THE USE OF ARBITRATION AGREEMENTS TO DEFEAT FEDERAL STATUTORY RIGHTS: WHAT REMAINS OF THE EFFECTIVE VINDICATION DOCTRINE AFTER *AMERICAN EXPRESS V. ITALIAN COLORS RESTAURANT*?

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ABSTRACT

The enforceability of agreements to arbitrate disputes arising under federal statutes is a relatively recent development in American law. One of the key restrictions on the use of arbitration for federal statutory claims has been the effective vindication doctrine. Pursuant to the effective vindication doctrine, arbitration agreements are only enforceable if the agreed upon procedures allow for the effective

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vindication of the parties' rights under federal statutes. The Supreme Court's decision in *American Express v. Italian Colors Restaurant*, however, has now cast doubt upon the continued validity of the effective vindication doctrine.

In *American Express*, the Supreme Court rejected the argument that an arbitration agreement which prohibited class actions prevented parties with relatively low value antitrust claims from effectively vindicating their statutory rights. In rejecting that argument, *American Express* described the effective vindication doctrine as a theory that originated in dictum and has never been applied by the Court. *American Express* has left lawyers and lower courts wondering whether the effective vindication doctrine is still good law, and, if so, under what circumstances it still applies.

This Article examines the rationale and development of the effective vindication doctrine, and concludes that the effective vindication doctrine is still good law. In light of *American Express*, however, courts will apply the effective vindication doctrine more narrowly than they have in the past. The article analyzes what types of arbitration agreements are still likely to run afoul of the effective vindication doctrine, and suggests how arbitrators should react when faced with arbitration agreements that make it increasingly difficult for parties to prove federal statutory claims.

I. INTRODUCTION

Since the Federal Arbitration Act[1] went into effect in 1926,[2] agreements to arbitrate rather than litigate contractual disputes have been enforceable in federal courts.[3] Agreements to arbitrate disputes involving violations of federal statutes, on the other hand, did not become enforceable until 1985 when the Supreme Court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[4] As a relatively recent invention, the legal principles governing the arbitration of statutory rights are still developing.[5] One particularly unsettled aspect of the developing law of arbitration of statutory rights is the effective vindication doctrine.[6]

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1. 9 U.S.C. §§1-16 (West 2015) [hereinafter "FAA"].

2. *Id.* at §14.

3. *Id.* at §§3, 4.

4. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). Prior to *Mitsubishi Motors,* the Supreme Court had only construed the FAA to require enforcement of agreements to arbitrate contract claims. *Id.* at 647 (Stevens, J., dissenting).

5. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1473 (D.C. Cir. 1997) (describing arbitration of statutory claims as "the new kid on the block"); Mohamed v.

The effective vindication doctrine had its genesis in *Mitsubishi Motors*, the case that first interpreted the FAA as applying to agreements to arbitrate statutory rights.[7] It is based on the concept that by agreeing to arbitrate rather than litigate a civil dispute arising under a federal statute, the complaining party "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[8] The purpose of an underlying federal statute would still be served in arbitration, therefore, so long as the arbitrating claimant "effectively may vindicate its statutory cause of action in the arbitral forum."[9] In the years following *Mitsubishi Motors*, the parameters of the doctrine were developed in several subsequent Supreme Court cases,[10] and in numerous lower court cases.[11]

Then, in 2013, the Supreme Court decided *American Express Co. v. Italian Colors Restaurant,*[12] and substantially limited the application of the effective vindication doctrine.[13] In that case, the plaintiff merchants

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Uber Techs., Inc., No. C-14-5200, 2015 U.S. Dist. LEXIS 75288, at *18 (N.D. Cal. June 9, 2015) (discussing increasing complexity "in recent decades" of legal principles to be applied when determining enforceability of arbitration agreements).

6. *See infra* II.B.

7. *Mitsubishi Motors*, 473 U.S. at 628; *see also* Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013) (effective vindication "originated as dictum in *Mitsubishi Motors*").

8. *Mitsubishi Motors*, 473 U.S. at 628.

9. *Id.* at 637.

10. *See* Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 89-92 (2000) (discussing effective vindication in light of plaintiff's objection to arbitration costs); Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539-41 (1995) (rejecting as premature argument that foreign arbitrator would not apply Carriage of Goods at Sea Act); Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 27-34 (1991) (enforcing agreement to arbitrate claim under Age Discrimination in Employment Act). Additionally, in *14 Penn Plaza LLC. v. Pyett*, 556 U.S. 247 (2009), the Court held that an arbitration clause in a union-employer collective bargaining agreement required an employee to arbitrate his claim arising under the Age Discrimination in Employment Act. *Pyett*, 556 U.S. at 251. Because the issue was not properly briefed or presented, *Pyett* declined to consider whether the arbitration agreement operated to prevent employees from effectively vindicating their federal statutory rights. *Id.* at 273-74.

11. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 29 (1st Cir. 2006) (arbitration provision barring treble damages prevents vindication of statutory right in antitrust case); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 658-65 (6th Cir. 2003) (discussing application of effective vindication doctrine in cases where arbitration costs are to be split); Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1059-60 (11th Cir. 1998) (declining to enforce arbitration agreement which would not allow plaintiff all remedies required under Title VII of the Civil Rights Act).

12. *Am. Express*, 133 S. Ct. at 2304.

13. *See id.* at 2310 (describing effective vindication as dictum that has never been applied by Supreme Court); *see also id.* at 2313 (Kagan, J., dissenting) (describing the

complained that their contracts with American Express violated the Sherman Act.[14] Those same contracts contained a provision that required arbitration of disputes, but prohibited arbitrations on a class basis.[15] That presented a problem for the complaining merchants because the estimated cost of proving the case greatly exceeded the maximum possible recovery for an individual claimant.[16] The Second Circuit, citing Supreme Court precedents, held that under those circumstances, the arbitration agreement gave the merchants no "opportunity to vindicate their statutory rights," and was thus unenforceable.[17] The Supreme Court not only reversed the Second Circuit, but in doing so stated that the effective vindication doctrine had its origins in dictum, and had never been applied by the Supreme Court to invalidate an arbitration agreement.[18]

American Express has left both the federal courts and attorneys drafting arbitration agreements wondering what, if anything, remains of the effective vindication doctrine.[19] This Article attempts to answer that question. Part II of the Article reviews the development of the effective vindication doctrine from its origins through the Supreme Court's decision in *American Express*. Part III considers the types of arbitration clauses typically thought to raise effective vindication issues, and analyzes whether they are still likely to do so after *American Express*. Part III concludes that it is likely that the effective vindication doctrine is still good law, but that its application will be more limited than before *American Express*. More specifically, Part III concludes that the effective vindication doctrine will still apply to arbitration agreements that impose prohibitive arbitral fees on claimants, appoint obviously biased arbitrators, have unreasonably short limitations periods, or prohibit the award of statutory remedies. It is unlikely that the effective vindication doctrine will apply to arbitration agreements that make it difficult to prove statutory claims, such as agreements that limit discovery. Part IV argues that, in light of the narrowed scope of the effective vindication

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majority's decision as "a betrayal of our precedents" that "prevents the effective vindication of statutory rights").

14. *Id.* at 2308.

15. *Id.*

16. *Id.*

17. *In re* Am. Express Merchants Litigation, 667 F.3d 204, 219 (2d Cir. 2012), *rev'd sub nom. Am. Express*, 133 S. Ct. at 2304.

18. *Am. Express*, 133 S. Ct. at 2308.

19. In particular, *American Express* states that the effective vindication exception to the enforceability of arbitration agreements "would perhaps cover filing and administrative fees attached to the arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11.

doctrine, arbitrators hearing cases that allege federal statutory violations should adapt arbitral procedures in order to give claimants a fair opportunity to prove statutory claims.

II. THE DEVELOPMENT OF THE EFFECTIVE VINDICATION DOCTRINE

A. The Enforceability of Agreements to Arbitrate Statutory Claims

In 1925, Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[20] Section 2 of the FAA states:

> 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.[21]

Section 1 of the FAA exempts from its purview "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[22] The Supreme Court has construed the term "workers engaged in foreign or interstate commerce" narrowly so that the exclusion applies only to workers engaged in transportation.[23] The phrase "transaction involving commerce" in Section 2, on the other hand, has been construed broadly to mean the same thing as "affecting commerce," so that the FAA operates as a full exercise of Congress' power to regulate interstate commerce.[24] Furthermore, the Court has held that the FAA preempts

20. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).
21. 9 U.S.C.A. §2 (West 2015).
22. *Id.* at §1.
23. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113-21 (2001).
24. Allied-Bruce Terminix Cos., v. Dobson, 513 U.S. 265, 273-77 (1995).

state law.[25] The collective effect of the Court's decisions construing the FAA gives the statute an extremely broad scope.[26]

Section 3 of the FAA states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[27]

Section 4 provides that if a party to "a written agreement for arbitration" refuses to arbitrate, the aggrieved party may petition a United States District Court for an order directing the parties to arbitration.[28] Read together, Sections 2, 3, and 4 of the FAA require federal courts to enforce agreements to arbitrate in contracts "involving commerce"[29] by staying litigation[30] and directing the parties to arbitration.[31] The courts will, however, not enforce a putative agreement to arbitrate if the agreement is revocable "upon such grounds as exist at law or in equity for the revocation of any contract."[32]

The FAA explicitly requires the enforcement of contracts to arbitrate disputes "arising out of such [a] contract."[33] But does it require enforcement of agreements to arbitrate disputes arising under a federal

25. *Id.* at 272.

26. *See id.* at 275 (broad interpretation of FAA consistent with its purpose); Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (Congress "contemplated a broad reach of the Act, unencumbered by state-law constraints."); *see also Circuit City,* 532 U.S at 132 ("There is little doubt that the Court's interpretation of the Act has given it a scope far beyond the expectations of the Congress that enacted it.") (Stevens, J., dissenting).

27. 9 U.S.C.A. §3 (West 2006).

28. *Id.* at §4.

29. *Id.* at § 2.

30. *Id.* at § 3.

31. *Id.* at § 4.

32. *Id.* at § 2.

33. *Id.*

statute? The answer to that question requires an analysis of which individual statutory rights may be waived, and which may not.[34]

At one end of the spectrum of possible approaches, one could argue that individual parties should be able to waive any statutory right. For example, an employee might agree that his employer could pay him less than the federal minimum wage, and that the employee would waive his right to seek redress under the Fair Labor Standards Act.[35] Allowing such waivers would arguably be consistent with free market economics because the waiving party is exchanging his statutory right for something that he values more.[36] American jurisprudence, however, prohibits the prospective waiver of a private party's federal statutory right if that right affects the public interest and the waiver would contravene statutory policy.[37] That prohibition does not extend to the waiver of a right to sue as part of a bona fide settlement of an existing claim.[38] Prospective waivers differ from waivers of rights that have already accrued because "prospective waivers of statutory rights tend to encourage violations of the law by notifying the wrongdoer in advance that he or she can act with impunity; therefore prospective waivers uniquely can violate public policy."[39]

At the opposite end of the spectrum, one could argue that parties to a contract should not even be able to waive their right to litigate rather than arbitrate claims arising under federal statutes. That was the approach that

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34. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (analyzing enforceability of agreement to arbitrate federal statutory claim in terms of "waiver of the right to a judicial forum").

35. *See* 29 U.S.C.A. § 216(b) (West 2015) (providing right of action to employee paid less than minimum wage). The Supreme Court addressed the issue of whether an employee could waive his right to damages under section 16(b) of the Fair Labor Standards Act, and held that he could not. *See* Brooklyn Sav. Bank v. O'Neill, 324 U.S. 697, 706-07 (1945).

