, a more congenial judicial attitude emerged that respected the autonomy of parties to elect to resolve an increasing array of disputes by private arbitration. As the Supreme Court broadened its conception of the mandate of the FAA, courts began to interpret the Act as permitting the arbitration of an increasing array of statutory claims. This broadening of the scope of arbitrable publiclaw claims necessitated the articulation of a limiting principle to ensure that the statutory rights of claimants are appropriately vindicated in the arbitral forum. The effective-vindication doctrine has served as this limiting principle.

In allowing the arbitration of federal statutory claims, the courts necessarily assume that arbitration adequately protects claimants' ability to

142. See *Amex*, 133 S. Ct. at 2309.

143. See text accompanying note 119, *supra*.

144. See *Mitsubishi*, 473 U.S. 614 at 628 (noting that parties choose to arbitrate their disputes principally to "trade[] . . . the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

resolve their statutory claims.¹⁴⁵ In fact, in finding that statutory claims are arbitrable unless Congress otherwise indicates, courts have frequently expressed the assumption that these claims are as vindicable in arbitral forums as they are in judicial ones.¹⁴⁶ However, this assumption of the appropriateness of arbitration for resolving statutory claims “falls apart . . . if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.”¹⁴⁷ Consequently, the effective-vindication doctrine operates as a necessary support for the receptiveness of arbitration as a suitable forum for resolving statutory claims. The doctrine does this by compelling the refusal to enforce an arbitration agreement where costs or terms of the arbitration agreement “would render arbitration an inaccessible or inadequate forum for the adjudication of federal right.”¹⁴⁸

In addition, the effective-vindication doctrine is vital in securing the deterrence function of federal command statutes.¹⁴⁹ Deterrence is often an important goal of command statutes. Central to “most command statutes is a deterrence goal. Congress wishes to stop particular conduct either because the conduct itself directly causes harm, or because secondary consequences of the conduct cause harm.”¹⁵⁰ Most federal statutory claims are based on statutes that have important deterrence goals.¹⁵¹ This deterrence function of command statutes is relevant not just to the particular claimant before the

145. *See, e.g.*, *Morrison v. Circuit City Stores*, 317 F.3d 646, 658 (6th Cir. 2003) (noting that “[t]he arbitration of statutory claims must be accessible to potential litigants as well as adequate to protect the rights in question so that arbitration, like the judicial resolution of disputes, will ‘further broader social purposes’”).

146. *See, e.g.*, text accompanying note 128, *supra*.

147. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1243 (10th Cir. 1999).

148. Brief of Amicus Curiae New England Legal Foundation’s in Support of Petitioners, at 8. In a similar vein, the court in *Paladino v. Avnet Computer Techs.*, noted that the arbitrability of federal statutory claims “rest on the assumption that the arbitration clause permits relief equivalent to court remedies” and that an agreement would not be enforceable if its provisions defeat the remedial purposes of the applicable federal statute. 134 F.3d 1054, 1062 (11th Cir. 1998).

149. *See Mitsubishi*, 473 U.S. 614 at 637 (noting that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions.”).

150. Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 456 (1989).

151. *See Salil K. Mehra, Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT’L L. 275, 278-84 (2002) (arguing that the fundamental purpose of U.S. antitrust law, as interpreted by courts, is deterrence).

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court but also to society generally.¹⁵² As a result, the treatment of federal statutory claims raises more complex issues than do those involving ordinary contractual transactions.¹⁵³ Unlike in the latter case which implicates private interests only, the former requires a careful balancing of the policy by favoring the enforcement of private obligations with the vital policy of realizing the goals of federal command statutes. Again, the effective-vindication doctrine affords a means of balancing these competing policy considerations.

Furthermore, the effective-vindication doctrine facilitates the realization of congressional intent in enacting the FAA. In enacting the FAA, Congress intended to enable private parties to resolve their disputes in a private, informal, flexible, yet effective forum.¹⁵⁴ The FAA was aimed at promoting the efficient resolution, not elimination, of claims in a private system of dispute resolution. The doctrine furthers this purpose of the Act “by encouraging agreements that will actually result in parties ‘resolving disputes’ in arbitration” and by providing “parties an incentive to negotiate agreements that allow for arbitration of federal statutory claims, as opposed to agreements that foreclose parties’ ability to vindicate federal rights in arbitration.”¹⁵⁵ Justice Kagan amplified this point in her dissent in *American Express*:

“[T]he effective-vindication rule furthers the purposes not just of laws like the Sherman Act, but of the FAA itself. That statute reflects a federal policy favoring actual arbitration – that is arbitration as a streamlined ‘method of resolving disputes,’ not as a foolproof way of killing off valid claims. Put otherwise: What the FAA prefers to litigation is arbitration, not de facto immunity. The effective vindication-rule furthers the statute’s

152. Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 591 (2005).

153. See Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1995 (2002) (noting that “[t]he treatment of statutory rights is different because of the public interest in the resolution of disputes over statutory rights—an interest that is separate from private parties’ interest in resolving a dispute between themselves.”).

154. See *Mastrobuono v. Sherson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting that “parties are generally free to structure their arbitration agreement as they see fit.”); *Hall Street Assoc., LLC. V. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (noting that the FAA enables parties to “tailor. . . many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.”).

155. Respondent’s Brief at 41.

goals by ensuring that arbitration remains a real, not faux, method of dispute resolution.¹⁵⁶

In this sense, the doctrine fosters the use of arbitration as an effective method of resolving disputes.¹⁵⁷ The limitation that the doctrine places on the arbitrability of federal statutory claims has contributed to the evolution of more “consumer –friendly” clauses in arbitration agreements, designed to reduce some of the problems of access in arbitrations.¹⁵⁸ These clauses enhance access to arbitration through the use of mechanisms like fee–shifting, cost–shifting, and cost–sharing arrangements.

Against the background of the foregoing policy considerations informing the doctrine, we shall now briefly examine how courts applied the doctrine in different contexts. The discussion focuses on its application in three important respects: its application to expenses associated with arbitration, its application to structural bias in arbitration, and its application to class action waivers. This discussion provides a useful context for understanding the radical nature of the Court’s decision in *American Express* and for exploring the broader consequences of the case on the evolution of American arbitration law.

C. Judicial Refinement of the Doctrine

1. Expenses Associated with Arbitration

Expenses associated with arbitration affect the ability of a claimant to use arbitration as a method of resolving disputes. These expenses include those obtainable in litigation, such as attorneys’ fees, and those peculiar to arbitration, such as arbitrators and administrative fees. Of particular concern with respect to the vindication of statutory rights is whether the fees and expenses peculiar to the system of arbitration chosen by the parties preclude the prospective claimant from vindicating his or her statutory rights in the arbitral forum. Important in this regard are not just the expenses associated

156. *Amex*, 133 S. Ct. 2304 at 2315.

157. *Id.* (Kagan notes that the doctrine encourages companies “to adopt arbitral procedures that facilitate efficient and accurate handling of complaints.”)

158. See Myriam Gilles, *Killing Them With Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 829 (2012) (arguing that the doctrine the doctrine has encouraged businesses to implement “bilateral arbitration agreements that appear designed to give judges comfort that the claimant will be able to vindicate its rights, thereby enabling courts to enforce those agreements...”).

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with arbitration, but also how those expenses are allocated between the parties. For example, clauses such as cost-splitting¹⁵⁹ and loser-pays clauses¹⁶⁰ may make it relatively more expensive for a prospective claimant to arbitrate a statutory dispute than to litigate it. The cost-differential between arbitration and litigation may be so wide and the financial burden of arbitration so heavy as to preclude a prospective claimant from vindicating her claim in an arbitral forum. Courts have struggled with how to determine when the relative costs of arbitration as compared to litigation would justify refusal to enforce an arbitration agreement under the effective-vindication doctrine.

Prior to the Court's decision in *Green Tree*,¹⁶¹ some courts adopted a *per se* approach in analyzing the effect of some cost provisions of arbitration agreements on the ability of prospective claimants to vindicate their statutory rights. In *Cole v. Burns*,¹⁶² for example, the D.C. Circuit applied a *per se* rule in analyzing a fee-splitting agreement.¹⁶³ The court reasoned that a party should not be required to pay the fees of an arbitrator as a condition for bringing a statutory claim under Title VII, especially in light of the fact that a party "would never be required to pay for a judge in court."¹⁶⁴ According to the court, in permitting the arbitration of federal statutory claims, the *Gilmer* Court assumed that arbitration would be a reasonable substitute for litigation;¹⁶⁵ an assumption that would be undermined where a claimant is saddled with the burden of paying arbitrators' fees, a burden that is nonexistent in the litigation context. Additionally, the court argued that requiring a claimant to share in the cost of the arbitrators' fees would deter prospective claimants from bringing claims to enforce their statutory rights.¹⁶⁶ The court concluded that a claimant "could not be required to arbitrate his public law claim . . . if the arbitration agreement required him to

159. Cost-splitting clauses require the parties to share the cost of the arbitration proceedings.

160. In contrast to cost-splitting agreements, loser-pays clauses require the losing party to pay the cost of the arbitration proceedings.

161. *Green Tree*, *supra* note 133.

162. 105 F.3d 1465 (D.C. Cir. 1997).

163. The court interpreted the arbitration clause in issue as not requiring the claimant to pay any arbitration fees and held that the clause, as interpreted, was enforceable.

164. *Id.* at 1468, 1484.

165. *Gilmer*, *supra* note 124.

166. *Cole*, *supra* note 162, at 1468.

pay all or part of the arbitrator's fees and expenses."¹⁶⁷ In *Paladino v. Avnet Computer Techs., Inc.*,¹⁶⁸ the Eleventh Circuit, citing *Cole*, stated that requiring a claimant to pay part of the hefty cost of arbitration was "a legitimate basis for a conclusion that the clause does not comport with statutory policy."¹⁶⁹

The approach in *Cole* was arguably inconsistent with the language and spirit of both *Mitsubishi* and *Gilmer* in that it shifted the focus from an evaluation of the effect of the arbitration agreement on the vindication of federal statutory rights to an evaluation of the equivalence between the costs of arbitration and litigation. The Supreme Court decisions called for the refusal to enforce only those arbitration agreements that have the practical effect of preventing prospective claimants from vindicating their statutory claims. This required not merely a tabulation of the relative costs of both processes, but an examination of whether the cost and other differentials between the two processes practically inhibited the vindication of federal statutory claims.

In its decision in *Green Tree*,¹⁷⁰ the Court shed some light on the nature of the analysis required in effective-vindication cases. *Green Tree* recognized that "large arbitration costs" may prevent a party from vindicating her statutory claims.¹⁷¹ However, it placed the burden on the claimant to establish that the costs of arbitration would be prohibitively expensive.¹⁷² The Court implicitly disapproved the *per se* approach. In rejecting the claimant's effective-vindication defense, the Court focused on the claimant's inability to show that she was likely to incur prohibitive costs.¹⁷³ In the Court's view, the mere "risk" that the claimant would be "saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."¹⁷⁴ After *Green Tree*, lower courts had to rethink their approach towards analyzing the effects of arbitration expenses on the enforceability of arbitration agreements.¹⁷⁵ Although *Green Tree*

167. *Id.* at 1485.

168. *Paladino*, *supra* note 136.

169. *Id.* at 1062.

170. *Green Tree*, *supra* note 133.

171. *Id.* at 90.

172. *Id.* at 91.

173. *Id.*

174. *Id.*

175. However, even subsequent to *Green Tree*, one circuit has held that fee – splitting agreements are *per se* unenforceable. See *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir.

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marked a movement away from the *per se* approach, there remained the issue whether courts should focus on the effect of arbitration costs on the particular claimant or whether the focus should also include the deterrence effect of arbitration costs on a class of prospective claimants. Two divergent approaches emerged in the circuits.

In *Bradford v. Rockwell Semiconductor Systems*,¹⁷⁶ the Fourth Circuit established an individualized approach that a majority of the circuits follow.¹⁷⁷ In *Bradford*, the claimant argued that the fee-splitting provisions in an arbitration agreement rendered the agreement unenforceable as a matter of law because, in his view, requiring claimants to pay all or part of arbitration costs would deter them from enforcing their statutory rights. He suggested that this would undermine the remedial and deterrent purposes of the federal statute.¹⁷⁸ The claimant encouraged the court to adopt a *per se* rule that would make unenforceable all arbitration agreements with fee-splitting provisions “irrespective of actual individual deterrence, based upon the overall deterrent effect of such provisions.”¹⁷⁹

The court rejected the *per se* approach. Although it acknowledged that fee-splitting provisions of an arbitration agreement would make the agreement unenforceable if they impose arbitration fees and costs that are so prohibitive as to effectively deny a claimant access to the arbitral forum,¹⁸⁰ the court felt that *Green Tree* compelled a case-by-case analysis of the effect of such provisions.¹⁸¹ In the court’s view, the refusal by the Court in *Green Tree* to accept “the speculative risk that a claimant might incur prohibitive costs [as grounds for invalidating an arbitration agreement]

2002). The court, however, did not cite *Green Tree* in conducting its effective-vindication analysis. *Id.* at 895.

176. 238 F.3d 549 (4th Cir. 2001).

177. *See, e.g.*, *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711-12 (5th Cir. 2002); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003).

178. *Bradford*, *supra* note 176 at 552. He had alleged his employer had acted in violation of the Age Discrimination in Employment Act, 29 U.S.C.S. § 621.

179. *Id.* In the alternative, the claimant argued that, if the court rejected the *per se* rule, he had personally established sufficient personal hardship and financial deterrence for the court to refuse to enforce the arbitration agreement. *Id.*

180. *Id.* at 554.

181. *Id.* at 557.

undermined the rationale” of the *per se* approach.¹⁸² *Green Tree* required the focus to be on the effect of the arbitration agreement on “the individual litigant” in contrast to the “*per se* rule that would nullify or invalidate an entire category of arbitration provisions.”¹⁸³ The central focus, in the court’s view, should be on “the particular claimant:” whether she has an adequate and effective arbitral forum for vindicating her statutory rights.¹⁸⁴ The court explained the nature of the required analysis as follows:

We believe the appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant’s ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.¹⁸⁵

In finding that arbitration was an appropriate forum for resolving federal statutory claims, the Supreme Court emphasized the importance of a claimant’s ability to vindicate his or her statutory rights in the arbitral forum. This ability was necessary in order for applicable federal statutes to “serve both [their] remedial and deferent function.”¹⁸⁶ Ensuring that a particular claimant is able to vindicate her rights in an arbitral forum by not being precluded from bringing a claim by the exorbitant cost of arbitration will help in realizing the remedial function of the applicable federal statute. However, focusing exclusively on the ability of individual claimants to vindicate their individual claims in the arbitral forum would not necessarily promote the realization of the deterrent function of applicable federal statutes. The provisions of an arbitration agreement may well have the capacity of deterring a class of prospective claimants from vindicating statutory claims without necessarily having that effect in the individual case before a court. For example, the particular claimant may be better resourced than the typical claimant. Consequently, a court may concentrate on the effect of the arbitration agreement on *the claimant* before it may decide to enforce an arbitration agreement, even though the agreement has the broader effect of discouraging other prospective claimants from prosecuting their claims.

182. *Id.*

183. *Id.*

184. *Id.* at 556.

185. *Id.*

186. *See Gilmer*, 500 U.S. 20 at 28.

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The case-by-case approach advocated by *Bradford* may lead to the undermining of the deterrence function of the federal statutes. This approach focuses the effective-vindication analysis almost entirely on the ability of arbitration to serve the remedial function of federal statutes by not deterring the particular claimant before the court, but pays scant attention to the deterrence effect of arbitration agreements on prospective claimants that are not before the court. Although the third prong of the *Bradford* test asks “whether that cost differential is so substantial as to deter the bringing of claims,”¹⁸⁷ the actual analysis conducted by the court focused on the deterrent effect of the fee-splitting provision on the claimant before it.¹⁸⁸

The individualized approach suffers the weakness of ignoring the potential “chilling effect” of certain arbitration agreements in deterring prospective claimants from vindicating their statutory rights.¹⁸⁹ As another court has noted, the key “issue is not only whether an individual claimant would be precluded from effectively vindicating his or her rights in an arbitral forum by the risk of incurring substantial costs, but also whether other similarly situated individuals would be deterred by those risks as well.”¹⁹⁰

Another problem with the individualized, case-by-case approach adopted by *Bradford*, and one which has led to the reduced viability of effective-vindication challenges, is that it requires claimants to prove their personal inability to afford the expense of arbitration. This invariably necessitates claimants submitting information about their personal finances and the projected costs of the arbitration proceedings, a requirement that has had the practical consequence of making it exceedingly difficult for claimants to prevail in effective-vindication inquiries.

