

THE CONTINGENCY OF OPENNESS IN COURTS: CHANGING THE EXPERIENCES AND LOGICS OF THE PUBLIC’S ROLE IN COURT-BASED ADR

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ABSTRACT

Debate exists about how much alternative dispute resolution (“ADR”) is used in courts and about the metrics by which to evaluate its impact. Yet on two measures—the volume of rulemaking and the privatization of court-based interactions—the results are unambiguous: courts have promulgated hundreds of rules governing ADR, and those rules rarely protect rights of the public to know much about either the processes or the results. Rather, court-based procedural rules are increasingly becoming contract-promoting rules, encouraging parties to conclude disputes without adjudication.

In this essay in honor of Professor Stephen Subrin, I explore the centrality of “open courts” to judicial legitimacy. Courts provide opportunities for democratic engagements with the production and application of law. The public’s right of access to observe proceedings in courts sustains judicial independence, legitimates public investments in the judiciary, and offers routes to oversight

* Arthur Liman Professor of Law, Yale Law School. © Judith Resnik, 2015. All rights reserved. Thanks are due to the conveners, Thomas Main and Margaret Woo—for inviting me to join in marking the contributions of Stephen Subrin, and thereby enabling me to have the opportunity to provide professional and personal thanks for his thoughtful leadership in exploring the norms of adjudication and for teaching us all so much. This essay builds on *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms*, written with Dennis E. Curtis (2011); *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 *LAW & ETHICS OF HUM. RTS.* 226 (2011); and a few aspects derive from and overlap with material originally published by the Yale Law Journal in my article, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *Yale L.J.* 2804 (2015). Some of the discussion in this essay is based on information provided by court staff, and thus thanks are due to many individuals who reviewed drafts and provided assistance. I have also benefitted from comments by Denny Curtis, Roberta Romano, and Donna Stienstra, and from research by Jason Bertoldi, Michael Clemente, James Dawson, John Giammatteo, Nicholas Handler, Patrick Hayden, Mark Kelley, Diana Li, Marianna Mao, Chris Milione, Devon Porter, Jonas Wang, and Benjamin Woodring, whose thoughtful, energetic, and generous work is reflected in this essay. Bonnie Posick provided invaluable help in organizing us, editing, researching, and reviewing materials.

when courts fail to live up to obligations to treat disputants fairly. These constitutional values ought to inform the shape of procedural innovations in courts. Court-based arbitration and court-based settlement programs, like court-based trials, should be regulated to reflect the constitutional obligations to provide a role for the public.

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I. PROCEDURAL ASPIRATIONS

What makes an institution a court, and what makes a procedural system legitimate? The answers are neither atemporal nor apolitical but embedded in changing practices of adjudication and in interpretations of the constitutional obligations of judges.

These contingencies, along with the dynamism and the vulnerability of courts, are at the center of this essay, honoring Stephen Subrin for his leadership in exploring the norms of procedure. In his 1999 article, *On Thinking About A Description of a Country’s Civil Procedure*,¹ Professor Subrin identified the central “*values and goals*” of the procedural system in the United States. His requirements (in this order) were that a procedural system resolves disputes “peacefully”; that it does so efficiently; that it fulfills “societal norms through law-application”; that it provides an “accurate ascertainment of facts” and “predictability”; that it “enhanc[es] human dignity”; that it “add[s] legitimacy and stability to government and society”; that it “permit[s] citizens to partake in governance”; that it aids in “the growth and improvement of law”; and that it works by “restraining or enhancing power.”²

Given his focus on the United States, Subrin’s analysis implicitly addresses the attributes of a procedural system in a democracy built on citizen-sovereignty as well as on the need for dispute resolution. In light of

¹ Stephen N. Subrin, *On Thinking About a Description of a Country’s Civil Procedure*, 7 TUL. J. INT’L & COMP. L. 139 (1999) [hereinafter Subrin, *On Thinking About a Description of a Country’s Civil Procedure*].

² *Id.* at 140.

democracy's commitments to egalitarian opportunities for participation in the body politic and to the constrained and accountable exercise of government power, specification of another attribute—*publicity*—is in order.³ That term, borrowed from Jeremy Bentham,⁴ represents ideas which became central to American political thought and to courts' procedures as state and federal constitutions welcomed and protected public access to open courts.

