

PROCEDURAL CONSTANTS: HOW DELAY AVERSION SHAPES REFORM

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INTRODUCTION

American civil procedure is in the fourth era of its history.¹ Interestingly, the set of procedural rules that launched the third era—the Federal Rules of Civil Procedure²—are still formally intact in the fourth era.³ Yet, sadly in my view, waves of profound, correlated, and enduring reforms engulfed the core values of those Federal Rules, thereby establishing *de facto* the current, fourth era.⁴

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¹ See generally Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

² For history of the Federal Rules of Civil Procedure, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1050–98 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 948–56 (1987).

³ See FED. R. CIV. P.

⁴ See Subrin & Main, *supra* note 1, at 1841–56.

Although my desire is to escape the clutches of a wayward fourth era, my research agenda focuses on the history of the transition from the third era to the fourth. I hope that a better understanding of that transition—which occurred incrementally in the 1970s and 1980s⁵—will shed light on how best to structure reforms that may ultimately usher in a new, fifth era.

Because I am partial to the values of the third era, I imagine a fifth era that resembles the third. The third era was premised on the notion that, once the parties learned the relevant facts, cases would either settle or go to trial.⁶ Judges had a limited but important role in this process: (1) ensure that both parties had access to all relevant facts; and (2) for those cases that did not settle, preside over a trial.⁷ Judges had very limited authority to dismiss the case prior to the discovery of relevant facts, and judges would rarely enter a summary judgment.⁸ Judges tried cases.⁹ And most cases settled.¹⁰

The fourth era was established through a number of reforms, most of which were initiated by judges through new interpretations of extant rules.¹¹ Experiencing something of a role reversal, judges in the fourth era play a significant role at each stage of litigation *except* for trials.¹² Indeed, trials have all but disappeared.¹³ Instead, in the fourth era: (1) the motion to dismiss has a screening function that terminates some cases (and chills others),¹⁴ (2) the discovery stage is harder to reach, and broad discovery harder to obtain,¹⁵ and (3) the summary

⁵ See *id.* at 1847–56.

⁶ See Edson R. Sunderland, *Foreword* to GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL*, at iii (1932); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 *YALE L.J.* 863, 864 (1933); see also Subrin & Main, *supra* note 1, at 1845–46. See generally John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L.J.* 522 (2012).

⁷ See Subrin & Main, *supra* note 1, at 1845–46.

⁸ JOE S. CECIL & C.R. DOUGLAS, *SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS* 1 (1987); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 *MARQ. L. REV.* 141, 147 (2000); Subrin & Main, *supra* note 1, at 1845.

⁹ See Subrin & Main, *supra* note 1, at 1845.

¹⁰ See *id.* at 1846 (“Nearly all of the remaining cases were resolved by settlement. When the parties settled, it was because both parties agreed that the settlement was preferable to the alternative. Importantly, the alternative was a trial . . .”). See generally Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 *STAN. L. REV.* 1339, 1340 (1994); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *JUDICATURE* 161, 162–64 (1986).

¹¹ See Subrin & Main, *supra* note 1, at 1847–49, 1852–53, 1887.

¹² *Id.* at 1853, 1859–67.

¹³ ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 12–13 (2001); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459, 462–63 tbl.1 (2004); Subrin & Main, *supra* note 1, at 1857 n.94, 1875–76; William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 *SUFFOLK U. L. REV.* 67, 83 (2006).

¹⁴ See Subrin & Main, *supra* note 1, at 1848–49.

¹⁵ *Id.* at 1849–51.

judgment motion is the “focal point” of litigation.¹⁶ In this regime, trial is a “mistake”;¹⁷ accordingly, judges are impelled to manage cases toward settlement from the onset of litigation.¹⁸ As in the third era, most cases in the fourth era settle; but the important difference is that rather than cases settling in the shadow of a trial,¹⁹ they now settle in the shadow of a sword of Damocles.²⁰

¹⁶ For references to summary judgment as the “focal point” of litigation, see 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, 1016 (2003); Subrin & Main, *supra* note 1, at 1852–53; Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 240 (2011). For a discussion of how summary judgment is increasingly the endpoint of litigation, see Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 710 (2012) (stating that movants win 55 to 68 percent of their summary judgments (citing Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson 1 (Apr. 12, 2007, rev. June 15, 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf))); see also BARRETT & FARAHANY, LLP, ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS FOR CASES IN WHICH AN ORDER WAS ISSUED ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT IN 2011 AND 2012 IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA 3, available at <http://ssrn.com/abstract=2326697> (reporting grant rates of 95 percent for partial summary judgments and 83 percent for full summary judgments).

¹⁷ See generally Fred J. Cassibry, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 271 (1971) (“Most of the time when I try a case I consider that I have somehow failed . . . [T]he judge must not only explore settlement but must actively pursue it with all the vigor at his command . . . [U]ntil every last road to settlement has been traveled, I will not try the case.”); Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3 (1996) (stating “[t]rial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost” (footnote omitted)); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 107–08 (1994) (suggesting that most judges and scholars believe “trials represent mistakes—breakdowns in the bargaining process—that leave the litigants and society worse off than they would have been had settlement been reached”). See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 n.200 (1995) (quoting Edward Cooper’s criticism of the prevailing tendency to view a “trial as a pathological event” (citing Edward Cooper, Reports, Minutes of the Civil Rules Advisory Committee 20 (October 21–23, 1993))).

¹⁸ See, e.g., William W. Schwarzer, *Managing Civil Litigation: The Trial Judge’s Role*, 61 JUDICATURE 400 (1978); see also D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 93 (1986) (criticizing academics and praising “[s]ettlement-oriented judges” who have a “fundamental commitment to enhancing settlement opportunities in the federal courts”). For criticism of this mindset, see Young, *supra* note 13, at 94 (collecting authorities).

¹⁹ See generally HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION (1991); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004).

²⁰ See *supra* note 13; see *infra* notes 131, 133–34 and accompanying text.

A dramatic increase in the civil caseload was a primary trigger (and the articulated justification) for the reforms that instigated the fourth era.²¹ Between the 1960s and 1990s, Congress significantly expanded the scope of federal jurisdiction and created hundreds of new causes of action.²² In the three decades leading up to 1969, the civil caseloads of federal courts grew at a modest average annual rate of approximately 3.4 percent.²³ But in the 1970s, the average annual rate of growth was 7.4 percent.²⁴ From 1980 to 1985, the average annual rate of growth was 10.1 percent.²⁵ (Since 1985, there has been essentially no growth.²⁶)

The burgeoning caseload was not ignored. First, there was a formal, institutional response: on a number of occasions, Congress expanded the capacity of the federal courts by creating new judgeships.²⁷ But increases in the number of judges did not match increases in the number of newly filed cases. For example, between 1969 and 1983, a period during which the civil caseload more than tripled, the number of federal district judges increased by only 70 percent.²⁸ As a practical matter, then, the average civil caseload of each federal judge doubled over the course of a long decade: in 1969, there were an average of nineteen new civil filings per judge per month; and in 1983, that number had increased to forty.²⁹

Of course the judges themselves also responded to the dramatic increase in the number of cases; hence the fourth era.³⁰ This response was institutional in the sense that it was implemented throughout the federal court system. Yet this

²¹ Subrin & Main, *supra* note 1, at 1859–67.

²² Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 956 (2000) (citing Memorandum from the Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998) (on file with the Harvard Law School Library)).

²³ See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl.C-1 (1940–1969) [hereinafter ANNUAL REPORTS].

²⁴ *Id.* at tbl.C-1 (1970–1979).

²⁵ *Id.* at tbl.C-1 (1980–1985).

²⁶ See *infra* notes 142–44 and accompanying text.

²⁷ The numbers of authorized district court judgeships increased significantly in 1949, 1954, 1961, 1966, 1970, 1978, 1984, 1990, 1999, 2000, and 2002. See *Authorized Judgeships*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships.aspx>. The Federal Magistrates Act of 1968 also increased the capacity of the district courts. See generally Philip M. Pro, *United States Magistrate Judges: Present But Unaccounted For* (Mar. 31, 2014) (unpublished thesis, Duke University, School of Law) (on file with author); see also *infra* notes 59, 180 and accompanying text.

²⁸ ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1969–1983).

²⁹ *Id.*

³⁰ The reforms that ushered in the fourth era appeared on many fronts, including pleading, summary judgment, class actions, ADR, standing, fee awards, justiciability, access to courts, access to lawyers, and case management. To be clear, not all of the reforms were reinterpretations of extant rules. There were some statutory reforms. There were also some reforms to the Federal Rules. See Subrin & Main, *supra* note 1.

was not a top-down reform that emanated from the Supreme Court. Although a number of the Court's decisions signaled key moments in the establishment of the fourth era,³¹ the Court played more of a ratifying role, as opposed to a leading role.³² Instead, district court judges powered the engine of reform toward a new era of procedure that, among other things, transformed the role of a federal district judge.³³

Locating the source of reform in the district courts (née "trial" courts) is particularly intriguing for two reasons. First, it discourages wholly ideological explanations for the institutionalization of the fourth era.³⁴ Although there are demonstrated political effects in Supreme Court decisionmaking,³⁵ recent empirical scholarship advises skepticism about the role of ideology at the trial court level.³⁶ To be sure, a conservative and anti-law-enforcement ideology un-

³¹ See, e.g., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (mandatory arbitration); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (class actions); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (personal jurisdiction); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (pleading); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (pleading); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating civil remedies); *Alden v. Maine*, 527 U.S. 706 (1999) (Eleventh Amendment); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (admissibility of evidence); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (mandatory arbitration); *Martin v. Wilks*, 490 U.S. 755 (1989) (complex litigation); *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987) (personal jurisdiction); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (summary judgment); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (summary judgment); *Marek v. Chesny*, 473 U.S. 1 (1985) (fees); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982). See Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1742–47 (2014).

³² See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004) (noting the rise of summary judgments in the 1970s, prior to the Supreme Court's trilogy of summary judgment cases in 1986); Subrin & Main, *supra* note 1, at 1848 (recounting history of heightened pleading and describing how "[t]he Supreme Court, like a drum major whose band was no longer following, sprinted to get back in front of the parade and preserve the appearance of leadership").

³³ Subrin & Main, *supra* note 1, at 1872–74, 1890–91.

³⁴ *Cf. id.* at 1861–67.

