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## COMMENT

### FAIRNESS IN NUMBERS: A COMMENT ON *AT&T V. CONCEPCION*, *WAL-MART V. DUKES*, AND *TURNER V. ROGERS*

*Judith Resnik*

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FAIRNESS IN NUMBERS:  
A COMMENT ON AT&T V. CONCEPCION,  
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*Judith Resnik\**

*Can eighteenth-century constitutional commitments that “courts shall be open” for private rights enforcement be coupled with twentieth-century aspirations that democratic orders provide “equal justice under law”? That question sits at the intersection of three cases, AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, decided in the 2010 Supreme Court Term. In each decision, Justices evaluated the fairness of particular procedures (class arbitrations, class actions, or civil contempt processes) when making choices about the meaning of governing legal regimes — the Federal Arbitration Act (FAA) and state unconscionability doctrine in AT&T; Rule 23 and Title VII in Wal-Mart; and the Due Process Clause and child support obligations in Turner.*

*AT&T and Wal-Mart presented related questions about how the form of dispute resolution (individual or aggregate) and the place of dispute resolution (public or private, state or federal) affect the level of public regulation of consumer and employment transactions predicated on boilerplate, rather than negotiated, terms. The issue in Turner was whether state-funded lawyers were required before a person could, at the behest of the child’s custodian, be incarcerated for contempt for failure to pay child support. The specific case involved two individuals, but their circumstances illustrated the challenges faced by millions of other lawyer-less litigants in state and federal courts.*

*Each case exemplifies the challenges that new rights, produced by twentieth-century social movements, pose for courts. When claimants such as consumers, employees, and household members presented themselves as entitled to equal treatment, jurists responded by interrogating their own procedural parameters. Relying on the Due Process Clause, courts developed distinct lines of analyses that — depending on the context — imposed criteria on decisionmaking procedures, mandated subsidies to address resource asymmetries between adversaries, shaped processes to reduce intra-litigant disparities, and facilitated access to courts. Requisite to those efforts was a practice that is intertwined with fairness — the*

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\* Arthur Liman Professor of Law, Yale Law School. All rights reserved, 2011. Intellectual friendship is a great gift. My thanks to Denny Curtis, Vicki Jackson, Reva Siegel, Sandy Baum, Emily Bazelon, Bill Eskridge, Abbe Gluck, Linda Greenhouse, John Langbein, Miguel Maduro, Daniel Markovits, Arthur Miller, Henry Monaghan, Robert Post, Margaret Jane Radin, Joanne Scott, Seth Waxman, John Witt, Stephen Yeazell, and my *Procedure* coauthors, Robert Cover and Owen Fiss; to Yale law librarian Camilla Tubbs for remarkable guidance; to participants in the Yale faculty workshop; and to generous and able current and former student-colleagues — Marissa Doran, Ester Murdukhayeva, Charles Tyler, and Jane Rosen, as well as Ruth Anne French-Hodson, Victoria Degtyareva, Jason Glick, Adam Grogg, Elliot Morrison, Roman Rodriguez, Allison Tait, Elizabeth Wilkins, and Daniel Winik. I have been a participant in some of the issues about which I write. I have testified on the use of federal courts (e.g., *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 67 (2010)) and on rulemaking (e.g., *Hearings on the Proposed Amendments to Federal Rule of Civil Procedure 23, Comm. on Rules of Practice and Procedure, Judicial Conference of the United States* (2002)), worked as a litigator (e.g., Transcript of Oral Argument, *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (No. 08-678)), and joined amici briefs (e.g., Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3934621).

public quality of adjudication that endows an audience with the authority to watch, critique, and respond through democratic channels to the legal norms announced. A “fair and public hearing” became a touchstone of what democratic orders required their courts to provide.

But, as this trio of cases demonstrates, whether seeking to implement those egalitarian aspirations or simply to function, courts have to grapple with economically disparate claimants and a vast volume of eligible rights holders. If eighteenth-century constitutional entitlements to open courts are to remain relevant to ordinary litigants, the question is not whether to aggregate, subsidize, and reconfigure process but how to do so “fairly,” in terms of what groups, which claims, by means of which procedures, and offering what remedies. But without public disclosures and oversight of dispute resolution — in and out of court, single file and aggregated — one has no way to know whether fairness is either a goal or a result.

## I. THE MISE-EN-SCÈNE: POSITIVE RIGHTS TO COURTS AND LAWYERS — INDIVIDUALLY AND IN THE AGGREGATE

### A. Challenging Courts

The reason to link *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers* is that all three rest on the role of lawyers in making courts accessible, on the challenges courts face when adverse litigants have asymmetrical resources and when large numbers of claimants seek their services, on the impact of public processes on rights enforcement, and on the function of courts in democratic orders. Each case involved individual plaintiffs claiming modest sums — consumers alleging an illegal telephone overcharge of \$30, employees arguing the loss of pay raises of \$2 per hour because of sex discrimination, and a parent seeking \$51 a week in child support. Given the stakes, lawyers would be unavailable absent two forms of market intervention — reallocating resources among litigants (such as through the class action rules on which *AT&T* and *Wal-Mart* turn) and state subsidies (at issue in *Turner*).

The three cases present related questions about how the form of dispute resolution (individual or aggregate) and the place of dispute resolution (public or private, state or federal) alter the level of public regulation of transactions that are rarely custom made.<sup>1</sup> In *AT&T* and *Wal-Mart*, the Court concluded that class actions put corporate defendants and absent co-plaintiffs in unfair positions. In *Turner*, the Court declined to require counsel as of right when the opponent also lacked counsel but held that civil contempt detention was unfair absent procedures to ensure that a court had information to assess whether a violation of a payment order was willful.

When read together, these cases provide a wide window into adjudication circa 2011. They make plain that the constitutional concept of courts as a basic public service provided by government is under siege. Pressures come from the demands imposed by the host of new

<sup>1</sup> See Todd D. Rakoff, *The Law and Sociology of Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 200, 206 (Omri Ben-Shahar ed., 2007) [hereinafter *BOILERPLATE*].

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claimants who, because of twentieth-century equality movements, gained recognition as rights holders; from institutional defendants arguing the overuse of courts and proffering alternatives; and from competition for scarce funds in government budgets.

This problem is not unique to the United States. Parallel challenges can be found in Europe, where Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms expressly endows “everyone” with a right to a “fair and public hearing.”<sup>2</sup> That aspiration is likewise made vulnerable by the volume of eligible claimants, limited funds, and transnational actors debating the utilities of public regulatory mechanisms.<sup>3</sup>

Like the terms of Article 6, the three 2011 Supreme Court decisions revolve around questions of fairness and of the relationship between fairness and public adjudicatory processes. Is it fair (in *AT&T*) to enforce a boilerplate provision in a cell phone contract waiving court access and class actions, fair to hold a class arbitration, or fair to insist on individual and private arbitrations? Is it fair (in *Wal-Mart*) to determine corporate liability for discrimination across thousands of employees through a class action, and is it fair to require individuals to participate in class actions? Is it fair (in *Turner*) to incarcerate a person for civil contempt without first providing a lawyer?

In each case, pivotal texts — the Federal Arbitration Act (FAA), Rule 23 of the Federal Rules of Civil Procedure, and the Due Process Clause — are embroidered by the Court’s precedents and its assessments of the quality and adequacy of certain processes. In each, the holdings (that the FAA preempts state contract law finding the class action waiver unconscionable; that the class action cannot proceed against Wal-Mart; that Turner has no right to counsel but a right to alternative procedures) reveal how procedure gives meaning to rights.

The two class action cases are encased in a thicket of precedents and distinctions about kinds of class actions, rendering the Court’s rulings inaccessible; they defy ready translations for popular consumption. Indeed, they do not make for easy reading by lawyers not fluent in a sequence of FAA decisions and in the distinctions among class actions as “mandatory” 23(b)(2) or “opt-out” 23(b)(3) classes. *Turner* is likewise opaque. Absent familiarity with its precedents, readers can easily miss the import of the majority’s due process ruling, just as they might underestimate the role played by judicial assessments of procedural fairness in *AT&T* and *Wal-Mart*.

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<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 6.1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>3</sup> See *infra* notes 504–506 and accompanying text.

Yet, despite the doctrinal distinctions, all three decisions raise larger questions of whether positive rights imposing obligations on government to provide certain services (in this instance courts) constitute enforceable entitlements, what forms of participation and kinds of procedures sustain the legitimacy of contracts and of court judgments, and what role judges play in shaping answers. Hence, analysis of the trio prompts inquiries into the normative underpinnings of the law of courts, the reasons to regulate their practices, the desirability of enabling or disabling their use, and the relationship of the use of courts to the democratic character of a political order.

Before turning to the three cases, I need to delineate the constitutional, institutional, and litigation contexts that render this trio important as a set. Hence, this introduction begins with a brief tour of the analytic structure of sixty years of due process law. These doctrines are the result of social and political movements that posed questions about the meaning of “equal justice under law” and that helped to produce the growth in state and federal courts as well as a market for private dispute resolution. I then discuss the participants in each case, who, as detailed below, were picture perfect in representing twentieth-century rights holders as they teed up twenty-first-century problems.

### *B. Open Courts and the Process Due*

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay.

— Nebraska Constitution of 1867<sup>4</sup>

Because the three rulings are shadowed by what, in 1950, Justice Jackson called the “cryptic and abstract” commands of the Due Process Clause,<sup>5</sup> unpacking their import requires understanding how, during the last century, law came to recognize four distinct ideas as problems of “due process” — procedural inadequacies in decisionmaking, asymmetrical resources of adversaries, disparities among co-litigants, and lack of access to courts. Each of the 2011 cases engages these issues and reveals the relevance of a fifth idea, public processes, that the case law has nested in an amalgam of rights to jury trial, the First Amendment, and common law traditions but that ought also to be more clearly identified as another facet of due process norms — the obligation to open adjudicatory processes to third parties, so as to illuminate and

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<sup>4</sup> Art. I, § 9. The Nebraska Constitution, enacted in 1866, went into effect in 1867 when the state was admitted to the United States. The provision was modified in 1996 to permit courts to enforce state-mandated arbitration. *See infra* pp. 130–31.

<sup>5</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see infra* pp. 137–39.

monitor the other facets of the process “due” and, in democratic orders, to legitimate the binding power of the judgments made.

A first genre of due process analysis probes the authority, the nature, and the kinds of procedures that make specific decisionmaking “fair.” *Turner* holds that to jail a person for civil contempt without a finding of ability to comply with the court order is fundamentally unfair.<sup>6</sup> *AT&T* evaluates class arbitrations and finds them too informal and unreviewable to be fair.<sup>7</sup> *Wal-Mart* relies on due process to conclude that absent plaintiffs must have opt-out rights<sup>8</sup> and further invokes due process to establish that Wal-Mart cannot be obliged to make payments for back wages without an opportunity to rebut each individual’s claim of discriminatory treatment.<sup>9</sup>

These assessments fall into a line of “fair hearing” cases in which the Court has concluded that, when individuals are at risk of losing certain forms of property and liberty (such as statutory entitlements to government benefits, jobs, or licenses<sup>10</sup>), process is due. Depending on the context, constitutionally fair decisionmaking entails various attributes, including in-person hearings,<sup>11</sup> specific allocations of burdens of proof,<sup>12</sup> reasons for the decisions rendered by impartial decisionmakers,<sup>13</sup> oversight of whether evidence supports a criminal verdict and of the quality of eyewitness identification,<sup>14</sup> and review of the award of punitive damages.<sup>15</sup>

A second due process inquiry, also at work in the 2011 decisions, shifts the focus from fair procedures to the problem of adversaries with asymmetrical resources. Due process (coupled, at times, with

<sup>6</sup> See *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

<sup>7</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–52 (2011) (interpreting the United States Arbitration Act (known as the Federal Arbitration Act), Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2006))).

<sup>8</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

<sup>9</sup> *Id.* at 2560. The Court does not cite *McCleskey v. Kemp*, 481 U.S. 279 (1987), but the analytic approach is similar. See *id.* at 294–97, 308–19 (rejecting statistical evidence of discrimination in the application of the death penalty).

<sup>10</sup> See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734–37, 751–55 (1964). Other analyses criticize the Court’s development of procedural due process as misguided policymaking. See generally Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

<sup>11</sup> *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (requiring an in-person hearing before termination of welfare benefits). But see *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (holding that in-person hearings were not necessary, given the procedures in place to decide whether to terminate disability benefits); *infra* pp. 157–58.

<sup>12</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

<sup>13</sup> See, e.g., *Goldberg*, 397 U.S. at 271; *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259–62 (2009).

<sup>14</sup> See, e.g., *Jackson v. Virginia*, 433 U.S. 307, 324 (1979); *Manson v. Braithwaite*, 432 U.S. 98 (1977); *New Hampshire v. Perry*, No. 2009-0590 (N.H. Nov. 18, 2010), *cert. granted*, 131 S. Ct. 2932 (2011).

<sup>15</sup> See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446 (1993).

other constitutional provisions) is sometimes the basis for a determination that certain power imbalances require government subsidies for one party, made vulnerable for reasons such as poverty or the stakes of a proceeding. Government versus an individual was the initial paradigm, and the classic example (central to *Turner*) is the 1963 decision of *Gideon v. Wainwright*,<sup>16</sup> which read the Sixth Amendment “right to counsel” to require states to provide lawyers for indigent criminal defendants facing prosecutors seeking felony convictions.<sup>17</sup> Due process has also been the basis of constitutional obligations to give indigent criminal defendants resources such as experts and translators necessary to mount a defense.<sup>18</sup> Moreover, due process commands that the government give exculpatory, material information to all criminal defendants — whether rich or poor.<sup>19</sup>

Asymmetrical power and high stakes have also been the predicate for civil litigants in certain family conflicts to be accorded due process-based equipage rights. Had Michael Turner argued he was not the child’s father, the state would have paid for a paternity test because, as Chief Justice Burger explained for a unanimous Court in 1981, the “requirement of “fundamental fairness” expressed by the Due Process Clause” would not otherwise be “satisfied.”<sup>20</sup> That year the Court also concluded that, although a parent facing the loss of that status had no per se right to counsel, the presumption against appointment of lawyers beyond what the Sixth Amendment requires could be overcome if a sufficient showing was made.<sup>21</sup> Rights to state-paid transcripts, if required to appeal child custody terminations, followed in 1996.<sup>22</sup>

The 1966 class action rule (at issue in *AT&T* and *Wal-Mart*) provides another form of intervention to respond to power asymmetries in civil litigation. Aiming to be due process compliant, rulemakers fashioned group proceedings to give members of racial minorities the ability to seek enforcement of injunctions mandating school desegregation and to give consumers claiming statutory rights the capacity to attract lawyers through the potential for large monetary recoveries. The utili-

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<sup>16</sup> 372 U.S. 335 (1963).

<sup>17</sup> *Id.* at 342–44.

<sup>18</sup> See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). *But see* *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2319–20 (2009) (holding that due process did not oblige Alaska to provide a DNA test to a convicted defendant alleging innocence).

<sup>19</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“Society wins not only when the guilty are convicted but when criminal trials are fair.”). Enforcement is, however, limited. See *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

<sup>20</sup> *Little v. Streater*, 452 U.S. 1, 16 (1981) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24 (1981)) (describing the “constitutional duty” a man had to support a child he fathered).

<sup>21</sup> *Lassiter*, 452 U.S. at 32.

<sup>22</sup> See *M.L.B. v. S.L.J.*, 519 U.S. 102, 129 (1996).

ties for would-be defendants included the potential to close out liability claims through one proceeding.

A third due process question, intra-litigant disparities, arises when similarly situated litigants on the same side of a dispute are in court. Differential resources and capacities can result in “like” cases not being treated “alike.” Constitutional adjudication on intra-litigant equity initially focused on criminal defendants.<sup>23</sup> For example, in 1956, the Court concluded that unfairness resulted if some defendants could afford to pay for transcripts for appeals and for lawyers while others could not.<sup>24</sup> Sentencing guidelines exemplify another effort to make decisions fair across a set of individuals proceeding single file; the implementation reflects the complexity of determining when persons are enough alike to be treated the same. Congress and the courts have struggled with mandates that judges punish similarly those persons whose crimes and backgrounds are comparable and justify the differentiations (“departures”) made.<sup>25</sup>

Not all “like” litigants are, however, in court involuntarily. Persons who are part of a cohort outside court sometimes seek judgments that could affect others who have not filed lawsuits. Aggregation becomes a method to avoid disparate outcomes. Once again, the challenges are to determine what shared experiences suffice to generate a group that courts ought to treat as a set, what commonalities of interests (central to *Wal-Mart*) permit representatives to go forth on behalf of absent others, what kinds of affiliations and forms of consent (affirmative, implicit, or inferred) legitimate binding all through final judgments.<sup>26</sup> And, when judges authorize aggregates, a new version of the question of asymmetrical resources of opponents arises, for (as argued in both *AT&T* and *Wal-Mart*) a class action could give one party undue leverage over an opponent.

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<sup>23</sup> Midcentury, the Court’s consciousness of race discrimination in the criminal justice system and its resolve to distinguish detention practices in democratic America from those of “totalitarian” regimes shaped the development of this due process doctrinal line. See Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 634–35 (2010).

<sup>24</sup> See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”). In 1963, the Court held that, although the Constitution did not require appeal as a matter of fair process, states had to subsidize appellate lawyers for indigent criminal defendants if appeals were generally available. *Douglas v. California*, 372 U.S. 353, 357 (1963) (announced the same day as *Gideon*).

<sup>25</sup> See 18 U.S.C. § 3553 (2006); U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1–5K3.1 (2010); *United States v. Booker*, 543 U.S. 220 (2005). See generally Nancy Gertner, Rita Needs Gall — *How to Make the Guidelines Advisory*, 85 DEN. U. L. REV. 63 (2007).

<sup>26</sup> For analyses of the distinct ideas entailed in representation, see STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) [hereinafter YEAZELL, MEDIEVAL GROUP LITIGATION], and Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 588 (2011).



What about individuals hoping to get into court, rather than those commanded to appear? The idea that fairness entails access rights for those standing at the door shaped a fourth line of cases that began when a class of “welfare recipients residing in Connecticut” argued that state-imposed fees of sixty dollars for filing and service precluded them from filing for divorce.<sup>27</sup> In 1971, in *Boddie v. Connecticut*, Justice Harlan wrote for the Court that the combination of “the basic position of the marriage relationship in this society’s hierarchy of values and the . . . state monopolization” of lawful dissolution resulted in a due process obligation by the state to provide access.<sup>28</sup>

Given the debate on the current Court about the legitimacy of judicial appraisals of fairness, the concurring opinions filed in *Boddie* illuminate why access questions have become centered on the Due Process Clause and on the evaluative judgments produced. Forecasting Justice Scalia’s objections to due process analyses, Justice Douglas argued that due process was too “subjective.”<sup>29</sup> Unlike Justice Scalia, however, Justice Douglas read the Equal Protection Clause’s prohibition of “invidious discrimination based on . . . poverty” to require subsidizing access.<sup>30</sup> (Two years later, the Court rejected poverty as a suspect classification for purposes of equal protection.<sup>31</sup>) Justice Brennan agreed that *Boddie* presented a “classic problem of equal protection”<sup>32</sup> on top of due process; the state’s legal monopoly required access for all attempting to “vindicate any . . . right arising under federal or state law.”<sup>33</sup> The breadth of that proposition, coupled with limited resources, resulted in a constitutional retreat from the logic Justice Brennan argued. Rather than mandate equipage for all poor civil litigants, the Court identified a narrow band (largely in family conflicts), garnering constitutional entitlements to government subsidies to use courts.<sup>34</sup>

<sup>27</sup> *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971).

<sup>28</sup> *Id.* at 374.

<sup>29</sup> *Id.* at 385 (Douglas, J., concurring).

<sup>30</sup> *Id.* at 386; *see id.* at 384 (raising the specter of *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>31</sup> *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

<sup>32</sup> *Boddie*, 401 U.S. at 388 (Brennan, J., concurring in part).

<sup>33</sup> *Id.* at 387. The sole dissenter, Justice Black, thought the Court had invaded state prerogatives. *Id.* at 393–94 (Black, J., dissenting). Justice Thomas also objected on those grounds in his *Turner* dissent. *Turner*, 131 S. Ct. at 2524–25 (Thomas, J., dissenting).

<sup>34</sup> *See United States v. Kras*, 409 U.S. 434, 446–50 (1973) (rejecting subsidies for bankruptcy filings). *See generally* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Right — Part I*, 1973 DUKE L.J. 1153 [hereinafter Michelman, *Part I*]; *Part II*, 1974 DUKE L.J. 527 [hereinafter Michelman, *Part II*]. Michelman argued that all exclusionary filing fees were unconstitutional burdens on what he termed “effective” access rights to courts. Michelman, *Part I, supra*, at 1162–68. His parallels between effective access to courts and to voting, *see Michelman, Part II, supra*, at 540–41, were echoed in the 2010 Term, as the same 5–4 disagreement in *AT&T* was replayed in *Arizona Free Enterprise Club’s Freedom Club PAC v. Ben-*

Less clearly articulated in the doctrine to date is the idea that the public, as an audience empowered to watch and critique in open courts, produces another form of fairness that the Due Process Clause should shelter. Fairness requires not only procedurally adequate hearings as well as efforts addressing inter- and intra-litigant asymmetries and easing access to courts but also participation from those outside a litigation triangle, invited to partake in interactive exchanges that produce, confirm, or reject legal rules. That publicity enables assessments of whether procedures and decisionmakers are fair and permits an understanding of the impact of resources (symmetrical or not), of the treatment of similarly situated litigants, and of why one would want to get into (or avoid) court. The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law's content and application.

Publicity could well be understood as an aspect of the quality of decisionmaking and, hence, subsumed within the first fairness inquiry, addressing the procedures for making binding judgments. But because publicity entails imbuing a third party — the public — with a specific role, and because fairness doctrine has not to date focused specially on the function of an “open” hearing, publicity stands in its own right. Without authorization for an audience to have a discrete and protected place — to serve as what Jeremy Bentham termed “auditors” (in his famous commitment to publicity as a disciplinary mechanism for government as well as for prisoners)<sup>35</sup> — one has no way to assess the practices or understand how nuanced law application can be. Indeed, it is the performance of fairness before the public that legitimates adjudication. (The phrase in the European Convention on Human Rights is, after all, a “fair and public hearing.”<sup>36</sup>) Moreover, third-party participation facilitates democratic lawmaking, in which court judgments serve as both an object of attention and a basis on which to argue for changing legal norms. Courts in democratic social orders are thus one of several venues in which the content of law is debated, and other branches of government may, in turn, respond.<sup>37</sup>

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*netl*, 131 S. Ct. 2806 (2011), in which the Court held that states lacked “a compelling state interest in ‘leveling the playing field’” and held that a public election financing law violated free speech rights, *id.* at 2825–26.

<sup>35</sup> JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence* (1827) [hereinafter BENTHAM, *Rationale of Evidence*], in 6 THE WORKS OF JEREMY BENTHAM 356 (John Bowring ed., Edinburgh, Tait 1843).

<sup>36</sup> ECHR, *supra* note 2, art. 6.1.

<sup>37</sup> For further discussion of the shift from rituals of performance to rights of access, see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 288–305 (2011).

Underlying these various formulations of fairness are different kinds of theories, themselves doing work in more than one arena. Some of the inquiry into the quality of procedure, for example, is justified through utilitarian concerns for accuracy, as well as by interests in guarding against non-arbitrary treatment by the government. Given that the linguistic lineage of due process traces back to traditions around the Magna Carta,<sup>38</sup> non-arbitrary treatment has a historical pedigree independent of democracy. But democratic values have come to provide new understandings of the purposes of non-arbitrary treatment, sounding today in terms of dignity, equality, and in the sovereignty of the people. Similarly, the demand for subsidizing and equalizing opportunities to participate, like the insistence on publicity, comes in service of democratic values that recognize the contribution of and need for diverse voices and participants being heard in social orders.

Thus, while political orders of all stripes have courts, the development of egalitarian norms during the twentieth century transformed the obligations of courts in democracies. The meaning of constitutional guarantees that “every person . . . shall have remedy by due course of law” (to borrow from Nebraska’s 1867 Constitution) expanded, as it was reread to embrace persons of all kinds. While theorists of courts often worry about whether court judgments tread on majoritarian decisionmaking, the argument here is that courts are themselves democratic institutions. The entitlement that “all courts shall be open” produces a government-sponsored occasion to level differences of resources and to impose, albeit fleetingly, the dignity reflected in the status held by a juridical person, competent to sue or be sued, able to prompt an answer from and entitled to be treated on a par with one’s adversary — whether that be an individual, a corporation, or the government itself. The odd etiquette of the courtroom disciplines both disputants and the state, as all are required to respond respectfully to claims. The public enactment of process and judgment documents how government officials are to treat individuals in democratic orders and enables debate about compliance with those goals as well as about the content of the governing legal norms.

The variegated constitutional case law outlined above documents both the development of aspirations to produce fair and equal treatment of disputants and the difficulty of doing so.<sup>39</sup> For decades, find-

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<sup>38</sup> The history of the terminology of “due process” is provided by Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in 18 NOMOS: DUE PROCESS 3 (J. Roland Pennock & John W. Chapman eds., 1977) [hereinafter Miller, *Due Process*].

<sup>39</sup> See generally THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010); Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305 (2010); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Le-*

ing methods to materialize these forms of fairness has also occupied Congress, the states, and procedural rulemakers in the public and private sectors. The results are eclectic and uneven, including a few legislated subsidies for criminal and civil litigation,<sup>40</sup> statutes authorizing aggregation, rules promulgated to facilitate filings, and efforts to reroute disputes to various alternative fora. Examples (detailed below) range from the banking laws in New York State in 1937 and the Fair Labor Standards Act of 1938, both of which pioneered group-based resolution techniques, to the 1966 federal class action rule, multidistrict litigation, and the revamped reliance on bankruptcy in mass torts.<sup>41</sup> Legislatures also devolved adjudication to administrative agencies (such as the Equal Employment Opportunity Commission (EEOC), which played a role in *Wal-Mart*) and outsourced to private providers (as the mandate to arbitrate in *AT&T* exemplifies). Some of these innovations, such as administrative adjudication and class actions, are more visible and regulated than others, such as arbitration and other alternative dispute resolution (ADR) programs.

States have a special place in the dialogue about procedural entitlements. Despite the conventional claim that, unlike other constitutional orders, positive rights are not common in United States constitutionalism,<sup>42</sup> most states operate under mandates such as the nineteenth-century provision in the Nebraska Constitution. Guarantees of “a right of access to the courts to obtain a remedy for injury” can be found “expressly or implicitly” in forty state constitutions.<sup>43</sup> Thus, while readings of the United States Constitution have elaborated remedies available under certain circumstances,<sup>44</sup> many state constitutions offer express guarantees of rights to remedies in open courts. And some states have recognized private enforcement of such rights. For example, Nebraska’s substantive right to use courts was the basis

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*gal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129 (2010) [hereinafter Hadfield, *Higher Demand*].

<sup>40</sup> See, e.g., Criminal Justice Act, 18 U.S.C. § 3006A (2006); Legal Services Corporation Act, 42 U.S.C. § 2996 (2006).

<sup>41</sup> See *infra* pp. 137–38 (New York State banking laws), 139–40 (Fair Labor Standards Act), 141–42 (federal class action rule).

<sup>42</sup> But see ROBIN L. WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 2* (1994); see also VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

<sup>43</sup> See Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 *N.Y.U. L. REV.* 1309, 1310 & n.6 (2003); *infra* pp. 104–05.

<sup>44</sup> See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 *HARV. L. REV.* 1731, 1779–91 (1991); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 *COLUM. L. REV.* 309, 329–39, 367–73 (1993). Theories of due process entitlements to judicial review are augmented in some instances by specific clauses of the Constitution, such as those protecting against the takings of property and the suspension of the writ of habeas corpus.

in 1889 and in 1991 on which that state's Supreme Court refused to enforce arbitration provisions.<sup>45</sup> As the Nebraska Supreme Court explained its 1889 decision a few years later, in 1902, to enforce contracts to arbitrate would "open a leak in the dike of constitutional guaranties which might some day carry all away."<sup>46</sup>

But not all celebrate the trajectory that identifies these due process obligations, producing more rights and more claimants knocking at courthouse doors. The intersection of high demand curves for courts, the burdens of procedures, the costs of lawyers, and the regulatory successes achieved by some plaintiffs have prompted diverse critiques, styling the civil justice system as overburdened, overreaching, and overly adversarial. Critics also argue that courts can generate unwise policies and that the risk of being sued chills productive economic exchanges. Energetic enthusiasts, sometimes gaining funds from institutions identified with repeat-player defendants, have fueled movements to shape avenues outside courts for dispute resolution (becoming known as "DR") and to encourage judges to rethink their roles in focusing on access to courts.<sup>47</sup>

From rules mandating the use of court-annexed arbitration and requiring judges to encourage settlement to federal doctrine declining to imply private causes of action and reading governmental immunities broadly, evidence of a different vision for courts came to the fore during the latter part of the twentieth century. As the debates in *AT&T* and *Wal-Mart* detail, supporters of privatization argue in terms of utility and fairness, as do proponents of public adjudication. Yet the sides diverge on the vectors of liberty and autonomy (invoked in support of limiting courts by enforcing provisions mandating arbitration and of protecting individuals from group-based litigation so that they can pursue their own property interests in court), and on the import of equality (argued to support forms of aggregation).

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<sup>45</sup> *German-Am. Ins. Co. v. Etherton*, 41 N.W. 406, 406 (Neb. 1889); *State v. Neb. Ass'n of Pub. Emps.*, Local 61, 477 N.W.2d 577, 581-82 (Neb. 1991).

<sup>46</sup> *Phoenix Ins. Co. v. Zlotky*, 92 N.W. 736, 737 (Neb. 1902).

<sup>47</sup> Diverse views support the ADR movement. See generally Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000). Some see litigation as harmful to economic expansion. See generally, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988). Others believe litigation is insufficiently responsive to disputants' interests. See generally, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995). For a critique of anti-litigation analyses, see generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

### C. Equal, Public, and Stressed Justice

*AT&T*, *Wal-Mart*, and *Turner* sit at the juncture of these competing visions for courts. Before I turn to the interstices, the next frame to be introduced is the set of political and social forces that underlie the ability of the plaintiffs in the three cases — consumers, employees, and parents — to seek redress in court. The words “EQUAL JUSTICE UNDER LAW” were etched in 1935 above the Court’s grand staircase when the building opened, but the debate about their meaning came to the fore — as *Gideon* and *Boddie* exemplify — only in the decades thereafter.<sup>48</sup> The phrase, picked to fit the facade, proved prescient in referencing a concept broader than what the law of equal protection may entail. Invoked in dozens of opinions and by Justices ranging from Brennan to Scalia,<sup>49</sup> the phrase serves as a signpost for the hopes that democratic orders place in courts.

During the second half of the twentieth century, women and men of all colors gained authority to invoke protection as consumers, entitlements to nondiscrimination in employment, and obligations to support their children. The due process law sketched above emerged when this array of newly endowed rights holders, with limited economic resources, presented themselves publicly as also entitled to equal and dignified treatment in court.

Courts were specially attractive venues for these pursuits, not only because of the power to order change but also because of the qualities of adjudication itself. Judges are supposed to treat all with dignity and respect, and disputants are obliged to do the same toward their adversaries. These egalitarian exchanges of mutual recognition make adjudication itself a democratic practice, and, as discussed above, third-party rights of access put the performance of these obligations before the public eye.<sup>50</sup> As Bentham put it, “publicity” enables the “Public-Opinion Tribunal” to form independent judgments about the quality of government actions.<sup>51</sup> While presiding over a trial, the

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<sup>48</sup> The phrase came not from a judicial opinion or the Constitution but from the firm of Cass Gilbert, the building’s architect. In 1932, Chief Justice Charles Evans Hughes and the United States Supreme Court Building Commission approved the text. See Office of the Curator, *The West Pediment*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/westpediment.pdf> (last visited Oct. 2, 2011).

