THE VINDICATION OF RIGHTS DOCTRINE: STILL A KEY TO THE COURTROOM OR ARBITRATION'S LATEST CASUALTY?

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ABSTRACT

For decades, federal courts have had discretion under the vindication of rights doctrine to strike down one-sided arbitration agreements that prevent plaintiffs from effectively vindicating their rights in arbitration. Whether the vindication of rights doctrine still serves as an exception to the FAA, however, was recently called into question in the Supreme Court's decision in American Express Co. v. Italian Colors Restaurant ("Amex"). In Amex, the Court held that lower courts cannot use the vindication of rights doctrine to strike down arbitration clauses containing class-action waivers. However, Amex also created confusion about whether, and under what circumstances, courts can invalidate other objectionable arbitral features outside of the class-action setting. This Note argues Amex is limited to class-action waiver challenges, and that federal courts can and should continue to invalidate one-sided arbitration agreements under the vindication of rights doctrine.

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INTRODUCTION

The use of arbitration clauses in contracts has fundamentally changed litigation.[1] Courts are increasingly compelling arbitration under the Federal Arbitration Act ("FAA"), even when doing so precludes plaintiffs from effectively vindicating their statutory rights.[2] This recent trend deviates from the Court's long line of holdings that certain claims are not arbitrable.[3] It also abandons a traditional view that arbitration is an inadequate substitute for a judicial proceeding.[4] On a practical level, increased judicial deference to one-sided arbitration clauses has created insurmountable barriers to many plaintiffs seeking to vindicate their statutory rights.[5] With the courthouse door locked to plaintiffs, emboldened company lawyers pack arbitration clauses with class-action waivers, excessive filing fees, limited discovery, and worthless remedies

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1 *See generally* David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 724 (2012) (discussing how statutory rights are shaped by court interpretation of arbitration clauses).

2 9 U.S.C. § 2 (2006); *see infra* Part I and accompanying text; David Horton, *Mass Arbitration and Democratic Legitimacy*, 84 U. COL. L. REV. 1, 27 (2013) ("The dark hallmark of the Court's recent FAA jurisprudence is to compel arbitration even when there is no dispute that doing so will eliminate statutory rights."); *see also* AT&T Mobility L.L.C. v. Concepcion 131 U.S. 1740, 1753 (2011) (holding that courts must compel arbitration even if doing so results in claims going unresolved). For lower court decisions interpreting *Concepcion*, see Coneff v. AT&T Corp., 673 F.3d 1155, 1158 (9th Cir. 2012); Green v. SuperShuttle Intern., Inc., 653 F.3d 766, 769 (8th Cir. 2011); Litman v. Cellco P'ship, 655 F.3d 225, 229 (3d Cir. 2011)

3 *See, e.g.*, McDonald v. City of West Branch, Mich., 466 U.S. 284, 292 (1984) (holding that arbitration of a civil rights claim was not an adequate substitute for trial); Wilko v. Swan 346 U.S. 427, 431 (1953) (holding that to compel arbitration would undermine the antitrust statutes); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968) (holding that arbitration of antitrust claim was inappropriate).

4 *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222-23 (1985) (holding that arbitrations limited discovery and less than rigorous evidentiary rules made it an inadequate substitute for a judicial trial).

5 *See, e.g.*, Am. Exp. Co. v. Italian Colors Rest., 133 U.S. 2304, 2312 (2013) (upholding an arbitration agreement where plaintiffs were unable to proceed with their antitrust claims because of a class-action waiver); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 298 (2d Cir. 2013) (holding that plaintiff was not prevented from effectively vindicating its rights by pursuing arbitration on an individual basis even though the cost of arbitrating individually exceeded any expected recovery).

all in an effort to stack the deck in their favor.[6] Yet, there are even broader implications. Enforcing one-sided arbitration clauses in individual cases has the aggregate effect of weakening federal and state laws intended to protect consumers and employees.[7]

With all of the negative externalities and potential for abuse, what explains the Court's increasing eagerness to compel arbitration? To answer this, one must begin with the statute. The FAA makes arbitration clauses "valid, irrevocable, and enforceable."[8] Yet in early cases, courts ignored this command under the non-arbitrability doctrine when plaintiffs asserted federal statutory claims.[9] The Court's rationale was that enforcing arbitration agreements should not come at the expense of diminishing federal statutory rights.[10] Three decades ago, the Supreme Court abolished the non-arbitrability doctrine and replaced it with the watered-down vindication of rights doctrine.[11] The vindication of rights

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[6] *See* David Horton, *Unconscionability Wars* 106 NW. U. L. REV. COLLOQUY 13, 13 (2011) (explaining that in addition to funneling cases away from court, companies strip remedies, slash discovery, select biased arbitrators, and eliminate the right to bring class actions in an effort to tilt the scales of justice in their favor); *see also* David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. Rev. 437, 460 (2011) (explaining that in response to judicial deference companies realized they could divert claims from court and impose self-serving procedures in arbitration).

[7] *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration* WIS. L. REV. 33, 115-17 (1997) (arguing that prospective waivers lead to externalities that include undermining the private right of action); *see also* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial* 16 OHIO ST. J. ON DISP. RESOL. 669, 670 (2001) (arguing that forced arbitration weakens the value of federal and state laws by removing consumers and employees rights to enforce those laws in court).

[8] 9 U.S.C. § 2 (2006).

[9] *See Wilko*, 346 U.S. at 438 (holding that a contractual waiver to select the forum would undermine the express purpose of the federal statute at issue); *see also* Lake Commc'ns., Inc. v. ICC Corp., 738 F.2d 1473, 1477-80 (9th Cir. 1984) (refusing to submit antitrust issues to arbitration); Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc., 627 F.2d 272, 277 (D.C. Cir. 1980) (refusing arbitration under the Railway Labor Act (RLA)); Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (refusing to compel arbitration under the Patent Act), *superseded in part by statute,* Act of August 27, 1982, ch. 29, § 294, 96 Stat. 317 (codified as amended at 35 U.S.C. § 294 (2006), *and overruled in part by* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Am. Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968) (holding that antitrust claims are inappropriate for arbitration); Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 961 (D.N.J. 1982) (holding that claim under the Commodity Exchange Act was not arbitrable).