³⁵ See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

³⁶ See, e.g., Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (finding that the judges' political preferences do not affect the outcome of summary judgment motions in civil rights cases); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 840–41 (2010) (finding no effect of the judges' political party on class action settlements and their fee awards); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 193 (2010) (finding that the "party of the deciding judge bears no relation to outcome"); see also Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 233 (2009) (suggesting that studies of political effects may be complicated by differences in judicial decision-making in published as opposed to unpublished opinions).

doubtedly played some role in launching and legitimizing the fourth era.³⁷ Yet it would be easy to exaggerate the significance of that explanation since many of the fourth era reforms were introduced or enthusiastically adopted by district judges who were appointed by Democratic presidents.³⁸

Second, identifying the district courts as the engine of reform invites speculation about how a group of relatively diverse, geographically scattered, and fiercely independent federal judges adopted *these* reforms and assigned themselves *this* role. How did they mobilize? Who was their leader? When and why did they set this agenda?

In this article, I demonstrate that the fourth era reforms were predictable in light of certain prevailing cultural norms of the district courts. These norms—what I call *procedural constants*—are phenomena that can be measured statistically and have remained constant for decades.³⁹ These procedural constants are not mandated by rule or statute, yet they have persisted amid otherwise remarkably dynamic circumstances. The strongest version of my thesis is that the fourth era reforms were path dependent. In other words, these reforms had no leader, and there was no mobilization effort, nor an agenda; instead, the procedural constants foreclosed any course of action other than the one pursued.

I divide the procedural constants into two clusters, but essentially everything that I discuss regards the timing of cases entering and exiting the federal court's civil docket. Part I unearths procedural constants from annual data regarding the number of filed cases, terminated cases, and pending cases. Part II reveals procedural constants that are embedded in annual data regarding the amount of time from filing to termination. In part III, I discuss how these procedural constants shaped reforms that led ineluctably to the fourth era. And part IV describes lawmaking efforts that bolstered the impromptu judicially-initiated reforms. In the conclusion, I contemplate a new, fifth era.

I. FILED CASES, TERMINATED CASES, AND PENDING CASES

The key observations of this article are not about things that changed during the dynamic transition from the third to the fourth eras, but rather about things that remained constant. In this part, I introduce the first two procedural constants: (i) the relationship between the number of terminations and the number of filings, and (ii) the size of the court's docket of pending cases.

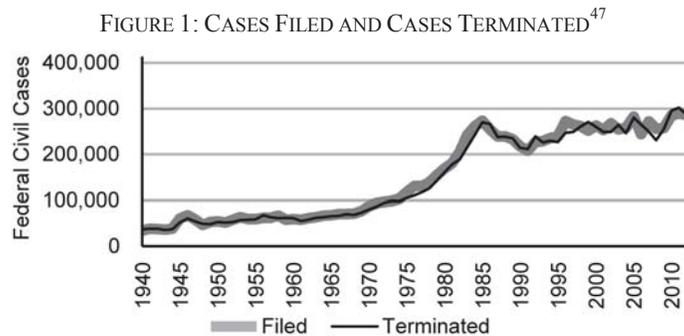
³⁷ Subrin & Main, *supra* note 1, at 1869–72; *see also* Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1235–36 (2015).

³⁸ Subrin & Main, *supra* note 1, at 1852 n.70, 1866.

³⁹ To be clear, what I label a procedural constant is really only a constant since about 1940 (and in some instances, because of the limited data available, only since 1963). The late 1930s was a critical moment in the construction of the modern identity of a system of federal courts—first with the promulgation of Federal Rules of Civil Procedure, and then the Court's articulation of the *Erie* Doctrine. *See* Rules of Civil Procedure, 308 U.S. 645 (1938); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Administrative Office of U.S. Courts was also established in 1939, and data prior to 1940 lacks certain indicia of reliability.

A. Cases Terminated and Cases Filed

The number of cases that are terminated⁴⁰ in a given year tracks very closely the number of cases that are filed that year. This is noteworthy since, over the course of the past seven decades, the federal courts have experienced significant changes including, *inter alia*, (i) the number of civil cases filed,⁴¹ (ii) the composition of the civil caseload,⁴² (iii) the size, makeup, infrastructure, and administrative management of the judiciary,⁴³ and (iv) the perception about the proper role of courts.⁴⁴ Yet, as Figure 1 below demonstrates, the close relationship between the number of filings and the number of terminations has remained constant for more than seventy years.⁴⁵ The very close relationship between these two numbers is unmistakable; in the language of statistics, the coefficient of determination (r^2 value) is 98.9 of a possible 100, and the average annual difference between the two numbers is about ± 5.1 percent.⁴⁶



⁴⁰ For a much more sophisticated treatment of what constitutes a termination, see Moore, *supra* note 37, at 1198.

⁴¹ *Id.* at 1208–38.

⁴² *Id.*

⁴³ See generally DEBORAH J. BARROW ET AL., THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE 11–24 (1996); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171 (1995).

⁴⁴ John M. de Figueiredo et al., *Congress and the Political Expansion of the U.S. District Courts*, 2 AM. L. & ECON. REV. 107 (2000).

⁴⁵ Statistical data published before the Administrative Office of U.S. Courts was established suggest that this relationship may have been constant since the mid-1920s. In 1923, the number of filings and terminations were, respectively, 30,716 and 28,916—a difference of about 6 percent. In each of the ten years before 1923, however, the differentials were much more pronounced, ranging from a low of 11 percent to a high of 85 percent. From 1923 to 1933, the percentage of difference never exceeded single digits. See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1923–1933).

⁴⁶ *Id.* at tbl.C-1 (1940–2013).

⁴⁷ *Id.*

Cases may terminate upon a court order following a trial, a motion for summary judgment, or a motion to dismiss. But more often, cases terminate by voluntary agreement of the parties.⁴⁸ Voluntary settlements occur in the shadow of formal litigation,⁴⁹ but the role of judges in generating these terminations is not altogether obvious; I will address this issue in the next subpart.⁵⁰

Although it may be intuitive that the number of terminations would or should closely track the number of newly-filed cases, it is neither necessary nor inevitable. To be sure, the total number of terminations cannot *exceed* the total number of filed cases. But the reverse is not true: terminations need not keep pace with the number of newly filed cases. If the number of terminations fell significantly behind the number of filings, the courts would accrue a growing inventory of pending cases. An inventory backlog could be addressed in leaner years or, absent that, structural delays would inevitably result. Large backlogs and long delays might be undesirable or even unjust,⁵¹ but they are undoubtedly *possible*. In fact, lay people (and experts who should know better) often speak as though backlogs and delays are endemic to civil litigation.⁵² Nevertheless, the close relationship between the number of filings and terminations each year is the first of several revelations in this paper regarding the federal judiciary's especially strong aversion to delays and inventory backlogs. In fact, this aver-

⁴⁸ See Galanter & Cahill, *supra* note 10, at 1338–40.

⁴⁹ See generally KRITZER, *supra* note 19; Galanter, *supra* note 19; Mnookin & Kornhauser, *supra* note 19; Subrin & Main, *supra* note 19.

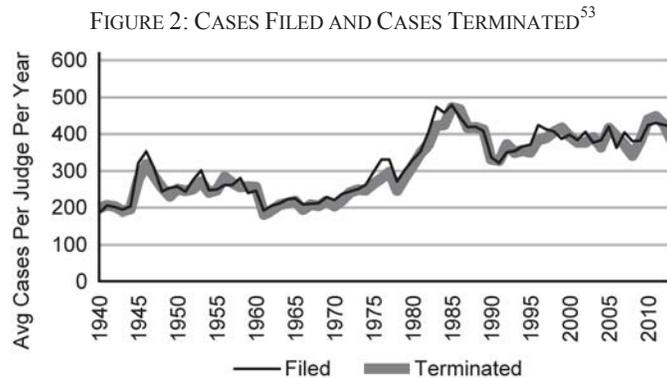
⁵⁰ See *infra* Part I.B.

⁵¹ See generally Magna Carta, Cl. 40 (“To no one will we deny or delay right or justice.”); Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMP. L. REV. 1075, 1092 n.70 (2006) (citing authorities); David Schultz, “Justice Delayed, Justice Denied”: *The Fastest Gun in the East (Or at Least on the Supreme Court)*, 16 CONST. COMMENT. 213, 213 (1999) (“‘Justice delayed, justice denied’ is an ancient legal maxim.”).

⁵² See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 765–67 (2010) (discussing changes to the Rules); Arthur R. Miller, McIntyre in Context: *A Very Personal Perspective*, 63 S.C. L. REV. 465, 477 (2012) (recounting the cost and delay rhetoric from the late 1970s and early 1970s when he served as Reporter to the Advisory Committee on Civil Rules); Moore, *supra* note 37, at 1179 (“[L]itigants have their cases delayed for months and months because our Federal courts are understaffed.” (quoting *The Federal Judgeship Act of 2013: Hearing on S. 1385 Before the Subcomm. on Bankr. & the Courts. of the Comm. on the Judiciary*, 113th Cong. 30 (Sept. 10, 2013) (statement of Sen. Patrick Leahy))). Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1116–32 (2012) (offering extensive citations in a section titled “Explaining the Resilience of the Cost-and-Delay Narrative”). See generally Warren E. Burger, *Preface* to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 5–6 (A. Leo Levin & Russell Wheeler eds., 1979) (articulating concerns about excessive delays in civil litigation); Edward H. Levi, *The Business of Courts: A Summary and a Sense of Perspective*, Address at National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 9, 1976), in POUND CONFERENCE, *supra*, at 269–70 (same); Leonard S. Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323, 1323 (1979) (describing the initiatives of the ABA’s Action Program to Reduce Court Costs and Delays). I will talk more about this in Part II. As a matter of fact, what is endemic are *concerns about delays* not delays.

sion to delay appears to be the animating force behind the procedural constants that, in turn, shape reform.

Figure 1, above, demonstrated the dynamic conformity between the number of cases filed and the number of cases terminated each year. Figure 2, below, presents that same data on a per-judge basis.



Naturally, the appointment of new judges moderated the impact of the seven-fold increase in the absolute number of new cases.⁵⁴ Yet, even on a per-judge basis, increases in the numbers of filings and terminations were significant.

The termination of a case is, essentially, a service that the judiciary provides. The courts are a shared public resource that provides a forum for the resolution of disputes. The system of procedural rules helps interrogate, investigate, filter, focus, and resolve each of those disputes; and each termination is the product of some integration of law and fact.⁵⁵ The data charted in Figure 2, above, suggest that the judiciary's capacity to produce this service is remarkably elastic: during the long decade from 1969 to 1983, for example, the average judge nearly doubled the supply of this service.⁵⁶

Doubling the supply of a service is an unusual achievement. Sometimes the supply of a particular service or good can be expanded at little or no marginal cost: when an airline has empty seats on a plane or a publisher can deliver a book electronically, the cost or effort of providing one more unit is nil. But ordinarily, an increase in the supply of a good or service requires significant additional cost: a restaurant can often serve more customers, for example, but there

⁵³ See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1940–2013). For the denominators I used the number of “authorized federal district court judgeships” for each year. See *supra* note 27.

