PROTECTING THE RIGHT OF CITIZENS TO AGGREGATE SMALL CLAIMS AGAINST BUSINESSES

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Two years ago I ranted against the Supreme Court's subversion of the Rules Enabling Act and its opposition to the benign aims of the twentieth-century progressive law reformers expressed summarily in Rule 1 of our Federal Rules of Civil Procedure.[1] I observed then that the majority of the Justices of the Supreme Court appeared to have joined the Chamber of Commerce, aligning themselves also with Vice President Dan Quayle's 1989 Council on Competitiveness[2] that denounced effective civil procedure as an enemy of economic development.[3] I was then commenting adversely on what the Court had done to transform Rule 8.[4] I renewed my

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1. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010). That paper was presented to a Committee meeting in Durham, North Carolina on May 11, 2010. It reflected prior thinking about the Supreme Court more fully expressed in Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009). And it was a salute to the late Richard Arnold—in my view, the wisest judge to sit on a federal bench in my time. *See also* DAVID R. DOW, AMERICA'S PROPHETS: HOW JUDICIAL ACTIVISM MAKES AMERICA GREAT (2009); DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2008); ROBERT F. NAGEL, UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER (2008); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008); Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161 (2011). Rule 1 of the Federal Rules of Civil Procedure states, "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *See* FED. R. CIV. P. 1.

2. Vice President Quayle was assigned the task of leading this federally funded council in 1989, and it mounted a political assault on the Federal Rules. *See* Nancy Watzman & Christine Triano, *Defund Quayle's Autocratic Competiveness Council*, L.A. TIMES, June 24, 1992, http://articles.latimes.com/1992-06-24/local/me-697_1_competitiveness-council. The Council survived defunding in 1993. For its current status, see *Council on Competitiveness*, COMPETE.ORG, http://www.compete.org (last visited Sept. 12, 2012).

3. *See* David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1. For his account of his presentation, see DAN QUAYLE, STANDING FIRM 282–90 (1994).

4. For the Court's transformation of Rule 8 pleading requirements, see Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). For another take on the impact of these cases, see Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535.

accusation last year[5] in South Carolina while commenting on the Court's ruling protecting a manufacturer from the local enforcement of New Jersey tort law by shortening the reach of that state's courts' jurisdiction over the claim of a local plaintiff who sought compensation for an injury caused by the defendant's negligent construction of a tool shipped to New Jersey with the help of its insolvent marketing distributor.[6] Now, for the third time in two years, I find myself protesting the Court's identification with the Quayle Commission and the Chamber of Commerce in its 2011 subversion of Rule 23(b)(3), which provides for the aggregation of small claims.[7]

Rule 1, which the Justices might usefully read again, simply expresses the progressive aim of our Rules of Civil Procedure to assure the enforcement of the private rights not only of major business firms but also those of small merchants, franchisees, consumers, employees, debtors, patients, passengers, and others who advance claims in federal district courts under state and federal law. As I emphasized on that 2010 occasion, our Rules as crafted in 1938 should be seen as an expression of twentieth-century progressive politics first brought to bear on the law of civil procedure by Roscoe Pound's celebrated address to the American Bar Association (ABA) meeting in St. Paul in 1906.[8] It took a while to work out the details, but our 1938 Civil Rules were designed to enable private citizens represented by private counsel to enforce their rights without dependence on public officials regulating the firms who sell them goods or services, lend them money, or employ them. Rules 26–37, providing for private investigation of the facts (i.e., discovery), were the crucial feature of this scheme of private law enforcement. And

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5. Paul D. Carrington, *Business Interests and the Long Arm in 2011,* 63 S.C. L. REV. 637 (2012); *see also* Erwin Chemerinsky, *Closing the Courthouse Doors: October Term 2010,* 14 GREEN BAG 2D 375, 389 (2011) ("One way of interpreting these decisions, and others like them, is that the conservative Justices are simply pro-business and pro-prosecutor and are denying access to the courts to consumers, employees, and criminal defendants. This certainly explains the rulings.") (footnote omitted); Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012); Alan B. Morrison, *The Impacts of* McIntyre *on Minimum Contacts*, 80 GEO. WASH. L. REV. ARGUENDO 1 (2011), *available at* http://groups.law.gwu.edu/LR/ArticlePDF/Morrison_SME_Arguendo.pdf.

6. For the Court's full opinion, see J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

7. For examples of the Court's "subversion" of Rule 23(b)(3), see Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam) (vacating a West Virginia decision holding an arbitration clause signed by a relative of a nursing home patient to be unconscionable); *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011).

8. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 29 A.B.A. REP. 395 (1906), *reprinted in* 35 F.R.D. 241, 273–91 (1964); *see also* Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)*, 82 IND. L.J. 1193 (2007).

in short order these rules were, with some modifications, adopted as the model for civil procedure in state courts.[9]

Business interests, it is fair to say, have seldom expressed enthusiasm for investigative discovery of their business practices by mere citizen plaintiffs. And their legitimate concerns have been elevated by enhancements of technology that have increased the cost of disclosures.[10] And so in 1986, our Justices, responsive to the concerns of the Chamber of Commerce, made some extravagant interpretations of Rule 56, the summary-judgment rule; those interpretations narrowed the window of discovery opened by Rules 26–37.[11] These confining reinterpretations of Rule 56 apparently did not have all the effect seemingly intended, for the frequency of summary judgment appears not to have materially increased.[12] So, it seems, in 2009 the Court turned to Rule 8 to encourage the use of judgments on the pleadings to close windows of discovery.[13]

Notwithstanding many protests about what the Court has done to rewrite Rules 56 and 8 to protect business interests from the revelation of evidence making them accountable in civil actions,[14] the Court has since that 2010 meeting moved on to diminish the availability of the small-claims class action established in Rule 23(b)(3) as a deterrence of unlawful business practices.[15] This is a third subversion of the purpose of the Civil Rules as stated in Rule 1. And it

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9. *See* FED. R. CIV. P. 26–37; *see generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (giving the historical context of the 1938 Civil Rules concerning discovery).

10. *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561 (2001).

11. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). On the relation to preexisting trends, see Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

12. *See* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007).

13. *See* sources cited *supra* note 4.

14. *See* Steven Alan Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53 (1988); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988).

15. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 n.7 (2011); *see also* Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012); Quilloin v. Tenet Health Sys. Phila., Inc., 673 F.3d 221 (3d Cir. 2012).

seems likely to have more consequence than the subversions of Rules 56 and 8.

I note that Rule 23(b)(3) was drafted and approved by a unanimous Advisory Committee appointed by the Chief Justice that included several lawyers from large firms representing large business clients. It was recommended by the Judicial Conference, unanimously promulgated by the Court, and accepted by Congress without objection in 1966.[16] Its stated aim was to facilitate the enforcement of rights offended on too small a scale to make a resort to law enforcement by private, contingent-fee lawyers economical. And that rule, allowing aggregation of small claims, was admired and soon replicated in many state courts and even in foreign countries seeking to protect citizens from various forms of commercial greed such as securities fraud.[17]

The idea of Rule 23(b)(3) was first envisioned in 1941 by scholar Harry Kalven, who observed that many business decisions are made in the secure knowledge that multiple harms resulting to many distant others may be too small in their financial consequences to make civil actions enforcing the law economically justified.[18] So a big firm that can, for example, cheat many thousands of prospective plaintiffs out of thirty or so dollars each need not worry that the law of fraud might be effectively enforced to seriously diminish their profits.

Kalven's insight might be viewed in the light of the eighteenth-century observation of Adam Smith, the saint of marketplace economics, who observed that humans, such as big business executives, may care a little, but not much, about harms experienced by distant others with whom they have no personal contact.[19]

Rule 23(b)(3) was thus written in the spirit of Rule 1 to enable private citizens to enforce law by aggregating small claims to make

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16. This occurred in the conference room of Covington & Burling LLP in Washington, D.C., where the Advisory Committee was sitting as guests of Committee member Dean Acheson. At the time, the class-action enlargement was not presented as a major political reform. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 386–87 (1967) (describing the formulation of revised Federal Rule 23).

17. For a current example, see Noam Noked, *A New Playbook for Global Securities Litigation and Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 2, 2012, 9:53 AM), http://blogs.law.harvard.edu/corpgov/2012/02/02/a-new-playbook-for-global-securities-litigation-and-regulation/.

18. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

19. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 136 (Oxford 1976) (1759) (recounting the relative indifference of his Glasgow neighbors to distant tragedies); *see also* DÖGAN GÖCMEN, THE ADAM SMITH PROBLEM: HUMAN NATURE AND SOCIETY IN THE THEORY OF MORAL SENTIMENTS AND THE WEALTH OF NATIONS 36 (2007).

the total sum in dispute worth the bother and expense of a lawsuit. Such individual plaintiffs and their counsel serve the public good by providing protection of fellow citizens from otherwise inevitable business practices that distribute minor harms to thousands.