In *Green Tree*, the Court made it clear that the mere “risk” that one would be “saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”¹⁹¹ Although the Court did not

187. *Bradford*, *supra* note 176 at 556.

188. *Id.* 558 (noting that “Bradford has failed to demonstrate any inability to pay the arbitration fees and cost . . . to support his assertion that the fee-splitting provision deterred him from arbitrating his statutory claims.”).

189. *Morison v. Circuit City Stores*, 317 F.3d 646, 661 (6th Cir. 2003), discussed *infra* at text accompanying note 197.

190. *Morison*, *supra* note 188, at 661.

191. *Green Tree*, *supra* note 133, at 91.

decide how “detailed the showing of prohibitive expense must be,”¹⁹² it was adamant that the expenses cannot be merely “speculative.”¹⁹³ *Bradford’s* three-prong test, when read together with *Green Tree’s* command that projected expenses be more than speculative, makes it an almost insurmountable task to establish cost-based effective-vindication challenges.

First, it is often difficult for claimants to prove, during the pre-arbitration phase when the court usually entertained these challenges, the projected cost of arbitration with the precision required by *Green Tree* and *Bradford*. The structure of the arbitration agreement may make this projection inherently imprecise, as in cases where the arbitration agreement “allows for different arbitration providers, contain[s] ambiguous language as to how many arbitrators would hear the case, and contains ambiguity involving the possibility of shifting of attorney’s fees.”¹⁹⁴ In such cases, the claimant may have failed to establish the effective-vindication defense even though she potentially faces a huge cost burden. Second, where claimants can only establish a range of possible costs of arbitration because of the difficulty of tabulating exact figures during the pre-arbitration phase of the hearing, courts often utilize the lower range in finding that the claimant has not established the effective-vindication defense. For example, in *Boyd v. Town Hayneville*,¹⁹⁵ the court rejected the defense on the grounds that the projected costs were merely “anticipated,” even though the plaintiff had shown that the arbitration would cost between \$1150 and \$6400 and the plaintiff and his wife had only about \$100 remaining each month after meeting their living expenses.

The *Bradford* approach compounds the difficulty that prospective claimants face in establishing the baseline of arbitration costs against which litigations costs can be compared. If great likelihood of high cost is insufficient to sustain a challenge, prospective claimants, “specifically those with limited means, are unlikely to gamble their food or housing money on the chance of a substantial arbitration award.”¹⁹⁶ The result is that such prospective claimants will be deterred from vindicating their statutory claim, thereby undermining the deterrent effect of the relevant federal statutes.

192. *Id.* at 92.

193. *Id.* at 91.

194. Richard A. Bales & Mark B. Gerano, *Determining the Proper Standard for Invalidating Arbitration Agreements Based on High Prohibitive Costs: A Discussion of the Varying Applications of the Case-by-Case Rule*, 14 *TRANSACTIONS* 57, 66 (2012).

195. 144 F. Supp. 2d 1272 (M.D. Ala. 2001).

196. Jennifer L. Peresie, *Reducing the Presumption of Arbitrability*, 22 *YALE L. & POL’Y REV.* 453, 460 (2004).

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Morrison v. Circuit City Stores,¹⁹⁷ a decision by the Court of Appeals for the Sixth Circuit, has advanced an alternative, more liberal approach in determining whether arbitration agreements operate to prevent the vindication of federal statutory rights. The *Morrison* approach broadens the focus of effective-vindication analysis from the deterrent effect of arbitration provisions on the individual claimant before the court to its effects on a class of similarly situated prospective claimants.¹⁹⁸ This liberal approach factors into the analysis how the arbitration provisions affect the realization of both the remedial function¹⁹⁹ and the deterrence function²⁰⁰ of federal statutes.

The plaintiff in *Morrison*, Lillian Morrison, had signed an arbitration agreement requiring the arbitration of all disputes arising from her employment with Circuit City, including all state and federal statutory claims.²⁰¹ The arbitration agreement contained a cost-splitting clause under which Morrison was to pay a filing fee as well as half of the costs of the arbitration, unless the arbitration tribunal decided otherwise.²⁰² When Circuit City terminated her employment, she filed a suit alleging race and sex discrimination.²⁰³ The district court granted Circuit City's motion to compel arbitration.²⁰⁴ On appeal, Morrison argued that the cost-splitting provision of the arbitration agreement prevented her from effectively vindicating her statutory rights.²⁰⁵

In its decision, the Sixth Circuit discussed the implication of both *Gilmer* and *Green Tree* on the conduct of effective-vindication analysis. The court felt that by requiring that the arbitral forum is accessible to prospective litigants in order "further broader social purposes," *Gilmer*

197. *Morrison*, *supra* note 188.

198. This approach has also been adopted by the Third Circuit. *See Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3rd Cir. 2003).

199. It requires an examination of the issue whether the provisions have the cumulative effect of preventing the potential claimant from vindicating her rights.

200. It requires an examination of the "chilling effect" of the arbitration provisions on a class of similarly situated prospective claimants.

201. *Morrison*, 317 *supra* note 188 at 654.

202. *Id.*

203. *Id.*

204. *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 828-29 (S.D. Ohio 1999).

205. *Morrison*, *supra* note 188, at 657-58. It is instructive to note that because the district court's order to compel arbitration was not stayed when she filed her appeal, the arbitrators had already issued their award before the Court of Appeals issued its judgment. *Id.* at 656.

entailed that “employers should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from” vindicating their statutory rights.²⁰⁶ Although the court acknowledged that *Green Tree* required a case-by-case approach in conducting effective-vindication analysis,²⁰⁷ it rejected the individualized case-by-case approach adopted in *Bradford*. It gave two compelling reasons why the *Bradford* approach was inadvisable: the difficulty of establishing baseline arbitration costs in the manner required under the *Bradford* test and the fact that the individualized approach does not factor in the “chilling effect” some arbitration agreements have in “detering a substantial number of potential litigants from seeking to vindicate their statutory rights.”²⁰⁸ In place of the individualized approach, the court adopted what it called a “revised case-by-case approach.”²⁰⁹ Under this approach, a court conducting an effective-vindication analysis would consider whether the arbitration provisions have the effect of preventing the prospective claimant before the court *and* other similarly situated individuals from vindicating their statutory rights.²¹⁰

The *Morrison* approach is more liberal than the *Bradford* approach for a variety of reasons. It enlarges the focus of the effective-vindicating analysis by factoring in the potential “chilling effect” of the arbitration provisions on similarly situated parties. This enlargement of focus is informed by the need to advance both the remedial and the deterrent functions of federal command statutes.²¹¹ The former function is realized by enabling a particular claimant to vindicate his or her statutory rights. The latter function, which implicates “broader social functions,” is advanced by ensuring that the subjects of statutory obligations do not evade those obligations by immunizing themselves from liability through the use of carefully worded arbitration

206. *Id.* at 658. It added that allowing employers to deter a substantial number of potential litigants would undermine the social goals of the federal statutes and enable employers to evade the requirements of those statutes. *Id.*

207. *Id.* at 659.

208. *Id.* at 660–61.

209. *Id.* at 663.

210. *Id.* According to the court, potential litigants should be allowed “to demonstrate that the potential costs of arbitration are great enough to deter them *and* similarly situated individuals from seeking to vindicate their federal rights in the arbitral forum.” (emphasis added) *Id.* The court’s use of the conjunctive is unfortunate, because while the realization of the deterrence function of federal statutes may require a focus on the effect of arbitration provisions on similarly situated prospective claimants, the realization of the remedial function of these statutes would require a successful effective-vindication challenge where the provisions of the arbitration agreement in question has the effect of deterring the particular claimant from vindicating his or her statutory rights.

211. *Id.* at 663.

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agreements that practically preclude access to the arbitral forum. In the court's view, it is the "presence [of potential litigants] in the system and their ability to vindicate their statutory rights that would help realize the deterrent function of federal statutory rights."²¹²

Furthermore, the *Morrison* approach adopts a more relaxed approach in establishing baseline arbitration costs. Unlike the *Bradford* approach, under which individual claimants have the burden of establishing their potential arbitration costs with a high degree of definiteness, the *Morrison* approach allows the court to "look to average or typical arbitration costs, because that is the kind of information that potential litigants will take into account in deciding whether to bring their claims in the arbitral forum."²¹³ Additionally, in determining the baseline costs of arbitration, the *Morrison* approach does not factor in the possible effect of cost-shifting provisions in eventually reducing the expenses of the claimant.²¹⁴ Because the *Morrison* effective-vindication analysis focuses on the effect of the arbitration agreement on similarly situated claimants, the possibility that the operation of the cost-shifting clause may reduce expenses of an individual claimant is less relevant. After all, the arbitration agreement may still have the overall effect of deterring similarly situated claimants from vindicating their legitimate statutory grievances despite having that practical consequence of reducing the expenses of a particular claimant in the particular instance.²¹⁵

Although the *Morrison* approach is consistent with the goal of realizing the remedial and deterrence function of federal statutes, there remains some tension between this approach and the tenor of Court's decision in *Green Tree*.²¹⁶ In *Green Tree*, the Court focused on whether the costs of arbitration "could preclude a litigant such as Randolph from effectively vindicating her statutory rights in the arbitral forum."²¹⁷ The Court felt that she had failed to establish the effective-vindication defense because "the record [did not]

212. *Id.*

213. *Id.* at 664.

214. *Id.* at 664–65.

215. *Id.* The court observed that "[i]n many cases, if not most, employees considering the consequences of bringing their claims in the arbitral forum will be inclined to err on the side of caution, especially when the worst-case scenario would mean not only losing on their substantive claims but also the imposition of the costs of arbitration." *Id.*

216. *Green Tree*, *supra* note 161.

217. *Id.* at 522.

show that Randolph will bear [large arbitration] costs if she goes to arbitration.”²¹⁸ The Court concluded that a party raising the effective-vindication challenge bears the burden of establishing the likelihood of incurring large arbitration costs.²¹⁹ The Court’s language strongly suggests that the case-by-case analysis should focus on the effect of arbitration provision on individual claimants, as the *Bradford* approach requires. However, narrowing the focus of the analysis in the manner suggested by *Bradford* undermines one of the foundational bases for the Court’s finding that federal statutory claims were arbitrable: the assumption that the arbitral forum, similar to the judicial forum, would advance the realization of the dual functions of federal command statutes.²²⁰

In *Gilmer*, the Court shed some light on the considerations that support the arbitration of federal statutory claims:

[T]he ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but . . . claims under those statutes are appropriate for arbitration. “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”²²¹

Here the court recognizes that federal statutory claims advance “important public policies” separate from the “individual grievances” of particular claimants. Nonetheless, the court finds that these claims are arbitrable, and that the statute will continue to perform its dual functions, so long as claimants are able to vindicate their rights. However, individualized effective-vindication analysis, advocated by *Bradford*, would advance redressing of “individual grievances” without necessarily furthering the realization of the “important social goals” that the *Gilmer* Court recognized are embodied in federal statutes. If arbitration frustrates the realization of these “important social goals,” it cannot be said to “further broader social

218. *Id.*

219. *Id.*

220. See *Mitsubishi*, 473 U. S. at 637 (noting that federal statutes would continue to perform their remedial and deterrent function “so long as the prospective litigant may vindicate its statutory rights”).

221. *Gilmer*, 500 U.S. at 27-28 [internal citations omitted].

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purposes” in the sense envisaged by the *Gilmer* Court and used by it in support of allowing the arbitration of federal statutory claims. It would seem that the *Morrison* approach to effective-vindication inquiry accords better both with the policy justifications used by the Courts for allowing the arbitration of federal statutory claims and with the policy considerations underpinning the effective-vindication doctrine.

In conducting effective-vindication inquiries, it is helpful to have an appreciation of the policy consideration underpinning the doctrine. For example, courts have grappled with how to deal with extra-contractual promises aimed at reducing a claimant’s arbitration costs when such promises are made in an effort to defend an effective-vindication challenge to the enforcement of an arbitration agreement. Courts have adopted varying responses to this strategy.²²² However, careful consideration of the policy underlying the doctrine would suggest that such offers should not be decisive in an effective-vindication inquiry. This is because while such extra-contractual promises advance the remedial function of federal statutory rights, by reducing the arbitration costs of the particular litigant, the arbitration agreements in question may well have the radical consequence of undermining the broader deterrence function of applicable federal statutes, by having a chilling effect on prospective claimants. In *Morrison*, the Sixth Circuit held that courts should reject such extra-contractual promises because, while they may be helpful in providing access to the individual claimant to whom the promise is made, the cost features of the arbitration agreement may deter other prospective litigants from vindicating their statutory claim.²²³ As the court aptly noted, the overriding concern in an effective-vindication inquiry is whether an arbitration agreement “will deter potential litigants from bringing their statutory claims in the arbitral forum.”²²⁴

Green Tree and its progeny make clear that the costs associated with arbitration may preclude a party from vindicating her statutory rights, even

222. For a summary of the relevant cases, see Horton, *supra* note 109, at 741 n.111.

223. *Morrison*, *supra* note 204, at 676–77.

224. *Morrison*, *supra* note 188, at 677. The Sixth Circuit has not consistently applied this approach. See, e.g., *Mazera v. Varsity Ford Management Service*, 565 F.3d 997, 1004–05 (6th Cir. 2009), where the court found that an arbitration agreement was enforceable despite arbitration in the case being “prohibitively expensive” because the defendant had offered to waive some of the fees associated with the arbitration.

though there is divergence in terms of the focus of the inquiry. Although the *Morrison* approach appears more consistent with the goal of reconciling the FAA with the policies and goals of other federal command statutes, the *Bradford* test has been more widely followed. Whether cost-based challenges can be founded on costs other than those of accessing the arbitral forum, such as arbitrators and administrative fees, was taken up by the Court in *American Express*. The Court's answer to this important question is discussed below.²²⁵

2. Structural Bias of Arbitration

Although *Gilmer* and its progeny have substantially limited the ability of courts to use the procedural inadequacies of arbitration as justification for refusing to enforce arbitration agreements, they do not foreclose using the structural bias of particular systems of arbitration as the foundation of effective-vindication challenges.²²⁶ In *Gilmer*, the Court indicated that the allegation of "procedural inadequacies [in an arbitration] is best left for resolution in specific cases."²²⁷ This leaves open the possibility that such inadequacies may justify refusal to compel arbitration. In this respect, the Seventh Circuit has observed that "Gilmer left open a door for plaintiffs to challenge mandatory arbitration of statutory claims by showing that [the] arbitration system is structurally biased."²²⁸

The Sixth Circuit has indicated that the structural bias of a system of arbitration would be sufficient to sustain an effective-vindication analysis. In *Floss v. Ryan's Family Steak House*,²²⁹ the court hinted that structural bias might invalidate an arbitration agreement. The claimant argued that the arbitration rules and procedures available for the arbitration of their Fair Labor Standards Act (FLSA) and Americans with Disabilities Act (ADA) claims prevented them from effectively vindicating their statutory rights.. They argued that the arbitration agreement "allow[ed] for the appointment of a biased and incompetent panel of arbitrators, as well as unduly limit[ed] the participants' discovery opportunities."²³⁰ Although the case was decided on

225. See Part III(b), *infra*.

226. See *Gilmer*, *supra* note 124 at 30 (noting that claimants had not demonstrated that the arbitration regime in the proposed arbitration was inadequate to guard against potential bias).

227. *Id.* at 33.

228. *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F. 3d 361, 366 (7th Cir. 1999).

229. 211 F. 3d 306 (6th Cir. 2000).

230. *Id.* at 311.