To analyze the roles played by the public, I first sketch the history of the development of the norm of publicity and its instantiation in the United States through constitutional texts insisting on open courts. These provisions protect two kinds of access rights—for potential claimants and for third parties, free to attend and observe proceedings. As I explore, an important relationship exists between publicity *in* courts and the qualities *of* courts that merit describing them as democratic. Thereafter, I examine the ways in which state and federal procedural systems, focused on trials in courthouses, once made public observation relatively easy, reducing the need for much reflection on the law and theory undergirding such practices.

Second, I turn to twentieth-century procedural reforms, which facilitated claimants' access to courts and yet contributed to the reshaping of judicial work in a fashion that has come to undercut the role played by the public. In terms of the aspect of open courts welcoming claimants, the 1938 Federal Rules of Civil Procedure were door-opening, as they simplified ways to file lawsuits and expanded techniques for gathering information. Yet the 1938 Rules also posed a challenge to the other aspect of open courts—the capacity of third parties to participate through direct observation. By creating a pretrial phase focused on lawyer-judge meetings, the Federal Rules led the way for the development of a litigation system in which trials became rare and key interactions took place outside the courtroom.

Nonetheless, the 1938 Rules also provided new routes for the public to gain insights into, and to participate in, norm development. The Rules' innovative system of forced-information exchanges through reciprocal obligations of discovery generated insights into a host of government and corporate activities. The 1966 revisions facilitating class actions enabled aggregation of various kinds of claims and, in conjunction with common law and statutory fee-shifting rules, supported an expansion of the plaintiffs' bar. The litigations that the Rules helped to spawn generated a wealth of public

³ See JEREMY BENTHAM, *Constitutional Code*, in 9 THE WORKS OF JEREMY BENTHAM 41 (John Bowring ed., 1843); FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE *CONSTITUTIONAL CODE* 26–27 (1983); Anthony J. Draper, 'Corruptions in the Administration of Justice': Bentham's Critique of Civil Procedure, 1806–1811, 7 J. BENTHAM STUD. 1 (2004).

⁴ See JEREMY BENTHAM, *Rationale of Judicial Evidence* (1827), 6 THE WORKS OF JEREMY BENTHAM 351–80 (John Bowring ed., 1843) [hereinafter BENTHAM, *Rationale of Judicial Evidence*].

information, as the materials filed in court were presumptively available for public review.

Government-subsidized adjudication and the authority to bring claims render courts redistributive. Procedural reforms in the twentieth century augmented the resources of all kinds of disputants (be they corporate defendants or employees, prison officials or prisoners) by easing access and facilitating the exchange of information. Litigants who had limited resources before entering the marketplace of law benefitted enormously from the constitutional, statutory, and rule developments that provided new routes *to* court and new rights *in* court.

Conflicts about the role to be played *by* courts ensued, illustrating the redistributive impact of open courts and how courts can function as a means of sparking public debates about the uses and limits of law. Reformers with diverse agendas pressed for refashioning rules. Some sought to respond to the volume *of* claimants by augmenting the methods for pursuing alleged violations of rights, for example through class action reforms. Others aimed to curb the capacity of individuals and groups *to be* claimants.

Beginning in the 1980s, procedural revisions pushed significant aspects of court-based dispute resolution out of sight. The Federal Rules were amended to provide that discovery materials were no longer routinely filed in courts unless appended to motions, and pre-discovery confidentiality agreements became routine.⁵ Other amendments promoted various modes of “alternative dispute resolution” (“ADR”), including settlement conferences, mediation, and court-annexed arbitration. The Federal Rules of Civil Procedure once posited ADR as an “extrajudicial” activity, pursued by the parties or through referrals to mediators outside the courthouse. But the revisions of the 1980s and 1990s brought ADR in-house. New mandates put judges to work promoting and at times participating in various forms of ADR.