<sup>49</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 388 (1971) (Brennan, J., concurring in part) (“Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike.”); *Roper v. Simmons*, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting) (“What kind of Equal Justice under Law is it that . . . gives as the basis for sparing one person from execution arguments *explicitly rejected* in refusing to spare another?”).

<sup>50</sup> See generally Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1 (2011).

<sup>51</sup> See JEREMY BENTHAM, *Constitutional Code*, in 9 THE WORKS OF JEREMY BENTHAM, *supra* note 35, at 41.

judge is, to paraphrase Bentham, on trial.<sup>52</sup> The information forced into the public realm by court processes becomes part of iterative exchanges with other branches of government.

Both federal and state constitutions entrenched this norm of publicity in courts by turning rituals of public attendance into rights. The federal courts have repeatedly insisted that neither the Constitution nor the common law tolerates blanket closures of criminal or civil proceedings.<sup>53</sup> Further, in 2011, in *Borough of Duryea v. Guarnieri*,<sup>54</sup> the Court reiterated that litigation, which facilitates “informed public participation that is a cornerstone of democratic society,” is also protected under the First Amendment’s Petition Clause.<sup>55</sup> As the Nebraska Constitution illustrates, state constitutions often directly express a substantive entitlement to “open courts” linked with rights to obtaining remedies without undue delay.

Further, although the South Carolina Supreme Court in *Turner* adopted the minority position that civil contemnors had no right to counsel, several jurisdictions require counsel for indigent civil contemnors facing jail, and a few also provide lawyers for poor individuals in other civil proceedings.<sup>56</sup> Impetus for expanding rights to counsel comes from firsthand experience with legions of lawyer-less litigants. In 2009, California tallied 4.3 million people in civil litigation without the assistance of lawyers.<sup>57</sup> In 2010, New York counted 2.3 million civil litigants without lawyers — including almost all tenants in eviction cases, debtors in consumer credit cases, and ninety-five percent of parents in child support matters.<sup>58</sup>

These figures have sparked a national movement, dubbed “Civil *Gideon*,” championed by bench and bar leaders to facilitate court access through guaranteeing counsel rights for some impoverished liti-

<sup>52</sup> BENTHAM, *Rationale of Evidence*, *supra* note 35, at 355.

<sup>53</sup> See, e.g., *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010) (per curiam) (reversing a conviction because a “lone courtroom observer” was excluded from the voir dire).

<sup>54</sup> 131 S. Ct. 2488 (2011).

<sup>55</sup> *Id.* at 2500–01.

<sup>56</sup> See *Price v. Turner*, 691 S.E.2d 470, 472 n.2 (S.C. 2010) (noting that eleven states and five federal courts had held that counsel is required for civil contemnors facing incarceration); see also *In re K.L.J.*, 813 P.2d 276, 283–86 (Alaska 1991) (holding that due process protections required appointed counsel for indigent parents facing loss of status as legal parents); *In re D.L.*, 937 N.E.2d 1042, 1046–47 (Ohio Ct. App. 2010) (holding that due process required appointed counsel for juveniles in civil protection order proceedings).

<sup>57</sup> This figure was cited in support of the Sargent Shriver Civil Counsel Act, creating a pilot program for poor litigants to obtain counsel. See Assemb. B. No. 590, 2009–2010 Leg., Reg. Sess. (Cal. 2009).

<sup>58</sup> JONATHAN LIPPMAN, STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 4 (2011), available at <http://www.courts.state.ny.us/CTAPPS/news/SOJ-2011.pdf>; see also S. Res. 6368, Assemb. Res. 1621, 2010 Assemb., Reg. Sess. (N.Y. 2010) (applauding the Chief Judge’s efforts and requesting annual reports of findings, work, and recommendations of the Task Force to Expand Access to Civil Legal Services in New York).

gants.<sup>59</sup> Evocative of Justice Brennan's *Boddie* analysis, the American Bar Association argued in its *Turner* amicus brief that "counsel should be provided as a matter of right to low-income persons in adversarial proceedings where basic human needs are at stake, such as those involving sustenance, safety, health, or child custody determinations."<sup>60</sup>

The challenges of providing access are at the core of *AT&T*, *Wal-Mart*, and *Turner*. All three cases are about the problem of generating legitimate decisions enforced by law in a world in which courts have limited funds, lawyers are expensive, and substantive rights are contested. In response, all nine Justices assessed what fairness requires, in resources and in process, in or out of public courts. Couched in terms of the Constitution, the FAA, Title VII, and Rule 23, all three rulings are judge-made balances of procedural costs and benefits. All three also invoke the resources of the opponent as a justification for limiting procedural rights for claimants.

*AT&T* and *Wal-Mart* insisted on disaggregation, devolution, and privatization, while *Turner* rejected a bright-line right to counsel for civil contemnors sent to jail at the behest of opposing private litigants. Those results were predicated on Justices' own impressionistic senses of both the costs and the benefits of using particular procedures. Not much analyzed were constitutional stipulations of courts as constitutional entitlements available to everyone, including litigants of limited means, or the remarkable success courts have had in attracting a high level of demand for and in obtaining a significant amount of public and private investment in their services, or courts' role as contributors to democratic lawmaking. The consequence of these rulings is that the substance of procedural due process thins. To paraphrase Grant Gilmore on contract's being "swallowed up by tort,"<sup>61</sup> procedure is being swallowed up by contract.<sup>62</sup>

#### D. Cast to Type: Litigants, Lawyers, and Judges

Had the litigants appeared in a novel, reviewers would have protested that they were clichés. Yet their profiles fit the doctrinal developments that their names will come to represent. Petitioning the Su-

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<sup>59</sup> See, e.g., Jonathan Lippman, Chief Judge, N.Y. Court of Appeals, Law in the 21st Century: Enduring Traditions, Emerging Challenges, Law Day 2010, at 2–7 (May 3, 2010) (transcript available at <http://www.nycourts.gov/whatsnew/pdf/LawDay2010.pdf>).

<sup>60</sup> Brief of Amicus Curiae American Bar Ass'n in Support of Petitioner at 4, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 118266 [hereinafter ABA Amicus for Turner] (citing ABA BASIC PRINCIPLES OF A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2010)) (also noting that counsel rights should apply to "extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature," ABA Amicus for Turner, *supra*, at 3 n.8).

<sup>61</sup> GRANT GILMORE, THE DEATH OF CONTRACT 103 (1974).

<sup>62</sup> See generally Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).



preme Court in the three cases were two large corporations, AT&T and Wal-Mart (each iconic in its own right), and an indigent father who would be unknown were he not in a public court seeking the right to a lawyer because of a twelve-month jail sentence for civil contempt in South Carolina.

Few under the age of thirty might know either that AT&T once stood for American Telephone and Telegraph, in reference to Alexander Graham Bell's 1870s patents, or that "Ma Bell" "owned, maintained, and controlled the nation's basic phone network."<sup>63</sup> That monopoly was disassembled by court edict in the early 1980s.<sup>64</sup> In the decade thereafter, AT&T seemed prosperous even as technologies developed by others were rendering its basic product — long-distance telephone lines — obsolete. Acquired by more nimble companies, AT&T survived as a moniker because its initials better branded services than did the names of its purchasers.

Wal-Mart, in turn, is (as the Supreme Court described) "the Nation's largest private employer"<sup>65</sup> and a corporation at the vanguard of transnational global retail services. Its legendary founder, Sam Walton, and his enterprise are the subject of several books mining his invention of the megastore<sup>66</sup> and puzzling about whether his business structure has helped or harmed his target customers, lower-income Americans.<sup>67</sup>

Wal-Mart is a fitting heir to American Telephone, for both made fortunes on new technologies for communications. Just as Theodore Vail succeeded in 1915 in building "the nation's first transcontinental" telephone lines for Bell,<sup>68</sup> Sam Walton realized in the 1980s that bar codes could collect information about product purchases and transform the efficiencies of retail sales.<sup>69</sup> And while journalists once called

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<sup>63</sup> STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* 6, 18 (1986).

<sup>64</sup> *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 226–34 (D.D.C. 1982), *aff'd mem. sub nom.* *Maryland v. United States*, 460 U.S. 1001, 1001 (1983). Overviews of federal government antitrust claims, dating from 1912, against AT&T can be found in LESLIE CAULEY, *END OF THE LINE: THE RISE AND FALL OF AT&T* 28 (2005), and SONNY KLEINFELD, *THE BIGGEST COMPANY ON EARTH: A PROFILE OF AT&T* 8 (1981).

<sup>65</sup> *Wal-Mart*, 131 S. Ct. at 2547. See generally NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS* 8 (2009).

<sup>66</sup> See SANDRA S. VANCE & ROY V. SCOTT, *WAL-MART: A HISTORY OF SAM WALTON'S RETAIL PHENOMENON* 8 (1994).

<sup>67</sup> Compare Richard A. Epstein, *On Wal-Mart: Doing Good by Doing Nothing*, 39 *CONN. L. REV.* 1287, 1299 (2007), with Katharine B. Silbaugh, *Wal-Mart's Other Woman Problem: Sprawl and Work-Family Balance*, 39 *CONN. L. REV.* 1713, 1715 (2007).

<sup>68</sup> CAULEY, *supra* note 64, at 28–30.

<sup>69</sup> The system is known as Uniform Bar Product Codes. See VANCE & SCOTT, *supra* note 66, at 93. In the late 1980s, Wal-Mart had the "world's largest private, integrated satellite communication network," beaming data to 1500 stores, and by the twenty-first century, Wal-Mart was a transnational retail pioneer that became the "largest private sector employer in the world." See LICHTENSTEIN, *supra* note 65, at 5, 40–43.

AT&T “the biggest company on earth” and the “wealthiest,”<sup>70</sup> Wal-Mart now lays claim to those accolades.<sup>71</sup>

The third petitioner — Michael Turner — is an individual at the other end of the income spectrum. Court records tell us that between 2003 and 2005, Turner made episodic child support payments, sometimes in the face of or after brief jail time.<sup>72</sup> By January 2008, he owed \$5,728.76.<sup>73</sup> Called to family court in South Carolina and appearing without a lawyer, Turner described his struggles with drugs and his efforts to obtain federal disability benefits.<sup>74</sup>

All three of these petitioners encountered adversaries of limited economic means. The two corporate defendants had been challenged by individuals proceeding as members of class actions that had, in the lower courts, been certified. Pitted against AT&T were Vincent and Liza Concepcion, consumers about whom public records reveal relatively little. Residents of San Francisco, these siblings had — like 54 million other customers — contracted for wireless services from Cingular, which was in 2006 “the largest provider of mobile wireless voice and data services in the United States”<sup>75</sup> and which subsequently bought and adopted the name AT&T Mobility. The Concepcions reported themselves surprised at charges of \$30.22 in sales tax for phones they thought came “free” with the two-year service contract.<sup>76</sup>

The Concepcions filed a federal class action “on behalf of all customers who entered into a transaction in California wherein they received a cell phone for free or a discount . . . but were charged sales tax” in excess of that “payable [as] calculated on the actual discounted price.”<sup>77</sup> They alleged that the providers had violated California’s

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<sup>70</sup> KLEINFELD, *supra* note 64, at 3, 4. In that era, AT&T’s assets outstripped the “gross national product of all but some twenty countries.” *Id.* at 4.

<sup>71</sup> See ROBERT SLATER, *THE WAL-MART DECADE: HOW A NEW GENERATION OF LEADERS TURNED SAM WALTON’S LEGACY INTO THE WORLD’S #1 COMPANY* 12 (2003).

<sup>72</sup> Turner was jailed for two- and three-day periods in 2004 and for four and a half months in 2005. Respondent[s]’ Brief in Opposition at 6–8, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2010 WL 5855419 [hereinafter Rogers Brief in Opposition].

<sup>73</sup> *Turner*, 131 S. Ct. at 2513.

<sup>74</sup> *Id.*

<sup>75</sup> See Complaint at para. 5, *Concepcion v. Cingular Wireless LLC*, No. 06 CV 0675 DMS (NLS) (S.D. Cal. March 27, 2006), 2006 WL 1194855 [hereinafter *Concepcion Complaint*]; First Amended Complaint at para. 5, *Concepcion v. Cingular Wireless LLC*, No. 06 CV 0675 DMS (NLS) (S.D. Cal. May 2, 2006), 2006 WL 1866797 [hereinafter *Concepcion First Amended Complaint*].

<sup>76</sup> The Concepcions paid \$149.99 for two cell phones, one “discounted by \$100 and the second ‘free’ . . . in connection with the purchase of a two-year cell phone service agreement.” *Concepcion First Amended Complaint*, *supra* note 75, at para. 4. They alleged that the \$30.22 charge was the equal of 7.75% sales tax on a \$399.98 phone, rather than the \$11.62 that would have been the sales tax on \$149.99. See *id.*

<sup>77</sup> *Id.* at para. 14.

1970s consumer protection laws<sup>78</sup> by deceptive and false advertising to lure marginal consumers into purchases.<sup>79</sup> The Concepcions' theories were that the provider should have either absorbed the costs of the sales tax or not advertised that the phones were free<sup>80</sup> and that the form waiver to class actions (in or out of court) that came with the phone was unenforceable because it enabled AT&T to extricate itself from California's consumer protection laws.

The next protagonist, Betty Dukes, is an African American woman from Tallulah, Louisiana, and the first-named plaintiff in the "largest Title VII class action in history" — filed against Wal-Mart.<sup>81</sup> Like the Concepcions' lawsuit, her claim stemmed from laws enacted in the second half of the twentieth century. In Title VII of the Civil Rights Act of 1964, Congress made discrimination on the basis of "race, color, religion, sex, or national origin" a violation of federal law.<sup>82</sup>

In 1994, Dukes took a part-time, five-dollar-an-hour job as a cashier at Wal-Mart in Pittsburg, California.<sup>83</sup> Dukes gained full-time employment and, by 1995, a "merit pay raise," followed by a promotion to Customer Service Manager in 1997.<sup>84</sup> After being demoted based on allegedly discriminatory grounds, Dukes went to California's Department of Fair Employment and Housing and, in 2001, to the EEOC, from which she received the statutorily required "right to sue" letter.<sup>85</sup> Then paid an hourly wage of \$8.44,<sup>86</sup> Dukes filed a federal lawsuit against the company.<sup>87</sup>

<sup>78</sup> The Concepcions relied on the Consumer Legal Remedies Act, enacted in 1970 and to be construed liberally. See CAL. CIV. CODE §§ 1750–1784 (2011).

<sup>79</sup> Concepcion First Amended Complaint, *supra* note 75, at para. 2. The complaint sought "restitution in an amount greater than five million dollars" on behalf of a class numbering far in excess of 100. *Id.* at para. 7. Federal jurisdiction was predicated on the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2006)). Invoking Federal Trade Commission regulations that required "extreme care" when offers advertised "free" goods or services and that any obligations incurred needed to be explained "clearly and conspicuously at the outset," the Concepcions argued that any footnote or asterisk references to special conditions were inadequate to prevent misunderstanding. Concepcion First Amended Complaint, *supra* note 75, at paras. 23, 32 (citing 16 C.F.R. § 251.1 (2005)).

<sup>80</sup> Concepcion First Amended Complaint, *supra* note 75, at para. 17(b).

<sup>81</sup> Kirsten S.P. Rigney & Sally Welch, *Symposium Introduction: Wal-Mart Matters*, 39 CONN. L. REV. 1267, 1269 (2007).

<sup>82</sup> 42 U.S.C. § 2000e-2 (2006).

<sup>83</sup> Declaration of Betty Dukes in Support of Plaintiffs' Motion for Class Certification at paras. 1, 3, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. 01-cv-02252) [hereinafter *Dukes's Declaration*].

<sup>84</sup> Third Amended Complaint at para. 30, *Dukes*, 222 F.R.D. 137 [hereinafter *Dukes Complaint*].

<sup>85</sup> *Id.* at paras. 40–41, exs. 1, 2.

<sup>86</sup> *Dukes's Declaration*, *supra* note 83, at para. 1.

<sup>87</sup> See *Dukes Complaint*, *supra* note 84; LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART* 4 (2004).

In 2002, after connecting to lawyers focused on Wal-Mart, Dukes became the lead plaintiff in a lawsuit to certify a class on behalf of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.”<sup>88</sup> The women claimed that Wal-Mart’s national policy of giving local managers discretion to make promotions and award merit pay increases within a two-dollar window, when coupled with an intensely monitored corporate culture rife with sex-stereotyped presumptions, resulted in a workplace in which women were “72% of the hourly sales employees, yet only one-third of management positions.”<sup>89</sup> The Dukes plaintiffs, arguing that Wal-Mart’s practices violated federal law, relied on two complex theories — that Wal-Mart had engaged in a pattern or practice of disparate treatment<sup>90</sup> and that the company’s policies had a disparate, discriminatory impact on women.<sup>91</sup> As remedies, the Dukes plaintiffs requested much of what Title VII authorized — injunctive and declaratory relief as well as back pay and punitive (but not compensatory) damages.

Naming Michael Turner’s adversary is more complex. Formally, his opponent was the child’s mother, Rebecca Rogers,<sup>92</sup> and the majority’s holding is predicated on the fact that it was the custodial parent seeking support and not the state itself. Yet state and federal government had obliged Rogers, as a recipient of government benefits, to pursue Turner. Under a “comprehensive federal-state partnership,”

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<sup>88</sup> *Dukes*, 222 F.R.D. at 141–42. Seven women had been the lead plaintiffs initially, but by the Supreme Court decision, Dukes’s two named co-plaintiffs were Christine Kwapnoski and Edith Arana. *Wal-Mart*, 131 S. Ct. at 2548.

<sup>89</sup> Dukes Complaint, *supra* note 84, at para. 1.

<sup>90</sup> A disparate treatment claim requires that management knew that a policy, as implemented, disadvantaged qualified women. See 42 U.S.C. § 2000e-2(a) (2006); Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

<sup>91</sup> The Dukes plaintiffs relied on 42 U.S.C. § 2000e-2(k) and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), recognizing that policies neutral on their face can work disadvantages resulting in statistically significant disparities. To succeed, the plaintiffs would have to show that “the company’s standard operating procedure [—] the regular rather than the unusual practice” — established a pattern or practice of discrimination. *Teamsters*, 431 U.S. at 336. Thereafter, Wal-Mart could rebut individual relief on the theory that a woman was “denied an employment opportunity for lawful reasons.” *Id.* at 362.

Complex questions shadow the tasks of making meaning of Title VII rights and structuring the forms of proof required by statute, and the judicial interpretations reflect different theories of equality. See generally George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980).

<sup>92</sup> By the time the case was in the Supreme Court, Rogers’s father was the child’s legal custodian. See *Turner*, 131 S. Ct. at 2513.

South Carolina was required to seek to recoup funds from delinquent parents,<sup>93</sup> and since 1988, the federal government has encouraged states to develop a “centralized, automated approach to child-support,” focused on tracking delinquent parents through automated databases and attaching income.<sup>94</sup>

Rogers had done so and continued to pursue Turner after her government funds ended and the South Carolina Attorney General’s Office classified the dispute as a “private domestic” matter in which it could take no position.<sup>95</sup> Nonetheless, the state was an ongoing presence. Court records reflect that, on at least one occasion, a lawyer employed by the state’s Department of Social Services was present at Turner’s child support hearing.<sup>96</sup> Moreover, a study of such support proceedings reported that the appearance of a state representative was not unusual.<sup>97</sup> Further, South Carolina was Turner’s custodian when detention was ordered.

In 2003, Rogers obtained a court order that Turner make weekly payments of \$51.73. After more hearings and both short and longer detentions for contempt, Turner sometimes paid.<sup>98</sup> In January 2008, a brief court hearing resulted in a sentence of twelve months, to be purged if Turner paid the almost \$6,000 in child support he then owed.<sup>99</sup> Although neither Turner nor Rogers mentioned a lack of counsel in family court,<sup>100</sup> Turner argued on appeal that South Caroli-

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<sup>93</sup> Brief of Senators DeMint, Graham, Johanns, and Rubio as *Amici Curiae* in Support of Respondents at 1, *Turner*, 131 S. Ct. 2507 (No. 10-10) [hereinafter Senators’ Amici for Rogers] (citing the Child Support Enforcement Amendments of 1984). Proposals to involve the federal government in child support collection date from 1949 when then-Representative Gerald Ford of Michigan introduced the “Runaway Pappy Act,” which decades later was referred to as the “Deadbeat Dad Act,” and in 1992 was enacted in gender-neutral terms. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 650-53 (2001). Since 1950, Congress has required state enforcement programs for child support as a condition of federal funds. Brief for the United States as Amicus Curiae Supporting Reversal at 2, *Turner*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 108380 [hereinafter U.S. Amicus, *Turner*]. By 1975, state plans had to have federal government approval, and Aid to Families with Dependent Children (AFDC) recipients had to cooperate in enforcement efforts and assign recouped funds to states. *Id.* at 3.

<sup>94</sup> U.S. Amicus, *Turner*, *supra* note 93, at 5-6. South Carolina’s noncompliant approach cost it in excess of \$55 million in fines. *Id.* at 6 n.4.

<sup>95</sup> Rogers Brief in Opposition, *supra* note 72, at 9 n.2.

<sup>96</sup> See Joint Appendix, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 50021, at \*40a [hereinafter Joint Appendix, *Turner*].

<sup>97</sup> In more than 300 proceedings observed, “an attorney for DSS was present” and sometimes participated in the hearings. Brief of Professor Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as *Amici Curiae* in Support of Petitioner at 14-15, *Turner*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 141223 [hereinafter Patterson Amici for Turner].

<sup>98</sup> *Turner*, 131 S. Ct. at 2513.

<sup>99</sup> See Joint Appendix, *Turner*, *supra* note 96, at \*60a-62a; Rogers Brief in Opposition, *supra* note 72, at 7-9.

<sup>100</sup> Rogers Brief in Opposition, *supra* note 72, at 8.

na's failure to provide him with a lawyer before ordering him to jail violated the Constitution.

As *Turner* illustrates, accounts of litigation require discussion about lawyers, who have historically functioned as gatekeepers to courts. In *Turner's* case, lawyers' absence was the central, if not unusual, point. As noted, the millions like him have prompted a national movement calling for Civil *Gideon*. The importance of that legal question enabled *Turner* to gain local volunteer counsel, supported by a collection of six amici before the South Carolina Supreme Court,<sup>101</sup> where Rebecca Rogers appeared unrepresented.

The United States Supreme Court is its own lawyer magnet, with firms and law schools competing to participate in the eighty or so arguments each year. Hence, pro bono counsel enabled both *Turner* and *Rogers* to have expert help from members of the increasingly insular Supreme Court bar.<sup>102</sup> Although, under the rubric of the Civil *Gideon* movement, *Rogers* might have argued that the problem was an absence of lawyers on both sides as well as for the child, she opposed a right to counsel for *Turner*. With these sides drawn, amici joined in — seven for *Turner* (including the United States, arguing that his sentence should be reversed)<sup>103</sup> and three for *Rogers* (including thirteen states led by Texas, as well as a group of United States senators).<sup>104</sup> As has also become customary, law professors for each side explained the wisdom of their opposing positions.<sup>105</sup>

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<sup>101</sup> Derek Enderlin, of the two-person firm Ross & Enderlin, was joined by Kathrine Haggard Hudgins of the South Carolina Commission on Indigent Defense. Several organizations filed in support. See Brief of the American Civil Liberties Union Foundation, South Carolina National Office, the Brennan Center for Justice, the National Ass'n of Criminal Defense Lawyers, the National Legal Aid & Defender Ass'n, and the South Carolina Ass'n of Criminal Defense Lawyers as Amici Curiae Supporting Appellant, *Price v. Turner*, 691 S.E.2d 470 (S.C. 2010) (No. 03-DR-37-472).

<sup>102</sup> Former Solicitor General Seth Waxman, in private practice at Wilmer Cutler Pickering Hale & Dorr LLP, argued for *Turner*; Acting Principal Deputy Solicitor General Leondra Kruger presented the federal government's position. Stephanos Bibas, Director of the University of Pennsylvania Law School Supreme Court Clinic, joined by lawyers from Paul, Hastings, Janofsky & Walker LLP, argued for *Rogers*.

<sup>103</sup> As Justice Breyer noted, "the Federal Government believes that 'the routine use of contempt for non-payment of child support is likely to be an ineffective strategy,'" yet the government argued "that 'coercive enforcement remedies . . . have a role to play.'" *Turner*, 131 S. Ct. at 2517 (quoting U.S. Amicus, *Turner*, *supra* note 93, at 21–22 & n.8).

<sup>104</sup> Senators' Amici for *Rogers*, *supra* note 93; see also Brief of Texas, Alabama, Arizona, Colorado, Florida, Hawaii, Maine, Mississippi, New Hampshire, South Carolina, Utah, Virginia, and Wyoming as Amici Curiae in Support of Respondents, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 567494.

<sup>105</sup> Brief for Law Professors Benjamin Barton and Darryl Brown as Amici Curiae in Support of Respondents, *Turner*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 567493 [hereinafter Law Professors' Amici for *Rogers*]; Patterson Amici for *Turner*, *supra* note 97. Barton directed the clinical programs at the University of Tennessee College of Law; Brown, a former public defender, taught at the University of Virginia Law School. Patterson, a faculty member at the University of South Carolina School of Law, served as the director of South Carolina's Department of Social Services.

Another lawyer magnet is the class action, and both Dukes and the Concepcions gained their counsel by means of that form. Like Turner and Rogers, Betty Dukes had gone from the state and federal administrative agencies to federal court pro se — a status that is now sometimes termed “self-representation” to suggest that volition, rather than economics, prompts the decision to proceed without a lawyer. Once folded into the class action as its first-named plaintiff,<sup>106</sup> Dukes gained an assemblage of lawyers. Equal Rights Advocates (founded in 1974 to work on behalf of women)<sup>107</sup> and the Impact Fund (begun in 1992 “to achieve economic and social justice”)<sup>108</sup> were part of a “coalition” of firms formed to finance and staff the complex litigation.<sup>109</sup> When the case reached the Supreme Court, thirteen amici, representing numerous organizations, joined on the plaintiffs’ behalf.<sup>110</sup>

Like Dukes, the Concepcions became connected to lawyers who were in medias res — pursuing a parallel case against T-Mobile, Verizon, and other wireless carriers. (The anonymity and fungibility of their consumer status is underscored by the happenstance that Concepcion, rather than the name Laster, the lead plaintiff in the other lawsuit, has become part of the Supreme Court’s annals.) Two San

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<sup>106</sup> Dukes filed her pro se complaint, alleging diversity jurisdiction, on June 4, 2001. Complaint at 1, *Dukes v. Wal-Mart Stores, Inc.*, No. C01-2252 MJJ, 2001 WL 1902806 (N.D. Cal. Dec. 3, 2001).

<sup>107</sup> EQUAL RIGHTS ADVOCATES, <http://www.equalrights.org/> (last visited Oct. 2, 2011).

<sup>108</sup> *About Us*, IMPACT FUND, [http://www.impactfund.org/index.php?cat\\_id=4](http://www.impactfund.org/index.php?cat_id=4) (last visited Oct. 2, 2011). Featherstone reported that Stephanie Odle — “a white Texan woman Dukes’s junior by more than two decades” — filed an EEOC complaint against Wal-Mart in 1999. Odle found lawyers who enlisted Brad Seligman, who had founded the Impact Fund in 1992. FEATHERSTONE, *supra* note 87, at 13, 20–24.

<sup>109</sup> FEATHERSTONE, *supra* note 87, at 27. The resulting roster also included the Public Justice Center, founded in 1985 in Baltimore to augment resources for structural litigation on behalf of the poor, and three private law firms: Cohen, Milstein, Hausfeld & Toll, of Washington, D.C., “which would end up bearing the greatest financial burden,” *id.* at 27; Davis, Cowell & Bowe, of San Francisco, which had litigated other cases against Wal-Mart; and Tinkler & Bennett. Joseph Sellers, of Cohen Milstein, argued at the Supreme Court.

<sup>110</sup> The amici briefs in support of the Dukes plaintiffs came from NAACP Legal Defense and Educational Fund, Inc., National Association for the Advancement of Colored People, Leadership Conference on Civil and Human Rights, AARP, Disability Rights Education and Defense Fund, Inc., LatinoJustice PRLDEF, Asian American Justice Center, Asian Law Caucus, and Lawyers’ Committee for Civil Rights Under Law; United Food and Commercial Workers International Union, American Federation of Labor and Congress of Industrial Organizations, and Change to Win; U.S. Women’s Chamber of Commerce, National Partnership for Women & Families, and California Women Lawyers; American Civil Liberties Union and National Women’s Law Center; Public Justice, P.C., National Association of Consumer Advocates, and National Consumers League; Consumers Union of United States, Inc., National Consumer Law Center, and Center for Constitutional Rights; Institute for Women’s Policy Research; Public Citizen, Inc.; National Employment Lawyers Association, Equal Justice Society, and Legal Aid Society–Employment Law Center; American Sociological Association and Law and Society Association; labor economists and statisticians; law and economics professors; and civil procedure professors. See Docket, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277).

Diego firms, each with fewer than ten lawyers and describing themselves as experienced in consumer and securities class actions, filed the Concepcion lawsuit, consolidated with the pending litigation.<sup>111</sup> In the Supreme Court, additional lawyers were at the fore — hailing from Public Citizen, founded as part of Ralph Nader’s consumer rights efforts in 1971 and appearing with some regularity at the Court.<sup>112</sup> Fifteen amici (including a combined filing on behalf of seven states and the District of Columbia) registered their support for the Concepcions.<sup>113</sup>

The corporate defendants were, predictably, relying on a different market. Each had in-house lawyers who enlisted major firms as the litigation unfolded. Wal-Mart enjoyed the counsel of a law firm numbering more than 900 on several continents;<sup>114</sup> its Supreme Court argument was made by a lawyer from another global firm counting 1000 lawyers on its roster.<sup>115</sup> At the trial level, the wireless service providers relied on a local 40-person San Diego firm, joined by a Seattle-based firm with more than 500 attorneys.<sup>116</sup> When in the Ninth Circuit and the Supreme Court, AT&T relied on a firm of some 1600 lawyers.<sup>117</sup>

The roster of amici in *Wal-Mart* and *AT&T* overlapped, as the interrelationship and stakes were well understood by repeat players in the Supreme Court. For example, the Equal Employment Advisory Council (an employer association) filed in both cases, just as the NAACP Legal Defense and Educational Fund sided with both the Dukes and the Concepcion classes.<sup>118</sup>

All three petitioners argued procedural defects that affected substantive rights. Both corporate defendants asserted that the proposed

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<sup>111</sup> Craig Nicholas and Matthew Butler, of the four-person firm Nicholas & Butler, filed *Laster v. T-Mobile* in 2005 in state court; the case was removed to federal court, and the *Laster* plaintiffs filed a revised complaint. See *Laster v. T-Mobile*, 407 F. Supp. 2d 1181, 1186 (S.D. Cal. 2005). In the Concepcion filing, the lead firm listed was Hulett Harper Stewart, followed by Nicholas & Butler.

<sup>112</sup> See *Accomplishments*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2313> (last visited Oct. 2, 2011).