36. *See* Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d 903, 906-07 (7th Cir. 2004) ("[N]o general doctrine of federal law prevents people from waiving statutory rights. . . for other things they value more[.]").

37. *Brooklyn Sav. Bank*, 324 U.S. at 704; *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("clear that there can be no prospective waiver of an employee's rights under Title VII" of the Civil Rights Act). This is consistent with the general rule of contract law that a contract term is unenforceable as against public policy if it exempts "a party from tort liability for harm caused intentionally or recklessly," or for harm caused negligently by a breach of "a duty of public service" to one to whom that duty is owed. RESTATEMENT (SECOND) OF CONTRACTS § 195(2) (2010).

38. *See Brooklyn Sav. Bank*, 324 U.S. at 714 (distinguishing waiver given as part of bona fide settlement).

39. Cange v. Stolter & Co., 826 F.2d 581, 594 n.11 (7th Cir. 1987); *see also* Newton v Rumery, 480 U.S. 386, 397-98 (1987) (upholding release of § 1983 claim in settlement in consideration of dismissal of criminal charge).

the Supreme Court initially took in *Wilko v. Swan*[40] and in *Alexander v. Gardner-Denver Co.*[41] In *Wilko*, a securities brokerage firm and its customer entered into a written contract that included a provision requiring arbitration of any controversy arising under that contract.[42] The customer later sued the brokerage firm in federal court under the Securities Act of 1933.[43] The defendant firm moved to stay the litigation pursuant to Section 3 of the FAA and the parties' arbitration agreement.[44] The plaintiff customer, however, relied on Section 14 of the Securities Act of 1933, which prohibits enforcement of agreements to "waive compliance" with that Act's provisions.[45] He argued that "arbitration lacks the certainty of a suit at law," and that enforcing the agreement to arbitrate would be an impermissible waiver of his rights under the Securities Act.[46]

The *Wilko* Court agreed with the customer that enforcing the agreement to arbitrate would be an impermissible waiver of his right to sue under the Securities Act. [47] In the view of the *Wilko* Court, even though the substantive provisions of the Securities Act would have applied in arbitration, their effectiveness would have been "lessened in arbitration as compared to judicial proceedings."[48] The Court noted that in arbitration the Securities Act would be:

> applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact' . . . cannot be examined.[49]

Accordingly, the Court concluded that Congress did not intend agreements to arbitrate alleged violations of the Securities Act to be enforceable.[50]

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40. Wilko v. Swan, 346 U.S. 427 (1953).
41. *Alexander*, 415 U.S. at 36.
42. *Wilko*, 346 U.S. at 432 n.15.
43. *Id.* at 428-29.
44. *Id.* at 429.
45. *Id.* at 432-33; *see also* 15 U.S.C. §77n (West 2015).
46. *Wilko*, 346 U.S. at 432-33.
47. *Id.* at 435.
48. *Id.*
49. *Id.* at 436.
50. *Id.* at 438.

The Court's skepticism of arbitration as a method of resolving disputes involving federal statutes was repeated in *Alexander v. Gardner-Denver Co.*[51] In that case, Alexander was fired by the Gardner-Denver Company for what the company alleged was poor work performance and what Alexander alleged was race discrimination.[52] Alexander was represented by a union which, pursuant to the terms of its collective bargaining agreement with Gardner-Denver, arbitrated whether Alexander should be reinstated.[53] The arbitrator ruled against Alexander, finding that he had been "discharged for just cause."[54] Alexander then sued Gardner-Denver, alleging that Gardner-Denver discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964.[55] Gardner-Denver argued that it should be granted summary judgment in the Title VII litigation based on the decision from the prior arbitration.[56] The Supreme Court rejected Gardner-Denver's argument on the ground that:

> Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. . . . 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.[57]

Alexander v. Gardner-Denver and *Wilko v. Swan* together indicated that agreements to arbitrate disputes would not require the parties to arbitrate disputes arising under federal statutes.[58] That approach changed, however, in 1985 when the Court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[59] *Mitsubishi* concerned a dispute between a Japanese automobile manufacturer and a Puerto Rican distributor, both

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51. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
52. *Id.* at 38-42.
53. *Id.* at 39-42.
54. *Id.* at 42.
55. *Id.* at 43.
56. *Id.* at 55-56.
57. *Id.* at 56.
58. The Court's negative view of arbitration for disputes involving federal statutory rights was reinforced by the subsequent cases of *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981) (arbitration insufficient to protect employee's rights under the Fair Labor Standards Act), and *McDonald v. West Branch*, 466 U.S. 284, 290 (1984) (arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard.").
59. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

of which were parties to a written Distributor Agreement.[60] The Distributor Agreement provided for disputes to be settled by arbitration in Japan under the rules of the Japan Commercial Arbitration Association.[61] When a dispute arose that included claims under the Sherman Act,[62] the distributor argued that it should not have to arbitrate its statutory claims.[63] The Supreme Court rejected that argument[64] in a marked departure from its prior decisions concerning arbitration of statutory rights.[65]

For decades prior to *Mitsubishi,* the Court had espoused the maxim that doubts concerning the scope of the issues to be arbitrated pursuant to an agreement should be resolved in favor of arbitration.[66] Previous cases, however, had only applied that rule in cases involving contract claims.[67] In *Mitsubishi,* the Court found that a presumption in favor of arbitration should also apply "where a party bound by an arbitration agreement raises claims founded on statutory rights."[68] Notably, in explaining its reasoning, the Court asserted that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[69] As to concerns that arbitration may be inappropriate to protect statutory rights, the Court stated:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It

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60. *Id.*at 616-17.

61. *Id.* at 617.

62. *Id.* at 619-20.

63. *Id.* at 624-25. The distributor argued that the arbitration agreement should be construed to exclude the Sherman Act claims. *Id.* The First Circuit Court of Appeals rejected that argument, *id.* at 621, but found that the Sherman Act claims were inappropriate for arbitration. *Id.* at 628-29.

64. *Id.* at 625.

65. *See id.* at 647 (holding that "neither the Congress that enacted the Arbitration Act in 1925 nor the many parties who have agreed to such standard clauses could have anticipated") (Stevens, J., dissenting).

66. *See, e.g.,* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (holding doubts concerning interpretation of arbitration clause "should be resolved in favor of coverage"); Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, 430 U.S. 243, 255 (1977) (holding same); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (holding same).

67. *Mitsubishi Motors,* 473 U.S. at 647 (Stevens, J., dissenting) ("Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims.").

68. *Id.* at 626.

69. *Id.* at 626-67.

> trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[70]

Mitsubishi was a turning point in the law of arbitration. A vigorous dissent argued that arbitration of statutory rights was a departure from precedent,[71] contrary to the plain language of the FAA, and contrary to Congressional intent.[72] The dissent's arguments have, however, remained unavailing; the Court has repeatedly reaffirmed, over the ensuing decades, that agreements to arbitrate federal statutory claims are enforceable under the FAA.[73]

B. The Effective Vindication Doctrine as a Limitation on Agreements to Arbitrate Federal Statutory Claims

While *Mitsubishi* established the principle that agreements to arbitrate statutory claims are enforceable, it also contained the genesis of a limitation on that principle. In response to the argument that an international arbitral forum might not adequately protect a party's rights under the Sherman Act, *Mitsubishi* states 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 function."[74] *Mitsubishi* also states "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

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70. *Id.* at 628. The reasoning espoused by the Court, that submitting to an arbitral forum does not waive any substantive rights under a federal statute, is essentially the argument that the Court had previously rejected in *Wilko v. Swan*. *See* Wilko v. Swan, 346 U.S. 427, 433 (1953) ("Respondent asserts that arbitration is merely a form of trial to be used in lieu of a trial at law.").

71. *Mitsubishi*, 473 U.S. at 650 (Stevens, J., dissenting).

72. *Id.* at 646 (Stevens, J. dissenting).

73. *See, e.g.*, Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.."); Green Tree Fin. Corp. – Ala. v. Randolph, 531 U.S. 79, 89 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration."); 14 Penn Plaza LLC. v. Pyett, 556 U.S. 247, 268 (2009) (Misconceptions concerning arbitration as inappropriate for the resolution of statutory issues "have been corrected.").

74. *Mitsubishi*, 473 U.S. at 637.

as against public policy."[75] Those two statements imply that if an agreement to arbitrate does not allow a prospective litigant to effectively vindicate a prospective cause of action under a federal statute, then the arbitration agreement will be unenforceable as a prospective waiver.[76]

Fifteen years later, the Court was squarely presented with an effective vindication argument in *Green Tree Financial Corp. – Alabama v. Randolph.*[77] In *Green Tree*, a lender and a borrower had agreed to arbitrate all disputes between them, including all disputes arising under statutory law.[78] The agreement did not specify which party would pay the costs of the arbitration.[79] The borrower sued the lender for violating the federal Truth in Lending Act, and the lender moved to compel arbitration.[80] The borrower opposed the motion by arguing that because of the risk that she would be responsible for prohibitive costs she was "unable to vindicate her statutory rights in arbitration."[81]

In deciding *Green Tree*, the Court stated that "it may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[82] In light of the federal policy favoring arbitration, however, the Court placed the burden on the party resisting arbitration to prove that the cost would be prohibitive.[83] The borrower in *Green Tree* had presented no such proof, other than noting that the arbitration agreement was silent as to costs, which the Court found "too speculative to justify the invalidation of an arbitration agreement."[84]

Green Tree did not rule that the effective vindication doctrine rendered the arbitration agreement at issue unenforceable.[85] The Court's discussion, however, left lower courts with the impression that an arbitration agreement would be unenforceable if it did not provide a party with an effective means to validate a federal statutory right.[86] In

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75. *Id.* at 637, n. 19.

76. *See supra* notes 35-39 and accompanying text (discussing rule against prospective waiver of statutory rights).

77. *Green Tree*, 531 U.S. at 79.

78. *Id.* at 82-83.

79. *Id.* at 84.

80. *Id.* at 83.

81. *Id.* at 90.

82. *Id.*

83. *Id.* at 91-92.

84. *Id.* at 91.

85. *Id.* at 92.

86. *See, e.g., In re* Cotton Yarn Antitrust Litigation, 505 F.3d 274, 282 (4th Cir. 2007) (arbitration of antitrust claim "will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum"); Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 80 (D.C. Cir. 2005) (stating Supreme Court decisions "make

particular, the lower courts understood *Green Tree* to mean that a party could invalidate an agreement to arbitrate if that party carried its burden of proving that the costs of arbitration would prevent it from effectively vindicating a federal statutory claim.[87]

C. Distinguishing Agreements to Arbitrate State Statutory Claims

The effective vindication doctrine applies to cases involving arbitration of federal statutory rights, not state statutory rights.[88] The purpose of the effective vindication doctrine is to reconcile two Congressional proposes: on the one hand, a liberal federal policy favoring arbitration under the FAA,[89] and on the other hand, a desire to avoid "a prospective waiver of a party's right to pursue statutory remedies" under another federal statute.[90] If a state statute conflicts with the Congressional purpose of the FAA, the state statute is preempted.[91]

While the effective vindication doctrine does not apply to claims under state statutes, the FAA provides that agreements to arbitrate are valid "save upon such grounds as exist at law or in equity for the

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clear" that arbitration should not be compelled if terms of agreement "interfere with the effective vindication of statutory claims"); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 658 (6th Cir. 2003) ("The Supreme Court has made clear that statutory rights, such as those created by Title VII, may be subject to mandatory arbitration only if the arbitral forum permits the effective vindication of those rights.").