To be sure, there is much to fix in courts, which ought not to be idealized or posited as the sole path to or the embodiment of justice.⁶ Entry barriers are

⁵ See generally Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181 (2014). This article surveyed cases on the sharing of information obtained in discovery, the use of “return-or-destroy” provisions required as a predicate either to discovery or to settlement, and a relaxed standard for granting protective orders of disclosures made. Benham called for rules building in the sharing of discovery as part of the goal of increasing the efficiency of litigation. He argued that his proposals fit the paradigm of Federal Rule amendments addressing proportionality as a test of the permissible scope of discovery. *Id.* Members of Congress have proposed, but not obtained enactment of, obligations to make more materials available. See, e.g., Sunshine in Litigation Act of 2014, S. 2364, 113th Cong. (2014).

⁶ See HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 148–66 (1999); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, DAEDALUS, Summer 2014, at 83, 83 (“The vast majority of ordinary Americans lack any real access to the legal system for resolving their claims and the claims made against them.”).

significant,⁷ and the judicial process can be used to work unfairness. Illustrative is one study of 4,400 lawsuits filed by debt buyers in Maryland courts; unrepresented debtors regularly defaulted on amounts owed (averaging about \$3000), all processed through courts that did not insist on judicial oversight or inquiries to check on the documents proffered.⁸ Courts are also the source of debt, as their user fees and fines can produce cycles of payments due, and even imprisonment for contempt of court as a result of nonpayments.⁹ The pains that courts can inflict became vivid in Ferguson, Missouri, as detailed in the 2015 Department of Justice account of how the municipal court in Ferguson¹⁰ worked in tandem with the police to maximize the locality's revenues through "constitutionally deficient" procedures that had a racially biased impact.¹¹

One lesson from Ferguson is the importance of public insight into the processes of courts. Documentation of the failures comes in part because of court obligations to maintain records and to permit public observation—opening paths to correct injustices, if popular will to do so exists.¹² Thus, the developments of so many rules privatizing the exchanges between judges and disputants in ordinary civil litigation requires exploration of a third topic: the role of the public in ADR.

Ferretting out ADR's relationship to the public proves to be difficult because the rules of ADR rarely identify obligations to the public. Reviews of hundreds of provisions at the local levels in federal and state courts, as well as interviews with court staff, were required to understand the place of the public in ADR.¹³ What that research demonstrates is that, to the extent rules address

⁷ The Supreme Court's interpretation of the Federal Arbitration Act, for example, precludes many employees and consumers from participating in class actions or going individually to court; instead, these potential claimants are required to use dispute resolution systems stipulated in job application forms or in documents accompanying purchases or the use of credit cards. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) [hereinafter Resnik, *Diffusing Disputes*].

⁸ Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179 (2014). Ninety-eight percent of the defaulting debtors lacked counsel. *Id.* at 208–09.

⁹ See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13–26 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>, archived at <http://perma.cc/J3AR-KRU2>.

¹⁰ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–62 (2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf, archived at <http://perma.cc/9EKY-NS43>.

¹¹ *Id.* at 42, 68–69.

¹² The breaches in Ferguson included the court's failure to make public all it was required to do. *Id.* at 97–98.

¹³ My understanding has deepened as a result of the thorough research of a group of students, who combed rules and called clerks' offices as we tried to ferret out the ways in which ADR rules deal with public access. See Memorandum from Mark Kelley, Chris Milione & Devon Porter to Judith Resnik, Court-Annexed Arbitration (Apr. 28, 2014)

the public or third parties, the purpose is generally to ensure confidentiality. As currently practiced, ADR makes most of its processes and outcomes inaccessible. Even as ADR takes place *inside* courthouses, it is generally *outside* the public purview and it displaces public adjudication.

The fourth issue is the import of the law and history of public adjudication to court-based ADR. The constitutional framework for public access to court-based activities stems from First, Sixth, and Fourteenth Amendment rights as well as from clauses in state and federal constitutions establishing the judicial branch and from common law traditions. The U.S. Supreme Court has articulated a presumption of openness for criminal trials and related activities, such as voir dire. The Court has not expressly decided rights of the public to observe civil litigation, but lower courts have read the Court's precedent to require access to civil litigation analogous to that accorded for criminal litigation. The Court's approach, predicated on the First Amendment, invokes historical experiences of courts as public venues and the values of the resulting public exchanges, understood in Benthamite terms as instilling confidence and providing accountability.¹⁴ Judges describe the analysis as a mix of "experience" (practices over time) and "logic" (the claimed benefits of openness or closure).¹⁵