<sup>113</sup> Those filing included National Academy of Arbitrators; NAACP Legal Defense & Educational Fund, Inc.; groups of “arbitration professors,” “contracts professors,” “civil procedure and complex litigation professors,” and “federal jurisdiction professors”; American Antitrust Institute; Legal Aid Society of the District of Columbia and national consumer advocacy organizations; National Workrights Institute; and Illinois, Maryland, Minnesota, Montana, New Mexico, Tennessee, Vermont, and the District of Columbia. See Docket, *AT&T*, 131 S. Ct. 1740 (No. 09-893).

<sup>114</sup> Wal-Mart first retained Paul, Hastings, Janofsky & Walker LLP.

<sup>115</sup> Theodore Boutrous of Gibson, Dunn & Crutcher LLP argued the case for Wal-Mart in the Supreme Court.

<sup>116</sup> The San Diego firm was Solomon Ward Seidenwurm & Smith LLP; the Seattle firm was Davis Wright Tremaine LLP.

<sup>117</sup> The firm was Mayer Brown, and the case was argued by Andrew Pincus.

<sup>118</sup> In addition to the Equal Employment Advisory Council, the other four amici filing on behalf of the corporations in both *AT&T* and *Wal-Mart* were DRI — The Voice of the Defense Bar, Pacific Legal Foundation, U.S. Chamber of Commerce, and New England Legal Foundation. In addition to the NAACP Legal Defense and Educational Fund, Professor Arthur Miller filed on behalf of both the Concepcions and the Dukes plaintiffs.



class configurations were illegal and that each set of plaintiffs' claims had to be heard individually to decide their merits fairly. AT&T argued that the Concepcions ought neither to be in federal court as a class nor to be part of a class in private arbitration because they had waived their rights to do so when buying a bundle that included wireless services, phones, and another feature — a customized dispute resolution system obliging them to proceed individually and exclusively through AT&T's dispute resolution program.<sup>119</sup>

AT&T designated the American Arbitration Association (AAA) to conduct arbitrations and permitted either party to use small claims courts but not to seek jury trials or participate in class actions.<sup>120</sup> AT&T argued that the 1925 FAA preempted both California's consumer statutes and its common law of contracts, and therefore the waiver provisions were enforceable.<sup>121</sup> As law professors filing on AT&T's behalf explained, the FAA, a kind of "equal protection clause" for contracts, prohibited California's "discrimination" against arbitration clauses.<sup>122</sup>

Wal-Mart likewise challenged the procedural form of the lawsuit in which it found itself, and again the fault lines were between individualization and aggregation, and the focus was on unfairness. Wal-Mart argued that its women employees, holding diverse jobs at different locations, had too little in common to proceed as a nationwide class.<sup>123</sup> Further, Wal-Mart objected to the form of the class action,<sup>124</sup> the failure to provide notice to individual members,<sup>125</sup> and the plan to use sampling or extrapolation for remedies.<sup>126</sup>

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<sup>119</sup> Given that the Ninth Circuit had also found a class waiver unconscionable in an earlier case, *Shroyer v. New Cingular Wireless Services*, 498 F.3d 976 (9th Cir. 2007), AT&T argued that its waiver was "substantively distinct" from that at issue in *Shroyer*. See *Laster v. T-Mobile USA Inc.*, No. 05CV1167 DMS (AJB), 2008 WL 5216255, at \*5 (S.D. Cal. Aug. 11, 2008).

<sup>120</sup> AT&T revised its arbitration provision in December 2006 and notified customers through inserts in their monthly bills. See Notice of Improved Arbitration at 2–3 (Dec. 2006), Declaration of Neal S. Berinhout in Support of AT&T's Motion to Compel Arbitration and Dismiss Claims of Concepcion Plaintiffs, ex. 1, *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (AJB), 2009 WL 4842801 (S.D. Cal. Dec. 14, 2009).

<sup>121</sup> See Brief for Petitioner, *AT&T*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3017755, at \*1, \*23.

<sup>122</sup> Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner, *AT&T*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3183856, at \*1–2 [hereinafter Law Professors' Amici for AT&T]; see also Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *AT&T*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3167313, at \*2 [hereinafter Chamber of Commerce Amicus for AT&T] ("Congress enacted the FAA to stop courts from discriminating against arbitration agreements.")

<sup>123</sup> See Brief for Petitioner, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 201045, at \*1 [hereinafter Brief for Petitioner, *Wal-Mart*].

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*14.

<sup>126</sup> *Id.* at \*23–31.

In both corporate litigations, lower court judges concluded that each set of plaintiffs could proceed in federal court and in the aggregate. In *AT&T*, the Ninth Circuit held that the FAA did not preempt California contract law and that state law rendered unenforceable the class action waiver.<sup>127</sup> In *Wal-Mart*, the appellate court (en banc, 6–5) concluded that the trial court had generally exercised its discretion and tailored the proposed class so as to make it manageable and could, if need be on remand, “decertify the class should it become unmanageable.”<sup>128</sup>

Returning to *Turner* and the procedural defects argued there, the record below reflects the limited resources not only of the parties but also of state courts. As Turner’s amici detailed, the transcript of the “evidentiary” hearing makes up three pages of the record,” Turner “spoke a total of 169 words,” and the entire proceeding took but a few minutes of the court’s time.<sup>129</sup> In contrast to the detailed opinions by lower court judges in *AT&T* and *Wal-Mart*, no trial judge published a written opinion. The many orders to pay and the findings of contempt were set forth through repeated use of a boilerplate form (“completed by typewriter or by hand,”<sup>130</sup> but often incomplete) as well as short transcripts of two hearings published through the appendix filed in the United States Supreme Court.<sup>131</sup>

The sole written opinion comes from the South Carolina Supreme Court, to which constitutional challenges can go, bypassing the intermediate tier.<sup>132</sup> That court “[d]isposed” of 1308 cases and had 920 pending in 2010.<sup>133</sup> The eight-paragraph ruling noted that of the courts addressing the issue, sixteen jurisdictions had held that a civil contemnor had a right to counsel before incarceration; South Carolina placed itself in the minority by ruling that no rights to counsel attached “before being incarcerated for civil contempt for nonsup-

<sup>127</sup> See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853, 856 (9th Cir. 2009).

<sup>128</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 627 & nn.56–57, 628 (9th Cir. 2010) (en banc). Aspects of the district court’s ruling were rejected. The dissent by Judge Ikuta disagreed. *Id.* at 628–29 (Ikuta, J., dissenting). Chief Judge Kozinski joined the dissent and added that the plaintiffs had “little in common but their sex and this lawsuit.” *Id.* at 652 (Kozinski, C.J., dissenting). Justice Scalia, writing for the Court, shared those views. See *Wal-Mart*, 131 S. Ct. at 2555, 2557.

<sup>129</sup> Brief of Amicus Curiae the Constitution Project in Support of Petitioner, *Turner*, 131 S. Ct. 2507 (No. 10–10), 2011 WL 108379, at \*8. Another amicus reported from observations of several dozen hearings that the hearings moved at an “assembly-line pace, lasting only about three minutes on average, with few hearings lasting more than six minutes.” Patterson Amici for Turner, *supra* note 97, at 14.

<sup>130</sup> See, e.g., Joint Appendix, *Turner*, *supra* note 96, at \*17a, \*20a, \*26a–27a, \*47a–48a, \*60a–63a, \*85a–86a.

<sup>131</sup> *Id.* at \*40a–46a, \*89a–91a. On April 29, 2008, the notation indicated that Turner commented “I can’t find no work” and that the judge found “the Defendant in willful contempt.” *Id.* at \*89a–90a.

<sup>132</sup> See *Price v. Turner*, 691 S.E.2d 470, 471 (S.C. 2010); S.C. APP. CT. R. 204(b).

<sup>133</sup> S.C. JUDICIAL DEP’T, ANNUAL ACCOUNTABILITY REPORT 51–52 (2009–2010).

port.”<sup>134</sup> When that decision was issued in March 2010, Turner had served the full twelve months of his contempt sentence.<sup>135</sup>

Like the litigants and lawyers, the nine United States Supreme Court Justices rendering the three decisions acted true to type. The five Justices finding for the corporate defendants in both cases had been nominated by Republican presidents; the four dissenters, arguing access to courts for consumers and employees, had been nominated by Democratic administrations. Justice Kennedy played his crossover role, providing the fifth vote for the *Turner* holding that South Carolina’s procedures had not provided the process due.

*E. The Institutional Context of Complex State and Federal  
Judiciaries, Costly Process, and the Market of Private Dispute  
Resolution Providers*

The litigants, the legal rights at stake, and the legions of lawyers reflected the economic and technological transformations of the past century. The jurists were likewise part of institutions — the state and federal court systems — that had been reconfigured over the last centuries. Moreover, in the past decades, the private sector had, with the help of public policies, developed a market for ADR replete with its own organizations.

Although today the federal courts loom large, their surroundings and import were once modest, and state courts dominated the litigation landscape. The centrality of the states was not simply a historical artifact of a localized economy but also the product of political will. As exemplified by the Nebraska Constitution, state constitutions enshrined courts and gave litigants rights to use them. Of the forty state constitutions that currently include “remedies clauses,” eighteen share language akin to that in the 1867 Nebraska Constitution and specify the entitlement that “all courts shall be open.”<sup>136</sup> (South Carolina’s

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<sup>134</sup> *Price*, 691 S.E.2d at 472. Turner’s count was that “seven federal circuit courts and fifteen state courts of last resort have held that indigent defendants in civil contempt proceedings have a right to appointed counsel if they face incarceration.” Petition for Writ of Certiorari, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2010 WL 2604155, at \*12. Five states had held no right to counsel, and three — Nevada, New Hampshire, and New Mexico — did case-by-case analyses. *Id.* at \*18–19.

<sup>135</sup> All nine Justices rejected the argument that the case was moot, for the problem — failure to pay and contempt citations — was “‘capable of repetition’ while ‘evading review.’” *Turner*, 131 S. Ct. at 2514–15 (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)); see *id.* at 2521 n.1 (Thomas, J., dissenting). As the majority noted, “[w]ithin months of his [Turner’s] release from the imprisonment here at issue he was again the subject of civil contempt proceedings. And he was again imprisoned, this time for six months.” *Id.* at 2515 (majority opinion). Further, in December 2010, Turner, then \$13,814.72 in arrears, was scheduled for another contempt hearing in May of 2011. *Id.*

<sup>136</sup> In addition to Nebraska, see ALA. CONST. art. I, § 13 (“That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”);

text reads: “All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.”<sup>137</sup>)

The federal government has less express constitutional commitments to civil litigants, and it was slower to populate its own lower courts. Before 1850, no federal government building bore the name “United States Courthouse.” Fewer than forty lower court federal judges were dispersed around the country, and they borrowed space in facilities dedicated to other purposes. But after the Civil War, Congress repeatedly turned to the federal courts to enforce newly minted national norms. Congress endowed the courts with new jurisdiction, judgeships, and eventually buildings of their own.<sup>138</sup> To support those efforts, lawyers were needed and, in 1870, Congress established the Department of Justice.<sup>139</sup>

During the twentieth century, federal and state legislatures crafted statutes addressed to courts, including the consumer protection laws on which the *Concepcions* relied, Title VII invoked by the *Dukes* plaintiffs, and the FAA defense advanced by *AT&T*. *Turner* represents another signature development. As women gained stature as equal persons, state and federal laws governing families burgeoned to deal with rights to divorce, child custody, and support. Moreover, both state and federal statutes authorized governments, individuals, and groups to bring claims and created both procedures and incentives to do so, such as the treble damage provisions of the antitrust laws, the 1966 class action rule, and the 1976 Civil Rights Attorney’s Fees

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DEL. CONST. art. I, § 9 (“All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.”); CONN. CONST. art. I, § 12 (“All courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”). See also FLA. CONST. art. I, § 21; IND. CONST. art. I, § 12; KY. CONST. § 14; LA. CONST. art. I, § 22; MISS. CONST. art. III, § 24; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; WYO. CONST. art. I, § 8; Phillips, *supra* note 43, at 1310 & n.6.

<sup>137</sup> S.C. CONST. art. I, § 9.

<sup>138</sup> In 1867, Congress gave federal courts authority to hear habeas corpus petitions from individuals held in state custody. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2006)). In 1871, Congress authorized federal courts to hear cases alleging deprivations of civil rights. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)). In 1875, Congress gave the federal courts “general federal question jurisdiction” to hear claims (if the amount in controversy sufficed) alleging violations of rights arising under federal law. Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2006)).

<sup>139</sup> An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

Awards Act.<sup>140</sup> The market in lawyers responded, as the plaintiffs' bar gained skills and resources.<sup>141</sup>

Data on dockets capture some of the success of last century's political aspirations that government and private litigants turn to the federal courts.<sup>142</sup> In 1901, fewer than 30,000 cases were filed in the federal courts, and the majority were criminal cases.<sup>143</sup> By 2001, more than 317,000 cases were brought, with civil filings outstripping criminal filings four to one.<sup>144</sup> In 1901, some 100 life-tenured judges staffed the federal judiciary. A century later, Congress had authorized some 850 judgeships assigned to more than 550 federal courthouses and aided by magistrate and bankruptcy judges, creatures of statute whose numbers were almost equal to the numbers of their Article III counterparts.<sup>145</sup>

These statistics are but small indicators of the impact of the novel precept that all persons — regardless of their demographics — have become eligible to pursue rights. According to the National Center for State Courts, some 50 million criminal and civil cases (traffic cases aside) are filed annually in state courts,<sup>146</sup> which report acute problems

<sup>140</sup> See Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 15(a) (2006)); FED. R. CIV. P. 23 (1966); Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)).

<sup>141</sup> See Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 205–17 (2001).

<sup>142</sup> See generally Gillian K. Hadfield, *The Dynamic Quality of Law: The Role of Judicial Incentives and Legal Human Capital in the Adaptation of Law*, 79 J. ECON. BEHAV. & ORG. 80 (2011); Gillian K. Hadfield, *The Levers of Legal Design: Institutional Determinants of the Quality of Law*, 36 J. COMP. ECON. 43 (2008).

<sup>143</sup> The numbers are 16,734 criminal cases and 11,971 civil filings, extrapolated by subtracting the number of cases pending at the end of 1900 from the sum of the cases terminated in and pending at the end of 1901. See 1 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934) (data on criminal cases); 2 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 111 (1934) (civil cases).

<sup>144</sup> Civil filings numbered 254,523; criminal filings numbered 63,473. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 6 (2001), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/front/highlights.pdf>. In 2010, some 360,000 cases and more than 1.5 million bankruptcy petitions were filed in the lower federal courts. JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9, available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> [hereinafter ROBERTS, 2010 FEDERAL JUDICIARY REPORT].

<sup>145</sup> The federal courts in 2010 had 179 authorized courts of appeals judgeships, 678 authorized district court judgeships, 352 authorized bankruptcy judgeships, and 571 authorized magistrate judgeships. ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 39–41 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>. In 2001, the courts had 179 courts of appeals judgeships, 665 district court judgeships, 324 bankruptcy judgeships, and 533 magistrate judgeships. ADMIN. OFFICE OF THE U.S. COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 34–35 (2003), available at <http://host4.uscourts.gov/judbus2002/front/jdbusiness.pdf>.

<sup>146</sup> NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 20 (2010), available at [http://www.ncsconline.org/D\\_Research/csp/2008\\_files/EWSC-2008-Online Version v2.pdf](http://www.ncsconline.org/D_Research/csp/2008_files/EWSC-2008-Online Version v2.pdf) (noting that, in 2008, state

of financing (as *Turner* documents) for both litigants and the courts themselves.<sup>147</sup> California runs more than 450 trial facilities,<sup>148</sup> and its seven supreme court justices consider about 250 matters each week.<sup>149</sup> Massachusetts clocked some 42,000 people entering its courts each day in 2009, even as budgets necessitated staff cuts of about ten percent.<sup>150</sup> (By way of contrast, the United States Supreme Court received about 8100 certiorari petitions, heard argument in 82 cases, and issued 73 signed opinions in 2010.<sup>151</sup>)

Indeed, literally keeping doors open is a problem for state courts. In 2009, New Hampshire, lacking funds, episodically suspended civil jury trials.<sup>152</sup> Margaret Marshall, when Chief Justice of Massachusetts, warned that, like other important institutions, state courts were at risk and called for federal support.<sup>153</sup> By July 2011, California budget cuts resulted in a proposed layoff of forty percent of staff and the closing of many courtrooms in San Francisco Superior Court; according to the court's presiding judge, the "civil justice system in San Francisco is collapsing."<sup>154</sup>

In contrast, AT&T's "courts" are thriving, and its "judges" and employees reportedly better paid as part of an industry that the 1925 FAA helped to spark.<sup>155</sup> Before sketching the contours of the private dispute

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courts had 21.3 million criminal, 19.4 million civil, 5.7 million domestic relations, and 2.1 million juvenile incoming cases — totaling 48.5 million).

<sup>147</sup> See Editorial, *An Impending Crisis in State Court Funding*, 92 JUDICATURE 52 (2008).

<sup>148</sup> Ray McDevitt, *Introduction to COURTHOUSES OF CALIFORNIA: AN ILLUSTRATED HISTORY*, at xvii (Ray McDevitt ed., 2001).

<sup>149</sup> Brief for California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers as Amici Curiae in Support of Respondent at 8–9, *Harrington v. Richter*, 131 S. Ct. 770 (2011) (No. 09-587), 2010 WL 2826986.

<sup>150</sup> Margaret H. Marshall, *Testimony Before the Joint Comm. on Ways and Means 1–2* (Mar. 1, 2010), available at <http://www.mass.gov/courts/fy2011-marshall-testimony.pdf>. That number did not include staff or jurors. *Id.* at 2.

<sup>151</sup> ROBERTS, 2010 FEDERAL JUDICIARY REPORT, *supra* note 144, at 9–10 (noting that, of the 8159 certiorari petitions, 6576 were *in forma pauperis*).

<sup>152</sup> James Podgers, *Witnesses Describe State and Local Courts Reeling from Budget Cutbacks*, ABA J., Mar. 1, 2011, [http://www.abajournal.com/magazine/article/beggaring\\_justice\\_witnesses\\_describe\\_state\\_and\\_local\\_courts\\_reeling\\_aba/](http://www.abajournal.com/magazine/article/beggaring_justice_witnesses_describe_state_and_local_courts_reeling_aba/).

<sup>153</sup> Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Mass., *At the Tipping Point: State Courts and the Balance of Power*, Benjamin N. Cardozo Lecture, New York City Bar Ass'n 11–12 (Nov. 10, 2009) (transcript available at [http://www.abcny.org/pdf/Cardozo\\_post\\_final.pdf](http://www.abcny.org/pdf/Cardozo_post_final.pdf)).

<sup>154</sup> Associated Press, *California: Huge Cuts for Court*, N.Y. TIMES, July 18, 2011, at A15 (quoting Judge Katherine Feinstein).

<sup>155</sup> Some arbitrators were reported to charge up to \$10,000 per day. See Eric Berkowitz, *Is Justice Served?*, L.A. TIMES, WEST MAGAZINE, Oct. 22, 2006, at 20, available at <http://articles.latimes.com/2006/oct/22/magazine/tm-arbitrate43>. In 2008, the head of the AAA received compensation of about \$1.2 million. GuideStar, Premium Report Generated for American Arbitration Association, Inc. 10 (July 12, 2011, 10:04 AM) (on file with the Harvard Law School Library). In that year, federal district judges were paid \$169,300. *Judicial Salaries Since 1968*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf> (last visited Oct. 2, 2011).

resolution market, a caveat is in order. The constitutional obligations of “open courts” have produced a wealth of data on judges’ salaries, court budgets, case proceedings, and outcomes. In contrast, private dispute resolvers are left to do as they wish, subject only in a few jurisdictions, such as California, to requirements that arbitration providers “collect, publish . . . , and make available to the public” information about parties, categories of disputes, time to disposition, and outcomes.<sup>156</sup> Aside from those data as well as several case studies, corporate disclosure statements, and thousands of anecdotes, the public face of private dispute resolution largely depends on what providers decide to put forth.<sup>157</sup>

Two institutions assert their dominance in a global market. The non-profit American Arbitration Association, founded within a year of the 1925 FAA, calls itself “the world’s leading provider of conflict management and dispute resolution services.”<sup>158</sup> Its roster of 8000 “neutrals” (an umbrella term) deals with 150,000 cases yearly,<sup>159</sup> mostly from contracts naming it as the provider.<sup>160</sup> A small fraction —

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The salary level has been a persistent source of concern. Chief Justices have repeatedly called for judicial pay raises in their annual reports. See, e.g., WILLIAM H. REHNQUIST, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <http://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.aspx>; WILLIAM H. REHNQUIST, 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <http://www.supremecourt.gov/publicinfo/year-end/2002year-endreport.aspx>; JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>.

<sup>156</sup> See CAL. CIV. PROC. CODE § 1281.96 (2011). After this 2002 enactment, the AAA complies by providing quarterly reports including nationwide data. See also MD. CODE ANN., COM. LAW § 14-3903 (West 2011); ME. REV. STAT. ANN. tit. 10, § 1394 (2010); D.C. CODE § 16-4430 (2008). Providers do not, however, provide comprehensive data. See CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE 5 (2004), available at [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf).

<sup>157</sup> Other than as required by California’s statute and those of a few other jurisdictions, no government agency . . . collects statistics on the number of employees covered by employer-promulgated arbitration programs or the outcomes of arbitration cases filed under these programs. What research has been done is based on data made available to individual researchers by arbitration service providers, most notably the American Arbitration Association (AAA) and the Financial Industry Regulatory Authority (FINRA).

Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, DISP. RESOL. J., Aug.–Oct. 2009, at 6–7. Public records as well as contracts offered to purchasers have given researchers other windows into arbitration use. See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008).

<sup>158</sup> Press Release, Am. Arbitration Ass’n, American Arbitration Association Elects New Board of Directors (May 5, 2011), available at <http://www.adr.org/si.asp?id=6533>.

<sup>159</sup> AM. ARBITRATION ASS’N, STATEMENT OF ETHICAL PRINCIPLES FOR THE AMERICAN ARBITRATION ASSOCIATION, AN ADR PROVIDER ORGANIZATION (2007), available at <http://www.adr.org/sp.asp?id=22036>.

<sup>160</sup> *Id.*

1500 — are consumer arbitrations.<sup>161</sup> The for-profit provider JAMS — letters that once stood for “Judicial Arbitration and Mediation Services Inc.” — was founded in 1979 by a former state court judge.<sup>162</sup> JAMS describes itself as the “largest private alternative dispute resolution (ADR) provider,” dealing with about 10,000 cases a year and employing more than 270 full-time experts in “mediating and arbitrating complex, multi-party business/commercial cases.”<sup>163</sup>

The work, both domestic and international, is framed by rules and manuals that set forth structures for proceedings in which the ideology of fairness is regularly invoked.<sup>164</sup> For example, the AAA’s website offers a “Consumer Due Process Protocol” that it signed (along with several other organizations) in 1998; stated are principles about “a fundamentally-fair ADR process” and parameters, such as competent and independent “neutrals,” as well as the qualities of ADR, such as privacy and confidentiality.<sup>165</sup> In addition, repeat players have a measure of control by being able to custom-tailor rules to some extent.

The institutional participants in the dispute resolution market are (like some judiciaries) not free from controversy. One service provider, the National Arbitration Forum (NAF), founded in 1986 and specializing in consumer debt, has become the focus of state and federal investigations. Concerns about NAF’s impartiality emerged with reports that companies won virtually all the cases,<sup>166</sup> and NAF then withdrew from that market.<sup>167</sup>

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<sup>161</sup> AM. ARBITRATION ASS’N, ANALYSIS OF THE AMERICAN ARBITRATION ASSOCIATION’S CONSUMER ARBITRATION CASELOAD (2007), available at <http://www.adr.org/si.asp?id=5027> [hereinafter AAA, ANALYSIS OF CASELOAD].

<sup>162</sup> STACY LEE BURNS, MAKING SETTLEMENT WORK 18 (2000).

<sup>163</sup> *About JAMS*, JAMS, [http://www.jamsadr.com/aboutus\\_overview](http://www.jamsadr.com/aboutus_overview) (last visited Oct. 2, 2011).

<sup>164</sup> See, e.g., AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2010), available at <http://www.adr.org/sp.asp?id=22440>.

<sup>165</sup> See NAT’L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOL (1998), available at <http://www.adr.org/sp.asp?id=22019> [hereinafter CONSUMER DUE PROCESS PROTOCOL].

<sup>166</sup> In 2008, San Francisco’s city attorney sued the NAF and accused it of running an “arbitration mill” favoring credit card companies; of 18,075 credit card cases heard over several years, consumers won thirty times. Complaint for Injunctive Relief and Civil Penalties for Violations of Business and Professions Code Section 17200 at 2, 9, *California v. Nat’l Arbitration Forum, Inc.*, No. 08-473569 (Cal. Super. Ct. Aug. 22, 2008), available at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=257>. See generally *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts, Hearing Before the Subcomm. on Domestic Policy of the H. Oversight & Gov’t Reform Comm.*, 111th Cong. (2009); PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 13–27 (2007), available at <http://www.citizen.org/documents/arbitrationtrap.pdf>.

<sup>167</sup> See *Legal Alert: NAF Announces That It Will No Longer Arbitrate Consumer Disputes, and AAA Comes Tumbling After*, SUTHERLAND (July 27, 2009), <http://www.sutherland.com/files/News/354b68eb-9ece-41eb-8da2-42c5ofd46e52/Presentation/NewsAttachment/316a4627-5b50-4dd3-a16f-41cb2bb6fe3/NAFAnnouncesThat.pdf>.



Who pays for private courts? As an amicus filing in support of AT&T noted, the process is “hardly cost-free for consumer businesses.”<sup>168</sup> Given the lack of public budgets, full accounts are not available, but some information on payment sources is. T-Mobile reported it paid “all filing, administration and arbitrator fees for claims that total less than \$75,000.”<sup>169</sup> Further, while high-end users offer large sums to the private judges they select,<sup>170</sup> the AAA permits consumers to pay no more than \$125 in arbitrator fees for claims under \$10,000 and, in California, provides fee waivers for consumers below the poverty line.<sup>171</sup>

Data on usage rates are similarly incomplete. Court records in the AT&T litigation include a report from the AAA that, from 2003 to 2007, 170 consumers used its system to arbitrate against AT&T Mobility, AT&T Wireless, and Cingular Wireless.<sup>172</sup> What number either invoked the pre-arbitration processes that AT&T offered or pursued the small-claims court option is not clear. The trial court noted that AT&T had tallied 570 customers in arbitration but had “failed to identify the nature or amount of these claims” or whether any involved deceptive advertising.<sup>173</sup> The AAA’s searchable class arbitration docket listed 224 such proceedings against various companies in 2007.<sup>174</sup>

Assessing whether a few hundred claims is a high, low, or reasonable rate of use requires a baseline. Socio-legal studies have identified relevant variables, including the number of people exposed to a potential harm, how individuals learn to “name, blame, and claim,”<sup>175</sup> the availability of relief from alternative sources such as insurance, and the capacity of dispute resolution systems to handle claimants.<sup>176</sup> For

<sup>168</sup> Brief of CTIA — The Wireless Ass’n as Amicus Curiae in Support of Petitioner at 21, *AT&T*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3183858 [hereinafter CTIA Amicus for AT&T].

<sup>169</sup> *Id.* at 21 n.4.

<sup>170</sup> See, e.g., Michael Hiltzik, *Private Justice Can Be Yours If You’re Rich*, L.A. TIMES, Mar. 16, 2006, at C1; Aaron Glantz, *Drastic Court Cuts Could Be a Boon to Private Judges*, BAY CITIZEN (July 21, 2011), <http://www.baycitizen.org/courts/story/drastic-court-cuts-could-be-boon-private>.

<sup>171</sup> See AM. ARBITRATION ASS’N, CONSUMER-RELATED DISPUTES SUPPLEMENTARY PROCEDURES C-8 (2007), available at <http://www.adr.org/sp.asp?id=22014#C8>.

<sup>172</sup> See Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents at 20, *AT&T*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3934621 [hereinafter Civil Procedure Amici for Concepcion].

<sup>173</sup> *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*13 (S.D. Cal. Aug. 11, 2008).

<sup>174</sup> See Searchable Class Arbitration Docket, AM. ARBITRATION ASS’N, <http://www.adr.org/sp.asp?id=25562> (last visited Oct. 2, 2011).

<sup>175</sup> See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1980–1981).

<sup>176</sup> Decades ago, efforts were undertaken in England and the United States to identify forms of injury and sources of remedies. See generally DONALD HARRIS, MAVIS MACLEAN, HAZEL GENN, SALLY LLOYD-BOSTOCK, PAUL FENN, PETER CORFIELD & YVONNE BRITTAN, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984); DEBORAH R. HENSLER, M. SUSAN MARQUIS, ALLAN F. ABRAHAMSE, SANDRA H. BERRY, PATRICIA A. EBENER,

example, one analysis from the 1980s concluded that of 100 injuries, about 10 resulted in pursuit of court remedies.<sup>177</sup>

The Concepcions' complaint alleged that more than 54 million people had cell phones,<sup>178</sup> and the district court reported that AT&T paid \$1.3 billion to settle billing problems in 2007 by giving "manual credits to resolve customer concerns and complaints."<sup>179</sup> Did the dollars paid capture the success of informal resolutions provided through AT&T's responsiveness or the tip of a volume of consumer claims never pursued? Does the demand on courts (in 2008, more than 25 million civil cases were filed — about 0.08 per capita given a population of about 300 million) predict rights-claiming in other venues? And what role do the rules of private arbitration play in prompting or deflecting claims? Unlike courts, third parties can neither attend nor inspect records (if made) of proceedings, opinions are not published, and parties may be subject to admonitions of confidentiality.<sup>180</sup>

In terms of the ease of using the procedures, the trial court in *AT&T* had found the waiver provisions unenforceable under California law, even as the judge noted that the arbitration process was "quick [and] easy to use,"<sup>181</sup> because class arbitration "could take months, if not years, and . . . may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars."<sup>182</sup> Yet few consumers invoked the process.

Return then to Turner's plea for counsel and consider its parallels in thinking about the Concepcion and Dukes plaintiffs' interest in using group-based procedures. The economic stakes in all three individuals' cases were too small to attract privately paid lawyers. Indeed, as Justice Breyer's dissent noted in *AT&T*, the stakes were so small that the Concepcions were unlikely to spend their own time "for the hassle."<sup>183</sup> Further, few would pay the \$125-capped AAA filing fee for a \$30 claim. Moreover, given the costs of investigation and of countering legal arguments, and the resources of their opponents, even if Dukes and the Concepcions were wealthy or had high-value claims,

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ELIZABETH G. LEWIS, E. ALLAN LIND, ROBERT J. MACCOUN, WILLARD G. MANNING, JEANNETTE A. ROGOWSKI & MARY E. VALANA, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991).

<sup>177</sup> See David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86 (1983).

<sup>178</sup> Concepcion Complaint, *supra* note 75, at para. 5.

<sup>179</sup> *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*3 (S.D. Cal. Aug. 11, 2008).

<sup>180</sup> See CONSUMER DUE PROCESS PROTOCOL, *supra* note 165, at princ. 12.

<sup>181</sup> *Laster*, 2008 WL 5216255, at \*11.

<sup>182</sup> *Id.* at \*12. See also *AT&T*, 131 S. Ct. at 1753.