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other grounds, the court was receptive to the idea that structural bias in an arbitration framework may prevent claimants from vindicating their statutory claims.²³¹ The court observed that, “even if arbitration is generally a suitable forum for resolving particular statutory claims, the specific arbitral forum provided under an agreement must nevertheless allow for the effective vindication of that claim.”²³²

Soon after, the Sixth Circuit directly addressed the issue in *McMullen v. Meijer, Inc.*,²³³ in which a claimant argued that she should not be compelled to arbitrate her Title VII²³⁴ claims because the arbitration agreement was structurally biased in that it granted her employer exclusive control over the pool of potential arbitrators. The court agreed, holding that the employer’s unfettered control over the pool of potential arbitrators prevented the claimant from effectively vindicating her statutory rights.²³⁵ The court reaffirmed this approach in *Walker v. Ryan’s Family Steak Houses, Inc.*,²³⁶ in which it held that the structural bias in an arbitration agreement prevented claimants from vindicating their rights under the FLSA.²³⁷ The court found that aspects of the arbitration process biased the process against the prospective claimant and in favor of the employer.²³⁸ The court noted that claimants can raise structural bias allegations as part of pre-arbitration challenges because such bias prevents arbitration from being an effective substitute for litigation.²³⁹

Recognition that structural bias may ground an effective-vindication challenge is certainly consistent with the policy arguments the Supreme Court used to justify the arbitrability of statutory claims. These include the assumption that arbitrations are effective substitutes for litigation and that

231. *Id.* at 314. The court expressed “serious reservations as to whether the arbitral forum [in the case] is suitable for the resolution of statutory claims.”

232. *Id.* at 313.

233. 355 F.3d 485 (6th Cir. 2004).

234. Title VII of the Civil Rights Act of 1964.

235. *McMullen*, *supra* note 232, at 494. However, the court remanded the case to the district court for determination whether the arbitrator-selection clause should be severed from the rest of the agreement. *Id.* at 496.

236. 400 F.3d 370 (6th Cir. 2005).

237. 29 U.S.C.S. §§ 201-219.

238. *McMullen*, *supra* note 232, at 385–88.

239. *Id.* at 385 (noting that the unfairness of the arbitrator-selection process makes arbitration an ineffective substitute for the judicial forum).

arbitrations “further broader social purposes” by allowing the realization of both the remedial and deterrent function of federal statutes. Clearly, an arbitration framework that is structurally biased against prospective claimants is not an ideal substitute for litigation and would frustrate the realization of the dual functions of federal command statutes. Moreover, structurally biased arbitration agreements are typically aimed at preventing claimants from vindicating their statutory rights by stacking the deck in favor of the prospective defendant.

The structural bias aspect to effective-vindication challenges is important for another reason. The recognition of structural bias as a basis for invalidating arbitration agreements derives from a vitally accurate insight: the policy considerations supporting the effective-vindication doctrine warrant broadening its scope beyond issues relating to the costs of accessing the arbitral forum and the application of mandatory federal laws, areas in which these challenges have traditionally been used. It remains to be seen how the Court’s recent decision in *American Express* will affect this aspect of effective-vindication challenges.

We now turn to the applicability of effective-vindication challenges to the waiver of class action claims.

3. Class Action Waivers in Arbitration Agreements

Class action waivers are increasingly found in arbitration agreements.²⁴⁰ In the context of arbitrations, these waivers are aimed at barring contracting parties from joining or consolidating claims in arbitration and obligating them to pursue individual claims in separate arbitration.²⁴¹ For businesses, class action waivers are a means of minimizing exposure to problems they associate with aggregation of claims.²⁴² We are here concerned not with the

240. For a discussion of the evolution of the use of class waivers in arbitration agreements, see Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396, *et seq.* (2005). In her article, she uses the phrase “collective action waivers” because these clauses typically “waiver not only the right to participate in class actions, but also the right to participate in classwide arbitrations or to aggregate claims with others in any form of judicial or arbitral proceeding.” *Id.* at 376 n.15.

241. For example, the arbitration agreement between the parties in *Stachurski v. DirecTV, Inc.*, the arbitration agreement provided that “[n]either you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.” 642 F.Supp. 2d 758, 762 (N.D. Ohio 2009).

242. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 WM. & MARY L. REV. 1, 5 (2000). *See also* Maria Glover, *Beyond*

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merits of the arguments against the use of class actions, but on how class action waivers adversely affect the ability of prospective claimants to vindicate their statutory rights. Whatever the merits of the case against class action measures, it is clear that by restricting claim aggregation, class action waivers have the practical consequence of significantly reducing the number of potential claims against businesses, especially where the costs and expenses associated with arbitration pale in comparison to the potential individual recovery.²⁴³ The preclusion of the ability to share expenses with other claimants in a joint action may prevent prospective claimants from vindicating their statutory rights.

Class actions have been particularly useful in aggregating claims whose individual prosecution would be economically unfeasible.²⁴⁴ This role of class actions is especially salient in the context of consumer transactions, where the recovery for individual injury may be very little even though the broader injury to consumers as a group is very great.²⁴⁵ Where potential

Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 VAND. L. REV. 1735, 1745 (2006) (noting that corporations use class action waivers because they view plaintiffs as exploiting “the class action procedure in order to wrest large and unfair settlements from defendants.”).

243. As one commentator has aptly noted, businesses are “insulating themselves from liability by contractually restricting potential plaintiffs’ use of a powerful and legitimate procedural tool in arbitration – the class action.” Byron Allyn Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Stand*, 45 HOUS. L. REV. 215, 218 (2008). This trend has made it more difficult for claimants “to stand up for their rights in the face of corporate neglect or wrongdoing.” Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 668-69 (2011).

244. This sentiment was shared by Justice Rehnquist, who observed that “[c]lass actions ... permit the plaintiffs to pool claims which would be uneconomical to litigate individually.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Instructively, the case in which he made the observation involved “claims averaging about \$100 per plaintiff,” which meant that “most of the plaintiffs would have no realistic day in court if a class action were not available.” *Id.* In a similar vein, the Seventh Circuit has observed that “The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. *Id.* A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997), cited with approval in *Amchen Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

245. David Rosenberg has stressed the role of class actions in ameliorating the “asymmetrical litigation power” evident in low stake claims “involving loss that is large in the aggregate, but too small as incurred by each plaintiff for a competent attorney to consider any single claim

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individual recoveries by consumers is low and the aggregate monetary benefit from violating consumer protection laws is high, a class action waiver may enable a corporation to violate consumer protection laws while practically immunizing itself from liability. Consequently, a class action waiver may operate to undermine both the remedial and the deterrent functions of federal consumer laws.

Despite their limitations, class actions remain a strategy for providing redress to consumers and other small players in the economy for grievances against larger players. As Myriam Gilles has noted:

“... class actions – warts and all – do far more good than harm. I take it as beyond dispute that the threat of class action liability plays a vital role in deterring corporate wrongdoing. And while one might argue – as many scholars do – that class action in contemporary practice may tend to *over* deter, or that agency costs hamper the effectiveness of class action device, I am aware of no serious argument that we should ditch class actions in their entirety. Everyone seems to agree that sound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings.”²⁴⁶

As the frontier of arbitration continues to expand, the restriction that class action waivers put on access to justice comes into sharper focus. In practice, because most class action claims are founded on federal questions, they often implicate federal statutory rights in areas such as federal consumer law, civil rights, antitrust, and securities law.²⁴⁷ Because most statutory claims are now arbitrable,²⁴⁸ parties increasingly use arbitration as a method of resolving these types of claims. The question necessarily arises whether the effective-vindication doctrine may be used to resist the

economically worth prosecuting.” David Rosenberg, *Decoupling Deterrence and Compensation Function in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1906 n.62 (2002).

246. Gilles, *supra* note 239, at 378 (emphasis in original). While Gilles was discussing the importance of class actions in the context of litigation, her arguments are also precisely relevant in the context of arbitration.

247. See Gilles, *supra* note 246, at 391. The class action procedure is often “uniquely suited” for the resolution of certain statutory right. See Melissa Hart, *Will Employment Discrimination Class Actions Survive?* 37 AKRON L. REV. 813, 813 (2004) (suggesting the appropriateness of class action litigation for the resolution of Title VII cases).

248. The arbitrability of most federal statutory claims means that “individuals pursuing long-established statutory claims, such as those brought under the federal securities and antitrust laws, and newer but long-sought civil rights claims, including race, sex, age, and disability discrimination, may now be forced to arbitrate if the parties are deemed to have assented to a pre-dispute arbitration clause.” Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through *Predispute Arbitration Clauses: The Average Consumer’s Experience* LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55–56.

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enforcement of class action waivers in arbitration agreements. It should be noted that the doctrine is irrelevant where a class action waiver operates to preclude class arbitration of an entirely contractual dispute that does not implicate statutory rights. In contrast, the doctrine will be relevant where the waiver is alleged to have the practical consequences of preventing a claimant from vindicating federal statutory rights.²⁴⁹

The evolution of judicial attitude towards the use of the effective-vindication doctrine to challenge the enforcement of class action waivers in arbitration agreements is best understood in the context of the methods that have been used to challenge such waivers. Unconscionability challenges were the first line of defense against enforcing class action waivers in arbitrations.²⁵⁰ The following discussion considers the unconscionability defense to the enforcement of class action waivers and explains how the arguments the Supreme Court used in limiting the availability of that defense came to play an important role in narrowing the availability of effective-vindication challenges.

Unconscionability is a long-standing defense to the enforcement of contractual obligations. Although the FAA, reflects “a liberal federal policy favoring arbitration,”²⁵¹ it contains a savings clause permitting the refusal to enforce arbitration agreements “upon such grounds as exist at law or in

249. Effective-vindication challenges to class waivers in arbitration agreements are distinguishable from challenges based on the inconsistency of class waivers with the framework of particular federal statutes. The Truth in Lending Act, for example, specifically provides for the use of class action litigation. TRUTH IN LENDING ACT, 15 U.S.C. §§ 1601-1693r (2000). Some claimants have suggested that class waivers clauses were unenforceable with respect to claims under the statute because of inherent conflict between the waiver and the enforcement scheme of the statute. Most circuits have rejected this argument. For example, the Third Circuit has held that “simply because judicial remedies are part of a law does not mean that Congress meant to preclude parties from bargaining around their availability.” *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000). The court held that Truth in Lending Act claims were arbitrable even if class action mechanism is unavailable. The attitude of most courts on this issue is that the mere provision for class actions in a statute does not entail that the right is non-waivable. It would seem, therefore, that “a congressional enactment will not be found to be facially incompatible with a collective action waiver in the absence of a specific statutory antiwaiver provision.” Myriam Gilles, *supra* note 239, at 405–06.

250. A commentator has characterized unconscionability challenges to class action waivers as the “first-wave challenges” to their enforceability. *See* Gilles, *supra* note 246, at 399. The “second-wave challenges,” on this view, are effective-vindication defenses. *Id.* at 406.

251. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

equity for revocation of any contract.”²⁵² The Supreme Court has interpreted the savings clause as allowing the invalidation of arbitration agreements on grounds of “generally applicable contract defenses, such as fraud, duress, or unconscionability,” while disallowing their invalidation on grounds of defenses that apply only to arbitration.²⁵³

The unconscionability doctrine was the basis for the first wave of challenges to the enforceability of class-action waivers in arbitration.²⁵⁴ California was at the forefront of these challenges.²⁵⁵ The California Supreme Court emphasized the vital role of class action remedies in consumer transactions and stressed that unconscionability challenges were an invaluable method of halting and redressing the exploitation of consumers.²⁵⁶ The Court articulated a rule [the Discover Bank rule] for determining the enforceability of class action waivers in arbitration agreements:

“[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.”²⁵⁷

This *Discover Bank* rule was influential in stimulating the trend of unconscionability challenges to class action waivers in arbitration. Although this trend was initially resisted in some states, “by 2011 at least fourteen states had ruled class action waivers unenforceable on these broad public

252. Section 2 of the FAA.

253. *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492–93 n.9 (1987).

254. See Gilles, *supra* note 239 at 399-402.

255. Myriam Gilles, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 632 (2012).

256. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal 2005). The court stressed that the importance of the unconscionability defense to the enforcement of class waivers especially in light of the fact that in many cases the “damages in consumer cases are often small” and a corporation may reap a handsome profit by wrongfully exacting “a dollar from each of millions of customers.” *Id.*

257. *Id.* at 1101-1108. (citing CAL. CIV. CODE ANN. § 1668). California courts frequently used this rule as grounds for invalidating class action waivers. See, e.g., *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 556-57 (2005); *Klussman v. Cross Country Bank*, 134 Cal.App. 4th 1283, 1297 (2005); *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1451-53 (2006).

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policy grounds” and the movement was towards the gradual acceptance of the unconscionability defense to class action waivers.²⁵⁸

As this movement gathered momentum, the Supreme Court faced the issue of whether the use of the defense to invalidate class action waivers in arbitration “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of [the FAA].”²⁵⁹ *AT&T Mobility v. Concepcion*,²⁶⁰ presented the Court with the question of “whether § 2 [of the FAA] preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable.”²⁶¹ The case arose from a decision of the Ninth Circuit²⁶² affirming a district court decision²⁶³ invalidating a class-action waiver on grounds of unconscionability. Vincent and Liza Concepcion purchased a two-year service contract from AT&T, which advertised a free or significant discounted phone in exchange for the wireless service contracts. Although AT&T did not charge the Conceptions for the phones, they did charge them with paying a sales tax of \$30.22, based on the full retail value of the phones. They filed a complaint against AT&T alleging that AT&T engaged in false advertising and fraud by charging a sales tax despite advertising the phones as free. The complaint was subsequently consolidated in a class action against AT&T. AT&T moved to compel arbitration, but the district court denied the motion. Although the arbitration agreement had some consumer-friendly features, which reduced the cost of arbitration for prospective claimants,²⁶⁴ the court felt compelled by the *Discover Bank* rule to invalidate the agreement. According to the court, “[f]aithful adherence to California’s stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages,

258. See Gilles, *supra* note 239, at 633. (See note 33 for examples of cases holding that class action waivers were unconscionable under state law).

259. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

260. 131 S. Ct. 1744 (2011).

261. *Id.* at 1746.

262. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

263. *Laster v. T-Mobile USA, Inc.*, 2008 U.S. Dist. LEXIS 103712, 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008).

264. *Id.* at 36. These features of the clause are summarized in the Supreme Court decision. *Concepcion*, 131 S. Ct. at 1744.

compels the Court to invalidate AT&T's class waiver provision."²⁶⁵ The Ninth Circuit affirmed the district court's decision, and further held that the FAA did not preempt the application of the *Discover Bank* rule.²⁶⁶

On appeal, the Supreme Court reversed, holding that the FAA preempted the *Discover Bank* rule because it stood "as an obstacle to the accomplishment and execution of the full purposes and objective of Congress."²⁶⁷ Writing for the majority, Justice Scalia indicated that the central purpose of the FAA "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."²⁶⁸ He reiterated the view that the FAA reflects "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."²⁶⁹ He opined that the savings clause of § 2 of the FAA, which permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," does not validate state laws aimed specifically at limiting the enforceability of arbitration agreements or "that derive their means from the fact that an agreement to arbitrate is at issue."²⁷⁰ Laws and policies that discriminate against arbitration, he noted, are not the kind of grounds for contract revocation that are a permissible basis for invalidating arbitration agreements under § 2.²⁷¹ The saving clause did not preserve state-law rules that interfere with the realization of the objectives of the FAA.²⁷² By requiring the availability of class wide arbitration, the *Discover Bank* rule interfered with the fundamental attributes of arbitration: "efficient, streamlined procedures tailored to the type of dispute."²⁷³ As a result, the rule was inconsistent with the FAA.²⁷⁴ Scalia went on to discuss the ways in

265. *Laster v. T-Mobile USA, Inc.*, at 42.

266. *Laster v. AT&T Mobility LLC*, *supra* note 261 at 852.

267. *Concepcion*, *supra* note 260, at 1753 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

268. *Concepcion*, *supra* note 260 at 1748.

269. *Id.* at 1749.

270. *Id.* at 1746, citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492-93 n. 9 (1987).

271. *Concepcion*, *supra* note 260 at 1746-48. He emphasized that a court, much like a state legislature, may not erect impenetrable barriers to the accomplishments of the objectives of the FAA. In this regard, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Id.* at 1747, (citing *Perry v. Thomas*, 482 U.S., at 493).

