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## NOTE

# Vindication of Federal Statutory Rights: The Future of Cost-Based Challenges to Arbitration Clauses After *American Express v. Italian Colors Restaurant* and *Green Tree v. Randolph*

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## INTRODUCTION

In the modern era of standard-form contracts and broadly enforced arbitration agreements, the decision to bring an employment or consumer purchase dispute to court often turns on one thing: cost.<sup>1</sup> In recent years, the jurisprudence of the Federal Arbitration Act (“FAA”) has continuously expanded, making it more difficult to pursue remedies through litigation.<sup>2</sup> Yet lower courts and state legislatures have continued to resist this trend, attempting to fit a full range of defenses into the FAA’s section 2 savings clause.<sup>3</sup> The savings clause

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<sup>1</sup> See Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 131 (2012) (recognizing the United States’ robust view of FAA preemptive power); Neil R. Bardack & Shannon M. Nessier, *The State of Arbitration Enforcement In Calif.*, LAW360 (Apr. 18, 2014, 3:36 PM EDT), <http://www.law360.com/articles/529015/the-state-of-arbitration-enforcement-in-calif> (explaining that mandatory pre-dispute arbitration clauses in adhesion agreements include all standardized contract forms used in consumer, health care and employment contexts); Stephanie Mencimer, *Have You Signed Away Your Right to Sue?*, MOTHER JONES (Apr. 2008), <http://www.motherjones.com/politics/2008/03/have-you-signed-away-your-right-sue> (signing an agreement meant submitting to an arbitrator hired by the employer for any employment-related disputes under the threat of being fired otherwise); Jessica Silver-Greenberg & Michael Corkery, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES (Mar. 16, 2015), <http://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html> (demonstrating a consumer’s lawsuit against an auto-lender being thrown out because of a mandatory arbitration clause in their contract).

<sup>2</sup> J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) (discussing how arbitration decisions from the last five years represent a thirty-year expansion of arbitration as an alternative to resolving disputes in virtually every type of claim); see William J. Nissen, *The Federal Takeover of Arbitration Law*, 83 ILL. B.J. 584, 584 (1995) (expanding the Federal Arbitration Act to commercial and consumer transactions through two recent decisions); Joshua R. Welsh, Comment, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 MARQ. L. REV. 581, 581-82 (2002) (binding arbitration agreements entered daily).

<sup>3</sup> 9 U.S.C. § 2 (2012); see *Garten v. Kurth*, 265 F.3d 136, 142 (2d Cir. 2001) (quoting *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167 (1963)) (“Fraud in the procurement of an arbitration contract, like fraud in the procurement of any contract, makes it void and unenforceable and [we agree] that this question of fraud is a judicial one, which must be determined by a court.”); *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 949 (D. Ariz. 2011) (finding that the employment contract arbitration provision was not procedurally unconscionable because the employees failed to show that the provision constituted unfair surprise, was oppressive, or that the employer attempted to hide the provision); *Luna v. Household Fin. Corp.* III, 236 F. Supp. 2d 1166, 1182-83 (W.D. Wash. 2002) (finding that the home loan agreement contract was substantively unconscionable due to one-sided provisions of class actions, the use of court proceedings for ancillary or preliminary remedies, confidentiality, and fee sharing); *Carlson v. Home Team Pest Def., Inc.*, 191

holds arbitration agreements valid unless “grounds . . . exist at law or in equity for the revocation of any contract.”<sup>4</sup> Since the Supreme Court decided the FAA applies to the states, the savings clause has been victim to a slew of varying interpretations, the more liberal of which allow general contract law defenses to enforceability and state public policy arguments to act as defenses to arbitration.<sup>5</sup> States continue to attempt to pass legislation evading arbitration’s dominion.<sup>6</sup> Judicially created doctrines evidence additional attempts to avoid the broadly-interpreted obstacle of FAA preemption of state doctrine, manifesting increasing creativity from state courts and legislatures.<sup>7</sup>

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Cal. Rptr. 3d 29, 32-33 (Ct. App. 2015) (finding an employment agreement in a wrongful termination action was both procedurally and substantively unconscionable).

<sup>4</sup> 9 U.S.C. § 2.

<sup>5</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (deciding FAA’s section 2 permits arbitration contracts to be invalidated with generally applicable contract defenses like fraud, duress or unconscionability); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”); see *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (discussing, but ultimately overruling, a judgment that deemed an arbitration contract unenforceable because of public policy concerns); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 *Geo. L.J.* 1217, 1232 (2013) [hereinafter *Arbitration Act Preemption*] (noting states often have local public policy reasons for invalidating arbitration clauses).

<sup>6</sup> See, e.g., ALA. CODE § 8-1-41 (2016) (attempting to preclude the FAA’s application to contracts involving intrastate commerce only); CAL. LAB. CODE § 2699 (2016) (codifying the 2004 Private Attorneys General Act, allowing employees to act as agents of state law enforcement); Assemb B. 465, 2015–2016 Legis., Reg. Sess. (Cal. 2015) (enacting AB 465, voiding employment contracts with certain characteristics as violations of public policy and unenforceable); Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 *OHIO ST. J. ON DISP. RESOL.* 759, 785-87 (2001) (discussing various state statutes attempting to shield compliance with predispute arbitration agreements).

<sup>7</sup> See, e.g., *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1080 (9th Cir. 2007), *overruled by* *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2015) (“California law provides that certain ‘public injunctions’ are incompatible with arbitration (and that such a holding is consistent with the FAA). Actions seeking such injunctions cannot be subject to arbitration even under a valid arbitration clause.”); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (attempting to create a specific version of unconscionability characterized by “a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and . . . the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money”). *But see* *Volt Info. Scis., Inc. v. Bd. of Trs. of*

Nonetheless, the Supreme Court has continued its “hammering” approach to clearing the path for FAA dominance.<sup>8</sup> In the last few decades, the Supreme Court has declared broad support of a national policy favoring arbitration.<sup>9</sup> First, the Court emphasized that the FAA preempts state laws that outright prohibit arbitration of a particular type of claim as conflicting with the FAA’s purpose.<sup>10</sup> The Court also clarified that it would not enforce exceptions to arbitration contracts regardless of state public policy reasons.<sup>11</sup>

Hope for retaining the rights available in a judicial forum remains in the effective vindication of federal statutory rights doctrine, a federal common law rule.<sup>12</sup> Vindication of federal statutory rights was first noted as an exception to the arbitrability of statutory law claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>13</sup> The *Mitsubishi Motors* court cautioned that arbitration may be improper if the litigant cannot effectively vindicate their cause of action and the

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Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (noting that even when Congress has not preempted the field in an area, state law can still be preempted if it is an obstacle Congress’s accomplishment of its full purposes and objectives).

<sup>8</sup> See generally Rebecca Wolf, Comment, “To a Hammer Everything Looks Like a Nail”: The Supreme Court’s Misapplication of the Vindication of Rights Doctrine, 21 AM. U. J. GENDER SOC. POL’Y & L. 951, 956-59 (2013) (discussing the legal shortcomings of the Supreme Court’s interpretation of the FAA).

<sup>9</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); see Claudia Salomon & Samuel de Villiers, *The United States Federal Arbitration Act: A Powerful Tool for Enforcing Arbitration Agreements and Arbitral Awards*, LEXISPSL ARB. (Apr. 17, 2014), <https://www.lw.com/thoughtLeadership/the-us-fed-arbitration-act>.

<sup>10</sup> *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008) (describing how the FAA supersedes state laws lodging primary jurisdiction in another forum).

<sup>11</sup> *Keating*, 465 U.S. at 16 (“Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”); see *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (striking down a state statute requiring litigants be provided a judicial forum for resolving wage disputes even when parties had entered into an agreement to arbitrate).

<sup>12</sup> See Horton, *Arbitration Act Preemption*, *supra* note 5, at 1233 (distinguishing the vindication of federal statutory rights doctrine from savings clause defenses). Some common criticisms of binding arbitration include the lack of assent in the weaker party, the relationships between private arbitration providers and repeat-players, the limited right to appeal an arbitrator’s verdict, the lack of jury trials and now, the inability to bring claims as a class action. See James Laffin, *Mandatory Arbitration and the Outsourcing of Justice*, 26 NO. 6 CAL. TORT REP. 192 (2005); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 696 (2004).

<sup>13</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (indicating that federal statutes can continue to serve their remedial and deterrent functions as long as the arbitral forum vindicates the cause of action).

statute fails to serve its deterrent and remedial functions.<sup>14</sup> However, Supreme Court decisions affecting arbitration have continuously scrutinized this doctrine.<sup>15</sup> Recently, the Supreme Court decided that submitting to arbitration was not enough to forego statutory rights — the arbitration process must “[choke] off a plaintiff’s ability to enforce [the] congressionally created rights.”<sup>16</sup> This raises the question of just how high arbitration costs must be before the Supreme Court agrees that they prevent individuals from effectuating their claims. A recent interpretation holds that difficulty raising the claim is not enough: the party’s rights remain intact as long as they have the right to pursue the statutory remedy.<sup>17</sup>

This Note examines the future of cost-based challenges to vindication of federal statutory rights. Specifically, it discusses how lower courts have interpreted challenges to plaintiffs’ inability to effectuate statutory rights in arbitration due to cost in light of the seminal cases *Green Tree Financial Corp.-Alabama v. Randolph* and *Am. Express Co. v. Italian Colors Rest.*<sup>18</sup> *Green Tree* first looked at vindication of statutory rights in the context of cost — deciding a party could invalidate an arbitration agreement by showing that it would incur prohibitive costs as a result.<sup>19</sup> *Italian Colors* brought over twenty years of post-*Green Tree* litigation to a crossroads, allowing a class action waiver to proceed in arbitration despite a showing of prohibitive cost.<sup>20</sup> By tracking the development of three common cost-based challenges to arbitration — class action waivers, fee-splitting provisions and fee-shifting provisions — we can discern the viability of these and other cost-based challenges to arbitration after *Green Tree* and *Italian Colors*.<sup>21</sup>

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<sup>14</sup> See *id.* at 636-38.

<sup>15</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (“But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the [federal statutory] *right to pursue* that remedy”); Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 438 (2014) (considering the federal vindication doctrine as limited to the facts of *Mitsubishi* and *Green Tree*, the Court is able to constrain its application); Wolf, *supra* note 8, at 958 (noting the Court no longer considering arbitration inherently unfit for contracts implicating federal statutes).

<sup>16</sup> *Italian Colors Rest.*, 133 S. Ct. at 2313.

<sup>17</sup> See *id.* at 2310-11.

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *Class Actions — Class Arbitration Waivers — American Express Co. v. Italian Colors Restaurant*, 127 HARV. L. REV. 278, 279 (2013).

<sup>20</sup> *Id.* at 278.

<sup>21</sup> See *infra* Part II.

Part I provides a summary of the origins of arbitration, the early use of the nonarbitrability doctrine, and the birth and development of the vindication of federal statutory rights doctrine.<sup>22</sup> Part II investigates the status of the vindication of federal rights doctrine before and after *Italian Colors*.<sup>23</sup> This Note will examine the doctrine in terms of court decisions on common contractual provisions, including anti-class action, cost-splitting, and “loser pays” clauses.<sup>24</sup> Part III reflects on the future of this doctrine and suggests statutory and analytical solutions to ensure its continued existence and functionality.<sup>25</sup>

## I. NINETY YEARS OF ARBITRATION

Congress enacted the Federal Arbitration Act in 1925 in response to public demand.<sup>26</sup> The goal of the FAA was to create a “national policy favoring [arbitration] and [place] arbitration agreements on equal footing with all other contracts.”<sup>27</sup> However, it took decades for courts to shift attitudes and enforce arbitration as the behemoth it is today.<sup>28</sup>

### A. *The Nonarbitrability Doctrine*

For approximately half a century following the FAA’s enactment, courts resisted enforcing arbitration agreements on equal footing with other contracts.<sup>29</sup> The nonarbitrability doctrine was one way of impeding arbitration agreements, as it stated that claims that “cannot provide an adequate substitute for a judicial proceeding” are not

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<sup>22</sup> See *infra* Part I.