87. *See, e.g.*, Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1260 (11th Cir. 2003) (holding party resisting arbitration of Title VII claim based on cost must show amount of fees and inability to pay); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 213-14 (3d Cir. 2003) (finding strong policy invalidating arbitration agreements when large costs preclude effective vindication of federal statutory rights); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 683 & n.9 (8th Cir. 2001) (remanding case to district court to consider argument that cost sharing provision made arbitration prohibitively expensive).

88. *See* Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928, 935-36 (9th Cir. 2013) (effective vindication is limited to federal statutes); Stutler v. T.K. Constructors, Inc., 448 F.3d 343, 345-46 (6th Cir. 2006) (same); Orman v. Citigroup, No.11 Civ. 7086, 2012 U.S. Dist. LEXIS 131532, at *9 (S.D.N.Y Sept. 12, 2012) (same).

89. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).

90. *Id.* at 637, n.19. The need to reconcile any tension between the FAA and the substantive rights contained in another statute can also be resolved by Congress evincing "an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628.

91. *See* Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500, 503-04 (FAA "the Supreme Law of the Land" pursuant to Article IV, clause 2 of the Constitution); *see also Ferguson*, 773 F. 3d at 935-36 (effective vindication does not extend to state statutes because FAA preempts state law).

revocation of any contract."[92] Because unconscionability is a ground for the revocation of any contract,[93] arbitration agreements that waive rights under state statutes are sometimes invalidated as unconscionable.[94] Although the effective vindication doctrine does not apply to state law claims, courts evaluating whether an arbitration agreement is unconscionable because it waives a state statutory right will sometimes use the effective vindication language found in the *Green Tree* decision.[95]

The Supreme Court's recent decision in *AT&T Mobility v. Concepcion*[96] demonstrates the limits on unconscionable state law challenges to arbitration agreements. In that case, the contract between AT&T and its customers required that claims be arbitrated on an individual basis.[97] Under California law, however, the waiver of the right to proceed on a class action basis was considered unconscionable.[98] The Ninth Circuit, therefore, applied California law and held that the arbitration clause in *AT&T Mobility* was unconscionable.[99] The Supreme Court reversed.[100] The Court stated that "the overarching purpose of the FAA, evident in the text of §§ 2, 3 and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[101] Requiring arbitrations to go forward on a class basis even though the parties' agreement was to the contrary would be nonconsensual and would sacrifice "the principal advantage of arbitration – its informality."[102] The Court, therefore, concluded that the

92. 9 U.S.C.A. §2 (West 2015).

93. *See* Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.").

94. *See, e.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 777-78 (7th Cir. 2014) (arbitration agreement that gave no prospect of a fairly conducted arbitration unconscionable), *cert. denied*, 135 S. Ct. 1894 (2015); Chavarria v. Ralph's Grocery Co., 733 F.3d 916, 925 (9th Cir. 2013) (arbitration agreement that disregards state law concerning allocation of costs unconscionable); Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 267 (3d Cir. 2003) (arbitration agreement requiring losing party to pay costs unconscionable).

95. *See* Damato v. Time Warner Cable, Inc., No. 13-CV-944, 2013 U.S. Dist. LEXIS 107117, at *37, n.11 (E.D.N.Y July 31, 2013) (applying the *Green Tree* framework to evaluate state law unconscionability claims).

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

97. *Id.* at 1744.

98. *Id.* at 1746.

99. *Id.* at 1745.

100. *Id.* at 1753.

101. *Id.* at 1748.

102. *Id.* at 1751.

California rule against waivers of the right to proceed on a class action basis was preempted by the FAA.[103]

D. American Express v. Italian Colors Restaurant

In 2013, the Supreme Court decided *American Express Co. v. Italian Colors Restaurant*,[104] and called into question much of the effective vindication jurisprudence that had developed in the preceding decade.[105] American Express had agreements with the merchants that accept its charge card, requiring them to also accept the American Express credit card.[106] Various merchants brought a class action suit alleging that the American Express agreements violated the Sherman Act.[107] The agreements in question, however, also required that all disputes be arbitrated on an individual basis.[108] American Express, therefore, moved to compel arbitration pursuant to the FAA.[109]

The plaintiff merchants in *American Express* argued that enforcing the arbitration agreements would prevent them from effectively vindicating their rights under the Sherman Act because of the prohibition of arbitration on a class basis.[110] In support of their effective vindication argument, the merchants submitted a declaration from an economist stating that it would cost at least several hundred thousand dollars to prepare the expert analysis necessary to prove an antitrust claim against American Express.[111] The maximum recovery for an individual merchant after trebling would only be $38,549.[112] The class action prohibition contained in the arbitration agreement would, therefore, prevent effective vindication of a federal statutory right because there was no economic incentive to proceed on an individual basis.[113]

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103. *Id.* at 1753.

104. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

105. *See id.* at 2313 (Kagan, J., dissenting) (describing the majority's decision as "a betrayal of our precedents" that "prevents the effective vindication of statutory rights"); *see also* Byrd v. SunTrust Bank, No. 2:12-cv-02314, 2013 U.S. Dist. LEXIS 101909, at *52 (W.D. Tenn. July 22, 2013) (questioning whether after *American Express* "there is any situation in which provisions in an arbitration agreement increasing the cost of arbitration are unenforceable").

106. *Am. Express*, 133 S. Ct. at 2308.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id. at 2310.*

111. *Id.* at 2316.

112. *Id.* at 2308.

113. *Id.* at 2310.

In a five-to-three majority decision,[114] the Court rejected the merchants' argument in terms that leave the continued vitality of the effective vindication doctrine in doubt.[115] The majority describes the merchants' argument as an invocation of "a judge-made exception to the FAA which, they say, serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the 'effective vindication' of a federal statutory right."[116] That phrasing carefully avoids having the Court itself say that arbitration clauses that prevent the effective vindication of federal statutory rights are invalid. The majority also avoids mentioning the many lower court decisions that had embraced the effective vindication doctrine based on the Court's opinion in *Green Tree*.[117] Instead, the majority describes the Court's prior statements concerning the need for effective vindication as dicta, and notes that none of the Court's cases that have "asserted the existence of an 'effective vindication' exception" have applied it to invalidate an arbitration agreement.[118]

The majority goes on to state that the effective vindication "exception finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies,'"[119] and that the desire to prevent a prospective waiver "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."[120] Whether it would cover any other kind of arbitration provision, however, is uncertain. The farthest the majority was willing to go was to say that "it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum

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114. *Id.* at 2307. Justice Kagan's dissent was joined by Justices Ginsburg and Breyer. Justice Sotomayor took no part in the consideration or decision of the case.

115. *See id.* at 2310-12.

116. *Id.* at 2310.

117. *See supra* notes 77-87 and accompanying text.

118. *Am. Express*, 133 S. Ct. at 2310. In addition to *Mitusbishi* and *Green Tree*, the Court also mentioned effective vindication in two other cases prior to *American Express*. In *Pyett*, the respondents raised an effective vindication argument, but the Court held that the issue was not properly before it. 14 Penn Plaza LLC. v. Pyett, 556 U.S. 247, 273 (2009). In *Gilmer*, the respondent argued that compulsory arbitration of claims under the Age Discrimination in Employment Act "would be inconsistent with the statutory framework and purposes of the ADEA." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991). In rejecting that argument, *Gilmer* quotes *Mitsubishi* for the proposition that the statute continues to serve its function "[s]o long as the prospective litigant effectively may vindicate" its statutory rights. *Id.* at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

119. *Am. Express*, 133 S. Ct. at 2310 (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

120. *Id.*

impracticable,"[121] a proposition that lower courts had assumed to be resolved in the affirmative after *Green Tree*.[122]

Given the Court's skeptical view of the effective vindication doctrine generally, it is not surprising that it did not invalidate the contract provision at issue in *American Express* requiring arbitration on an individual basis only.[123] In the majority's view, "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."[124] The majority further stated that the merchant's argument in *American Express* was essentially resolved by *AT&T Mobility*,[125] because that case "specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"[126]

Justice Kagan's dissent finds little common ground with the majority opinion, which the dissent calls "a betrayal of our precedents and of federal statutes like the antitrust laws."[127] In the dissent's view, the effective vindication rule[128] was "a core part of *Mitsubishi*," not dicta.[129] Furthermore, in the dissent's view, the effective vindication rule fits the facts of *American Express* "hand in glove"[130] because forcing the merchants to arbitrate a complex antitrust matter on an individual basis meant that the merchants would incur the impermissible "prohibitive costs" discussed in *Green Tree*.[131]

In urging a broader application of the effective vindication doctrine, the *American Express* dissent discusses the following ways in which an arbitration agreement might be used to defeat federal statutory rights:

> On the front end: The agreement might set outlandish filing fees or establish an absurd (*e.g.*, one-day) statute of limitations, thus

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121. *Id.* at 2310-11.

122. *See supra* notes 77-87 and accompanying text.

123. *Am. Express*, 133 S. Ct. at 2310.

124. *Id.* at 2311.

125. *See supra* notes 96-103 and accompanying text (discussing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)).

126. *Am. Express*, 133 S. Ct. at 2312 (quoting *AT&T Mobility*, 131 S. Ct. at 1753).

127. *Id.* at 2313 (Kagan, J., dissenting).

128. Among the points on which that the majority and dissent disagree is whether the effective vindication doctrine is a rule or an exception. The majority refers to the effective vindication doctrine as an "exception to the FAA." *Id.* at 2310. The dissent refers to it as a "rule" that reconciles the FAA "with all the rest of federal law – and indeed promotes the most fundamental purposes of the FAA itself." *Id.* at 2313 (Kagan, J., dissenting).

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

130. *Id.* at 2313 (Kagan, J., dissenting).

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

> preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator's authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability. . . . Or else the agreement might appoint as an arbitrator an obviously biased person – say the CEO of Amex.[132]

The effective vindication doctrine should, in the dissent's view, be able to address each of those situations in order to ensure that "arbitration remains a real, not faux, method of dispute resolution."[133]

While the dissent's arguments in favor of a broader application of the effective vindication doctrine may be persuasive, the arguments remain rejected by the majority. The majority opinion in *American Express*, while indefinite as to particulars,[134] indicates that the effective vindication doctrine does not apply as broadly as had previously been thought.[135]

III. APPLYING THE EFFECTIVE VINDICATION DOCTRINE AFTER *AMERICAN EXPRESS V. ITALIAN COLORS RESTAURANT*

American Express leaves attorneys drafting arbitration agreements and courts reviewing those agreements with little guidance as to what limits the effective vindication doctrine still imposes. *American Express* tells us that as far as the Supreme Court is concerned, the effective vindication doctrine has only been discussed by the Court in dicta and has never actually been applied by the Court to invalidate an arbitration agreement.[136] It also tells us one situation in which the effective vindication doctrine definitely does not apply: it does not apply to an arbitration agreement that causes a claim to be not worth pursuing

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132. *Id.* at 2314 (Kagan, J., dissenting).

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

134. *Id.* at 2310-11 (explaining that effective vindication "would perhaps cover" high administrative and filing fees).

135. *See* Byrd v. SunTrust Bank, No. 2:12-cv-02314-JPM-cgc, 2013 U.S. Dist. LEXIS 101909, at *51 (W.D. Tenn. July 22, 2013) (*American Express* appears to make it more difficult to prove arbitration clause unenforceable).