272. *Concepcion*, *supra* note 260 at 1748.

273. *Id.* at 1749.

274. *Id.* at 1748.

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which class wide arbitrations interfere with the fundamental attributes of arbitration: by sacrificing the flexibility of arbitration,²⁷⁵ by fostering procedural formality,²⁷⁶ and by increasing the risks to corporate defendants.²⁷⁷ In his view, arbitration was ill suited “to the higher stakes of class litigation.”²⁷⁸ In response to the claim that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” he indicated that “[s]tates cannot require a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons.”²⁷⁹

It is instructive to note that the central issue in *Concepcion*, which was clearly stated in the majority opinion, was whether the FAA preempted the *Discover Bank* rule.²⁸⁰ The Court focused its analysis on whether the rule was valid under the savings clause of § 2. The Court’s decision that the FAA preempted the rule was founded on essentially two grounds. The first was the view that the savings clause “does not preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objective.”²⁸¹ The second was its finding that by “[r]equiring the availability of classwide arbitration,” the *Discover Bank* rule “interfere[d] with the fundamental attributes of arbitration,” and was therefore inconsistent with the FAA.²⁸² *Concepcion* is then best understood as answering the preemption question, which Scalia clearly stated was the one before the Court.

As we shall see, the Court’s dismissal of the argument for the use of class proceedings in prosecuting small-value claims that may fall through the cracks of the legal system was to play an important role in the its analysis of the effective-vindication doctrine in *American Express*.²⁸³ What is important to appreciate at this juncture is that the Court’s dismissal of that argument in *Concepcion* was perhaps understandable in light of its finding

275. *Id.* at 1751.

276. *Id.* at 1751–52.

277. *Id.* at 1752.

278. *Id.*

279. *Id.* at 1753.

280. According to Scalia, “The question in this case is whether § 2 preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.” *Id.* at 1746.

281. *Id.* at 1748.

282. *Id.*

283. See Part III(b), *infra*.

that requiring the availability of classwide arbitration interfered with the fundamental attributes of arbitration.²⁸⁴ If that requirement is inconsistent with the FAA, a contestable position, then the preemption rule compels the invalidation of a state rule enacting that requirement, regardless of the policy merits of the requirement.

Because *Concepcion* subsequently played an unexpected role in *American Express*, it is crucial to reiterate what *Concepcion* did and what it did not do. In examining whether the FAA preempted application of the *Discover Bank* rule, the Court highlighted the various reasons why, in its opinion, the requirement of the availability of classwide arbitrations stood in opposition to the fundamental attributes of arbitration. In light of the pro-arbitration policy of the FAA and that Court's finding that the *Discover Bank* rule interfered with that policy, the Supremacy Clause compelled invalidating the rule. The preemption analysis does not turn on a balancing of the competing public policy interests underlying the FAA, a federal law, and the *Discover Bank* rule, a state rule. Under the Supremacy Clause, the inconsistent state law is necessarily displaced. This explains the Court's breezy dismissal of the claim that class proceedings are necessary for the prosecution of small-value claims. As the Court rightly noted, the desirability of a state rule enhancing the prosecution of small-value claims would not validate the rule if it is inconsistent with a federal statute, in this case, the FAA.²⁸⁵

The Justices who decided *Concepcion* was not concerned with the effective-vindication doctrine,²⁸⁶ and the majority rightfully did not make any reference to the doctrine. As explained above, the effective-vindication doctrine is a means of balancing competing public policies embodied in the FAA and other federal statutes. In contrast, “[preemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated

284. For a rebuttal of the view that the *Discover Bank* rule was an obstacle to a fundamental objective of the FAA, see Breyer's dissent, *Concepcion*, *supra* note 260, at 1758-61.

285. *Concepcion*, *supra* note 260, at 1753.

286. In fact, petitioner in *Concepcion* rightfully assumed that the effective-vindication rule was not in issue in the case. The petitioner stated the issue presented as follows: “Whether the Federal Arbitration Act preempts States from conditioning the enforceability of an arbitration agreement on the availability of particular procedures—here class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their rights.” Brief for Petitioner Issue Presented, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3017755.

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powers, intends one to displace the other.”²⁸⁷ Because the effective-vindication issue was not an issue, the Court did not have to decide whether the preclusion of class-wide arbitration would negatively affect the ability of claimants to vindicate their federal statutory rights. In contrast to the preemption analysis, the effective-vindication analysis would have required the Court to balance the public policy favoring arbitration, enshrined in the FAA, with the need to vindicate the rights enshrined in other federal statutes.

The *American Express* litigation, to which we now turn, presented an opportunity for the Supreme Court to examine the modalities for conducting this balancing-of-policies analysis: the reconciliation of the pro-arbitration policies of the FAA with competing federal policies embodied in other federal statutes. It also provided an opportunity for the Court to examine whether the effective-vindication doctrine could be used to invalidate a class action waiver. We will examine the procedural history of the litigation, evaluate the Supreme Court decision, and explore the broader implications of the decision on the effective-vindication doctrine and on the development of American arbitration law.

III. THE AMERICAN EXPRESS LITIGATION

A. *In the Second Circuit*

The case stemmed from a class-action law suit brought against American Express Travel Related Services Company, Inc., (Amex) by several merchants alleging that Amex had engaged in an illegal “tying arrangement” in violation of Section 1 of the Sherman Act.²⁸⁸ The essential facts were that Amex charged substantially higher fees for its charge cards compared to other credit card providers, and merchants were willing to pay these fees because they believed that holders of charge cards were likely to be more affluent than holders of credit cards.²⁸⁹ When Amex began issuing

287. *Trollinger v. Tyson Foods, Inc.*, 370 F. 3d 5025–26, 608 (6th Cir. 2004).

288. 15 U.S.C. § 1. (2012).

289. While charge card holders are required to pay the full balance on their accounts at the end of the billing cycle, holders of credit cards could make minimum payments at the end of the billing cycle and pay off the balance over time. See *In re Am. Express Merchs’ Litig.*, 2006 U.S. Dist. LEXIS 11742 1 n. 6 (S.D.N.Y. Mar. 15, 2006) (noting that “the credit card is a means of financing purchases” while “the charge card is a method of payment”).

credit cards, it charged significantly higher fees than other credit card providers, thereby decreasing the incentive for merchants to accept Amex's credit cards. To ensure that merchants accepted its credit cards, Amex included an "Honor All Cards" provision in its card acceptance agreement with merchants. This obligated any merchant who accepted one of Amex's card products as payment to honor "any card or other account access device issued by [Amex]."²⁹⁰ As a result, merchants who refused to honor Amex's credit cards were not allowed to honor Amex's charge cards, exposing them to the likelihood of losing "a significant portion of sales they receive[d] from businesses, travelers, affluent customers," and other typical users of Amex charge cards.²⁹¹ The merchants argued that the "Honor All Cards" obligation constituted an illegal tying arrangement.²⁹²

The card acceptance agreement between Amex and the merchants contained a mandatory arbitration provision that included a waiver of class-wide arbitration.²⁹³ When Amex moved to compel arbitration under the terms of the agreement, the merchants resisted on the grounds, *inter alia*, that the class action waiver contained in the agreement would preclude them from vindicating their statutory rights. This was because, according to them, "each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only \$5000."²⁹⁴ The district court held that the arbitration agreement was broad enough to apply to the disputes between the parties and that the merchants' substantive claims, including that regarding the enforceability of the class

290. *In re Am. Express Merchs' Litig.*, 554 F. 3d 300, 308 (2d Cir. 2009), [hereinafter "Amex I"].

291. *Id.*

292. Tying arrangements have been defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Cited with approval in *Amex I*, *id.* at 308., *supra* note 289, at 308. (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958)).

293. The relevant portion of the agreement provided as follows:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.

Amex I, *supra* note 289, at 306.

294. *In re Am. Express Merchs' Litig.*, 2006 U.S. Dist. LEXIS 11742 at 4.

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action waiver provision, were subject to arbitration.²⁹⁵ The court granted Amex's motion to compel arbitration. Because it held that the enforceability of the class waiver provision was an issue for the arbitrator, the court did not rule on the merchants' effective-vindication defense, although it was skeptical about its cogency.²⁹⁶

On appeal, the Second Circuit held that it was proper for the lower court to decide the question of the enforceability of the class action waiver. It then proceeded to consider the merchants' effective-vindication defense. According to the court, the issue was narrow: whether the class action waiver contained in the parties' agreement was enforceable.²⁹⁷ The court distinguished this case from *Gilmer*²⁹⁸ by noting that, unlike in *Gilmer*, the merchants in the instant case were not arguing that the class action waiver was unenforceable merely because the relevant statute allowed class action. Instead they were contending that the enforcement of the class action waiver would preclude them from vindicating their statutory rights.²⁹⁹ Relevant to the case, in the court's opinion, was *Green Tree*,³⁰⁰ which placed the burden on the claimant in an effective-vindication case to prove that arbitration was prohibitively expensive.³⁰¹ In the view of the court, the merchants discharged this burden because there was abundant evidence in the record that they would incur prohibitive costs if compelled to arbitrate their disputes with Amex.

295. See *In re Am. Express Merchs' Litig.*, 2006 U.S. Dist. LEXIS 11742 at 6 (noting that issues relating to the enforceability of the class action waiver was for the arbitrator to decide "once arbitrability is established.").

296. In the view of the court, the "Plaintiffs' contention . . . that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act..." *In re Am. Express Merchants' Litig.*, *id.* at 5. Section 4 of the Act, which the court cited in support of this point, allows for recovery of triple damages, court costs and reasonable attorney's fee. In light of plaintiffs' claim that the discovery costs outweigh the possible average recovery by hundreds of thousands of dollars, the costs associated with the arbitration could still preclude the plaintiffs from vindicating their statutory rights. The trebling of small damages, on the plaintiffs' account, would be insufficient to defray the cost of the expenses associated with the arbitration.

297. *Amex I*, 554 *supra* note 289, at 305.

298. *Gilmer*, *supra* note 124.

299. *Amex I*, *supra* note 124, at 314.

300. 531 *Green Tree*, *supra* note 161).

301. *Amex I*, 554 *supra* note 289, at 315.

The unchallenged evidence in the record showed that the average merchant claimant “might expect four-year damages of \$1,751, or \$5,252 when trebled” while “the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might even exceed \$1million.”³⁰² According to the court, the merchants had demonstrated “the necessity of some class mechanism” for the vindication of their statutory rights. The evidence showed that “the size of the recovery received by any individual [merchant] will be too small to justify the expenditure of bringing an individual action.”³⁰³ The court agreed with the merchants that the practical consequence of enforcing the class action waiver would be that “no small merchant may challenge American Express’s tying arrangements under the federal antitrust laws.”³⁰⁴ In effect, the class action waiver operated to grant Amex *de facto* immunity from liability for violating its obligations under U.S. antitrust laws and was therefore unenforceable.³⁰⁵

The court stressed that class action waivers were not *per se* unenforceable. Each case had to be reviewed on its merits to gauge its effect on the ability of prospective claimants to vindicate their statutory rights.³⁰⁶

In its decision, the Second Circuit sought to balance the pro-arbitration policies of the FAA with the public interest in ensuring that parties are able to vindicate their statutory rights. Instructively, the court noted that this balancing analysis should be conducted “with a healthy regard for the fact that the FAA ‘is a congressional declaration of a liberal federal policy favoring arbitration agreements.’”³⁰⁷

On a petition for writ of certiorari by Amex, the Supreme Court vacated the judgment and remanded it for reconsideration³⁰⁸ in light of its decision in *Stolt-Nielsen*.³⁰⁹ In that case, the court held that a party may not be

302. *Id.* at 317 (testimony of Gary L. French, an economist retained by the merchants. Amex had suggested that the merchants could reduce the experts’ costs by sharing them with other merchants that were suing Amex in similar litigation. However, the court rejected this argument, noting that the parties’ agreement precluded the sharing of costs. The agreement provided that “[t]he arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party.” *Id.* at 318.

303. *Id.* at 320.

304. *Id.* at 319.

305. *Id.* at 320.

306. *Id.* at 321.

307. *Id.*

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

309. *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

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compelled to “submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”³¹⁰ This principle derives from the fact that consent is one of the foundational principles of the FAA.³¹¹ Consequently, a party may not be forced into class wide arbitration without its consent. In the Court’s view, in light of the fundamental changes brought by a change from bilateral to classwide arbitration, an arbitrator may not infer from the silence of the parties’ agreement that they had consented to class proceedings.³¹²

Stolt-Nelsen was, however, relevant to the effective-vindication analysis conducted by the Second Circuit. The Second Circuit did not order class arbitration in its original decision. What it did was find that the waiver of class arbitration was unenforceable because it operated to preclude the prospective claimants from vindicating their statutory rights. *Stolt-Nelsen* stands for the principle that a party cannot be compelled to engage in class arbitration without its consent, and that silence of an arbitration agreement on the availability of class arbitration is not indicative of the contracting parties consenting to class arbitration. Nothing in this principle suggests that the non-availability of class arbitration may not operate to confer *de facto* immunity to a prospective defendant, and thereby, have the consequence, as the Second Circuit found, of preventing a party from vindicating his or her federal statutory rights.

On remand, the Second Circuit reaffirmed its previous decision, finding that its original analysis was not affected by *Stolt-Nielsen*.³¹³ The court rightly noted that the analysis in its previous decision focused not on whether the parties’ agreement provided for class arbitration, but on whether the class action waiver precluded the merchants from effectively vindicating their federal statutory rights.³¹⁴ The availability of a class action mechanism, in the court’s view, is important in this analysis. The court noted that the Supreme Court itself had previously acknowledged the relevance of the class action mechanism as a “vehicle for vindicating federal statutory rights” in cases where it is the “only economically rational alternative” for prosecuting

310. *Id.* at 1775.

311. *Id.*

312. *Id.* at 1776.

313. *In re Am. Express Merchants’ Litig.*, 634 F.3d 187 (2d Cir. 2011) [hereinafter *Amex II*].

314. *Id.* at 193-94.

small-value claims.³¹⁵ The Second Circuit reiterated its previous finding that “Amex has brought no serious challenge to the plaintiffs’ demonstration that their claims cannot reasonably be pursued as individual actions . . . in arbitration.”³¹⁶ Accordingly, it reaffirmed its finding that the class action waiver was unenforceable as it precluded the claimants from effectively vindicating their statutory rights.³¹⁷

Shortly after *Amex II* was decided, the Supreme Court issued its ruling in *Concepcion*,³¹⁸ invalidating the *Discover Bank* rule on the grounds that it was preempted by the FAA. It would be recalled that the rule required the availability of class actions in certain consumer disputes. The Second Circuit decided to consider the effect of *Concepcion* on its decision in *Amex III*.³¹⁹ *Concepcion* was essentially a preemption case in which the court held that states cannot interfere with the realization of the fundamental objectives of arbitration by requiring the availability of class wide arbitrations. Instructively, the preemption analysis does not, as the effective-vindication analysis does, require the courts to balance the competing policies embodied in the FAA and other federal statutes. For this reason, *Concepcion* did not have to determine whether the non-availability of class arbitration precluded the claimants from vindicating their statutory rights.

The Second Circuit reaffirmed its holding in *Amex III*. It found that while “*Concepcion* plainly offers a path for analyzing whether a state contract law is preempted by the FAA,” *Amex* was concerned with something different: the effective-vindication of statutory rights.³²⁰ It noted that *Concepcion* did not decide that class action waivers are *per se* enforceable,³²¹ neither did it invalidate the effective-vindication doctrine articulated by the court in *Mitsubishi* and *Green Tree*.³²² Applying the effective vindication doctrine, the court reaffirmed that because individual actions against Amex were not economically feasible, the class waiver

315. *Id.* at 194 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974)) (“Economic reality dictates that petitioner’s suit proceed as a class action or not at all.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”).

316. *Amex II*, 634 F.3d at 199 (citing *Amex I*, 554 F.3d at 319).

317. *Id.*

318. *Concepcion*, 131 S. Ct. 1740.

319. *In re Am. Express Merchants’ Litig.*, 667 F.3d 204 (2d Cir. 2012) [hereinafter *Amex III*].