<sup>23</sup> See *infra* Part II.

<sup>24</sup> See *infra* Part II.

<sup>25</sup> See *infra* Part III.

<sup>26</sup> Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1253 (2011) (discussing the original purpose of FAA); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 976-78 (1999) (describing the intersection of the explosion of trade arbitration systems and the desire of the business community to resolve disputes quickly through arbitration).

<sup>27</sup> *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

<sup>28</sup> See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2862 (2015) (describing early arbitration as based on consent); Salomon & de Villiers, *supra* note 9 (describing early decisions as skeptical of enforcing legal rights in arbitration).

<sup>29</sup> See Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1224 (2011) (explaining that jurists and courts considered arbitration inferior to adjudication in court, believing it unable to handle certain types of disputes); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996).

appropriate for arbitration.<sup>30</sup> Despite legislative progress, courts still viewed arbitration as inferior to litigation.<sup>31</sup> This concern is persuasive; after all, arbitration employs inactive judges, contains limited or no appellate rights, and streamlines procedural and evidentiary rules.<sup>32</sup> And yet in the mid-1980s, the Supreme Court suddenly reversed course.<sup>33</sup>

### B. *The Birth and Expansion of Vindication of Federal Rights*

In *Southland Corp. v. Keating*, the Supreme Court held that the FAA preempts state laws that bar enforcement of arbitration agreements.<sup>34</sup> The Court further evinced its shift in the enforcement of arbitration agreements in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, which involved a sales agreement between international corporations that implicated federal antitrust claims.<sup>35</sup> *Mitsubishi Motors* went one step further, announcing that the FAA also allows arbitration of

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<sup>30</sup> Robert Ward, Note, *Divide & Conquer: How the Supreme Court Used the Federal Arbitration Act to Threaten Statutory Rights and the Need to Codify the Effective Vindication Rule*, 39 SETON HALL LEGIS. J. 149, 153 (2015).

<sup>31</sup> Horton, *Arbitration Act Preemption*, *supra* note 5, at 1232 (describing nonarbitrability doctrine); see *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984) (ruling that arbitration is not an adequate substitute for a judicial trial in a §1983 action).

<sup>32</sup> Horton, *Arbitration Act Preemption*, *supra* note 5, at 1232-33 (“Indeed, because arbitration features lay judges, limited appellate rights, and streamlined procedural and evidentiary rules, the Court held that Congress could not have meant for plaintiffs to pursue public-law rights in a forum that ‘cannot provide an adequate substitute for a judicial trial.’”).

<sup>33</sup> *Id.* at 1233.

<sup>34</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 17 (1984) (holding that the FAA preempts state laws that withdraw the power to enforce arbitration agreements, but not extending sections 3 and 4 of the FAA to state procedural rules).

<sup>35</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 617, 626 (1985). See generally *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (holding that North Carolina hospital must arbitrate its claim against Alabama-based construction company, even though it meant it could not consolidate the action with its ongoing litigation against contractor and architect); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (finding that the arbitration clause in a dispute between New Jersey manufacturer and Maryland manufacturing firm was broad enough to require arbitration of all issues outside of the arbitration clause itself); Warren E. Burger, Chief Justice, Supreme Court of the United States, Agenda for 2000 A.D.—Need for Systematic Anticipation, Keynote Address Before the National Conference of the Causes of Popular Dissatisfaction with the Administration of Justice (April 7, 1976), in 70 F.R.D. 79, 92 (1976) (calling for a reappraisal of the values of the arbitration process and noting that “[t]here is nothing incompatible between efficiency and justice.”).

federal statutory rights, so long as bringing the claim in an arbitral forum allows vindication of those rights.<sup>36</sup> But the Court also noted that if an arbitration clause operates as a “prospective waiver of a party’s right to pursue statutory remedies,” it would be rendered unenforceable.<sup>37</sup> Thus, even if arbitration could generally serve as a substitute for judicial proceedings, situations could still exist where the arbitral forum is inappropriate, interfering with a party’s ability to comprehensively resolve claims involving federal statutory rights.<sup>38</sup> The Court left undecided just how severe arbitration proceedings’ interference with federal statutory rights had to be, what types of interference were applicable, and what types of arbitration agreements it applied to.<sup>39</sup> Would the vindication of federal statutory rights take root as the new nonarbitrability doctrine in resisting universal arbitration, or was it just an offhand comment by the court?<sup>40</sup>

*Gilmer v. Interstate/Johnson Lane Corp.* and *Green Tree v. Randolph* further defined and solidified the vindication of federal statutory rights doctrine.<sup>41</sup> In *Gilmer*, the Supreme Court considered whether a claim under the Age Discrimination in Employment Act of 1967 (“ADEA”) was subject to compulsory arbitration pursuant to an arbitration agreement.<sup>42</sup> First, the Court clarified that arguments of inadequate arbitration procedures and unequal bargaining power would no longer be valid.<sup>43</sup> The Court had accepted arbitration proceedings as equal to

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<sup>36</sup> *Mitsubishi Motors*, 473 U.S. at 637 (noting that as long as the prospective litigant may vindicate its cause of action in the arbitral forum, the statute continues to serve its purposes).

<sup>37</sup> *Id.* at 637 n.19; Myriam E. Gilles, *Gutting the Vindication-of-Rights Challenge to Arbitration Agreements* 3-4, (Cardozo Legal Studies Research Paper No. 391, 2013) [hereinafter *Gutting the Vindication-of-Rights Challenge*], [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2263401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263401).

<sup>38</sup> See Ward, *supra* note 30, at 155.

<sup>39</sup> See Matthew Harris, Comment, *Riding the Waiver: In Re American Express Merchants’ Litigation and the Future of the Vindication of Statutory Rights*, 54 B.C. L. REV. E-SUPPLEMENT 15, 22 (2013) (stating that in creating the vindication of rights doctrine, the *Mitsubishi Motors* Court “did not elaborate . . . on what it means for a litigant to ‘effectively vindicate its statutory cause of action.’”). See generally *Mitsubishi Motors*, 473 U.S. at 624-40 (mentioning the vindication of rights doctrine briefly).

<sup>40</sup> See David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 724 (2012) [hereinafter *Arbitration and Inalienability*].

<sup>41</sup> See *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

<sup>42</sup> *Gilmer*, 500 U.S. at 23.

<sup>43</sup> *Id.* at 30-33.

those in the judicial forum.<sup>44</sup> Although the ADEA claim did not prevail, the Court noted that if the petitioner could show a legislative intent of precluding waiver of judicial remedies, they could avoid arbitration.<sup>45</sup>

*Green Tree* involved a home financing contract silent as to the apportionment of arbitration costs and fees, yet mandating arbitration for the resolution of disputes.<sup>46</sup> The plaintiffs argued that they could not afford to resolve their dispute through arbitration.<sup>47</sup> The Court ruled that when a party seeks to invalidate an arbitration agreement on the ground that it would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.<sup>48</sup> The Court acknowledged that costs may prevent vindication of statutory rights, but refused to decide how prohibitively expensive a showing must be, considering the risk too speculative in the present case.<sup>49</sup> But by stating “[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,” the Court left the door for cost-based challenges open.<sup>50</sup>

### 1. The Scope of Vindication of Federal Statutory Rights

A litigant may allege the inability to vindicate statutory rights for a variety of reasons. A judge-made exception to the FAA’s overarching tenet that arbitration is a matter of contract, it allows courts to invalidate arbitration agreements that prevent a party from effectively exercising a right granted by a federal statute.<sup>51</sup> A vindication of

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 26 (noting it is up to the petitioner to show Congress intended to avoid waiver of the judicial forum either in the ADEA’s text, legislative history, or an “inherent conflict” between arbitration and the ADEA’s underlying purposes).

<sup>46</sup> *Green Tree Fin. Corp. Ala.*, 531 U.S. at 89; Ward, *supra* note 30, at 156.

<sup>47</sup> *Green Tree Fin. Corp. Ala.*, 531 U.S. at 90-91.

<sup>48</sup> *See id.* at 92.

<sup>49</sup> *See id.* at 90-92 (“It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum.”); Chukwumerije, *supra* note 15, at 400; Horton, *Arbitration and Inalienability*, *supra* note 40, at 735-36; Ward, *supra* note 30, at 157.

<sup>50</sup> *Green Tree Fin. Corp. Ala.*, 531 U.S. at 90; Chukwumerije, *supra* note 15, at 400; E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 16 (2015).

<sup>51</sup> *See* Chukwumerije, *supra* note 15, at 382-83; Suzanne H. Holly & Margaret E. Juliano, *Recent Developments Concerning Enforcement of ADR Provisions*, 15 DEL. L. REV. 55, 60-61 (2014).

statutory rights claim simply asserts “the frustration of the right to pursue claims granted by statute.”<sup>52</sup> The doctrine originates in courts’ desire to prevent the prospective waiver of rights granted by Congress.<sup>53</sup>

The doctrine is one component of the broader idea of arbitrability — the preliminary question of whether a court or an arbitral tribunal should have the initial power of determining whether an arbitral tribunal has the authority to decide the dispute.<sup>54</sup> Like the nonarbitrability doctrine, this doctrine’s purpose is to show that certain aspects of the arbitral forum are inherently unequal and claims are unable to be fully adjudicated as they would be in court.<sup>55</sup> Although cost-based claims are recently the most litigated aspect of the effective vindication doctrine, a plaintiff can use the doctrine for any feature of an arbitration contract that causes the arbitral forum to

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<sup>52</sup> *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 n.22 (1st Cir. 2006).

<sup>53</sup> See, e.g., Joseph R. Brubaker & Michael P. Daly, *Twenty-Five Years of the “Prospective Waiver” Doctrine in International Dispute Resolution: Mitsubishi’s Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. MIAMI L. REV. 1233, 1243 (2010) (“Faced with the decision of whether an arbitration clause contained in the relevant CBA was enforceable, the Court was forced to inquire into whether Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum.”); see *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 209 (Cal. 2013) (noting that “the ‘effective vindication’ exception ‘finds its origin in the desire to prevent prospective waiver of a party’s right to pursue statutory remedies’”).

<sup>54</sup> See Laurence Shore, *Defining ‘Arbitrability’: The United States vs. the Rest of the World*, N.Y.L.J., June 15, 2009, <http://www.gibsondunn.com/publications/documents/shore-definingarbitrability.pdf>; see also Olga Y. Bykov, *Escaping Arbitrability: Challenging Delegation Clauses Based on Cost, Choice of Law and Arbitrator’s Self-Interest*, JUST RESOLS. ENEWSLETTER, Sept. 2016, [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/lawschool/boskey\\_essay\\_contest/2016/2016\\_Boskey\\_Competition\\_Honorable\\_Mention.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/lawschool/boskey_essay_contest/2016/2016_Boskey_Competition_Honorable_Mention.authcheckdam.pdf).

<sup>55</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (asserting that claims are fully arbitrable if a litigant may vindicate its statutory cause of action in the arbitral forum); Ward, *supra* note 30, at 153 (describing the effective vindication rule as a modern version of nonarbitrability doctrine, which rejected arbitration agreements in causes of action under federal law); see also Horton, *Arbitration and Inalienability*, *supra* note 40, at 726 (“At the highest level of generality, the rule is an attempt to facilitate Congress’s intent: lawmakers do not want parties to be able to relinquish their federal statutory rights at the pre-dispute stage. . . . [T]he vindication of rights doctrine . . . requir[es] forceful proof that a plaintiff cannot effectively prosecute her statutory cause of action in arbitration. But like the non-arbitrability doctrine, the vindication of rights rule is simply the tool that courts use to enforce the statutory waiver rule: it invalidates arbitration provisions that are the functional equivalent of express waivers of federal statutory rights.”).

materially interfere with their claims.<sup>56</sup> Litigants have also brought vindication of federal statutory rights claims concerning joinder of parties, forum selection clauses, statute of limitations periods, discovery limitations and more.<sup>57</sup> The status of cost-based challenges to arbitration clauses in claims involving federal statutes is arguably of the most practical importance to plaintiffs, and the most unclear.<sup>58</sup>

## 2. Cost-Based Challenges at the Judicial Forefront

After *Green Tree*, jurisdictions disagreed about how to assess vindication of rights challenges.<sup>59</sup> And pursuant to the Supreme Court's recent decisions in *AT&T Mobility LLC v. Concepcion* and *Am. Express Co. v. Italian Colors*, the doctrine's status is even more uncertain.<sup>60</sup> *Concepcion* involved a claim of misleading advertising on cell phones, where AT&T advertised the phones as free but charged sales tax on their retail value.<sup>61</sup> The litigation involved issues of contract interpretation concerning class action arbitration, preemption and unconscionability, but not effective vindication — no federal statute was involved.<sup>62</sup> Still, the court weighed in by opining on

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<sup>56</sup> See *Mitsubishi Motors Corp.*, 473 U.S. at 628 (agreeing to arbitrate a claim doesn't forego substantive rights, it just submits their resolution to the simplicity, informality, and expedition of arbitration); see also *id.* at 648 n.14 (noting the differences between the fact-finding process in judicial and arbitral proceedings, including different evidentiary rules, a less complete record and severely limited rights and procedures common to civil trials).