ADR complicates this doctrinal approach. ADR shifts the experiences in courts and justifies privacy as useful to reach agreements that, when predicated on consent, are argued as vitiating the need for accountability to third parties. As closed ADR procedures become the modality of judges in civil litigation, courts lose their capacity to serve as one of many venues constituting the public sphere and facilitating debates about law's reach. Instead, courts turn into dispute resolution systems largely shielded from public oversight and competing for filings with private sector providers.¹⁶

The difficulty with courts remitting decision-making to private ordering in a neo-liberal fashion is that it undermines the unique form of state authority that courts provide. Judges gain legitimacy from being embedded in public exchanges as they exercise the power to direct the reallocation of property and the reorganization of families as well as to impose limitations on liberty. Courts are "a huge information system—an entity that receives, processes, stores,

[hereinafter Kelly, Milione & Porter, Memo, Court-Annexed Arbitration] (on file with the author); Memorandum from Michael Clemente, Mark Kelley, Jonas Wang & Benjamin Woodring to Judith Resnik, Confidentiality, ADR, and Local Rules (October 1, 2014) (on file with the author). Thereafter, we returned to confirm information with many courts, and Bonnie Posick reviewed the local rules.

¹⁴ See, e.g., *Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 507–08 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980). See generally BENTHAM, RATIONALE, *supra* note 4.

¹⁵ These terms appear in many decisions. See, e.g., *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298–99 (2d Cir. 2011).

¹⁶ See also Resnik, *Diffusing Disputes*, *supra* note 7 at 2806–54.

creates, monitors, and disseminates large quantities of documents and information.”¹⁷ Substantive law and the values of procedural rights are being effectuated, applied, engaged, undermined, or ignored in dispute resolutions based in courts—with and without adjudication.¹⁸ If third parties have no access to the processes and the impact of judges’ actions (whether they are working in their roles as mediators, managers, or adjudicators), the rationales for judicial legitimacy, independence, and for significant public subsidies to courts weaken.

Therefore, when courts require disputants to participate in court-based settlement programs and court-based arbitration in the hopes that both will obviate the need for court-based trials, courts ought to shape public dimensions for these alternatives. As bargaining becomes a requirement of the law (rather than an activity in its shadow), judges need to take responsibility for the resulting agreements. The denouement of lawsuits, shepherded by judges pressing for accords to disputes, are not the equivalent of negotiated contracts created by parties seeking each other out to generate mutual benefits. As the rules of procedure turn into a set of practices promoting contracts,¹⁹ constitutional regulation must follow to insist on a role for the public so as to protect the opportunities courts provide for democratic engagements with the production of law and to justify the independence of judges and the authority of and resources devoted to courts.

II. THE CHANGING “VALUES AND GOALS” OF OPEN COURTS

The custom of open adjudicatory processes has a long history. Roman law conceived of criminal proceedings as “*res publica*”—a public event.²⁰ Centuries later, as cities developed, dispute resolution was one of the basic functions of government; indeed, some argue the formation of cities in Medieval times stemmed from the need to deal with conflicts so as to facilitate commerce and provide a modicum of peace and security.²¹

¹⁷ RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 201 (2008).

¹⁸ The role of adjudication in information production is central to Louis Kaplow’s article, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 *STAN. L. REV.* 1303 (2015).

¹⁹ See Judith Resnik, *Procedure as Contract*, 80 *NOTRE DAME L. REV.* 593 (2005).

²⁰ See BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS: STUDIES IN CICERO’S PRO CAECINA* (1985); J.A. CROOK, *LEGAL ADVOCACY IN THE ROMAN WORLD* (1995).

²¹ See, e.g., Mario Sbriccoli, *Legislation, Justice and Political Power in Italian Cities, 1200–1400*, in *LEGISLATION AND JUSTICE* 37, 42–44 (Antonio Padoa-Schioppa ed., 1997). Sbriccoli traced the movement in the thirteenth century toward an inquisitorial posture that displaced private ordering (“vendettas, duels, and private alliances”) with “‘reasons for (public) justice’,” such that justice became “one of the criteria by which the effectiveness of government power was measured.” *Id.* at 49–50; see also Clive Holmes, *The Legal Instruments of Power and the State in Early Modern England*, in *LEGISLATION AND JUSTICE*, *supra*, at 269–89.