320. *Id.* at 213.

321. *Id.* at 214.

322. *Id.* at 214-17.

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provision effectively precluded the merchants from vindicating their statutory rights, and was therefore unenforceable.³²³

The final phase in the protracted proceedings in the Second Circuit was the decision of the court denying a request for *en banc* review of its previous ruling.³²⁴ Concurring in the denial of *en banc* review, Circuit Judge Pooler reiterated the fact that unlike *Concepcion*, which dealt with the preemption of state “rights existing under a common law of unconscionability,” *Amex* involved a different question: “whether the FAA always trumps rights created by a competing federal statute.”³²⁵

In a dissenting opinion, Chief Judge Jacobs argued that *Amex II* swept too broadly and established a principle “that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class action waiver.”³²⁶ He was concerned that such challenges involve “searching” inquiries that would add “more delay, expense, and uncertainty” to the arbitration process.³²⁷ It should be noted that the dissent did not weigh this efficiency argument against the fundamental objective of ensuring that claimants are able to vindicate their statutory rights. The FAA surely reflects a pro-arbitration policy and promotes the use of arbitration as an efficient method of dispute resolution. However, the question remains whether the pro-arbitration policy of the FAA invariably trumps other competing policies embodied in other federal statutes? The dissent did not provide an adequate answer to this question,³²⁸ and as we shall see, neither did the majority of the Supreme Court which reversed the decision of the Second Circuit.

323. *Id.* at 218–19. The court emphasized the point that it was not ordering class arbitration, but was merely pronouncing on the enforceability of the class action waiver. *Id.* at 219.

324. *In re Am. Express Merchants’ Litig.*, 681 F.3d 139 (2d Cir. 2012) (*hereinafter* Amex IV).

325. *Id.* at 140.

326. *Id.* at 143 (Jacobs, J., dissenting).

327. *Id.* at 144–45 (Jacobs, J., dissenting).

328. Chief Judge Jacobs makes two crucial points that presage the decision of the majority of the Supreme Court in this case. He argues that since the Court in *Concepcion* has held that “the FAA preempts even state law that permits evasion of a class action waiver clause,” there was no basis for “permitting *precisely* the same sort of evasion as part” of an effective-vindication analysis. *Id.* at 146–47 (Jacobs, J., dissenting). He further construes *Green Tree* as dealing with the “cost of access to an arbitral forum” and not the overall cost of litigation or arbitrating a claim. *Id.* at 147 (Jacobs, J., dissenting). I consider these arguments below, as part of the evaluation of the Supreme Court’s decision.

B. In the Supreme Court: Narrowing the Scope of the Doctrine

In the Supreme Court, Amex argued that, in reaching its decision, the Second Circuit ignored the FAA's mandate that arbitration agreements should be enforced in accordance with their terms. They also contended that the decision contravened *Concepcion* which, according to them, forbade "refus[ing] to enforce an arbitration agreement on the ground that it precluded class wide arbitration procedures."³²⁹ Advocating a restrictive reading of *Green Tree*³³⁰ and *Mitsubishi*,³³¹ Amex suggested that the former was concerned only with "costs associated with access to the arbitral forum,"³³² while the latter dealt only with the refusal of arbitrators to apply federal substantive law.³³³ It disputed the policy arguments in support of class wide arbitrations. In any event, Amex argued, the FAA compelled enforcement of the arbitration agreement and that "it is Congress's prerogative to weigh [the competing policy considerations relating to the availability of classwide arbitration] and limit bilateral arbitration where it deems appropriate."³³⁴

Before the Supreme Court, the respondent merchants clarified that they were not insisting on class proceedings, but merely wanted to ensure that the arbitration agreement did not operate to preclude them from vindicating their federal statutory rights.³³⁵ They argued that the effective-vindication doctrine was a recognized part of the court's jurisprudence,³³⁶ promoted the legitimacy of arbitration,³³⁷ and was broad enough to invalidate the instant arbitration agreement.³³⁸

329. Brief for Petitioners at 27, *Am. Express Co., et al., v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2012 WL 6755152.

330. *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

331. *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

332. Brief for Petitioners, *supra* note 328, at 18. In Amex's view, such costs included filing fees, arbitrator's fees and other administrative fees, but did not extend to "litigation costs generally." *Id.*

333. *Id.*

334. *Id.* at 19.

335. Brief for Respondents, at 17-18, *Am. Express Co., et al., v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 267025.

336. They disputed the narrow interpretation given to *Mitsubishi* and *Green Tree* by Amex. In their view, the two cases and their progeny "does not turn on the precise way in which the agreement or the costs of arbitrating prevent the vindication of substantive rights. What matters is whether, not precisely why, the federal statutory claims can be resolved in the arbitral forum." *Id.* at 25.

337. They argued that enforcing arbitration agreement such as the instant one that precludes them from accessing the arbitral forum "may cause the public to lose confidence in arbitration as a legitimate mechanism of dispute resolution." Brief of Professional Arbitrators and Arbitration

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It bears noting that the merchants advocated a narrow version of the effective-vindication doctrine. Had this narrow version been accepted by the Court, it would have significantly limited the availability of the doctrine to prospective claimants. According to the claimants, they were not insisting on class proceedings. Their central concern was the availability of a mechanism that allowed them to recoup the costs associated with the proceedings, particularly the high expert costs, should they prevail.³³⁹ They were amenable to non-class arbitration so long as Amex was willing to allow a system that enabled them to recoup costs associated with the arbitration. To this end, they noted that “[i]f Petitioners prefer non-class arbitration, they could offer to shift Respondents’ costs, or they could permit Respondents to share those costs through mechanisms other than class proceedings.”³⁴⁰

The position canvassed by the merchants would limit the applicability of cost-related effective-vindication challenges to cases where the non-recoupable costs incurred by the potential claimants would be higher than their potential net recovery. The practical consequence of this position would be to make effective-vindication challenges unavailable in cases where an arbitration agreement has a chilling effect on the ability of prospective claimants to bring a claim, especially where the maximum recovery in individual arbitrations is so low as to be worth the effort of prosecuting the claim. As one commentator has rightly noted, “[o]nce the question has been reduced to a clinical calculation that asks only whether non-recoupable costs exceed the recovery sought . . . it should be clear that few camels will make it through the eye of this needle.”³⁴¹

The Supreme Court was to reject this narrow conception of cost-based effective-vindication challenge in favor of an even more parsimonious version.

Writing for the majority, Justice Scalia framed the issue before the Court as being “whether a contractual waiver of class arbitration is

Scholars as Amici Curiae in Support of Respondents at 16, *Am. Express Co., et al., v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 457379.

338. Brief for Respondents, *supra* note 334, at 57.

339. *Id.* at 17–18.

340. *Id.* at 18.

341. Myrian E. Gilles, *Gutting the Vindication-of-Rights Challenge to Arbitration Agreements*, 82 *Geo. Wash. L. Rev.* (forthcoming 2013) (manuscript at 25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263401.

enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."³⁴² The majority answered in the negative, holding that the effective-vindication doctrine applies where an arbitration agreement operates to eliminate the "*right to pursue*" a statutory claim, but not where it merely makes it "not worth the expense involved in *proving* a statutory" claim.³⁴³ In reaching this conclusion, the Court stressed the pro-arbitration mandate of the FAA, narrowly interpreted its decisions in *Mitsubishi* and *Green Tree*, and broadly construed its ruling in *Concepcion*.

Scalia began by reiterating the view that § 2 of the FAA requires "courts [to] 'rigorously enforce arbitration agreements according to their terms.'"³⁴⁴ In his view, the mandate to enforce arbitration agreements applies with equal force to federal statutory claims, unless the mandate "has been 'overridden by a contrary congressional command.'"³⁴⁵ This framing of the issue blurs the historical context of the arbitrability of federal statutory claims. The Court was initially cautious in allowing the arbitration of federal statutory claims. In gradually allowing the arbitration of federal statutory claims, the Court recognized the need to balance the pro-arbitration mandate of the FAA with the policies embodied in other federal statutes. While the Court has consistently viewed the FAA as rejecting the antiquated judicial hostility towards arbitration, it has in the past been careful to moderate the commitment to allowing the arbitration of federal statutory claims with the need to advance the functions of relevant federal statutory regimes. The effective-vindication doctrine has served as the moderating mechanism in U.S. arbitration law.

Prior decisions of the Supreme Court have stressed the importance of the doctrine as a limiting principle to the arbitrability of federal statutory claims. For example, in rejecting the argument that, because of the important social policies promoted by the ADEA, arbitration was not an appropriate forum for arbitrating claims arising under the Act, the Court observed that:

342. *Amex*, 133 S. Ct. at 2307. The Court had granted certiorari to consider "[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." *Id.* at 2308.

343. *Id.* at 2311.

344. *Id.* at 2309 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

345. *Id.* (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669). Scalia found that there was there was no congressional command requiring the invalidation of the waiver of class arbitration in the instant case. *Id.*

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We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. . . . The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but [we have held that] claims under those statutes are appropriate for arbitration. “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”³⁴⁶

In contrast, Scalia minimizes the role of the effective-vindication doctrine as a limiting principle by stipulating “contrary congressional command” as the major limitation to the arbitrability of federal statutory claims. He emphasizes that the effective-vindication exception originated as a dictum in *Mitsubishi*,³⁴⁷ seeming not to appreciate how the exception was central to the Court’s analysis. While it is true that the *Mitsubishi* Court “did not hold that federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate his rights in the arbitral forum,”³⁴⁸ the Court indicated in very strong terms that its finding on arbitrability was informed by the belief that the claimants would be able to vindicate their federal statutory rights in the arbitral forum. It was in this regard that it noted that “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”³⁴⁹ Scalia’s dismissal of the doctrine as a dictum in *Mitsubishi* reveals his skepticism of its value. He failed to indicate that the doctrine was “an essential condition”³⁵⁰ of the Court’s decision in *Mitsubishi* and that subsequent opinions of the Court have acknowledged its importance in enforcing arbitration agreements dealing with federal statutory claims.

Tellingly, Scalia states the doctrine originated from “the desire to prevent ‘prospective waiver of a party’s *right to pursue* statutory remedies.’”³⁵¹ In his view, this right would be implicated by arbitration agreements prohibiting prospective claimants from asserting federal

346. *Gilmer*, 500 U.S. at 27-28 (citing *Mitsubishi*, 473 U.S. at 637).

347. *Amex*, 133 S. Ct. at 2310.

348. *Id.* at 2310 n.2.

349. *Mitsubishi*, 473 U. S. at 637 n.19.

350. *Amex*, 133 S. Ct. at 2317 (Kagan, J., dissenting).

351. *Id.* at 2310 (citing *Mitsubishi*, 473 U. S. at 637 n.19).

statutory rights and by arbitrations where prohibitive filing and administrative fees make “access to the forum impracticable.”³⁵² According to him, the doctrine would not apply where “the expense involved in *proving*” a claim precludes a party from vindicating his or her federal statutory rights; this expense “does not constitute the elimination of the *right to pursue*” the claim.³⁵³ In essence, he considers the rules in *Mitsubishi* and *Green Tree* as limited to the facts of the respective cases. The former dealt with the application of federal substantive law in arbitration and the latter with the effect of prohibitive filing and administrative fees in arbitration.

However, *Mitsubishi* and its progeny speak broadly about the ability of prospective claimants to vindicate their federal statutory claims in the arbitral forum. The issue of the application of relevant federal substantive law that arose in *Mitsubishi*, and that of prohibitive filing and administrative fees that arose in *Green Tree*, were merely illustrations of a principle of general application. As Justice Kagan rightly notes in her dissent, the two decisions “establish what in some quarters is known as a principle: When an arbitration agreement prevents the effective vindication of federal rights,” a court may invalidate the agreement.³⁵⁴ She notes that the principle would apply in a range of instances, reaching “the world of other provisions a clever drafter might devise to scuttle even the most meritorious of federal claims.”³⁵⁵ Viewed in this light, the central focus of effective-vindication inquiry ought not to be on the “precise mechanism” but on the overall effect of the arbitration agreement on the ability of prospective claimants to vindicate their statutory rights.³⁵⁶

By interpreting *Mitsubishi* and its progeny so narrowly, the majority effectively shifted the focus of effective-vindication analysis from broader concerns about the ways in which arbitration agreements preclude access to justice in the arbitral forum to a more limited analysis of a notional “right to pursue” federal statutory claims. It should be noted that this narrowing of effective-vindication inquiries is incompatible with the role the doctrine has played in reconciling the competing policies embodied in the FAA and other federal statutes. It has hitherto served as a mechanism for reconciling the

352. *Id.* at 2310–11.

353. *Id.* at 2311.

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

355. *Id.* (Kagan, J., dissenting).

356. *Id.* at 2317–18 (Kagan, J., dissenting). She notes that a central tenet of the Court’s decisions on arbitration: “An arbitration clause may not thwart federal law, irrespective of exactly how it does so.” *Id.* at 2313.

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pro-arbitration mandate of the FAA with the public policies embodied in federal command statutes, thereby enabling courts to invalidate arbitration agreements that preclude the vindication of federal statutory claims.

Prospective claimants may be precluded from vindicating their federal statutory rights not only when a notional “right to pursue” claims is eliminated but where the arbitration agreement and the structure of the arbitration process have the practical consequence of precluding access to the arbitral forum. For example, the Sixth Circuit has used the doctrine to invalidate an agreement due to the structural bias of the arbitration process. Scalia’s narrowing of the focus of effective-vindication inquires would seem to preclude the use of the doctrine in this context. On Scalia’s narrow construction, structural bias does not inhibit the “right to pursue” claims, even though it may have the practical consequence of ensuring that violations of federal statutory rights go without being redressed.

The reconciliation of the FAA and other federal statutes requires more than the protection of the “right to pursue” claims in an arbitral forum. It requires ensuring that arbitration does not become a forum for stifling federal statutory claims, a function that the effective-vindication doctrine has hitherto performed.

Scalia probably believes that the FAA’s pro-arbitration mandate compels a narrow conception of the doctrine. After all, the arbitrability of federal statutory claims can always be “overridden by a contrary congressional command.”³⁵⁷ However, Congress has rarely expressly excluded the arbitrability of federal statutory claims, a fact that does not necessitate the conclusion that Congress countenances the use of arbitration to stifle federal claims. As Kagan notes, Congress did not intend the FAA to become “a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”³⁵⁸ In enacting the FAA, Congress commanded the enforcement of arbitration as a tailored and streamlined mechanism for redressing injuries, not a means of granting “*de facto* immunity” to potential defendants.³⁵⁹

Nonetheless, the majority has now narrowed the doctrine to protect only the “right to pursue” a claim. According to Scalia this right is implicated

357. *Id.* at 2309.

358. *Id.* at 2320 (Kagan, J., dissenting).

359. *Id.* at 2315, 2320.

when an agreement “forbid[s] the assertion of certain statutory rights” and “perhaps [when] filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable.”³⁶⁰ In contrast, he indicates that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”³⁶¹ However, Scalia does not clearly explain why prohibitive filing and administrative fees may operate to eliminate the right, but costs associated with “proving” a claim would not. *Green Tree* was concerned with the alleged effects of prohibitive filing and administrative fees, but there was nothing in that case that suggested that the doctrine would not apply to other expenses associated with arbitrating a dispute.³⁶² In fact, there is little principled basis for confining cost-based effective-vindication challenges to prohibitive “filing and administrative fees,” a limitation the dissent characterized as a “weirdly idiosyncratic.”³⁶³

In support of his decision that the arbitration agreement did not adversely affect the merchants’ “right to pursue” their claims, Scalia observes that class action waivers merely limit arbitration proceedings to the contracting parties, but do not eliminate the right to pursue federal statutory claims.³⁶⁴ It is nonetheless evident that the non-availability of class-action proceedings may in particular instances make the expenses associated with arbitration, when compared to litigation, so prohibitive as to preclude a prospective claimant from vindicating their federal statutory rights. This was precisely the argument made by the merchants. Practically immunizing oneself from suit by making unavailable in compulsory arbitration procedures that are available to a party in litigation has the same practical consequence as eliminating the federal statutory claim.