<sup>57</sup> In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 283 (4th Cir. 2007) (joinder of parties); see *Mitsubishi Motors Corp.*, 473 U.S. at 631 (forum selection clauses); *Escobar-Noble v. Luxury Hotels Int'l of P.R., Inc.*, 680 F.3d 118, 123 (1st Cir. 2012) (statute of limitations); *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 330-31 (D. Conn. 2011) (statute of limitations).

<sup>58</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (arguing that a class arbitration waiver prevents effective vindication because respondents have no incentive to pursue claims individually); 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, 849 (noting that "courts struggled with the prohibitive cost analysis", using varying factors and analyses); Myriam E. Gilles, *Myriam Gilles on Arbitration Clauses After Concepcion*, CONSUMER L. & POL'Y BLOG (Sept. 3, 2012), <http://pubcit.typepad.com/clpblog/2012/09/myriam-gilles-on-arbitration-clauses-after-concepcion.html> ("[C]ost-based vindication of rights challenges remain a significant concern to corporate defendants.").

<sup>59</sup> Horton, *Arbitration and Inalienability*, *supra* note 40, at 736.

<sup>60</sup> See generally *Italian Colors Rest.*, 133 S. Ct. 2304 (holding that the effective vindication doctrine failed); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>61</sup> *Concepcion*, 563 U.S. at 333.

<sup>62</sup> See *id.*; Spitko, *supra* note 50, at 18.

financial impediments to arbitration overall, failing to note that claims arising under federal statutes were subject to different considerations.<sup>63</sup> The Court rejected the argument that not allowing class actions in arbitration effectively prevented low-value claims from being brought, applying their ruling to both state and federal statutes.<sup>64</sup>

*Italian Colors* involved a dispute between Italian Colors Restaurant and American Express.<sup>65</sup> Plaintiffs claimed Sherman Antitrust Act violations and attempted to effectuate class action arbitration.<sup>66</sup> Even with federal law at issue, Justice Scalia stated: “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.”<sup>67</sup> His response seemingly disregarded the vindication of statutory rights doctrine’s purpose and the idea that between two federal laws, one does not automatically preempt the other.<sup>68</sup> Justice Kagan’s dissent provided some solace, claiming the majority’s effective deprivation of legal recourse amounted to responding “too darn bad.”<sup>69</sup> Nonetheless, the Court unveiled a narrow distinction where high fees that make access to a forum impracticable violate the vindication of federal statutory rights doctrine, while financially unprofitable claims pose no issue.<sup>70</sup>

The Supreme Court’s decisions in *Italian Colors* and *Green Tree* created a tension in the jurisprudence. The respective holdings muddled the distinction between which cost-based challenges to

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<sup>63</sup> *Concepcion*, 563 U.S. at 344-46.

<sup>64</sup> See *id.* at 351-52; Horton, *Arbitration Act Preemption*, *supra* note 5, at 1222 (disregarding the fact that waiving class arbitration will shield corporations from low-value claims).

<sup>65</sup> See *Italian Colors Rest.*, 133 S. Ct. at 2306; ITALIAN COLORS RESTAURANT, <http://www.italiancolorsrestaurant.com/> (last visited January 8, 2016).

<sup>66</sup> Ward, *supra* note 30, at 162.

<sup>67</sup> *Italian Colors Rest.*, 133 S. Ct. at 2311.

<sup>68</sup> *Id.* at 2320; see also Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 170 (2015) (“The FAA is an old statute, and when two federal statutes conflict, the more recent or more specific one can trump the older or more general one.”).

<sup>69</sup> *Italian Colors Rest.*, 133 S. Ct. at 2313; Wolf, *supra* note 8, at 995 (“[W]e can no longer ensure that arbitration agreements are only enforced when arbitration provides a change in forum and does not require plaintiffs to forgo substantive rights.”).

<sup>70</sup> *Italian Colors Rest.*, 133 S. Ct. at 2310-11 (suggesting that pursuit of statutory remedies would perhaps be allowed in an agreement where filing and administrative fees make access to a forum impracticable, but the right to pursue a remedy is not eliminated by the fact that it is not worth pursuing the expense).

vindication of federal rights would be sufficient to evade arbitration.<sup>71</sup> The precedents established saddle lower courts with the task of consolidating and applying the decisions to a plethora of challenges to arbitration.<sup>72</sup> And thus, especially concerning cost-based challenges, courts are still left with the balancing act described in *Mitsubishi Motors* decades ago: deciding whether proceedings “in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.”<sup>73</sup>

## II. VINDICATION OF FEDERAL RIGHTS TODAY NO LONGER EXISTS

### A. *Pre-Italian Colors*

#### 1. Class Actions Waivers

A class action waiver in an arbitration clause is essentially an express agreement not to file or participate in a class action involving claims covered by the contract.<sup>74</sup> More than just a change in procedure, class actions waivers signal a change in liability.<sup>75</sup> In *AmEx III*, the Second Circuit stated, “the cost of plaintiffs’ individually arbitrating their dispute with [American Express] would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”<sup>76</sup> Lower courts in the Second Circuit eagerly enforced that ruling.<sup>77</sup>

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<sup>71</sup> Resnik, *supra* note 28, at 2875-76 (noting that lower courts are having trouble agreeing on when and “whether using arbitration is unduly burdensome”).

<sup>72</sup> See e.g., *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1291 (11th Cir. 2015); *Raniere v. Citigroup Inc.*, 533 F. App’x 11, 13-14 (2d Cir. 2013); *In re A2P SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 497 (S.D.N.Y. 2013).

<sup>73</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985); Ward, *supra* note 30, at 155 (explaining that the application of the effective vindication rule should be limited to where the agreement forecloses a party’s ability to pursue a federal statutory claim).

<sup>74</sup> See, e.g., DISCOVER, <https://www.discover.com/credit-cards/cardmember-agreement/arbitration.html> (last visited Nov. 18, 2016); see *Class Action Waivers in Terms & Conditions*, TERMSFEED, [https://termsfeed.com/blog/class-action-waivers-terms-conditions/#Why\\_you\\_want\\_a\\_class\\_action\\_waiver](https://termsfeed.com/blog/class-action-waivers-terms-conditions/#Why_you_want_a_class_action_waiver) (last visited Oct. 24, 2016).

<sup>75</sup> Fitzpatrick, *supra* note 68, at 166.

<sup>76</sup> *In re Am. Express Merchants’ Litig.*, 667 F.3d 204, 217-18 (2d Cir. 2012), *rev’d sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (“[T]he only economically feasible means for plaintiffs [to enforce] their statutory rights is via a class action . . .”).

<sup>77</sup> See, e.g., *Fromer v. Comcast Corp.*, 886 F. Supp. 2d 106, 107 (D. Conn. 2012); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 410-11 (S.D.N.Y. 2011),

But other courts foresaw the conservative Supreme Court's ruling.<sup>78</sup> The Ninth Circuit caused a circuit split in *Coneff v. AT&T Corp.*, holding that class action waivers did not prevent vindication just because such claims are worth much less than the cost of litigating them.<sup>79</sup> The Northern District of California followed in *Jasso v. Money Mart Express, Inc.*, holding that a class waiver was not unenforceable just because the amounts at issue and the expense of litigation would effectively preclude vindication of statutory rights.<sup>80</sup> Courts before *Italian Colors* had considered the ability to bring low-cost claims in a class action as part of the vindication analysis.<sup>81</sup> However, the analyses were somewhat vague since *Green Tree v. Randolph* had not considered the effect of a class action waiver on vindication of rights.<sup>82</sup>

## 2. Cost-Splitting Provisions

A cost-splitting or fee-splitting provision in an arbitration clause provides that parties will be equally responsible for arbitral costs.<sup>83</sup> Cost-splitting provisions' effect on the accessibility of arbitration has been less clear than that of class action waivers. First, agreements can split arbitration costs in different amounts.<sup>84</sup> Additionally, many

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*rev'd sub nom.* *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013).

<sup>78</sup> See generally *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1042 (N.D. Cal. 2012).

<sup>79</sup> *Coneff*, 673 F.3d at 1159; see *Homa v. Am. Express Co.*, 494 F. App'x 191, 196-97 (3d Cir. 2012); see also Scott T. Schutte et al., *Battle for Vindication of Statutory Rights Post-Concepcion*, A.B.A. SEC. LITIG. (Nov. 20, 2012), <http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-statutory-rights-post-concepcion.html>. The Third and Eleventh Circuits also issued decisions agreeing with the Ninth Circuit that class arbitration waivers did not prevent vindication of federal rights. *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234-36 (11th Cir. 2012); *Litman v. CellcoPartnership*, 655 F.3d 225, 230 (3d Cir. 2011).

<sup>80</sup> *Jasso*, 879 F. Supp. 2d at 1046.

<sup>81</sup> See *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1138 (D. Kan. 2003); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 411 (S.D.N.Y. 2003).

<sup>82</sup> *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (declining to reach the argument that the agreement precludes respondent from bringing her claims under TILA as a class action because it was not addressed below).

<sup>83</sup> Kimberly Klein, *Despite Fee-Splitting Agreements, Employers May Still Have to Pay Arbitration Costs in New York*, MOSES & SINGER LLP (2012), <http://www.mosessinger.com/site/files/arbitrationcostfeesplitting.pdf>.

<sup>84</sup> Peter T. Mavrick, *Arbitration Agreements and the FLSA: The Effect of Fee-splitting and Fee-shifting Provisions*, MAVRICK L. FIRM (Apr. 2, 2014 4:40 PM), <http://www.mavricklaw.com/arbitration-agreements-and-the-flsa-the-effect-of-fee-splitting-and-fee-shifting-provisions/> (“[A] ‘fee-splitting’ provision is a contractual

circuit courts have developed their own tests for analyzing the enforceability of cost-splitting agreements.<sup>85</sup>

Early in the cost-splitting jurisprudence, the Court considered vindication of rights cost-based challenges to arbitration in *Green Tree Financial Corp.-Alabama v. Randolph*.<sup>86</sup> Arguably, this is where the slippery slope of cost-based line drawing began.<sup>87</sup> The Supreme Court affirmed that the burden was on the plaintiff to show prohibitive arbitration costs, but declined to clarify how prohibitive the costs must be.<sup>88</sup>

One early interpretation of *Green Tree* took a case-by-case approach.<sup>89</sup> The Fourth Circuit in *Bradford v. Rockwell Semiconductor Systems, Inc.* decided whether an arbitration agreement imposed excessive costs by considering factors such as the claimant's ability to pay, the difference between costs of litigation and arbitration, and the likelihood that the cost of arbitration will deter the bringing of claims.<sup>90</sup> The Second Circuit created a second approach in *Morrison v. Circuit City Stores*.<sup>91</sup> *Morrison* weighed the previous individualistic approach against a more holistic approach, considering the agreement's effects on broader social purposes and the deterrent effect on other potential litigants. The Sixth Circuit adopted the "similarly

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provision requiring that the parties to an arbitration agreement share . . . the costs of arbitration." Although cost-splitting provisions can, in theory, split up fees in any amounts, they are usually divided evenly between the parties. See Horton, *Arbitration and Inalienability*, *supra* note 40, at 736.