136. *Am. Express*, 133 S. Ct. at 2310-11. As discussed above, the dissent to *American Express* disagrees with the majority as to whether the Court's prior statements concerning effective vindication were dicta. *See supra* notes 128-29 and accompanying text. As is also discussed above, prior to *American Express*, lower federal courts accepted the effective vindication doctrine as good law and applied it to invalidate arbitration provisions. *See supra* notes 86-87 and accompanying text.

because the cost of proving the claim is greater than the potential recovery.[137] The *American Express* majority recognizes that the desire to avoid a prospective waiver would "certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."[138] Such explicit waivers of statutory rights, however, were unenforceable long before the advent of the effective vindication doctrine.[139]

What then does the effective vindication doctrine cover? Both the majority and dissent suggest possibilities. The majority says that effective vindication "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[140] The dissent says that arbitration agreements appointing an obviously biased arbitrator, imposing an absurdly short limitations period, preventing a claimant from presenting necessary proof, or limiting an arbitrator's authority to grant meaningful relief, all could run afoul of the effective vindication doctrine.[141] This Article now analyzes whether any of those possible grounds for challenging the enforceability of an arbitration agreement remains valid after *American Express*. In conducting that analysis, the Article considers Supreme Court precedent, including *American Express*, and lower court decisions issued both before and after *American Express*.

A. Agreements Imposing Prohibitive Arbitral Costs

Prior to the Court's decision in *American Express*, it was well-established in the lower federal courts that an arbitration agreement that imposed high costs on a party with a federal statutory claim could, under the right circumstances, violate the effective vindication doctrine.[142] That was consistent with the Court's statement in *Green Tree* that "[i]t may well be that the existence of large arbitration costs could preclude a

137. *Am. Express*, 133 S. Ct. at 2311.

138. *Id.* at 2310.

139. As discussed above, a contract provision that explicitly waives a federal statutory right that affects the public interest would be void as contrary to public policy. *See supra* notes 37-39 and accompanying text.

140. *Am. Express*, 133 S. Ct. at 2310-11.

141. *Id.* at 2314 (Kagan, J., dissenting).

142. *See, e.g.*, Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1260 (11th Cir. 2003) (party resisting arbitration of Title VII claim based on cost must show amount of fees and inability to pay); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 213-14 (3d Cir. 2003) (strong policy invalidating arbitration agreements when large costs preclude effective vindication of federal statutory rights); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 683 & n.9 (8th Cir. 2001) (remanding case to district court to consider argument that cost sharing provision made arbitration prohibitively expensive).

litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[143] *Green Tree* made clear that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."[144] Since the plaintiff in *Green Tree* presented no evidence on that point, the Court declined to discuss what kind of a showing would have been sufficient.[145] It was, therefore, unclear even before *American Express* how courts should determine whether the arbitration provision in a particular case imposed unacceptably high costs on a plaintiff.[146]

As discussed above, *American Express* casts doubt on the validity of the effective vindication doctrine generally, including the issue of whether large arbitration costs can ever make an arbitration agreement unenforceable.[147] Courts and attorneys considering cost issues will, therefore, first need to determine whether the effective vindication doctrine still applies at all.[148] If it does, they will next need to determine how it applies to provisions that require a party with a federal statutory claim to pay arbitral costs.[149]

Although *American Express* casts doubt on its continued validity, there are several good reasons to believe that the effective vindication doctrine is still good law and should be applied to invalidate agreements that make the cost of arbitrating federal statutory rights "so high as to make access to the forum impracticable."[150] To begin with, application of the effective vindication doctrine to prohibitive costs is logically consistent with the general rule against prospective waivers of federal statutory rights that affect the public interest.[151] For example, the Supreme Court case of *Brooklyn Savings Bank v. O'Neil* established that an agreement between an employer and an employee whereby the employee agrees to waive his right to be paid the federal minimum wage would be void because the waiver would effectively nullify portions of

143. Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 90 (2000).

144. *Id.* at 92.

145. *Id.*

146. *See Spinetti*, 324 F.3d at 217 (Supreme Court has not provided standard for showing prohibitive expense).

147. *See supra* notes 104-26 and accompanying text; *see also* Byrd v. SunTrust Bank, No. 2:12-cv-02314-JPM-cgc, 2013 U.S. Dist. LEXIS 101909, at *52 (W.D. Tenn. July 22, 2013) (questioning whether "there is any situation in which provisions in an arbitration agreement increasing the cost of arbitration are unenforceable. . .").

148. *See infra* notes 150-99 and accompanying text.

149. *See infra* notes 170-91 and accompanying text.

150. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310-11 (2013).

151. *See supra* notes 37-39 and accompanying text.

the Fair Labor Standards Act.[152] Similarly, an arbitration provision that requires an employee to pay thousands of dollars in arbitration costs in order to vindicate his right to be paid the minimum wage would effectively nullify portions of the Fair Labor Standards Act.[153]

In addition, the Supreme Court stated in *Green Tree* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," and that the party seeking to invalidate an arbitration agreement on that ground "bears the burden of showing the likelihood of incurring such costs."[154] While the *American Express* majority might call those statements dicta, they are dicta from a Supreme Court decision that was joined by three of the Justices from the *American Express* majority: Justices Scalia, Kennedy and Thomas. [155] Of those three, Justice Thomas is the only one to have indicated that he no longer adheres to the effective vindication doctrine described in *Green Tree*.[156]

Justice Thomas wrote a sole concurrence to *American Express* stating that, in his view, an agreement to arbitrate must be enforced "unless a party successfully challenges the formation of the arbitration agreement."[157] Because the effective vindication doctrine is not a challenge to contract formation, Justice Thomas does not believe that it can be used to invalidate an arbitration agreement.[158] Justices Scalia and Kennedy, however, did not join Justice Thomas' concurrence, and gave no indication that they necessarily disagree with the view they previously concurred with in *Green Tree*.[159]

Of the current Justices on the Supreme Court, Justice Thomas is the only one who has definitively indicated a belief that the effective vindication doctrine could never justify invalidating an arbitration

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152. Brooklyn Sav. Bank v. O'Neill, 324 U.S. 697, 707 (1945).

153. *See* 29 U.S.C.A. § 216(b) (West 2015); *see also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 269 (discussing inability of discharged employees to pay arbitration fees for claim against employer).

154. Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 91-92 (2000).

155. The dicta concerning arbitral costs and the effective vindication of federal statutory rights is in section III of *Green Tree*. *Id.* at 89-92. Section III of *Green Tree* was written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, Thomas and Ginsberg. *Id.* Of those six, Justices Scalia, Kennedy and Thomas were part of the majority in *American Express*. *See Am. Express*, 133 S. Ct. at 2307.

156. *See Am. Express*, 133 S. Ct. at 2312 (Thomas, J., concurring).

157. *Id.*

158. *Id.*

159. *American Express*, in fact, quotes *Green Tree's* statement that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." *Am. Express*, 133 S. Ct. at 2311 (quoting *Green Tree*, 531 U.S. at 90).

agreement.[160] Of the other four Justices in the *American Express* majority, two (Justices Scalia and Kennedy) also joined the opinion in *Green Tree* that indicated a party could challenge the validity of an arbitration agreement by proving that it kept an individual from effectively vindicating her federal statutory rights by imposing prohibitive costs.[161] The other two Justices in the *American Express* majority (Chief Justice Roberts and Justice Alito) have indicated that they consider the effective vindication doctrine to be Supreme Court dicta, but have not indicated one way or the other whether they would apply it in an appropriate case.[162] Justice Sotomayor took no part in *American Express*, and her opinion as to whether the effective vindication doctrine is good law remains unknown.[163]

On the other hand, the three *American Express* dissenters have indicated that, in their view, the effective vindication doctrine is not dicta, and that they consider it to be good law.[164] In sum, therefore, three current Justices are on record as having endorsed the effective vindication doctrine, and would have applied it in *American Express*; one Justice is on record stating that the effective vindication doctrine should never be used to invalidate an arbitration agreement; and five Justices have not committed themselves one way or the other.

Those Justices who have not yet indicated whether they believe that the effective vindication doctrine can ever invalidate an arbitration agreement might find it persuasive that the lower federal courts, relying on what is now labeled as Supreme Court dicta, have uniformly accepted the effective vindication doctrine as good law.[165] Prior to *American Express*, there was uncertainty among the federal courts as to how to apply the effective vindication doctrine,[166] but universal agreement that in an appropriate case prohibitive arbitral costs could invalidate an arbitration provision.[167] Thus, in 2001, in a case in which the plaintiff

160. *See supra* notes 156-59 and accompanying text.

161. *See supra* notes 154-55 and accompanying text.

162. *Am. Express*, 133 S. Ct. at 2307, 2310-11.

163. *Id.* at 2307.

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

165. *See supra* notes 86-87 and accompanying text.

166. *See, e.g.* Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 217 (3d Cir. 2003) (The Supreme Court has not provided standard for showing prohibitive expense.); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 658-59 (6th Cir. 2003) (noting split in the Circuits as to whether cost splitting provisions deny effective vindication per se); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 553-54 (4th Cir. 2001) (noting that the courts differ on what type of cost splitting provisions will make arbitration agreement unenforceable).

167. *See, e.g.*, ., Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1260 (11th Cir. 2003) (party resisting arbitration of Title VII claim based on cost must show

employee alleged a violation of his rights under Title VII of the Civil Rights Act, the Fourth Circuit stated:

> Notably, although the courts and the parties differ on the extent to which fee splitting automatically renders an arbitration agreement unenforceable even absent any showing of individual hardship or deterrence, it is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum.[168]

After *American Express*, it can no longer be said that it is undisputed that the effective vindication doctrine can render an arbitration agreement unenforceable.[169] Nevertheless, even after *American Express*, no federal court has been willing to wholly abandon the effective vindication doctrine.[170] The Ninth Circuit in particular has given a strong indication that it does not read *American Express* to mean that arbitration agreements can never be invalidated based on high arbitral costs.[171]

In *Chavarria v. Ralphs Grocery Co.*,[172] a former employee of the defendant grocery company commenced a proposed class action against her former employer for alleged violations of California statutes. The defendant moved to compel arbitration pursuant to an agreement it had with all its employees.[173] The district court found that the arbitration agreement was unconscionable for several reasons, including the cost of

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amount of fees and inability to pay); *Spinetti,* 324 F.3d at 213-14 (strong policy invalidating arbitration agreements when large costs preclude effective vindication of federal statutory rights);); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 683 n.9 (8th Cir. 2001) (remanding case to district court to consider argument that cost sharing provision made arbitration prohibitively expensive).

168. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 553-54 (4th Cir. 2001) (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000)).

169. At a minimum, Justice Thomas would dispute the appropriateness of using the effective vindication doctrine to invalidate an arbitration agreement. *See supra* notes 157-158 and accompanying text.

170. *See, e.g.*, Torres v. Simpatico, Inc., 781 F.3d 963, 970 (8th Cir. 2015) (holding that plaintiffs failed to carry burden of showing that costs were so high as to "prevent them from effectively vindicating their rights in the arbitral forum"); Sanchez v. Nitro-Lift, L.L.C., 762 F.3d 1139, 1150 (10th Cir. 2014) (remanding case to district court for a determination as to whether cost provision renders arbitration agreement unenforceable); Mohamed v. Uber Techs., Inc., No. C-14-5200, 2015 U.S. Dist. LEXIS 75288, at *55 (N.D. Cal. June 9, 2015) (The Supreme Court "has repeatedly suggested" that courts may refuse to enforce arbitration agreements that require "significant forum fees.").