⁵⁴ See *supra* Figure 1.

⁵⁵ Subrin & Main, *supra* note 1, at 1877–80 (describing procedure's instrumental purpose); Subrin & Main, *supra* note 19.

⁵⁶ In 1969, each federal judge terminated an average of 218 civil cases per year. In 1983 that number had increased to 422. See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1969–1983).

is a marginal cost associated with that increase in production.⁵⁷ Typically the marginal cost would include additional staff, extra supplies, and more food. If there is no additional investment of this sort when the number of customers doubles, then the marginal cost may be a decline in the quality of the service and food. In that same vein, then, one might fairly wonder—and I later will return to this question—whether each of the average district judge’s thirty-five terminations per month in 1983 is a diluted and inferior version of the eighteen terminations per month that she produced in 1969.

One possible explanation for the impressive increases in the number of terminations per judge is the increased efficiency of the judiciary. To be sure, efficiency and better case management were championed by Warren Burger, who became Chief Justice of the U.S. Supreme Court in 1969.⁵⁸ Judges may also have worked longer hours to increase their supply of terminations. Moreover, there was a dramatic expansion in the staff of the judiciary—namely, magistrate judges, law clerks, and judges with senior status.⁵⁹

But if improved efficiency explains the increases, what explains the decreases—including, for example, the six years of steady decline from 1985 to 1991 (as demonstrated in Figure 2 above)? If efficiency increased the average judge’s capacity to supply terminations at the rate of 473 cases per year in 1985, why would she terminate only 328 cases (approximately two-thirds of the earlier number) in 1990?⁶⁰ Importantly, for reasons that I address in the next subpart, there was no shortage of cases.⁶¹ Yet rather than tracking some number resembling maximum efficiency, the number of terminations each year instead closely tracked the number of newly-filed cases.

⁵⁷ This logic assumes that there was no excess of waiters or food prior to the increase. Similarly, there is certainly no indication that the courts had excess capacity in 1969. To the contrary, concerns about the lack of capacity precipitated the passage of the Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107; *see also* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 103 (1969) (referring to “an across-the-board increase in judicial business in 1969” and to mounting “arrearages on the dockets of the district courts”).

⁵⁸ Subrin & Main, *supra* note 1, at 1862 n.116 (“I do not suggest that justice can ever become automated . . . [,] yet [in] the medical profession . . . [it is] possible today for one physician or surgeon . . . to do three to ten or fifteen times what his counterpart could do.” (quoting Warren E. Burger, *Deferred Maintenance of Judicial Machinery*, Speech at the National Conference on the Judiciary (Mar. 12, 1971), in WARREN E. BURGER, *DELIVERY OF JUSTICE* 56 (1990))).

⁵⁹ *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 27–28 (1996); Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 93 (2012) (noting that, in 2009, senior district judges accounted for 21.2 percent of case terminations and 26.8 percent of all trials); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983); Moore, *supra* note 37, at 1189–90; Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998); Resnik, *supra* note 22, at 949; Pro, *supra* note 27; *see also infra* note 180 and accompanying text.

⁶⁰ *See supra* note 53.

⁶¹ *See infra* Part II.

The best explanation for the dynamic conformity between the number of cases terminated and the number of cases filed is simple: most civil cases in federal court are (and always have been) resolved relatively quickly. As I present in part II below, the median time from filing to termination for a civil case in federal court is approximately eight months.⁶² Accordingly, the very close relationship between the number of cases terminated and the number of cases filed each year is no more mysterious than the close relationship each year between, say, the number of pregnancies within a population and the number of births: a predictably certain and short gestation period aligns those two numbers. Although the relationship between any particular case filing and its termination date is, naturally, somewhat less certain and more variable than a pregnancy, a strong analogy is appropriate since (i) the relationship between filings and terminations is remarkably close; (ii) that relationship has endured throughout the entire modern era of federal courts; and (iii) that relationship persists amid otherwise remarkably dynamic circumstances.

Because correlation is insufficient proof of causation, I must acknowledge the possibility that causation runs in the opposite direction from what I have presumed above. Specifically, one might fairly wonder whether the number of terminations drives the number of filings (rather than vice versa): lawyers and litigants might view rises and falls in the number of terminations as an indicator of the court's capacity and respond accordingly. This explanation would trigger a conversation along the lines of those who debate whether building wider roads relieves traffic congestion or instead, paradoxically, simply encourages more people to drive.⁶³ But induced demand is not a plausible explanation here. To the extent that lawyers and litigants are sensitive to issues about the court's capacity, presumably it would be court access (e.g., delays in processing), not the number of terminations, that would signal capacity.⁶⁴ Also, if terminations drove the number of filings, we would expect some delay between the termination and filing numbers, since the number of cases terminated in a given year is not published until the following year. If there is any lag effect to be observed in this data, it appears to be an infrequent and modest amount of delay that runs in the direction of terminations trailing filings. This lag—to the extent that it exists at all—is consistent with the compelling if unremarkable explanation for the close relationship between filings and terminations, to-wit, most lawsuits terminate quickly (and always have done so).⁶⁵

⁶² See also Moore, *supra* note 37.

⁶³ See generally ANTHONY DOWNS, STILL STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION (2004); M.J.H. MOGRIDGE, TRAVEL IN TOWNS: JAM YESTERDAY, JAM TODAY AND JAM TOMORROW? (1990); Gilles Duranton & Matthew A. Turner, *The Fundamental Law of Road Congestion: Evidence from US Cities*, 101 AM. ECON. REV. 2616 (2011).

⁶⁴ I will address court delays in Part II, *infra*.

⁶⁵ See *infra* Part II.

But even if this procedural constant is merely a product of the short shelf life of litigation, we have only re-framed the important questions. Still unanswered is the question how district judges could terminate enough cases (and terminate each one of them as fast as they ever did⁶⁶) to keep pace with the dramatic increases in the number of filings? And to what extent are judges consciously maintaining this constant? Especially in light of the fact that, statistically speaking, most cases are terminated by a voluntary settlement, one might wonder whether the short shelf life of litigation (and thus the dynamic conformity between the numbers of terminations and filings) is the product of an invisible hand or a visible one? This query is examined in the discussion of pending cases in the next subpart.

B. Pending Cases

In this subpart, we have an opportunity to consider—even if indirectly—the extent to which the short shelf life of litigation is judicially-directed or is instead simply the natural life cycle of litigation (unaffected by judicial behavior). The extent to which judges control their caseloads is an important issue because much of this article imparts agency on the part of judges. Specifically, I speak of judges terminating cases, judges calibrating caseloads, and judges maintaining the constants. Judges have told me that cases on their dockets are not *their* cases, but rather are the *parties'* cases; this suggests little or no agency. Yet, we also know that judges have an extraordinary amount of discretion that includes setting the pace of litigation, influencing how the law is applied, and occasionally even defining what the law requires.⁶⁷ To address questions about the judges' agency, I turn to data that captures the number of “pending cases” in the federal courts. Examination of this data also reveals another procedural constant.

At any given time, the dockets of federal judges have a number of pending cases. Even in a regime where most cases are resolved relatively quickly, some cases—especially those filed near the end of the fiscal year—will be pending at the start of the following fiscal year. (Consider, again, the analogy of the connection between the number of pregnancies and the number of births.) The initial point here is simply that the number of cases (or pregnancies) pending at the end of each year is never zero; there is a statistically-predictable carry-over from year to year.

Yet the number of civil cases pending in the federal system at each year's end appears greater than just that set of cases that would be the product of a statistical carry-over. Indeed, notwithstanding everything set forth in the previous subpart, as a matter of fact, there are hundreds of thousands of cases that are carried from one year to the next. For example, on June 30, 2013, there were

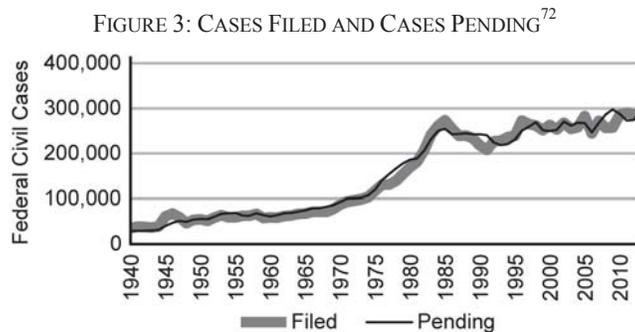
⁶⁶ See *infra* Part II.

⁶⁷ See generally Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988).

295,701 pending civil cases.⁶⁸ This rather substantial inventory of pending cases demonstrates that the number of terminations in a given year is an *adjusted* function of the number of cases filed that year. In other words, the filing and termination numbers each year are not exactly the same, even though, as Figures 1 and 2 above demonstrated, they are almost the same.

So, let us focus on this *adjustment*. As a mathematical matter, in any given year, this adjustment is simply the difference between the number of cases terminated and the number of cases filed. From 1940 to 2013, the average difference (adjustment) each year was $\pm 7,423$ cases—sometimes the number of terminations was higher than the number of filed cases, and sometimes it was lower.⁶⁹ As a percentage of the total number of filed cases, the average annual adjustment is ± 5.1 percent.⁷⁰ Thus, in any given year, the magnitude of this adjustment is very small; indeed, it has to be small or we would not have observed the sort of identity in the lines exhibited in Figures 1 and 2 above.

The amount of the adjustment each year is so small that it could be mistaken as but a very modest error rate for the phenomenon that we observed in the previous subpart. Yet, because the adjustments were positive in 75 percent of the years from 1940–2013, and negative only 25 percent of the time,⁷¹ this does not appear to be a randomly distributed error; hence the significant size of the inventory. Moreover, as Figure 3, below, demonstrates, there is a distinct pattern to the accumulation and shedding of the number of pending cases. Specifically, the total number of pending cases at the end of each year closely tracks the number of cases that were filed that year.



Through increases and decreases in the number of cases filed, from the start of the third era, through the transition to the fourth, and to the present day, the judiciary has carried about one year's worth of cases as inventory.⁷³ The

⁶⁸ See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (2013).

⁶⁹ *Id.* at tbl.C-1 (1940–2013).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ The average number of pending cases is about 103 percent of the number of filed cases.

coefficient of determination (r^2 value) between the number of cases filed in a given year and the number of cases pending at that year's end is 98.2. It is peculiar that there is any significant inventory of pending cases since the elasticity in the supply of terminations could surely minimize the number of pending cases.⁷⁴ But it is especially remarkable that the inventory of pending cases is consistently equivalent to one year's worth of cases.