<sup>85</sup> See Mavrick, *supra* note 84; Nikolas D. Johnson, Enforceability of Arbitration Fee Allocation Clauses in Employment-related Disputes 1, 7-18 (unpublished manuscript), <https://www.hitpages.com/doc/4790575383445504/1/> (analyzing cost-splitting claims through a fifth, seventh, fourth, third, eighth, first, tenth and eleventh circuit analysis).

<sup>86</sup> *Green Tree Fin. Corp. Ala.*, 531 U.S. at 79.

<sup>87</sup> See generally *id.* (discussing whether costs of arbitration could make it impossible to vindicate a claim).

<sup>88</sup> *Id.* at 92 (explaining that the party seeking to invalidate an arbitration agreement due to cost bears the burden of showing the likelihood of incurring such costs, but ignoring how detailed the showing of prohibitive expense should be); see also *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 227 (1987) ("The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.").

<sup>89</sup> *Bradford v. Rockwell Semiconductor Sys.*, 238 F.3d 549, 556 (4th Cir. 2001).

<sup>90</sup> *Id.*; see also *Mazera v. Varsity Ford Mgmt. Servs., LLC*, 565 F.3d 997, 1003 (6th Cir. 2009).

<sup>91</sup> *Morrison v. Circuit City Stores*, 317 F.3d 646, 658-61 (6th Cir. 2003) (weighing the *Bradford* case-by-case approach against the agreement's ability to further broader social purposes).

situated potential litigant” approach.<sup>92</sup> However, due to other courts’ wildly differing analysis and approaches, no clear rule emerged.<sup>93</sup> Nonetheless, despite disjointed analyses, some cost-splitting claims were successful.<sup>94</sup>

### 3. “Loser Pays” Provisions

Fee-shifting arbitration clause provisions, also known as cost-shifting and “loser pays,” provide that the losing party will pay the prevailing party’s attorney’s fees, often including all reasonable fees incurred in the process.<sup>95</sup> Conversely, attorney’s fees in the United States, both in arbitration and litigation, have long been fashioned according to the American Rule, where the prevailing party is not entitled to collect attorneys’ fees from the loser.<sup>96</sup> But this default rule is avoidable if either the governing statute provides specific procedures for attorney’s fees or an arbitration agreement that says otherwise

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<sup>92</sup> *Id.* at 663.

<sup>93</sup> Horton, *Arbitration and Inalienability*, *supra* note 40, at 727; *see* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 3 (1st Cir. 1999) (demonstrating the after-the-fact judicial review approach taken by the first and seventh circuits); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (demonstrating the per-se rejection of cost-splitting provisions adopted by the tenth, eleventh and D.C. circuits); Koridze v. Fannie Mae Corp., 593 F. Supp. 2d 863, 869 (E.D. Va. 2009) (concluding that even though the challenging party had minimal financial resources and was unemployed, plaintiff’s educational and employment background suggested that she is only presently unable to pursue a claim and could in future); *see also* John F. Crawford, *Going Dutch: Should Employees Have to Split the Costs of Arbitration in Disputes Arising from Mandatory Employment Arbitration Agreements?*: Morrison v. Circuit City Stores, Inc., 1 J. DISP. RESOL. 277, 277 (2004).

<sup>94</sup> *See* Gambardella v. Pentec, Inc., 218 F. Supp. 2d 237, 246 (D. Conn. 2002); Brady v. Williams Capital Grp., L.P., 878 N.Y.S.2d 693, 702 (2009), *aff’d as modified*, 14 N.Y.3d 459 (2010).

<sup>95</sup> *Arbitration and Attorney Fees Clause in Your Contract*, BE YOUR OWN CONTRACTOR TRAINING (2016), <http://beyourowncontractortraining.com/free-tutorials/arbitration-and-attorney-fees-clause-in-your-contract>; *see* Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 317 (1998); Mavrick, *supra* note 84.

<sup>96</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 1 (1796) (declaring that courts would not award attorney’s fees as damages unless or until dictated to do so by statute); *see also* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327 (2013) (explaining that the English rule, used in most of the world, requires the losing party to pay the winner’s reasonable attorney fees).

binds the parties.<sup>97</sup> Given the lack of Supreme Court attention to this doctrine, questions as to its future are largely unanswered.<sup>98</sup> One issue looming for plaintiffs' attorneys is the need to distinguish fee-shifting costs in arbitration from similar heavy litigation costs.<sup>99</sup>

Prior to *Green Tree*, courts heavily disfavored loser-pays costs (verging on being per se unenforceable).<sup>100</sup> But the Court in *Green Tree* reaffirmed the dominance of the FAA, reminding courts of the strong federal preference for arbitration and directing disputes to be enforced by arbitration whenever possible.<sup>101</sup> In an arbitration agreement silent about allocation of fees and costs, the fact that the plaintiff "might be required to bear substantial costs of the arbitration" would not be enough to render the agreement unenforceable.<sup>102</sup> Thus,

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<sup>97</sup> Lloyd C. Anderson, *Equitable Power to Award Attorney's Fees: The Seductive Appeal of "Benefit"*, 48 S.D. L. REV. 217, 217-18 (2003); see Sheila Mortazavi, IV, *No Implied Right to Attorney's Fees Under the National Labor Relations Act*, 66 GEO. WASH. L. REV. 1040, 1042 (1998) (explaining that without explicit congressional authorization, attorney's costs, and other litigation fees, may not be shifted); David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 588-89 (2005); see e.g., Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 859-60 (2012) [hereinafter *Killing Them*] (demonstrating "loser pays" provisions of two companies, where someone bringing an arbitration claim against Comcast or Time Warner cable must pay the companies' costs, attorneys' fees and any costs of appeal).

<sup>98</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (analyzing contract in terms of class action provision, following *Concepcion* decision); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337 (2011) (consumer friendly arbitration contract, no "loser pays" provision).

<sup>99</sup> *Brady*, 878 N.Y.S.2d at 698. See generally Ed Batts, *In an Abrupt Reversal, Delaware Says "Ummm. . . Wait!" to Fee Shifting Bylaws*, DLA PIPER PUBLICATIONS (May 27, 2014), <https://www.dlapiper.com/en/us/insights/publications/2014/05/in-an-abrupt-reversal/> (discussing the role of fee-shifting clauses in preventing shareholders from litigating against corporations).

<sup>100</sup> *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (refusing to enforce fee-shifting agreements in arbitration contracts, holding that they effectively denied the Title VII plaintiff a forum to vindicate his claims); *Paladino v. Avnet Comput. Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (suggesting a per se rule against fee-shifting agreements in arbitration); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (refusing to enforce fee-shifting agreements in arbitration contracts, holding that requiring an employee to pay \$500 to \$1,000 per day or more in arbitrator's fees would effectively deny the plaintiff a forum to vindicate his statutory claims).

<sup>101</sup> *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258 (11th Cir. 2003) (interpreting *Green Tree Financial Corp. Ala. v. Randolph*); see *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 89-91 (2000).

<sup>102</sup> *Green Tree Fin. Corp. Ala.*, 531 U.S. at 91 ("The 'risk' that Randolph will be

at the very least, arbitration clauses silent on fee-shifting would likely be allowed, regardless of whether all fees and costs were later imposed on a losing plaintiff.<sup>103</sup>

In the confusion left by *Green Tree* and *Italian Colors*, circuits were in disagreement as to whether to allow “loser pays” clauses, and when to enforce them. The Eleventh Circuit, the court from which *Green Tree* was appealed, took the Supreme Court’s decision to mean that instead of alleging a *possibility* of prohibitive arbitration cost, the plaintiff had the burden of demonstrating that they were *likely* to incur prohibitive costs.<sup>104</sup> Most prominently, the Ninth Circuit announced that the presence of a fee-shifting clause would invalidate an agreement.<sup>105</sup> For the most part, however, courts were hesitant to invalidate even “loser pays” clauses, absent a particularized showing of prohibitive costs.<sup>106</sup> Cases where fee-shifting clauses were written into the contract were more easily distinguished from *Green Tree* (and easier to win) because the likelihood of costs being prohibitively expensive was readily present, instead of speculative.<sup>107</sup>

The precedent’s practical result is a heavier burden for avoiding arbitration. Thus, the party seeking to avoid arbitration under a fee-shifting agreement has the burden of establishing that the agreement’s enforcement would preclude effective vindication of federal statutory rights.<sup>108</sup> Factors analyzing vindication of federal statutory rights are

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saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”); *Randolph v. Green Tree Fin. Corp.* Ala., 178 F.3d 1149, 1158 (11th Cir. 1999), *aff’d in part, rev’d in part*, 531 U.S. 79 (“Because the clause is silent on the subject of arbitration fees and costs, [plaintiff] might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim.”).

<sup>103</sup> *Green Tree Fin. Corp. Ala.*, 531 U.S. at 91 (revealing only the arbitration agreement’s silence on fees and costs was insufficient to render the agreement unenforceable); *id.* at 97 (Ginsburg, J., dissenting) (arguing that if excessive costs were imposed on the plaintiff in the end, she would have to come dispute them in a judicial forum, sacrificing certainty and judicial economy).

<sup>104</sup> *Musnick*, 325 F.3d at 1259; *Bess v. Check Express*, 294 F.3d 1298, 1303 (11th Cir. 2002).

<sup>105</sup> *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1004-05 (9th Cir. 2010); *Musnick*, 325 F.3d at 1259 n.3; Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 203-4 (2004).

<sup>106</sup> *Goodman v. ESPE Am., Inc.*, No. 00-CV-862, 2001 WL 64749, at \*3-5 (E.D. Pa. Jan. 19, 2001).

<sup>107</sup> See *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 214 (3d Cir. 2003) (severing clause providing for attorney’s fees costs); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (severing punitive damages clause).

<sup>108</sup> *Musnick*, 325 F.3d at 1259; *Herrington v. Wells Fargo Bank (In re Herrington)*, 374 B.R. 133, 145 (Bankr. E.D. Pa. 2007); *Cash in Advance, Inc. v. Jolley*, 612 S.E.2d 101, 103 (Ga. Ct. App. 2005) (noting some fee-shifting does not render contract

similar to those used in an unconscionability analysis.<sup>109</sup> The analysis includes the provisions' fairness, the plaintiff's costs compared to potential recovery, the ability to recover attorneys' fees and other costs (and obtain representation to prosecute the underlying claim) and the waiver's effect on a company's ability to engage in unchecked market behavior.<sup>110</sup>

Courts also questioned contracts that provided for fee-splitting, but allowed arbitrators to shift all costs onto the losing party in the course of arbitration.<sup>111</sup> To the average plaintiff, even the possibility that all costs of arbitration could be imposed on them is enough to deter arbitration when costs are prohibitively expensive.<sup>112</sup> In *Delta Funding Corp. v. Harris*, the Third Circuit decided that an arbitration clause risked preventing vindication of federal statutory rights where a cost-splitting clause gave the arbitrator authority to shift all fines and fees on the losing party if they saw fit.<sup>113</sup> Other courts agreed not to allow "loser pays" provisions, but insisted that such fee-shifting discretion clauses should be severed, if possible, instead of invalidating the contract entirely.<sup>114</sup>

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unenforceable, party seeking to avoid it has the burden of showing that its enforcement would prevent him from vindicating federal statutory rights); *see also* Randall, *supra* note 105, at 200-01.

<sup>109</sup> *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs.' Litig.)*, 554 F.3d 300, 321 (2d Cir. 2009) *cert. granted, vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (listing relevant circumstances in analysis, such as the provisions' fairness, an individual plaintiff's cost compared to their potential recovery, the ability to recover attorneys' fees and other costs to obtain legal representation to prosecute the underlying claim, "the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns").

<sup>110</sup> *Dale*, 498 F.3d at 1224.