171. *See* Chavarria v. Ralphs Grocery Co., 733 F.3d 916 (9th Cir. 2013).

172. *Id.*

173. *Id.* at 919.

the arbitral forum,[174] and the Ninth Circuit affirmed.[175] Because the case involved only state statutory claims, the *Chavarria* decision is based on unconscionability, rather than the effective vindication doctrine.[176] The Ninth Circuit's analysis, however, discussed the Supreme Court's decision in *American Express*, and concluded that *American Express* did not preclude invalidating an arbitration agreement based on the costs imposed on the party alleging a state statutory violation.[177] There is no reason to believe the Ninth Circuit would reach a different conclusion in a case alleging a federal statutory violation.[178]

Within the Ninth Circuit, the plaintiffs in *Mohamed v. Uber Technologies*[179] alleged violations of both state and federal law.[180] Although the district court couched its analysis in terms of unconscionability,[181] it discussed both *Green Tree* and *American Express* in its analysis of whether an agreement putatively requiring arbitration was unenforceable because the complaining party would have to pay "hefty fees."[182] In discussing *American Express*, *Mohamed* acknowledged that the Supreme Court only indicated that arbitration provisions that impose high fees "may well be unenforceable."[183] The district court, nonetheless, concluded that the plaintiff before it had carried his burden of proving that the arbitration provision at issue was unconscionable because of the fees imposed.[184]

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174. *Id.* at 923.

175. *Id.* at 927.

176. *See supra* notes 88-95 and accompanying text (discussing inapplicability of the effective vindication doctrine to claims under state law).

177. *Chavarria*, 733 F.3d at 926-27.

178. *See* Damato v. Time Warner Cable, Inc., No. 13-CV-944, 2013 U.S. Dist. LEXIS 107117, at *37, n.11 (E.D.N.Y July 31, 2013) (noting that courts have applied effective vindication analysis to evaluate unconscionability under state law). The argument for invalidating arbitration agreements that prevent the effective vindication of federal statutory rights is stronger than the argument for invalidating arbitration agreements that frustrate state statutory rights. State statutory rights may be preempted by FAA, whereas the effective vindication doctrine is used to resolve conflicts between the FAA and another federal statute. *See supra* notes 88-103.

179. Mohamed v. Uber Techs., No. C-14-5200, 2015 U.S. Dist. LEXIS 75288, at *3 (N.D. Cal. June 9, 2015).

180. *Id.*

181. In a case where the party resisting arbitration alleges both state and federal statutory claims it is logical to address the enforceability of the arbitration agreement in terms of unconscionability rather than effective vindication because the effective vindication doctrine does not apply to the state law claims. *See supra* notes 88-95 and accompanying text.

182. *Mohamed*, 2015 U.S. Dist. LEXIS 75288, at *53-57.

183. *Id.* at *56.

184. *Id.* at *56-57.

Outside of the Ninth Circuit, since *American Express*, several district court cases have accepted the continued validity of the concept of effective vindication challenges based on the cost of arbitrating, but have declined to invalidate the arbitration agreement at issue in the case at bar.[185] In addition, in *Nesbitt v. FCNH, Inc.*,[186] the District of Colorado found an arbitration agreement to be unenforceable pursuant to the effective vindication doctrine.[187] In *Nesbitt,* the plaintiff and defendant had an agreement calling for arbitration pursuant to the Commercial Rules of the American Arbitration Association, but the plaintiff argued that the cost of the arbitration would prevent her from effectively vindicating her federal statutory rights under the Fair Labor Standards Act.[188] In support of her effective vindication argument, the plaintiff submitted evidence that she could not afford the costs she would likely incur.[189] The District of Colorado, citing *American Express*,[190] found the arbitration agreement unenforceable.[191]

Although the courts are only beginning to grapple with the issue of what remains of the effective vindication doctrine after *American Express*, the approach taken by the Western District of Tennessee in *Byrd v. SunTrust Bank*[192] may be indicative of what to expect generally. In *Byrd*, the plaintiff contended that the costs imposed by an arbitration agreement violated the effective vindication doctrine. The defendant responded by arguing that under *American Express*, prohibitive expense was no longer a ground for invalidating an arbitration agreement.[193] The

185. *See* Whitt v. Prosper Funding LLC, No.1:15-cv-136, 2015 U.S. Dist. LEXIS 91413, at *14-16 (S.D.N.Y July 14, 2015) (plaintiff failed to sustain burden of showing prohibitive arbitral costs); Monserrate v. Hartford Fire Ins. Co., No. 6:14-cv-149, 2014 U.S. Dist. LEXIS 116023, at *4 (M.D. Fla. Aug. 20, 2014) ("[T]he effective vindication doctrine permits courts to invalidate arbitration agreements."); Damato v. Time Warner Cable, Inc., No. 13-CV-994, 2013 U.S. Dist. LEXIS 107117, n.10 (E.D.N.Y July 31, 2013) (complaint about cost of "access to the arbitral forum" not foreclosed by *American Express*); Reynolds v. Cellular Sales of Knoxville, Inc., No. 2:13-cv-32, 2013 U.S. Dist. LEXIS 100351, at *9 (S.D. Ind. July 18, 2013) (The Supreme Court has recognized that high arbitral costs could prevent effective vindication of statutory right.).

186. Nesbitt v. FCNH, Inc., No. 14-cv-00990, 2014 U.S. Dist. LEXIS 162141 (D. Colo. Nov. 19, 2014).

187. *Id.* at *16.

188. *Id.* at *12-13.

189. *Id.* at *14-15.

190. *Id.* at *12.

191. *Id.* at *16. The arbitration agreement also required each party to pay its own attorney's fees. Because the FLSA provides that a prevailing plaintiff can recover attorney's fees, the court found that provision to be unenforceable as well. *Id.* at *16-17.

192. Byrd v. SunTrust Bank, No. 2:12-cv-02314, 2013 U.S. Dist. LEXIS 101909 (W.D. Tenn. July 22, 2013).

193. *Id.* at *50.

district court stated that it disagreed with the defendant's interpretation of *American Express*, but that *American Express* does make it "more difficult to demonstrate that particular provisions in an arbitration clause are unenforceable because those provisions make it more expensive to arbitrate a federal statutory claim."[194] Based on *Byrd* and the other district court decisions, it seems the lesson that lower federal courts are taking from *American Express* is not that the effective vindication doctrine is dead, but that the burden placed on a party raising such a challenge is a heavy one.[195]

American Express makes clear that an effective vindication challenge will not succeed just because the cost of the arbitral forum compared to the potential recovery causes a claim to be not worth pursuing.[196] Whether an effective vindication challenge can ever succeed based on high costs that make access to the arbitral forum impracticable remains an open question after *American Express*.[197] Nevertheless, it seems likely that based on the Supreme Court's decision in *Green Tree*,[198] and on lower federal court precedent,[199] the effective vindication doctrine will continue to be a valid basis for challenging arbitration agreements that impose prohibitive arbitral costs.

B. Agreements Appointing an Obviously Biased Arbitrator

The dissent to *American Express* posits that an arbitration agreement that appoints an "obviously biased" arbitrator would run afoul of the effective vindication doctrine.[200] The dissent suggests the chief executive officer of the defendant as a hypothetical example of such an obviously biased arbitrator.[201] The majority makes no comment on that possibility, other than the majority's general assertion that the effective vindication doctrine originated in dicta and has never been applied by the Court.[202] Because *American Express* casts doubt on the effective vindication

194. *Id.* at *51.

195. *See id.*; *see also, e.g.*, Whitt v. Prosper Funding LLC, No.1:15-cv-136, 2015 U.S. Dist. LEXIS 91413, *14-16 (S.D.N.Y July 14, 2015) (Plaintiff failed to meet the burden for effective vindication challenge to the arbitration agreement.); Monserrate v. Hartford Fire Ins. Co., No. 6:14-cv-149, 2014 U.S. Dist. LEXIS 116023, at *4-5 (M.D. Fla. Aug. 20, 2014) (holding same); Reynolds v. Cellular Sales of Knoxville, Inc., No. 2:13-cv-32, 2013 U.S. Dist. LEXIS 100351, at *11 (S.D. Ind. July 18, 2013) (holding same).

196. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2311 (2013).

197. *Id.* at 2310-11.

198. *See supra* notes 154-59 and accompanying text.

199. *See supra* notes 165-95 and accompanying text.

200. *Am. Express*, 133 S. Ct. at 2314 (Kagan, J., dissenting).

201. *Id.*

202. *Id.* at 2310.

doctrine in its entirety, it cannot be said with any assurance that the doctrine can be used to invalidate agreements that appoint obviously biased arbitrators to decide disputes arising under federal statutes.[203] In addition, the text of the FAA complicates the analysis of whether the effective vindication doctrine should encompass challenges based on arbitrator partiality.[204]

Section 10(a)(2) of the FAA provides that a federal district court may vacate an arbitration award if "there was evident partiality" by the arbitrator.[205] Section 10(a)(2) thus indicates that even in contractual disputes Congress intended arbitrations under the FAA to be conducted before impartial arbitrators.[206] It may, therefore, be argued that the effective vindication doctrine should apply *a fortiori* because in a dispute concerning a federal statutory right the courts must accommodate Congress' intent in both the FAA and in the allegedly violated substantive statute.[207] By applying the effective vindication doctrine to an arbitration agreement based on obvious arbitrator bias, the purpose of the substantive federal statute is served at no cost to the purposes of the FAA because the FAA intended arbitrations to be conducted before impartial arbitrators. The case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[208] which involved arbitration of a contractual dispute,[209] illustrates this point.

In *Commonwealth Coatings,* a supposedly neutral arbitrator did not disclose that he occasionally received fees for providing engineering services to one of the parties.[210] After the award was issued, the losing party learned of the arbitrator's business relationship with the winning party, and challenged the award even though there was no charge that the "arbitrator was actually guilty of fraud or bias in deciding" the relevant dispute.[211] The Supreme Court held that the award should be vacated under Section 10 of the FAA,[212] stating that it could "perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any

203. *See supra* notes 104-26 and accompanying text.

204. *See* 9 U.S.C.A. §10(a)(2) (2002).

205. *Id.*

206. *See* Commonwealth Coatings Corp, v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968) (Section 10 of the FAA indicates Congress' desire to provide for impartial arbitration.).

207. *Am. Express,* 133 S. Ct. at 2310 (effective vindication argument based on harmonizing competing federal policies).

208. *Commonwealth Coatings,* 393 U.S. at 145.

209. *Id.* at 146.

210. *Id.*

211. *Id.* at 146-47.

212. *Id.* at 147.

dealings that might create the impression of possible bias."[213] The Court stressed the need to be scrupulous in safeguarding the impartiality of arbitrators and concluded by stating that it could not have been Congress' purpose "to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."[214]

Commonwealth Coatings predates by seventeen years the Supreme Court's decision to apply the FAA to agreements to arbitrate disputes under federal statutes.[215] The case nonetheless implies that the effective vindication doctrine should apply to putative agreements to arbitrate such disputes before an obviously biased arbitrator. If Congress did not intend for parties to submit their contractual disputes to biased arbitrators,[216] then surely it did not intend for parties to submit their federal statutory disputes to biased arbitrators.[217] In addition, *Commonwealth Coatings*' "requirement that arbitrators disclose to the parties any dealings that might create the impression of possible bias"[218] provides little benefit if a party may then be required to proceed before an obviously biased arbitrator anyway.[219]

On the other hand, Section 10 of the FAA provides for vacating arbitration awards, not for refusing to enforce arbitration agreements before there has been a hearing.[220] Thus, in *Gilmer v. Interstate/Johnson Lane Corp.*,[221] when the plaintiff objected to arbitrating his federal age discrimination claim on the ground that the arbitration panel would be biased, the Supreme Court dismissed the objection as speculation.[222] *Gilmer* noted that the arbitration rules applicable in that case provided protections against biased panels, and that Section 10 of the FAA provides a means of overturning awards that are the product of partial or corrupt arbitrators.[223]

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213. *Id.* at 149.