Although it is conceivable that the natural life cycle of litigation, apart from the influence of judges and the judicial process, could consistently for seventy years produce one year's inventory of pending cases, there is another, more likely explanation. Maintaining approximately one year's inventory of pending cases may be a judicial preference—the sweet spot between, on one hand, terminating so many cases that judges may be perceived as idle, and on the other hand, carrying such high inventories that the legislature creates more judgeships.⁷⁵

This is not a novel suggestion. A formal model and empirical research from Professors Michael Beenstock and Yoel Haitovsky demonstrated that “judges, for reputational reasons, will avoid a large case backlog and hence will dispose of more cases when the caseload increases.”⁷⁶ Similarly, Professors Eric Helland and Jonathan Klick have observed that judges in class action cases have an incentive to easily grant the attorney's fee request in order to terminate cases rapidly, thus avoiding court congestion.⁷⁷ Simply put, empirical studies confirm the intuitive notion that judges are sensitive to the magnitude of their caseloads.⁷⁸

⁷⁴ See *supra* note 56 and accompanying text.

⁷⁵ For sources discussing the judiciary's opposition to the appointment of more judges, see Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 194 (1993); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 984 (2000) (recognizing that many judges argued against expansion of the federal judiciary to preserve selectivity and minimize inconsistencies); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1143 n.139 (2006) (“[A] federal judiciary rising above 1,000 members will be of lesser quality and could be dominated by a bureaucracy of ancillary personnel.” (citing WILLIAM H. REHNQUIST, CHIEF JUSTICE'S 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY, reprinted in THIRD BRANCH, Jan. 1992, at 1, 2)); Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A. J. 70 (1993). See generally William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

⁷⁶ Jef De Mot et al., *Appellate Caseload and the Switch to Comparative Negligence*, 42 INT'L REV. L. & ECON. 147, 148 (2015); see also Eric Helland & Jonathan Klick, *The Effect of Judicial Expedience on Attorney Fees in Class Actions*, 36 J. LEGAL STUD. 171, 187 (2007) (citing Michael Beenstock & Yoel Haitovsky, *Does the Appointment of Judges Increase the Output of the Judiciary?*, 24 INT'L REV. L. & ECON. 351 (2004)). See generally LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 9, 12, 31, 38–41, 210, 214, 229 (2013).

⁷⁷ Helland & Klick, *supra* note 76.

⁷⁸ See *infra* notes 81–82, 99–102 and accompanying text.

If maintaining one year's inventory were not a preference of the court, we would expect the number of pending cases to decline dramatically in years when the number of newly-filed cases declines. After all, if the number of pending cases were simply a function of the natural life cycle of litigation, the system should "catch up" during the lean years (when the number of new filings dips). If in the lean years of 1986, 1987, and 1988, for example, every judge terminated the same number of cases that she terminated in 1985, the total number of pending cases at the end of 1988 would have been 168,142 cases instead of the actual number, 244,242 cases.⁷⁹ The judiciary would have experienced a decrease of more than 30 percent in the inventory of pending cases. Yet, the actual number of pending cases in 1988 instead closely tracked the number of new filings (239,634 and 244,242, respectively).⁸⁰

The suggestion here is only that judges, sensitive to the magnitude of their caseload, influence the pace of terminations in order to calibrate the desired number of pending cases. Naturally, judges can determine the pace of many cases—and thus can hasten or delay the filing and consideration of dispositive motions and other key events. Even though most cases settle (and are therefore somewhat beyond the immediate control of judges), the ability of a judge to induce settlements is a well-established phenomenon.⁸¹ Thus, there appears to be a visible hand on enough cases that judges influence the total number of pending cases. Importantly, by implication then, judges have some control over the total number of terminations in a given year, including, presumably, some of the voluntary settlements. This calibration is the procedural constant in action. Of course, this data doesn't address whether this Goldilocks-constant inventory of pending cases is attributable to an organized, collective action or to some universally shared innate sense of the judicial task. The unlikely prospect of collective action on the part of the judiciary would support the latter explanation.⁸²

So, in this part I, we observed two procedural constants. First, we saw that the number of terminations in a given year is very closely aligned with the number of newly-filed cases. And second, we observed that, to the extent those two numbers are not exactly the same, the difference—the adjustment—is put to the task of adjusting an inventory of total pending cases that itself tracks the number of newly-filed cases (i.e., one year's inventory). Thus, but for the slight adjustment necessary to calibrate the overall number of pending cases, the relationship among these three numbers has remained constant throughout the modern history of federal courts: Cases Filed = Cases Terminated (\pm Adjust-

⁷⁹ See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1986–1988).

⁸⁰ *Id.* at tbl.C-1 (1988).

⁸¹ See, e.g., Galanter & Cahill, *supra* note 10; Kritzer, *supra* note 10; Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 44 (1995).

⁸² Judicial education efforts may help explain this. I am presently researching that hypothesis.

ment) = Total Cases Pending. Importantly, in order to maintain these constants, judges must terminate cases at a rate that keeps pace with the number of new case filings.

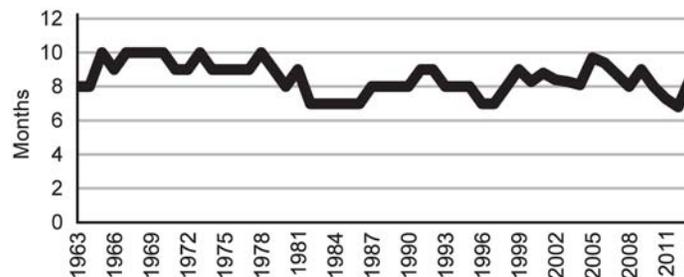
II. THE TIME FROM FILING TO TERMINATION

The next procedural constant is the shelf life of a civil case. This inquiry differs from Part I because it examines the data regarding individual cases, as opposed to aggregate dockets. For at least the past fifty years, the average civil action in federal court has terminated approximately eight months after it was filed.⁸³ Data from the Administrative Office of U.S. Courts also enables a more nuanced look at this procedural constant.

A. Median Cases, Big Cases, and Small Cases

Figure 4, below, demonstrates that the median time from filing to disposition for a civil action in federal court was eight months in 1963 and nine months in 2013. The time to disposition for the median civil case throughout these five decades has never strayed outside the range of seven to ten months; the standard deviation from the mean of eight is less than one.

FIGURE 4: TIME TO TERMINATION: THE MEDIAN CASE⁸⁴



The average life span of a typical civil case was constant—or, technically, declined⁸⁵—even during the long decade from 1969 to 1983 when the average judge’s civil caseload doubled.⁸⁶ Echoing the observations made in part I, above, this constant is neither necessary nor inevitable. Indeed, if one views a procedural system as integrating law and fact to produce a termination in each

⁸³ In this Part II, the relevant data from the Administrative Office of the U.S. Courts is unfortunately limited to the period from 1963 forward.

⁸⁴ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1963–2013). Unfortunately the AO data starts in 1963.

⁸⁵ In 1969, the median case was terminated ten months after it was filed. In 1983, the median case was terminated seven months after it was filed. These match the absolute highs and absolute lows, respectively, for the fifty years of data represented in Figure 4.

⁸⁶ See *supra* notes 53–56 and accompanying text.

case,⁸⁷ one would expect an increase in the number of cases on a per-judge basis to introduce a corresponding increase in the amount of time necessary to resolve each case. Yet no such effect is observed; quite the contrary. This observation is simply another look at the remarkable (or curious, as the case may be) elasticity of the judiciary's supply of the service of terminating cases.⁸⁸

The data presented in Figure 4, above, also refutes the all-too-familiar narrative of the litigation crisis, to-wit: that the courts are plagued with inordinate delays.⁸⁹ As a matter of fact, civil cases in federal court are—and long have been—resolved promptly.⁹⁰ Decades of empirical data and reams of careful legal scholarship have done tragically little to dislodge a narrative about chronic and worsening delays in federal court that has traction for reasons other than its truth.⁹¹

Although the average (median) case has not experienced delay as a result of the dramatic increase in the number of cases, some commentators decry the long and lengthening delay in the so-called “big cases.”⁹² The big cases are those cases that make up between 5 and 15 percent of the caseload, but involve the highest stakes, the largest law firms, and/or the most complex matters.⁹³ Although big cases constitute a small percentage of federal court litigation, the problems with big cases tend to dominate popular narratives about civil litigation and tend to fuel reforms that affect all cases, rather than only the big cases.⁹⁴ Of course, there could be a large and worsening problem with delays in the big cases that a focus exclusively on the median case would simply overlook. Yet, Figure 5, below, which presents the Administrative Office's data regarding the civil case at the ninetieth percentile for case length, suggests that the amount of time from filing to termination in the big cases did not increase substantially as a result of the large expansion in the number of cases (nor as a result of any other dynamism in the federal courts over this period).

⁸⁷ See *supra* note 57 and accompanying text.

⁸⁸ See *supra* notes 60–66 and accompanying text.

⁸⁹ See *supra* note 52 and accompanying text.

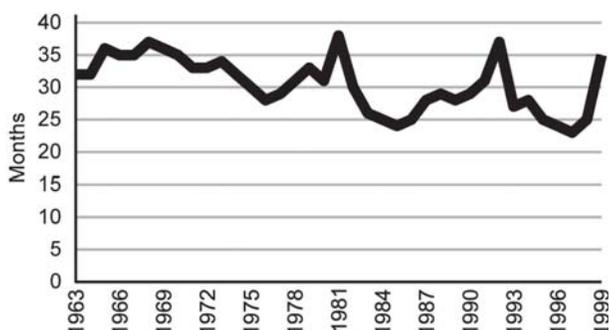
⁹⁰ See *infra* Part III.

⁹¹ See *supra* note 52; see also Moore, *supra* note 37, at 1183; Subrin & Main, *supra* note 1, at 1875–78.

⁹² See, e.g., Leonard S. Janofsky, *The “Big Case”: A “Big Burden” on Our Courts*, 66 A.B.A. J. 848 (1980); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984).

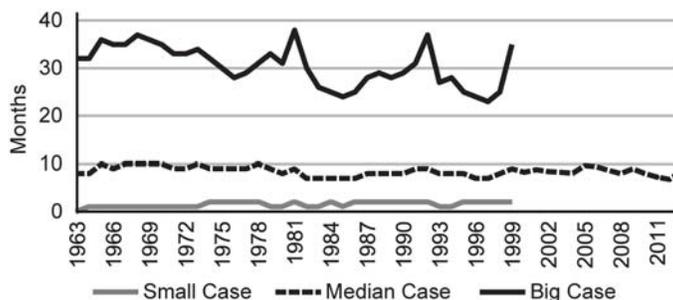
⁹³ Subrin & Main, *supra* note 1, at 1875–78.