<sup>111</sup> *See Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 284-85 (3d Cir. 2004); *Herrington*, 374 B.R. at 144-45; *Delta Funding Corp. v. Harris*, 912 A.2d 104, 113 (N.J. 2006); *Garrett-Scheier v. Muller Auto. Grp., Inc.*, No. L-135-10, 2010 WL 1599419, at \*4 (N.J. Super. Ct. Law Div. Apr. 16, 2010). *But see* *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 764 (Wash. 2004) (noting purely speculative effect of attorney's fees provision in agreement, allowing the ability to shift attorney's fees to remain).

<sup>112</sup> *Parilla*, 368 F.3d at 284.

<sup>113</sup> *Delta*, 912 A.2d at 113 (giving arbitrator unchecked discretion to shift arbitration's entire cost to defendant, an unconscionable risk that deters vindication of statutory rights).

<sup>114</sup> *Morrison v. Volkswagen Tulsa, LLC*, No. 12-CV-375-JED-PJC, 2013 WL 249367 at \*4 (N.D. Okla. 2013) (short filing time and loser pays provision in employer's dispute resolution procedure are unenforceable but can be severed so that rest of policy is valid; plaintiff must arbitrate wage and hour and discrimination

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B. Post-Italian Colors

1. Class Actions Waivers Prevent Vindication of Federal Statutory Rights

Despite the fact that *Concepcion* was a case about preemption, the Supreme Court weighed in on the negative effects of class action waivers in pursuing claims in arbitration.<sup>115</sup> Without class actions, small-dollar claims would slip through the legal system unresolved – but the majority was unfazed by this aspect of their decision.<sup>116</sup> Furthermore, despite an overwhelming consensus amongst scholars (and the dissent) that *Concepcion* and *Italian Colors* involved different legal issues the majority claimed, “[O]ur decision in *AT&T Mobility* all but resolves this case.”<sup>117</sup> The Court ignored the effective vindication exception, ruling that class actions were against the fundamental attributes of arbitration and that despite class action waivers’ possible negative effects, arbitration agreements were to be enforced according to their terms.<sup>118</sup>

In *American Express Co. v. Italian Colors*, the Court rejected the notion that plaintiffs could only pursue claims on a class-wide basis,

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claims); Michael J. Killeen & Sheehan Sullivan Weiss, *Washington Appeals Court: Cost-Shifting Provisions in Employment Arbitration Agreement Invalid*, DAVIS WRIGHT TREMAINE LLP (Spring 2010), [http://www.dwt.com/advisories/Washington\\_Appeals\\_Court\\_CostShifting\\_Provisions\\_in\\_Employment\\_Arbitration\\_Agreement\\_Invalid\\_08\\_10\\_2009/](http://www.dwt.com/advisories/Washington_Appeals_Court_CostShifting_Provisions_in_Employment_Arbitration_Agreement_Invalid_08_10_2009/) (discussing *Walters v. A.A.A. Waterproofing, Inc.*, where the court severed a fee-shifting provision, sending employees the message not to try to assert advantages they wouldn’t already have in litigation); see *Garrett-Scheier*, 2010 WL 1599419, at \*4.

<sup>115</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

<sup>116</sup> *Id.* at 351-52.

<sup>117</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *id.* at 2313-20 (criticizing the majority’s failure to analyze the agreement as a whole, instead of only in terms of the class action waiver, and distinguish *Concepcion* for involving state law, which could not possibly implicate the effective-vindication rule); Resnik, *supra* note 28, at 2875 (noting the Court relied on a state preemption case, *Concepcion*, for its ruling in *Italian Colors*, a federal statutory rights case, despite the dissent’s attempts to distinguish the two); Ward, *supra* note 30, at 159-60 (*Concepcion* was ultimately decided based on preemption).

<sup>118</sup> *Italian Colors Rest.*, 133 S. Ct. at 2312; Daniel Fisher, *Class-Action Lawyers Lose Big at Supreme Court with American Express Case*, FORBES (June 20, 2013, 12:31 PM), <http://www.forbes.com/sites/danielfisher/2013/06/20/class-action-lawyers-handed-a-big-loss-at-supreme-court/> (repudiating effective vindication sweeps away many arguments against class action waivers); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”).

narrowing the applicability of the federal vindication doctrine's scope.<sup>119</sup> The majority disagreed that because the cost of pursuing claims far outweighed one's potential recovery, individual arbitration prevented effective vindication.<sup>120</sup> Thus, the agreement did not fall within the federal vindication doctrine's scope.<sup>121</sup> The Court reasoned that the remedy existed even if it was not worthwhile, or possible, for individuals to pursue claims individually.<sup>122</sup>

Courts have come down hard on attempts to use class actions to widen the boundaries of arbitration (as opposed to other mechanisms).<sup>123</sup> After *Italian Colors*, the Supreme Court's war on class actions has left lower courts to either march along with its ruling or attempt to duck the ruling through distinctions. The Second Circuit gave up its long fight from *Amex I* and *II*, holding in *Sutherland v. Ernst & Young LLP* that a "class-action waiver is not rendered invalid by virtue of the fact that [a plaintiff's] claim is not economically worth pursuing individually."<sup>124</sup> In subsequent cases involving claims that

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<sup>119</sup> See *Italian Colors Rest.*, 133 S. Ct. at 2309-12.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2311.

<sup>122</sup> *Id.*

<sup>123</sup> See generally *id.* (finding no reason to widen the boundaries of arbitration); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (rejecting the argument that the court should invalidate an arbitration agreement because without class actions small claims would not be dealt with in the legal system); Jason M. Halper & William J. Foley, *United States: Seven Months After "American Express v. Italian Colors Restaurant": The End of Class Actions?*, MONDAQ (Jan. 14, 2014), <http://www.mondaq.com/unitedstates/x/285906/Class+Actions/Seven+Months+After+American+Express+v+Italian+Colors+Restaurant+The+End+Of+Class+Actions> (construing *AmEx* so as to "prevent customers, employees, clients and other constituents of corporate America from utilizing class actions where a contract provides for individual arbitration."); James Schurz, *Consumer Class Actions Take Another Hit: Supreme Court Rules Class-Action Arbitration Waiver Covers Antitrust Claims*, WESTLAW J. (Aug. 2013), <http://media.mofo.com/files/Uploads/Images/130712-Arbitration-Waiver-Covers-Antitrust-Claims.pdf> ("[T]he Supreme Court's most recent term 'was a near bloodbath for class-action plaintiffs' lawyers." (quoting Deepak Gupta)); Schutte et al., *supra* note 79 ("class actions issues are hot").

<sup>124</sup> *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013); Halper & Foley, *supra* note 123; Luke Tsai, *Supreme Court Rules Against Italian Colors in AmEx Suit*, E. BAY EXPRESS (June 26, 2013), <http://www.eastbayexpress.com/oakland/supreme-court-rules-against-italian-colors-in-amex-suit/Content?oid=3619448> (describing *Italian Colors*' path through the New York court system, taking over ten years to be heard since the plaintiff first filed in 2003). See generally *Nat'l Supermarkets Ass'n v. Am. Express Travel Related Servs. Co.* (*In re Am. Express Merchs.' Litig.*), 634 F.3d 187 (2d Cir. 2011) (refusing to mandate arbitration of claims); *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.* (*In re Am. Express Merchs.' Litig.*), 554 F.3d 300 (2d Cir. 2009) (similarly refusing to mandate arbitration of claims).

prohibitive costs prevent vindication of federal rights, the Second Circuit has continued to rule against its own precedent.<sup>125</sup> Vindication of federal rights does not apply to a class action waiver just because it is not economically feasible to enforce rights individually.<sup>126</sup> A string of lower court decisions forced to disregard class action waivers in the vindication of federal rights analysis soon followed.<sup>127</sup>

In an agreement outside of the arbitration context, the Sixth Circuit allowed a class action to proceed under an FLSA claim – no countervailing federal policy was at issue.<sup>128</sup> But where arbitration agreements were involved, prohibitive costs of bringing an individual case no longer rendered class action waivers in arbitration clauses unenforceable.<sup>129</sup> Even where a court explicitly agreed that a contract’s arbitration clause forbidding class-wide arbitration was one-sided, adhesive, and “favor[ed] LexisNexis at every turn”, the agreement was enforced under *Italian Colors*.<sup>130</sup>

Some may argue that there was sufficient support for finding that class action waivers prevented vindication of statutory rights prior to *Italian Colors*, and that courts intent on effectuating policy will continue finding ways to avoid class waivers. Before *Concepcion* and *Italian Colors*, courts successfully used the effective vindication doctrine to invalidate class action waivers.<sup>131</sup> In *Kristian v. Comcast Corp.*, for example, the First Circuit declared, “[i]f the class

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<sup>125</sup> *Raniere v. Citigroup Inc.*, 533 F. App’x 11, 13-14 (2d Cir. 2013) (“*Italian Colors* reversed *Amex III* and requires us to conclude that the District Court’s statements . . . were erroneous.”).

<sup>126</sup> *Id.* at 14.

<sup>127</sup> See *Porreca v. Rose Grp.*, No. 13-1674, 2013 U.S. Dist. LEXIS 173587, at \*42 (E.D. Pa. Dec. 11, 2013); *Shetiwy v. Midland Credit Mgmt.*, 959 F. Supp. 2d 469, 474 (S.D.N.Y. 2013); *Walthour v. Chipio Windshield Repair, LLC*, 944 F. Supp. 2d 1267, 1273 (N.D. Ga. 2013).

<sup>128</sup> *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014).

<sup>129</sup> *Brown v. Sklar - Markind*, No. 14-0266, 2014 U.S. Dist. LEXIS 157891, at \*30 (W.D. Pa. Nov. 7, 2014); *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994 (ARR)(RML), 2013 WL 3968765, at \*10 (E.D.N.Y. July 31, 2013).

<sup>130</sup> *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013) (“The clause is indeed as one-sided as Crockett says: the clause favors LexisNexis at every turn, and . . . makes it economically unfeasible for Crockett or any other customer to assert the individual claims that Crockett seeks to assert here.”).

<sup>131</sup> *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009) (arguing that if arbitration prevents plaintiffs from vindicating their rights, it is no longer a valid alternative to traditional litigation); *Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir. 2006) (“Because the denial of class arbitration in the pursuit of antitrust claims has the potential to prevent Plaintiffs from vindicating their statutory rights, Plaintiffs present a question of arbitrability.”).

mechanism prohibition here is enforced, [the defendant] will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law.”<sup>132</sup> And where a contract prohibited the joinder of claims to lower costs imposed by arbitration proceedings, a California court rendered the contract unenforceable because it discouraged or prevented customers from vindicating their rights.<sup>133</sup>

*a. All Costs Are Not Created Equal*

Even parts of the *Italian Colors* opinion may leave room for debate. Justice Scalia opined that an agreement forbidding a party from bringing certain claims would prevent effective vindication of statutory rights.<sup>134</sup> And “perhaps” so would “filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>135</sup> Some courts have grasped onto this language.<sup>136</sup> Despite predictions of the end of class actions, judges in 2014 allowed class action arbitration to proceed in 28 out of 134 cases.<sup>137</sup> Attorneys continue to create reasons to convince courts to overturn class action waivers.<sup>138</sup> Moreover, the National Labor Relations Board defiantly continues to hold that class action waiver provisions run afoul of the National Labor Relations Act.<sup>139</sup>

Plaintiffs in *Damato v. Time Warner Cable* attempted to avoid a class action waiver by pinning their prohibitive costs on filing fees and arbitrator’s compensation, differentiating their claim from that of

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<sup>132</sup> *Kristian*, 446 F.3d at 61.

<sup>133</sup> *Parada v. Superior Court*, 98 Cal. Rptr. 3d. 743, 769-70 (Ct. App. 2009) (finding defendants’ failure to justify excessive arbitration expenses demonstrates an improper purpose of discouraging or preventing its customers from vindicating their rights).

<sup>134</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

<sup>135</sup> *Id.* at 2310-11.

<sup>136</sup> See *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 376-79 (10th Cir. 2016); *Pollard v. ETS PC, Inc.*, No. 16-cv-0097-WJM-MJW, 2016 WL 2983530, at \*9 (D. Colo. May 12, 2016); *Gillette v. Uber Techs.*, No. C-14-5241 EMC, 2015 WL 4481706, at \*5 (N.D. Cal. July 22, 2015).