[10] *See, e.g.*, *Wilko,* 346 U.S. at 438 (implying that arbitration weakens the federal statutory scheme).

[11] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (emphasis added) (holding that arbitration is appropriate so long as the prospective litigant can *effectively vindicate* its statutory rights in the arbitral forum); *see also* Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000) (holding that claims arising under statutes designed to further important social goals can be arbitrated so long as the prospective litigant can effectively vindicate its statutory rights in arbitration).

rule similarly allowed courts to strike down arbitration agreements that prevented plaintiffs from effectively vindicating their rights.[12]

Whether the vindication of rights doctrine still serves as an exception to the FAA, however, was recently called into question in the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* ("Amex").[13] In *Amex*, the Court held that lower courts cannot use the vindication of rights doctrine to strike down arbitration clauses containing class-action waivers.[14] However, *Amex* also created confusion about whether, and under what circumstances, courts can invalidate other objectionable arbitral features outside of the class-action setting.[15]

This Note argues that courts can and should continue to invalidate one-sided arbitration agreements under the vindication of rights doctrine.[16] Part I provides background information in the form of important cases dealing with the scope of arbitration clauses, and traces the development of the vindication of rights doctrine.[17] Part II will examine the Supreme Court's recent decision in *Amex*.[18] Part III argues that *Amex* is limited to class-action waiver challenges and provides a framework for courts to continue to strike down one-sided arbitration agreements under the vindication of rights doctrine.[19]

I. BACKGROUND

A. The FAA and Early Courts

In 1925, Congress passed the Federal Arbitration Act in light of widespread judicial hostility toward arbitration.[20] The FAA went beyond merely recognizing arbitration as a valid forum and actually gave arbitration some teeth. Section 2 of the statute explains that contractual agreements to settle disputes by

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[12] *Green Tree,* 531 U.S. at 90.
[13] Am. Exp. Co. v. Italian Colors Rest., 133 U.S. 2304, 2312 (2013).
[14] *Id.* at 2311-12 (holding that the vindication of rights doctrine was not an exception to class-action waivers in arbitration clauses and reaffirming its holding in *AT&T v. Concepcion*, 131 U.S. 1740 (2011) (that enforcement of arbitration cannot be conditioned on the availability of class-arbitration).
[15] *Id.* at 2310-11 (emphasis added) (referring to the "effective vindication" exception as "dictum" and asserting that its purpose is only to prevent a prospective waiver of a parties *right to sue*).
[16] *See infra* Part III.
[17] *See infra* Part I.
[18] *See infra* Part II.
[19] *See infra* Part III.
[20] H.R. Rep. No. 96, 68th Cong., (1st Sess. 1924).

arbitration are "valid, irrevocable and enforceable."[21] It was against this backdrop that the Court in *Wilko v. Swan* created the non-arbitrability doctrine.[22]

In *Wilko*, the plaintiff had a contract with the defendant that compelled arbitration.[23] The Court found that the arbitration provision constituted an "impermissible waiver" of the plaintiff's statutory rights under the Securities Act of 1933 because the Act gave the plaintiffs an express right to sue in court.[24] The Court explicitly held that arbitration was not the proper forum for a Securities Act claim.[25] This conclusion was in fact most likely influenced more by the presence of an express non-waiver provision in the Securities Act rather than the Court's underlying disdain for arbitration. Indeed, the Court in *Wilko* closes the opinion by describing arbitration as prompt, economical, and adequate.[26]

Regardless, subsequent cases interpreted *Wilko* as providing a basis for courts to strike down arbitration provisions when they felt arbitration was an inadequate forum.[27] In *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, the Second Circuit held that an antitrust claim brought by the plaintiff was an inappropriate claim to be brought in arbitration.[28] In *Alexander v. Gardener-Denver Co.*, the Court refused to compel arbitration and interpreted Title VII as granting the plaintiffs a private cause of action in court.[29] In a more recent case, the court in *McDonald v. City of West Branch, Mich.* similarly found that

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[21] 9 U.S.C. § 2 (2006).

[22] *See* Wilko v. Swan 346 U.S. 427, 430 (1953) ("The question is whether an agreement to arbitrate a future controversy is a 'condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision' of the Securities Act which s[ection] 14 declares 'void.'").

[23] *Id.* at 429.

[24] *Id.* at 434-35.

[25] *Id.* at 438.

[26] *See id.* (holding that Congress has provided parties an opportunity to secure adequate, prompt, and economical solutions to controversies through arbitration).

[27] *See* Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968) ("We think that the remedy a statute provides for violation of the statutory right it creates may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal, such as arbitration, unless the right itself is of a character inappropriate for enforcement by arbitration." (quoting Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1953), *rev'd*, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) ("[W]e conclude that the antitrust claims raised here are inappropriate for arbitration.")); Lake Commc'ns., Inc. v. ICC Corp., 738 F.2d 1473, 1477-80 (9th Cir. 1984) (refusing to submit antitrust issues to arbitration); Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (refusing to compel arbitration under the Patent Act), *superseded in part by statute,* Act of August 27, 1982, ch. 29, § 294, 96 Stat. 317 (codified as amended at 35 U.S.C. § 294 (2006)), *and overruled in part by* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 961 (D.N.J. 1982) (holding that claim under the Commodity Exchange Act was not arbitrable); Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc., 627 F.2d 272, 277 (D.C. Cir. 1980) (refusing arbitration under the Railway Labor Act (RLA)).

[28] *See Am. Safety Equip. Corp.*, 391 F.2d at 825 (2d Cir. 1968).