<sup>183</sup> *AT&T*, 131 S. Ct. at 1760 (Breyer, J., dissenting).

lawyers would have little reason to sign on unless other disputants were added to build the potential for a larger recovery.<sup>184</sup>

In short, nineteenth- and twentieth-century political will — embodied in state and federal constitutions, legislation, and common law — opened courthouse doors for diverse kinds of litigants, but that will did not extend to devising systematic methods of financing access to litigation.<sup>185</sup> The ability to use courts turns in large measure on the private bar, a smattering of public legal aid programs, third-party insurance companies, and chronically underfunded agencies. The EEOC, constructed to serve as both an ADR provider and a gateway to court, is the example relevant here. In 2010, the EEOC received 99,222 requests for assistance<sup>186</sup> and filed 250 federal lawsuits.<sup>187</sup> Thus, the questions for the twenty-first century, illuminated by *AT&T*, *Wal-Mart*, and *Turner*, are whether and how to enable the use of courts and to provide resources for them to handle the resulting volume — or, as was argued in these cases, whether leaving people to their own devices to find their way into court or leaving courts behind is the wiser course.

## II. MAKING MEANING OF THE FEDERAL ARBITRATION ACT: FROM *WILKO V. SWAN* TO *AT&T V. CONCEPCION*

[I]n a consumer contract of adhesion [when] . . . disputes . . . involve small amounts of damages . . . the waiver [of a class action] becomes in practice the exemption of the party “from responsibility for [its] own fraud.”

— *Discover Bank v. Superior Court* (2005)<sup>188</sup>

*AT&T* holds that the Federal Arbitration Act preempts state law and that *AT&T*'s boilerplate bundle, permitting no opt-outs from its

<sup>184</sup> See generally Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943 (2004). As Yeazell and others have analyzed, the system is focused on settlement. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 483 (2004); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 926 (2000).

<sup>185</sup> Tracking public and private investments in justice systems is difficult. Exemplary efforts include Hadfield, *Higher Demand*, *supra* note 39, and EUROPEAN COMM'N FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS: EFFICIENCY AND QUALITY OF JUSTICE (2010).

<sup>186</sup> *Charge Statistics FY 1997 Through FY 2010*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Oct. 2, 2011). The budget for 2010 was about \$370 million. *EEOC Budget and Staffing History 1980 to Present*, EEOC, <http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm> (last visited Oct. 2, 2011).

<sup>187</sup> *EEOC Litigation Statistics, FY 1997 Through FY 2010*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Oct. 2, 2011).

<sup>188</sup> 113 P.3d 1100, 1110 (Cal. 2005) (quoting CAL. CIV. CODE § 1668).

individualized mandatory dispute resolution program, is enforceable.<sup>189</sup> To reach this conclusion, the Court interpreted the 1925 FAA as requiring bilateral arbitrations in the absence of bilateral negotiations.<sup>190</sup>

Text alone could not produce that result. Required are the forms of fairness analyses outlined above, comparing the quality of procedures in arbitration and in courts, evaluating the relevance of asymmetrical resources when forming contracts or classes and of the likelihood of intra-litigant equal treatment, and assessing the importance of publicity to facilitate access and discipline decisionmaking. To understand the interpretative choices made, a history of prior FAA rulings is required, for as Justice O'Connor explained in 1984, the Court has been “building . . . , case by case, an edifice of its own creation.”<sup>191</sup>

Through its doctrine, the Court has moved the FAA from a limited role to a major source of regulation of both state and federal judges and, to a lesser degree, of arbitrators. The Court has taken this early-twentieth-century provision, modeled for negotiated contracts, and applied it to the anonymous transactions recorded in boilerplate clauses. In addition to preempting state constitutional remedy provisions, state legislation on employee and consumer protection, the state common law of contracts, and state debates about the relationship between rights to court and ADR, the long arm of the FAA overrides many other federal statutory schemes that assign roles for rights enforcement to courts. If we inhabit a “Republic of Statutes,”<sup>192</sup> the Court’s purposeful interpretation of the FAA has turned it into a new pillar. The building blocks are outlined below.

#### A. *Scoping Out the 1925 FAA’s Reach*

As is familiar, voluntary arbitration has a long history, in and outside the United States.<sup>193</sup> But during the nineteenth century, courts protected their own jurisdiction by concluding that public policy did not permit the enforcement of an ex ante arbitration agreement over the objection of one side. Despite the then-reigning ideology of freedom of contract, courts “jealously” guarded their monopoly on judgment.<sup>194</sup> The FAA aimed to revise that attitude through its injunction

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<sup>189</sup> See *AT&T*, 131 S. Ct. at 1753.

<sup>190</sup> See *id.* at 1750–51.

<sup>191</sup> *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

<sup>192</sup> See generally WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

<sup>193</sup> See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION — NATIONALIZATION — INTERNATIONALIZATION* 15–100 (1992); Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 *THEORETICAL INQUIRIES* L. 423 (2009).

<sup>194</sup> H.R. REP. NO. 68-96, at 1–2 (1924).

that an arbitration provision “written . . . in any maritime transaction or a contract evidencing a transaction involving commerce” was “valid, irrevocable, and enforceable”<sup>195</sup> — subject to “such grounds as exist at law or in equity for the revocation of any contract,”<sup>196</sup> and excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>197</sup>

As is also familiar, the 1925 statute preceded the contemporary understanding of the reach of the Commerce Clause — raising questions about to which contracts and transactions, and in what jurisdictions, the FAA applied. In the decisions debating the FAA’s meaning, questions about its intended scope interacted with the Justices’ views of the relevance of differently resourced parties entering into contracts and about the utility of the arbitral form.

In 1953, the FAA’s applicability to one set of consumer contracts was decided in *Wilko v. Swan*.<sup>198</sup> A customer sued a brokerage firm for allegedly violating 1933 federal securities laws by making false representations about a merger.<sup>199</sup> The question was the enforceability of an agreement that suits would be stayed, at the behest of either party, in favor of arbitration.<sup>200</sup> Writing for the Court, Justice Reed concluded that even if some buyers and sellers dealt at “arm’s length on equal terms,” the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor” and therefore precluded application of the FAA.<sup>201</sup>

When rejecting the adjudication waiver, the Court discussed the differences between courts and arbitration.<sup>202</sup> As Justice Scalia would later note in *AT&T*, arbitration was informal and unreviewable, making it ill suited for a class.<sup>203</sup> In 1953, those qualities were also unacceptable for a “bilateral arbitration” (as the *AT&T* Court named it)<sup>204</sup> when a party objected. As the *Wilko* Court described the problems, arbitrators’ awards “may be made without explanation of [arbitrators’] reasons and without a complete record of their proceedings”; hence, one could not examine “arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘materi-

<sup>195</sup> Federal Arbitration Act, 9 U.S.C. § 2 (2006).

<sup>196</sup> *Id.* Congress took as its model a New York law of 1920. See MACNEIL, *supra* note 193, at 68.

<sup>197</sup> 9 U.S.C. § 1.

<sup>198</sup> 346 U.S. 427 (1953).

<sup>199</sup> *Id.* at 428–29.

<sup>200</sup> *Id.* at 430.

<sup>201</sup> *Id.* at 435.

<sup>202</sup> *Id.* at 433–38. The holding was premised on the interpretation that the arbitration constituted a “condition, stipulation, or provision binding any person acquiring any security to waive compliance” with the 1933 Act, which Congress had prevented parties from doing. *Id.* at 430 & n.6 (quoting 15 U.S.C. § 77n).

<sup>203</sup> *AT&T*, 131 S. Ct. at 1751–52.

<sup>204</sup> *Id.* at 1745.

al fact.”<sup>205</sup> In contrast, adjudication performed its regulatory role in monitoring adherence to congressional mandates protecting purchasers of stock.<sup>206</sup> Those views shaped three decades of decisions. Between 1953 and 1983, the Court heard fifteen cases in which arbitration was at issue,<sup>207</sup> and in the four in which an individual (as contrasted with a corporation) objected, the Court declined to require arbitration.<sup>208</sup>

But thereafter, the Court revisited the FAA and, between 1985 and 1989, overruled *Wilko*.<sup>209</sup> Specifically rejecting the 1953 Court’s concerns that arbitration was a “method of weakening the protections afforded in the substantive law to would-be complainants,”<sup>210</sup> new majorities reread both the FAA and other statutes to require or permit arbitration for various legal claims and between parties of different bargaining capacities.<sup>211</sup> The Court, as a matter of either statutory interpretation or common law elaborations of textual lacunae,<sup>212</sup> re-

<sup>205</sup> *Wilko*, 346 U.S. at 436; see also Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 223 (1995).

<sup>206</sup> Justice Jackson concurred. *Wilko*, 346 U.S. at 438–39 (Jackson, J., concurring). Justice Frankfurter in dissent, joined by Justice Minton, argued that no evidence had been presented that “the arbitral system as practiced in the City of New York . . . would not afford the [purchaser] the rights to which he [was] entitled,” as contrasted with the “tortuous course of litigation, especially in the City of New York.” *Id.* at 439–40 (Frankfurter, J., dissenting). Another critique of arbitration followed in 1956. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) (“Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited . . .”).

<sup>207</sup> *Wilko*, 346 U.S. 427; *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), overruled by *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Bernhardt*, 350 U.S. 198; *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957); *Goodall-Sanford, Inc. v. United Textile Workers, A.F.L. Local 1802*, 353 U.S. 550 (1957); *Gen. Elec. Co. v. Local 205, United Elec., Radio & Mach. Workers*, 353 U.S. 547 (1957); *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167 (1963); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Gen. Atomic Co. v. Felter*, 436 U.S. 493 (1978); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56 (1981); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

<sup>208</sup> See *Wilko*, 346 U.S. at 438; *Moseley*, 374 U.S. at 169; *U.S. Bulk Carriers, Inc.*, 400 U.S. at 357; *Merrill Lynch*, 414 U.S. at 138–39.

<sup>209</sup> *Wilko* was directly overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which built on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). See *Mitsubishi Motors Corp.*, 473 U.S. at 640 (enforcing an agreement to arbitrate antitrust claims); *Dean Witter Reynolds Inc.*, 470 U.S. at 218 (enforcing an agreement to arbitrate claims brought under the Securities Exchange Act related to an investment account); see also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (holding that claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act were arbitrable).

<sup>210</sup> *Rodriguez de Quijas*, 490 U.S. at 481.

<sup>211</sup> See, e.g., *id.* at 485–86.

<sup>212</sup> See *D’Antuono v. Serv. Rd. Corp.*, No. 3:11CV33 (MRK), 2011 WL 2175932, at \*21–31 (D. Conn. May 25, 2011) (reading *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000), and

quired enforcement unless objectors could meet their burden of demonstrating that Congress had directed otherwise in another statute,<sup>213</sup> that an “inherent conflict” existed between the other statutory right and arbitration,<sup>214</sup> or that the alternative dispute program was inadequate to “vindicate” statutory rights.<sup>215</sup>

In 1984, the Supreme Court applied the FAA to state courts. Chief Justice Burger (himself an ardent proponent of ADR)<sup>216</sup> wrote in *Southland Corp. v. Keating* that the FAA preempted California’s Franchise Investment Law,<sup>217</sup> which required “judicial consideration of claims brought under” it.<sup>218</sup> That decision met with objections by Justice Stevens that Congress had not “intended entirely to displace state authority”<sup>219</sup> and with sharper disagreement from Justice O’Connor and then-Justice Rehnquist. Given the statute’s specific reference to “the courts of the United States” in other provisions, Justices O’Connor and Rehnquist read the “facial silence” of the general mandate to arbitrate as a direction that the FAA applied only to the federal judiciary.<sup>220</sup> A decade thereafter, Justice Scalia agreed, stating he stood “ready to join four other Justices in overruling” *Southland*.<sup>221</sup>

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Second Circuit law as developing a common law evaluating whether arbitration expenses undercut its effectiveness as a method of vindicating federal statutory rights).

<sup>213</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

<sup>214</sup> *Id.* The question of whether the Credit Repair Organizations Act, 15 U.S.C. § 1679 (2006), is one such statute is before the Court in the 2011 Term in *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010), cert. granted, 131 S. Ct. 2874 (2011).

<sup>215</sup> *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)); see also *Green Tree Fin. Corp.—Ala.*, 531 U.S. at 90 (quoting *Gilmer*, 500 U.S. at 28).

<sup>216</sup> See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1603–04 (2006).

<sup>217</sup> CAL. CORP. CODE §§ 31,000–31,516 (West 1977).

<sup>218</sup> 465 U.S. 1, 10 (1984). The Chief Justice’s position was in tension with his general preference for state adjudication. The decision is a relatively early example of preemption as a major route for federalization. See generally Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011).

<sup>219</sup> *Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part). Justice Stevens argued that interpretation of § 2 was federal contract common law and that California law could be applied without “impairing the basic purposes of the federal statute.” *Id.* at 21.

<sup>220</sup> *Id.* at 22–23 (O’Connor, J., dissenting). Justice O’Connor faulted the Court’s application of the FAA as creating a “newly discovered federal right.” *Id.* at 35. In addition, the “unambiguous” legislative history supported this textual interpretation because Congress had relied on its power “to control the jurisdiction of the federal courts” to create a new procedural remedy rather than a new federal substantive right enforceable in state courts. *Id.* at 25. “Today’s decision is unfaithful to congressional intent, unnecessary, and . . . inexplicable.” *Id.* at 36; see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (O’Connor, J., concurring) (acquiescing in not overturning *Southland* but arguing it created a “faulty foundation”).

<sup>221</sup> *Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting).

Justice Thomas has likewise recorded his view that the FAA should not be applied to state courts.<sup>222</sup>

Yet as the details of the *AT&T* opinion illuminate, the Court became committed to arbitration as a process in addition to being a federally enforceable contractual clause. In 1985, the Court had rejected “the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”<sup>223</sup> But, by 2011, the Court read “bilateral” arbitration’s perceived advantages over adjudication to have been a part of the 1925 statute’s agenda. Arbitration’s attributed utilities — speed, low cost, and informality — became more important as the Court lost interest in power imbalances and in the idea that enforcement required negotiation and actual consent. In the 1960s, the Court referenced the “amicable and trusting atmosphere” and “frankness” of a mutually selected arbitral forum,<sup>224</sup> but its subsequent application of the FAA to consumers and employees deemphasized mutuality and choice and discounted asymmetrical resources.

That movement is mapped over decisions of the last two decades. In 1991, the Court enforced arbitration obligations over the objections of a financial services manager bringing a claim under the Age Discrimination in Employment Act.<sup>225</sup> “Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>226</sup> But that employee had the protection of New York Stock Exchange arbitration procedures approved by the Securities and Exchange Commission.<sup>227</sup> Thus, some argued that the FAA should be read to exempt employees in general, given that the text specifically excludes the only workers (those “engaged in foreign or interstate commerce”)<sup>228</sup> whom Congress had the clear authority to regulate in 1925. Although four Justices were persuaded that the statute was best read not to apply to employees, in 2001, a five-person majority held otherwise,<sup>229</sup> and the

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<sup>222</sup> *Id.* at 285 (Thomas, J., dissenting); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting).

<sup>223</sup> *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

<sup>224</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring).

<sup>225</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

<sup>226</sup> *Id.* at 33.

<sup>227</sup> See *id.* at 31 (citing Order Approving Proposed Rule Changes by the New York Stock Exchange Relating to the Arbitration Process and the Use of Pre-dispute Arbitration Clauses, 54 Fed. Reg. 21,144 (May 16, 1989)).

<sup>228</sup> 9 U.S.C. § 1 (2006).

<sup>229</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). The Court’s 5–4 *Circuit City* split debated which canons of construction governed and the question of inter-disputant inequality. Justice Stevens’s dissent argued that, while it was not “necessarily wrong for the Court to put its own imprint on a statute,” the legislative history made plain that the “potential disparity in bar-



Court has enforced arbitration clauses even when they appeared on job applications and when employees alleged violations of state anti-discrimination laws.<sup>230</sup>

Thereafter, the Court continued enlarging the FAA's scope when addressing the quality of consent,<sup>231</sup> the impact of the costs of arbitration,<sup>232</sup> and the allocation of authority between arbitrator and judge about contract interpretation.<sup>233</sup> The many decisions, often 5–4, regularly relied on the Court's own assessment of arbitration as preferable to adjudication. As the *AT&T* majority explained, enforcement of “privately made agreements to arbitrate”<sup>234</sup> was only one purpose of the FAA; the other was to eliminate “costliness and delays of litigation”<sup>235</sup> by promoting arbitration — a conclusion predicated on “our cases.”<sup>236</sup>

*B. The Fairness of Bilateralism, Boilerplate, and Class Arbitrations*

Figure 1 is a photocopy of my own cell phone contract, which I published in a law review in 2006 to illustrate that essay's title, *Whither and Whether Adjudication?*<sup>237</sup> Upon receiving this unilateral amendment to my prior service contract, I was unsuccessful in a telephone effort to negate it.

Whatever the fairness of either the underlying clause or the method of its amendment, the refusal to vary the terms for any one individual could well be described as “fair” in that, were I able to renegotiate, I would have used my superior legal knowledge and resources to strike a

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gaining power” between “large employers” and their employees “underlay Congress' exemption of contracts of employment from mandatory arbitration.” *Id.* at 132–33 (Stevens, J., dissenting).

<sup>230</sup> See, e.g., *id.* at 109 (majority opinion); *Equal Emp't Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002).

<sup>231</sup> For example, in 2009, the Court concluded (5–4) that because of a union collective bargaining arbitration agreement, individual employees had lost rights to have courts decide their age discrimination claims. See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1464–65 (2009).

<sup>232</sup> See, e.g., *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

<sup>233</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006), *rev'g Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862–64 (Fla. 2005). Further, even when state law would send an issue to an administrative forum, federal law requires arbitration. See *Preston v. Ferrer*, 128 S. Ct. 978, 984–87 (2008). In 2010, the Court held (again 5–4) that a challenge to the enforceability of an entire agreement (which the Ninth Circuit had held unconscionable because of a lack of meaningful consent) was for the arbitrator to decide. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010). However, in *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010), the Court held that the district court, and not the arbitrator, was to decide whether a collective bargaining agreement with a no-strike provision had been “validly formed during the strike period.” *Id.* at 2853.

<sup>234</sup> *AT&T*, 131 S. Ct. at 1749 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)) (internal quotation mark omitted).

<sup>235</sup> *Id.* (quoting *Dean Witter Reynolds*, 470 U.S. at 220 (quoting H.R. REP. NO. 68-96, at 2 (1924))) (internal quotation mark omitted).

<sup>236</sup> *Id.*

<sup>237</sup> See Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1134–35 (2006); see also RESNIK & CURTIS, *supra* note 37, at 319 fig.201.

deal that other cell phone customers could not.<sup>238</sup> Such provisions, central to “standard-form, nonnegotiated contracts,”<sup>239</sup> are justified not only by installing identical treatment across a class of one-shot players<sup>240</sup> but also by providing economies of scale through controlling sellers’ agents<sup>241</sup> and thereby stabilizing and lowering the costs of transactions across diverse participants.<sup>242</sup> Boilerplate can also be recycled. The increasingly ubiquitous court/class waiver provisions at issue in *AT&T* can, like prefabricated housing modules, move from context to context.<sup>243</sup> Lawyers are a major source of their manufacture,<sup>244</sup> and digital technology magnifies the potential for both replication and modification.<sup>245</sup>

The net effects of reliance on boilerplate clauses of various kinds are contested. Some commentators praise the overall managerial efficiency in promoting stability and agency control and argue that purveyors’ reputational interests will result in relaxed enforcement (and, hence, some individualization) when appropriate.<sup>246</sup> Critics, pointing

<sup>238</sup> In some contexts, differential dealing can prompt legal challenges. The alleged illegality of special prices for preferred customers is at the heart of the complaint against the securities trading firms that produced the Supreme Court’s famous class action ruling in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). *Eisen*’s interpretation of Rule 23, that plaintiffs bear the cost of individualized notice for classes certified under 23(b)(3), *see id.* at 177–79, was one of the reasons that plaintiffs such as the Dukes class would hope to gain the status of a (b)(2) class. *See infra* notes 383–386 and accompanying text.

<sup>239</sup> Omri Ben-Shahar, *Preface; or, A Boilerplate Introduction*, in *BOILERPLATE*, *supra* note 1, at ix [hereinafter Ben-Shahar, *Preface*].

<sup>240</sup> Boilerplate can also enable some consumers to differentiate themselves. *See* David Gilo & Ariel Porat, *The Unconventional Uses of Transaction Costs*, in *BOILERPLATE*, *supra* note 1, at 66, 69 (explaining how terms such as best-price guarantees and rebates enable price discrimination if acted upon by energetic consumers obtaining differential benefits).

<sup>241</sup> *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1222–23 (1983).

<sup>242</sup> *Id.* at 1221. In this classic article, Todd Rakoff argued for the presumptive unenforceability by judges of what he termed “invisible” adhesive clauses that were not the product of actual bargaining or of shopping. *Id.* at 1250–55; *see also* Rakoff, *The Law and Sociology of Boilerplate*, *supra* note 1, at 200–02.

<sup>243</sup> *See* Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, in *BOILERPLATE*, *supra* note 1, at 163, 164, 171. For example, one review of 161 businesses in home repair, hospitals, airlines, and grocery stores found that 35% included arbitration clauses in their consumer contracts. *See* Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, *LAW & CONTEMP. PROBS.*, Winter–Spring 2004, at 55, 62–63, 67–70.

<sup>244</sup> *See* Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, in *BOILERPLATE*, *supra* note 1, at 176, 176–77 (tracing the development and the “common law of common boilerplate”).

<sup>245</sup> *See* Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, in *BOILERPLATE*, *supra* note 1, at 189, 190–92.

<sup>246</sup> *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE*, *supra* note 1, at 3, 3–11. They posited a “large number of cases in which sellers dependably treat consumers much better than their contracts require them to do.” *Id.* at 9. Their examples focused on publication, hotel, and airline contracts, *id.* at 10, and

# Your Cellular Service Agreement

Please read carefully  
before filing in a safe place.

## YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT . . . . IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). . . . YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE . . . .

Fig. 1. Cellular phone contract

to resource asymmetries, worry that boilerplate could enable “informal implementation of apparent rules as standards [to] exacerbate wealth disparities.”<sup>247</sup>

their analysis was “limited to . . . repetitive selling . . . under conditions of good consumer information about sellers,” *id.* at 11. Rakoff criticized that essay for lacking a model of reputation or of the transaction costs of sorting the merits of consumers’ claims. Rakoff, *The Law and Sociology of Boilerplate*, *supra* note 1, at 200, 201. Others argued the validity of arbitration clauses based on the “manifested intention to be legally bound.” Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 627, 639 (2002); *see also* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements — With Particular Consideration of Class Actions and Arbitration Fees*, 5 *J. AM. ARB.* 251, 264–69 (2006).

<sup>247</sup> *See* Radin, *supra* note 245, at 193. Radin also noted the potential efficiency trade-offs. *Id.* at 192–94. Additional criticism comes from PUB. CITIZEN, *THE ARBITRATION TRAP: HOW*

### **INDEPENDENT ARBITRATION**

**INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:**

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

The poor visual quality of the cell phone contract reproduced in figure 1 makes another point. Just as readers of these pages are unlikely to delve into its provisions, those who find these clauses in packaging (or on job applications) are similarly unlikely to read the terms.<sup>248</sup> The unreadability embodies their "unreadiness," which is of course also economical. Reading is a waste of time because the provi-

CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

<sup>248</sup> One review found that 31% of arbitration clauses did not explain who would conduct the arbitration, 73% did not detail how the arbitrator would be selected, and 42% gave no information regarding the division of costs and fees. See Demaine & Hensler, *supra* note 243, at 67–70.

sion is a “take it or leave it” clause, avoided only by not buying that phone service.

In this instance, the options are narrower. Consumers either accept similar terms or do not have cell phones. According to AT&T’s amicus CTIA — The Wireless Association, “[m]ost of the 240 million mobile telephone subscribers in the United States have service agreements that expressly provide for arbitration and specify that the arbitration must proceed on an individual basis.”<sup>249</sup> That neither shopping nor bargaining is available is underscored by the odd symmetry that my cell phone provision proffers. Both the provider and I agree to waive our rights to proceed in a class, as if providers relied on class actions to pursue claims against customers. This facet exemplifies Omri Ben-Shahar’s point that boilerplate terms can “appear objective, but they are often one-sided . . . . Disguised by ‘legalese,’ they are often unbalanced, favoring their drafter.”<sup>250</sup> In short, enforcing boilerplate class waivers raises problems of equipage, equality, and fairness, as do decisions about when to permit class actions and to provide rights to counsel.

The gravamen of the Concepcions’ complaint was that AT&T had violated state deceptive advertising laws by charging sales tax on phones’ retail prices while describing them as “free.” But reaching that issue turned on the legality of another AT&T provision — that a consumer pursue arbitration only as an “individual,” rather than “as a plaintiff or class member in any purported class or representative proceeding,”<sup>251</sup> and that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.”<sup>252</sup> Before I turn to the Court’s decision, the idea of a “class arbitration” needs explication.

That procedural form is a by-product of the interaction between arbitration policies and courts. In the early 1980s, California was one

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<sup>249</sup> CTIA Amicus for AT&T, *supra* note 168, at 2. As of July 2011, T-Mobile distinguished itself by permitting an opt-out of that provision within thirty days if the customer did so in writing or via a phone call — rewarding customers who read and then act. See *Service Agreement*, T-MOBILE (2009), available at [http://www.t-mobile.com/company/pdf/english/Manual Service Agreement.pdf](http://www.t-mobile.com/company/pdf/english/Manual%20Service%20Agreement.pdf); *T-Mobile Terms & Conditions*, T-MOBILE, [http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr\\_Ftr\\_TermsAndConditions](http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions) (last visited Oct. 2, 2011).

<sup>250</sup> Ben-Shahar, *Preface*, *supra* note 239, at ix, x. As he explained, boilerplate is “a legal phenomenon different from contract” that is often deployed in contracts. *Id.* at xiv; see also Douglas G. Baird, *The Boilerplate Puzzle*, in *BOILERPLATE*, *supra* note 1, at 131, 133–34. Baird, generally critical of case law invalidating some boilerplate clauses, argued that adhesion clauses themselves were not problematic but their content could be. See *id.* at 142. His examples included the Writers Guild of America, West’s arbitration provision, in which the “arbiters themselves do not meet” or “even know each other’s names,” and thus “undercut[] process rights that the law regards as particularly important.” *Id.* at 141.

<sup>251</sup> *AT&T*, 131 S. Ct. at 1744 (quoting Petition for Writ of Certiorari at 61a, *AT&T*, 131 S. Ct. 1740 (No. 09-893)) (internal quotation mark omitted).

<sup>252</sup> *Id.* at 1744 n.2 (quoting Petition for Writ of Certiorari, *AT&T*, *supra* note 251, at 61a) (internal quotation marks omitted).

of the pioneers of class arbitrations, designed to meld pro-arbitration policies with classwide claims of injury.<sup>253</sup> An oft-cited example was a challenge by some 800 franchisees to their franchisor's accounting practices.<sup>254</sup> Rather than having claimants proceed single file, the California Supreme Court concluded that a class arbitration could "offer a better, more efficient, and fairer solution."<sup>255</sup>

But because absentees may not know they are part of a group committed to a private arbitrator rendering unreviewable decisions, that court outlined what some call a "hybrid class": arbitrators resolve the merits and judges deal with issues of certification, notice to absentees, and distributions of damages<sup>256</sup> so as to safeguard absentees' rights.<sup>257</sup> Thereafter, a trickle of law responded,<sup>258</sup> as some state and federal courts held they lacked power to authorize class arbitrations,<sup>259</sup> and others found them permissible if judges supervised arbitrators through the kinds of procedures California had sketched.<sup>260</sup>

Assuming arbitration's economies, one could find class arbitration attractive not only because of its potential to deal equally with similarly situated disputants but also because it might respond to another facet of fairness: asymmetries between disputants. If one models arbitration as a substitute for adjudication as well as a means of filling contract gaps in instances when contracts are negotiated expressions of the parties' intentions,<sup>261</sup> class arbitrations may do that work more successfully than individual arbitrations and provide outcomes that supply missing terms. Moreover, the hybrid method serves to force in-

<sup>253</sup> An earlier example is *Coleman v. National Movie-Dine, Inc.*, 449 F. Supp. 945 (E.D. Pa. 1978), which found arbitrable a class action because, if not, "adding persons to a civil action . . . would thwart the federal policy in favor of arbitration." *Id.* at 948; *see also* 1977 Mass. Acts 518 (codified at MASS. GEN. LAWS ANN. ch. 251, § 2A) (recognizing consolidation in arbitration). Further, as the Court noted in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the New York Stock Exchange rules provided for "collective proceedings" in arbitration. *Id.* at 32.

<sup>254</sup> *See Keating v. Superior Court*, 645 P.2d 1192, 1208–10 (Cal. 1982). The decision was overturned in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). *See supra* notes 216–222 and accompanying text; *see also* *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301 (2004).

<sup>255</sup> *Keating*, 645 P.2d at 1192; *see also* *Lewis v. Prudential Bache Sec.*, 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 322 & n.6 (Cal. Ct. App. 1986) (holding that courts may reserve "due process review").

<sup>256</sup> *See Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1166–67 (Cal. 2003).

<sup>257</sup> *See Lewis*, 225 Cal. Rptr. at 75.

<sup>258</sup> *See generally* 2 IAN R. MACNEIL, RICHARD E. SPEIDEL, & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 18.9 (1999) ("Classwide Arbitrations").

<sup>259</sup> *See, e.g.*, *Champ v. Siegel Trading Co.*, 55 F.3d 269, 271 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001).

<sup>260</sup> *See* Buckner, *supra* note 254, at 322.

<sup>261</sup> *See* Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 486–88 (2010).

formation about the process into the public realm, producing some of the publicity that accompanies adjudication.

In 2003, the Supreme Court appeared to lend support to the concept of class arbitrations when, in *Green Tree Financial Corp. v. Bazzle*, it held that the question of whether a contract precluded class arbitration was to be determined initially by an arbitrator rather than a judge.<sup>262</sup> The marketplace responded, as the AAA and JAMS fashioned rules along the lines of Rule 23 for class arbitrations.<sup>263</sup> By 2009, as *AT&T* recounted, the AAA's searchable class arbitration docket listed 283 class arbitrations, of which 121 were active and 162 were "settled, withdrawn, or dismissed" without merits rulings.<sup>264</sup> By 2011, the number tallied on the AAA docket had grown to 307.<sup>265</sup> That database may not account for all such proceedings, for it depends on arbitrators to forward information.<sup>266</sup> But the AAA docket does make public a roster of cases, complaints, and in some instances, materials noting settlements or decisions.<sup>267</sup> Court-based class actions, however, cannot be dismissed or compromised without judicial approval and appellate rights and, hence, produce public records of the alleged merits of claims, parties' accommodations, and judicial rulings.<sup>268</sup> In contrast, a full account of process and outcomes for class arbitrations remains elusive.

Further, as my cell phone provision and the debate in *AT&T* illustrate, many businesses wrote clauses imposing "the express condition

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<sup>262</sup> 539 U.S. 444, 452–54 (2003) (plurality opinion). Justice Breyer was joined by Justices Scalia, Souter, and Ginsburg, with Justice Stevens concurring in the judgment and dissenting in part. Some also read the Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), that arbitrators could not permit a class arbitration if a contract did not expressly authorize it, as further evidence that class arbitrations were viable. *Id.* at 1775–76.

<sup>263</sup> AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2007), available at <http://www.adr.org/sp.asp?id=21936>; JAMS, CLASS ACTION PROCEDURES (2009), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Class\\_Action\\_Procedures-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf). The AAA included provisions for hybrids, as well. Buckner, *supra* note 254, at 333–34. For a brief time, JAMS took the position that it would not enforce waivers of class rights but then retreated. See Press Release, JAMS, JAMS Takes Steps to Ensure Fairness in Consumer Arbitrations (Nov. 12, 2004) (on file with the Harvard Law School Library); Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2005) (on file with the Harvard Law School Library) (explaining that, as a neutral, it would take no position on class action waivers); Buckner, *supra* note 254, at 303 n.20.