Local rulers of various kinds regularly displayed their authority to make and enforce rules through public performances of their adjudicatory powers. But their processes relied on conceptions of judges, litigants, and the public that were very different than those in democratic polities. Then, judges were styled loyal servants of the states, subject to kingly (and godly) rule, rather than independent actors entitled to pronounce judgment on behalf of the state. Litigants depended on the grace of rulers to be eligible to participate in courts, and not all persons were authorized to bring suits, to testify, to serve as professional or lay judges, or to assert claims for protection of their person and property. In contrast to the modern notions that each person is a juridical equal and that the state is obliged to subject itself to scrutiny, the point of open procedures then was to impress on viewers the power of the state to compel obedience to its edicts.

Yet even in eras before popular sovereignty, public procedures produced complex interactions between the public and the state. Executions offer one such example, illuminating not only the capacity of the state to enforce its laws through dramatic punishments,²² but also the potential for spectators to exercise power as well. In England, executions “lurched chaotically between death and laughter” amidst carnivalesque atmospheres that undermined the “script” of a solemn ritual of state authority.²³ Mikhail Bakhtin saw large crowds producing “the suspension of all hierarchical rank, privileges, norms, and prohibitions.”²⁴ Given the tumult, hangings could only take place “with the tacit consent of the crowd.”²⁵ One way to control the crowds was to relocate the act of punishment, moving it from city squares to prisons, offstage and outside the purview of the

²² In seventeenth-century Amsterdam, for example, the burgomasters staged the ceremony in which death sentences were pronounced in a ground floor room opened to onlookers, who were able to watch through windows of the Town Hall; executions followed thereafter out front. Katharine Fremantle, *The Open Vierschaar of Amsterdam's Seventeenth-Century Town Hall as a Setting for the City's Justice*, 77 OUD HOLLAND 206, 208 (1962).

²³ Thomas W. Laqueur, *Crowds, Carnival and the State in English Executions, 1604–1868*, in *THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE* 305, 309–311 (A.L. Beier, David Cannadine & James M. Rosenheim eds., 1989) [hereinafter *THE FIRST MODERN SOCIETY*]. Laqueur examined graphic prints displaying the carnival-like atmosphere, suggesting that “from the audience’s perspective, executions were a species of festive comedy or light entertainment” with a theatricality that came to be parodied. *Id.* at 323–25. England was not unique in this regard. See generally SAMUEL Y. EDGERTON, JR., *PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE* (1985).

²⁴ MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 10 (Hélène Iswolsky trans., 1984).

²⁵ Laqueur, *supra* note 23, at 352. Public executions stopped in England in the late 1960s, and by 1965, the United Kingdom effectively abolished capital punishment itself. See Murder (Abolition of Death Penalty) Act, 1965, c. 71 (Eng.). Yet, as Foucault pointed out, the authority had already shifted its sites of operation. Governments cut out the crowds by incarcerating individuals in prisons removed from the public. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 7–8 (Vintage Books 2d ed., Alan Sheridan trans., 1995) (1977).

public. That form of privatization, as Michel Foucault identified, expanded state power while escaping popular oversight.²⁶

Despite the vividness of execution scenes, scholars of the English legal system point out that “many more people of all ranks of society . . . came into contact with the legal system through the civil rather than the criminal courts.”²⁷ The expansion of commerce, coupled with the growth in governments’ administrative activities and of the legal profession, brought increasingly diverse people into court. Just as spectators at executions responded, the audience watching court proceedings developed views about the legitimacy of the processes and of the decisions made.