[29] 415 U.S. 36, 42, 51, 59-60 (1974).

arbitration of a civil rights claim was not an acceptable replacement for a judicial trial.[30]

The line of cases following *Wilko* represents an era marked by liberal application of the non-arbitrability doctrine.[31] That era, however, is all but gone.[32] In its ashes, the Supreme Court has crafted a more restricted view of the non-arbitrability doctrine not nearly as quick to prevent arbitration of federal claims.[33]

B. The Vindication of Rights Doctrine

The landmark case establishing the transition from non-arbitrability to the vindication of rights doctrine was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*[34] In *Mitsubishi*, the Court evaluated whether arbitration of an antitrust claim was appropriate.[35] The Court deviated from *Wilko* and its progeny and found that the complexity of an antitrust claim was insufficient reason to bar arbitration.[36] The Court compelled arbitration, holding that arbitration for a federal claim was appropriate so long as the prospective litigant can effectively vindicate his or her claim in arbitration.[37] The Court then went on to explain that in arbitration a plaintiff does not forego substantive rights afforded by a statute.[38] The Court opined that arbitration is merely a change in a forum.[39] The Court also noted the benefits of arbitration, describing it as more simple, informal, and efficient than a judicial proceeding.[40]

However, the holding was not unanimous approval of all arbitration. Rather, the Court reiterated that it would have no trouble striking down an arbitration clause should the clause amount to a prospective waiver of a party's right to pursue a statutory claim.[41] Thus, the Court ultimately sought to strike a

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30 McDonald v. City of West Branch, Mich., 466 U.S. 284, 292 (1984).
31 *See supra* note 27 and accompanying text.
32 *See, e.g.*, *Green Tree*, 531 U.S. at 79 (compelling arbitration under the ECOA); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991) (compelling arbitration of an ADEA claim); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987) (compelling arbitration of a RICO claim); Bradford v. Rockwell Semiconductor Systems, Inc., 238 F.3d 549 (4th Cir. 2001) (compelling arbitration under the ADEA).
33 *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 637 (1985) (holding that arbitration is enforceable so long as the plaintiff can effectively vindicate its rights); *see also supra* note 29 and accompanying text.
34 *Id.*
35 *Id.* at 624.
36 *See id.* at 633-34 (holding that potential complexity alone is not sufficient to conclude that arbitration could not handle an antitrust matter).
37 *Id.* at 637.
38 *Id.* at 628.
39 *Id.*
40 *Id.*
41 *Id.* at 637 n.19.

balance between enforcing arbitration agreements to their terms and allowing for judicial discretion in cases of where the agreements are disproportionately one-sided.[42]

Even with the Court's caveat, the new trend toward compelling arbitration gained momentum.[43] Following *Mitsubishi*, several cases applied the vindication of rights doctrine and found arbitration was a proper forum for a variety of federal statutory claims.[44] For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court compelled arbitration of claim arising under the Age Discrimination and Employment Act ("ADEA").[45]

Perhaps the most influential of this line of cases articulating the vindication of rights doctrine was *Green Tree Financial Corp.-Alabama v. Randolph*.[46] In *Green Tree*, the plaintiff filed a class action against Green Tree under the Truth in Lending Act ("TILA") and Equal Credit Opportunity Act ("ECOA").[47] The plaintiff had also agreed to arbitrate claims in its contract with defendant.[48] At trial, the plaintiff argued that she would not be able to vindicate her rights in arbitration because the cost would be too prohibitive.[49] The Court held that an arbitration agreement can only be invalidated if a plaintiff shows that it would be prohibitively expensive.[50] The Court further held that the plaintiff bears the burden of showing that he or she would likely incur such costs.[51] The Court found that the plaintiff did not meet this burden.[52]

While *Green Tree* gave the vindication of rights doctrine some contours, lower courts were still uncertain as to how to apply the doctrine.[53] In *Bradford v.*

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42 *Id.*

43 *See, e.g.*, *Green Tree*, 531 U.S. at 79 (compelling arbitration under the ECOA); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991) (compelling arbitration of an ADEA claim); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987) (compelling arbitration of a RICO claim); Bradford v. Rockwell Semiconductor Systems, Inc., 238 F.3d 549 (4th Cir. 2001) (compelling arbitration under the ADEA).

44 *See, e.g.*, *Gilmer*, 500 U.S. at 31-32 (holding arbitration was an appropriate forum for an ADEA claim in part because arbitrators could grant similar relief to a court); *see also Shearson*, 482 U.S. at 227 ("To defeat application of the Arbitration Act in this case, therefore, the McMahons must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act, an intention discernible from the text, history, or purposes of the statute.").

45 500 U.S. 20, 28 (1991).

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

47 *Id.* at 83.

48 *Id.*

49 *Id.* at 80-81.

50 *Id.* at 81.

51 *Id.*

52 *Id.* at 92.

53 *See* Horton, *supra* note 1, at 737 ("After *Green Tree*, jurisdictions have disagreed about how to assess vindication of rights challenges. One common problem is cost-splitting provisions, which usually require plaintiffs to pay half of the arbitral expenses.").

Rockwell Semiconductor Systems, Inc., the Fourth Circuit attempted to refine the vindication of rights doctrine.[54] In *Bradford*, the plaintiff sued his employer for discriminating against him on the basis of age.[55] The plaintiff's employer immediately sought to compel arbitration based on the arbitration provision in plaintiff's employment agreement.[56] Consistent with *Green Tree*, the Court held that a plaintiff had to prove that arbitration would be prohibitively expensive in order to strike down an arbitration agreement.[57] The Fourth Circuit further held that the complaining party's ability to pay arbitration costs should be assessed on a case-by-case basis in determining whether arbitration would be prohibitively expensive.[58] Under the test, courts would also examine whether the difference in cost between litigation and arbitration is so substantial that it would deter the claimant from bringing the claim(s).[59] The Court applied this rule to the plaintiff and found that he offered no evidence of prohibitive expense.[60]

The cases following *Mitsubishi* created a higher burden for plaintiffs challenging arbitration agreements.[61] Nonetheless, the Court still maintained that arbitration agreements could be held unenforceable under the vindication of rights doctrine if a plaintiff was unable to effectively vindicate its rights in arbitration.[62] However, the Court created what appears to be a double standard for vindication of rights challenges based on class arbitration waivers and vindication of rights challenges to other arbitral features. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, for example, the Court held that an arbitration agreement silent on the issue of arbitration does not permit an arbitrator to infer that class arbitration is permitted.[63] The Court reasoned that class-arbitration fundamentally changes the nature of bilateral arbitration and thus foregoes the benefits of lower costs, speed and efficiency.[64]