⁹⁴ *Id.*

FIGURE 5: TIME TO TERMINATION: THE BIG CASE⁹⁵

Even if there is too much volatility in this graph to label its subject a procedural constant, Figure 5, above, demonstrates that, for several decades, the average time from filing to termination for the big cases was 30.5 months, with the range spreading no more than 20 percent in each direction, and a standard deviation of 4.2.

For the sake of completeness, I include another graph produced from this data set. Figure 6, below, combines the data from Figures 4 (the median case) and 5 (the big case), and also adds the time from filing to termination for the cases at the tenth percentile of case length—that is, the small case.⁹⁶

FIGURE 6: TIME FROM FILING TO TERMINATION⁹⁷

The portrait in Figure 6, above, conveys relative stability. Only the data for the big case shows any volatility or slope, as already discussed.⁹⁸ The data for the big cases also has a curious property: the time-to-termination has a fairly

⁹⁵ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1963–1999). Unfortunately, this data is available only for the period 1963 through 1999.

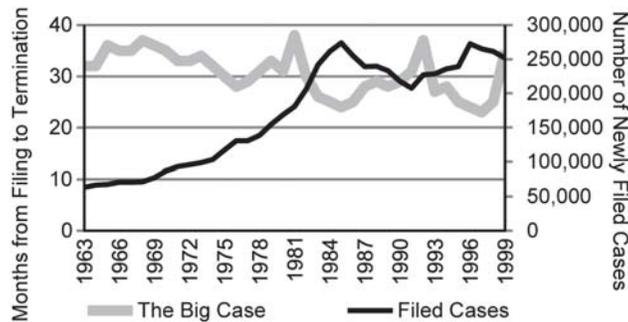
⁹⁶ Because this data is not representing anything about the size of the case itself, the labels “small,” “median,” and “big,” could be perceived as misleading. To be clear, the data is merely reporting the time from filing to termination for the cases that fall at the 10th, 50th, and 90th percentiles.

⁹⁷ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1963–1999). Unfortunately, some of this data is available only for the period 1963 through 1999.

⁹⁸ See *supra* note 95.

strong inverse correlation (a correlation coefficient of -0.71 from a possible range of -1.00 to $+1.00$ ⁹⁹) with the size of the overall civil caseload. In other words, the greater the number of civil cases that are filed in a given year, the more quickly the big cases tend to be resolved. To illustrate this relationship, Figure 7, below, graphs the data from Figures 1 and 5 on the same graph.

FIGURE 7: LENGTH OF THE BIG CASE VERSUS OVERALL CASELOADS¹⁰⁰



This inverse relationship may be further evidence of the proposition, discussed in Part I.B, above,¹⁰¹ that the magnitude of judicial caseloads affects how judges manage cases toward termination.¹⁰²

B. Stages of Termination

The consistency of the shelf life of litigation is a curious finding in light of the dramatic expansion in the judicial caseload. The data captured by the Administrative Office allows for an even more nuanced account of this constant. In addition to examining the length of the small, the median, and the big case, as discussed above, we can review the average amounts of time to each of several key stages of litigation. This inquiry allows us to investigate whether the consistency of the eight-months figure is masking other fundamental changes in the timing of the life cycle of litigation.

The data presented in this subpart assign the termination of every case to one of four categories. The four categories are represented with arrows in the graphic below. Importantly, these data capture the *stage* of the termination of each case, and not the *reason* for the termination. The first category/arrow includes cases that were terminated after the filing of a complaint, but before there was *any* court action. Presumably, nearly all of the terminated cases assigned to the first category were settled by agreement of the parties or after a voluntary dismissal by the plaintiff. Once there is any “court action”—a ruling

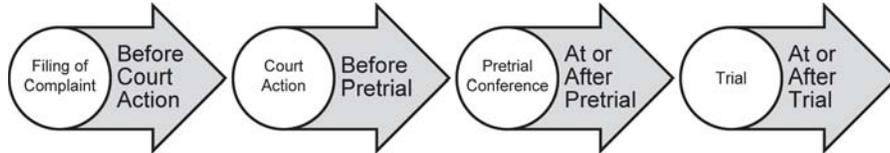
⁹⁹ The correlation coefficient is -0.75 when the length of the big case is correlated against the number of cases on a per-judge basis.

¹⁰⁰ See ANNUAL REPORTS, *supra* note 23, at tbls.C-1 & C-5 (1963–2013).

¹⁰¹ See *infra* Part I.

¹⁰² See *supra* notes 75–82 and accompanying text; see also *infra* Part III.

on a motion, for example¹⁰³—the termination will necessarily be assigned to one of the remaining three categorical stages. The latter three categories use two benchmark events in litigation—the pretrial conference and trial—to identify the stage of the termination.



One might imagine that the tip of each of these arrows is a successive departure point on a single highway; all travelers depart the highway at one of these four exits. The highway is a useful analogy because we have the average “travel time” to each of the four departure points on the litigation highway. Figure 8, below, presents nearly fifty years of data for the average time from filing to termination for each of the four possible termination points.

FIGURE 8: TIME FROM FILING TO TERMINATION¹⁰⁴

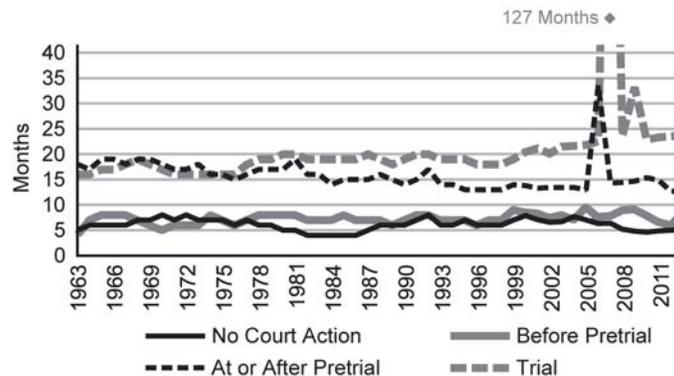


Figure 8 reveals two more procedural constants—one from each of the first two categories. First, for cases that were terminated without and before any court action, the average time from filing to termination is six months. In the past fifty years, that number has never fallen below four nor exceeded eight months. With a standard deviation of just 1.1 from the mean, the graphical representation of this data is essentially a flat line.

¹⁰³ For a description of the Administrative Office’s system of coding, see CIVIL STATISTICAL REPORTING GUIDE, TECH. TRAINING & SUPPORT DIV. & STATISTICS DIV. OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS (July 1999), available at http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Using_Court_Records_Appendix/Civil_Statistical_Reporting_Guide.pdf. For the varieties of this coding system, see Moore, *supra* note 37.

¹⁰⁴ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1963–2013). Unfortunately, some of this data is only available from the period 1963 forward.

Second, for cases that are terminated after some court action but before a pretrial conference, the time from filing to termination is a fairly consistent seven months. Although the cases assigned to this category experienced some “court action,” it is important to appreciate that the termination was not necessarily a product of that court action. For example, cases that settled by voluntary agreement of the parties—but after a motion to dismiss was denied, or after a motion to amend was granted—would be assigned to this category, provided the case never reached a pretrial conference.¹⁰⁵ The time-to-termination for cases at this stage consistently falls within the range of five to nine months, and both the mean and median are seven months.¹⁰⁶ With a standard deviation of 1.1, again, the graphical representation of this data is essentially a flat line.

The other two categories are represented graphically with lines that are relatively steady, although not constant. Both of these lines exhibit an observable slope—one drifting slowly downward, and the other trending upward. For cases that are terminated at or after the pretrial conference (but before a trial), the average amount of time from filing to termination has slowly declined a total of about 22 percent over the last five decades—from approximately eighteen months to fourteen months.¹⁰⁷ For cases that are resolved at trial, the average amount of time from filing to termination has steadily increased to an aggregate 50 percent gain—from about sixteen months fifty years ago to twenty-four months today.¹⁰⁸ The graphical lines that chart these latter two categories also reflect some dramatic spikes for outlier events in 2006, 2007, and 2009.¹⁰⁹

But for the relatively modest changes detailed in the preceding paragraph, Figure 8, above, conveys a picture of relative stability. Even as judicial case-

¹⁰⁵ See *supra* note 103.

¹⁰⁶ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1963–2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Every year there are a number of consolidated cases that are terminated, and occasionally the size (and the unique circumstances) of one set of consolidated cases can overwhelm the statistical portrait of federal civil litigation in a given year. In 2006, the Eastern District of Michigan terminated more than 15,000 breast implant cases at or after pretrial (but before trial); most of these cases had been pending for at least eight years. The Eastern District of Michigan accounted for more than 55 percent of all of the terminations at or after pretrial in the entire federal court system in 2006. If the data from this district is removed from the overall counts, the median time interval for 2006 cases that terminated at or after pretrial was 17.3 months. In 2007, the Middle District of Louisiana terminated more than 6,300 consolidated cases associated with an oil refinery explosion; these cases had been pending for more than ten years. The Middle District of Louisiana accounted for more than 66 percent of all of the terminations at trial in the entire federal court system in 2007. If the data from this district is removed from the overall counts, the median time interval for 2007 cases that terminated at trial was 24.3 months. In 2009, the Middle District of Louisiana terminated still more of the cases associated with the aforementioned oil refinery explosion; many of these cases had then been pending for more than twelve years. The Middle District of Louisiana accounted for 33 percent of all of the terminations at trial in the entire federal court system in 2009. If the data from this district is removed from the overall counts, the median time interval for 2009 cases that terminated at trial was 23.5 months.

loads changed more or less dramatically, the pace of litigation—as metered by the benchmark events of pretrial conferences and trials—remained relatively constant. Returning to the analogy of the highway, even as the overall amount of traffic varied dramatically over the past fifty years—including more than doubling on a per-lane basis (and increasing more than five-fold on an absolute basis)—the average travel time for drivers who departed at the first and second exits remained constant; travelers to the third and fourth exits experienced a modest decline and a modest increase, respectively, in their travel times. Traffic engineers would surely be impressed, if not jealous.

For our purposes, this stability confirms that the basic structure of the timing of litigation has remained constant for the past fifty years. More specifically, the average case takes eight months from start to finish; cases that are terminated at or before a pretrial conference take six to eight months; cases resolved after pretrial conference but before a trial have taken fourteen to eighteen (with current trends pushing the lower end of that bound); and cases resolved at trial have taken sixteen to twenty-four months (with current trends pushing the higher end of that bound).