In the eighteenth century, the shift to popular sovereignty, exemplified by the French and American Revolutions, profoundly altered the expectations of courts and the obligations of judges. A return to Jeremy Bentham, who was formulating his thoughts on public participation in the early part of the nineteenth century, is thus in order. Bentham conceived of adjudication as a robust check on state authority. Deeply concerned about the self-interested actions of common law judges and lawyers, Bentham argued that publicity provided several benefits. A first was that, when the public was present, judges presiding at trial would themselves be “under trial.”²⁸ Thus, as Michel Foucault later explicated, with public oversight comes the disciplinary power of surveillance.²⁹

Second, the immediacy of an audience would, Bentham thought, also turn judges into teachers and courts into “schools” as well as “theaters of justice.”³⁰ Bentham assumed that judges would want to explain their actions to the audience, who would learn why and how judgments were made. These

²⁶ See FOUCAULT, *supra* note 25. The contemporary prison reform effort comes in part from the publicity produced from efforts to “stop solitary” confinement and to respond to violence inside prisons. See, e.g., AM. CIVIL LIBERTIES UNION OF TEX., *A SOLITARY FAILURE: THE WASTE, COST AND HARM OF SOLITARY CONFINEMENT IN TEXAS* (2015), available at <http://aclutx.org/download/197>.

²⁷ C.W. Brooks, *Interpersonal Conflict and Social Tension: Civil Litigation in England, 1640–1830*, in *THE FIRST MODERN SOCIETY*, *supra* note 23, at 357, 357. Brooks also noted that eighteenth century rates of civil litigation were lower than in some prior eras. *Id.* at 396–97. English history also included a brief period, in the 1760s, when both litigants and spectators had to pay fees to enter the galleries of the Old Bailey, London’s criminal court. See John Brewer, *The Wilkites and the Law, 1763–74: A Study of Radical Notions of Governance*, in *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 128, 150 (John Brewer & John Styles eds., 1980); Simon Devereaux, *The City and the Sessions Paper: “Public Justice” in London, 1770–1800*, 35 *J. BRIT. STUD.* 466, 486 (1996). Another form of limited access was that not all the materials submitted were included in the records kept. *Id.* at 488. By way of illustration, between 1560 and 1640, “the number of lawyers (‘barristers’) qualified to practice before the central courts increased fourfold.” Holmes, *supra* note 21, at 273.

²⁸ See BENTHAM, *Rationale of Judicial Evidence*, *supra* note 4, at 355. See generally Frederick Schauer, *Transparency in Three Dimensions*, 2011 *U. ILL. L. REV.* 1339.

²⁹ See generally FOUCAULT, *supra* note 25.

³⁰ BENTHAM, *RATIONALE*, *supra* note 4, at 355.

different utilities turned publicity, for Bentham, into “the very soul of justice.”³¹

The idea of the public as an authoritative overseer of the judiciary was part of a broader reconception of courts’ relationship to the body politic. Historically, judges served at the pleasure of the monarchs who appointed them. The English Act of Settlement of 1701 is one marker of shifting norms; judges no longer lost their commissions when the monarchy changed.³² A century later, Bentham argued that spectators ought to become active participants (“auditors” was his term),³³ disseminating their own notes, taken without state control. The public could thus report on how judges treated all litigants, including when the government (which appointed judges) appeared before them.

III. CONSTITUTIONALIZING RIGHTS OF THE PUBLIC

The procedural system in the United States, which is at the core of Professor Subrin’s interests,³⁴ embraced the idea of courts as public venues. The new states in North America constitutionalized “publicity” by mandating that “all courts shall be open.”³⁵ What had been rituals of power became obligations of government, as provisions on open courts were regularly linked to clauses protecting rights-to-remedies for harms to property and person.

Together, these guarantees generated two kinds of access: empowering individuals to bring claims to courts and authorizing third parties to watch proceedings in courts. The 1819 Alabama Constitution is one of many such texts, with its phrases echoing England’s Magna Carta, providing: “All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.”³⁶

³¹ JEREMY BENTHAM, *Bentham’s Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, in 4 THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., 1843).

³² David Lemmings, *The Independence of the Judiciary in Eighteenth-Century England*, in THE LIFE OF THE LAW: PROCEEDINGS OF THE TENTH BRITISH LEGAL HISTORY CONFERENCE, OXFORD 1991, at 125, 125–130 (Peter Birks ed., 1993).

³³ BENTHAM, RATIONALE, *supra* note 4, at 355–56.