Scalia emphasizes that class action proceedings only became generally available in 1938, after the passage of the FAA.³⁶⁵ In his view, mechanisms that were considered sufficient to assure effective-vindication of a federal statutory right prior to the emergence of class-action procedures “did not suddenly become ‘ineffective vindication’ upon their adoption.”³⁶⁶ He

360. *Id.* at 2310–11.

361. *Id.* at 2311.

362. *See id.* at 2318 (Kagan, J., dissenting) (noting that *Green Tree* “gave no hint of distinguishing among the different ways an arbitration agreement can make a claim too costly to bring”).

363. *Id.* at 2318 (Kagan, J., dissenting).

364. *Id.* at 2311.

365. *Id.*

366. *Id.*

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argues that “time does not change the meaning of effectiveness, making ineffective vindication today what was effective vindication in the past.”³⁶⁷ But what is required for a party to vindicate its statutory rights is not frozen in time. The focus ought not to be on what, at the time a particular statute was enacted, would preclude a right from being effectively vindicated, but on whether, at the time of the hearing, the arbitration agreement operates to preclude the effective vindication of rights. After all, the doctrine is a method of reconciling the pro-arbitration policy of the FAA with the policy embodied in other federal command statutes. What would enable a party properly to vindicate its rights may change over time. In the instant context, the emergence of class-action proceedings substantially enhanced the ability of consumers and small-value claimants to prosecute federal statutory claims. This materially altered the calculation of what is necessary to vindicate such claims in an arbitral forum.

Cost-based effective-vindication analysis involves, in part, a comparison of the relevant costs of litigation and arbitration. It is difficult to envisage a cost-based effective-vindication challenge succeeding where the cost of arbitration is lower than the cost of litigation. In weighing the cost implications of arbitration agreements, courts look towards the relative costs of litigation and arbitration at the time of the proceedings, not the relative cost at the time the federal command statute was enacted. Similarly, when the waiver of class arbitration is alleged to preclude the vindication of statutory rights, the focus should be on the current state of affairs. Whether the procedural device in question was available at the time the federal statute was enacted is irrelevant in this regard. As Kagan rightfully notes, “the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute.”³⁶⁸

Scalia cites *Gilmer*³⁶⁹ and *Vimar*³⁷⁰ in support of his conclusion that the class waiver clause was enforceable.³⁷¹ In *Gilmer*, the claimant had argued that arbitration of the claim would not adequately enhance the goals of the

367. *Id.*

368. *Id.* at 2319 (Kagan, J., dissenting). She adds that the application of the doctrine “requires courts to determine in the here and now—rather than in ye olde glory days—whether an agreement’s provisions foreclose even meritorious [federal] claims.” *Id.*

369. 500 U.S. 20.

370. 515 U.S. 528.

371. *Amex*, 133 S. Ct. at 2311–12.

ADEA³⁷² because the arbitration agreement in question did not “provide for . . . class actions.”³⁷³ The Court rejected the argument, holding that the fact that the ADEA provided for the possibility of class actions did not mean that it barred “individual attempts at conciliation.”³⁷⁴ It is noteworthy that the claimant in *Gilmer*, unlike those in *Amex*, did not argue that a class action waiver had the practical consequence of preventing them from vindicating their statutory claims. Instead, the claimant in *Gilmer* was concerned that arbitration did not “adequately further the purposes of the ADEA,” merely because it did not provide for class proceedings.³⁷⁵

Similarly, *Vimar* was not concerned with the effective vindication of federal statutory rights. There, the claimant resisted a motion to compel arbitration on the grounds that the inconvenience and cost of the arbitration proceeding would lessen the liability of the carrier under the Carriage of Goods by Sea Act (CGSA).³⁷⁶ The Act prohibited agreements lessening the liability of a carrier. The Court rejected this argument, noting that the CGSA did not “require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.”³⁷⁷ Instructively, the claimants never argued that the cost of arbitration precluded them from vindicating their statutory claim. Their argument was that those costs, together with the inconvenience of arbitration, lessened the liability of carrier. When the *Vimar* Court stated that it was “unwieldy and unsupported by the terms or policy of the statute” to require the “tally[ing of] costs and burdens” of arbitration,³⁷⁸ it was considering whether such tallying was necessary to determine if an arbitration agreement lessened the liability of the carrier. In contrast, such a tallying would be necessary in an effective-vindication analysis, where the claim is not just that the liability of the defendant is lessened, but that an arbitration agreement would have the practical consequence of precluding the vindication of federal statutory rights.

372. 29 U.S.C. § 621 (2012).

373. *Gilmer*, 500 U.S. at 32.

374. *Id.*

375. *Id.*

376. 46 U.S.C. app. § 1303(8) (1988).

377. *Vimar*, 515 U.S. at 536.

378. *Id.*

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Scalia goes on to suggest that the Court's decision in *Concepcion*³⁷⁹ "all but resolves this case."³⁸⁰ He notes *Concepcion* decided that class arbitrations "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."³⁸¹ *Concepcion*, it would be recalled, held that a state court could not condition the enforceability of an arbitration agreement on the availability of class proceedings. *Concepcion* found that such a requirement would "interfere with fundamental attributes of arbitration and thus create a scheme inconsistent with the FAA."³⁸²

However, the issue in *Concepcion* was not whether the arbitration agreement precluded the claimants from vindicating their statutory rights. In fact, the claimants in *Concepcion* neither argued nor suggested that they could not vindicate their federal statutory rights under the framework of their arbitration agreement. The concern of the Court in *Concepcion* was with the *Discover Bank* rule, a California rule, which conditioned enforcement of certain arbitration agreements on the availability of class proceedings. The validity of this state rule did not require consideration of the effective-vindication doctrine. Moreover, as the majority noted in *Concepcion*, "the claim [in dispute] was most unlikely to go unresolved," because the AT&T arbitration agreement in that case contained consumer-friendly provisions that provided adequate "incentive[s] for the individual prosecution of meritorious claims."³⁸³ It was precisely because effective-vindication was not before it that the *Concepcion* Court did not cite the Court's effective-vindication precedents.³⁸⁴

As Kagan notes in her dissent, *Concepcion* was a preemption case.³⁸⁵ The central concern of the Court in *Concepcion* was whether the FAA preempted the California *Discover Bank* rule.³⁸⁶ *Concepcion* held that the

379. 131 S. Ct. 1740.

380. *Amex*, 133 S. Ct. at 2312.

381. *Id.* (citing *Concepcion*, 131 S. Ct. at 1751).

382. *Concepcion*, 131 S. Ct. at 1748.

383. *Id.* at 1753.

384. Justice Kagan emphasizes this point in arguing *Concepcion* did not control the outcome of *American Express*. *Amex*, 133 S. Ct. at 2319-20 (Kagan, J., dissenting).

385. *Id.* at 2320 (Kagan, J., dissenting).

386. *See supra* text accompanying note 256.

state rule was preempted by the FAA because it interfered with the fundamental objectives of the FAA. Because *Concepcion* was a preemption case, the Court did not have to reconcile the pro-arbitration policy of the FAA with the policy embodied in other federal command statutes, as it is required to do in an effective-vindication inquiry. As Kagan rightly notes, in preemption cases the Court has “no earthly interest (quite the contrary) in vindicating [the state] law.”³⁸⁷ Effective-vindication becomes relevant only where there is a conflict between the FAA and another federal statute. In effective-vindication inquiries, unlike in preemption analysis, “one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them.”³⁸⁸

Nonetheless, Scalia believes that *Concepcion* was more than a preemption case and that it establishes rules that apply broadly to arbitrations. According to him, *Concepcion* categorically “rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”³⁸⁹ However, he did not discuss the reasons why the court rejected that argument. The Court in *Concepcion* gave two reasons for that position. The first was the fact that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”³⁹⁰ This consideration is, however, irrelevant in an effective-vindication inquiry, because the relevant tension is not with State law but with the policy embodied in a federal statute that has the same constitutional force as the FAA. The second reason given by the *Concepcion* Court was that the claim involved in that case “was most unlikely to go unresolved” because of the consumer-friendly features of the arbitration agreement.³⁹¹ In essence, the reasons *Concepcion* gave for rejecting the need for class arbitration were not directly relevant to the issues before the Court in *Amex*.

In effect, Scalia decouples the *Concepcion* statement about class arbitration from its preemption context and uses it in service of a thinly founded effort to whittle down the scope of the effective-vindication doctrine. This leads him to make the rather startling claim that *Concepcion* establishes that “the FAA’s command to enforce arbitration agreements

387. *Amex*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

388. *Id.*

389. *Id.* at 2312 (citing *Concepcion*, 131 S. Ct. at 1753).

390. *Concepcion*, 131 S. Ct. at 1753.

391. *Id.*

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trumps any interest in ensuring the prosecution of low-value claims.”³⁹² What support does he provide for this sweeping declaration? Nothing more than *Concepcion*’s rejection of the view that “class proceedings are necessary to prosecute small-dollar claims,”³⁹³ a rejection that, as explained above, the *Concepcion* Court justified by reference to the preemption rule and by emphasizing the fact that the “claim [in *Concepcion*] was most unlikely to go unresolved.”³⁹⁴ From that rather thin premise, Scalia derives the sweeping generalization that the FAA’s mandate to enforce arbitration agreements invariably trumps any public interest in “ensuring the prosecution of low-value claims.”³⁹⁵

Scalia concludes his judgment with an efficiency argument against cost-based effective-vindication challenges. According to him, such challenges would require courts to evaluate theories supporting a claim, the evidence necessary to prove them, and the damages recoverable in the event of success.³⁹⁶ He suggests that this pre-arbitration inquiry “would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure.”³⁹⁷ He states that such a judicially-created inquiry is not sanctioned by the FAA.³⁹⁸ Tellingly, Scalia never mentions the countervailing concern of enabling claimants to vindicate their federal statutory rights. Efficiency is certainly one of the laudable advantages of arbitration and one of the compelling reasons for embracing arbitration as an alternative to litigation. In fact, the expeditious resolution of disputes was a motivating consideration for the enactment of the FAA. However, efficiency is not invariably the determinative consideration, especially where it comes into conflict with the vindication of vital rights granted by Congress. By stating the efficiency argument without counterbalancing it with other competing policy considerations, Scalia fails to conduct the kind of careful balancing of interests required in effective-vindication inquiries.

392. *Amex*, 133 S. Ct. at 2312 n.5.

393. *Concepcion*, 131 S. Ct. at 1753.

394. *Id.*

395. *Amex*, 133 S. Ct. at 2312 n.5.

396. *Amex*, 133 S. Ct. at 2312.

397. *Id.*

398. *Id.*

What is more, the efficiency argument is not as compelling as it appears at first blush. The effective-vindication doctrine has been a part of U.S. arbitration law since it was first propounded in *Mitsubishi*. Yet there is little evidence that it has proven an obstacle to the speedy resolution of disputes in arbitration. There is no evidence that these inquires have “destroy[ed] the prospect of speedy resolution” of disputes by arbitration.³⁹⁹ Moreover, the Court has put a heavy burden of proof on claimants in effective-vindication challenges.⁴⁰⁰ This burden has proved difficult in practice for most claimants to sustain, with the result that most of the challenges end in failure. As Kagan notes, the court has placed limits on the doctrine “which ensure that it does not diminish arbitration’s benefits.”⁴⁰¹ Consequently, the doctrine has “operated year in and year out without undermining, much less ‘destroy[ing],’ the prospect of speedy dispute resolution that arbitration secures.”⁴⁰²

Kagan’s dissent demonstrates a keen understanding of the role the doctrine has played in ensuring access to justice in arbitration, in legitimizing the role of arbitration, and in reconciling the policies reflected in the FAA with those embodied in other federal statutes. She notes that the doctrine is a “limiting principle” to the arbitrability of federal statutory claims, aimed at safeguarding federal rights.⁴⁰³ The doctrine operates to prevent prospective defendants from immunizing themselves from liability for violations of federal statutes.⁴⁰⁴ It ensures that arbitration agreements do not “chok[e] off a plaintiff’s ability to enforce congressionally created rights.”⁴⁰⁵

Unlike Scalia, Kagan attempts to reconcile the doctrine with the FAA. She puts the FAA in its proper historical context, noting that it favors arbitration as a flexible and streamlined method of resolving disputes, not a forum for snuffing out legitimate claims.⁴⁰⁶ The FAA was not designed as an enabling device for conferring *de facto* immunity to prospective

399. *Id.*

400. *See supra* text accompanying note 172.

401. *Amex*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

402. *Id.* at 2316 (Kagan, J., dissenting).

403. *Id.* at 2314 (Kagan, J., dissenting). She notes that the doctrine was “an essential condition” for permitting the arbitration of federal statutory claims. *Id.* at 2317 (Kagan, J., dissenting).

404. *Id.* at 2313 (Kagan, J., dissenting) (noting that the doctrine precludes arbitration agreements from “operat[ing] to confer immunity from potentially meritorious federal claims”).

405. *Id.* (Kagan, J., dissenting).

406. *Id.* at 2315 (Kagan, J., dissenting).

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defendants, she observes, but as a method of promoting actual resolution of disputes in arbitrations.⁴⁰⁷ The effective-vindication doctrine advances this goal “by ensuring that arbitration remains a real, not faux, method of dispute resolution.”⁴⁰⁸ It does this, in part, by incentivizing prospective defendants to fashion arbitration procedures that facilitate, not impede, the efficient resolution of disputes.⁴⁰⁹ The realization that courts would refuse to enforce agreements that operate to immunize prospective defendants from liability for violating federal laws encourages the formation of arbitration agreements that promote actual resolution of disputes. Kagan notes that while the doctrine provides a conducive environment for “[m]ore arbitration [and] better enforcement of federal statutes,” its absence would lead to “[l]ess arbitration [and] poorer enforcement of federal statutes.”⁴¹⁰ She cautions that the majority’s attenuation of the doctrine may lead arbitration “to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”⁴¹¹ This would be far from the tailored and streamlined system facilitating the redress of injuries envisaged by the drafters of the FAA.

In contrast to Scalia, Kagan views *Mitsubishi*⁴¹² and *Green Tree*⁴¹³ as establishing a principle of general application barring the enforcement of arbitration agreements that prevent the vindication of federal rights.⁴¹⁴ Also in contrast to Scalia, she recognizes that this principle applies in a diverse range of circumstances,⁴¹⁵ extending beyond non-application of federal substantive law and prohibitive costs of accessing arbitration, the two areas to which Scalia was inclined to confine the doctrine.⁴¹⁶ For Kagan, the focus is not on the precise nature of the measure in question, but on whether it operates to preclude the vindication of a party’s federal right. This leads her

407. *Id.* (Kagan, J., dissenting) (“What the FAA prefers to litigation is arbitration, not *de facto* immunity”).

408. *Id.* (Kagan, J., dissenting).

409. *Id.* (Kagan, J., dissenting).

410. *Id.* (Kagan, J., dissenting).

411. *Id.* at 2320 (Kagan, J., dissenting).

412. 473 U.S. at 614.

413. 531 U.S. at 79.

414. *Amex*, 133 S. Ct. at 2317 (Kagan).

415. *Id.* at 2317–18.

416. *Id.* at 2310–11.

to reject as “weirdly idiosyncratic” the attempt to limit cost-based effective-vindication challenges to those areas that were at issue in *Green Tree* and *Mitsubishi*.⁴¹⁷ She views the principle as being broad enough to “cover the world of . . . provisions a clever drafter might devise to scuttle even the most meritorious federal claims.”⁴¹⁸

Kagan puts the effective-vindication doctrine in its broader historical context and demonstrates how the doctrine is both consistent with and also furthers the goals of the FAA. Nonetheless, in applying the rule to the facts of the case, she essentially adopts the narrow version of the doctrine advanced by the respondents. Under this view, cost-based effective-vindication challenges would succeed only where the costs associated with arbitrating a claim do not preclude a party from vindicating a federal statutory claim. Her major concern with the arbitration agreement in dispute was that its provisions had the consequence of making the costs associated with the arbitration, particularly the expert fees, prohibitive.⁴¹⁹

The arbitration agreement did not only include a class-action waiver, but it also precluded “any avenue for sharing, shifting, or shrinking necessary costs.”⁴²⁰ The result was that respondent’s outlay for the arbitration would be substantially higher than their largest possible recovery. In essence, the arbitration agreement ensured that the respondents would “[s]pend way, way more money than [their] claim is worth, or relinquish your [federal statutory rights].”⁴²¹ In Kagan’s view, a rational actor would not elect to incur such expenses in return for so little return.⁴²²

Instructively, Kagan believes that a more consumer-friendly arbitration agreement, even one containing a class-waiver, would have survived an effective-vindication challenge. She notes that an effective-vindication challenge is concerned with “whether the arbitration agreement *as a whole* precludes a claimant from enforcing federal statutory rights,” and that the provisions should not be evaluated in isolation because they may “close off

417. *Id.* at 2318. Kagan noted that there was nothing distinctive about the filing and arbitrator’s fees that were in issue in *Green Tree*. Moreover, she added, *Green Tree* “gave no hint of distinguishing among the different ways an arbitration agreement can make a claim too costly to bring.” *Id.*

418. *Id.* at 2317.