Indeed, it may be in a sense the professional duty of a corporate executive to her shareholders to cheat a few million distant others out of sums so small that they cannot be worth the cost for the victims to seek compensation. Of course, it is the professional duty of business lawyers, if permitted, to write contracts for their clients that will protect them from the threat of enforcement of the law by private plaintiffs. They have the opportunity to write many standard-form contracts that are not negotiated but imposed on parties with whom their clients deal. And so we have mandatory arbitration clauses written into standard form contracts that a mere consumer, debtor, patient, employee, franchisee, or the like will not read or understand and that will serve to preclude their access to courts. We were told by the Supreme Court in 2011 that the mandatory arbitration clause may be used to prevent the aggregation in court of small claims pursuant to Rule 23(b)(3).[20] Never mind the applicable state law of contracts that treats such a use of printed arbitration clauses as unconscionable and thus void.[21]

Candor requires that I confess that my interest in mandatory arbitration clauses reflects professional engagements that confirm my views on the subject. Not only have I joined in repeated academic protests against the misuse of arbitration clauses in standard-form contracts to deter claims,[22] but I have twice served as a paid lobbyist to direct the attention of Congress to such misuses. In 2000, I represented the National Automobile Dealers Association to object to arbitration clauses written into franchise agreements to deprive dealers seeking to enforce the Automobile Dealers' Day in Court Act[23] of their access to discovery or a local jury. Republican Senator Orrin Hatch bought our argument and secured an amendment to the Day in Court Act to assure the access of dealers to federal courts.[24] And in 2007, I represented an organization of small farmers who objected to mandatory arbitration of their disputes with the food producers who buy all their production pursuant to printed

20. *AT&T Mobility LLC*, 131 S. Ct. 1740 (2011).

21. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

22. *E.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996).

23. Automobile Dealers' Day in Court Act (ADDCA) of 1956, 15 U.S.C. §§ 1221–1225 (2006).

24. Motor Vehicle Franchise Contract Arbitration Fairness Act, S. 1140, 107th Cong. (2001).

contracts. This time, it was Republican Senator Chuck Grassley who secured an amendment liberating farmers from arbitration on the terms dictated by the producer unless the farmer freely and explicitly approved the terms separately from a signing of a standard-form contract.[25]

I have, of course, not been alone in protesting the abuse of the Federal Arbitration Act. Historians point to the documents of the time to demonstrate the modesty of the aim of Congress in enacting that law.[26] That aim was simply to protect arbitration clauses included in negotiated interstate business transactions from rulings by federal judges, who in 1925 seemed prone to invoke their judicial authority derived from the parties' diversity of citizenship to make a federal common law invalidating all arbitration agreements ousting the judges' own jurisdiction that were made prior to the emergence of the dispute to be arbitrated, even if the terms were enforceable in state courts. There was no strong "national policy favoring arbitration" until the Supreme Court took it upon itself to re-read the Act in the 1980s and declare that strong "national policy favoring arbitration."[27] Never mind the original intent of the 1925 Congress.

The Justices in 2011 have invoked their strong "national policy" to prevent the aggregation of small claims.[28] They have thus disabled effective private enforcement of many laws made to protect citizens other than farmers or auto dealers. The case decided by the Court was exactly the kind envisioned by the generation of lawyers and judges who made Rule 23(b)(3). The plaintiffs in *Concepcion* had bought a telephone service that the phone company said came with a free phone. But then the plaintiffs were unexpectedly billed $30.22 as a sales tax on that "free" phone. The same scam was included in many thousands of phone service transactions. The phone company knew that very few consumers would bother to contest a thirty-dollar tax bill, even though they were told that the phone would be free and might be annoyed to be billed for that sum. Enforcing the law of fraud in such circumstances is, for most

25. An amended version of Grassley's original bill, Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. (2007), was enacted as part of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11005, 122 Stat. 1356–58 (codified as amended at 7 U.S.C.A. § 197a (West 2012)).

26. *See, e.g.*, IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 92–113 (1992).

27. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

28. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011).

consumers, clearly not worth the bother, as Harry Kalven observed long ago.[29]

The Concepcions brought their action on behalf of the entire class of consumers who had been disappointed to receive a thirty-dollar tax bill. The telephone company pointed to the arbitration clause in their printed contract. Among the features of the unnoticed arbitration clause was an agreement not to aggregate the plaintiff's claims with those of other consumers similarly cheated. The plaintiffs replied that the clause was clearly unconscionable under the applicable California law[30] because it prevented effective enforcement of the state's law protecting consumers from small frauds. The Ninth Circuit agreed.[31]

Justice Scalia ruled for the majority that the 1925 Federal Arbitration Act barred California from enforcing its state contract law against the contractual preclusion of small claim aggregation as unconscionable and void.[32] Never mind the text of Rule 23(b)(3) providing for aggregation of such claims or the language of Rule 1 favoring enforcement of state law protecting the rights of citizens. Never mind the explicit provision of that 1925 Act denying the enforceability of an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract."[33] Also never mind if thousands of other purchasers of telephone service were each cheated out of thirty dollars. Let the phone company keep their money if the inattentive purchasers failed to strike the arbitration clause from their printed purchase agreements and now do not have the funds and energy needed to sue for the mere thirty dollars.