<sup>264</sup> *AT&T*, 131 S. Ct. at 1751 (citing Brief of American Arbitration Ass'n as Amicus Curiae in Support of Neither Party at 22–24, *Stolt-Nielsen*, 130 S. Ct. 1758 (No. 08-1198), 2009 WL 2896309).

<sup>265</sup> See *Searchable Class Arbitration Docket*, *supra* note 174.

<sup>266</sup> See AM. ARBITRATION ASS'N, CCP SECTION 1281.96 DATA COLLECTION REQUIREMENTS (2011), available at <http://www.adr.org/si.asp?id=6488>.

<sup>267</sup> *Searchable Class Action Docket*, *supra* note 174; see, e.g., *Brown v. Cellco P'ship*, AM. ARBITRATION ASS'N, <http://www.adr.org/sp.asp?id=29384> (last visited Oct. 2, 2011).

<sup>268</sup> See FED. R. CIV. P. 23(e).

that arbitration be individualized.”<sup>269</sup> In the Court’s ruling, all Justices agreed that enforcement turned on what meaning to give to the FAA direction that arbitration contracts were “valid, irrevocable, and enforceable,” subject to “such grounds as exist at law or in equity for the revocation of any contract.”<sup>270</sup> All also agreed that California contract law governed, unless preempted.

The relevant state decision, *Discover Bank v. Superior Court*, interpreting a California statute, turned on asymmetries of bargaining power.<sup>271</sup> California refused to enforce class waivers if (a) they were in a “consumer contract of adhesion,” (b) predictably small damage disputes could arise between the parties, and (c) the “party with the superior bargaining power” was alleged to have “carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>272</sup> When those criteria were met, enforcing class waivers would effectively permit the proffering party to exempt itself from responsibility for the allegedly willful injury inflicted.<sup>273</sup>

While California law had judged the AT&T clause to be unfair, AT&T’s lawyer specifically told the Supreme Court that it was “fair” to apply the terms, and the reasons were twofold, engaging the ideas of intentionality and discrimination. First, the Concepcions had signed a contract, and holding persons to their promises was “fair.” Second, California law itself was unfair, for it discriminated against the federally protected right to insist, once contracts were signed, on arbitration as the forum for dispute resolution.<sup>274</sup>

The majority adopted those terms in framing its holding; given that arbitration, “a matter of contract,”<sup>275</sup> had been placed on “an equal footing with other contracts”<sup>276</sup> by the FAA, the issue was whether the California rule was hostile to the “overarching purpose”<sup>277</sup> of ensuring “the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>278</sup> Built into that description was the outcome. The California prohibition on waivers of class arbi-

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<sup>269</sup> CTIA Amicus for AT&T, *supra* note 168, at 18; *see also* Edward Wood Dunham, *Operations Manual: The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).

<sup>270</sup> 9 U.S.C. § 2 (2006).

<sup>271</sup> 113 P.3d 1100, 1110 (Cal. 2005).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* The court relied on a statutory prohibition on exempting oneself from responsibility for one’s own fraud or for willful injury. *Id.*; *see* CAL. CIV. CODE § 1668 (2011).

<sup>274</sup> Transcript of Oral Argument at 12:7–10, 21:13–22, *AT&T*, 131 S. Ct. 1740 (No. 09-893) (argument by AT&T’s attorney Andrew Pincus), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-893.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-893.pdf).

<sup>275</sup> *AT&T*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)) (internal quotation mark omitted).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1748.

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



tration “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and was thus preempted.<sup>279</sup>

Disagreeing with the characterizations of both the California rule and the FAA, Justice Breyer’s dissent (joined by Justices Ginsburg, Sotomayor, and Kagan) objected to the lack of “honor” paid to “federalist principles.”<sup>280</sup> For the dissenters, California’s *Discover Bank* holding applied “equally” to class waivers in and out of court; the FAA’s purpose was to create “no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.”<sup>281</sup> Thus, “[l]inguistically speaking,” California’s rule fit “directly within the scope” of the Act’s recognition of state law’s governance of contract revocation.<sup>282</sup>

The divide also turned on disagreements about whether the FAA provided substantive directions on the virtues or vices of individual versus class arbitrations and, hence, the discussion sounded in due process-like assessments of the quality of decisionmaking and the impact of procedural rights on the power relationships of adversaries. The majority described “bilateral” arbitration as embodying “the principal advantage of arbitration — its informality.”<sup>283</sup> (That informality, with its potential for lawlessness, was what, in 1953, made arbitration unenforceable in *Wilko*.) Further, the *AT&T* majority characterized bilateral arbitrations as speedy and relatively low cost, whereas class arbitrations were slow.<sup>284</sup>

How did the Court know about the trade-offs? California was a source, for, as noted, the state requires arbitration organizations to report some data.<sup>285</sup> The majority thus turned to an AAA report that “the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only.”<sup>286</sup> In contrast, in the 283 class arbitrations “opened” by the AAA, the “median time from filing to settlement, withdrawal, or dismissal — not judgment on the merits — was 583 days, and the mean was 630 days.”<sup>287</sup> On the majority’s reading of the numbers, class arbitrations were “more likely to generate procedural morass than final judgment.”<sup>288</sup> In addition, class

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<sup>279</sup> *Id.* at 1753.

<sup>280</sup> *Id.* at 1762 (Breyer, J., dissenting).

<sup>281</sup> *Id.* at 1757 (quoting 65 CONG. REC. 1931 (1924)) (internal quotation mark omitted).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 1751 (majority opinion) (noting that “class arbitration requires procedural formality”).

<sup>284</sup> *Id.*

<sup>285</sup> See *supra* note 156.

<sup>286</sup> *AT&T*, 131 S. Ct. at 1751 (citing AAA, ANALYSIS OF CASELOAD, *supra* note 161).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

arbitrations rendered confidentiality and protection of absent parties “more difficult.”<sup>289</sup> Lurking, but unexplored, were due process questions about whether such decisions could legally be preclusive of new claims filed by absentees.<sup>290</sup> The majority also did not analyze whether “hybrid classes,” where judges supervised the procedural structure, might mitigate some of the concerns.

The majority concluded that class arbitrations gave plaintiffs too much power, creating the risk of “in terrorem” settlements, putting the defendant into the posture of having (in the Court’s words) to “bet the company with no effective means of review.”<sup>291</sup> The informal, extra-legal nature of class arbitrations “greatly increase[d] risks to defendants,” and such risks were at “unacceptable” levels because of the limited role for court oversight.<sup>292</sup> Why was so little court oversight involved? Under the FAA, judges were to consider only whether an award was “procured by ‘corruption,’ ‘fraud,’ or ‘undue means,’” and parties could not, per the Court’s 2008 ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, confer additional authority on courts to widen grounds for review.<sup>293</sup> Not in the majority’s calculations were the factors of which process facilitated access for more people, which addressed intra-litigant disparities, and which produced public information and control over decisionmakers. Further, the majority’s insistence that contract terms had to be enforced could, depending on the clauses written, be in tension with its view that the FAA imposed the rule of bilateral arbitrations. The counterfactual hypothetical is, of course, that a provider might oblige class arbitrations.

Justice Breyer’s dissent argued the benefits of aggregation to right, rather than tilt, the power equilibrium. In 1925, he commented, arbitration was nascent, and therefore the FAA could have neither mandated nor codified particular procedures such as bilateral arbitration.<sup>294</sup> Moreover, as the FAA’s history focused on opponents of “roughly equivalent bargaining power,” the development of aggregate arbitrations was consistent with what Congress had in mind for its statute’s users and beneficiaries.<sup>295</sup> Further, while the majority had compared class and individual arbitrations, the dissent compared class actions in court and in arbitration. Drawing on data from a study of class actions in California, Justice Breyer noted that “class arbitrations

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<sup>289</sup> *Id.* at 1750.

<sup>290</sup> See CTIA Amicus for AT&T, *supra* note 168, at 14, 17–18 (objecting as well to the hybrid form).

<sup>291</sup> *AT&T*, 131 S. Ct. at 1752.

<sup>292</sup> *Id.*

<sup>293</sup> 552 U.S. 576, 578 (2008) (quoting 9 U.S.C. § 10(a)(1) (2006)).

<sup>294</sup> *AT&T*, 131 S. Ct. at 1759 (Breyer, J., dissenting).

<sup>295</sup> *Id.*

can take considerably less time than in-court proceedings in which class certification is sought.”<sup>296</sup> A single class action would be “surely more efficient than thousands of separate proceedings for identical claims.”<sup>297</sup>

But that efficiency depended on individuals who opted to use the procedures. Unmentioned in either *AT&T* opinion were the data cited by Concepcion amici and by the district court on use of the arbitration program. Between 2003 and 2007 (when the market of cell phone users exceeded 50 million), the AAA recorded 170 consumer arbitrations against AT&T Mobility, AT&T Wireless, and Cingular Wireless; AT&T reported a higher number — 570 arbitrations.<sup>298</sup> “Thousands of separate proceedings for identical claims” were not the alternative.<sup>299</sup> The few customers using the procedures made individualization very economical for the providers. As Justice Breyer — quoting Judge Posner — pointed out, even if the process provided were easy to use, the “‘realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.’”<sup>300</sup>

The larger question, unaddressed by all the Justices, was the one that Arthur Leff posed in 1970: “why would one . . . characterize those pieces of paper which pass between [these] parties as ‘contracts’?”<sup>301</sup> While the documents used the word “contract,” they departed from that model, which entailed “not only a deal, but dealing” that could, across a set, “lessen the possibility of monolithic one-sidedness.”<sup>302</sup> The consumer materials at issue in *AT&T* demonstrated, instead, a “monolithic one-sidedness.” Unilateral change — without a hint of negotiation — was what AT&T repeatedly imposed. During the pendency of the litigation, AT&T changed its dispute resolution rules to be

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<sup>296</sup> *Id.* (citing JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION 18 (2010)).

<sup>297</sup> *Id.*

<sup>298</sup> See Civil Procedure Amici for Concepcion, *supra* note 172, at 20 (citing Declaration of Bruce L. Simon in Support of Plaintiffs’ Opposition to Defendants’ Amended Motion to Compel Arbitration, *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009) (No. 06-944) (detailing statistics on the AAA’s website and noting that consumers were self-represented in 122 of 140 cases against AT&T)); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*13 (S.D. Cal. Aug. 11, 2008) (noting that between December 2006 and February 2008, AT&T received 570 Notices of Dispute and Demands for Arbitration).

<sup>299</sup> *AT&T*, 131 S. Ct. at 1759 (Breyer, J., dissenting).

<sup>300</sup> *Id.* at 1761 (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

<sup>301</sup> Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132 (1970); see also Radin, *supra* note 245, at 189–99.

<sup>302</sup> Leff, *supra* note 301, at 138, 140. In a study of contracts when bargaining existed, fewer than one in ten mandated arbitration. See Eisenberg, Miller, & Sherwin, *supra* note 157, at 876.

more consumer friendly,<sup>303</sup> and AT&T is free unilaterally to amend its rules again.<sup>304</sup>

Leff admired the “analytic device” of “contracts of adhesion” that 1940s theorists and jurists had developed.<sup>305</sup> But what flowed from that category was a fixation by courts on righting the deal,<sup>306</sup> when no deal had taken place. Thus, Leff concluded that the idea of a contract of adhesion, while “elegant,” was a practical “disaster.”<sup>307</sup> The doctrine invited courts to undo various contracts through “public policy,” “unconscionability,” or other doctrines<sup>308</sup> (as California, as well as Nebraska, New Jersey, Missouri, and South Carolina, had done when evaluating class action waivers<sup>309</sup>). But Leff thought ideas of unconscionability, duress, and fraud were “beside the point.”<sup>310</sup> Instead of putting such boilerplate provisions into the category of contract, Leff argued that “products of non-bargaining” were “unilaterally manufactured commodities.”<sup>311</sup> Papers like those that passed between AT&T and the Concepcions were a product, a “thing,” and if the “thing” had quality control problems, the law ought to regulate it.

<sup>303</sup> As the majority put it, AT&T’s agreement “authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions.” *AT&T*, 131 S. Ct. at 1744.

<sup>304</sup> Two caveats, one imposed by the state and one by the market, are in order. First, the majority concluded that states could “take steps addressing the concerns that attend contracts of adhesion — for example, requiring class-action-waiver provisions in adhesive agreements to be highlighted.” *Id.* at 1750 n.6. Second, the AAA has independent reputational stakes and hence has its own procedures for consumer arbitrations, which would constrain AT&T unless it selected another dispute resolution provider. *See, e.g.*, AAA Consumer Procedures, AM. ARBITRATION ASS’N, [http://www.adr.org/consumer\\_arbitration](http://www.adr.org/consumer_arbitration) (last visited Oct. 2, 2011). But the institutional participants have leverage, as illustrated by the decision of JAMS, which initially refused to enforce class waivers, to retreat in the face of protests from its corporate customers. *See supra* note 263.

<sup>305</sup> Leff, *supra* note 301, at 142.

<sup>306</sup> Justice Thomas’s concurrence in *AT&T* likewise focused on dealmaking. *See* 131 S. Ct. at 1753 (Thomas, J., concurring). He read the FAA requirement of “enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake” to dictate that revocation based on the *Discover Bank* rule was invalid because a state’s public policy objection had no relation to the formation of the contract. *Id.* at 1755. He noted the possibility of other defenses based on contract formation. *Id.*

<sup>307</sup> Leff, *supra* note 301, at 142.

<sup>308</sup> *Id.* at 142–43.

<sup>309</sup> Decisions doing so were vacated and remanded in light of *AT&T*. *See* *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (applying California law); *Cellco P’ship v. Litman*, 131 S. Ct. 2872 (2011) (applying New Jersey law); *Litman v. Cellco P’ship*, 131 S. Ct. 2873 (2011) (same); *Mo. Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011) (applying Missouri law); *Sonic Auto., Inc. v. Watts*, 131 S. Ct. 2872 (2011) (applying South Carolina law).

<sup>310</sup> Leff, *supra* note 301, at 148.

<sup>311</sup> *Id.* at 147. *See also* Rakoff, *The Law and Sociology of Boilerplate*, *supra* note 1, at 202–03. Unconscionability law embraced the language of manufacturing. For instance, in 1962, the Supreme Court of California held that a “mass-made contract” — in that case, a life insurance policy sold in an airport vending machine — could not be “equate[d] [with] the bargaining table, where each clause is the subject of debate.” *Steven v. Fid. & Cas. Co. of N.Y.*, 377 P.2d 284, 293, 298 (1962).

By failing to regulate, as Margaret Jane Radin has charted, the law moved from enforcing provisions that were the output of the voluntary meeting of minds (“bespoke,” to borrow the English term for custom-tailored clothes) to relying on a fictive assent; the result is the “rearrangement of entitlements without any consent or assent.”<sup>312</sup> To intervene usefully requires (to borrow from Todd Rakoff) a focus on “the particular institutional location of the parties involved”<sup>313</sup> — that is, consideration of resource and knowledge asymmetries that undermine the fairness of enforcing provisions in contracts. Absent such regulation, Radin warned, “sovereign functions” move from the state to the firm.<sup>314</sup>

The Court’s reading of the FAA has shifted those functions by divesting states of the potential to tailor arbitration obligations to address fairness concerns. Nebraska, evoked at the outset, provides the example. In 1987, its legislature enacted a version of the Uniform Arbitration Act whose words track parts of the FAA.<sup>315</sup> But Nebraska imposed both more constraints (such as that contracts be “entered into voluntarily and willingly”) and more exemptions (such as those arising under the state’s Fair Employment Practice Act).<sup>316</sup> In 1991, the Nebraska Supreme Court held that the arbitration statute violated the state constitution’s open court/rights-to-remedy clause.<sup>317</sup>

In response, various businesses, the state’s Chamber of Commerce, and others sought a constitutional amendment that, although opposed by a group including trial lawyers,<sup>318</sup> was enacted in 1996. Added to the mandates that courts be open and “every person shall have a remedy” was the constitutional proviso that the legislature could “provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntari-

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<sup>312</sup> Radin, *supra* note 245, at 196; *see also* Daniel Markovits, Market Solidarity: Price as Commensuration, Contract as Integration 201 (2011) (unpublished manuscript) (on file with the Harvard Law School Library) (arguing that “contracts of adhesion allow term-makers to behave unfairly and inefficiently against term-takers, whom they render unfree”).

<sup>313</sup> Rakoff, *The Law and Sociology of Boilerplate*, *supra* note 1, at 204.

<sup>314</sup> Radin, *supra* note 245, at 199; *see also* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 441 (2011) (arguing that the Court’s interpretation of the FAA permits unconstitutional delegation of lawmaking powers to the private sector).

<sup>315</sup> Compare L.B. 71, 90th Leg., 1st Sess., 1987 Neb. Laws 259 (codified at NEB. REV. STAT. § 25-2602 (1995) (repealed and reenacted in 1997)), with the FAA, 9 U.S.C. §§ 1-14 (2006).

<sup>316</sup> NEB. REV. STAT. § 25-2602. Other states have also imposed limits. *See, e.g.*, MONT. CODE ANN. § 27-5-114(2) (2009). In *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Supreme Court held Montana’s special notice provision in the prior version of its arbitration statute to be preempted by the FAA. *Id.* at 683.

<sup>317</sup> *State v. Neb. Ass’n of Pub. Emps., Local 61*, 477 N.W.2d 577, 581-82 (Neb. 1991) (citing NEB. CONST. art. I, § 13).

<sup>318</sup> *See, e.g.*, Editorial, *1996 Field of Amendments Contains Two Worthy of a Yes*, OMAHA WORLD-HERALD (Neb.), May 7, 1996, at 10; Leslie Boellstorff, *Amendments May Be “Innocent Bystanders,”* OMAHA WORLD-HERALD (Neb.), May 12, 1996, at 4B.

ly and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>319</sup> Yet the Nebraska courts’ interpretative authority over that constitutional text has now been eclipsed by FAA preemption,<sup>320</sup> as has the authority of the several other state courts holding waivers unconscionable.<sup>321</sup>

Return then to the facets of fairness analyses engaged when the Supreme Court made its interpretative choices. The Concepcions and their amici argued that the federal structure of the United States gave rein to state contract law, including decisions such as California’s that leaving consumers to individualized procedures was profoundly unfair.<sup>322</sup> The providers insisted that they could tolerate no variations across state lines; they required not only a “uniform contract to govern customer relationships across the country”<sup>323</sup> but one that permitted no arbitration aggregation.<sup>324</sup> The providers threatened that if the waivers were not upheld, they would abandon arbitration altogether and force their customers into litigation<sup>325</sup> — extracting rents not only from

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<sup>319</sup> NEB. CONST. art. I, § 13 (amended 1996). Thereafter, the legislature reenacted the statute. See NEB. REV. STAT. § 25-2602.01 (2010). See generally John M. Gradwohl, *Arbitrability Under Nebraska Contracts: Relatively Clarified at Last*, 31 CREIGHTON L. REV. 207 (1997).

<sup>320</sup> See *Cornhusker Int’l Trucks, Inc. v. Thomas Built Buses, Inc.*, 637 N.W.2d 876 (Neb. 2002); *Aramark Unif. & Career Apparel, Inc. v. Hunan, Inc.*, 757 N.W.2d 205 (Neb. 2008).

<sup>321</sup> See *supra* note 309.

<sup>322</sup> Respondents’ Brief in Opposition at 13, *AT&T*, 130 S. Ct. 3322 (No. 09-893), 2010 WL 1725601.

<sup>323</sup> CTIA Amicus for AT&T, *supra* note 168, at 22 (noting also that California was a key market space, *id.* at 23).

<sup>324</sup> The efficiencies and legalities of uniformity are important to parse. The economic impact of variation in waiver clauses that could result from different state laws depends in part on whether class actions filed in states permitting them produce positive or negative externalities. Two states, filing on behalf of AT&T and therefore for the preemption of state law, argued individual arbitrations were “consumer-friendly” and class actions problematic. Brief for Amici Curiae the States of South Carolina and Utah in Support of Petitioner, *AT&T*, 130 S. Ct. 3322 (No. 09-893), 2010 WL 3198844, at \*8 [hereinafter *South Carolina & Utah Amici for AT&T*]. Several other states and the District of Columbia, filing in support of the Concepcions, praised consumer class actions as “an important complement to government efforts at safeguarding consumers against fraudulent and deceitful practices.” Brief for the States of Illinois, Maryland, Minnesota, Montana, New Mexico, Tennessee, and Vermont and the District of Columbia as Amici Curiae in Support of Respondents at 1, *AT&T*, 130 S. Ct. 3322 (No. 09-893), 2010 WL 3973890 [hereinafter *Illinois et al. Amici for Concepcion*].

<sup>325</sup> As noted, AT&T provided a “small claims” court option — albeit without much detail in its agreement. See *supra* p. 102. In contrast, the Sprint contract explained that if a class arbitration clause were held unenforceable, Sprint would insist that disputes “must be brought in court.” CTIA Amicus for AT&T, *supra* note 168, at 19. Further, the Chamber of Commerce noted that Comcast, “the nation’s largest cable services provider,” had “abandon[ed] arbitration,” as had American Express, which informed its credit card holders that if restrictions on arbitration were “deemed invalid,” the arbitration provisions were inapplicable. See Chamber of Commerce Amicus for AT&T, *supra* note 122, at \*4–5, \*16. Yet class waiver forms were prohibited by the private association governing the securities industry. See Catherine M. Foti & David C. Austin, *How “AT&T Mobility” Changes the Course of Securities Class Actions, Arbitrations*, N.Y. L.J., June

purchasers but, if customers pursued claims, also from other court users and the judicial system itself.

While the debate in *AT&T* took place under the rubric of the FAA, a good deal of the substantive discussion sounded in differing assessments of the qualities of arbitration and adjudication, singular and aggregated. The Justices did not use the phrase “due process,” for that constitutional mandate runs to governments,<sup>326</sup> yet their judgments and disagreements entailed considering the quality of procedures, the asymmetries between disputants and the risks of intra-litigant disparities, and the relevance of access and publicity, all of which are dimensions of the due process analyses set forth at the outset.

Indeed, private providers of dispute resolution services themselves specifically invoke aspects of what they label due process. The AAA joined in the development of a “Consumer Due Process Protocol,” whose first principle is that “[a]ll parties are entitled to a fundamentally-fair ADR process.”<sup>327</sup> Detailed thereafter are provisions familiar from the law on fair procedures, such as “notice of hearings and an opportunity to be heard,” the impartiality of “neutrals,” opportunities to include lawyers if disputants retain them, and access to information from opponents.<sup>328</sup>

Yet a central feature of these voluntarily adopted “rights” is “confidentiality,” making hearings private.<sup>329</sup> Thus, holding aside state attorneys general (many reporting themselves strapped for resources)<sup>330</sup> or action by the Federal Trade Commission, the Court’s FAA jurisprudence provides no mechanism for fairness generated by publicity, which would force information into the public about the kinds of claims that the millions of ordinary customers of AT&T and other providers may have. Lost is the ability to assess the qualities of the procedures and of decisionmakers and to evaluate whether asymmetries between disputants are taken into account. Also lost are opportunities for private initiatives to check government enforcement and to remedy illegalities that, if widespread, could generate the kind of “recall” for which the automobile industry has become famous.

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24, 2011, at 2 (discussing Rule 12,204(d) of the FINRA code of arbitration procedures, which forbids member firms from enforcing arbitration agreements against certified or putative classes).

<sup>326</sup> Some commentators have argued that arbitration in some forms ought to be subject to due process constraints. See Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 249–55 (2006); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 117 (1992); see also Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, LAW & CONTEMP. PROBS., Winter–Spring 2004, at 279, 302.

<sup>327</sup> CONSUMER DUE PROCESS PROTOCOL, *supra* note 165, at princ. 1.

<sup>328</sup> *Id.* at princs. 3, 12(1), 9, 13.

<sup>329</sup> *Id.* at princ. 12(2).

<sup>330</sup> Illinois et al. Amici for Concepcion, *supra* note 324, at 6. But see South Carolina & Utah Amici for AT&T, *supra* note 324, at \*7–8.

Moreover, under the Court's ruling, AT&T can assert its "sovereignty" to hail unwilling opponents into its dispute resolution system more readily than can state courts. The power differential comes from another piece of the Court's due process jurisprudence — its substantive due process constraint on courts' jurisdictional authority to command absent litigants to come before them. In the 2010 Term, the Court decided *J. McIntyre Machinery, Ltd. v. Nicastro*, raising the issue of when an absent defendant can be required by a state court to submit to its jurisdiction.<sup>331</sup> The Court concluded that the decision of a defendant to put a product into the stream of commerce did not suffice to authorize a state to require that a party come to its courts. Instead, evidence was needed of genuine volition, that a defendant had "purposefully" availed itself of a forum so as to legitimate the sovereignty of a state court.<sup>332</sup>

Consumers, however, are left without the possibility of that form of purposefulness. Nor is theirs the kind of consent implied by the rhetoric of contracts entailing "dealing" (pace Leff) that produces mutual agreements. The providers won the power to impose a mandatory, no-opt-out system in their own private "courts" designed to preclude aggregate litigation.<sup>333</sup> At the same time, as detailed below, *Wal-Mart* limited aggregate options in courts, as it also expanded obligations to give individuals opt-out rights to reflect an autonomy said to enhance their control over their property interests.

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<sup>331</sup> 131 S. Ct. 2780 (2011).

<sup>332</sup> *Id.* at 2788–89. This opinion did not deploy the word "fairness," while the other personal jurisdiction ruling of the Term did. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (discussing "fair play"). Both decisions stem from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), in which the Court held that the state of Washington could exercise jurisdiction over an absent defendant because to do so was "fair," given that the litigant had "systematic and continuous" contacts with the state and that the conflict — whether it owed contributions to a fund for unemployment — "arose out of those very activities." *Id.* at 320. That fairness inquiry is predicated on a substantive due process entitlement. See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

<sup>333</sup> The role judges have played in licensing competitors to undercut the once-unique service provided by courts is analyzed by Bryant Garth in *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931 (1993).



### III. THE LOGIC OF AGGREGATION: FROM CONSOLIDATION TO CLASS ACTIONS AND *WAL-MART V. DUKES*

Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay.

— *Wal-Mart Stores, Inc. v. Dukes* (2011)<sup>334</sup>

#### A. *Shifting the Presumption Toward Grouping*

The 1966 class action rule was drafted with people like the Conceptions in mind. One of the rule drafters' express goals was to facilitate access to courts for those who lacked the resources or the knowledge that they had possibly been harmed. The method was to attract lawyers to bring cases to court and to put judges in charge of supervising the parameters of the groups and of overseeing the loyalty of their representatives.<sup>335</sup>

These aims were ambitious (and arguably naïve). The challenges posed in legitimating representational structures (in politics and business as well as in courts) have produced a vast literature aiming to assess the degree to which agents bond to their principals, the levels of coherence within groups, and how groups can inform, monitor, and control their agents. As legions of commentators have modeled and theorized, difficulties abound in constraining representatives, assessing their work, valuing individuality, and avoiding free riders in dynamic and strategically fraught interactions so as to obtain optimal outputs.<sup>336</sup> Fairness haunts the enterprise, both in terms of fairness to those within the group and to their opponents.

Nonetheless, the market and political forces that generated a "sociology of boilerplate"<sup>337</sup> have spawned a multitude of efforts to produce groupwide outcomes through courts. Impetus comes not only from those seeking to facilitate rights-claiming but also from those looking

<sup>334</sup> 131 S. Ct. at 2560.

<sup>335</sup> I detail the archival sources in Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 6–15. See also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386–400 (1967). Thanks to Arthur Miller, who served as a Reporter on the Committee and worked with Kaplan, for reviewing my reflections on Rule 23's drafting.

<sup>336</sup> See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 418–25 (2000); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Action*, 77 NOTRE DAME L. REV. 1057 (2002); David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 570 (2011).

<sup>337</sup> See Rakoff, *The Law and Sociology of Boilerplate*, *supra* note 1, at 202.

for resolution, closure, and predictability (“global peace”), as well as from governments trying to deal with an avalanche of claims. Aggregation can simultaneously be a form of Civil *Gideon* for plaintiffs and a means of insurance for defendants seeking to circumscribe their liability. Vivid current examples include the oil spill off the Louisiana coast and injuries of 9/11. Negotiations between British Petroleum and President Obama resulted in that company’s commitment of some \$20 billion to an ad hoc aggregator, Ken Feinberg, who had played a similar role for a set of 9/11 claimants, themselves collected in part by a federal statute that structured the options and that permitted pursuit of claims through the Victim Compensation Fund or pursuit of individual remedies exclusively in the U.S. District Court for the Southern District of New York.<sup>338</sup>

Thus, although the *Wal-Mart* opinion prefaces its analysis of Rule 23 with the statement that the “class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,’”<sup>339</sup> that description has long since ceased to be apt. Indeed, that quotation comes from a case in which a class action was permitted — reflecting that, for decades, the public and private sectors have endorsed forms of aggregation to address the fairness problems of intra-litigant equality, the disparate resources of opponents, and the equipage that a group can provide. The mix of new substantive and procedural rights modified the background premises of the individual model invoked by the *Wal-Mart* majority: that the authority of courts came from personal consent to their jurisdiction volunteered by autonomous individual plaintiffs stepping forth to participate personally or through lawyers retained by contract.

Above, I delineated discrete, interrelated strands of fairness analyses. Aggregation is likewise an umbrella, in this instance for different practices enabling the grouping of claims, and, hence, a sketch of the development of various forms is in order before turning to the conflict in *Wal-Mart*. A first example is administrative adjudication, a procedural intervention to segregate groups to treat similarly situated claim-

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<sup>338</sup> See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (establishing a compensation fund for 9/11 victims); *In re* Sept. 11 Litig., 600 F. Supp. 2d 549, 552–53 (S.D.N.Y. 2009) (describing the “coordinated management” of ninety-five suits and “procedural rules to govern settlements” to enable “distributive fairness”); *In re* Sept. 11 Litig., 723 F. Supp. 2d 534, 534 (S.D.N.Y. 2010) (approving settlements of eighteen of twenty-one property damage cases). See generally Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC’Y REV. 645 (2008).

<sup>339</sup> *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) (upholding a nationwide class certification on behalf of old age and disability benefits recipients challenging a recoupment effort)).

ants comparably.<sup>340</sup> Political will generates the creation of administrative regimes, as the history of workers' compensation laws illustrates. In the late 1890s, institutional participants — railroad lawyers, bar associations, judges, and insurance companies — came together to deal with negligence claims, perceived as “blocking our calendars with a mass of litigation so great as to impede administration in all other branches of law.”<sup>341</sup> Those efforts modified legal commitments to freedom of contract and redistributed the costs of injuries. New York's 1910 Worker's Compensation Act, upheld over objections of Fourteenth Amendment deprivations, changed common law rules that employees contracting with employers had accepted the risk of co-workers' negligence.<sup>342</sup> As John Witt has chronicled, rights to proceed in tort “swallowed up” contract,<sup>343</sup> and then administrative regimes “swallowed up” aspects of tort, often by quid pro quos in which employer liability was limited as employees gained rights to capped amounts of compensation.<sup>344</sup> Thereafter, management personnel systems shaped insurance settlement systems for injuries with monetary relief outlined through guidelines in lieu of individualized appraisals.<sup>345</sup>

Guidelines have also become a feature of sentencing, as they aim to rationalize judgments across a set yet engender debates about trade-offs between presumptive categories and individual circumstances. Sophisticated members of the criminal bar understand when “departures” from guidelines can be sought,<sup>346</sup> just as personal injury lawyers know the going rates for particular kinds of injuries in the active marketplace of claims and settlement.<sup>347</sup>

<sup>340</sup> See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007).

<sup>341</sup> Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1580 (2004) (quoting a member of the New York State Bar Association).