III. HOW THE CONSTANTS SHAPED REFORM

Although the changes wrought by the transition from the third to the fourth era of procedure were “revolutionary,”¹¹⁰ some things remained constant. In fact, it was the commitment to maintain the procedural constants that essentially caused the revolutionary change.

In the long decade from 1969 to 1983, judges faced the relentless pressures of constant year-over-year increases in the number of newly-filed cases.¹¹¹ Judges had essentially three options when they felt this pressure: (1) ignore the mounting pressure and continue processing cases as before; (2) continue processing cases as before, but work harder; or (3) do something different; change the mode of processing cases.

One can fairly assume that option (2) was fully pursued. As their caseloads increased, judges undoubtedly worked more intently and labored for longer hours. But this option had inherent limitations; even in 1969, judges were not idle.¹¹² Any excess capacity was ultimately consumed, of course, and at that

¹¹⁰ See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010) (referring to the “revolution[.]” in the law on pleading); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court’s New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 38 (1988) (discussing the “new” use of summary judgment); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010) (referring to the “revolution in pleading”).

¹¹¹ See *supra* notes 29, 56 and accompanying text.

¹¹² See *supra* note 57.

point in time the available options for dealing with the unremitting increases in the caseload were reduced to options (1) and (3).

Option (1) would have likely delayed the processing of cases and created inventory backlogs. Maintaining the procedural constants foreclosed this option. This was unfortunate. Delays and backlogs, although hardly virtuous,¹¹³ must be evaluated in light of the baseline alternative: delays may be cruel, but cruel compared to what? Like economists who advocate deficit spending during recessions, judges could have tolerated delays and backlogs with an eye toward catching up in future years. Or, to the extent that delays and backlogs proved intolerable, those circumstances might have triggered legitimate reforms—for instance, additional judgeships, rule amendments, and Congressional reforms.

But with the procedural constants entrenched, the judges instead engaged in option (3). Specifically, they changed their mode of processing cases in order to double their supply of terminations—keeping pace with the number of newly-filed cases and deciding individual cases as promptly as ever.¹¹⁴ This change in the mode of processing cases returns us to the question posed in part I, to-wit: was the average district judge's thirty-five terminations per month in 1983 a diluted and inferior version of the eighteen terminations per month that she produced in 1969? The answer to that question depends, of course, on the changes that the judges fashioned in implementing option (3).

To better understand how the judiciary responded, let us begin with a snapshot of the average federal judge's civil caseload for a month in the heart of the third era of American civil procedure—several years before the long decade commenced. In 1965, for example, an average of nineteen cases entered and eighteen cases exited a judge's civil docket each month.¹¹⁵ On average, two of these terminated cases were “land condemnation cases, habeas corpus cases, deportation reviews and motions to vacate sentence”—easy cases that the Administrative Office excepts from its data set.¹¹⁶ Setting these two easy cases aside, Figure 9, below, depicts the stage of termination for the remaining sixteen ordinary civil matters—that is, where each case exited the aforementioned litigation highway.

¹¹³ See *supra* note 51.

¹¹⁴ See *infra* Part III.

¹¹⁵ See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1965).

¹¹⁶ *Id.* For a discussion about the exclusion of these “easy” cases, see Moore, *supra* note 37.

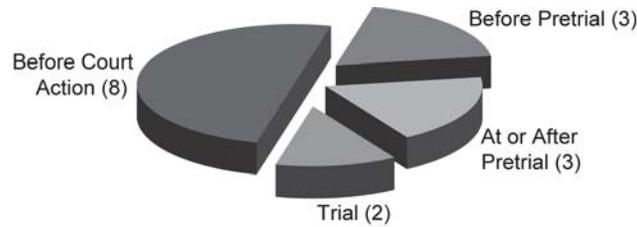
FIGURE 9: TERMINATIONS BY STAGE (AVERAGE MONTH, 1965)¹¹⁷

Figure 9, above, demonstrates that half of the sixteen cases were terminated without—and before—any court action. Thus the other eight cases were terminated after some court action. Of these eight, three were terminated before the pretrial conference; these may have received modest or significant court attention prior to their termination, but given the impotence of motions to dismiss and motions for summary judgment in the third era,¹¹⁸ these terminations were most likely the product of voluntary settlements by the parties. The remaining five cases were managed *for trial*.¹¹⁹ On average, three of those cases settled on the eve of trial, and two were tried.

Now, with the benefit of Table A, below, let us compare the average federal judge's civil caseload for an average month at the start and end of the long decade from 1969 to 1983. During this long decade, we know that the number of new filings each year more than tripled on an absolute basis, and doubled on a per-judge basis.¹²⁰

TABLE A: TERMINATIONS BY STAGE (AVG. MONTH)¹²¹

	1969	1983
Terminated Without any Court Action	7 ¹²² (47%)	15 (51%)
Terminated Before a Pretrial Conference	3 (23%)	9 (29%)
Terminated at or After the Pretrial	3 (18%)	4 (14%)
Terminated at Trial	2 (12%)	2 (6%)
Total	15¹²³	30¹²⁴

¹¹⁷ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1965).

¹¹⁸ See *supra* note 8 and accompanying text.

¹¹⁹ Judge William Young has eloquently described the difference between managing for trial and managing for settlement. See Young, *supra* note 13; William G. Young, *Keynote: Mustering Holmes' "Regiments"*, 48 NEW ENG. L. REV. 451 (2014).

¹²⁰ See *supra* notes 28–29, 47–56 and accompanying text.

¹²¹ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1969, 1983).

¹²² For purposes of illustrating the caseload for an average month, these figures are rounded to the nearest whole number. The percentage amounts are the more precise of the two figures in each cell.

This table reveals at least three important data points:

First, the bottom row of the table reflects a doubling in the number of terminations (from fifteen per month to thirty). This doubling reflects the court's success in keeping pace with the doubling of the number of newly-filed cases.¹²⁵ This aversion to delay and backlogs is the procedural constant in action.

Second, as the number of terminations doubled over the course of the long decade, the number of cases that experienced any court action was only half of the total number of terminations. Thus, in an average month in 1969, there was some court action in only eight of the fifteen cases terminated;¹²⁶ the other seven terminated without any court action. Still, because of the doubling over the course of the long decade, in 1983, the number of cases receiving court action jumped from eight in 1969 to fifteen in 1983.¹²⁷ And of course we know not only that the number of terminated cases doubled to match the increase in case filing, but also that the overall time-to-termination statistics remained constant.¹²⁸

Third, Table A, above, reveals what the courts did differently: more cases were terminated at earlier stages of litigation. When the number of cases requiring court attention increased by seven additional cases per month, 86 percent (six of seven cases) of that increase was absorbed into the category of cases that were resolved before a pretrial conference.¹²⁹ Naturally, this reallocation of

¹²³ In addition to these fifteen cases, the court terminated three “land condemnation, habeas corpus cases, deportation reviews and motions to vacate sentence.” Data for these cases are omitted from Table C-5 of the data from the Administrative Office of U.S. Courts.

¹²⁴ In addition to these fifteen cases, the court terminated five “land condemnation, habeas corpus cases, deportation reviews and motions to vacate sentence.” Data for these cases are omitted from Table C-5 of the data from the Administrative Office of U.S. Courts.

¹²⁵ See *supra* Part I.A.

¹²⁶ The eight cases include the three cases terminated before a pretrial conference, plus the three terminated at or after the pretrial, and the two terminated at trial.

¹²⁷ The fifteen cases include the nine cases terminated before a pretrial conference, plus the four terminated at or after the pretrial, and the two terminated at trial.

¹²⁸ See *supra* Part II.A.

¹²⁹ If the number of new cases were instead terminated across the various stages in proportions that matched the 1969 allocations, the number terminated before a pretrial conference would have been six (instead of nine), the number terminated at or after pretrial conference would have been five (instead of three), and the number terminated at trial would have been four (instead of two). It is important to point out that while the shift toward earlier termination of cases was underway, the benchmark of a “pretrial conference” was also shifting. In the third era, a typical “pretrial conference” occurred approximately ten days before the scheduled trial date. See Warren K. Urbom, *Calendar Control—Organizing the Flow of Cases*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 7, 9 (1973); Peter T. Fay, *Settlement Approaches*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES, *supra*, at 67, 71–72. The conference then contemplated by FED. R. CIV. P. 16—and the pretrial conference serving as the benchmark for these time-to-termination statistics—thus was a pretrial conference about an imminent trial. See FED. R. CIV. P. 16; Resnik, *supra* note 22, at 935–36. In other words, a case that reached the “pretrial conference” benchmark in the third era had made its way through the motion stage, through discovery, and was close to trial. But Federal Rule 16 was significantly overhauled in 1983 (and has

case terminations avoided delay, because all of the new cases (or a mix of old and new cases that approximated the number of new cases) were resolved at the earliest stages of litigation, delays were avoided and the overall time-to-termination statistic remained constant. Returning to the highway analogy, it is as if the traffic engineers, faced with a doubling of the number of travelers, directed all of the new travelers on the highway to depart at the first or second exits, no matter their preferred destination. Such a (re)direction keeps constant the overall average commute time.

The reallocation of cases to earlier stages of termination was achieved through new interpretations of extant rules. Two motions, in particular, that had been left for dead were given a new zombie-like life.¹³⁰ Heightened pleading standards were introduced by the lower courts in the 1970s, and persisted in various iterations for decades before the Supreme Court ultimately endorsed the aggressive use of motions to dismiss for failure to state a claim.¹³¹ Meanwhile, summary judgment emerged as the focal point of litigation as much as a decade before the Supreme Court ratified that practice with its 1986 trilogy of cases.¹³² The result of these and complementary reforms was the termination of cases at earlier stages of litigation.

The termination of cases at earlier stages of litigation was an austerity measure that valued expediency over accuracy. Yet it was pursued because this approach kept the number of terminations in line with the number of filings, and it held constant the time-to-termination metric. Such an approach is, of course, of great consequence. Unfortunately, cases that are redirected to depart

been amended again many times since). Since 1983, the Federal Rule requires scheduling and planning conferences at much earlier stages in the litigation process. Specifically, a scheduling order must issue within 120 days of service of the complaint. FED. R. CIV. P. 16(b)(2). That scheduling order, in turn, must “set dates for pretrial conferences and for trial.” FED. R. CIV. P. 16(b)(3)(v). Note the plural use of the term pretrial conferences. These pretrial conferences now regard subjects much more preliminary than the trial, including “eliminating frivolous claims,” “amending the pleadings,” and “scheduling discovery.” FED. R. CIV. P. 16(c)(2)(A)–(B), (F). Accordingly, in the fourth era, a case that reaches the “pretrial conference” benchmark may only be reaching a Rule 16(b) scheduling conference. This shift in the timing and the meaning of a pretrial conference means that my discussion of the shift toward earlier termination of cases is even worse than it appears: fewer cases are reaching the pretrial conference benchmark even as that benchmark moves ever closer to the starting line.