The Court's holding in *Stolt-Nielsen* laid a foundation for its later holding in *AT&T Mobility L.L.C. v. Concepcion*.[65] In *Concepcion*, the plaintiffs, Vincent and Liza Concepcion, filed a class-action lawsuit against AT&T for false advertising and fraud.[66] AT&T moved to compel arbitration, citing its wireless service agreement with the plaintiffs which contained an arbitration clause and

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[54] Bradford v. Rockwell Semiconductor Systems, Inc., 238 F.3d 549 (4th Cir. 2001).
[55] *Id.* at 551
[56] *Id.*
[57] *Id.* at 557-58.
[58] *Id.* at 556.
[59] *Id.*
[60] *Id.* at 558.
[61] *See supra* notes 40, 43-44 and accompanying text.
[62] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 637 (1985).
[63] Stolt-Nielsen S.A. v. Animal Feeds International Corp., 559 U.S. 662, 685 (2010).
[64] *Id.*
[65] AT&T Mobility L.L.C. v. Concepcion, 131 U.S. 1740, 1752 (2011).
[66] *Id.* at 1744.

class-action waiver.[67] The plaintiffs objected, arguing that under California law class-action waivers in arbitration agreements are unconscionable and thus unenforceable.[68] AT&T countered the plaintiffs' argument, asserting that the unconscionability doctrine was preempted by the FAA in cases where arbitration agreements contain class arbitration waivers.[69] The Court held that the FAA preempted a California Supreme Court decision holding that class arbitration waivers in consumer arbitration agreements were unconscionable.[70] Similar to the holding in *Stolt-Nielsen*, the Court explained that the state rule interfered with the fundamental characteristics of arbitration and was thus incompatible with the FAA's mandate.[71]

In light of the Court's decision in *Stolt-Nielsen* and *Concepcion*, lower courts were left to figure out how to reconcile the vindication of rights doctrine with one-sided arbitration agreements, particularly those that contained class arbitration waivers.[72] This was especially perplexing because in *Concepcion*, the Court held that states cannot mandate the availability of class procedures in arbitration agreements.[73] But *Concepcion* dealt with the enforceability of arbitration agreements based on state unconscionability principles. The vindication of rights doctrine, on the other hand, is a creature of federal common law.[74] Thus, the question remained as to whether federal courts could continue to the use the vindication of right doctrine to strike down arbitration agreements containing class arbitration waivers. The Supreme Court attempted to answer this important question with its decision in *Amex*.[75]

II. AMERICAN EXPRESS CO. V. ITALIAN COLORS RESTAURANT (2013)

A. Factual and Procedural Background

In *Amex*, the plaintiffs were merchants who accepted American Express cards.[76] The plaintiffs filed a class action against American Express, asserting that American Express violated Section 1 of the Sherman Act.[77] The plaintiffs claimed

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67 *Id.* at 1742.
68 *Id.* at 1745.
69 *Id.* at 1747-48.
70 *Id.* at 1748.
71 *Id.*
72 *See* Horton, *supra* note 1, at 743-45 (explaining that lower courts interpreted *Stolt-Nielsen* and *Concepcion* inconsistently in the class-action context).
73 *AT&T*, 131 U.S. at 1748.
74 *See* Horton, *supra* note 1, at 725 (explaining that the vindication of rights doctrine is a creature of federal common law).
75 Am. Exp. Co. v. Italian Colors Rest., 133 U.S. 2304, 2312 (2013).
76 *Id.* at 2308.
77 *Id.*

that American Express forced merchants to accept credit cards at rates approximately thirty percent higher than the fees for competing credit cards by leveraging its monopoly power.[78] The plaintiffs sought treble damages for the class as permitted under section 4 of the Clayton Act.[79]

American Express moved to compel individual arbitration, citing that the plaintiffs had signed contracts agreeing to arbitrate all claims and that the plaintiffs waived their right to sue as a class.[80] The plaintiffs resisted the motion to compel arbitration, noting that the costs of expert analysis necessary to prove their antitrust claims would far outweigh the maximum recovery of any individual plaintiff even with treble recovery.[81] The plaintiffs argued that the inability to sue as a class precluded them from effectively vindicating their federal statutory rights under the Sherman Act.[82] The Second Circuit agreed and held that the arbitration agreement between American Express and the plaintiffs was unenforceable.[83]

B. Holding and Rationale

The Supreme Court disagreed with the Second Circuit and reversed, finding for American Express. [84] The Court explained that the FAA mandated courts to rigorously enforce arbitration agreements according to their terms.[85] This includes provisions that dictate with whom arbitration takes place and what rules govern arbitration.[86] The Court further explained that the FAA mandate applies to federal statutory claims unless Congress commands otherwise.[87] The Court found that Congress did not make such a command when it drafted antitrust laws.[88]

The Court then turned to the plaintiffs' vindication of rights doctrine argument. The plaintiffs argued that if the class arbitration waiver was enforced it would preclude the plaintiffs from effectively vindicating their federal statutory rights.[89] In response, the Court noted that the vindication of rights doctrine

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78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id*.
83 *See In re* Am. Exp. Merchants' Litig., 667 F.3d 204, 218 (2d Cir. 2012) (holding that because plaintiffs demonstrated that they could not feasibly vindicate their rights, the arbitration agreement was unenforceable), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* Am. Exp. Co. v. Italian Colors Rest., 133 U.S. 594 (2012), *overruled by* 133 U.S. 2304 (2013).
84 *Amex*, 133 U.S. at 2310.
85 *Id.* at 2309.
86 *Id*.
87 *Id*.
88 *Amex*, 133 U.S. at 2309-10.
89 *Id.* at 2308.

originated in dictum and while the Court has acknowledged its existence, the Court has never applied it to a particular case.[90] The Court explained that the doctrine's purpose was to prevent a prospective waiver of a party's *right to sue*.[91] In other words, had the arbitration agreement contained a provision that expressly barred the plaintiffs from bringing antitrust claims, then the Court would use the doctrine to strike it down. The *Amex* plaintiffs still had the *right to sue*, even if doing so would have been so expensive as to be impractical.[92]

In closing, the Court noted that in *Concepcion* it had already invalidated a state law conditioning enforcement of arbitration on the availability of a class arbitration option.[93] The Court reiterated its position that class arbitration was not necessary to prosecute low value claims that may not be worthwhile for plaintiffs to bring individually.[94] The Court further reasoned that the FAA's command to enforce arbitration agreements outweighs any interest in prosecuting low value claims.[95] The Court did not, however, explain whether the vindication of rights doctrine could be used to invalidate arbitration agreements on other grounds.