<sup>137</sup> Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (“In 2014 alone, judges upheld class-action bans in 134 out of 162 cases.”).

<sup>138</sup> Walter Olson, *AmEx v. Italian Colors: The End of the World?*, OVERLAWYERED (June 24, 2013), <http://overlawyered.com/2013/06/amex-v-italian-colors-contd/>.

<sup>139</sup> Angela C. Zambrano, *Class Action Litigation Trends Post-Italian Colors*, LAW360 (Nov. 3, 2014, 5:26 PM EST), <http://www.law360.com/articles/592831/class-action-litigation-trends-post-italian-colors>.

*Italian Colors*.<sup>140</sup> With only individual arbitration allowed, the plaintiffs would end up paying almost \$2,000 per day in hearing fees and the daily costs of hiring an arbitrator.<sup>141</sup> Meanwhile, the costs in *Italian Colors* were prohibitive due to the enormous costs of expert analysis.<sup>142</sup> The court agreed that costs could be prohibitive, but concluded that plaintiffs had insufficient evidence to prove their claims, citing *Green Tree's* caution against speculative costs.<sup>143</sup> Plaintiffs in *In re A2P SMS Antitrust Litigation* similarly argued that the fees specific to their case made access to the forum impracticable, but were also rejected for their failure to specifically show prohibitive costs.<sup>144</sup> Thus, it is only a matter of time until a case with sufficient evidence of prohibitive costs arises.

*b. Contract Validity: Offer and Acceptance*

The battleground of offer and acceptance remains, and is arguably as rocky as ever.<sup>145</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* established that a party cannot be forced to submit to class arbitration unless there is a contractual basis for concluding that they agreed to do so.<sup>146</sup> Therefore, *Stolt-Nielsen S.A.* provides plaintiffs the argument that there was never a valid agreement to waive class arbitration to begin with.<sup>147</sup>

Furthermore, *Concepcion* and *Italian Colors* agreed that successfully challenging an arbitration agreement's formation, such as by proving fraud or duress, does not implicate the FAA.<sup>148</sup> The Ninth Circuit recently followed this line of reasoning, striking down an arbitration agreement with a class arbitration waiver where there was no evidence that the plaintiff had actual or constructive notice of the terms of the

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<sup>140</sup> *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994 (ARR)(RML), 2013 WL 3968765, at \*10 (E.D.N.Y. July 31, 2013); Halper & Foley, *supra* note 123.

<sup>141</sup> *Damato*, 2013 WL 3968765, at \*10.

<sup>142</sup> Halper & Foley, *supra* note 123.

<sup>143</sup> *Damato*, 2013 WL 3968765, at \*11-12 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)); Halper & Foley, *supra* note 123.

<sup>144</sup> *In re A2P SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 497-98 (S.D.N.Y. 2013) (adding that “[w]hile certain plaintiffs may conclude that it is not ‘worth the expense involved in proving’ the alleged statutory violation . . . [that] does not amount to a statutory deprivation of their right to pursue their claims.”).

<sup>145</sup> See Schurz, *supra* note 123; see also Neal H. Klausner & Ariel L. Stillman, *Is Silence Golden?*, N.Y.L.J., Apr. 7, 2008, [http://www.dglaw.com/images\\_user/newsalerts/Klausner\\_Stillman\\_Is%20Silence%20Golden\\_Apr08.pdf](http://www.dglaw.com/images_user/newsalerts/Klausner_Stillman_Is%20Silence%20Golden_Apr08.pdf).

<sup>146</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684-85 (2010).

<sup>147</sup> See *id.* (needing agreement to compel party under FAA to submit to class arbitration); Schutte et al., *supra* note 79.

<sup>148</sup> Schurz, *supra* note 123.

agreement.<sup>149</sup> And California employers are verifying that their employment agreements include express class action waivers.<sup>150</sup> Although California Governor Jerry Brown recently vetoed a bill requiring waivers of an employee's legal rights to be knowing, voluntary, in writing, and not an express condition of employment, similar legislation is on its way.<sup>151</sup> For now, contract formation arguments may be the best remaining argument for plaintiffs attempting to avoid arbitration, especially on an individual basis.<sup>152</sup>

Despite these outliers, Scalia's opinion and the Court's recent scrutiny of class actions indicates that the prospect of avoiding arbitration due to a class action waiver is in jeopardy, at least for the near future. On behalf of class action waivers, *Italian Colors* seems to be living up to its reputation as the "worst Supreme Court arbitration decision ever."<sup>153</sup>

## 2. Cost-Splitting Provisions Prevent Vindication of Federal Statutory Rights

Cost-splitting mechanisms largely escaped the Court's analysis in *Concepcion*, removing them from its strict scrutiny.<sup>154</sup> Even though *Concepcion* involved state statutory rights, companies took notice of the benefits of "consumer friendly" arbitration clauses after *Concepcion*, promising to pay for all initiation fees, deposits, and costs of the arbitral proceedings.<sup>155</sup> Thus, it is likely that these were the

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<sup>149</sup> *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014); *Zambrano*, *supra* note 139.

<sup>150</sup> See Michael Campbell, *California Employers Exhale Relief, Governor Vetoes Ban on Employment Arbitration Agreement*, SHEPPARDMULLIN LAB. & EMP. L. BLOG (Oct. 16, 2015), <http://www.laboremploymentlawblog.com/2015/10/articles/arbitration-agreements/employers-exhale-relief-governor-vetoes-ban-on-employment-arbitration-agreements/>.

<sup>151</sup> *Id.*

<sup>152</sup> *American Express Co. v. Italian Colors Restaurant: Supreme Court Upholds Contractual Provision Waiving Class Arbitration*, DAVIS POLK (June 25, 2013), [http://www.davispolk.com/sites/default/files/062513\\_amex%5B1%5D.pdf](http://www.davispolk.com/sites/default/files/062513_amex%5B1%5D.pdf) (responding to motions to compel arbitration, plaintiffs may need to rely on contract formation arguments).

<sup>153</sup> Schurz, *supra* note 123.

<sup>154</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-37 (2011) (exemplifying a consumer friendly arbitration agreement, stating "AT&T must pay all costs for nonfrivolous claims" and thus no cost-sharing).

<sup>155</sup> Gilles, *Killing Them*, *supra* note 97, at 853-54 (examining the most common consumer-friendly provisions that has been added to arbitration clauses post-*Concepcion*: the promise to pick up the tab for all initiation fees, deposits, and costs of the arbitral proceeding).

filing and administrative fees Scalia referenced in the narrow exception in *Italian Colors* as to what impediment remained in the Court's eyes to vindication of federal statutory rights.<sup>156</sup> Some lower courts foresaw such a result, looking at cost-splitting narrowly: “[i]f *Green Tree* has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims.”<sup>157</sup>

Justice Scalia's statement in *Italian Colors* that the vindication doctrine might “cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable,” indirectly referenced cost-shifting provisions.<sup>158</sup> In fact, the agreement at issue in *Italian Colors* did not allow cost-splitting, distinct from *Concepcion* and other “consumer-friendly” arbitration clauses.<sup>159</sup> After *Concepcion* and *Italian Colors*, some courts continue to use the vindication of federal statutory rights doctrine to invalidate arbitration clauses with overly burdensome cost-splitting provisions.<sup>160</sup> For example, where an arbitration provision provided that each side should bear its own arbitration expenses, a Colorado district court held that it effectively deprived the plaintiff of an accessible forum to resolve her statutory Fair Labor Standards Act rights.<sup>161</sup> But where the plaintiff did not show that a similar cost-splitting provision made arbitration prohibitively expensive, a Florida district court enforced it.<sup>162</sup> These differing outcomes raise questions about which costs may be split.

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<sup>156</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013).

<sup>157</sup> *Kaltwasser v. AT & T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011).

<sup>158</sup> *Italian Colors Rest.*, 133 S. Ct. at 2310-11; see also *Coram v. Shepherd Commc'ns, Inc.*, No. 3:14CV-298-JHM, 2014 U.S. Dist. LEXIS 134043, at \*13 (W.D. Ky. Sept. 23, 2014).

<sup>159</sup> Gilles, *Gutting the Vindication-of-Rights Challenge*, *supra* note 37, at 7 (guaranteeing that claimants could not engage in any cost-splitting, information-sharing, or resource-pooling in bringing such an individual arbitration).

<sup>160</sup> See *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366, 1373-75 (D. Colo. 2014).

<sup>161</sup> *Id.*; E. Colin Thompson & Amy Reagan, *After Concepcion, Is Your “New” Arbitration Agreement Still Enforceable?*, A.B.A. SEC. LITIG. (Feb. 19, 2015), <http://apps.americanbar.org/litigation/committees/classactions/articles/winter2015-0215-four-years-after-concepcion-is-your-new-arbitration-agreement-still-enforceable.html>.

<sup>162</sup> *Monserate v. Hartford Fire Ins. Co.*, No. 6:14-cv-149-Orl-37GJK, 2014 WL 4101684, at \*2 (M.D. Fla. Aug. 20, 2014) (failing to find evidence that splitting the cost of arbitration would be prohibitively expensive, the court was unable to strike the cost-splitting language or invalidate the arbitration provisions).

After the vague *Italian Colors* opinion, lower courts are left largely in the same position as they were after *Green Tree* in terms of cost-sharing.<sup>163</sup> Despite the fact that the arbitration agreement in *Italian Colors* did not contain provisions that would provide for costs to be shifted to American Express in the event that Italian Colors' claim was successful (and the Court largely ignored analyzing these provisions), the decision nonetheless sent a signal.<sup>164</sup> Arbitration clauses where the company would cover arbitration forum costs seemed certain to avoid litigation; arbitration clauses that forced the plaintiff to cover all of their own costs and expenses (cost-sharing) also seemed like a safe bet.<sup>165</sup>

No overwhelming trend amongst cost-sharing claims has emerged since *Italian Colors*. Despite a high bar, the ability to invalidate a fee-splitting arbitration provision based on the federal vindication doctrine remains — a victory in and of itself. Courts continue to strike down clauses providing for cost-sharing.<sup>166</sup> Additionally, *Italian Colors* could even be seen as a success on the front of cost-sharing arbitration clauses, as many companies have since heeded court precedent and changed contracts to pay various filing and expert fees.<sup>167</sup> “Consumer-friendly” cost-splitting provisions provide that even if costs are split in

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<sup>163</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (“How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss . . .”); Lampley, *supra* note 58, at 849 (questioning what type of costs could lead to a viable cost-based defense).

<sup>164</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2318-19 (2013) (Kagan, J., dissenting) (explaining how a pre-dispute arbitration clause prohibiting class arbitration may still be valid if there are other avenues to overcome costs); Ward, *supra* note 30, at 168.

<sup>165</sup> See *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, 300 F. Supp. 2d 1107, 1126-27 (D. Kan. 2003); *Giordano v. Pep Boys—Manny, Moe & Jack, Inc.*, No. 99-1281, 2001 U.S. Dist. LEXIS 5433, at \*25 (E.D. Pa. Mar. 29, 2001).

<sup>166</sup> *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (“In this case, administrative and filing costs, even disregarding the cost to prove the merits, effectively foreclose pursuit of the claim. Ralphs has constructed an arbitration system that imposes non-recoverable costs on employees just to get in the door.”); *Nesbitt v. FCNH, Inc.*, No. 14-cv-00990-RBJ, 2014 WL 6477636, at \*474 (D. Colo. Nov. 19, 2014) (citing, inter alia, *Italian Colors* in holding that an arbitration agreement was wholly unenforceable due to cost of arbitration and duty that each side bear its own expenses, effectively depriving plaintiff of an accessible forum to resolve her statutory Fair Labor Standards Act rights); Thompson & Reagan, *supra* note 161.