419. *Id.* at 2316.

420. *Id.*

421. *Id.*

422. *Id.* (noting that the claim was worth “tens of hundreds of dollars” while the costs associated with the arbitration would run into “the hundreds of thousands.”).

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one avenue to pursue a claim while leaving others open.”⁴²³ In her view, the arbitration agreement containing the class-waiver would not have offended the effective-vindication doctrine “*if* it had provided an alternative mechanism to share, shift, or reduce necessary costs.”⁴²⁴ For her, the decisive consideration was that it foreclosed the use of those mechanisms, such as “informal coordination among individual claims.”⁴²⁵

Scalia’s rejection of Kagan’s, and the respondents’, narrow conception of the effective-vindication doctrine and his espousal of an even more limited conception marks the decline of the doctrine. Severely limited by the majority decision, the doctrine will no longer be helpful in ensuring the prosecution of small value claims. We now turn to the broad implications of Scalia’s parsimonious version of the effective-vindication doctrine.

IV. IMPLICATIONS OF THE NARROWING OF THE EFFECTIVE-VINDICATION DOCTRINE

A. *Small Value Claims*

Amex substantially narrows the avenues for resisting the enforcement of arbitration agreements where they practically limit access to justice. Although *Amex* involved a business dispute regarding the enforcement of antitrust laws, it will have stronger resonance outside this context. Its impact will especially be felt in the areas of consumer transactions and labor relations, areas where class proceedings are frequently the most effective mechanism for vindicating the statutory rights of prospective claimants.

Amex has essentially limited the availability of effective-vindication challenges to the enforceability of arbitration agreements to cases where they interfere with the exercise of the “right to pursue” federal statutory remedies.⁴²⁶ The exercise of this notional “right to pursue” federal statutory claims is not, in the view of the majority, implicated where the costs associated with arbitration make it “not worth the expense involved in

423. *Id.* at 2318 (emphasis in original).

424. *Id.* (emphasis in original).

425. *Id.*

426. *Amex*, 133 S. Ct. at 2310.

proving a statutory remedy.”⁴²⁷ According to the majority, the right is implicated only where arbitration agreements “forbid[] the assertion of certain statutory rights” and “perhaps . . . [where] filing and administrative fees attached to arbitration are so high as to make access to the forum impracticable.”⁴²⁸

The reality is that in many consumer transactions and employee wage-and-hour suits brought under the FLSA, individual recoveries are often notoriously lower than the costs associated with individual arbitration. Class proceedings are consequently the most effective mechanism for prosecuting these claims. Individually unviable, these suits become economically feasible to prosecute when aggregation ensures the sharing of costs and expenses. Hitherto, consumers and employees have used effective-vindication challenges for resisting the enforcement of class action waivers in small value claims. The usual argument is that these waivers operate to preclude small value claimants from vindicating their statutory rights because the individual prosecution of these claims is frequently economically unfeasible. Sadly, *Amex* has now all but eliminated this ground for resisting class action waivers.

Proponents of class action waivers often contend that “informal coordination among claimants” is a way of encouraging the prosecution of small value claims. Interestingly, Kagan suggests this as a solution.⁴²⁹ Along this line, one commentator has suggested that where class proceedings are waived, consumers can “band together to share the cost of attorneys’ fees and expert fees.”⁴³⁰ In his view, even though small value claimants would have to pursue their claims individually, “sharing costs could make their claims economically viable.”⁴³¹ However, practice belies this claim. Characterizing this view as “magical thinking,” another commentator has aptly noted that “courts have tossed hundreds of class actions in the two years since *Concepcion*, and none of them was subsequently revived as a mass of individual arbitrations with shared costs.”⁴³²

427. *Id.* at 2311 (emphasis omitted).

428. *Id.* at 2310–11.

429. See text accompanying note 424, *supra*.

430. Andrew Pincus, quoted in Alison Frankel, *What Hope Remains for Consumers, Employers after SCOTUS Amex Ruling*, REUTERS BLOG (June 20, 2013), <http://blogs.reuters.com/alison-frankel/2013/06/20/what-hope-remains-for-consumers-employees-after-scotus-amex-ruling-2/>.

431. *Id.*

432. See Paul Bland, quoted in Alison Frankel, *id.*

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Amex indicates that the effective-vindication inquiry focuses on the ability of individual claimants to exercise their “right to pursue” statutory remedies. On this view, the question is whether an arbitration agreement adversely precludes an individual claimant from exercising his or her right to pursue a federal statutory claim. This may result from the agreement forbidding the assertion of the right or from filing and administrative fees that make access impracticable. However, most arbitration clauses do not prevent the assertion of federal statutory claims. Consequently, the first prong of the right would rarely be at issue. With respect to the second prong, “consumer-friendly” arbitration agreements will become increasingly relevant. These agreements seek to reduce the cost of filing and administrative fees without necessarily addressing the issue of economic unviability of individual claims. Even though they may reduce filing and administrative fees borne by small-value claimants, these “consumer-friendly” arbitration provisions do not usually provide sufficient incentive for prospective claimants to prosecute legitimate grievances. It is often difficult to find attorneys willing to handle such low-value claims individually. Class proceedings, which enable the accumulation of costs and benefits, provide incentives for the prosecution of these claims. In effect, these “consumer-friendly” provisions, which would pass the test under the second prong of the “right to pursue statutory claims,” leave unaddressed the potential chilling effect that class action waivers have on the ability of small-value claimants to vindicate their federal statutory rights. To make matters worse, Scalia declares that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”⁴³³

Amex has virtually eliminated the relevance of the availability of class proceedings to effective-vindication inquires. The majority suggests that class action waivers do not interfere with the “right to pursue” statutory remedies because they “merely limit[] arbitration to the two contracting parties.”⁴³⁴ It rejects “the argument that class arbitration [is] necessary to prosecute claims ‘that might otherwise slip through the legal system.’”⁴³⁵

433. *Amex*, 133 S. Ct. at 2312 n.5.

434. *Id.* at 2311.

435. *Id.* at 2307.

The consequence is that it would be a fool's errand to challenge the enforcement of a class action waiver with respect to small-value claims.

The "savings clause" of the FAA remains an available method of challenge.⁴³⁶ However, its scope limited; it permits courts to invalidate arbitration agreements based on "generally applicable contract defenses, such as fraud, duress, or unconscionability."⁴³⁷ Moreover, the availability of the unconscionability challenge and the foundation for the first wave of challenges to the enforcement of class action waivers⁴³⁸ have been significantly limited by *Concepcion*.⁴³⁹ *Concepcion* decided that the "savings clause" does not allow courts to invalidate arbitration agreements based on "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."⁴⁴⁰

B. *Effective Vindication of State Rights*

To what extent does *Amex* affect cases where state courts have used the effective-vindication doctrine to invalidate arbitration agreements for preventing the vindication of state, as opposed to federal, statutory rights? This question did not arise directly in *Amex*; however, the opinions of both the majority and the dissent suggest that the effective-vindication doctrine does not apply to the vindication of state rights.

Some state courts have used effective-vindication arguments in refusing to enforce class action waivers. For example, in *Gentry v. Superior Court*,⁴⁴¹ the California Supreme Court held that in some situations, class action waivers in arbitration agreements "would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of [state statutes.]"⁴⁴² The *Gentry* rule called for California courts to invalidate arbitration agreements containing class action waivers where a review of relevant factors⁴⁴³ indicates that "class arbitration

436. See 9 U.S.C. § 2.

437. See *Concepcion*, 131 S. Ct. at 1746.

438. See Gilles, *supra* note 239, at 399.

439. See *Concepcion*, 131 S. Ct. at 1748 (noting that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration.>").

440. *Id.* at 1746.

441. *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007).

442. *Id.* at 450.

443. The case involved a claim for violation of statutory rights to overtime pay. According to the court, the relevant factors include the size of the potential recovery and "other real world

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is likely to be a significantly more effective means of vindicating [state statutory rights] than individual litigation or arbitration, and . . . that the disallowance of class action will likely lead to a less comprehensive enforcement of [the applicable state statute].”⁴⁴⁴ The *Gentry* rule was a clarification of the *Discover Bank* rule⁴⁴⁵ that was invalidated by *Concepcion*.

It is doubtful that the *Gentry* rule survived *Concepcion*, which clearly indicated that state courts may not condition the enforcement of arbitration agreements on the availability of class proceedings. The continued validity of the rule is currently under review by the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles*.⁴⁴⁶ Several federal decisions have held that the rule did not survive *Concepcion*,⁴⁴⁷ and California decisions have questioned its continued validity.⁴⁴⁸

There is, in fact, no principled basis for distinguishing the *Gentry* rule from the *Discover Bank* rule, which was invalidated in *Concepcion*. Like in the *Discover Bank* rule, the *Gentry* rule calls for the invalidation of class action waivers where this is compelled by an evaluation of factors, such as size of the potential individual recovery, the inequality in bargaining power of the parties, and “other real world obstacles” to the individual prosecution

obstacles to the vindication of class member’s rights to overtime pay through individual arbitration.” *Id.* at 568.

444. *Id.*

445. The *Gentry* court stated that it had granted review “to clarify our holding in *Discover Bank*,” *Id.* at 560.

446. *Iskanian v. CLS Transp. of L.A. L.L.C.*, 286 P.3d 147 (2012).

447. *See, e.g., Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp.2d 831, 840 (N.D.Cal. 2012) (“[T]he Court can find no principled basis to distinguish between *Discover Bank*, which was expressly overruled in *Concepcion*, and *Gentry*”); *Sanders v. Swift Transp. Co. of Ariz., LLC*, 843 F. Supp. 2d 1033, 1037 (N.D. Cal. 2012) (“*Concepcion* effectively overrules *Gentry*’ because *Gentry* prohibits the arbitration of claims brought under California labor laws in certain contexts.”); *Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp.2d 1161, 1167 (N.D.Cal. 2011) (“*Concepcion* effectively overrules *Gentry*”).

448. *See, e.g., Truly Nolen of Am. v. Superior Court*, 145 Cal. Rptr. 3d 432, 435 (Cal. Ct. App. 2012), (“Although *Concepcion*’s reasoning strongly suggests that *Gentry*’s holding is preempted by federal law, the United States Supreme Court did not directly rule on the class arbitration issue in the context of unwaivable statutory rights and the California Supreme Court has not yet revisited *Gentry*.”); *Kinecta Alternative Fin. Solutions, Inc. v. Superior Court*, 140 Cal. Rptr. 3d 347, 355 (Cal. Ct. App. 2012) (“A question exists about whether *Gentry* survived the overruling of *Discover Bank* in *Concepcion*, but it is not one we need to decide.”); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011).

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of claims.⁴⁴⁹ This analysis essentially involves the evaluation of state policy considerations, which *Concepcion* rejected as grounds for invalidating class action waivers in arbitration agreements. As the Court stressed in *Concepcion*, regardless of how desirable a particular procedure may be in light of state policy interests, a state may not enact such a procedure if it is inconsistent with the FAA.⁴⁵⁰ Moreover, *Concepcion* has made it clear that a state may not require the availability of classwide arbitration as a condition for enforcing arbitration agreements as this would “interfere[] with fundamental attributes of arbitration.”⁴⁵¹

Amex rejects the arguments for requiring availability of classwide arbitration as a condition for enforcing arbitration agreements. According to Scalia, *Concepcion* “specifically rejected the argument that class arbitrations was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”⁴⁵² To buttress this point, Scalia noted, “the FAA . . . favor[s] the absence of litigation when that is the consequence of a class-action waiver, since its ‘principal purpose’ is the enforcement of arbitration agreements according to their terms.”⁴⁵³

The cumulative effect of *Amex* and *Concepcion* is effectively to abrogate the *Gentry* rule. *Amex* reiterated the preemption of state rules that condition the enforceability of arbitration agreements based on the availability of class proceedings, even when these rules are aimed at ensuring the vindication of state statutory rights.

Post-*Concepcion*, the Massachusetts Supreme Judicial Court has articulated an effective-vindication theory that seeks to invalidate class action waivers that preclude a party from vindicating state statutory rights. In *Feeney v. Dell Inc.*⁴⁵⁴ the court held that the effective-vindication doctrine may be used to invalidate a class action waiver “where the class waiver provision has conferred on the defendant de facto immunity from private civil liability for violations of State law.”⁴⁵⁵ This would be the case “where plaintiff can demonstrate that he or she lacks the ability to pursue a claim against the defendant in individual arbitration according to the terms of the

449. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005).

450. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1753.

451. *Id.* at 1748.

452. *Amex*, 133 S. Ct. at 2307.

453. *Id.* at 2312 n.5.

454. *Feeney v. Dell Inc.*, 989 N.E.2d 439, 460 (Mass. 2013).

455. *Id.*

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agreement.”⁴⁵⁶ The court required an individual factual inquiry to determine whether “class proceedings are the only viable way for a consumer . . . to bring a claim against a defendant, as may be the case where the claims are complex, the damages are demonstrably small and the arbitration agreement does not feature the safeguards found in the *Concepcion* agreement.”⁴⁵⁷ The court was particularly concerned that businesses should not be allowed “[t]o use class action waivers as a means to exculpate themselves from liability for small value claims.”⁴⁵⁸

Even if it was previously in dispute whether *Concepcion* foreclosed this application of the effective-vindication rule, *Amex* makes it clear that it does. The concern of ensuring the prosecution of small value claims, which underlay the *Feeney* decision, has been rendered irrelevant by Scalia’s declaration that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”⁴⁵⁹ Moreover, *Amex* reiterated the Court’s rejection of the necessity of class proceedings for prosecuting claims that may “slip through the legal system.”⁴⁶⁰

There remains the important question whether the effective-vindication doctrine is even relevant in the context of the vindication of state, as opposed to federal, statutory rights. The effective-vindication doctrine has traditionally been viewed as a mechanism for resolving the tension between the pro-arbitration policy of the FAA, and the realization of the policies embodied in other federal command statutes. The assumption is that in commanding the enforcement of arbitration agreements under the FAA, Congress did not intend to undermine the vindication of rights it creates in other statutes. The doctrine enables courts to refuse to enforce arbitration agreements despite the pro-arbitration mandate of the FAA in cases that would preclude a claimant from vindicating his or her federal statutory rights. This reconciliation of tension is not relevant where a state law is inconsistent with the FAA, as the latter would preempt the former under the

456. *Id.*

457. *Id.* at 501-02.

458. *Id.* at 444 (citing an earlier decision in *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007)).

459. *Amex*, 133 S. Ct. 2304, 2312 n.5 (2013).

460. *Id.* at 2307.

Supremacy Clause.⁴⁶¹ As a court has noted, “there is no principled reason to apply the [effective-vindication] doctrine to bar arbitration claims grounded in state laws which were not created by Congress.”⁴⁶²

Although Scalia did not directly discuss whether the effective-vindication doctrine applies in connection with state laws,⁴⁶³ Kagan clarifies the reach of the doctrine. According to her, the doctrine is an important “limiting principle, designed to safeguard federal rights”⁴⁶⁴ She distinguished preemption analysis, which is relevant when a state law conflicts with the FAA, and an effective-vindication inquiry, which is relevant “when the FAA is alleged to conflict with another *federal* law.”⁴⁶⁵ She stresses that in the federal context “one law does not automatically bow to the other.”⁴⁶⁶ Consequently, the doctrine serves the function of reconciling any tension between the FAA and other federal laws.⁴⁶⁷

Because the doctrine is limited to the federal context, it cannot be the basis for sustaining the application of a state rule that conflicts with the FAA. As *Concepcion* makes clear, state laws that “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA]”⁴⁶⁸ are preempted by the FAA, even when they promote desirable social ends. The *Feeney* court acknowledged this point, noting that its rule invalidating class-waivers in arbitration agreements where they preclude the vindication of state statutory rights was sound “not because it can be harmonized with the FAA,” but because it believed that the rule did not conflict with the FAA.⁴⁶⁹ However, *Amex* now makes it clear that such a rule conflicts with the FAA’s mandate to enforce arbitration agreements.