III. ANALYSIS

While *Amex* undoubtedly expresses increased deference to the FAA and arbitration agreements,[96] courts should resist the temptation to read the opinion too broadly. This section of the Note will argue that the Court's treatment of the vindication of rights doctrine is limited to class-action waiver challenges. It will also discuss why courts can and should continue to strike down one-sided arbitration agreements under the vindication of rights doctrine. Finally, it will reason that courts should utilize a subjective framework when applying *Green Tree's* prohibitive cost analysis to future cases.

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90 *Id.* at 2309.
91 *Id.* at 2314 (emphasis added).
92 *Id.*
93 *Id.* at 2312 ("Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure . . ."); *see* AT&T Mobility L.L.C. v. Concepcion 131 U.S. 1740, 1753 (2011) ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA." (citing Hines v. Davidowitz*,* 312 U.S. 52, 67 (1941))).
94 *See Amex*, 133 U.S. at 2312 (quoting *Concepcion* 131 U.S. at 1753) (holding that class-arbitration is not necessary to prosecute claims "that might otherwise slip through the legal system").
95 *See id.* at 2312 n.5 ("The FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.").
96 *See supra* Part II.

A. Applying the Vindication of Rights Doctrine After Amex.

Amex failed to provide lower courts much guidance when it comes to assessing arbitration challenges outside of the class-action setting. Specifically whether, and under what circumstances, the vindication of rights doctrine remains a viable defense to arbitration. The importance of answering this question cannot be overstated as whether the doctrine remains viable will in many cases dictate whether a legal claim can survive in arbitration.[97]

A close look at *Amex* suggests that the doctrine survives, albeit in a much more limited form. The Court explains that the vindication of rights doctrine would "certainly" cover an arbitration provision that expressly precludes the assertion of a statutory right.[98] The doctrine would "perhaps" cover administrative and filing fees that are "so high as to make access to arbitration impracticable."[99] The Court, however, stops short of providing lower courts an analytical framework to identify such a fee. And assuming that an arbitration agreement did contain a fee that makes access to arbitration impracticable, the Court in *Amex* only goes as far as stating that the vindication of rights doctrine would "perhaps" apply.[100]

Lower federal courts may find *Amex's* ambiguity surrounding the vindication of rights doctrine as justification for applying *Amex* broadly. Language elsewhere in the opinion would ostensibly appear to support such an interpretation. For example, the Court in *Amex* began its analysis by explaining that lower courts should enforce arbitration agreements unless there is some contrary congressional command present in the relevant statute.[101] The Court's threshold inquiry into whether there is any contrary congressional command suggests that arbitration agreements are presumed enforceable.[102]

Amex's language characterizing judicial review of arbitration agreements can also be construed to support a broad interpretation. In *Amex*, the Court describes judicial review of arbitration agreements as "judicially created superstructure[s]" not sanctioned by the FAA.[103] The Court reasoned that requiring federal courts to assess arbitrability on a case-by-case basis would be

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[97] *See, e.g.*, *Amex*, 133 U.S (enforcement of class-action waiver left plaintiffs unable to bring their antitrust claims).
[98] *Id.* at 2310.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 2309.
[102] *See id.* (holding that courts must "rigorously enforce" arbitration agreements to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).
[103] *Id.* at 2312.

unduly burdensome.[104] It would also destroy the speed and efficiency that arbitration was intended to provide.[105]

Finally, there are policy arguments that courts might consider in justifying a broad application of *Amex*. One such argument is that the issue of one-sided arbitration clauses should be dealt with by the arbitral system itself.[106] This argument is based on the rationale that the arbitral system needs a chance to improve itself without judicial interference.[107] Others argue that arbitration is much more efficient than litigation.[108] This quality, some say, actually makes arbitration pro-consumer.[109] Businesses save on dispute resolution costs through arbitration and then pass those savings onto the consumer.[110]

1. Amex is Limited to Class-Action Waiver Challenges.

Any sweeping principle that purportedly appears in *Amex* is countervailed by strong arguments that the Court's treatment of the vindication of rights doctrine is limited to class-action waiver challenges. To illustrate this, it is first worth noting that the plaintiffs in *Amex* had access to other beneficial arbitral features that, in the Court's opinion, appeared to mitigate any harshness of the class-action waiver.[111] For example, the plaintiffs' arbitration agreement with American Express allowed for cost sharing.[112] Cost sharing would have allowed the plaintiffs to pool their resources to secure expert testimony in support of their antitrust claims. The Court also suggested during oral argument that the

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[104] *See id.* ("Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure.").

[105] *Id*.

[106] *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2067 (2011) (arguing that the arbitral system should be given a chance to confront one-sided arbitration agreements).

[107] *Id.*

[108] *See* Amy J. Schmitz, *Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 126 (2002) (arguing that arbitration has the potential to be more equitable, inexpensive, and efficient than litigation); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1162 (2009) (arguing that arbitration is more efficient because plaintiffs do not have to wait for court congestion to clear up); *AT&T Mobility LLC v. Concepcion*, 131 U.S. 1740, 1749 (2011) (explaining that arbitration allows for efficient, streamlined proceedings).

[109] *See generally* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 89 J. DISP. RESOL. 90 (2001) (arguing that people tend to overlook the pro-consumer aspect of arbitration).

[110] *Id.*

[111] *See, e.g.*, Transcript of Oral Argument at 4-5, Am. Exp. Co. v. Italian Colors Rest., 133 U.S. 2304 (2013) (No. 12-133), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf (describing plaintiffs ability to share costs in paying for expert testimony).