³⁴ Professor Subrin has sustained interests in global and comparative procedure as well. See Margaret Woo, *Manning the Courthouse Gate: Pleadings, Jurisdiction, and the Nation-State*, 15 NEV. L.J. 1261 (2015).

³⁵ An overview of many such provisions can be found in Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 (2012).

³⁶ ALA. CONST. of 1819, art. I, § 14. The current Alabama Constitution, ratified in 1901, has an almost identical clause. See ALA. CONST. art. I, § 13 (“That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”).

Yet a reminder is in order. Courts in many states—North and South—were not then venues in which all persons were equal.³⁷ Indeed, courts were institutions centered on the protection of property and status-conventional relationships, as was made painfully clear by the U.S. Supreme Court’s 1856 *Dred Scott* decision, holding that Harriet and Dred Scott could not seek redress in courts because they lacked legal personhood and juridical capacity.³⁸

The idea of courts as both *sources* of the recognition that all persons are equal rights-holders and as *resources* for the full array of humanity is an artifact of the First and Second Reconstructions. Not until well into the twentieth century did U.S. law and practice fully embrace the propositions that race, gender, and class did not preclude access to courts, that women and men of all colors could serve as jurors and judges, and that all participants were entitled to equal dignity and respect.³⁹ Not only did all persons gain entitlements to courts, but the import of phrases guaranteeing rights-to-remedies for “an injury to lands, goods, person, or reputation” changed. Examples include rights to be free from discrimination; rights for consumers, employees, and members of households; and the development of protections for the environment as well as for criminal defendants.

The interaction between the constitutional obligations of earlier eras and developing commitments to equality turned courts into universal entitlements and, on occasion, pressed them to be deliberately redistributive as well. Once the government obliged itself to show “equal concern for the fate of every person over whom it claims dominion” (to borrow Ronald Dworkin’s description of equality’s entailments⁴⁰), courts had new tasks. The promises of access and remedies become illusory when, for example, courts charge entry fees that systematically exclude sets of claimants and when government resources overwhelm opponents.⁴¹

³⁷ For example, the Connecticut Constitution of 1818 had a similar set of guarantees. *See* CONN. CONST. of 1818, art. I, § 12 (“All courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”).

Yet, while protecting rights to “open” courts and to “remedy by due course of law,” the state did not permit women to vote until after the enactment of the Nineteenth Amendment in 1919, and racial qualifications for voting did not end until after the Civil War. WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION 18–19* (2d ed. 2012).

³⁸ *Scott v. Sandford*, 60 U.S. 393, 427 (1856); *see also* LEA VANDERVELDE, *MRS. DRED SCOTT: A LIFE ON SLAVERY’S FRONTIER* 233–319 (2009).

³⁹ *See generally* Judith Resnik, *Asking About Gender in Courts*, 21 *SIGNS* 952 (1996). Further, while my focus is on the United States, these premises have a transnational sweep, as illustrated by the 1966 United Nations Covenant on Civil and Political Rights, declaring that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights art. 14, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁴⁰ *See* RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 2 (2011).

⁴¹ *See* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 *HARV. L. REV.* 78 (2011) [hereinafter Resnik, *Fairness in Numbers*].

But what forms of access ought to be subsidized, which asymmetries should be addressed, and what costs should be imposed on users? These questions about the need for resources (both individual and institutional) to pursue and to entertain claims are not new. In 1793, Jeremy Bentham inveighed against court fees, which he described as a “tax upon distress.”⁴² Yet, once all persons are egalitarian rights-holders, the problems become all the more acute—both for users and for court systems. Responses promoting access unfolded during the twentieth century and ranged from workers’ compensation programs and small claims courts to new constitutional doctrines, such as the guarantee in *Gideon v. Wainwright* for indigent defendants facing felony charges to have state-provided counsel,⁴³ and the requirement in *Boddie v. Connecticut* that the state waive fees for indigent litigants seeking divorces.⁴⁴ Congress authorized the Legal Services Corporation to support poor civil litigants more generally, and many waves of procedural reforms eased access to courts and to information from opponents.