214. *Id.* at 150.

215. *See supra* notes 58-73 and accompanying text (discussing genesis of applicability of FAA to disputes under federal statutes).

216. *See Commonwealth Coatings*, 393 U.S. at 150.

217. *See* Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013) (effective vindication argument based on harmonizing competing federal policies).

218. *Commonwealth Coatings*, 393 U.S. at 149.

219. *See id.* at 150 (Congress' purpose is not to "authorize litigants to submit their cases and controversies" to biased arbitrators.).

220. 9 U.S.C. §10 (2002).

221. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

222. *Id.* at 39-40.

223. *Id.* at 30. *Gilmer* also quotes *Mitsubishi*'s statement that the Court would not "indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Id.*

Arguably, Section 10 indicates that Congress wished parties with complaints of arbitrator bias to proceed to arbitration, and then object to the award afterward.[224] That argument, however, fails to differentiate between a case in which arbitrator partiality is mere speculation and a case in which arbitrator partiality is part of the structure of the arbitration agreement.[225]

In *Gilmer*, the Supreme Court specifically noted that the relevant arbitral forum had procedures in place to protect against arbitrator bias, and that there had been no showing that those provisions were inadequate.[226] The Sixth Circuit case of *Walker v. Ryan's Family Steak Houses, Inc.*,[227] in contrast, illustrates a case in which the arbitration agreement created a biased forum.[228]

In *Walker,* the plaintiff's employees alleged violations of the Fair Labor Standards Act by the defendant employer.[229] The plaintiff employees had signed agreements to arbitrate any employment disputes,[230] and those agreements provided for the arbitrators to be selected from pools maintained by a for-profit company that received forty-two percent of its income from the defendant employer.[231] The Sixth Circuit held that the arbitration forum was not neutral, and the arbitration agreements were unenforceable pursuant to the effective vindication doctrine.[232] In doing so, the Sixth Circuit acknowledged that "[g]enerally a party cannot avoid the arbitration process simply by alleging that the arbitration panel will be biased," and that a party with such an allegation is usually limited to challenging an unfavorable award

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(quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

224. In *Hojnowski v. Buffalo Bills, Inc.*, 995 F. Supp. 2d 232 (W.D.N.Y. 2014), an employee of a National Football League team objected to an agreement that required him to arbitrate a federal statutory claim before the commissioner of the league. The district court held that any attack on the partiality of the arbitrator would have to be made after an award was issued. *Id.* at 239. The court noted, however, that the employee did not raise an effective vindication argument, and so the court did not address that issue. *Id.* at 239, n.1.

225. The *American Express* dissent refers to an arbitrator who is "obviously biased." Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting).

226. *Gilmer*, 500 U.S. at 30.

227. Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6h Cir. 2005).

228. *Id.* at 385.

229. *Id.* at 373.

230. *Id.* at 375.

231. *Id.* at 386.

232. *Id.* at 385-86.

under Section 10 of the FAA.[233] The court held, however, that the general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair. In such a case, "the arbitral forum is not an effective substitute for a judicial forum," and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial review.[234]

Prior to *American Express*, the Fourth Circuit[235] and the District of Columbia Circuit[236] also invalidated arbitration agreements that appointed biased arbitrators.

In addition, after *American Express*, the Seventh Circuit decided *Jackson v. Payday Financial, LLC*,[237] which invalidated an arbitration agreement that provided for an arbitrator to be "chosen in a manner to ensure partiality."[238] In *Jackson*, the plaintiffs entered into loan agreements with the defendant that required all disputes to be resolved by arbitration "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules."[239] The Cheyenne River Sioux Tribal Nation, however, had no experience with private arbitration, and the district court found the agreement's "promise of a meaningful and fairly conducted arbitration" to be a "sham."[240] The case involved only state law claims,[241] and so the Seventh Circuit's analysis was based on the unconscionability doctrine rather than the effective vindication doctrine.[242] The decision, however, held that the arbitration agreement was

> [V]oid not simply because of a strong possibility of arbitrator bias, but because it provides that a decision is to be made under a

233. *Id.* at 385 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

234. *Walker*, 400 F.3d at 385 (internal citation omitted) (quoting *Mitsubishi*, 473 U.S. at 634).

235. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (arbitration clause not enforced where arbitrator selection process "is crafted to ensure a biased decisionmaker").

236. See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.").

237. Jackson v. Payday Fin., LLC, 764 F.3d 765 (7th Cir. 2014).

238. *Id.* at 779.

239. *Id.* at 769.

240. *Id.* at 770.

241. *Id.* at 768.

242. *See id.* at 781; *see also supra* notes 88-103 and accompanying text (discussing distinction between unconscionability and effective vindication).

> process that is a sham from stem to stern. . . . It hardly frustrates FAA provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines or guarantees of fairness.[243]

It is probable that the Seventh Circuit would likewise find that it does not frustrate the purposes of the FAA to void an arbitration clause that requires federal statutory rights to be determined by an obviously biased arbitrator.[244]

If the effective vindication doctrine survives at all, which seems probable for the reasons discussed above,[245] it likely will continue to apply to agreements that appoint obviously biased arbitrators. The FAA's general disapproval of arbitrator partiality,[246] the Supreme Court's condemnation of arbitrator partiality in contract cases,[247] and lower federal court precedent[248] all weigh in favor of applying the effective vindication doctrine to such cases.

C. Agreements Limiting a Claimant's Ability to Prove Its Case

The *American Express* dissent suggests that one way an arbitration agreement could violate the effective vindication doctrine would be to "block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability – say, by prohibiting any economic testimony."[249] Although the dissent suggests five different hypothetical examples of how an arbitration agreement might violate the effective vindication doctrine,[250] this is the only such example to which the majority specifically responds, stating that "it is not a given that such a clause would constitute an impermissible waiver."[251] A review of the

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243. *Jackson*, 764 F.3d at 779 (citing Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999)).

244. *See supra* notes 88-103 and accompanying text (comparing rationales for voiding arbitration agreements under state law unconscionability and under effective vindication doctrine).

245. *See supra* notes 150-95 and accompanying text.

246. *See supra* notes 205-07 and accompanying text.

247. *See supra* notes 208-19 and accompanying text.

248. *See supra* notes 228-44 and accompanying text.

249. *See* Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting).

250. The five hypothetical examples suggested by the dissent are: high filing fees, a short limitations period, removal of meaningful relief, blocking the claimant from presenting proof, and appointing an obviously biased arbitrator. *Id.*

251. *Id.*

relevant precedent offers support for the majority's reluctance to prohibit arbitration agreements that limit a party's ability to prove its case.

It is well established that one of the purposes of the FAA was to permit parties to contract for a system of dispute resolution that eliminates "'the costliness and delays of litigation.'"[252] It has, therefore, been held repeatedly that parties to an arbitration agreement have "discretion in designing arbitration processes" in order to streamline dispute resolution.[253] The case in which the Supreme Court first established the enforceability of agreements to arbitrate claims under federal statutes also stated that the FAA permits arbitrations with rules different from those called for in the underlying statute.[254]

Arbitration agreements that call for a less thorough process than what is available in litigation leave open the possibility that a party with a statutory claim will be tactically disadvantaged by the arbitral forum.[255] On the other hand, such claimants may gain the benefits of "lower costs, greater efficiency and speed."[256] It is not irrational for a contracting party who may one day have a statutory claim to opt for a quick and cheap method of resolution instead of a thorough and expensive one.[257] The Supreme Court decided that Congress, in passing the FAA, "has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."[258] A system aimed at delivering quick rather than necessarily legally correct decisions may be particularly desirable for those types of disputes that often involve

252. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (quoting H.R. REP. No. 96, 68th Cong., 1st Sess., 2 (1924)).

253. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011); *see also, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (discussing that arbitration agreements can be used to reduce costs compared to litigation); Stolt –Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 685 (2010) (holding that arbitration trades procedural rigor for efficiency); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (holding that arbitration can have simpler procedures and rules).

254. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

255. *See* Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 31 (1991) (discussing that limited discovery available in arbitration makes proving age discrimination difficult).

256. *Stolt-Nielsen*, 559 U.S. at 685.

257. For example, in a 1999 employment discrimination case the Fourth Circuit noted that according to one study "litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve." Hooters of Am., Inc. v. Phillips, 173 F.3d. 933, 936 (4th Cir. 1999). Faced with that prospect, an employee and employer might well decide that it is in their mutual best interest to trade off the expensive thoroughness of the civil litigation system for a cheaper alternative.

258. Wilko v. Swan, 346 U.S. 427, 438 (1953).

relatively small amounts of money.[259] In such situations, arbitration "can serve as a sort of small-claims tribunal."[260]

Critics may argue that a quicker, cheaper, less thorough forum is inappropriate for federal statutory claims, but that is an argument that the Supreme Court rejected when it decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* in 1985.[261] The Court has made it clear that objections "centered on the nature of arbitration" are not valid reasons for refusing to enforce agreements to arbitrate statutory claims.[262] The *American Express* decision is the latest indication of the Court's willingness to uphold the parties' agreed upon arbitral procedures even if those procedures make it more difficult to prove a federal statutory claim.[263]

Parties have sometimes sought to invalidate arbitration agreements on the ground that the agreement at issue only allowed for limited discovery.[264] Even before *American Express*, however, courts generally enforced the discovery limitations set forth in the parties' contract.[265] After *American Express*, it is to be expected that courts will be even more reluctant to find arbitration agreements invalid based on allegedly inadequate arbitral procedures, such as discovery.[266] In one antitrust case

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259. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (benefits of arbitration important in employment cases, which often involve smaller sums).

260. Metro East Center for Conditioning and Health v. Qwest Comm. Int'l, Inc., 294 F.3d 924, 927 (7th Cir.), *cert. denied*, 537 U.S. 1090 (2002).

261. *See supra* notes 59-73 and accompanying text (discussing the applicability of FAA to agreements to arbitrate federal statutory claims).

262. 14 Penn Plaza LLC. v. Pyett, 556 U.S. 247, 269 (2009).

263. *See supra* notes 104-35 and accompanying text (discussing Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)).

264. *See, e.g.*, Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20 (1991) (discussing whether discovery is limited in arbitration); Kristian v. Comcast Corp., 446 F.3d 25, 37 (1st Cir. 2006) (deciding whether limited discovery prevents effective vindication of statutory claim); Wilks v. The Pep Boys, 241 F. Supp. 2d 860, 864 (M.D. Tenn. 2003) (determining whether arbitration provision is lopsided in context of Fair Labor Standards Act claim).

265. *See, e.g.*, Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 675 (5th Cir. 2006) (limited discovery sufficient for claims under Uniformed Services Employment and Reemployment Rights Act); Kristian v. Comcast Corp., 446 F.3d 25, 42 (1st Cir. 2006) ("[T]he Supreme Court has already foreclosed limited discovery as a ground for opposing the enforcement of an arbitration clause.") (citing *Gilmer*, 500 U.S. at 20); *Metro East Center*, 294 F.3d at 927, *cert. denied*, 537 U.S. 1090 (2002) (expedited arbitration procedures without discovery reduce cost of proceedings).