[112] *Id.*

expensive expert testimony that the plaintiffs sought might not even have been absolutely necessary in the more informal world of arbitration.[113]

These factors appear to have persuaded the Court that it was more justified in applying a restricted version of the vindication of rights doctrine to the *Amex* plaintiffs. That is, in cases like *Amex* where the plaintiff has access to other beneficial arbitral features, the Court might have less pause in applying a restrictive version of the vindication of rights doctrine. While, on the other hand, the Court might find that a restricted version of the doctrine would be less justifiable in a case where the arbitration agreement is completely one-sided.

2. Access to Arbitration Versus Proceeding Inside Arbitration.

Another aspect of *Amex* suggests that the Court's holding was primarily aimed at class-action waiver challenges. Specifically, the Court appears to draw a distinction between challenging an arbitration clause as barring access to the arbitral forum and challenging an arbitration agreement once inside arbitration.[114] The Court's emphasis on why class-action waivers do not eliminate a plaintiff's right to sue implies a distinction between those provisions that eliminate a plaintiff's right to sue and those that merely make it more difficult or not worthwhile.[115] For example, an arbitration agreement containing a high filing fee might actually eliminate a plaintiff's right to sue, while an arbitration agreement containing a class-action waiver might just make it more difficult or not worthwhile. In other words, a high arbitration fee may prevent access to arbitration altogether; a class-action waiver may just make proceeding through arbitration more difficult.[116] Under this line of reasoning, the former would implicate the vindication of rights doctrine while the latter would not.

The counterargument here is that this distinction breaks down all too quickly. This is because there is arguably no meaningful difference between a high filing fee that bars access to arbitration and a class-action waiver that removes any incentive or ability to proceed once inside arbitration. Both the fee and the class-action waiver have the same result: legal claims that could have been brought in court cannot survive in arbitration.[117]

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[113] *Id.*

[114] *See Amex*, 133 U.S. at 2311 (distinguishing between a plaintiff's right to sue and the manner in which they prove a statutory remedy).

[115] *Id.*

[116] *See id.* (plaintiffs unable to proceed with antitrust claim in the absence of class-action procedures).

[117] *See id., e.g.*, (enforcing a class-action waiver in spite of uncontroverted evidence that plaintiffs could not proceed individually).

Yet, *Amex* can be distinguished even further from future non-class-action cases based on its heavy reliance on *Concepcion*.[118] In *Concepcion*, the Court held that the FAA preempted a California Supreme Court decision holding that class-action waivers in consumer arbitration agreements were unconscionable.[119] The Court reasoned that conditioning enforcement of arbitration on the availability of class-action procedures interfered with fundamental characteristics of arbitration and thus was inconsistent with the FAA's mandate.[120] In *Amex*, the Court similarly refused to invalidate a class-action waiver and explained that its decision in *Concepcion* "all but resolves this case."[121] Such strong reliance on *Concepcion* suggests that the class-action context was also a key factor for the majority's decision in *Amex*.[122]

3. Arguing Around Arbitration's Fundamental Attributes.

After *Amex*, the door to challenging class-action waivers in arbitration agreements under the vindication of rights doctrine is probably closed.[123] *Amex* does appear, however, to leave the door open for vindication of rights challenges to other arbitral features so long as doing so does not interfere with the "fundamental attributes of arbitration."[124] While the Court does not clarify what all of arbitration's fundamental attributes are, it does explain that arbitration is fundamentally bilateral in nature.[125] This is precisely why the Court held that mandating the availability of class procedures in *Amex* would have interfered with arbitration's fundamental attributes.[126]

But not all arbitration provisions implicate arbitration's fundamental attributes.[127] For example, conditioning enforcement of arbitration on the

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118 AT&T Mobility L.L.C. v. Concepcion, 131 U.S. 1740, 1748 (2011).
119 *Id.* at 1748.
120 *See Amex*, 133 U.S. at 2312.
121 *Amex*, 133 U.S. at 2312.
122 There is an argument that the Court's reliance on *Concepcion* is inapposite because *Concepcion* dealt with federal preemption of state law unconscionability doctrine, while the issue in *Amex* was based on federal common law (vindication of rights doctrine). *See Concepcion*, 131 U.S. at 1748 (holding that states cannot condition enforcement of arbitration on availability of class procedures under state unconscionability doctrine).
123 *See id.* at 2307 (holding that class-action procedures fundamentally interfere with arbitration).
124 *See id.* (citing *Concepcion*, 131 U.S. at 1748) (holding that in *Concepcion*, it invalidated a law conditioning enforcement of arbitration on the availability of class procedure because the law interfered with the fundamental attributes of arbitration).
125 *See supra* note, 112.
126 *See supra*, note 93.
127 Which provisions go to the heart of arbitration's attributes is not clear. However, there is an argument that because the Court singled out class-actions procedures as interfering with arbitration's fundamental attributes, other procedures not discussed by the court may not. *See supra* note, 112.

availability of a cost-sharing mechanism for plaintiffs would not fundamentally change the nature of arbitration in the way forcing class-arbitration would. Cost sharing would simply allow plaintiffs to proceed through arbitration while sharing costs associated with proving their legal claims, such as securing expert testimony.[128] It preserves the bilateral nature of arbitration while avoiding any of the inefficiencies the Court in *Amex* associated with class actions.[129]

Furthermore, cost-sharing mechanisms are just one of many arbitral features that appear in arbitration agreements.[130] There are many arbitral features that have nothing to do with class-action procedures.[131] Thus, plaintiffs seeking to challenge arbitration agreements should argue that non-enforcement would not interfere with arbitration's fundamental attributes.