Justice Breyer's dissent was joined, as one should expect, by his three colleagues who have joined in resisting what I have described as the Quayle Commission or Chamber of Commerce reforms of federal civil procedure.[34] Breyer noted that the telephone company could have provided for the aggregation of claims in arbitration.[35]

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29. *See* Kalven & Rosenfield, *supra* note 18, at 684.

30. D.R. Horton, Inc. v. Cuda, 357 N.L.R.B. No. 184 (Jan. 3, 2012). For the California law, see CAL. CIV. CODE §§ 1668, 1670.5(a) (West 2012).

31. *AT&T Mobility LLC*, 131 S. Ct. at 1747; Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).

32. *Laster*, 584 F.3d at 855.

33. 9 U.S.C. § 2 (2006).

34. *See* David E. Bernstein & Josh Blackman, *Supreme Court Justice Stephen Breyer Shows Progressive Streak*, NEWARK STAR-LEDGER (July 12, 2011, 5:55 AM), http://blog.nj.com/njv_guest_blog/2011/07/supreme_court_justice_stephen.html.

35. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1756–62 (2011). The Court had recently held that arbitrators could not conduct a class arbitration in the absence of a provision in the arbitration clause empowering them to do so. *See* Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. 1758 (2010).

In making this point, his dissent drew on amicus briefs filed by arbitration firms eager to perform the mission of resolving disputes aggregated in the Rule 23 manner in order to assure effective law enforcement.[36] Justice Scalia dismissed this consideration on the ground that class arbitration would be more expensive than arbitration of each small claim advanced by an individual plaintiff, and so the telephone company should not be compelled to take that course.[37] What would make the class action truly more expensive is that all the purchasers' rights might be enforced instead of just one. Notwithstanding Justice Scalia's caution, lower federal courts have found implicit authority for arbitrators to conduct class arbitrations.[38]

The consequences of the Court's holding will be substantial despite such cautions. Good lawyers will write class action waiver provisions into countless consumer and employment contracts, and countless citizens will be cheated out of thirty dollars here and thirty dollars there. And no one will be able to do anything about it until we change the law made by the Court.

To be fair, as Suzanna Sherry has emphasized, the dispute resolution clause in the printed contract was, in some respects, unusually generous. It obligated AT&T to pay all costs for nonfrivolous claims and promised (1) that arbitration must take place in the county in which the customer is billed; (2) that for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; and (3) that either party may bring a claim in small claims court in lieu of arbitration. The agreement, moreover, denies AT&T any opportunity to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, it requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees. These provisions seem very generous and on their face are quite "conscionable."[39] But they do not disguise the fact that AT&T is seeking to escape from the risk that the small rights of all its customers might be enforced by a private plaintiff invoking Rule

36. *E.g.*, Brief for Am. Arbitration Ass'n as Amicus Curiae Supporting Neither Party, Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198).

37. *See AT&T Mobility LLC*, 131 S. Ct. at 1751 (2011).

38. *See, e.g.*, Sutter v. Oxford Health Plans LLC, 675 F.3d 215 (3d Cir. 2012); Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011). Both courts distinguished the *Stolt-Nielsen* case on the ground that the parties had stipulated that there was no authorization in the arbitration clause. *See Sutter*, 646 F.3d at 222–23; *Jock*, 646 F.3d at 123.

39. *See* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court,* 2011 SUP. CT. REV. 1 (2011).

23(b)(3) or similar state law.[40] And, of course, AT&T would never pay the promised $7,500 merely to avoid a thirty-dollar lawsuit. Claimants who file for thirty dollars will be compensated, but not those who do not.