<sup>342</sup> After the New York Court of Appeals invalidated the statute in 1911, see *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911), the state's constitution was amended, and in 1917, the Supreme Court held the change constitutional, see *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

<sup>343</sup> As I have, Witt also cited Grant Gilmore for this metaphor. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* 17 (2004).

<sup>344</sup> “By 1917, [workers'] compensation programs covered 13.5 million American wage earners, . . . 69 percent of the paid workforce.” *Id.* at 190. Efforts in the 1930s to create administrative remedies for automobile accidents met with “organized interest” group opposition, by then protective of the status quo of car accident litigation. See *id.* at 195.

<sup>345</sup> Issacharoff & Witt, *supra* note 341, at 1588–89.

<sup>346</sup> For authority to seek such departures, see *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007).

<sup>347</sup> Some call for making such information public. See generally Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, in *TRANSPARENCY IN THE CIVIL JUSTICE SYSTEM* (Joseph Doherty & Robert Reville eds., forthcoming 2011).

These administrative adjudication programs encompass various goals, including accommodating volume, lowering the price per process, reducing the need for lawyers, educating and controlling decisionmakers, and achieving legitimacy. But unlike ADR mechanisms such as arbitration, administrative adjudication aims specifically to create intra-litigant equity for disputants proceeding single file, and it builds in public oversight by way of obligatory recordkeeping, some third-party access to administrative adjudication,<sup>348</sup> and limited court review. The result has been public debate about the quantity and quality of the judgments rendered, and judicial reversal of some outcomes<sup>349</sup> — again in contrast to a closed private arbitration process like that licensed by *AT&T*.

Repeatedly, those subjected to various aggregation methods have challenged the systems by invoking the Due Process Clause. In response, courts have assessed the capacities of individual disputants, the underlying aims of the aggregative regime, and the qualities of the procedures proffered. In addition to the substantive due process claim advanced against the 1910 New York Worker's Compensation Act, a classic example of a procedural attack on aggregation prompted the 1950 decision of *Mullane v. Central Hanover Bank & Trust Co.*<sup>350</sup> The case arose from inventiveness stemming not from judicial interpretations of Rule 23 and Title VII (to which the *Wal-Mart* Court objected)<sup>351</sup> but from the New York State Legislature's effort in 1937 to

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<sup>348</sup> See, e.g., AM. ARBITRATION ASS'N, WIRELESS INDUSTRY ARBITRATION RULES, Rule 24 (2009), available at <http://www.adr.org/sp.asp?id=22010> (providing that the "arbitrator shall ensure the privacy of the hearings"). The Better Business Bureau's Arbitration Rule 11 permits its staff and "volunteers from its pool of arbitrators or government representatives" to attend arbitration hearings. BETTER BUS. BUREAU OF THE SOUTHLAND, UNIFORM RULES FOR BINDING ARBITRATION, Rule 11 (2009), available at <http://www.la.bbb.org/ArbitrationBindingRules.aspx>. "For any other observer . . . to attend a hearing," the Bureau makes a determination as to whether "reasonable accommodations exist and that neither the parties nor the arbitrator objects." *Id.* Regulations on public access vary among administrative agencies: EEOC hearings have limited access for those with information relevant to the complaint, 29 C.F.R. § 1614.109(e) (2010); some kinds of immigration hearings are open, 8 C.F.R. § 1240.10(b) (2011); and Social Security hearings are open to the public unless the administrative law judge, based on "good cause," chooses to close a hearing, 20 C.F.R. § 498.215(d) (2010).

Obligations to provide open proceedings come in part from the application of constitutional rights of third-party access to administrative adjudication. For example, the Second Circuit held that the New York Transit Authority had wrongly closed to the public its decisionmaking on low-level crime in subways; in 2008, some 19,000 people so accused were in the administrative procedure that had barred third parties. See *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, No. 10-0372-cv, 2011 WL 2852412, at \*1-2 (2d Cir. July 20, 2011).

<sup>349</sup> A ready example comes from federal appellate judges' distress at immigration judges' decisions. See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). See generally *Jaya Ramji-Nogales*, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

<sup>350</sup> 339 U.S. 306 (1950).

<sup>351</sup> *Wal-Mart*, 131 S. Ct. at 2554-55.

attract business for banks. The state adopted a practice that had developed elsewhere to permit asset pooling in common trusts.<sup>352</sup> New York offered these relatively new kinds of transactions and, by creating a kind of class action, provided a method to insulate banks from the potential of many beneficiaries' bringing challenges to the investment decisions.<sup>353</sup>

New York authorized banks to pool trust assets of beneficiaries from across the United States, thereby enabling modest investors to have the benefit of corporate fiduciaries.<sup>354</sup> To give the banks insurance against undue liability, the statute instructed them to bring, periodically, a kind of declaratory action to obtain judicial affirmation of the proper discharge of fiduciary duties; the law of *res judicata* thereafter precluded unhappy beneficiaries from alleging imprudent investments.<sup>355</sup>

But how were the thousands of beneficiaries to know that their rights were being adjudicated and to participate? The New York State Legislature required that notice about the process be put in the initial trust documents (akin to what AT&T now provides by giving notice of class and court waivers when one opens an account). In addition, under the New York statute, when banks filed their actions "settling accounts," notice was also given through newspaper publication and directly to two court-appointed lawyers, acting as guardians *ad litem* for what were functionally two subclasses, the *inter vivos* trustees and the testamentary beneficiaries.<sup>356</sup>

In 1950, the Supreme Court upheld the state statute's grant of nationwide jurisdiction to its courts over the trusts but ruled the statutory provisions of notice unconstitutional.<sup>357</sup> As in the three cases in the

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<sup>352</sup> See Nat'l Conference of Comm'rs on Unif. Laws, Uniform Common Trust Fund Act 3 (1938) (approved 1939), available at [http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920\\_69/uctf3852.pdf](http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uctf3852.pdf) (noting that its Uniform Act reflected what "approximately twenty states" had undertaken, albeit "in a different form").

<sup>353</sup> *Mullane*, 339 U.S. at 307-09; N.Y. BANKING § 100-c (repealed 1986; codified as revised at N.Y. BANKING § 100-c (2008)).

<sup>354</sup> As Justice Jackson explained, "[m]ounting overheads have made administration of small trusts undesirable to corporate trustees." *Mullane*, 339 U.S. at 307. By 1949, ten banks, representing "by far the largest volume of trust business in New York State," had established common trust funds. Brief of New York State Bankers Ass'n at 1-2, *Mullane*, 339 U.S. 306 (No. 378).

<sup>355</sup> N.Y. BANKING § 100-c. In *Mullane*, the trust was established in 1946 and a first accounting brought in 1947, 339 U.S. at 309; under the current provisions, accountings are to be brought "[a]t least once every ten years." N.Y. BANKING § 100-c(6). The revised statute details obligations of mailing as well as publishing notice. *Id.*

<sup>356</sup> N.Y. BANKING 100-c(12). Kenneth J. Mullane, guardian ad litem for the income beneficiaries, argued that without notice sent directly to more beneficiaries, a bank would use pooled trusts "as a dumping ground for its own shaky and depreciated securities." Appellant's Brief at 26, *Mullane*, 339 U.S. 306 (No. 378), 1950 WL 78701 (quoting Robert W. Bogue, *Common Trust Fund Legislation*, 5 LAW & CONTEMP. PROBS. 430, 435 (1938)).

<sup>357</sup> *Mullane*, 339 U.S. at 312-13, 320.

2010 Term, the *Mullane* Court made a fairness assessment, in this instance by endorsing the utility of pooling for private investors and the commercial interests of the banks (and their host states) to achieve abatement from claims, while insisting on the need for regulatory oversight of both the banks and the state-appointed representatives for the beneficiaries.<sup>358</sup> Justice Jackson read due process as not imposing “impossible or impractical obstacles” to producing a decision about the banks’ prudence while also as requiring an “opportunity” for those affected by this private dispute to be heard.<sup>359</sup>

*Mullane* held that publication notice could suffice in some circumstances, but not when names of beneficiaries were “at hand” and “easily” found on the bank’s books.<sup>360</sup> Yet personalizing notice was not to impose too great an economic burden on the underlying activity.<sup>361</sup> Therefore, a form of sampling could be used, for the “individual interest does not stand alone but is identical with that of a class.”<sup>362</sup> Notice “reasonably certain to reach most of those interested” sufficed, for those notified would “safeguard the interests of all.”<sup>363</sup>

The New York banking law is one of several examples of legislative aggregates. Another comes from Congress, which in 1938 enacted the Fair Labor Standards Act (FLSA), requiring minimum wages and overtime payments and authorizing the Secretary of Labor to bring actions for the benefit of employees.<sup>364</sup> Congress also welcomed both individual employees and their designated “agent or representative”

<sup>358</sup> *Id.* at 312–15.

<sup>359</sup> *Id.* at 313–14.

<sup>360</sup> *Id.* at 319.

<sup>361</sup> As James Vaughan, the guardian for the principal beneficiaries, argued, “the objective which the legislation had in view consists in avoidance of such notice requirements as would tend to make the common trust fund uneconomical or unworkable.” Brief of Respondent Special Guardian and Attorney for Infants, Etc. Having an Interest in Trust Principal at 9, *Mullane*, 339 U.S. 309 (No. 378), 1950 WL 78532. The Court agreed that the “expense of keeping informed from day to day of substitutions among even current income beneficiaries . . . to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages.” *Mullane*, 339 U.S. at 318.

<sup>362</sup> *Mullane*, 339 U.S. at 319 (“Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.” (quoting *Blinn v. Nelson*, 222 U.S. 1, 7 (1911)) (internal quotation marks omitted)).

<sup>363</sup> *Id.* *Mullane*’s brief reported that the trusts had more than 2000 beneficiaries but that none had appeared in any of the five accountings. Appellant’s Brief, *Mullane*, *supra* note 356, at 45. The Court’s ruling affected not only the many states with pooled trusts but also states’ general notice provisions. See John Wilson Perry, *The Mullane Doctrine — A Reappraisal of Statutory Notice Requirements*, in CURRENT TRENDS IN STATE LEGISLATION 32, 33–39 (1952).

<sup>364</sup> Fair Labor Standards Act of 1938 (FLSA), Pub. L. No. 75-718, §§ 6, 7, 15, 17, 52 Stat. 1060, 1062–64, 1068–69 (codified as amended in scattered sections of 29 U.S.C.). The FLSA was enacted after the Court upheld Washington state’s minimum wage, hour, and working conditions law for women and children. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386–87, 400 (1937).

(such as a union) to bring suit on behalf of “other employees similarly situated.”<sup>365</sup> Those provisions were cut back in 1947, when Congress limited initiation of private damage actions to employees and required that employees who were joined also had to “opt in” (in contemporary parlance) by filing written consent in court.<sup>366</sup> Like New York’s banking law, which authorized court-appointed guardians ad litem paid from trust overhead, the FLSA built in equipage incentives; courts could award “a reasonable attorney’s fee” and costs paid to plaintiffs by defendants.<sup>367</sup> Further, akin to the New York statute and Rule 23, judges likewise oversaw outcomes; the Supreme Court interpreted the FLSA to prohibit settlements that had employers pay less than the law required.<sup>368</sup>

The more famous aggregate technique, at issue in *Wal-Mart*, comes from another legal source — federal procedural rules. Within months of the FLSA’s enactment, the Supreme Court promulgated the 1938 Federal Rules of Civil Procedure, the first national provisions spanning law and equity, which had been drafted, under Charles Clark (then Yale Law School’s Dean), by a committee of lawyers.<sup>369</sup> These liberal rules of pleading and joinder permitted different kinds of claims and various parties to be brought together in a single lawsuit. Over time (and with other doctrinal developments), these procedures widened the parameters of lawsuits. Unlike workers’ compensation, the New York banking law, and the FLSA, the 1930s Federal Rules crafted a transsubstantive set of procedures to be applied regardless of the kind of lawsuit

<sup>365</sup> FLSA § 16(b).

<sup>366</sup> See Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (codified at 29 U.S.C. § 216(b) (2006)). The Supreme Court addressed the mechanisms in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), and committed to district courts the discretion to facilitate notice to employees who might be interested in joining. *Id.* at 169. Since then, district judges have developed techniques to review and in some sense certify a collective action, subject to decertification. See generally David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL’Y J. 129 (2003).

<sup>367</sup> FLSA § 16(b). The FLSA’s collective action mechanism has been criticized as less effective than Rule 23. See, e.g., Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Under-enforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1325–46 (2008).

<sup>368</sup> *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 108 (1946). Some lower courts thereafter held that settlements require the supervision of the Department of Labor or the federal courts. See, e.g., *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–53 (11th Cir. 1982); *Dees v. Hydrady, Inc.*, 706 F. Supp. 2d 1227, 1237 (M.D. Fla. 2010). Court assessment resembles the inquiry under Rule 23(e) for approval of class action settlements with an added criterion of whether a compromise “frustrates implementation of the FLSA.” *Dees*, 706 F. Supp. 2d at 1241. Although courts have also upheld mandatory arbitration requirements precluding FLSA filings, some have held that outcomes cannot be kept private, given the FLSA’s purposes. See, e.g., *id.* at 1245–47.

<sup>369</sup> See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

(contract, tort, patent, federal statutory right) or the form of relief (damages or injunction).

The 1938 rules also provided for class actions, but with limited finality of judgments. Only something found to be a “true” class action (and not a “spurious” or “hybrid” class) could bind absentees, and that typology was rooted in conceptualizing the underlying right as indivisible or as a collection of rights, each held individually by different people.<sup>370</sup> (The holding in *Wal-Mart* can be read as a return to such disaggregation.<sup>371</sup>) By the 1960s, the 1938 class action rule’s distinctions were seen as arcane, scrambled, and too confining for the modern state. Thus, when Chief Justice Earl Warren appointed an ad hoc committee, chaired by Dean Acheson with Harvard Law School’s Benjamin Kaplan as its Reporter, to review the rules,<sup>372</sup> the group worked on revisions to Rule 23 in conjunction with other third-party practice provisions. Between 1962 and 1964, that group produced the class action rule debated in *Wal-Mart* and rejected as an option in *AT&T*.

The 1966 version of Rule 23 attenuated individual consent and participation so as to produce final and binding outcomes. The drafters read the Due Process Clause to permit law to take people who were not otherwise in a relationship (indeed, not only strangers but potentially unaware of their rights, each other, or a pending claim) and turn them into a juridical entity. How this innovation nets out in autonomy terms is unclear; classes reduce personal participation yet enable individuals who would not otherwise be able to pursue rights to do so. This enabling function is what defendants object to, and some, such as Wal-Mart, act as if they are spokespersons for absent class members and argue that, if certified, a class would impinge on the autonomy interests of absentees in pursuing individual claims.<sup>373</sup>

The due process concerns of access, intra-litigant equity, and resource asymmetry were at the 1966 rule’s core.<sup>374</sup> As Kaplan later explained, the class action rule “was not neutral: it did not escape attention at the time that it would open the way to the assertion of many, many

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<sup>370</sup> See FED. R. CIV. P. 23(a)(1)–(3) (1938) (describing rights as “joint, or common, or secondary” and “several”).

<sup>371</sup> Cf. David L. Shapiro, *Class Actions: The Class as Party and as Client*, 73 NOTRE DAME L. REV. 913, 917–19 (1998) (arguing that class actions ought to be understood as entities rather than aggregations of individual claims).

<sup>372</sup> See Announcement of the Chief Justice of the United States, Committee on Rules of Practice and Procedure, Apr. 4, 1960, in 28 U.S.C.A. at xvii (FED. R. CIV. P. (1966)); Earl Warren, Chief Justice of the U.S., Address at the Annual Meeting of the American Law Institute (May 18, 1960), in 25 F.R.D. 213, 216 (1960).

<sup>373</sup> See, e.g., Brief for Petitioner, *Wal-Mart*, *supra* note 123, at \*34–38.

<sup>374</sup> See generally Resnik, *From “Cases” to “Litigation,”* *supra* note 335; Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996).



claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants.”<sup>375</sup> To do its work, the rule was less than transsubstantive, for its subparts were (as *Wal-Mart* detailed<sup>376</sup>) crafted with discrete sets of plaintiffs in mind.

In terms of those claims “that otherwise would not be pressed,” school desegregation cases were one concern; after children graduated, individual plaintiffs could not pursue enforcement of injunctions.<sup>377</sup> The drafters therefore shaped Rule 23(b)(2) as a mandatory class action (meaning that co-plaintiffs cannot exit) when the “party opposing the class has acted or refused to act on grounds that apply generally to the class” and injunctive relief is appropriate. This innovation ensured the authority of judges to oversee long-term school desegregation decrees and paved the way for parallel structural remedies addressing jails, prisons, mental hospitals, and employment.<sup>378</sup> When Rule 23(b)(2) was coupled with the Civil Rights Attorney’s Fees Awards Act of 1976 (as well as the fee-shifting provisions of other statutes, including Title VII), novel sets of plaintiffs made their way into the federal courts.

The Concepcions are paradigmatic of another group of claimants whom the rule drafters sought to help: consumers with low-value claims. A 1941 article by Harry Kalven and Maurice Rosenfield explained: “Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.”<sup>379</sup> Although administrative agencies offered some redress, they too had limits (as the details of the EEOC, noted above — a budget of about \$370 million and complaints numbering 1 million<sup>380</sup> — exemplify).

But if private lawyers could bundle claimants, or if the costs of adversarial litigation were lower, incentives to file would exist as long as

<sup>375</sup> Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126–27 (1989). Thanks to Stephen Subrin for pointing me to this commentary.

<sup>376</sup> *Wal-Mart*, 131 S. Ct. at 2556–57.

<sup>377</sup> See Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 102 (1966) (proposed Rule 23 advisory committee’s note) (explaining that civil rights actions were “[i]llustrative” of the purpose of Rule 23(b)(2) and listing school desegregation cases as examples). See generally David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

<sup>378</sup> See generally Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

<sup>379</sup> Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941). Examples included the “single and isolated security holder . . . helpless in protecting his own interests or pleading his own cause.” *Id.* at 684 (quoting SEC. & EXCH. COMM’N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, PART II, at 1 (1937)) (internal quotation marks omitted).

<sup>380</sup> See *EEOC Budget and Staffing History 1980 to Present*, *supra* note 186.

lawyers could be paid from the money garnered. An equitable doctrine that developed early in the twentieth century provided the route. Lawyers could be understood to confer a “common benefit” on a group and then be compensated from a percentage of the fund recouped.<sup>381</sup> Thus, if procedures permitted small claims to become large, lucrative classes, lawyers would take the risk of serving as “champions of semi-public rights,” and class actions could augment administrative regulatory oversight.<sup>382</sup>

The drafters of Rule 23 therefore crafted a subdivision — (b)(3) — that was, as Kaplan explained, designed so that individuals “without effective strength to bring their opponents into court at all” could do so,<sup>383</sup> subject to judicial approval of proposed classes. This provision required a district judge to decide whether a proposed class met the four prerequisites of Rule 23(a) — numerosity, typicality, commonality, and adequacy. Thereafter, the rule required the judge to assess whether and what kind of class action to certify. If no limited fund (called, in the trade, a “(b)(1) class”) was at hand,<sup>384</sup> and if no classwide injunctive relief (a “(b)(2) class”) was sought, a judge could authorize a “(b)(3)” class — but only upon findings that common issues predominated and that proceeding as a class was superior to individual litigation. To do so, the judge was to consider the feasibility and fact of individualized litigation and whether a class could “fairly and efficiently” enable adjudication of the controversy.<sup>385</sup> The rule gave (b)(3) class members rights to notice and to opt out, whereas those in mandatory classes had no such option.<sup>386</sup>

The 1966 rule gave judges additional work. Before a class action could be dismissed or compromised, a judge had to approve the outcome as “fair, reasonable, and adequate.”<sup>387</sup> Analytically, that charter is in some tension with the idea that, at certification, the judge found the named representatives adequate. Not only does that built-in redundancy reflect that information (about the underlying claims and the lawyers pursuing the class action) changes over time, but the reassessment un-

<sup>381</sup> Resnik, Curtis & Hensler, *supra* note 374, at 304, 337–38.

<sup>382</sup> Kalven & Rosenfield, *supra* note 379, at 717.

<sup>383</sup> Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

<sup>384</sup> The criteria are explored in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *See id.* at 821.

<sup>385</sup> FED. R. CIV. P. 23(b)(3) (1966).

<sup>386</sup> *Id.* at 23(c). The Court later held that plaintiffs had to bear the cost of notice and that the “best notice practical under the circumstances” language of Rule 23 required mailings to those whose addresses could be found. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). In 2003, amendments to the rule expressly authorized district judges to use their discretion to require notice for (b)(1) and (b)(2) class members. FED. R. CIV. P. 23(c)(2)(A) (2003 rule).

<sup>387</sup> Before the 2003 amendments, these criteria were developed by case law and then, in those amendments, put into the text of Rule 23(e)(2).

derscores the special monitoring role assigned to judges, who in 2003 also gained authority to appoint class counsel and oversee fee awards.<sup>388</sup>

Class actions were not the only method of aggregation that became familiar to federal judges, who themselves became promoters of some forms of aggregation. In 1968, the Judicial Conference of the United States, which makes policies for the federal judiciary, proposed a statute authorizing consolidation across districts if related cases were pending.<sup>389</sup> Now commonplace, multidistrict litigation (MDL) serves to group tens, hundreds, or thousands of technically independent cases into a joint pretrial proceeding.<sup>390</sup> The presumptive barrier between aggregation and mass torts toppled in the years thereafter, when A.H. Robins (faced with a volume of claims arising out of harms from its Dalkon Shield) and Johns-Manville (defending an avalanche of asbestos claims) filed for bankruptcy.<sup>391</sup>

Other groups, albeit often with less judicial superintendence, made their way into federal court. After judges embraced a managerial role and an individual calendar system, case assignments placed them at the hub, and they could coordinate sub-rule and sub-statutory aggregations.<sup>392</sup> Lawyers could also amass clients through crafting ad hoc law firms (“plaintiffs’ steering committees”) or bundling clients and negotiating for them as a set,<sup>393</sup> a process commended, if structured along the lines it proposed, by the American Law Institute (ALI) in its 2009 *Principles of the Law of Aggregate Litigation*.<sup>394</sup> Federal and state legislatures likewise supported the idea of group processing. Since 1966, Congress has repeatedly noted the availability of class actions in various consumer protection statutes,<sup>395</sup> as do many states.<sup>396</sup>

<sup>388</sup> FED. R. CIV. P. 23(g)–(h) (2003 rule).

<sup>389</sup> See Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, § 1, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (2006)).

<sup>390</sup> See generally Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

<sup>391</sup> See Resnik, *From “Cases” to “Litigation,”* *supra* note 335, at 28–29. See generally Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984).

<sup>392</sup> See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>393</sup> See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 385 n.1, 390 (2000). See generally Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

<sup>394</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2009) [hereinafter ALI 2009 AGGREGATION PRINCIPLES]. This range of variations for aggregate litigation prompted an interest in regularization that produced several versions of the *Manual for Complex Litigation*, now in its fourth edition, which provides advice to judges and lawyers. See MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

<sup>395</sup> One example is the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of the U.S. Code, Title I of which is known as the Truth in Lending Act), as amended in the Fair Credit Billing Act of 1974, Pub. L. No. 93-495, 88 Stat.

In sum, despite the *Wal-Mart* Court's invocation of the individual adjudication model, that option is not widely available.<sup>397</sup> Even an ordinary car crash case centers on insurance companies, supporting the litigation by virtue of contracts with the individuals involved. And without such insurance, the costs of litigation have — for individuals, if not for corporations of AT&T and Wal-Mart's size — made obsolete the Court's premise that the "usual rule [is] that litigation is conducted by and on behalf of the individual named parties only."<sup>398</sup> The debate had, before last Term, been shifting away from asking whether to aggregate to examining which mechanisms and what groupings are preferable means of reaching fair dispositions,<sup>399</sup> and what forms of third-party funding to license.<sup>400</sup>

### B. Class Wars

To describe policymakers as unmitigatedly enthusiastic about what group litigation produces is to miss Benjamin Kaplan's point that "the rule would stick in the throats of establishment defendants."<sup>401</sup> While multiple forms of aggregation exist, class actions have proved specially attractive vehicles for bringing cases to courts. Opponents of Rule 23 are committed to its cabining and press their views in various venues,<sup>402</sup> as the AT&T waivers illustrate.

In the last few decades, "establishment defendants" — both public and private — persuaded Congress to impose limits on class action opportunities. Congress has banned the Legal Services Corporation from representing classes, constrained classes in securities litigation (in part by interposing judges to decide what entities qualify as lead plaintiffs), and

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1511. The legislation authorizes individual and class actions for damages against creditors failing to comply with its regulations. See 15 U.S.C. § 1640(a)(1)(2)(A)(B) (2006).

<sup>396</sup> Examples of states permitting class actions for deceptive advertising claims, such as that at issue in *AT&T*, were provided by Illinois et al. Amici for Concepcion, *supra* note 324, at 34 & n.8. Noted were fourteen jurisdictions, including California, see CAL. CIV. CODE § 1781 (2011), and Connecticut, see CONN. GEN. STAT. ANN. § 42-110g(b) (2010). Six states' consumer provisions prohibit class actions. Illinois et al. Amici for Concepcion, *supra* note 324, at 35 & n.10.

<sup>397</sup> See generally Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691 (2006).

<sup>398</sup> *Wal-Mart*, 131 S. Ct. at 2550.

<sup>399</sup> See generally Symposium, *Aggregate Litigation: Critical Perspectives*, 79 GEO. WASH. L. REV. 293-772 (2011).

<sup>400</sup> See Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 320-23 (2011).

<sup>401</sup> Kaplan, *Comment on Carrington*, *supra* note 375, at 2127.

<sup>402</sup> Efforts included having rule drafters make Rule 23 more restrictive. See, e.g., Minutes of Advisory Committee on Rules of Civil Procedure (Jan. 22-23, 2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0102.pdf>; see also Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 300-02 (2003).

required that state-based claims involving sufficient stakes be removed to federal courts (as in the *Concepcions*' case).<sup>403</sup>

In the debates surrounding these statutory alterations, the questions of resource (im)balance and social utility that undergird policymaking about aggregation have been at the fore, and those issues were argued to the Court in both *AT&T* and *Wal-Mart*. Proponents detailed class action virtues — enabling compensation, deterring misbehavior, and equalizing resources between disputants.<sup>404</sup> They argued the utility of attracting the private investment of resources to complement public enforcement by increasing the numbers able to bring actions and generating enforcement competition that could inhibit agency capture.<sup>405</sup> Class action advocates also laid claim to economies of scale for disputants and courts and argued that the use of Rule 23 for decades has rendered its procedures relatively transparent, stable, and simple.<sup>406</sup>

Further, advocates claimed that aggregation provided courts not only with more information (because of the resources made available) but also with better and different information, engendering more accurate decisions about claims than could a single-file processing system. This point, related to the ideas in a famous economics essay about the analytic distortions produced by owning one product that was a “lemon” and by the asymmetries of marketplace information,<sup>407</sup> had been extant for some time in the law review literature,<sup>408</sup> and the idea gained a place in the *Wal-Mart* briefing. The argument is that, for certain claims, outcomes across a comprehensive set can identify, with greater accuracy, the meritorious claims than can individual decisions, which produce “noise” and distortions obscuring “obvious patterns.”<sup>409</sup>

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<sup>403</sup> See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.); 45 C.F.R. § 1617 (2010).

<sup>404</sup> See, e.g., Brief of *Amici Curiae*, Labor Economists and Statisticians in Support of Respondents, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 719643, at \*4 [hereinafter Labor Economists & Statisticians Amici for Dukes]; Civil Procedure Amici for *Concepcion*, *supra* note 172, at 4-14.

<sup>405</sup> Civil Procedure Amici for *Concepcion*, *supra* note 172, at 13; see also Kalven & Rosenfield, *supra* note 379, at 687.

<sup>406</sup> See, e.g., Brief *Amicus Curiae* of Civil Procedure Professors in Support of Respondents, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 794121, at \*4-5.

<sup>407</sup> See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

<sup>408</sup> See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987).

<sup>409</sup> Labor Economists & Statisticians Amici for Dukes, *supra* note 404, at \*11-12. See generally Joshua P. Davis, *Class-Wide Recoveries* (Feb. 1, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1768148>.

As economists and statisticians told the Court, for a pattern-and-practice discrimination claim such as that advanced by the Dukes plaintiffs, “a statistical model is more likely than a series of individual adjudications to identify with appropriate accuracy the persons injured by a proven pattern or practice of discrimination and the amount of their awards, . . . mak[ing] a statistical model a more ‘just’ procedure.”<sup>410</sup> The argument ran further that because statistical models can weed out those who have not been injured, the accuracy of remedial awards improves — making them fairer for defendants as well as for plaintiffs.<sup>411</sup> In addition, through the law of claim preclusion, binding the entire group results in consistency of outcomes across a set of similarly situated individuals.

Opponents of class actions argued that the form itself produced “lemons” — distorting decisions on the merits by giving unfair advantages to its users or, more aptly, the lawyers who file suit. As the U.S. Chamber of Commerce informed the Court, classes enable “a few hundred dollars” to “instantly metastasize into a potentially catastrophic judgment of hundreds of millions or even billions of dollars of damages,”<sup>412</sup> producing “blackmail settlements”<sup>413</sup> that “can cripple a business with a gargantuan judgment.”<sup>414</sup> Moreover, the Chamber argued that “[l]ogic and empirical evidence make clear that class actions do not deter unlawful behavior.”<sup>415</sup>

Although each side invoked empiricism, the bits of data extant are limited. Studying litigation is hugely expensive, and lawyers working on aggregation are a moving target, shifting their methods in response to changes in the market and the law. Data go stale quickly. Moreover, absent class action certification efforts, many methods of aggregation take place out of public sight. Small slices of information — such as a study from the Federal Judicial Center (FJC),<sup>416</sup> research forays into

<sup>410</sup> Labor Economists & Statisticians Amici for Dukes, *supra* note 404, at \*20.

<sup>411</sup> See *id.* at \*22–25 (arguing that the result of using statistical models would be more “just” outcomes). Further, since some would sue and some would not, a formula would be more just across a set. *Id.* at \*29.

<sup>412</sup> Chamber of Commerce Amicus for AT&T, *supra* note 122, at \*7.

<sup>413</sup> *Id.* at 8 n.2 (quoting *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.)).

<sup>414</sup> *Id.* at 14; see also Brief of DRI — The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner at 19, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 288903 (arguing that, “if affirmed, the decision . . . would trigger an explosion of meritless class actions filed solely to force settlements”).

<sup>415</sup> Chamber of Commerce Amicus for AT&T, *supra* note 122, at \*4.

<sup>416</sup> THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996), available at <http://ftp.resource.org/courts.gov/fjc/rule23.pdf> [hereinafter FJC, CLASS ACTIONS IN FOUR DISTRICTS 1996].

dockets,<sup>417</sup> and a RAND review from 2000<sup>418</sup> — have looked at filings, certifications, and outcomes in particular districts and cases. For example, the FJC examined dockets in a few federal districts and found that the majority of proposed classes were not certified, that certified class actions went to adjudication at rates akin to those of other cases, and that class members' recovery rates from class funds varied widely.<sup>419</sup>

Do class actions produce net benefits? Do they treat class members fairly and optimize enforcement or unfairly endow small claimants with too much power (as the majority in *AT&T* opined)? Do class actions have peripheral benefits, such as prompting changes in policy,<sup>420</sup> or does the publicity put defendants in unfair positions? The issues are plain. But like the claims about the utility and the justice of boilerplate and of arbitration, available data offer limited support for grand conclusions.<sup>421</sup> Instead, normative views of the desirability or undesirability of enabling ready use of courts drive the results.