<sup>167</sup> Gilles, *Killing Them*, *supra* note 97, at 829 (noting the recent trend in large companies incorporating consumer friendly provisions into arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising premium payments to claimants who achieve a better outcome in arbitration than the company's last-best offer).

arbitration, plaintiffs' costs are more reasonable than they would be otherwise.<sup>168</sup>

Still, a larger number of cost-sharing agreements are being upheld.<sup>169</sup> And a newer type of cost-splitting has emerged, where the arbitrator decides how to apportion fees.<sup>170</sup> For example, in *Escobar v. Celebration Cruise Operator*, the court rejected a plaintiff's federal vindication cost-splitting claim because the defendant bore the initial costs of arbitration and the plaintiff could always challenge the award at a later stage.<sup>171</sup> Thus, although such contracts may not include an explicit cost-splitting provision, the outcome may be just as expensive. Without a legal ruling plainly banning cost-sharing agreements, companies are at liberty to change back their arbitration clauses any time.<sup>172</sup>

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<sup>168</sup> See *id.* at 838; see, e.g., Aaron Blumenthal, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 706 (2015) (describing what made the contract in *Concepcion* consumer friendly, despite its containing a class action waiver).

<sup>169</sup> *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1152 (10th Cir. 2014); *Monserate v. Hartford Fire Ins. Co.*, No. 6:14-cv-149-Orl-37GJK, 2014 WL 4101684, at \*2 (M.D. Fla. Aug. 20, 2014); *Byrd v. SunTrust Bank*, No. 2:12-cv-02314JPM-cgc, 2013 U.S. Dist. LEXIS 101909, \*49-50 (W.D. Tenn. July 22, 2013); see also *Coneff v. AT&T Corp.*, 673 F.3d 1159 (9th Cir. 2012) (rejecting the effective vindication where claims were worth less than the cost of litigating them, noting a number of fee-shifting and otherwise pro-consumer provisions identical to those in *Concepcion*).

<sup>170</sup> *Coram v. Shepherd Commc'ns, Inc.*, No. 3:14CV-298-JHM, 2014 U.S. Dist. LEXIS 134043, at \*15 (W.D. Ky. Sept. 23, 2014) (describing the impossible burden that plaintiffs have in proving excessive costs in agreements where cost allocation is determined by the arbitrator, costs are speculative beforehand).

<sup>171</sup> *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1292 (11th Cir. 2015) (holding that the excessive-cost argument was premature at the arbitration-enforcement stage; the amount costs would be split was an issue for the arbitrator to consider, but plaintiff was not denied access to the forum, and the time for the plaintiff to raise arguments relating to the payment of fees would be at the award-enforcement stage).

<sup>172</sup> See Gilles, *Killing Them*, *supra* note 97, at 847 ("Furthermore, most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop."); Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS. L. REV. 39, 50-52 (2014) (discussing different approaches of lower courts in analyzing cost-sharing agreements in the lack of a Supreme Court ruling); Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 33 (2014) (discussing how limited judicial review of arbitration agreements can "open the door for employers to tilt the scales more in their favor by drafting arbitration clauses with questionable procedures").

### 3. “Loser Pays” Provisions Prevent Vindication of Federal Statutory Rights

Besides responding to preemption, the contract in *Concepcion* precluded AT&T from shifting attorney’s fees onto the plaintiff.<sup>173</sup> Although *Italian Colors* pinpointed vindication of federal statutory rights, the Court framed its cost analysis largely in terms of class action waivers.<sup>174</sup> There is an argument that Scalia’s mention of certain fees making access to the forum impracticable does not include fee-shifting provisions that may prevent people from using the forum, but the case’s direct implications on fee-shifting are unclear.<sup>175</sup> Since the majority ignored the cost-shifting provisions in American Express’s contract, lower courts are left to analyze fee-shifting under the general principles of *Italian Colors*.<sup>176</sup>

Fee-shifting was not interpreted as a central issue in either *Concepcion* or *Italian Colors*, and as a result lower court jurisprudence has not shifted significantly.<sup>177</sup> Discretionary fee-shifting post arbitration, severability of fee-shifting clauses, and consideration of attorney’s fees not unique to arbitration remain significant issues in this area.<sup>178</sup> But since *Green Tree*, the Court has repeatedly stated that the plaintiff bears the burden of showing prohibitive costs.<sup>179</sup> This

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<sup>173</sup> AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 337 (2011); see also Lampley, *supra* note 58, at 830 (coupling class waivers with the “arbitration-friendly” procedures in AT&T’s arbitration clause, such as the availability of receiving double the attorney’s fees, no longer per se unconscionable).

<sup>174</sup> Am. Express Co. v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

<sup>175</sup> *Id.* at 2310-11; Ward, *supra* note 30, at 169 (cost-sharing provisions’ implications unclear).

<sup>176</sup> Ward, *supra* note 30, at 170-71 (leaving lower courts with a rigid application of the FAA and the effective vindication rule, the *Italian Colors* majority did not address cost-sharing, so no process or standard by which lower courts can evaluate it).

<sup>177</sup> See generally *Italian Colors Rest.*, 133 S. Ct. 2304 (arbitration clause did not involve fee-shifting agreement); *Concepcion*, 563 U.S. 333 (similarly this case did not involve an arbitration clause with a fee-shifting agreement).

<sup>178</sup> See Henry F. Minnerop & Kimberly A. Johns, *Attorneys’ Fees in Arbitration*, 61 BUS. LAW. 589, 592-93 (2006) (discussing how the New York Stock Exchange, American Arbitration Association and other arbitration organizations have inconsistent rules concerning post-judgment fee shifting); see also Kevin C. Clark, *The State of Arbitral Fees After Green Tree Financial: Uncertainty and Contradiction Demands Further Guidance from the Supreme Court*, 3 PEPP. DISP. RESOL. L.J. 133, 141 (2003).

<sup>179</sup> See *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 81 (2000) (seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs).

direction does not necessarily limit a plaintiff to pleading only costs related to accessing the arbitration forum, but practically, the costs resolving the dispute do not end there.<sup>180</sup> Only considering costs unique to arbitration leaves employers to create fee-splitting contracts that can become fee-shifting at the discretion of the arbitrator.<sup>181</sup> Moreover, other procedural distinctions of arbitration, such as the finality of most judgments, raise the stakes in allowing such agreements to proceed.<sup>182</sup> This doctrine brings to the forefront the age-old consideration that arbitration simply is not equal to litigation, and treating them equally brings about crude justice at best.<sup>183</sup>

Sympathy for plaintiffs aside, attorney's fees clauses are not unique to arbitration, which makes them distinguishable from arbitration-specific prohibitive costs, such as filing fees, arbitrator's fees, and other administrative fees.<sup>184</sup> These types of fees do not prevent vindication of rights in arbitration any more than they would impede a plaintiff from bringing a lawsuit.<sup>185</sup> Courts such as the Fourth Circuit consider

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<sup>180</sup> See Harris, *supra* note 39, at 25 (“[T]he Amex III panel concluded that the ‘costs of arbitration’ mentioned in *Green Tree* applied to costs incurred as a result of arbitration . . .”).

<sup>181</sup> Zuver v. Airtouch Commc'ns, Inc., 101 P.3d 753, 764-65 (2004) (noting effect of attorney's fees provision is purely speculative and the ability to shift attorney's fees remains).

<sup>182</sup> Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 216-17 (2007) (“Under section 10(a) [of the FAA], a court may reverse an arbitral award only under very limited circumstances.”); see 9 U.S.C. § 10 (2012); *Consumer Guide to Mandatory Arbitration Clauses*, CITIZEN ADVOC. CTR. (Sept. 02, 2002), <http://www.citizenadvocacycenter.org/uploads/8/8/4/0/8840743/mandatoryarbitrationbrochure.pdf> (providing examples of what a plaintiff must show to receive judicial review and vacate an arbitrator's decision).

<sup>183</sup> See generally *Using Arbitration to Settle Commercial Disputes: A Look at the Pros and Cons*, FELLHEIMER & EICHEN (2016), <http://www.fellheimer.net/?t=40&an=17780> (discussing the pros and cons of arbitration compared to litigation, and how litigation provides more safeguards to ensure rights are protected both during trial and on appeal).

<sup>184</sup> Gilles, *Gutting the Vindication-of-Rights Challenge*, *supra* note 37, at 20; see *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (covering an arbitration agreement provision forbidding the assertion of certain statutory rights, perhaps covering high filing and administrative fees attached to arbitration that make access to the forum impracticable); Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 HARV. J.L. & PUB. POL'Y 991, 1012 (2012) (excluding *Green Tree*'s application where prohibitively expensive costs are imposed by the claim itself).

<sup>185</sup> See *Koridze v. Fannie Mae Corp.*, 593 F. Supp. 2d 863, 871 (E.D. Va. 2009) (comparing attorney's fees in litigation and arbitration); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 411 (S.D.N.Y. 2003) (using *Bradford* factors, including looking at the cost differential between arbitration and litigation in court); see also *Bradford v. Rockwell Semiconductor Sys.*, 238 F.3d 549, 556 (4th Cir. 2001)

differences in cost between litigation and arbitration in vindication analyses.<sup>186</sup> Given that attorney's fees are often just as large in litigation as they are in arbitration, only fee-shifting analyses unique to arbitration should be considered.<sup>187</sup> Perhaps the Supreme Court believed that only costs that prevent access to the forum interfere with vindication of federal statutory rights, not costs that generally occur as a result of adjudication of claims.<sup>188</sup> Fee-shifting clauses may increase arbitration costs, but there is nothing unique to arbitration that causes this.

III. REHASHING *GREEN TREE V. RANDOLPH* AND *AMERICAN EXPRESS V. ITALIAN COLORS*

A. *Statutory Codification of the Vindication of Federal Statutory Rights Doctrine*

The Supreme Court has repeatedly refused to diminish the FAA's establishment of a federal policy favoring arbitration.<sup>189</sup> State law formulations fighting arbitration were understandably defeated by the federal doctrine of preemption.<sup>190</sup> But the Supreme Court went one step further, allowing the FAA to dominate over other federal statutes

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(finding appropriate inquiry one based upon "the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims").

<sup>186</sup> See *Bradford*, 238 F.3d at 556.

<sup>187</sup> See *Batts*, *supra* note 99 (discussing high fee-shifting costs preventing shareholders from litigating against corporations); *Root*, *supra* note 97, at 607-08 (discussing the negative effects of loser-pays agreements generally, specifically deterring reasonable claims due to cost); Fred T. Isquith, *SEC Needs to Act on Fee Shifting*, LAW 360 (Nov. 5, 2014, 11:05 AM), <http://www.law360.com/articles/592979/sec-needs-to-act-on-fee-shifting> (discussing fee-shifting clauses' threat to private enforcement of securities laws).

<sup>188</sup> See *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) ("If *Green Tree* has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims."); *Harris*, *supra* note 39, at 25 (arguing that the costs of arbitration only refer to costs of access to the arbitral forum).

<sup>189</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). See generally 9 U.S.C. §§ 2-4 (2012) (establishing federal policy favoring arbitration in certain circumstances).

<sup>190</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (preempting California's *Discover Bank* rule); see also *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (2005) (establishing characteristics of arbitration clauses which make them unconscionable), *abrogated by Concepcion*, 563 U.S. 333.

in a broad form of field/impact preemption that rejected dissenting opinions arguing that one federal law should not automatically bow to another.<sup>191</sup> The Court proceeded with rigorous enforcement of arbitration agreements according to their terms, leaving only the contrary congressional command option developed in *Shearson/American Express v. McMahon* and upheld in *Italian Colors*.<sup>192</sup> Under this doctrine, courts will enforce arbitration agreements unless Congress manifests a countervailing policy precluding waiving judicial remedies.<sup>193</sup> This countervailing policy will be in another federal statute's text, its legislative history, or in an inherent conflict between arbitration and the statute's underlying purposes.<sup>194</sup>

Thus, the most successful way to ensure plaintiffs are able to vindicate federal statutory rights, evinced in the Court's words themselves, is to codify the judicially created doctrine of vindication of federal statutory rights.<sup>195</sup> Federal statutes are preferable, avoiding preemption issues, but state statutory attempts to evince support for change can help in their own right.