I note that the NLRB[41] and the SEC[42] have each adopted rules forbidding the use of mandatory arbitration clauses in employment contracts or investment agreements in their jurisdictions. There is also a possibility that the Consumer Financial Protection Bureau created by the Dodd-Frank bill might bar the use of mandatory arbitration clauses aimed to prevent aggregation of small claims against bankers.[43] But it is easily imaginable that five Justices will hold that all such rules of administrative law also violate the 1925 Federal Arbitration Act. It seems that if Congress and the American people want to regulate business effectively to protect citizens from harms caused by the indifference to their welfare of the distant executives of business firms of size, they may need to confer more regulatory power and responsibility on the executive branch and its administrative agencies. But it may be that the Chamber will successfully contend that the 1925 Act as rewritten by the Court trumps the later enactments of laws empowering the administrative agencies to bar the misuse of arbitration clauses.

There is also the possibility of class actions in state courts. California's Private Attorney General Act of 2004[44] establishes a procedure closely resembling the Rule 23 class action. It has been held that a private attorney general cannot be required to comply with an arbitration clause imposed on fellow workers because he or she represents the public, and the public cannot be barred from law enforcement because of a waiver by a prospective victim of a breach

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40. Professor Sherry has emphasized that these provisions justify a Supreme Court reversal of the California court's decision on the ground that the clause is clearly "conscionable." *See id.* She is right that a holding based on that ground would have spared us the consequences of a holding that invites the universal use of arbitration clauses to delete Rule 23(b)(3). But all that this would accomplish would be the universalization of the use of elegant provisions to trump Rule 23(b)(3). It would not be likely to result in effective enforcement of small claims such as those advanced by the Concepcions. One may agree with Professor Sherry that the plaintiffs were "overreaching" in the contemporaneous case of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See Wal-Mart Stores, Inc.*, 131 S. Ct. 2541 *passim*.

41. *See* D.R. Horton, Inc. v. Cuda, 357 N.L.R.B. No. 184 (Jan. 3, 2012).

42. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1841 (2010).

43. *See* David Lazarus, *Consumer Bureau May Have Final Say on Arbitration Clauses*, L.A. TIMES, May 1, 2012, at B1.

44. CAL. LAB. CODE § 2699 (West 2011).

of a public law.[45] And perhaps Congress might be induced to reconsider its Class Action Fairness Act of 2005 that aimed to remove class actions from state courts to federal courts when the diversity jurisdiction might be invoked.[46] The aim of that law has been seriously impaired by the Court's holding in *Concepcion*.

In any case, if the purpose stated in Rule 1 is to be faithfully pursued by federal courts, the time has come to consider the need for a law reform proscribing the validity of mandatory contract provisions imposed on consumers, patients, franchisees, or others that are meant to prevent the aggregation of small claims as provided in Rule 23(b)(3). That is, for the moment, a task for consideration by the institutions established by the Rules Enabling Act and empowered to propose reforms to the Court and Congress. They must face the risk that the Court might then reject their proposal as a rule of substantive contract law and thus not one within their authority under the Rules Enabling Act. But it would seem that such a ruling by the Court rejecting an amendment by the Judicial Conference would serve to elevate the interest of Congress in addressing the issue posed by the Concepcions.

If the Conference fails to revive Rule 23 by the process established in the Rules Enabling Act, or if the five Justices who voted for *AT&T* were to reject the advice of the Judicial Conference and its Advisory Committees in regard to an amendment of the rule to shield the aggregation of small claims, it would then be time for deferential Congress to reconsider the Rules Enabling Act. Congress should then reassert its indispensable role as a politically accountable legislature to define the roles, powers, and responsibilities of our legal institutions in enforcing the rights of citizens and should, in this instance, diminish the role of the Court and its subordinate Judicial Conference by itself enacting a law to override the ruling in the *Concepcion* case.

Indeed, given the frequency with which the five Justices have displayed their hostility to the aims stated in Rule 1, Congress has an immediate duty to address the problem by modifying the structure of the Court. I have joined numerous others in urging Congress to modify the law governing the Court.[47] Congress has addressed the problem of overbearing Justices before. David Currie describes a time in which the rage of Federalists and Democrats resulted in a

45. *See* Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011).

46. 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2006); *see also* Georgene Vairo, *The Complete CAFA: Analysis and Development Under the Class Action Fairness Act of 2005*, *in* MOORE'S FEDERAL PRACTICE (2011).

47. *See* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Paul D. Carrington & Roger C. Cramton eds., 2006).

change in the number of Justices.[48] Again, during the Civil War the size of the Court was enlarged to prevent Justices favoring slavery from having their way.[49] Of course, there was 1937, when the President's "Court-packing" proposal resulted in the "switch that saved nine."[50] Such a modification of the Court is now very much in need.[51]

48. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, 198–200 (1997).

49. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 155–58 (1993).

50. *See* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, at 232 *passim* (1963).

51. SANFORD LEVINSON, CONSTITUTIONAL FAITH (2011).