### C. Commonality, Individuality, and Access to Courts

The *Wal-Mart* Court thus faced a host of arguments about the merits of class actions. Amid these policy claims, the company framed its challenge to the certified class based on Rule 23's text and two alleged due process defects, intertwined with the parameters of Title VII. First, Wal-Mart relied on its corporate rights of personhood<sup>422</sup> to assert that due process as well as Title VII's directions on back pay determinations entitled it to individualized findings about whether the company

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<sup>417</sup> See, e.g., Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* 32 (RAND Working Paper Series, Paper No. WR-599-ICJ, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1206315](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206315).

<sup>418</sup> DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000).

<sup>419</sup> FJC, *CLASS ACTIONS IN FOUR DISTRICTS* 1996, *supra* note 416, at 9 (finding that thirty-seven percent of cases filed as class actions were certified); *id.* at 66 (finding that the trial rate in class actions was "not notably different" from that in nonclass civil actions); *id.* at 69–78 (discussing varying rates of recovery). Another study found certification rates in cases removed from state court to run at under twenty-five percent. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., *AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION* 35 n.49 (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/\\$file/clact05.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/$file/clact05.pdf).

<sup>420</sup> See Steven Greenhouse, *Wal-Mart Asks Supreme Court to Hear Bias Suit*, N.Y. TIMES, Aug. 26, 2010, at B1; Press Release, Wal-Mart Stores, Inc., Cole Brown Named Chief Diversity Officer, Walmart U.S. (June 22, 2009), available at <http://walmartstores.com/pressroom/news/9215.aspx>.

<sup>421</sup> Recovery rates found in a small sample of class actions ranged from under five percent to over eighty percent. Pace & Rubenstein, *supra* note 417, at 32.

<sup>422</sup> See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936); *Citizens United v. FEC*, 130 S. Ct. 876, 899–900 (2010).

had nondiscriminatory reasons for its treatment of each female employee.<sup>423</sup> Second, as if a fiduciary for the absent plaintiffs, Wal-Mart insisted that plaintiffs' injunctive requests were dwarfed by the amount of back pay<sup>424</sup> and therefore that the lower court's certification of a (b)(2) class violated absent class members' due process rights to notice and the opportunity to opt out.<sup>425</sup>

The *Wal-Mart* class had attracted much concern because of its ambition. The Court's holding, written by Justice Scalia, is likewise ambitious. When granting certiorari, the Court added the question of whether the women had enough in common to meet the prerequisites of Rule 23.<sup>426</sup> A majority of five answered in the negative. This part of the Court's ruling imposed a heightened standard of proof at the certification stage that undercut the Court's prior law, which had been read to instruct trial judges not to go deeply into the merits when ruling on certification.<sup>427</sup>

But even as that 5–4 divide mirrored *AT&T*, all nine agreed in one respect: back pay claims of the kind advanced by the plaintiffs could not be part of a mandatory class action under 23(b)(2)<sup>428</sup> but could be

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<sup>423</sup> Brief for Petitioner, *Wal-Mart*, *supra* note 123, at \*36–43 (referencing 42 U.S.C. § 2000(e)-5(g)(2) (2006)). Wal-Mart argued that the “right to litigate the issues raised’ . . . includes the right ‘to present every available defense.’” *Id.* at \*43 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

<sup>424</sup> *Id.* at \*50. Wal-Mart relied on the Advisory Committee Note to Rule 23(b)(2). See 39 F.R.D. 69, 102 (1966) (“The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”). The concept of “incidental” monetary claims grew out of this comment, and many courts had used 23(b)(2) to certify Title VII classes, including those seeking back pay. See John C. Coffee, Jr., “*You Just Can’t Get There From Here*”: A Primer on *Wal-Mart v. Dukes*, U.S. L. WK., July 19, 2011, at 93 [hereinafter Coffee, *A Primer on Wal-Mart*].

<sup>425</sup> Brief for Petitioner, *Wal-Mart*, *supra* note 123, at \*1 (arguing that the structure of the class “abrogate[d] the substantive and procedural rights of both Wal-Mart and absent class members”). Unless certification was reversed, the class representatives would be allowed to “extinguish the rights of millions of absent class members without even telling them about it.” *Id.* at \*2. Because they could not opt out, “[a]bsent class members are powerless to extricate themselves from the class even though their interests squarely conflict with those of the named plaintiffs purporting to represent them.” *Id.* at \*37.

<sup>426</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010) (mem.) (granting petition for certiorari and adding the question “[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)” to the one posed, “[w]hether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) . . . and, if so, under what circumstances,” Petition for Writ of Certiorari at i, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2010 WL 3355820).

<sup>427</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), had been read to disapprove of that approach. See *Wal-Mart*, 131 S. Ct. at 2552 n.6. See generally Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324 (2011); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002).

<sup>428</sup> As John Coffee commented shortly after the *Wal-Mart* decision came down, the Court's unanimous agreement on the presumptive unavailability of (b)(2) classes was a blow to Title VII plaintiffs. Coffee, *A Primer on Wal-Mart*, *supra* note 424, at 610–11. Lower courts had long proceeded



pursued only through a (b)(3) class action, requiring the “best notice that is practicable” to plaintiffs so that they could exclude themselves from the class.<sup>429</sup> Why? The Court’s reasons were twofold.

Plaintiffs’ autonomy and liberty were a first concern. Justice Scalia’s opinion explained that those with money at stake had a right to decide “*for themselves* whether to tie their fates to the class representatives’ or go it alone.”<sup>430</sup> But the Court did not explore the prospects for exercising that option. Betty Dukes had tried to “go it alone” against Wal-Mart. Her pro se complaint, while impressive given her lack of legal training, had little chance of prevailing absent the assistance of lawyers. Professionals, however, would not likely invest in individual efforts to seek the small amount of back pay owed (at two dollars an hour, even if over several years) because the “hassle” (to borrow from Justice Breyer’s *AT&T* dissent)<sup>431</sup> of investigation and litigation, as well as the resources of the opponent, make illusory the use of the courts by such one-shot players.

The Court’s second reason for disaggregating was Wal-Mart’s “entitle[ment] to litigate its statutory defenses to individual claims”<sup>432</sup> under Title VII, which the Court translated to mean that the company had court-based rights to “individualized determinations of each employee’s eligibility for backpay.”<sup>433</sup> The Court also mentioned the Due Process Clause<sup>434</sup> in reference to its decision that a state’s personal jurisdiction over absent plaintiffs with damage claims depended on their consent, inferred by offering them opt-out rights.<sup>435</sup> But the *Wal-Mart* Court offered no explanation of why rights to raise defenses could be instantiated only through single-file procedures.

Given that Justice Scalia, who authored the opinion, is well known for using historical analyses<sup>436</sup> to illuminate the “cryptic and abstract”

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to certify classes under (b)(2) because, while common issues existed that permitted decisions on certain aspects en masse, plaintiffs could rarely demonstrate the “predominance” of those common issues for purposes of the (b)(3) certification. *Id.* Further, given Title VII’s reference to “back pay” in the context of “other equitable relief,” some courts have understood that remedy as falling under (b)(2)’s parameters. For discussions of back pay as equitable restitution and the degree of discretion judges had to award it, see *Curtis v. Loether*, 415 U.S. 189, 196–97 (1974), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the power to provide back pay without a jury trial).

<sup>429</sup> *Wal-Mart*, 131 S. Ct. at 2558.

<sup>430</sup> *Id.* at 2559.

<sup>431</sup> *AT&T*, 131 S. Ct. at 1760 (Breyer, J., dissenting) (quoting *Laster v. AT&T*, 584 F.3d 849, 856 (9th Cir. 2009)).

<sup>432</sup> *Wal-Mart*, 131 S. Ct. at 2561.

<sup>433</sup> *Id.* at 2560.

<sup>434</sup> *Id.* at 2559–60.

<sup>435</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), cited with approval in *Wal-Mart*, 131 S. Ct. at 2559. See generally Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

<sup>436</sup> See, e.g., *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 609–19 (1990).

commands of the Due Process Clause,<sup>437</sup> one answer might have come from history, implicitly evoked through his comment that class actions were the exception to the “usual rule” that litigation was conducted by “individual named parties only.”<sup>438</sup> Autonomy expressed through personal participation has great appeal and deep roots in the American political and legal narrative.<sup>439</sup>

Yet history alone cannot justify individualization. As Stephen Yeazell and others have documented, group litigation also has a long and complex lineage dating back to medieval parishes (“a world of collectivity”) and moving through the creation of corporate personalities to the transformations occasioned in the “modern” class action.<sup>440</sup> Repeatedly, group litigation did work for the state, as “the king and barons . . . called” groups into existence via incorporation so as to govern them, and group solidarity emerged from sharing conditions on the ground (literally and metaphorically).<sup>441</sup> While, as the 1950 *Mullane* decision illustrates, the state still seeks decisions that embrace large numbers of people, the social conditions for doing so have changed. Thus, when groups “became anomalous” in practice,<sup>442</sup> courts and legislatures “called” them into being.

But what people ought to be bundled in groups? The 1966 class action rule, coupled with new statutory rights and a widening circle of persons recognized as rights holders, introduced the challenges that the debate about the Dukes plaintiffs’ commonality tracks. What level of identity of interests, as contrasted with forms of delegation through actual or inferred consent, should authorize representatives to proceed for absentees, and how does Rule 23 guide that judgment?<sup>443</sup> As Ar-

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<sup>437</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>438</sup> See *supra* p. 135.

<sup>439</sup> See generally MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009). Redish argued that class actions are an unconstitutional encroachment on liberal democratic autonomy values.

<sup>440</sup> See YEAZELL, *MEDIEVAL GROUP LITIGATION*, *supra* note 26, at 24–41, 57–71.

<sup>441</sup> *Id.* at 83, 96.

<sup>442</sup> *Id.* at 99.

<sup>443</sup> Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued that the text of Rule 23(a) required only “questions of law or fact common to the class.” See *Wal-Mart*, 131 S. Ct. at 2562 (Ginsburg, J., concurring in part and dissenting in part). Looking to the dictionary (as some of her colleagues have done in the past), Justice Ginsburg then offered the definition of a “question of fact” as “[a] disputed issue to be resolved . . . [at] trial.” *Id.* (alterations in original) (quoting BLACK’S LAW DICTIONARY 1366 (9th ed. 2009)) (internal quotation marks omitted). What the record showed was that women were “70 percent of the hourly jobs” but “only ‘33 percent of management employees.’” *Id.* at 2563 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146 (N.D. Cal. 2004)). Further, the statistics identified both wage gaps and “disparities *within* stores.” *Id.* at 2564 n.5. Given the policies of the company (a “tap on the shoulder” promotion process; a systemwide discretionary “\$2 band for every position’s hourly pay rate”; and an obligation that, “as a condition of promotion to management jobs, . . . employees be willing to relocate”

thur Leff put it decades ago, the answer depends on disaggregating factors to choose which are relevant. “[T]here is no such thing as a thoroughly homogeneous class. . . . The minute you shift your attention from the common element upon which your classification is based to some other, previously ignored, your classification explodes. Or at least it ought to.”<sup>444</sup>

Recognition of that point has generated a host of decisions identifying subclasses or issue classes, for which judges have done microanalyses to determine that members of a group have enough in common as to a particular aspect of a litigation, such as an “issues” or a “liability” class. Further, judges have devised methods to test claims through “bellwethers” — a form of purposive sampling that identifies individual instances as representative of a set and relies on trials of those cases to extrapolate judgments for others.<sup>445</sup> Judges and commentators justify such procedures on the view that, across a set, these methods produce more “fair” and “just” results for both plaintiffs and defendants than would individual decisionmaking.<sup>446</sup> In addition, by publicly accounting for how distinctions are drawn among claimants, these sampling devices enable forms of accountability that enhance the private bargaining “in the shadow of the law” for which trial verdicts provide benchmarks.<sup>447</sup>

These extrapolation methods can be analogized to the procedure endorsed in the 1950 *Mullane* decision, also seeking to be due process compliant while focused on enabling the underlying economic transaction of pooling trusts and the regulatory goals of oversight. Individual notice was required, but only in a form that was not so burdensome as to undo either goal. And sampling was licensed on the theory that,

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to preserve “uniformity throughout the company,” *id.* at 2563), enough commonality existed for a preliminary showing required by Rule 23(a). *Id.* at 2565.

The dissent made another linguistic point, that if the question of “differences between class members” is subsumed under the analysis of commonality, “no mission remains for Rule 23(b)(3)” with its textual direction to evaluate whether common issues “predominate” over individual ones. *Id.* at 2566. The dissent and majority also disagreed about the relationship between the merits and certification questions, and both opinions cited Richard A. Nagareda’s essay *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009). *Wal-Mart*, 131 S. Ct at 2551, 2557 (majority opinion); *id.* at 2566 (Ginsburg, J., concurring in part and dissenting in part).

<sup>444</sup> Leff, *supra* note 301, at 132–33.

<sup>445</sup> See Alexandra D. LaHav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 637 (2008) (arguing that such procedures bring “public, democratic decisionmaking” into arenas “dominated by private settlement”).

<sup>446</sup> An oft-cited example of extrapolation is *Cimino v. Raymark Industries, Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), which relied on sampling in asbestos litigation by using 160 cases to determine compensatory damages for 2300 cases. See *id.* at 652–54. See generally Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

<sup>447</sup> See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

given sufficiently shared interests, notice to some could suffice to produce the desired level of information to and control over representatives.

Moreover, payments are routinely made under settlement decrees through categorizing individuals on a few dimensions (as administrative systems do) and distributing funds. Indeed, that method has been proposed for the settlement of an EEOC action on behalf of a “class of females” seeking to be hired in “open order-filler positions” at a Wal-Mart distribution center in London, Kentucky.<sup>448</sup> Without admitting liability, Wal-Mart made various concessions on hiring and deposited \$11.7 million in back pay and compensatory damages, to be allocated to 1380 women who had sought employment at the center between 1998 and 2005.<sup>449</sup>

These various innovations meld aggregation (often on liability) with forms of structured disaggregation to provide remedies. *Wal-Mart* sideswiped such efforts by, in dicta, disapproving of what the Court called “Trial by Formula,” and specifically chastising a lower court effort to do so through its evaluation of several dozens of individual claims used to extrapolate values for a class of several thousand.<sup>450</sup> That hostility built on the rejection, by the majority of five, of the claim by the Dukes class that it met Rule 23(a)’s commonality requirement. This aspect of the holding precluded a remand to explore the wisdom of subdivisions into clusters of claimants for certain issues or by geography or kind of job. Further, the decision by all nine Justices to prohibit the use of a mandatory class for back-pay claims limited access to courts for the construction of remedies predicated on grids to distribute funds across large numbers of claimants seeking relief based on structurally parallel liability arguments.

These *Wal-Mart* rulings crafted new impediments to the congressional charter authorizing private enforcement of Title VII as well as to Rule 23’s recognition of different kinds of relatedness (the (b)(1), (b)(2), and (b)(3) classes) as a predicate for aggregation under judicial supervision. (Soon after the decision was announced, one program for lawyers asked whether the ruling sounded the “Death of Complex

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<sup>448</sup> Consent Decree at 1, EEOC v. Wal-Mart Stores, Inc., No. 01-339-KKC (E.D. Ky. Mar. 1, 2010).

<sup>449</sup> *Id.* at 3–7; Revised Notice of Proposed Distribution, EEOC v. Wal-Mart, No. 6:01-cv-00339 (E.D. Ky. Feb. 15, 2011). Awards, ranging from \$2000 to \$42,000, were to depend on information provided by claimants on forms soliciting facts about whether a person met the established criteria.

<sup>450</sup> *Wal-Mart*, 131 S. Ct. at 2561. Mentioned was *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), cited with approval by the Ninth Circuit in *Dukes v. Wal-Mart Stores, Inc.* See 603 F.3d 571, 625–27 (9th Cir. 2010). The district court in *Hilao* calculated compensatory damages for 9541 class members by having a special master value 137 claims, from which compensatory damages were extrapolated for the class. See *Hilao*, 103 F.3d at 782–83.

Class Actions.”<sup>451</sup>) Akin to the Court’s equal protection jurisprudence, focused on a defendant’s intentionality rather than the impact on plaintiffs of patterns of behavior,<sup>452</sup> the Court took the large-scale interactions of Wal-Mart and its workforce and flipped them into individualized exchanges. In contrast, the four dissenters suggested in Justice Ginsburg’s opinion that the wiser course was to return the case to the trial court for consideration of whether a class could be certified under (b)(3).<sup>453</sup>

With the aegis of the class action reduced, individuals are remitted to the power of either their adversaries or their lawyers. Given the limits on class certification, plaintiff lawyers who remain in the aggregate market have new incentives to bundle clients into “aggregate settlements,” a method the ALI proposed to structure in 2009 by calling for legislatures to permit lawyers to obtain *ex ante* agreements from clients asked to consent in advance to private settlements negotiated thereafter. The settlements would, if approved by a majority of the client cohort formed by the lawyer, bind all without obliging anyone to go to court to disclose or justify publicly the terms that were set.<sup>454</sup> Moreover, providers like AT&T and employers like Wal-Mart can abort public inquiries altogether by binding their customers and employees through boilerplate forms waiving access to court.

#### IV. THE SUBSTANCE OF PROCEDURAL DUE PROCESS: BALANCING DISPARATE RESOURCES AND ADJUDICATING LEGITIMACY IN *TURNER V. ROGERS*

A requirement that the State provide counsel to the noncustodial parent [when the custodial parent lacks counsel] . . . could make the proceeding less fair overall . . . .

— *Turner v. Rogers* (2011)<sup>455</sup>

At the outset, I sketched five kinds of fairness analyses — evaluating the quality of specific procedures, the resources of adversaries, the disparities of capacities within a set of similarly situated litigants, the ability to access court, and the role of publicity in ensuring the demo-

<sup>451</sup> The decision’s breadth prompted the ALI and American Bar Association to host a discussion titled “*Wal-Mart v. Dukes*: Death of Complex Class Actions?” See ALI-ABA, [http://www.ali-aba.org/index.cfm?fuseaction=courses.course&course\\_code=TST105](http://www.ali-aba.org/index.cfm?fuseaction=courses.course&course_code=TST105) (last visited Oct. 2, 2011).

<sup>452</sup> See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

<sup>453</sup> *Wal-Mart*, 131 S. Ct. at 2561 (Ginsburg, J., concurring in part and dissenting in part).

<sup>454</sup> ALI 2009 AGGREGATION PRINCIPLES, *supra* note 394, at 264–89. This process has parallels to the class action waivers discussed above. See Judith Resnik, *Compared to What? ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 681–83 (2011).

<sup>455</sup> 131 S. Ct. at 2519.

cratic character of law application and generation. All inform *Turner v. Rogers*.

Michael Turner advanced a positive right — that the state had the obligation to provide him with counsel when seeking to impose the sanction of confinement. He lost that claim. *Turner* holds that the Due Process Clause “does not *automatically* require the provision of counsel at civil contempt proceedings” for an indigent facing incarceration of up to one year because of an unpaid child support order owed to a child’s custodian, who, the Court noted, was also likely to lack counsel.<sup>456</sup> Resource asymmetries drove that result, as the Court concluded that mandating counsel for a noncustodial parent when the custodial parent lacked counsel “could make the proceeding *less* fair overall.”<sup>457</sup> Thus, and despite the degree to which South Carolina was implicated in the pursuit of debtor parents, the majority specifically limited its no-lawyer rule to cases in which the opposing party is a private, not a public, actor.<sup>458</sup>

Although Turner lost his right-to-counsel claim, his civil contempt sentence was reversed because he won recognition of two other entitlements, both moored in a substantive understanding of procedural due process’s import.<sup>459</sup> If a contemnor facing an unrepresented private opponent lacks a lawyer, the Due Process Clause requires “substitute procedural safeguards,”<sup>460</sup> including clear notice that the legal question to be decided is the ability to pay and a method “to elicit information about his financial circumstances.”<sup>461</sup> Further, as a predicate to detention for violation of child support payments due, the judge must make an express evidentiary finding that the debtor “was able to pay his arrearage.”<sup>462</sup> Absent such “alternative procedures that

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<sup>456</sup> *Id.* at 2520. All members of the Court agreed that civil contemnors’ rights did not rest on the Sixth Amendment, which they limited to criminal defendants. *Id.* at 2516; *id.* at 2521 (Thomas, J., dissenting). The majority relied instead on the Fourteenth Amendment’s Due Process Clause. *Id.* at 2520 (majority opinion).

<sup>457</sup> *Id.* at 2519.

<sup>458</sup> *Id.* at 2520.

<sup>459</sup> Both entitlements were also suggested by the Solicitor General of the United States in its amicus filing. U.S. Amicus, *Turner*, *supra* note 93, at 19–23.

<sup>460</sup> *Turner*, 131 S. Ct. at 2518.

<sup>461</sup> *Id.* at 2520.

<sup>462</sup> *Id.* The majority was ambiguous as to whether judges are required to make such a finding whether or not a debtor has counsel, for as the dissent noted, the Court drew much of its ruling requiring “alternatives” to the counsel right that Turner pressed from the Solicitor General’s brief. *See id.* at 2521 (Thomas, J., dissenting). Support for an independent right to a finding of willful incapacity to pay could be analogized to the right to an evidentiary finding predicated on due process that has been recognized in the criminal context. *See generally* Jackson v. Virginia, 443 U.S. 307 (1979).

assure a fundamentally fair determination of the critical incarceration-related question,”<sup>463</sup> a state cannot send a debtor to jail.

Five Justices centered their ruling on a shared understanding of what was “fair.” That word is so often equated with due process, and the terms “fair hearing” and “fairness” are so commonplace in doctrine and statutes that one might expect to be able to trace fairness’s long pedigree in constitutional texts and case law. Indeed, the entailments of what modern constitutional law has brought within the rubric of due process reflect a set of concerns about justice that date back to Thomas Aquinas and invite discussions of the relationship between fairness and commutative and distributive justice.<sup>464</sup>

While fairness is now commonplace (for example, the Class Action Fairness Act of 2005<sup>465</sup> and Article 6 of the European Convention on Human Rights),<sup>466</sup> the term “fair” is absent from both federal and state constitutions of the founding era.<sup>467</sup> Indeed, the word was relatively rarely invoked in case law before the twentieth century.<sup>468</sup> Rather, as Justice Thomas discussed in his *Turner* dissent, due process once was viewed through the lens of customary practice.<sup>469</sup> Procedures that accorded with “the law of the land” were all that the Constitution required.<sup>470</sup> Thus, Justice Thomas argued that because “an original un-

<sup>463</sup> *Turner*, 131 S. Ct. at 2512.

<sup>464</sup> See generally DANIEL MARK NELSON, *THE PRIORITY OF PRUDENCE: VIRTUE AND NATURE LAW IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS* (1992); Quentin Skinner, *Ambrogio Lorenzetti: The Artist as Political Philosopher*, 72 *PROC. BRITISH ACAD.* 1 (1987).

<sup>465</sup> Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2006)). See generally Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 *U. PA. L. REV.* 1439 (2008).

<sup>466</sup> ECHR, *supra* note 2, art. 6.1 (“fair and public hearing”).

<sup>467</sup> See generally Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 *CONST. COMMENT.* 339 (1987); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 *AM. J. LEGAL HIST.* 265 (1975); Miller, *Due Process*, *supra* note 38. The term “fair” was not commonly invoked in published decisions by nineteenth-century English judges. Ian Langford, *Fair Trial: The History of an Idea*, 8 *J. HUM. RTS.* 37 (2009). Further, the word “fair” once referenced how one looked (fair as in “beautiful”) and then came to be read in law as “free from blemish.” *Id.* at 38, 40–46.

<sup>468</sup> A search of a Supreme Court online database through 2008 found that the phrase “opportunity to be heard” gained currency after the Civil War and the Fourteenth Amendment, with 554 of the 556 opinions using the phrase issued after 1866. The Court did not often deploy the phrase “fundamental fairness” until the 1940s. See, e.g., *Lisenba v. California*, 314 U.S. 219, 236 (1941) (concluding that the “denial of due process” in a criminal trial “is the failure to observe that fundamental fairness essential to the very concept of justice”). After the 1960s, “fundamental fairness” was a more frequent referent, with 212 of 235 opinions invoking the phrase issued since 1960.

<sup>469</sup> *Turner*, 131 S. Ct. at 2521 (Thomas, J., dissenting). Justice Thomas was joined in full by Justice Scalia and in some respects by Chief Justice Roberts and Justice Alito.

<sup>470</sup> See Eberle, *supra* note 467, at 341–42. Eberle noted that the South Carolina Constitution of 1778 provided such protection and that none of the early state constitutions used the term “due process.” *Id.* His analysis of pre-Civil War case law focused on how often courts looked to “set-

derstanding of the Constitution” gave no right to counsel in civil cases and only a right to “employ counsel” under the Sixth Amendment, that Amendment had no role to play. Instead, due process governed Turner’s claim and, for Justice Thomas, required consideration only of processes sanctioned by “settled usage.”<sup>471</sup> Since civil contemnors had historically not been afforded appointed counsel, Justice Thomas concluded that Turner had no right to a lawyer.<sup>472</sup>

Yet, as the *Turner* majority reflects, the Court has repeatedly rejected that analysis. Instead, over the last several decades, the Court developed a test for procedural adequacy through a formula by which to decide the quantum of process “due.”<sup>473</sup> The balancing test (known by the name of the case, *Mathews v. Eldridge*, that detailed it) identifies as factors to consider the “private interest that will be affected,” the government interest in the procedures provided, and the instrumental benefits and costs — in terms of the risk of error — of additional procedures argued to be constitutionally required.<sup>474</sup>

This utilitarian calculation, absent from the *Wal-Mart* opinion, provides insight into how judges reason about what fairness entails. For example, had *Wal-Mart* deployed *Mathews v. Eldridge* to consider

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tled usages and modes of proceeding existing in the common and statute law of England” to determine the adequacy of procedures provided. *Id.* at 359 (quoting *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)) (internal quotation mark omitted). Further, since jury rights were customary, the concept of what process was due was often linked to civil jury rights. *See id.* at 362.

<sup>471</sup> *Turner*, 131 S. Ct. at 2521 (Thomas, J., dissenting) (quoting *Weiss v. United States*, 510 U.S. 163, 197 (1994) (Scalia, J., concurring in part and concurring in the judgment)) (internal quotation mark omitted).

<sup>472</sup> *Id.* at 2521–22. This portion of Justice Thomas’s dissent was joined by Justice Scalia but not by Chief Justice Roberts or Justice Alito.

<sup>473</sup> When doing so in the early twentieth century, the Court relied on a formulation that the “essential elements of *due process* of law” were “notice and opportunity to defend.” *Simon v. Craft*, 182 U.S. 427, 436 (1901) (emphasis added). Within a few decades, the Supreme Court settled on the description that the “fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

<sup>474</sup> 424 U.S. 319, 335 (1976). While *Mathews v. Eldridge* is regularly invoked — including in cases evaluating procedures provided to detainees at Guantanamo, *see, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 529–35 (2004) — it is not the only test deployed by the Supreme Court to assess procedural adequacy. As noted, historical practice is the metric that some Justices have repeatedly embraced. *See Burnham v. Superior Court*, 495 U.S. 604, 608–19, 622–23 (1990). Another line of cases, involving burdens of proof in state criminal and quasi-criminal proceedings, is exemplified by *Medina v. California*, which defers to states on criminal procedures unless they “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” 505 U.S. 437, 445 (1992) (quoting, *inter alia*, *Patterson v. New York*, 432 U.S. 197, 202 (1977)) (internal quotation mark omitted). Before *Turner*, one could also have identified a special test for rights to counsel for civil litigants: the 1981 decision of *Lassiter v. Department of Social Services* cited the *Mathews v. Eldridge* formulation as creating a presumption against counsel for civil litigants, to be balanced in the individual case against the utility of providing a lawyer. 452 U.S. 18, 31 (1981).



the merits of the competing claims about the impact of class certification on accuracy, economy, and justice, the factors to consider would have included the degree of commonality among co-plaintiffs and the nature of the claims to be decided, the level of alleged lack of compliance with the law in the marketplace, and the resources and incentives available for alternative forms of enforcement, as contrasted to the complexity of the alternative processes available, their costs, the risk and nature of the errors made by individual and group procedures, and which side ought to bear the risks of error.

Yet even as *Mathews v. Eldridge* prompts a judicial accounting of the bases for a due process ruling, its veneer of scientific constraints on judicial judgment can serve to mask the lack of genuine empiricism. Neither judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or know) the impact in terms of false positives and negatives produced by the same, more, or different processes. In *Wal-Mart*, the sides offered warring hyperbole about the impact of class actions. In *AT&T*, the parties disagreed about the efficacy and accuracy of class arbitrations, and in *Turner*, the disputants debated whether lawyers slowed or facilitated decisionmaking and whether adding lawyers would enhance accuracy or produce more misguided results.<sup>475</sup> While one can state the equation, one cannot do the math because the data are missing. Interpretative choices abound.

Moreover, the *Mathews v. Eldridge* formulation, focused on accuracy, does not take other goals that can be assigned to due process into account. As Jerry Mashaw explained, *Mathews v. Eldridge* addressed procedures for determining an individual's continuing eligibility for disability benefits. Recipients had various interests as part of a class of claimants, all entitled by federal legislation to benefits if eligible. Mashaw argued that the due process prohibition against arbitrary state action encompassed values he catalogued as accuracy, dignity, and equality.<sup>476</sup> Mashaw suggested that a trial-like proceeding might

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<sup>475</sup> For example, according to an amicus brief submitted in *Turner*, one "2010 observational study" of 326 parent/debtor contempt hearings found that 98% of the contemnors were unrepresented by counsel, 95% were sentenced to jail for an average of three months, 75% testified about problems of obtaining income and lacking the ability to pay, and parents without counsel were held in contempt "more than twice as often as" those represented by counsel. Patterson Amici for *Turner*, *supra* note 97, at 3. The study also recorded clerical errors and noted that "purge amounts" were not "tailored to" particular contemnors' circumstances. *Id.* at 16, 19. As for the costs of error, in addition to wrongful incarceration, the state paid some \$143 million to run its jails in 2009, and about 13% of those in jail came from family court. *Id.* at 25-27; *infra* note 482. But as Rogers's law professor amici countered, the observational data were limited, and correlations were not necessarily evidence of causation. See Law Professors' Amici for Rogers, *supra* note 105, at 7-8.

<sup>476</sup> Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46 (1976) [hereinafter Mashaw, *Due Process Calculus*]. As Mashaw also noted, the formulation in

be less useful to effectuate those interests than would be management mechanisms, such as oversight, audits, and sanctions, to render consistent and correct decisions across the group.<sup>477</sup> From that vantage point, administration and management could be a better way to produce fairness than adversarial adjudication.

Given the numbers of family members who are in courts but lack lawyers, the temptation to remove those issues from courts and take up the managerial approach Mashaw advocated could be powerful. In the *Turner* context of family support collection procedures, for example, the federal government has looked to national databases to enable property and income attachments rather than court sanctions of contempt.<sup>478</sup> Yet what *Turner* reveals are the risks of moving to a completely bureaucratic or privatized regime.

Turner's volunteer lawyer made an argument to the Court that the majority ignored when framing the problem as one of fact (did Turner have or could he get the money to pay?). Turner's lawyer had asked the Court to recognize the embedded legal question of what constitutes an "ability to pay"<sup>479</sup> and hence the need to explore the problems of when and how to impute income earning capacities to individuals. Administrative agencies, as currently constituted, are generally directed to apply facts to statutory criteria and not to interrogate those criteria. Further, whether in court or in administrative or private settings, resource asymmetries would remain a challenge; individuals would be faced with repeat-player adversaries, be they social welfare staff or lawyers employed by social services departments.