¹³⁰ Both the motion to dismiss and the motion for summary judgment were thought to be dead. See Subrin & Main, *supra* note 1, at 1844–45; see also *supra* note 8. For a list of other Fourth Era reforms, see *supra* note 30.

¹³¹ See generally Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules*, 46 VILL. L. REV. 311 (2001) (recounting the introduction of heightened pleading in all U.S. Circuit Courts of Appeals). The Supreme Court embraced a liberal notice pleading standard as late as 2002 with its *Leatherman* and *Swierkiewicz* decisions, before abruptly changing course with its embrace of plausibility pleading in *Twombly* and *Iqbal*.

¹³² Burbank, *supra* note 32 (noting that summary judgment “started to assume a greater role in the 1970s”).

the litigation highway at the first or second exits may not belong there.¹³³ Further, even litigants with nonmeritorious positions can be denied a meaningful opportunity to be heard.¹³⁴

In summary, then, by the end of the long decade, the courts had committed to a strategy that rejected option (1), exhausted option (2), and embraced option (3). Option (3) was to terminate more cases at earlier stages of litigation.

IV. LAWMAKERS ADD CASE MANAGEMENT

A. A Formal Reform to Complement the Judge-Initiated Reforms

Throughout most of the long decade from 1969 to 1983, there were only relatively modest formal reforms by procedural rulemakers or Congress to address the fundamental challenges that district judges faced with their burgeoning caseloads. It was only after the caseload crisis was almost behind them that lawmakers responded boldly and formally—prescribing case management for all cases.¹³⁵ Echoing the mandate of the procedural constants, “avoiding delay” was a major refrain of these case management reforms.¹³⁶ Never mind that, by any measure, cases were no more delayed in the 1980s than they were in the 1960s.¹³⁷

In 1983, waves of reforms required judges to get involved earlier and more aggressively in each case.¹³⁸ Specifically, Rule 16 was amended to make “scheduling and case management an express goal of pretrial procedure.”¹³⁹ Similarly, Rule 26 was amended to require judges to use active case management to curtail discovery abuse.¹⁴⁰

¹³³ For citations to authorities discussing the fateful consequences of early termination of cases, see Subrin & Main, *supra* note 1, at 1849.

¹³⁴ See generally Subrin & Main, *supra* note 1.

¹³⁵ Case management had been the norm for big cases since the 1970s. And the Federal Judicial Center was promoting it for all cases in the 1970s. But the formal reforms came much later. See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010); Subrin & Main, *supra* note 1, at 1862–63.

¹³⁶ See, e.g., Robert F. Peckham, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253–54 n.3 (1985) (describing case management as an effort to “structure and shepherd[] [a case to] its expeditious completion”); see also Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 89, 203 (1976).

¹³⁷ See *supra* Part II.A.

¹³⁸ Gensler, *supra* note 135, at 677; Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1588 (2003); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2199 (1989).

¹³⁹ See FED. R. CIV. P. 16 advisory committee’s note (1983); see also *id.* (“Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation.”). See generally Gensler, *supra* note 135, at 677; Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1268 (2010).

¹⁴⁰ See Fed. R. Civ. P. 26(b) advisory committee’s note (1983). See generally ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE:

The timing of the case management reforms was unfortunate because, after 1985, civil caseloads quit growing. That year marked the end of decades of constant growth in the number of newly-filed civil cases.¹⁴¹ In five of the six years from 1986 through 1991, there was a year-over-year decline in the number of newly-filed civil cases.¹⁴² In fact, in the twenty-three years since 1985, there has been virtually no growth: in 1985 there were 273,670 new civil filings, and in 2013, there were 283,087.¹⁴³ This represents an annual growth rate of approximately 0.3 percent since 1985.¹⁴⁴ Of course, one might fairly speculate that the termination of cases at earlier stages of litigation chilled putative plaintiffs from filing cases, thereby stemming this tide. But whatever the reasons, the pressure of an ever-increasing flow of cases relented, beginning in 1985.

However, the worst thing about case management is not that it came too late, but rather that it came at all. Because, unfortunately, the year 1985 also marked the end of decades of stability in the percentage of cases terminated “without court action.” These are cases that depart the litigation highway at the first exit—settled by the parties without and before the court is involved in the case. Since this metric was first captured in 1963, the percentage of cases that terminated without court action hovered consistently around 50 percent—even throughout the long decade of caseload increases.¹⁴⁵ In 1985, that number was 52 percent—its highest level since 1967.¹⁴⁶ These data confirm not only that “most cases settle[d],” but also that most cases settled without any judicial interference.¹⁴⁷ This data point changed dramatically in the five years between 1985 and 1990, when the percentage of cases terminated without court action was cut nearly in half.¹⁴⁸ The number has fallen further since.

Figure 10, below, is an area chart that vividly demonstrates the shift away from terminations without court action and the shift toward terminations before a pretrial conference. This graph is essentially the pie chart from Figure 9 charted over time.

PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 30–36 (1984); Gensler, *supra* note 135, at 677.

¹⁴¹ From 1962 to 1985, there was only one year when there was not year-over-year growth in the number of newly-filed civil cases.

¹⁴² Since 1985, there have been fourteen years when there was a year-over-year decline, and fourteen years when there was a year-over-year increase.

¹⁴³ See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1986–2013). See generally Moore, *supra* note 37.

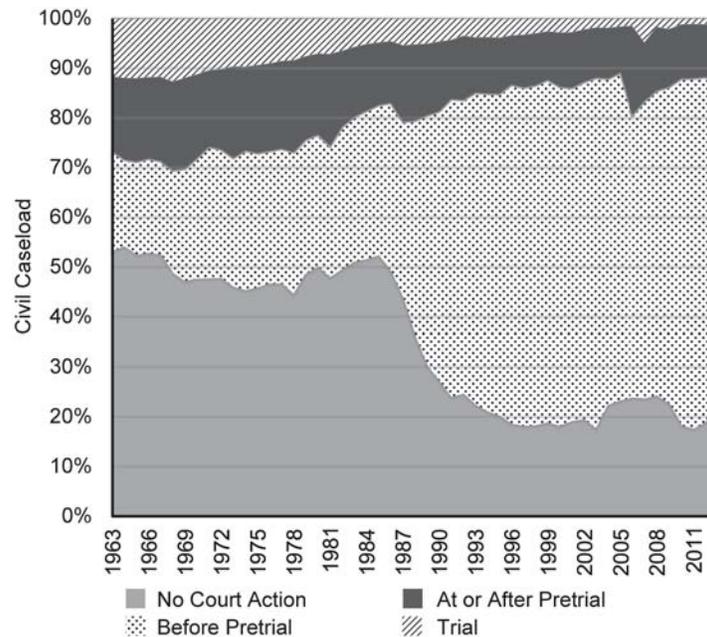
¹⁴⁴ For a much more sophisticated account of different ways that one might measure the growth in the civil caseload, see Moore, *supra* note 37.

¹⁴⁵ See *supra* Figure 9 and Table A.

¹⁴⁶ For reference, the low water mark from the years 1963 through 1985 was 44 percent in 1978. The high water mark was 54 percent in 1964.

¹⁴⁷ See *supra* note 10 and Part I.B.

¹⁴⁸ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1986–2013).

FIGURE 10: AREA CHART: TERMINATIONS BY STAGE¹⁴⁹

Naturally, the requirement that judges involve themselves earlier in each case decreased the number of cases terminated before there was any court action. Thus, in the substantial number of cases that would have faded from the dockets without any court action, there was—and is now—court action.

Although the proliferation of case management is the likely culprit for the substantial diminution in the number of cases decided without court action, the timing is curious since the number of cases terminated without court action didn't decline for several years after its grand introduction. Early case management was underway when Professor Judith Resnik warned of its consequences in her 1982 seminal article.¹⁵⁰ The aforementioned 1983 amendments purported to institutionalize the practice.¹⁵¹ Yet, even in 1985, the percentage of cases terminated without court action was 52 percent.¹⁵² In the years that followed, that percentage dropped to 49 percent (1986), 43 percent (1987), 36 percent (1988), 30 percent (1989), and 27 percent (1990).¹⁵³ Presumably, the delayed onset was but a lag between the adoption of the case management mandates and their full implementation by judges.¹⁵⁴

¹⁴⁹ See ANNUAL REPORTS, *supra* note 23.

¹⁵⁰ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

¹⁵¹ See *supra* notes 138–40 and accompanying text.

¹⁵² See ANNUAL REPORTS, *supra* note 23, at tbl.C-1 (1985).

¹⁵³ See ANNUAL REPORTS, *supra* note 23, at tb.C-1 (1986–1990).

¹⁵⁴ One might fairly wonder whether the decrease in the number of cases decided without court action was a product not of the 1983 reforms, but one of the later waves of case man-

B. *The Vanishing Trial*

Many commentators have documented and eulogized the vanishing trial.¹⁵⁵ Naturally, trials are another casualty of the procedural constants: trials take longer and therefore cause delays to which the judiciary is pathologically averse.¹⁵⁶ Interestingly, though, my study of procedural constants views 1985 as the year when trials became endangered. This may surprise readers who have absorbed the conventional wisdom that the trial has been in decline since long before 1985.¹⁵⁷ The timing issue is important if we are to understand why trials disappeared and how they might be restored.

To be sure, the *percentage* of cases terminated by trial has been in steady decline for at least half a century. See Figure 10, above. But until 1985, the *absolute* number of cases terminated by trial each year had consistently grown. Indeed, the total number of civil trials in 1985 was nearly twice the number of trials in 1963. But 1985 is the pivotal year when even the absolute number of trials began steadily to decline. By 1997 the absolute number of trials across the

agement reform. But the second and third waves—in 1990 and 1993, respectively—were too late. See Civil Justice Reform Act of 1990 (CJRA), Pub. L. No. 101-650, 104 Stat. 5089 (codified in part at 28 U.S.C. §§ 471–482) (ordering the federal judiciary to experiment with a set of case management techniques); FED. R. CIV. P. 16 advisory committee’s note (1993) (enlarging the trial court’s case management authority); FED. R. CIV. P. 26(b) advisory committee’s note (1993) (accorded district judges broader discretion to manage discovery); FED. R. CIV. P. 26(f) advisory committee’s note (1993) (making the discovery-planning conference a mandatory event); see also FED. R. CIV. P. 1 advisory committee’s note (1993) (noting that the purpose of the amendment was “to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay”). See generally Gensler, *supra* note 135, at 677. With respect to the notion of a lag, there is no question that some judges resisted at least some of the case management reforms. See JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT, at xxi (1996) (noting that some of the pilot districts were less enthusiastic about experimentation and implementation); Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 235–39 (1997) (noting the RAND Report’s findings that the federal judges implementing the CJRA were not always committed to the enterprise). The judiciary even campaigned against the CJRA. See Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1190 (1996). Yet “[i]n its Final Report to Congress on the CJRA, the Judicial Conference endorsed early case management as provided in Rule 16, saying that ‘[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation.’” Gensler, *supra* note 135, at 680 (quoting JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 10 (1997)).