B. Applying Green Tree's Prohibitive Cost Analysis.

Assuming *Amex* does not foreclose the ability to challenge other arbitral features not related to class-actions, *Green Tree's* prohibitive cost analysis provides a framework that courts can use to determine whether to enforce an arbitration agreement.[132] Recall that in *Green Tree*, the Court held that a plaintiff can avoid arbitration upon meeting his or her burden of showing that arbitration would be prohibitively expensive.[133] The Court in *Amex* appears to have heightened this burden even further. Plaintiffs must now show that the costs will be so high that access to the forum would be impracticable in order to avoid arbitration.[134] Therefore, the question becomes: at what point does an arbitration

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128 *See supra*, note 111.
129 *See supra*, note 104.
130 *See supra*, note 6.
131 *Id.*
132 *See Green Tree*, 531 U.S. at 92-93 (holding that plaintiffs can avoid arbitration by making an individualized showing of incurring prohibitive costs). A line of recent cases also suggests that the *Green Tree's* prohibitive cost analysis remains viable. *See, e.g.*, *In re* Sprint Premium Data Plan Marketing and Sales Practices Litigation 10-CV-6334 SDW MCA, 2013 WL 4773972 (D.N.J., Sept. 4, 2013) (applying the *Green Tree* prohibitive cost analysis to find that plaintiffs did not meet their burden); *Damato v. Time Warner Cable, Inc.*, 13-CV-994 ARR RML, 2013 WL 3968765 (E.D.N.Y., July 31, 2013) (applying *Green Tree's* prohibitive cost analysis but finding that plaintiffs failed to meet their burden); *Morris v. Ernst & Young LLP*, CV C-12-04964 RMW, 2013 WL 3460052 (N.D. Cal., July 9, 2013) (holding that plaintiffs failed to meet their burden under *Green Tree* of demonstrating that they cannot effectively vindicate their statutory rights in arbitration based solely on the risk of loss argument).
133 Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000).
134 *See Amex*, 133 U.S. at 2310-11 (emphasis added) (stating that the vindication of rights doctrine would *perhaps* cover "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable"); *see also* Byrd v. Sun Trust Bank, WL 3816714 at *17-19 (W.D. Tenn., 2013) (holding that plaintiffs did not meet their burden of showing that they will be unable to vindicate their rights in arbitration due to prohibitive costs, in light of the higher burden established by the Supreme Court in *Amex*).

fee make access to arbitration impracticable? Is the standard an objective or subjective one?

If the vindication of rights doctrine is to truly serve its purpose, the standard must be subjective.[135]Allow the following basic hypothetical to illustrate the point. Jake files an employment discrimination claim under Title VII against his employer in federal district court. Jake's employer moves to compel arbitration, citing an arbitration agreement that Jake signed when he was hired. The arbitration agreement requires Jake to pay a $300 filing fee upfront to pursue his claim in arbitration. However, Jake has recently been fired and possesses only $176.98 in his checking account. Jake desperately wants to pursue his claim, and he has a good chance of winning, but he simply cannot afford the filing fee. Jake gives up.

The burden of this $300 filing fee obviously falls harder on a financially insolvent plaintiff like Jake, than it would a financially solvent plaintiff. And while Jake theoretically retains the "right to sue," in all actuality he cannot sue. The filing fee has effectively acted as a prospective waiver of his statutory rights.[136] Indeed, the filing fee as applied to Jake begins to resemble exactly the type of arbitration agreement that the Court in *Amex* explains it would have no trouble striking down.[137]

Green Tree's prohibitive cost analysis based on a subjective framework provides the case-by-case approach necessary to deal with cases like the hypothetical above. However, in a recent article, Professor Lampley argues that a subjective framework "makes little sense in terms of contractual expectations."[138] Specifically, there is "no reason that a wealthy or high-income litigant should be treated differently from a low-income litigant under a vindication of statutory rights analysis from a contractual point of view."[139] Instead, Professor Lampley advocates for a comparative approach by which "the costs of proceeding in the arbitral forum are compared with the costs of proceeding in litigation."[140]

The first flaw with Professor Lampley's claim is that it is premised on the idea that contractual expectations between the parties to an arbitration agreement trump the parties' actual ability to effectively vindicate their rights under the

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[135] *See id.* at 2314-15 (Kagan, J., dissenting) (explaining that *Green Tree's* prohibitive cost analysis is used to condemn arbitration clauses that act as prospective waivers).

[136] *See id.* at 2313-14 (Kagan, J., dissenting) (explaining that high fees can be used to bar access to arbitration and thereby act as a prospective waiver).

[137] *See Amex*, 133 at 2310-11 (2013) (holding that the vindication of rights doctrine would "certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights").

[138] Ramona L. Lampley, *The Price of Justice: An Analysis of the Costs that are Appropriately Considered in a Cost-based Vindication of Statutory*
Rights Defense to an Arbitration Agreement, 2013 BYU L. Rev. 825, 870 (2014).

[139] *Id.* at 871.

[140] *Id* at 872.

agreement.[141] Quite the opposite is true. A party's expectation that arbitration will be enforced matters little when the terms of the agreement preclude the other party from arbitrating. For example, imagine that an employer enters into an arbitration agreement with an employee who happens to be confined to a wheelchair. The arbitration agreement between the employer and employee calls for arbitration to take place on the roof of the building where the employee works. The only way to the roof of the building is by stairs because there is no elevator. It is quite absurd to think that the arbitration agreement should be held enforceable with judgment defaulting to the employer simply because both parties agreed to arbitrate and the employer contractually expected arbitration.

Professor Lampley's argument in favor of a comparative approach is similarly flawed because it rests on the premise that litigation and arbitration can be compared.[142] They cannot. Litigation and arbitration are inherently different forums that cannot truly be compared on the same plane for purposes of assessing prohibitive costs for plaintiffs.[143] For example, one cannot say that a $300 filing fee to arbitrate a claim is the cost-equivalent of a $300 filing fee to litigate in court. Plaintiffs attorneys routinely pay the filing fees on behalf of plaintiffs in litigation. It is unlikely, however, that this same attorney would represent a plaintiff in arbitration. In arbitration, discovery is restricted and remedies are often severely limited, which provides a disincentive for lawyers to represent clients in arbitration. A comparative costs approach premised on the notion that the costs of arbitration and litigation are comparable is flawed.