Several state and federal courts had drawn the line at liberty and held that jail time required that counsel be afforded to civil contemnors.<sup>480</sup> *Turner's* regulation of judges instead is a disquieting retrench-

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*Mathews v. Eldridge* marked a cut back from plaintiffs' perspectives, in that the test was often used to uphold limited procedures. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005).

<sup>477</sup> Mashaw, *Due Process Calculus*, *supra* note 476, at 45–57.

<sup>478</sup> See 131 S. Ct. at 2517.

<sup>479</sup> Transcript of Oral Argument at 11, *Turner*, 131 S. Ct. 2507 (No. 10-10) [hereinafter Transcript of Oral Argument, *Turner*]. Underlying the question was whether contemnors had defenses and whether the procedures in place helped to inform judges of them. See Brief *Amici Curiae* of the National Ass'n of Criminal Defense Lawyers, the Brennan Center for Justice, the National Legal Aid & Defender Ass'n, the Southern Center for Human Rights, and the American Civil Liberties Union in Support of Petitioner at 16–19, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 160857. More generally, the claim is that lawyers are efficient for courts as well as for parties and enhance the quality of decisions. See ABA Amicus for *Turner*, *supra* note 60, at 7–11. Of course, raising such claims would alter the character of proceedings, such as those in South Carolina, that took but a few minutes of court time. As argued to the Court, "[g]iven the straightforward nature of child support enforcement proceedings . . . adding lawyers may do little more than increase the contentiousness and prolong the duration of the proceeding." Law Professors' Amici for Rogers, *supra* note 105, at 13.

<sup>480</sup> See cases cited *supra* note 56.

ment. Given the many references in the majority and dissenting opinions to mothers as the likely custodial parents who were also unlikely to have retained lawyers,<sup>481</sup> the holding is a frank due process/symmetry of resources ruling that elides the alternative form of equality — providing lawyers for both parties as well as for the child.

The Court's imposition of adjudicatory standards could result in state court actions of different forms. One default would be that, in lieu of crafting "alternative procedures," states could supply lawyers for indigent contemnors, paying that price for seeking incarceration. A yet more economical form of compliance would be not to seek jail time for debtors — and thereby save the costs of lawyers, procedures, and confinement (which, in Turner's case, far outstripped the few thousand dollars owed).<sup>482</sup> As presently formatted, however, the *Turner* rule is oddly incomplete. Although it imposes a regulatory regime on South Carolina, enforcement depends on and returns contemnors to the very judges who dealt with them too hastily.

But for lawyers who volunteered their services to Turner and "open court" obligations, we — third parties — would have no knowledge of how South Carolina struggles to staff its courts, the typewritten forms it uses (but which are not always completed), and the number of people the state sends, uncounseled, to jail. (Recall that Turner was en route to another six months after he had completed the twelve-month sentence.) What the public in-court process revealed were the inadequacies of the decider of fact. The trial judge spent less than five minutes, made no findings on the record, left the form incomplete, and sent Turner to jail for twelve months.

How in the future can one ascertain that the requisite findings are made and procedural alternatives installed? Current law on standing makes unlikely the potential for a class of potential contemnors to bring an affirmative federal action against states, and damages actions would be bounded by immunity doctrines. Further, while the majority

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<sup>481</sup> *Turner*, 131 S. Ct. at 2519–20; *id.* at 2525–27 (Thomas, J., dissenting).

<sup>482</sup> Specifically, *Turner* amici noted that jail administrators reported that 13%–16% of their population was "made up of family court contemnors," *see* Patterson Amici for Turner, *supra* note 97, at 4, and that the state spent over \$17,000 per detainee, *id.* at 24–27. More generally, South Carolina has not been an economically rational actor in its structuring of child support enforcement. As the Solicitor General informed the Court, South Carolina was the "only State that does not have a certified automated system" for child support enforcement, as required by federal law, and, by the time the case was argued, it had paid \$72 million in fines. U.S. Amicus, *Turner*, *supra* note 93, at 6, 7 n.4; *see also* Transcript of Oral Argument, *Turner*, *supra* note 479, at 61; *supra* note 475.

Rogers's amici argued the utility of detention and the inappropriateness of imposing counsel rights and cited the experiences in New Jersey in support of that position. After that state's supreme court required counsel for indigent parents facing incarceration, its use of the detention sanction stopped, as the state could not afford to provide counsel to all eligible. Senators' Amici for Rogers, *supra* note 93, at 24–25.

argued that it needed to respect the bright line of “criminal/civil,” it might well have relied on another bright line of liberty/detention. Absent some public accounting and lawyer involvement, few mechanisms exist to police the fairness that *Turner* calls for, to elaborate the normative question of when the state ought to conclude that a parent has the “ability” — as a matter of fact and law — to pay, and to police the person making those judgments across sets of similarly situated litigants. But for the information-forcing function of courts (which could be a legal condition mandated for agencies and private providers if adjudicatory functions were devolved to them), the challenges facing the Turner and Rogers households and the judges of South Carolina become invisible.

#### V. DISAGGREGATED UNFAIRNESS, UNFAIR AGGREGATIONS, POLITICAL WILL, AND FRAGILE COURTS

Justice Scalia’s opinion in *Wal-Mart* noted the “adventuresome innovation” of the drafters of the 1966 class action rule.<sup>483</sup> All three of the opinions discussed here are likewise innovative, fashioning procedural requirements by extrapolations from statutes, rules, and the Constitution. *AT&T* and *Wal-Mart* fit within a series of procedural modeling decisions of this and the last few Terms, such as rulings on pleadings, standing, government immunities, jurisdiction, and summary judgment, that impose significant entry barriers to federal courts.<sup>484</sup> The narrowing of federal access puts pressure on state courts, which bear the brunt of responding to civil litigants of all incomes and to the vast numbers of criminal defendants — totaling 50 million cases annually.<sup>485</sup>

<sup>483</sup> *Wal-Mart*, 131 S. Ct. at 2558 (referring to Rule 23(b)(3)) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)) (internal quotation marks omitted).

<sup>484</sup> See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (pleadings); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (pleadings); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (standing); *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (immunity); *Bowles v. Russell*, 127 S. Ct. 2360 (2007) (jurisdictional time barriers). See generally Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009); 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).

<sup>485</sup> State court filings (traffic cases excluded) rose almost 22% from the 1980s to the 1990s; rose 10.6% from the 1990s to 2000; and in the interval from 2000 to 2008, rose more than 39%. The numbers include domestic cases and, in the most recent interval, criminal filings, which rose at twice the rate of civil filings. See COURT STATISTICS & INFORMATION MANAGEMENT PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980, 55 tbl.13 (1984); COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, 108 tbl.7 (1992); COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2001, 138 tbl.7 (2002); COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2008, 45 tbl.1 (2010); COURT STATISTICS

The twentieth-century narrative of ever-expanding federal court activity produced a sense of confidence that supported impressive investments in jurisdiction, judgeships, and courthouses. The numbers of judges, case filings, and courthouses rose dramatically during most of that century. But federal filing rates are no longer increasing as they once did. In 2010 (as in 1995), some 325,000–350,000 civil and criminal cases were begun, outstripped (as they have been in the past) by bankruptcy petitions numbering almost 1.5 million.<sup>486</sup> Further, civil filings represented the major source of growth during the big spurt years of the 1960s to the 1980s. More recently, criminal filings have constituted the primary component of the rise in the current federal caseload.<sup>487</sup>

The flattening slope of the demand curve suggests that Congress and private market participants are reappraising their interest in using federal courts. Indeed, while members of Congress had for decades threatened to strip federal jurisdiction, the 1996 Congress did so, as have its successors, imposing new limits on the judiciary's statutory authori-

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PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 38 (2010). Reports are available online at [http://www.ncsconline.org/D\\_Research/csp/SCCS-pastreports.html](http://www.ncsconline.org/D_Research/csp/SCCS-pastreports.html). Funding and filing issues make criminal and civil litigation interdependent. See generally HAZEL G. GENN, JUDGING CIVIL JUSTICE (2010); Yeazell, *supra* note 397.

<sup>486</sup> A comparison between filings predicted in 1995 and filings occurring, as of 2007, can be found in ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS, STATUS REPORT, I-18 (April 2008). Focusing on the years 2001, 2006, and 2009, civil and criminal filings averaged 331,022. The average for bankruptcy filings over the same period was 1,317,570; the year-to-year figures were more volatile. Filings in criminal cases increased in 2010 to 78,428. See *Judicial Business of the U.S. Courts*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx> (last visited Oct. 2, 2011). Slight variations on these numbers can be found at *Federal Court Management Statistics*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (last visited Oct. 2, 2011), and at *Judicial Facts and Figures 2008*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2008.aspx> (last visited Oct. 2, 2011). For data focused on 1995, see ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (1995).

<sup>487</sup> Civil and criminal filings grew about 10% from 1950 to 1965, about 95% from 1965 to 1980, and about 50% from 1980 to 1995; since then, the growth has slackened, to under 25% from 1995 to 2010. Specifically, from 1950 to 1965, filings in federal courts increased by 9.39% (23.9% increase in civil filings and 11.63% decrease in criminal filings). From 1965 to 1980, total filings increased by 95.73% (149.4% increase in civil filings and 13.24% decrease in criminal filings). From 1980 to 1995, they increased by 48.39% (47.13% increase in civil filings and 55.78% increase in criminal filings). From 1995 to 2010, they increased by 22.57% (13.68% increase in civil filings and 71.55% increase in criminal filings). Thus, beginning in 1980, the growth in criminal filings outstripped the growth in civil filings. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS: 1950, at 138 tbl.C1, 165 tbl.D1 (1950); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: 1965, at 174 tbl.C1, 213 tbl.D1 (1965); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: 1980, at 370 tbl.C1, 415 tbl.D1 (1980); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (1995); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2010).

ty.<sup>488</sup> Further, even as the judiciary has been relatively successful in maintaining its budgetary allotments,<sup>489</sup> Congress has cut back on construction funds,<sup>490</sup> refused many judgeship requests, and consistently rejected judicial salary increases that would have kept pace with inflation.<sup>491</sup>

Some will argue that reduced use of courts is either efficient or, whether wise or not, legally compelled. The majority in *AT&T* is surely right to worry about due process in the odd animal called “class arbitration,” birthed through the state and federal courts’ arbitration jurisprudence of the past decades. The Court raised important puzzles about how private dispute resolution mechanisms could or should bind absent members and provide the closure that makes aggregation attractive to some would-be defendants.<sup>492</sup> But the alternative need not be to preclude group litigation. One could permit nonbinding class arbitrations or read the FAA not to preclude court-based class actions, so as to return large-scale cases to judges, charged with publicly policing both named representatives and decisionmakers.

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<sup>488</sup> See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.); Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(e), 120 Stat. 2600, 2636 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *invalidated in part by* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

<sup>489</sup> Support for operating budgets in both fiscal year 2009 and fiscal year 2010 was approximately 96% and 98% of the amount sought, respectively. See Press Release, Admin. Office of the U.S. Courts, Judiciary Makes Case for Fiscal Year 2009 Funding (Mar. 12, 2008), *available at* [http://www.uscourts.gov/News/NewsView/08-03-12/Judiciary\\_Makes\\_Case\\_for\\_Fiscal\\_Year\\_2009\\_Funding.aspx](http://www.uscourts.gov/News/NewsView/08-03-12/Judiciary_Makes_Case_for_Fiscal_Year_2009_Funding.aspx); *Update: Fiscal Year 2009 and 2010 Budgets*, THIRD BRANCH, Apr. 2009, at 4, 4, *available at* [http://www.uscourts.gov/News/TheThirdBranch/09-04-01/Update\\_Fiscal\\_Year\\_2009\\_and\\_2010\\_Budgets.aspx](http://www.uscourts.gov/News/TheThirdBranch/09-04-01/Update_Fiscal_Year_2009_and_2010_Budgets.aspx); Press Release, Admin. Office of the U.S. Courts, Judiciary to Get \$6.9 Billion in FY 2010 Appropriations (Dec. 15, 2009), *available at* [http://www.uscourts.gov/News/NewsView/09-12-15/Judiciary\\_To\\_Get\\_6\\_9\\_Billion\\_In\\_FY\\_2010\\_Appropriations.aspx](http://www.uscourts.gov/News/NewsView/09-12-15/Judiciary_To_Get_6_9_Billion_In_FY_2010_Appropriations.aspx). The 2011 budget of \$6.91 billion was approximately 94% of what was requested. See Press Release, Admin. Office of the U.S. Courts, Expanding Caseload Fuels Judiciary Request for Resources in 2011 (Mar. 18, 2010), *available at* [http://www.uscourts.gov/News/NewsView/10-03-18/Expanding\\_Caseload\\_Fuels\\_Judiciary\\_Request\\_for\\_Resources\\_in\\_2011.aspx](http://www.uscourts.gov/News/NewsView/10-03-18/Expanding_Caseload_Fuels_Judiciary_Request_for_Resources_in_2011.aspx); *Federal Judiciary Funded to End of Fiscal Year*, THIRD BRANCH, Apr. 2011, at 1, 1, *available at* [http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Federal\\_Judiciary\\_Funded\\_to\\_End\\_of\\_Fiscal\\_Year.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Federal_Judiciary_Funded_to_End_of_Fiscal_Year.aspx). Further, the \$6.91 billion for 2011 was “about 1 percent above a FY 2010 hard freeze level.” *Id.*

<sup>490</sup> See, e.g., *Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing, and Enforcing Congressionally Authorized Limits on Size and Cost: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure*, 111th Cong. 4-5 (2010); see also *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 1-2 (2010).

<sup>491</sup> Requests for salaries are a regular feature of the Chief Justice’s annual review of the judiciary. See, e.g., sources cited *supra* note 155.

<sup>492</sup> Were the “hybrid” method expanded, and the merits as well as procedures reviewable in court, then the arbitrator would become like a special master, functioning with public oversight.

Similarly, the Court in *Wal-Mart* is right to worry about the scope and size of the Dukes class, which would have had to prove that an official policy of nondiscrimination coupled with corporate culture and managerial discretion at 3400 stores worked, systemwide, a discriminatory pattern or practice or had a disparate impact. Yet the Court not only refused that sprawling class but cut off opportunities to tailor a viable group-based claim to explore whether the statistically gendered pattern of employment violated congressional equality mandates. In passing, the Justices casually disparaged efforts to use “formulas” to deal with large numbers of similarly situated disputants so as to diminish intra-litigant disparities.

Likewise, the *Turner* majority was keenly aware of the vast well of need, once the line between a “criminal” right to counsel and civil litigation was breached, and the Court also worried about the risk of generating asymmetries by insisting on counsel for only one side of a family dispute. But its holding undervalues liberty by permitting persons to be sent to prison for up to a year at a time without imposing either counsel or methods to monitor the structural safeguards it prescribed for those facing the loss of liberty.

Thus, all three cases invented process by assessing the qualities of procedures, and all three holdings relied on the asymmetry of resources between plaintiff and defendant to justify limiting procedural opportunities for underequipped litigants — the Concepcions, Betty Dukes, and Michael Turner. Further, *AT&T* and *Wal-Mart* insisted on the importance of individual volition (to buy services, sign contracts, purchase services, or treat persons equally rather than discriminatorily) while providing no procedural supports to enable the persons affected to engage in the autonomous pursuit of arguing about the legality of the exchanges.

Just as boilerplate provisions in contracts are justified in part on the grounds of fair treatment across consumers, and just as standards for employee pay and promotion are aimed at dampening unfair discretion, courts also need structures to deal en masse, as well as to disaggregate and to customize when appropriate. The task is to decide which persons or entities can be understood as sufficiently similar to proceed as a juridical set, as well as to sort out which litigants have access to what forms of process. Debate — in the name of fairness — about how to equip litigants individually and through aggregation is what a world teeming with claimants requires.

What is lost through the *AT&T* and the *Wal-Mart* preclusion of group-based, court-based adjudication is the opportunity to explore how to structure aggregate decisionmaking that is fair and regulated. What is lost in *Turner* is an insistence that the state’s coercive power of incarceration is not cushioned by adding the adjective “civil.” What is put at risk are not only entitlements to courts but the legitimacy and functional integrity of the institutions of courts as well. Rather than

banning entry to courts and imposing presumptions against rights to counsel, law needs to welcome struggles with multiple modes of equi-page and aggregation to learn methods to balance power asymmetries, fund lawyers for certain sets of litigants, identify forms of ADR respecting access and publicity rights, and impose regulations and limits on those that do not. Rather than damping down judicial and political engagement with these problems, the Court should be inviting input from diverse venues of lawmaking, while insisting that certain aspects of “fairness” be maintained, in whatever venue is provided.<sup>493</sup>

Above, I discussed the repeated exchanges between the Nebraska courts and legislature about whether arbitration could coexist with constitutional rights to remedies in “open courts,” and I sketched the national Civil *Gideon* movement aiming to identify subsets of indigent civil litigants to be given free lawyers.<sup>494</sup> These examples illustrate that, just as the twentieth century produced a host of targeted reform efforts aiming to whittle at the enormous problem of producing fair and binding outcomes for millions of new rights holders, attempts are under way in the twenty-first to do so as well. Given the dedication of this volume to the Supreme Court’s Term, this Comment has been court-centric. But rather than positioning the three 2010 Term cases as exemplary of the only procedural inventiveness on the drawing boards, brief examples taken from Congress and from Europe make plain that other institutions are assessing the qualities required for fair procedures and responding to asymmetries of resources, intra-litigant disparities, access to court, and ways to enable the public to comprehend the results.

Since the 1990s, Congress has considered a series of statutory proposals to respond to the Court’s expansion of the Federal Arbitration Act. Several bills have proposed to exempt civil rights plaintiffs, consumers, and employees from being bound by ex ante waivers of court access for claims under federal or state law.<sup>495</sup> A few have become

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<sup>493</sup> As Rakoff put it, the challenge is how to deal with a volume of disputes without toppling courts or leaving all unregulated by removing “large swathes of contracts from the courts to the arbitrators.” Rakoff, *The Law and Sociology of Boilerplate*, *supra* note 1, at 206.

<sup>494</sup> The Chief Judge of New York, for example, proposed that free services be provided to homeowners facing foreclosure. See David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES, Feb. 16, 2011, at B1. Child custody disputes are given priority under the California pilot project. See Sargent Shriver Civil Counsel Act, CAL. GOV’T CODE § 68651(b)(2) (2011).

<sup>495</sup> Bills introduced between 1996 and 2001 were titled Civil Rights Procedures Protection Act and were to apply to claims filed under Title VII, the Age Discrimination Act, the Rehabilitation Act, the Americans with Disabilities Act, the Fair Labor Standards Act, and the Family and Medical Leave Act. See, e.g., Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong., 2d Sess. (1996); Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong., 1st Sess. (1997); Civil Rights Procedures Protection Act of 1999, S. 121, 106th Cong., 1st Sess. (1999); Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong., 1st Sess. (2001).



law. In 2002, in a bill called the Motor Vehicle Franchise Contract Arbitration Fairness Act, Congress addressed the “disparity in bargaining power between motor vehicle dealers and manufacturers.”<sup>496</sup> The statute prevents car companies from enforcing forms requiring arbitration of disputes with their dealerships.<sup>497</sup> The 2008 Farm Bill included the Fair Contracts for Growers Act, making unenforceable arbitration provisions in contracts between chicken farmers and processing companies, unless agreements to arbitrate are made after conflicts emerge.<sup>498</sup> In 2010, one set of employees bringing Title VII claims received an exemption from arbitration by way of a provision in the Defense Appropriations Act of 2010, which restricts mandatory arbitration clause enforcement by military contractors.<sup>499</sup> The same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act made unenforceable arbitration provisions in mortgage and home equity loans and in certain whistleblower cases. The legislation also called on the Consumer Financial Protection Bureau, created by the Act, as well

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Since 2007, proposals for an Arbitration Fairness Act have sought FAA exemptions for consumers as well as for civil rights plaintiffs, employees, and other plaintiffs with unequal bargaining power. *See, e.g.*, Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong., 1st Sess. (2007); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., 1st Sess. (2009); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong., 1st Sess. (2011). Those bills provided that no “predispute arbitration agreement shall be valid or enforceable” if it required arbitration of “employment, consumer, or franchise dispute[s]” or “dispute[s] arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power,” that federal law governed, and that the Act’s application was to be “determined by the court, rather than the arbitrator,” regardless of whether a contract specified otherwise. *See, e.g.*, H.R. 3010 § 4. Collective bargaining agreements were excluded. *Id.* § 4(d). In addition, a few bills aimed to regulate particular industries, such as the 2008 Fairness in Nursing Home Arbitration Act, which would have made not “valid” or “enforceable” predispute arbitration agreements between a “long-term care facility and a resident.” Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong., 2d Sess. § 2(b) (2008).

<sup>496</sup> *See* Motor Vehicle Franchise Contract Arbitration Fairness Act, S. REP. NO. 107-266, at 2 (2002) (describing dealers as “virtual economic captives of automobile manufacturers” who proffer contracts on a “‘take it or leave it’ basis”). The law provides that if parties elect, *ex post*, to arbitrate, arbitrators are required to provide them with a written justification for orders. *See* 21st Century Department of Justice Appropriations Authorization Act, 15 U.S.C. § 1226 (2006).

<sup>497</sup> *See* 15 U.S.C. § 1226.

<sup>498</sup> *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11005, 122 Stat. 1651 (codified as amended at 7 U.S.C. § 197c (2006 & Supp. IV 2010)). Unlike the automobile franchise bill, the Fair Contracts for Growers Act does not impose regulations on arbitrators to provide written comments. *See* 7 U.S.C. § 197c.

<sup>499</sup> Government contractors receiving more than \$1 million are prohibited from enforcing or requiring “as a condition of employment” that either employees or independent contractors “agree to resolve” claims through arbitration if such claims could have been filed under Title VII or involved any “tort related to or arising out of sexual assault or harassment.” Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116(a)(1), 123 Stat. 3409 (2009). This “Franken” amendment, named after its proponent, Senator Al Franken, came after a woman was allegedly gang-raped by coworkers at a corporate subsidiary in Iraq. *See* Chris McGreal, *Rape Case to Force US Defence Firms into the Open*, GUARDIAN, Oct. 16, 2009, at 27.

as on the Securities and Exchange Commission, to consider limiting or banning predispute arbitration clauses elsewhere.<sup>500</sup>

Turning to the transnational context (in which a market for ADR is blooming, with both the AAA and JAMS offering globalized services),<sup>501</sup> the relationship between fair hearings and ADR has been debated in Europe's courts. The framing is, once again, "fairness," obliged by Article 6 of the European Convention on Human Rights and by Article 47 of the Charter of Fundamental Rights of the European Union, providing that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal."<sup>502</sup>

One example comes from a challenge to an Italian statute imposing mandatory "dispute settlement rules" for disputes between consumers and telecommunication companies and entailing some use of the internet to file claims.<sup>503</sup> Consumers argued that the statute violated Europe's commitment to providing everyone with a "fair and public hearing."<sup>504</sup> The European Court of Justice (ECJ) responded and, as in the U.S. context, a utility calculation was offered. The ECJ's Advocate

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<sup>500</sup> Pub. L. No. 111-203, §§ 1414, 922, 124 Stat. 1376 (2010). The Bureau is to study the use of predispute arbitration provisions in consumer agreements and, if warranted, "may prohibit or impose conditions or limitations on the use of" arbitration provisions in such agreements. *Id.* § 1028. The Commission's authority to "prohibit, or impose conditions or limitations on the use of," arbitration agreements between customers and broker-dealers is set forth in § 921.

<sup>501</sup> The AAA helped to launch the International Centre for Dispute Resolution. *International ADR*, AM. ARBITRATION ASS'N, <http://www.adr.org/icdr> (last visited Oct. 2, 2011). JAMS likewise is part of a global network. *About JAMS*, JAMS, [http://www.jamsadr.com/aboutus\\_overview](http://www.jamsadr.com/aboutus_overview) (last visited Oct. 2, 2011).

<sup>502</sup> See ECHR, *supra* note 2, art. 6.1; Charter of Fundamental Rights of the European Union art. 47, Dec. 7, 2000 (2000 O.J. (C. 364)), as adjusted Mar. 3, 2010 (2010 O.J. (C. 83)) ("Right to an Effective Remedy and a Fair Trial"). Fairness, translated as asymmetries in bargaining power, is also the concern of the European Union's Directive on Unfair Terms in Consumer Contracts. Council Directive 93/13 (1993).

<sup>503</sup> In the United States, the term is "online dispute resolution" or ODR. See Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 23 AM. REV. INT'L ARB. (forthcoming 2012) (manuscript at 110-11), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1919936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919936). As Stipanowich also noted, *see id.* at 70-73, the Canadian Supreme Court recently declined (5-4) to insist on arbitration of a consumer dispute with a cell phone provider. The court concluded that, given the prohibition of waivers of "rights, benefits, or protections" under the Business Practices and Consumer Protection Act of British Columbia, and that statute's conferral of a right to bring actions in the Supreme Court of British Columbia, a consumer contract mandating reference of any claims arising out of a cell phone contract to "private and confidential mediation," followed if unsuccessful "by private, confidential, and binding arbitration," was not enforceable as to certain claims. *Seidel v. Telus Commc'ns, Inc.* (2011), 329 D.L.R. 4th 577 at paras. 13, 31, 48-50 (Can.). Because the cell phone provision made "the class action waiver dependent on the arbitration provision," it too was not enforceable, but the court took no position on whether a class ought to be certified. *Id.* at paras. 46-49.

<sup>504</sup> See Case C-317/08, *Alassini v. Telecom Italia* (Mar. 18, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0317:EN:HTML>. Under the statute, before courts would take jurisdiction, the law required the parties to "attempt to settle the dispute," electronically or in person, out of court. *Id.*

General concluded that “a mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection . . . [but] a minor infringement . . . that is outweighed by the opportunity to end the dispute quickly and inexpensively.”<sup>505</sup> In 2010, the ECJ concurred but, unlike the U.S. Supreme Court, imposed regulatory caveats: that the settlement outcomes were not binding; that the ADR efforts imposed no “substantial delay” in bringing legal proceedings and that the ADR tolled time bars; that forms of judicial “interim measures” remained available; and that, if settlement procedures were available only electronically, national courts were to assess the burden placed on individuals.<sup>506</sup> In contrast, the Supreme Court’s rulings in *AT&T* and *Wal-Mart* work at a less fine-grained level, imposing no regulations on ADR, leaving people with fewer avenues to lawyers and courts, limiting the role of lower court judges in joining with other branches of government to puzzle about due process mandates, and reducing public knowledge about transactions.

## VI. THEORIES OF VALUE FOR COURTS IN DEMOCRACY

While the conflicts, participants, institutions, procedural formats, and outcomes of the three lawsuits resemble an overly pat story line, neither a novelist nor happenstance produced them. Rather, eighteenth- and nineteenth-century constitutional commitments that courts be open helped to generate a new set of democratic norms, an ambitious project that put government processes before the public eye and offered access to all then understood as rights holders. The texts and common law practices of those eras generated a “settled usage”<sup>507</sup> reflected in the many constitutions providing rights to remedies in court and echoed in *Marbury v. Madison*’s embrace of those terms as well.<sup>508</sup>

But what were those rights and who had them? None of the litigants in the three cases on which this Comment centers could have then asserted their claims, nor could they have formed aggregates or been provided free lawyers. The Concepcions, Betty Dukes, and Rebecca Rogers gained their entitlements relatively recently, through the social and political movements of twentieth-century America, which

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<sup>505</sup> Cases C-317/08 to C-320/08, Opinion of Advocate General Kokott (Nov. 19, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0317:EN:HTML>.

<sup>506</sup> Case C-317/08, *Alassini*, paras. 47–67.

<sup>507</sup> *Turner*, 131 S. Ct. at 2521 (Thomas, J., dissenting) (quoting *Weiss v. United States*, 510 U.S. 163, 197 (1994) (Scalia, J., concurring in part and concurring in judgment) (internal quotation mark omitted)).

<sup>508</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is the obvious reference here. Its oft-quoted phrase is that when an individual has a legal right, “the laws of his country afford him a remedy.” *Id.* at 168.

endowed consumers, employees, and parents with the particular rights pressed in all three cases. Those statutory entitlements interacted with new commitments to equality and with the incorporation of dignity as a constitutional value,<sup>509</sup> thereby transforming the agenda of courts.

Legislators, state and federal, responded by authorizing more judgeships and delineating additional layers of courts, devolving adjudicatory authority to administrative agencies, licensing outsourcing to private providers, and shaping various aggregate procedures. Millions of annual filings pay tribute to the embeddedness of right-to-remedy aspirations. But political will did not extend to staff all the venues of adjudication, to provide funding for all unable to afford lawyers, or to regulate the marketplace of private lawyers to reduce the gaps in services.

Where do these many new users of courts — of which the *Concepcions*, *Dukes*, and *Rogers* are exemplary — fit in adjudicatory institutions that have an ancient lineage but have been profoundly altered by democratic precepts? Do courts in democracies remain legitimate if their doors are shut to many potential claimants? And what are the risks of doors' being open too wide, permitting strategic exploitation of opponents?

Three centuries of the open structure of courts produced the records excavated here that pose these questions. Court documents provide the lens through which we — the public — learn about the consumer claims of Vincent and Liza Concepcion, the bundle of services provided by AT&T and its promotion of alternative dispute resolution, the challenges facing workers such as Betty Dukes, the textured structure of the workplace at Wal-Mart, the painful family life of Michael Turner and Rebecca Rogers, and the disparities in resources at play in all of these disputes.

When critiquing the narrow focus of the “due process calculus” in *Mathews v. Eldridge*, Jerry Mashaw termed its approach “three factors in search of a theory of value.”<sup>510</sup> The issues raised by *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers* likewise required theories of values, implicitly supplied by the Justices as they elaborated doctrine that enabled or limited the use of courts. The debates among the Justices about the utility and the normative desirability of access to courts for individuals and groups paralleled broader conflicts about the role and function of government regulation and of government support in contexts ranging from voting to health and education.

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<sup>509</sup> See, e.g., Naomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); Reva Siegel, *Dignity and the Politics of Abortion: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1934 (2003).

<sup>510</sup> Mashaw, *Due Process Calculus*, *supra* note 476, at 28–30.

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Yet the question of governments' relationships to courts is distinct, not only because of the constitutional charter running to courts but also because of the dependence of the state on courts to order its society. If persons like the plaintiffs discussed here have no way to voice their claims — be they right or wrong — in court, if the ordinary civil litigant is priced out or among the millions of pro se complainants, then courts become the domain of the criminal defendant; of the well-to-do litigants who opt in rather than buying private dispute resolution services; of the few constitutional claimants able, like *Turner*, to attract issue-oriented lawyers; and of the government, supported by taxpayer dollars in its role as plaintiff or defendant in litigation. That reduced spectrum of users becomes a problem *for* the democratic legitimacy of courts, as they sit legally "open" to provide "everyone" with remedies but functionally closed. And the limited use of courts cuts off their utility as contributors *to* democracy through their structural insistence on participatory parity and their due process practices of according equality and dignity to those before them.

Traditions of public proceedings surrounding courts are thousands of years old, but democratic innovations of recent centuries endowed courts' audiences with participatory capacities to interrogate, confirm, or seek to dislodge the procedures imposed and the judgments rendered. Only through finding paths to courts for diverse users and by public disclosures and oversight of dispute resolution, whether in or out of court, single file or aggregated, can one know whether fairness is either a goal or a result. *AT&T*, *Wal-Mart*, and *Turner* comprise the agenda for the twenty-first century, during which decisions will be made about what courts are for, who pays the price for process, and what remains of relevance in the phrase "equal justice under law."