461. See Gilles, *supra* note 254, at 641 (explaining the difference between preemption and effective-vindication analysis).

462. *Orman v. Citigroup, Inc.*, 2012 U.S. Dist. LEXIS 131532, 9 (S.D.N.Y., 2012). See also *Kilgore v. KeyBank Nat’l Ass’n*, 673 F.3d 947, 961 (9th Cir. 2012), *aff’d on reh’g*, 697 F.3d 1181 (9th Cir. 2012) (noting that the limits on the reach of the FAA “may be found only in other federal statutes, not in state law or policy”), *aff’d en banc*, 718 F.3d 1052 (9th Cir. 2013).

463. Scalia references the respondent by saying that the doctrine “serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right.” *Amex*, 133 S. Ct. at 2310. Scalia, however, did not express his view on whether the doctrine applies only to the harmonization of federal statutes.

464. *Amex*, 133 S. Ct. at 2314 (Kagan, J., concurring).

465. *Id.* at 2320. (emphasis in original).

466. *Id.*

467. *Id.*

468. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

469. *Feeney v. Dell Inc.*, 465 Mass. 470, 494. As argued above, *Amex* now makes it clear that the rule conflicts with the FAA.

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V. THE CASE FOR A LEGISLATIVE RESPONSE

By limiting the availability of the effective-vindication doctrine and by stressing that the FAA “trumps any interest in ensuring the prosecution of low-value claims,”⁴⁷⁰ *Amex* weakens the protections and rights afforded to consumers, employees, and others by federal statutes. In the wake of *Amex* and *Concepcion*, a carefully worded arbitration agreement containing a class action waiver might make it practically unfeasible for prospective claimants to vindicate their statutory rights. Together, both decisions significantly limit the mechanisms for resisting enforcement of arbitration agreements that operate substantively to limit access to justice.⁴⁷¹

After *Concepcion*, it was no longer permissible for states to condition enforcement of arbitration agreements on the availability of class proceedings. *Amex* added that the availability of class proceedings is not necessary for the effective vindication of statutory rights,⁴⁷² even where such proceedings are the only viable mechanism for prosecuting such statutory claims. We are told that it is relevant that these claims may fall through the cracks of the system and go without redress.⁴⁷³ According to the Court in *Amex*, the interest in enforcing arbitration agreements supersedes the interest

470. *Amex*, 133 S. Ct. at 2312 n.5.

471. *Amex* compounds the negative effect *Concepcion* has had on access to justice. Following the Court’s decision in *Concepcion*, one commentator noted: “The notion that an injured person has a right to his or her day in court is deeply ingrained in American culture. But the proliferation of arbitration agreements, and the Supreme Court’s aggressive enforcement of them, means that it is increasingly a myth that an injured person can sue.” See Erwin Chemerinsky, Op-Ed., *Supreme Court: Class (action) dismissed*, L.A. TIMES, May 10, 2011, <http://articles.latimes.com/2011/may/10/opinion/la-oe-chemerinsky-class-action-20110510>. *Amex* has now made it clear that the interest in the aggressive enforcement of arbitration agreements “trumps any interest in ensuring the prosecution of low-value claims.” See *Amex*, 133 S. Ct. at 2312 n.5.

472. While class proceedings have their limitations, they serve as a crucial mechanism for protecting the interest of consumers and employees. As one commentator has observed, there are ongoing legislative efforts to reform the class action procedures and it is this legislative procedure; Congress as well as federal and state rules committees, “rather than companies themselves, are best positioned to weigh the benefits and drawbacks of class actions and refine the rules as needed. We should not allow companies to shortcut the legislative process by using arbitration to abolish class actions.” Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 725 (2012).

473. *Amex*, 133 S. Ct. at 2312.

in ensuring that claimants are able in practice to seek redress for violations of their statutory rights.

Amex stresses that the FAA embodies the “overarching principle that arbitration is a matter of contract”⁴⁷⁴ and indicates “courts must ‘rigorously enforce arbitration agreements according to their terms.’”⁴⁷⁵ It is trite that arbitration is a matter of contract and is based on the consent of the parties. What is often lost in this declaration of principle is the reality that in most consumer transactions and employment relations, consumers and employees do not have the bargaining power to negotiate predispute arbitration agreements that would enable them adequately to protect their statutory rights. This is not an argument against enforcing arbitration agreements in consumer and employment contracts,⁴⁷⁶ but one for caution in reviewing the use of arbitration in these areas.⁴⁷⁷

The *Discover Bank* rule⁴⁷⁸ was motivated in part by the recognition that inequality in bargaining power between contracting parties may result in an arbitration that operates essentially to immunize the stronger party from liability for injury to the weaker party.⁴⁷⁹ The *Discover Bank* court used unconscionability analysis to invalidate a category of these agreements. *Concepcion* severely limited the scope of unconscionability challenges to the enforcement of arbitration agreements. To compound this trend, *Amex* now makes it clear that the effective-vindication doctrine, hitherto considered a viable, if limited, method of protecting statutory rights, confers only a notional “right to pursue” statutory remedies. *Amex* construes this right so narrowly that it would scarcely be of use to most prospective claimants.

474. *Id.* at 2309.

475. *Id.* (citation omitted).

476. In fact, arbitration has some useful benefits in the resolution of certain consumer and employment disputes. See, e.g., George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 691-96 (2013) (noting that arbitration, in some contexts, offers benefits to consumers and employees).

477. For a discussion of the case for reform instead of abolishing the use of arbitration the use of arbitration in consumer and employment transactions, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 469 (2011) (arguing for reform of the arbitration regime instead of abolishing the use of arbitration in consumer and employment transactions, “so that consumer arbitration may truly become a useful and beneficial alternative dispute resolution process.”).

478. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal 2005); see *supra* text accompanying note 256.

479. *Id.* at 1110. Part of the relevant factors under the rule was whether “the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” *Id.*

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In addition to the problem of unequal bargaining power, there are also other structural issues that sometimes negatively affect perception of the fairness of the arbitration process, particularly in the consumer and employment contexts. These structural issues, such as “repeat player effect”⁴⁸⁰ and structurally biased arbitration agreements, necessitate a legislative framework for ensuring that arbitration is a fair and neutral process for resolving consumer and employment disputes.⁴⁸¹ This is especially necessary because these disputes typically implicate statutory rights serving important public policy goals.

Furthermore, *Amex* will have the effect of inhibiting the realization of the deterrence function of federal command statutes by shifting the focus of effective-vindication analysis to the ability of individual claimants to exercise their “right to pursue” statutory claims, and by not considering the chilling effect arbitration agreements may have in precluding prospective claimants from vindicating their rights. The Court has previously acknowledged the importance of the deterrence function of these statutes in the context of arbitration,⁴⁸² but the practical consequence of its decision in *Amex* and *Concepcion* is to inhibit the realization of this function by enabling some businesses to practically immunize themselves from liability for violations of these statutes.⁴⁸³

The United States is exceptional in the sense of not affording some protections to consumers with respect to the enforcement of arbitration agreements.⁴⁸⁴ As one commentator has noted, “[t]he United States has been exceptional in its strict enforcement of [Business-to-Consumer] arbitration . . . while other nations have refused or limited enforcement of

480. For a discussion of this effect in the employment context, see Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997).

481. See Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 311-14 (2012) (stressing the need for procedural safeguards in employment arbitrations.).

482. See *supra* text accompanying note 128.

483. See Sternlight, *supra* note 471, at 704 (noting that *Concepcion* afforded “companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.”).

484. See generally Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT’L L. REV. 81, 83 (2012) (arguing that unlike the United States, other countries restrict the availability of arbitration in consumer transactions; Schmitz examined the practice in France, Germany, and the United Kingdom.).

these arbitrations due to public policy.”⁴⁸⁵ The Court compounded this problem. It gave an expansive interpretation to the FAA, in the process broadening its scope,⁴⁸⁶ while paying scant attention to the need to ensure that the arbitral process does not become a means for some businesses to immunize themselves from liability for violating statutory rights. Left unchecked, the Court’s trend towards whittling down the range of defenses available against the enforcement of arbitration agreements—a trend exemplified by the narrowing of the effective-vindication defense in *Amex*—would lead to the continuing erosion of the substantive rights conferred by statutes.

A legislative response has become necessary to regulate the use of arbitration agreements outside the business-to-business context in which arbitrations were historically used.⁴⁸⁷ At the time the FAA was drafted, arbitration was used mostly in commercial transactions. The proliferation of arbitration agreements in consumer and employment transactions is a more recent phenomenon,⁴⁸⁸ necessitating the clarification of the limits and standards for the use of arbitration in these contexts.

The ability of courts to play an active role in policing the use of arbitration in these areas has been hampered by the Supreme Court’s expansive interpretation of the FAA. As a result, courts “have largely abdicated their policing responsibilities.”⁴⁸⁹ Furthermore, the ability of states to regulate the use of arbitration in these areas is limited. With the Court’s expansive reading of the FAA and the preemptive force of the Act, the “savings clause” is about the only mechanism available to states to safeguard against abuses in arbitration.⁴⁹⁰ As the Court has made clear,

485. *Id.* at 103.

486. *See generally* Margaret Moses, *supra* note 8, at 157 (arguing that the Court has misconstrued the FAA).

487. *See* Padis, *supra* note 470, at 672 (noting that “the FAA’s original purpose was to secure enforcement of predispute arbitration in merchant-commercial contracts.”).

488. *Id.* at 679-80 (discussing the proliferation of arbitration agreements in employment and consumer transactions in the last two decades).

489. Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not be an All or Nothing Proposition*, 87 IND. L.J. 289, 301-11 (2012) (discussing the need to police abusive provisions in employment arbitration agreements and the failure of courts to perform this function adequately).

490. *See* Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 388-89 (2007) (discussing the attenuated role of state legislatures in regulating arbitrations).

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“Congress intended to foreclose state legislature attempts to undercut the enforceability of arbitration agreements.”⁴⁹¹

Consequently, legislative efforts to reform the use of arbitration have to come from Congress. Some members of Congress have proposed bills to regulate the enforceability of predispute arbitration agreements in certain transactions, although none of these bills have made it outside the committee stage.⁴⁹² Although these efforts have not been successful, they demonstrate an awareness of the need to safeguard abuses of the arbitral process. For example, the “findings” section of the proposed Arbitration Fairness Act of 2007 makes the case for reform:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. . . .

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed⁴⁹³ Federal policy favoring arbitration over the constitutional rights of individuals.

The various iterations of the proposed Arbitration Fairness Act have sought to limit the availability of predispute arbitration agreements in certain transactions. For example, the 2013 version provides that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil right dispute.”⁴⁹⁴ Under this approach, these types of disputes would be amenable to arbitration only where the parties enter into a post dispute arbitration

491. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). And the Court has not hesitated to strike down state law, as it did in *Perry v. Thomas*, with respect to a state law restricting the availability of arbitration in wage-and-hour claims. 482 U.S. 483 (1987).

492. See Arbitration Fairness Act of 2007, S. 1782, 110th Cong.(2007); Arbitration Fairness Act of 2009, H.R. 1020 § 4, 111th Cong.(2009); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

493. See Arbitration Fairness Act of 2007, *id.*

494. Arbitration Fairness Act of 2013 § 402(a), S. 878, 113th Cong. (2013).

agreement. Presumably, at this point the weaker party would be better equipped to make an informed decision whether to agree to arbitrate the dispute.⁴⁹⁵ However, the chances of enacting the proposed bill in the current political climate in Washington are slim.⁴⁹⁶

One area in which there has been some legislative success is the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),⁴⁹⁷ which established the Consumer Financial Protection Bureau (CFPB). Dodd-Frank empowered the agency to “prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and of the protection of consumers.”⁴⁹⁸ The Act also requires the Bureau to study the use of arbitration in consumer transactions and report its findings to Congress.⁴⁹⁹ Congress would presumably take action to address any problems identified in the report. Recently, the Bureau issued final rules prohibiting the use of predispute arbitration agreements in mortgage and home equity loan contracts.⁵⁰⁰ The Bureau has also launched an inquiry to determine “how consumers and financial services companies are affected by arbitration and arbitration clauses.”⁵⁰¹ After completing the inquiry, the Bureau “will assess

495. For the case against restricting the availability of predispute arbitration agreement, see Peter B. Rutledge, *Who Can be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008) (arguing that post dispute arbitration is not a viable alternative to enforcing predispute arbitration agreements).

496. According to govtrack.us the 2013 bill has 9% chance of getting past the committee stage and 3% chance of being enacted into law. See <http://www.govtrack.us/congress/bills/113/hr1844> (last visited Sept. 17, 2013).

497. 12 U.S.C. § 5301.

498. Dodd-Frank, *id.* § 1028(b). Under § 1002 of the Act, the jurisdiction of the Bureau is limited to the consumer laws enumerated in that section. It should also be noted that the Act also prohibits the use of predispute arbitration agreements in mortgage and home equity loan contract. Section 1414(e)(1) provides that “[n]o residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.”

499. Dodd-Frank, *id.* § 1028(a).

500. The rule issued on June 1, 2013 provides that “[a] contract or other agreement for a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer’s principal dwelling) may not include terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claim arising out of the transaction.”

501. CFPB PRESS RELEASE (Apr. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>.

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whether imposing conditions or prohibitions on arbitration clauses would better protect consumers and serve the public interest.”⁵⁰²

Although the efforts in Congress to reform the use of arbitration have so far been met with limited success, *Amex* will add to the widening call for a broad legislative solution to the problem of access to justice in arbitration.

CONCLUSION

Amex has brought into sharper focus the need to reform the FAA, especially as it relates to the arbitration of consumer and employment disputes. These types of disputes often require the application of statutes designed to protect consumers and employees. Consequently, it is crucial that arbitration is an effective and fair mechanism for redressing injury for violations of these protective statutes. The FAA was drafted at a time when arbitration was infrequently used to resolve consumer and employment disputes. It is therefore not surprising that it does not contain safeguards that guarantee that arbitration is utilized legitimately in these areas. As arbitration is increasingly used as a method of resolving these disputes, the case for safeguards becomes evident.

Unfortunately, *Amex* is the latest illustration of the Court’s unwillingness to provide the necessary safeguards. It has instead chosen to interpret the FAA, originally conceived to promote the arbitration of commercial disputes, in a manner that substantially weakens protections for consumers and employees, and restricts access to arbitral justice. For the Court, promoting the efficiency of arbitration has become an overriding consideration. In the view of the Court, neither the interest in promoting fairness nor the need for effective redress for violations of vital statutory rights can interfere with the efficiency of arbitration.

However, if the arbitral process is perceived as unfair, the public will begin to question its legitimacy as a mechanism for resolving disputes. Certainly, arbitration provides the important benefit of a flexible and efficient method of resolving disputes. Nonetheless, it will continue to play this vital role only if the public retains confidence in the fairness of arbitration. As this paper has argued, corrective reforms are necessary to restore the legitimacy of arbitration.

⁵⁰² *Id.*

The time has come for Congress to reform the FAA. Because of the limitations the Supremacy Clause places on the ability of states to enact necessary reforms, states are unable to perform this function. Additionally, the Court has been reluctant to interpret the FAA in a manner that would guarantee the fairness of the arbitral process.

Recent decisions of the Court threaten to make arbitration “a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”⁵⁰³ Congress should act to ensure that arbitration continues to perform its vital and historical function as “a way of using tailored and streamlined procedures to facilitate redress of injuries.”⁵⁰⁴

503. *Amex*, 133 S. Ct. at 2320.

504. *Id.*