266. *See* Charles v. Sherman & Howard L.L.C., No. 14-cv-03416, 2015 U.S. Dist. LEXIS 53983, at *16 (D. Colo. April 24, 2015) (limited discovery does not invalidate arbitration agreement in Civil Rights Act case); *see also* Shetiwy v. Midland Credit Management, 959 F. Supp. 2d 469, 474 (S.D.N.Y. 2013) ("[B]arriers to 'proving a

after *American Express*, a district court has gone so far as to decide that "any limitations on discovery in arbitration do not establish grounds to defeat the agreement to arbitrate."[267]

American Express upheld an arbitration agreement with a procedure that made it more difficult for a party to prove a federal statutory claim.[268] In doing so, the Court held that the FAA requires courts to enforce the terms of arbitration agreements, including "the rules under which that arbitration will be conducted."[269] It is possible to imagine an arbitration provision with a procedural limitation so extreme (for example, a provision that forbids a party from presenting any evidence of a statutory claim) that the limitation amounts to a prohibited prospective waiver of a statutory right.[270] Absent such an extreme case, however, it seems unlikely after *American Express* that the effective vindication doctrine will be applied to arbitration agreements on the ground that an arbitral procedure makes it difficult to prove a claim.

D. Agreements Shortening the Limitations Period

The *American Express* dissent suggests that the effective vindication doctrine would invalidate an arbitration agreement that incorporated "an absurd (*e.g.*, one-day) statute of limitations."[271] The majority opinion does not respond to the dissent on that point, other than to note that the Court has never actually applied the effective vindication doctrine to invalidate an arbitration agreement.[272]Apart from any special concerns related to arbitration, it is generally the law that parties to a contract may agree to shorten a statute of limitations "provided the time is not unreasonably short."[273] The reference to "an absurd" limitations period in the *American Express* dissent seems intended to put effective vindication challenges to arbitration agreements into a similar analytical framework as the law on the statute of limitations generally.[274]

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statutory remedy'" do not fall within effective vindication exception.) (quoting *Am. Express*, 133 S. Ct. at 2311).

267. Spinelli v. National Football League, 96 F. Supp. 3d 81, 106 (S.D.N.Y. 2015).

268. *See Am. Express*, 133 S. Ct. at 2311.

269. *Id.* at 2309 (quoting Volt Info. Scis. Inc. v. Bd. Of Trs. Of Leeland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

270. *See supra* notes 37-39 and accompanying text.

271. *Am. Express*, 133 S. Ct. at 2314 (Kagan, J., dissenting).

272. *See supra* notes 104-26 and accompanying text.

273. Mo., Kan. & Tex. Ry. Co. v. Harriman Bros., 227 U.S. 657, 672 (1913); *see also* Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947) (absent a statute to the contrary, contract may reasonably shorten limitations period).

274. *See Am. Express*, 133 S. Ct. at 2314 (Kagan, J., dissenting).

There are several complicating factors that make it difficult to predict whether an arbitration agreement that shortens the limitations period for a federal statutory claim will be found to violate the effective vindication doctrine. First, assuming that the parties may shorten the limitations period to a reasonable time, it is difficult to predict how short a period will be deemed unreasonable.[275] Second, apart from any concerns under the FAA, the recent Sixth Circuit case of *Boaz v. Fedex Customer Information Services, Inc.*[276] indicates that courts may find some agreements to shorten limitations periods to be contrary to public policy.

Boaz did not involve an arbitration agreement, but the plaintiff and defendant had an employment agreement that required any lawsuit to be brought within six months. The plaintiff had claims under the Fair Labor Standards Act and Equal Pay Act that were commenced within the required statutory period, but not within six months.[277] The Sixth Circuit acknowledged that agreements to shorten statutory limitations periods had been enforced in other cases,[278] but it held that shortening the limitations period for claims under the Fair Labor Standards Act and Equal Pay Act constituted impermissible statutory waivers.[279]

Lastly, it is not clear how the FAA affects the usual rule that parties may contract to shorten a limitations period, so long as the shortened period is reasonable. The federal court decisions that have addressed the issue in an arbitration context are inconsistent. The Ninth Circuit has held that an arbitration agreement that reduced the limitations period for a claim under the Petroleum Marketing Practices Act from one year to ninety days was an impermissible waiver of a statutory right.[280] The Sixth Circuit has held that an arbitration agreement was enforceable where the plaintiff "failed to show that the one-year limitations period in the agreement unduly burdened her or would unduly burden any other claimant wishing to assert claims arising from their employment."[281] The First Circuit has held that issues involving statutes of limitations often

275. *Compare* Davis v. O'Melveny & Myers, 485 F.3d 1066, 1077 (9th Cir. 2007) (one year limitations period for claims under Fair Labor Standards Act and California Labor Code unreasonable) *with* Soltani v. W & S Life Ins. Co., 258 F.3d 1038, 1044 (9th Cir. 2001) (six month limitations period for wrongful termination claims reasonable).

276. Boaz v. Fedex Customer Information Servs., Inc., 725 F.3d 603 (6th Cir. 2013).

277. *Id.* at 605.

278. *Id.* at 606; *see also* Thurman v. DaimlerChrysler, Inc., 397 F.3d 352, 357-59 (6th Cir. 2004) (applying contractual limitations period in race discrimination case).

279. *Boaz*, 725 F.3d at 606-07.

280. Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244, 1247-48 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

281. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 673 (6th Cir. 2003).

involve issues of fact, and, therefore, cases in which the arbitration agreement contains a limitations period different from a federal statute should be referred to the arbitrator for a decision.[282] In addition, the Southern District of Florida refused to enforce an agreement to arbitrate federal statutory claims on the ground that the agreement imposed a one year limitations period that prevented the plaintiff from obtaining "meaningful relief."[283]

Overall, it seems likely that the effective vindication doctrine will continue to apply to arbitration agreements that unreasonably shorten the limitations period for a federal statutory claim. This approach is consistent with the general rule concerning agreements to shorten limitations periods.[284] In addition, the federal cases that have considered shortened limitations periods in arbitration agreements, though inconsistent in their approaches, have generally been willing to consider the possibility that the agreement might impermissibly conflict with the underlying federal statute.[285] At a minimum, an arbitration agreement with an unreasonably short limitations period is at risk that the agreement will be found unenforceable under the effective vindication doctrine.[286]

E. Agreements Restricting Remedies

American Express describes the effective vindication doctrine as an "exception to the FAA" that "originated as dictum" and that has never been applied by the Supreme Court.[287] *American Express*, however, also states that the dictum "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'"[288] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the case in which the Supreme Court first established the applicability of the FAA to statutory claims,[289] the Court stated that it was unwilling to conclude that a foreign arbitral tribunal would be unwilling to provide the statutory remedies available under the Sherman Act.[290] *Mitsubishi* also stated "that in the event the choice-of-forum and choice-of-law clauses acted in

282. Kristian v. Comcast Corp., 446 F.3d 25, 43-44 (1st Cir. 2006).

283. *In re* Managed Care Litigation, 132 F. Supp. 2d. 989, 1000 (S.D. Fla. 2000).

284. *See* Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947); *see also* Mo., Kan. & Tex. Ry. Co. v. Harriman Bros., 227 U.S. 657, 672 (1913).

285. *See supra* notes 280-83 and accompanying text.

286. *See* Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting).

287. *Id.* at 2310.

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

289. *See supra* notes 59-70 and accompanying text.

290. *See Mitsubishi Motors*, 473 U.S. at 635-36.

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."[291] If, therefore, the effective vindication doctrine is not to be completely repudiated,[292] it should apply to arbitration agreements that seek to eliminate federal statutory remedies.

Prior to *American Express*, federal courts routinely applied the effective vindication doctrine to invalidate arbitration agreements that prohibited the award of a federal statutory remedy.[293] In particular, courts refused to enforce arbitration agreements that changed the manner in which attorney's fees were awarded from what was required by federal statute.[294] While the federal courts are now only beginning to struggle with how to apply the effective vindication doctrine after *American Express*, the District of Colorado has decided two cases in which it invalidated arbitration agreements that limited a party's federal statutory remedies. In *Nesbitt v. FCNH, Inc.*,[295] the relevant arbitration agreement called for each party to bear its own attorney's fees.[296] The plaintiff, however, had a claim under the Fair Labor Standards Act, which provides for successful plaintiffs to be awarded attorney's fees.[297] The district court found that the agreement was unenforceable because it undermined a federal statutory policy.[298] Similarly, in *St. Charles v.*

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291. *Id.* at 637, n. 19.

292. *See supra* notes 150-95 and accompanying text (arguing effective vindication doctrine is still good law).

293. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670 (6th Cir. 2003) (invalidating arbitration agreement that limits remedies available for federal statutory claim); Paladino v. Avenet Computer Technologies, Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (arbitration agreements must provide the equivalent of court remedies); *In re* Managed Care Litigation, 132 F. Supp. 2d. 989, 1000 (S.D. Fla. 2000) (invalidating arbitration agreement that limits remedies available for federal statutory claim); *see also* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability and Preclusion Principles*, 38 U.S.F. L. REV. 49, 50 (2003) (courts have "uniformly refused to enforce such remedy-stripping clauses").

294. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 51-52 (1st Cir. 2006) (arbitration agreement prohibiting award of attorney's fees contradicts antitrust statute); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 216 (3d Cir. 2003) (arbitration agreement requiring each party to pay its own attorney's fees regardless of outcome is contrary to Civil Rights Act and Age Discrimination in Employment Act); Perez v. Globe Airport Sec. Services., Inc., 253 F.3d 1280, 1285 (11th Cir. 2001) (arbitration agreement requiring all fees to be shared "circumscribes the arbitrator's authority to grant effective relief" in Civil Rights Act case), *vacated*, Perez v. Globe Airport Sec. Serv. Inc., 294 F.3d 1275 (11th Cir. Fla. 2002).

295. Nesbitt v. FCNH, Inc., 74 F. Supp. 3d 1366 (D. Colo. 2014).

296. *Id.* at 1374.

297. *Id.*

298. *Id.* at 1374-75.

Sherman & Howard L.L.C.,[299] the relevant arbitration agreement called for the parties to split fees and expenses.[300] The plaintiff, however, had a claim under the Civil Rights Act, which provides for successful plaintiffs to recover their costs.[301] The district court, citing *American Express*, found the provision to be void.[302]

Based on Supreme Court dicta,[303] and on precedent from lower federal courts both before and after *American Express*,[304] it is likely that courts will continue to apply the effective vindication doctrine to arbitration agreements that limit the remedies that may be awarded to parties with federal statutory claims. An arbitration provision that prohibits an arbitrator from awarding a remedy that would be available under a federal statute should be unenforceable under the effective vindication doctrine.[305]

F. Conclusions Regarding the Continued Validity of the Effective Vindication Doctrine

American Express describes the effective vindication doctrine as a "judge-made exception to the FAA" that originated as dictum and has never been applied by the Supreme Court.[306] Furthermore, *American Express* carefully avoids indicating that there is any situation in which the Court will apply the effective vindication doctrine in the future.[307] *American Express* thus leaves attorneys and lower courts in a quandary as to whether the effective vindication doctrine is still good law, and, if so, when it should be applied. Based on Supreme Court dicta and precedent from lower federal courts, it seems likely that the effective vindication doctrine is still good law.[308] *American Express*, however, indicates that it will be applied more sparingly than courts and attorneys might have thought in the past.[309] At a minimum, *American Express* tells us that the effective vindication doctrine will not be used to invalidate

299. St. Charles v. Sherman & Howard L.L.C., No. 14-cv-03416, 2015 U.S. Dist. LEXIS 53983 (D. Colo. April 24, 2015).

300. *Id.* at *13-14.