Green Tree's prohibitive costs analysis based on a subjective framework certainly has its own flaws. Plaintiffs will still have to spend money on attorney's fees in litigating whether or not they have the money to pay arbitration fees. But while this approach may not be the most ideal or most efficient, as of now, it is the most fair in light of the Court's recent arbitration jurisprudence.

C. Public Policy Favors Application of the Vindication of Rights Doctrine

Public policy favors allowing federal courts to continue to strike down arbitration agreements that undermine statutory rights.[144] Allowing federal granted statutory rights to be modified and diluted by arbitration agreements will slowly but surely deteriorate consumer and employee rights.[145] Certain substantive rights—like the right to bring discrimination claims—may not be

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141 *See id.* at 871 (explaining that there is no reason why wealthy or low income litigants should be treated differently based on the fact that each party was aware of their socioeconomic status).
142 *See id.* at 872.
143 *See supra* note, 6.
144 *See supra* note 6 and accompanying text.
145 *See* Horton, *supra* note 6, at 13 (arguing that upholding unconscionable arbitration provisions erodes certain substantive rights).

bargained away, even if the parties act on an informed, competent, and voluntary basis.[146] A broader social policy of protecting certain substantive rights far outweighs any benefits that arbitration provides in terms of efficiency and lower costs. [147] Society's collective desire or need for lower costs and efficiency cannot, and should not, be assessed on the same plane as socially important substantive rights.[148]

Additionally, some scholars argue that mandating arbitration infringes on a person's Seventh Amendment right to a jury trial.[149] While the right to a jury trial can be waived, it must be waived knowingly, voluntarily, and intelligently.[150] Even the staunchest proponent of arbitration would be hard-pressed to argue that the average consumer or employee—whose product purchase or employment is conditioned on agreeing to arbitration—truly waives this right knowingly, voluntarily, or intelligently.[151] Rather, parties with lesser bargaining power are faced with the "take it or leave it" language of standard form contracts and have little choice but to accept the terms if they want the product or job.[152] Enforcing these coercive arrangements under the illusion that it serves the FAA's purpose or cuts costs sends the wrong message and will only further embolden drafters of one-sided arbitration agreements.[153]

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[146] Horton, *supra* note 1, at 727.

[147] *See id.* at 728 (arguing that not every right is comparable to money and that we value certain privileges, such as freedom from discrimination, differently than money).

[148] *See id.* at 728 (arguing that money and substantive rights cannot be assessed along a common metric).

[149] *See generally* Sternlight, *supra* note 7, at 670 (arguing that it is unconstitutional for courts to enforce arbitration agreements that are used to deny an individual its Seventh Amendment right to a jury trial); Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555 (2010) (arguing that federal pro-arbitration policy usurps the Seventh Amendment right to a jury trial).

[150] *See generally* Sternlight*,* supra note 7, at 732-33.

[151] *See Concepcion*, 131 U.S. at 1750 (explaining that the days in which consumer contracts are anything but adhesive are gone); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (explaining that virtually every scholar who has written about adhesion contracts concedes that the adhering party is unlikely to have read or would even understand the terms of a standard form contract).

[152] *See generally* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) (arguing that standard form terms are democratically illegitimate).

[153] *See* Horton, *supra* note 6, at 460 (arguing that drafters of arbitration clauses created one-sided arbitration agreements in light of increased judicial deference).

CONCLUSION

In the abstract, arbitration is an understandably alluring antidote to an over-crowded legal system that is continuously hemorrhaging resources.[154] Arbitration does have its benefits: parties can replace the procedural confusion associated with complex litigation for the efficiency, speed and informality of arbitration.[155] In addition, some scholars argue that arbitration actually saves consumers money—businesses save on dispute-resolution costs and then pass those savings onto customers.[156] A recent study even shows that at least in the employment law context, employee win rates in litigation compared favorably to those in arbitration.[157]

But any of the benefits that can be derived from arbitration should not come at the expense of weakening our individual and collective federal statutory rights. When Congress enacted and passed the FAA, it sought to create a streamlined process for resolving disputes, not a barrier to plaintiffs bringing legitimate claims.[158] Deferring to one-sided arbitration clauses undermines the FAA and the field of meaningful alternative dispute resolution.[159] It also undermines the judiciary as an institution and weakens federal and state laws designed to protect consumers and employees.[160]

All of these consequences make a narrow interpretation of *Amex* all the more important. While *Amex* has probably closed the door to challenging class-action waivers in arbitration agreements,[161] it has left the door open to challenge other arbitral features under the vindication of rights doctrine.[162] *Amex* may be distinguished based on the heavy emphasis it placed on class-action waivers and

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[154] *See* The Editorial Board, *Federal Courts in Crisis*, N.Y. TIMES, Aug. 26, 2013, at A22, *available at* http://www.nytimes.com/2013/08/26/opinion/federal-courts-in-crisis.html; *see also* Hanes Corp. v. Millard, 531 F.2d 585, 598 (D.C. Cir. 1976) (stating that a policy of liberally construing arbitration agreements serves to ease court congestion).

[155] *See supra* note 102 and accompanying text.

[156] *See generally* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 89 J. DISP. RESOL. 90 (2001) (arguing that arbitration is actually pro-consumer).

[157] Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, Cornell University, ILR School site, *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles.

[158] *See Amex*, 133 U.S. at 2315 (Kagan, J., dissenting) ("What the FAA prefers to litigation is arbitration, not *de facto* immunity.").

[159] *Id.*

[160] *See* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial* 16 OHIO ST. J. ON DISP. RESOL. 669, 670-71 (2001) (arguing that forced arbitration weakens the value of federal and state laws by removing consumers and employees rights to enforce those laws in court).

[161] *See Amex*, 133 U.S. at 2307 (holding that class action procedures are incompatible with arbitration).

[162] *See* discussion, *supra* Part III (B).

its reliance on *Concepcion*.[163] Plaintiffs can then invoke *Green Tree's* prohibitive cost analysis using a subjective framework to show that the arbitration fees prevent them from effectively vindicating their rights.[164] While invoking *Green Tree's* prohibitive cost analysis under the vindication of rights doctrine is not the ideal approach, it may be plaintiffs' only key to the courtroom.

163 *Id.*
164 *Id.*