### 1. Federal Attempts

Plaintiffs have attempted to use the contrary congressional command framework, but unsurprisingly the Supreme Court has interpreted this doctrine narrowly.<sup>196</sup> The Court insists on explicit congressional authorization, discouraging reading too deeply into congressional intent.<sup>197</sup> However, more explicitly worded statutes,

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<sup>191</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (arguing that between two federal laws, one statute should not automatically give way to another); see Fitzpatrick, *supra* note 68, at 170-71. See generally Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711 (2015) (describing how the FAA jurisprudence has surpassed field preemption to a broader type of "impact" preemption).

<sup>192</sup> *Shearson/Am. Express*, 482 U.S. at 226; Fitzpatrick, *supra* note 68, at 173.

<sup>193</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

<sup>194</sup> *Gilmer*, 500 U.S. at 26; *Dean Witter Reynolds*, 470 U.S. at 221.

<sup>195</sup> See Ward, *supra* note 30, at 178-79.

<sup>196</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309; *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991) ("We find nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."); see *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) ("right to sue" authorization in the Credit Repair Organizations Act represented right to dispute claim generally, not a right to litigate).

<sup>197</sup> *Gilmer*, 895 F.2d at 197 (indicating courts should be reluctant to find an

such as the Magnuson-Moss Act, have succeeded in allowing consumers to pursue litigation, and disqualifying arbitration agreements that provide otherwise.<sup>198</sup>

Recently, Congress has awakened to the dilemma faced by employees and consumers in pre-dispute resolution contracts. Democrats in Congress introduced the Arbitration Fairness Act (“AFA”) in 2009, 2011, 2013 and again in 2015, a comprehensive piece of legislation that attempts to revamp arbitration.<sup>199</sup> The AFA completely bans the use of mandatory pre-dispute arbitration clauses.<sup>200</sup> Although a complete ban on arbitration agreements in certain employment, consumer, civil rights and other oft-imbalanced contexts is attractive, it is impractical, overinclusive, and an ineffective approach to reigning in the FAA’s dominance.<sup>201</sup> Negotiating arbitration after a dispute arises takes more power out of the individual’s hands, as the party in power has the resources to evaluate

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intention to preclude enforcement of arbitration agreements where Congress has not expressed one); *Nicholson v. CPC Int’l, Inc.*, 877 F.2d 221, 227 (3d Cir. 1989) (taking statute’s suggestive language and legislative history of incompatibility with arbitration as not enough, but finding an inherent conflict), *abrogated by Gilmer*, 500 U.S. 20.

<sup>198</sup> See *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 618-19 (11th Cir. 2001) (interpreting the text and legislative history of the Magnuson-Moss Act as allowing a consumer cause of action); *see also id.* at 620 (finding inherent incapability with the purposes of the ADEA and arbitration).

<sup>199</sup> 159 CONG. REC. 2,448-03 (2013); *see* Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013), <https://www.govtrack.us/congress/bills/113/s878> (showing the repeated attempts to pass the AFA); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/hr2087/summary>; Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 459 (2011); Nancy A. Welsh, *What Is “(Im)partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 405 (2010) (describing the Arbitration Fairness Act as oft-introduced, oft-ignored); *see also* Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/1844> (sponsored by 82 Democrats, 0 Republicans).

<sup>200</sup> Welsh, *supra* note 199, at 405; *see* Ashlee Kieler, *Arbitration Fairness Act Would Reinstate Consumers’ Right to Sue in Court*, CONSUMERIST (April 30, 2015), <http://consumerist.com/2015/04/30/arbitration-fairness-act-would-reinstate-consumers-right-to-sue-in-court/> (urging that “the decision to go into arbitration not be made before the dispute has actually taken place”); *see also* Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT’L ARB. 455, 455 (2007).

<sup>201</sup> *See* Peter Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 268-69 (2008) (noting the AFA would declare unenforceable arbitration clauses in employment, consumer, franchise disputes, disputes in the securities industry, disputes arising under statutes intended to protect civil rights or transactions between parties of unequal bargaining power).

the claim's merit and bargain accordingly.<sup>202</sup> For weak claims, a company could simply refuse arbitration, leaving the consumer to wrestle with the contingency fees and procedural hurdles of the judicial system.<sup>203</sup> And functionally, the AFA would drastically shift a large number of disputes to litigation, which courts' caseloads may not be prepared to handle.<sup>204</sup>

Instead, Congress should aim to tweak the most problematic aspects of arbitration and modify overly broad interpretations of the FAA.<sup>205</sup> The FAA is still workable in many of its aspects; a massive overhaul of the statute is unnecessary.<sup>206</sup> Thus, the AFA's vagueness falls short of the specificity needed in revising the FAA.<sup>207</sup>

Another more precise, but cumbersome approach could be to take a comprehensive look at federal statutes such as the ADEA, Title VII and TILA and insert a contrary congressional command for those statutes that provide the most problematic structure for vindication of federal statutory rights.<sup>208</sup> Choosing federal statutes that have been most incompatible with arbitration can provide tangible results, and this nuanced approach may be more likely to gather bipartisan support.

## 2. State Attempts

Throughout FAA expansion, state courts have also attempted to shape arbitration doctrines. *Perry v. Thomas* overruled one California

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<sup>202</sup> *Id.* at 278-79 (“[N]either the company nor the individual knows in advance the terms or nature of a dispute . . . . Yet each has an incentive to enter into arbitration . . . .”).

<sup>203</sup> *See id.*

<sup>204</sup> *See* Sussman, *supra* note 200, at 464-65.

<sup>205</sup> *See* Alicia J. Surdyk, Note, *On the Continued Vitality of Securities Arbitration: Why Reform Efforts Must Not Preclude Pre-dispute Arbitration Clauses*, 54 N.Y.L. SCH. L. REV. 1131, 1149 (2009–2010) (noting issues in the securities industry with the current arbitration system, but advocating against the effects of the FAA).

<sup>206</sup> *See id.* at 1154.

<sup>207</sup> Sussman, *supra* note 200, at 464.

<sup>208</sup> *See, e.g.,* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (refusing to deny mandatory class arbitration absent clear congressional command otherwise); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (refusing to preclude arbitration unless plaintiff can point to clear congressional command otherwise); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (holding that there must be evidence of a contrary congressional intent in another federal statute for court not to enforce arbitration agreement); *see also* Shelley McGill & Ann Marie Tracey, *The Next Chapter: Revisiting the Policy in Favor of Arbitration in the Context of Effective Vindication of Statutory Claims*, 31 ARIZ. J. INT'L & COMP. L. 547, 560 (2014) (discussing what evidence it would take to find a contrary congressional command).

statute that allowed parties to bring actions to collect wages in court regardless of arbitration agreements.<sup>209</sup> A Montana statute requiring arbitration clauses to be in underlined capital letters on the first page of a contract was also struck down due to its differential treatment of arbitration.<sup>210</sup> Although state statutes often use unconscionability rationales and are subject to preemption, this use of the legislative process can signal states' disagreement with arbitration's suppression of state and federal rights to Congress and the Supreme Court.<sup>211</sup>

*B. Is Vindication Prevented? Totality of the Circumstances Analysis*

In ascertaining the existence of probable cause necessary for the issuance of a search warrant, determining the validity of patents, and deciding whether a debtor satisfied the good faith requirement under 11 U.S.C. § 1325(a)(3)'s Chapter 13 bankruptcy plan, courts have turned to a totality of the circumstances analysis.<sup>212</sup> The malleable inquiry has been used in various contexts, allowing courts discretion in reviewing both practical and legal considerations. Along a similar line of reasoning, determining how cost-prohibitive arbitrating a claim would be is best discerned by looking at the contract as a whole.<sup>213</sup> In her dissent in *Italian Colors*, Justice Kagan reminded the court that their analysis in *Green Tree* considered the entirety of the provisions of the contract.<sup>214</sup> Thus, regardless of how persuasive the court's analysis of class action waivers could have been, it did not consider the effect of the arbitration agreement on the plaintiff as a whole, as a plaintiff would.<sup>215</sup>

The specifications of this adjustment to the vindication of federal statutory rights analysis are malleable; courts can emphasize costs

<sup>209</sup> CAL. LAB. CODE § 229 (2016); *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

<sup>210</sup> MONT. CODE ANN. § 27-5-114(4) (2016); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

<sup>211</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (2005), *abrogated by Concepcion*, 563 U.S. 333. (2011).

<sup>212</sup> Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 86-88 (2012) ("Courts have also used a totality of the circumstances test . . . in determining foreseeability in employer-liability cases, [and] in establishing vicarious liability under the Commodities Exchange Act . . ."); see *State v. Colon*, 864 A.2d 666, 701 (2004) (totality of the circumstances analysis).

<sup>213</sup> See *Italian Colors Rest.*, 133 S. Ct. at 2318-19 (Kagan, J., dissenting); *Trigg v. Little Six Corp.*, 457 S.W.3d 906, 916-17 (Tenn. Ct. App. 2014), *appeal denied* (Nov. 20, 2014); *Ward*, *supra* note 30, at 169.

<sup>214</sup> See *Italian Colors Rest.*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

<sup>215</sup> See *Ward*, *supra* note 30, at 177.

unique to arbitration or put more weight on a plaintiff's specific financial circumstances, amongst other approaches. But as a bottom line, explicit consideration must be given to every provision of an arbitration contract. For example, a sample arbitration clause by Sprint provides for a mandatory class action waiver, fee-splitting provision (on counsel, experts and witnesses), and covers the costs of filing, case management and arbitrator's fees, while leaving some other specifications to be additionally decided by Judicial Arbitration and Mediation Services ("JAMS") rules.<sup>216</sup> Although there is a class action waiver, Sprint's additional provisions weigh against prohibitive costs.<sup>217</sup> The effects of JAMS, AAA and other private arbitration provider's rules must also be factored into this inquiry.<sup>218</sup> Considering each of these components when analyzing vindication of federal statutory rights challenges will provide for a more complete understanding of the financial demands of the arbitration agreement.

#### CONCLUSION

In general, rights are only as viable as the remedies available to enforce them. With skyrocketing litigation costs, the price of pursuing a right may generally not be worth vindicating one's claim.<sup>219</sup> However, this predicament can become even worse when constrained to the confines of the arbitral forum.<sup>220</sup> With the modern state of contracts of adhesion, most people are likely subject to arbitration clauses, whether in consumer, employment, civil rights, or elsewhere.<sup>221</sup> If courts are going to interpret the FAA as regulating

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<sup>216</sup> *Terms & Conditions*, SPRINT, [https://shop2.sprint.com/en/legal/os\\_general\\_terms\\_conditions\\_popup.shtml](https://shop2.sprint.com/en/legal/os_general_terms_conditions_popup.shtml) (last visited Jan. 10, 2016).

<sup>217</sup> *See id.*

<sup>218</sup> *See* AM. ARB. ASS'N, <https://www.adr.org/> (last visited Oct. 4, 2016); ARB. RESOL. SERVS. INC., <https://www.arbresolutions.com/> (last visited Oct. 4, 2016); JAMS, <http://www.jamsadr.com/> (last visited Oct. 4, 2016).

<sup>219</sup> *See, e.g.*, Jeffrey Weiner, *The High Cost of Litigation*, MARCUM LLP (Oct. 10, 2014), <http://www.marcumllp.com/mp-blog/the-high-cost-of-litigation>.

<sup>220</sup> *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) ("[E]stimat[ing] that the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed \$1 million,' while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled.").

<sup>221</sup> Bardack & Nessler, *supra* note 1 (explaining that mandatory pre-dispute arbitration clauses in adhesion agreements include all standardized contract forms used in consumer, health care and employment contexts); Mencimer, *supra* note 1 (signing an agreement meant submitting to an arbitrator hired by the employer for any employment-related disputes under the threat of being fired otherwise); *see* Silver-

arbitration's equality to litigation, then substantial equality must exist not only in theory, but also in practice. Contracts are a part of modern life, and it is unlikely that consumers will ever have significant bargaining power to transform them significantly. Thus, the responsibility falls on the courts and judiciary to bridge the gap.

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Greenberg & Corkery, *supra* note 1 (demonstrating a consumer's lawsuit against an auto-lender being thrown out because of a mandatory arbitration clause in their contract).