301. *Id.* at *14.

302. *Id.* at *14-15.

303. *See supra* notes 287-92 and accompanying text.

304. *See supra* notes 293-302 and accompanying text.

305. *See* St. Charles v. Sherman & Howard L.L.C., No. 14-cv-03416, 2015 U.S. Dist. LEXIS 53983, at *5-6 (D. Colo. April 24, 2015); Nesbitt v. FCNH, Inc., 74 F. Supp. 3d 1366, 1372-73 (D. Colo. 2014).

306. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013).

307. *See supra* notes 114-22 and accompanying text.

308. *See supra* notes 150-91 and accompanying text.

309. *See supra* notes 192-95 and accompanying text.

arbitration agreements that merely make it cost ineffective to pursue a federal statutory claim.[310] The problem thus becomes identifying situations in which the effective vindication doctrine is still applicable.[311]

In arguing for a broader application of the effective vindication doctrine, the *American Express* dissent states that if an arbitration agreement frustrates the purpose of a federal statute, it should not matter whether it does so at the beginning, middle or end of the arbitration process.[312] In light of the *American Express* majority opinion, however, it does matter. The effective vindication doctrine probably still applies to arbitration provisions that prevent a party with a federal statutory claim from reaching an impartial decision maker in the first place, such as provisions that impose prohibitive arbitral costs or that appoint an obviously biased arbitrator.[313] The effective vindication doctrine also probably still applies to arbitration provisions that prevent an arbitrator from providing relief for a federal statutory claim at the end of the arbitral process, such as provisions that impose an unreasonable limitations period or that prohibit the award of statutorily authorized remedies.[314] The effective vindication doctrine probably does not apply to arbitration provisions that allow a party to present its case, but make the case more difficult to prove, such as provisions that limit the claimant's ability to conduct discovery.[315]

IV. A PROPOSED ARBITRAL REACTION TO A MORE LIMITED EFFECTIVE VINDICATION DOCTRINE

As courts and attorneys adjust to a more limited effective vindication doctrine after *American Express*, arbitrators should expect to encounter more cases in which parties with federal statutory claims have obstacles to overcome that they would not face in litigation. Because it is now clear that arbitration agreements can prohibit class actions even for low value claims, claimants who proceed to arbitration in such cases will have limited resources for things like expert reports.[316] Because it seems likely that the courts will enforce agreements that limit discovery, some claimants will have little or no opportunity to obtain evidence in the

310. *See Am. Express*, 133 S. Ct. at 2311-12.

311. *See supra* notes 196-97 and accompanying text.

312. *See Am. Express*, 133 S. Ct. at 2314 (Kagan, J., dissenting).

313. *See supra* notes 142-249 and accompanying text.

314. *See supra* notes 271-86 and accompanying text.

315. *See supra* notes 249-70 and accompanying text.

316. *See Am. Express*, 133 S. Ct. at 2308 (enforcing arbitration agreement where estimated cost of expert report would greatly exceed potential recovery).

possession of alleged tortfeasors.[317] Other permissible methods of making it more difficult to prove statutory claims will probably develop as attorneys adjust to drafting arbitration agreements with less concern over effective vindication doctrine issues.[318]

The question thus becomes: How should arbitrators react after *American Express* to cases in which agreed arbitral procedures substantially hinder a party from proving a federal statutory claim? The *American Express* dissent suggests a possible answer: "A hallmark of arbitration is its use of procedures tailored to the type of dispute and amount in controversy."[319] If American arbitration is to function as a legitimate method of resolving federal statutory disputes even in cases where parties do not have the panoply of processes available in litigation, then arbitrators should not expect claimants to prove their cases as though they were in a federal district court. Arbitrators should recognize that arbitration agreements that abridge the thoroughness of federal civil procedure for statutory claims indicate that the parties have opted for "less certainty of legally correct adjustment."[320] In such cases, the arbitrator functions not as an approximation of a federal district court, but "as a sort of small-claims tribunal."[321] Such an approach has been approved by the Supreme Court's statement that "it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement."[322]

Arbitrators have substantial discretion in adapting hearing procedures to match the level of thoroughness that the parties have provided for in their agreement. Arbitrators are not ordinarily bound by the Federal Rules of Evidence.[323] When the plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.* complained that limited discovery would make it difficult for him to prove his claim under the Age Discrimination in Employment Act, the Supreme Court responded that "an important counterweight to reduced discovery . . . is that arbitrators are not bound

317. *See supra* notes 249-70 and accompanying text (discussing challenges to arbitration agreements that make it more difficult to prove federal statutory violation).

318. *See Am. Express,* 133 S. Ct. at 2314 (Kagan, J., dissenting) ("possibilities are endless" for arbitration provisions to defeat statutory claims).

319. *See Am. Express,* 133 S. Ct. at 2316, n.1 (Kagan, J., dissenting).

320. Wilko v. Swan, 346 U.S. 427, 438 (1953), *overruled by*, Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989).

321. Metro East Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc., 294 F.3d 924, 927 (7th Cir.), *cert. denied*, 537 U.S. 1090 (2002).

322. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684-85 (2010).

323. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204 n.4 (1956); *see also* ALAN MILES RUBEN, FRANK ELKOURI, & EDNA ASPER ELKOURI, ELKOURI & ELKOURI, HOW ARBITRATION WORKS 341(BNA BOOKS, 6th ed. 2003).

by the rules of evidence."[324] The Supreme Court thus anticipated that evidentiary standards would be relaxed in arbitration when the circumstances justify it.[325] Furthermore, the FAA provides that in some instances an arbitrator's decision may be vacated for "refusing to hear evidence pertinent and material to the controversy,"[326] but not for accepting evidence that might have been rejected by a federal court applying the Federal Rules of Evidence.[327] An arbitrator might, for example, take arbitral notice of facts where a judge would not take judicial notice,[328] or might except a written statement (such as a letter from a physician) that a judge would reject as hearsay.[329]

Arbitrators can also use burden shifting and adverse inferences in appropriate cases. In civil litigation, the party which initiates a claim ordinarily has the burden of producing evidence to prove that claim,[330] and it is generally considered unfair to require a party to prove a negative.[331] In arbitration, however, if the party which initiates a claim is not permitted a full opportunity for discovery, the arbitrator can shift the burden of proof to the party that controls the relevant evidence on a particular issue.[332]

Furthermore, even in litigation "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."[333] That inference arises from the presumption "that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not

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324. Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 31 (1991).

325. *Id.*

326. Federal Arbitration Act, 9 U.S.C. § 10(a)(3) (2015). Even in cases where an arbitrator excludes relevant testimony, the award will not ordinarily be vacated unless the exclusion was so serious as to deprive a party of a fair hearing. *See,* Century Indem. Co. v. Certain Underwriters at Lloyds, London, 584 F.3d 513, 556 (3d Cir. 2009).

327. *See* Bell Aerospace Co. Div. of Textron Inc. v. Local 516 United Auto., Aerospace and Agric. Implement Workers, 500 F.2d 921, 923 (2d Cir. 1974) ("In handling evidence an arbitrator need not follow all the niceties observed by the federal courts."); Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d. 813 (D.C. Cir. 2007); Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001).

328. *See* FED. R. EVID. 201.

329. *See* FED. R. EVID. 802.

330. *See* Moore v. Kulicke & Soffa Indus., Inc., 318 F.3d 561, 566 (3d Cir. 2003).

331. *See* United States v. Decoster, 624 F.2d 196, 240 (D.C. Cir. 1976), *judgment entered,* 598 F.2d 311 (D.C. Cir. 1979).

332. *See* HOW ARBITRATION WORKS, *supra* note 323, at 422-23 (in arbitration burden of proof may depend on the issue, with no required order for presenting evidence).

333. Int'l Union, United Auto., Aerospace and Agric. Workers of Am. v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

subpoenaed."[334] In a case where a party to an arbitration is unable to prove a statutory claim because evidence in the possession of the other party was not produced, an arbitrator would likewise be able to draw an adverse inference against the party that chose not to produce the relevant evidence.[335]

Years before *American Express* was decided, the National Academy of Arbitrators recommended to its members that if an arbitration agreement "lacks fundamental due process, the arbitrator should insist upon an agreed correction as a condition of service and, failing agreement, should decline the appointment or withdraw from any further participation."[336] In the years following *American Express*, it is to be expected that the effective vindication doctrine will be construed more narrowly, and arbitrators will be faced with an increasing number of cases in which parties with federal statutory claims face significant procedural difficulties that they would not have faced in litigation.[337] In some of those cases arbitrators may be able, as the National Academy of Arbitrators suggests, to convince the parties to amend their procedures.[338] In others, arbitrators should, in the Supreme Court's words, "presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement."[339] While those procedures may provide "less certainty of legally correct adjustment,"[340] they should at least provide a reasonable opportunity for a party with a good federal statutory claim to prove its case.

V. CONCLUSION

The effective vindication doctrine provided reasonable assurance that parties would not be able to use arbitration agreements to contract away

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334. *Id.* at 1338.

335. *See* Nat'l Casualty v. First State Ins. Group, 430 F.3d 492, 497 (1st Cir. 2005) (describing arbitration in which adverse inference applied against party not producing evidence); Barahona v. Dillard's, Inc., 376 Fed. Appx. 395, 397-98 (5th Cir. 2010) (same).

336. NAT'L ACAD. ARBITRATORS, *Policy Statement on Employment Arbitration* (May 20, 2009), http://naarb.org/due_process.asp.

337. *See supra* notes 249-70 and accompanying text.

338. The National Academy of Arbitrators also states that "in assessing the fairness of a given system, the arbitrator should be mindful that the parties to a post-dispute agreement have much more latitude to vary from the procedural and substantive requirements of statutory systems than do parties to a pre-dispute agreement." NAT'L ACAD. ARBITRATORS, *supra* note 336.

339. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684-85 (2010).

340. Wilko v. Swan, 346 U.S. 427, 438 (1953).

their rights under federal statutes with important public policy goals. In *American Express,* the Supreme Court stated that the effective vindication doctrine originated as dictum, has never been applied by the Court, and would not be applied to an arbitration agreement that made the cost of arbitrating a statutory dispute greater than the potential recovery. *American Express* has left lawyers and lower courts unsure as to when, if ever, the effective vindication doctrine should be applied.

An analysis of Supreme Court dicta concerning effective vindication, lower court precedent from before *American Express*, and those cases which have struggled with effective vindication since *American Express*, indicates that the effective vindication doctrine is probably still good law, but narrower than previously thought. It seems likely that the effective vindication doctrine will still be applied in appropriate cases involving agreements that impose prohibitively high arbitral costs, appoint obviously biased arbitrators, impose unreasonably short limitations periods, or prevent an arbitrator from awarding statutory remedies. On the other hand, the doctrine probably does not apply to arbitration agreements with procedures that make it difficult for a party to prove a federal statutory claim, such as procedures that limit discovery. Because the effective vindication doctrine appears to be more limited than previously thought, there will probably be an increased number of arbitrations in which a party with a federal statutory claim is at a procedural disadvantage. Arbitrators should use the flexibility inherent in arbitration to adopt procedures that will give such a claimant a fair opportunity to prove its case.