¹⁵⁵ See, e.g., Mark W. Bennett, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.U. SCH. L. REV. 685 (2013); Galanter, *supra* note 13, at 461; Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Young, *supra* note 13.

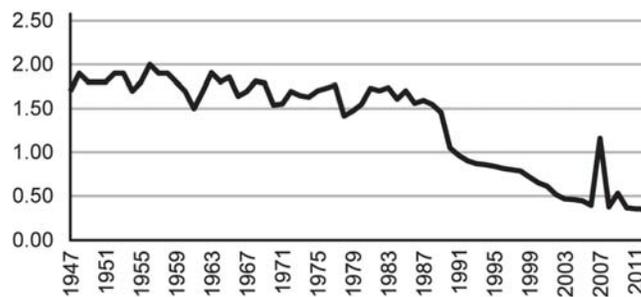
¹⁵⁶ See *supra* Part III.

¹⁵⁷ See *supra* Figure 10.

federal system approximated the number of trials held in 1962.¹⁵⁸ And the absolute number of trials has dropped in half again since 1997, such that the number of trials across the federal system in 2013 is substantially fewer even than the number of trials held in 1940, at the dawn of the modern era of federal courts.¹⁵⁹

But let us instead look at trials from the perspective of a judge's civil caseload in an average month. In 1947, the average judge tried 1.7 civil cases per month. Nearly forty years later, in 1985, the average judge still tried 1.7 civil cases per month. Accordingly, even during the long decade from 1969 to 1983, when the average judge's caseload doubled, judges still tried the same (absolute) number of cases.¹⁶⁰ Throughout the period from 1947 to 1985, the mean and median number of civil trials per judge per month was 1.7, with a standard deviation of 0.14. Indeed, in 1985, one might even have mistaken the number of civil trials per judge per month as a procedural constant.

FIGURE 11: AVERAGE NUMBER OF CIVIL TRIALS PER JUDGE PER MONTH¹⁶¹



Since 1985, the number of civil trials has been in free fall: it dropped to 1.1 trials per month in 1990, to 0.8 in 1995, to 0.7 in 2000, to 0.4 in 2005, to 0.4 in 2010, and finally, to 0.3 in 2013.¹⁶² On average, contemporary judges preside over a civil trial approximately once every three months.

The judiciary's commitment to trials faded in 1985 *after* the caseload crisis had already abated. Put another way, the 1985 judge did everything that her 1969 counterpart did, including trials, plus more. But because trials have vanished, the same cannot be said of the contemporary judge *vis-à-vis* her 1969 counterpart. In lieu of trials, and because of case management mandates, the contemporary judge is inserting herself into a substantial number of cases that would otherwise settle even without court action.

¹⁵⁸ See *supra* note 149.

¹⁵⁹ See *supra* note 149.

¹⁶⁰ The definition of a trial is "a contested proceeding where evidence is introduced." See *supra* note 103.

¹⁶¹ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1947–2013).

¹⁶² See ANNUAL REPORTS, *supra* note 23.

CONCLUSION: A FIFTH ERA?

The judiciary's aversion to delay, combined with substantial increases in the civil caseload, led to the activation of motions to dismiss and motions for summary judgment (and complementary reforms) that, in turn, led to the termination of cases at earlier stages of litigation. Case management reforms, also wrought from concerns about delay, have made matters worse.

This situation is problematic. The important resource that the judiciary provides is a forum for the integration of law and fact.¹⁶³ When the parties settle a case prior to trial or when a judge terminates a case prior to a trial, the process of integrating law and fact is truncated. When this process is abbreviated systematically, the mandate of substantive law is compromised; false negatives and, to a lesser extent, false positives, surely follow.¹⁶⁴ Trials, in particular, are the paradigmatic integration of law and fact.¹⁶⁵ Importantly, when trials vanish, the *shadow* of trials also vanish.¹⁶⁶ The shadow of a trial is critical for parties engaged in settlement negotiations: if trial is not a realistic alternative to a negotiated settlement, the only realistic alternative is a motion terminating the case.

So where might we go from here? In a perfect world, judges would be put to their highest and best use, to-wit, presiding over trials. But of course the procedural constants warn against trials since cases that are tried linger on the dockets an average of twenty-four months. That is three times longer than the median time-to-termination that the judiciary has maintained for at least the past fifty years.

For a model of a procedural system where judges tried cases yet also maintained the procedural constants, we need only revisit the third era. In the third era, motions to dismiss and motions for summary judgment were exceptional events. Instead of hearing dispositive motions or trying to settle cases, judges managed cases for trial, and tried about 1.7 civil cases per month. Most cases settled—and 50 percent of all cases settled without and before any court action at all. But is it realistic to imagine a return to a third era approach to contemporary caseloads?

Eliminating aggressive case management would be the starting point. Indeed, it appears to be the broad institutionalization of case management, not the ever-expanding caseload, that caused judges to abandon their long-established practice of presiding over 1.7 civil trials per month. Reducing judicial involvement in the substantial percentage of cases that would terminate even without that involvement would give contemporary judges more time to perform other judicial tasks, hopefully trials. This suggestion is consistent with rigorous em-

¹⁶³ See *supra* note 55 and accompanying text.

¹⁶⁴ For the significant disadvantage to plaintiffs, in particular, see Moore, *supra* note 37, at 1181, 1206.

¹⁶⁵ See *supra* note 55.

¹⁶⁶ For the importance of this metaphor, see *supra* note 19.

pirical data that proves scheduling conferences, settlement conferences, discovery conferences, and more robust pretrial conferences do not prevent delays and, moreover, tend to increase the overall expense of litigation.¹⁶⁷ As this empirical study suggested (and as judges will attest),¹⁶⁸ the only case management techniques that actually save money and time are firm discovery cut-offs and firm trial dates.¹⁶⁹ Case management of this latter sort does not require a substantial investment of judicial time.¹⁷⁰

The next step would be to return motions to dismiss and motions for summary judgment to their shallow graves.¹⁷¹ The transformation of summary judgment into the “focal point” of litigation is arguably unconstitutional and is undoubtedly unfair to certain plaintiffs.¹⁷² But even more to the point of this article, it is also inefficient: it diverts an enormous amount of judicial resources from other tasks, and adds to the cost of litigation.¹⁷³ Simply put, rather than putting resources into a motion for summary judgment that is a prediction about a hypothetical trial, we should simply schedule the trial.¹⁷⁴ The same criticism and prescription applies to the motion to dismiss for failure to state a claim, which is the “new summary judgment.”¹⁷⁵ Motions to dismiss and motions for summary judgment are needed only for exceptional cases.¹⁷⁶ In ordinary cases, the promise of a trial offers a meaningful integration of law and fact that leads either to a truly voluntary settlement or to a trial.

The problem, however, is that contemporary judges have a heavier civil caseload than their third era counterparts. In 1969, judges terminated an average of fifteen cases per month. In 2013, judges terminated an average of twenty-four cases per month. This is fewer than the thirty cases per month that judges terminated in 1985, but it is still significantly higher than the 1969 caseload.

But as Table B illustrates below, the important difference is not the increase in the total number of terminations; the better measure of judicial workload is the increase in the number of cases receiving court attention. In this table I have included three columns—the first, as a reference point, demonstrating again the consequences of a third era approach; the second col-

¹⁶⁷ JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 14 (1996).

¹⁶⁸ Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

¹⁶⁹ KAKALIK ET AL., *supra* note 154, at 91.

¹⁷⁰ For a discussion of the very different meanings of the term case management, see Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 855 (2013).

¹⁷¹ Subrin & Main, *supra* note 1, at 1851.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY. U. L. REV. 231, 250 (2011).

¹⁷⁶ See Subrin & Main, *supra* note 1, at 1851 n.65.

umn depicts actual figures from Fiscal Year 2013; and the third column is a projection about how a third era approach might affect 2013 data.

TABLE B: TERMINATIONS BY STAGE (AVG. MONTH)¹⁷⁷

	1969	2013 (Act.)	2013 (Proj.)
Terminated Without any Court Action	7 (47%)	5 (22%)	12
Terminated Before a Pretrial Conference	3 (23%)	16 (65%)	6
Terminated at or After the Pretrial	3 (18%)	3 (12%)	4
Terminated at Trial	2 (12%)	0 (1%)	2
Total	15	24	24

In 2013, there was court action in nineteen of twenty-four cases. Based upon decades of experience in the courts prior to the implementation of aggressive case management, the elimination of case management could drop the number of cases requiring court attention to twelve cases per month.¹⁷⁸ And based upon decades of experience in the courts prior to the invigoration of motions to dismiss and motions for summary judgment, by simply managing the remaining cases for trial, most would settle and two would be tried.¹⁷⁹

To be sure, even the twelve cases requiring court attention in the projected 2013 data is substantially more than the eight cases requiring court attention in 1969. The creation of additional judgeships would solve the problem. But the expense and controversy associated with such an effort is unnecessary, at least as a first step. Contemporary judges have a team of magistrate judges, senior judges, and law clerks wholly unknown to their 1969 counterparts.¹⁸⁰ This support team was institutionalized and expanded during the fourth era, and these adjuncts have been assigned responsibilities to complement a fourth era approach to dispute resolution.¹⁸¹ A repurposing of this team may be all that is necessary to transition toward a fifth era where, like the third era, cases are managed for trial, judges try cases, and almost all cases settle.

¹⁷⁷ See ANNUAL REPORTS, *supra* note 23, at tbl.C-5 (1969 & 2013).

¹⁷⁸ See *supra* Table B.

¹⁷⁹ See *supra* Table B.

¹⁸⁰ See *supra* note 59 and accompanying text.

¹⁸¹ See Moore, *supra* note 37, at 1188 (“The number of senior district judges authorized for staff has increased 122% since 1986. The number of full-time magistrate judge positions has increased 90% since 1986.” (footnote omitted)).