IV. THE POLITICAL IMPORT AND THE PRACTICE OF PUBLIC PROCESSES

These brief forays into the development of the public and democratic functions of courts—and the new challenges that shift has produced—are in service of analyzing several facets of the contingency of courts, and hence of what Professor Subrin termed courts’ “values and goals.” A first point is about the relationship of courts to what political theorists call the “public sphere,” often defined as civic (rather than governmental) institutions that facilitate policy debates and the formation of civic cultures.⁴⁵

These spaces are cherished in democracies for enabling the “public” to understand its ability to affect government—or as Nancy Fraser explained, the “public(s),” because the diverse subgroups within democracies constitute multiple public sphere(s).⁴⁶ Courts should be understood as falling in the public sphere category because, while government-supplied, courtrooms are venues where private and public sectors meet to argue—before an audience of

⁴² JEREMY BENTHAM, *A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice*, in 2 THE WORKS OF JEREMY BENTHAM 573, 582 (John Bowring ed., 1843).

⁴³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁴ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁴⁵ See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1991); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1998).

⁴⁶ See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun, ed., 1992).

strangers—about law’s obligations.⁴⁷ More than that, courts are one sphere aspiring to cut across class and ethnicity to welcome all who seek to participate.

A second point is that courts have come to serve purposes beyond those contemplated by Bentham. The social movements of the twentieth century reinvented courts as venues recognizing the equal rights of all persons and as sources of new understandings of what “equal” means. Courts operating under these conditions are not just sources of rights but also *sites* of democratic practices—places in which people learn about what democratic interactions require,⁴⁸ or about the failure of courts to live up to those obligations.⁴⁹ In courts, disputants are obliged to treat opponents civilly, and the state is compelled to accord women and men of all colors and classes equal respect and dignity. The public watches those exchanges, as it also learns that law is not fixed *ex ante*, but that norms develop in the interaction between fact and law and attitudes; what law itself is can be seen as contested terrain, produced through sequences of conflicts and their resolutions.⁵⁰ Courts are places in which the sovereignty of the people matters, in which law becomes vivid, and through which norms are reaffirmed or undermined.

Third, publicity has another, less appreciated, function as foundational to judicial independence, which in turn is also a predicate to the legitimacy of adjudication in democracies. I have already adverted to the history of judges acting as loyal servants of the state. The concept of ordinary judges enjoying an authority to sit in judgment of the very power that employs them dates back only a few centuries. In the United States, both state and federal constitutional commitments to judicial independence have helped to generate a culture that has come to assume—and therefore to protect—this attribute, even as judicial independence remains elusive in many parts of the world.⁵¹

⁴⁷ See JOHN R. PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE* (2012).

⁴⁸ See JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 288–305 (2011).

⁴⁹ The new shorthand for these failings is “Ferguson,” as the March report from the U.S. Department of Justice charted the degree to which its court system was biased. See *CIVIL RIGHTS DIV.*, *supra* note 10. Thereafter Missouri’s Supreme Court assigned an appellate justice to replace the local judge. See *Order Transferring The Honorable Roy L. Richter, Eastern District, Missouri Court of Appeals, to the 21st Judicial Circuit (St. Louis County)* (Mo. Mar. 9, 2015) (en banc).

⁵⁰ Deborah Hensler, paper presented at Northeastern University School of Law, *Through a Glass Starkly: Civil Procedure Reconsidered*, A Symposium Celebrating the Scholarship of Professor Steve Subrin (Apr. 11, 2014).

⁵¹ Several international efforts seek to understand and to support the independence of judges. See *generally* *THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES* (Shimon Shetreet & Christopher Forsyth eds., 2011); Bernd Hayo & Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence—A Global Survey*, 11 *J. EMPIRICAL LEGAL STUD.* 159 (2014).

While the meaning of judicial independence is debated, a shared central premise is that judges are not to be controlled or corrupted by others,⁵² and therefore that their judgments merit attention and compliance. Publicity is one method of producing and policing independence. If judges are on display, the public can know whether judges bow to the state or to other powerful litigants. Further, the constitutional obligations of “open courts,” implemented through statutes creating and funding judiciaries, have made routine the disclosure of judges’ salaries and court budgets as well as data on filings, trends, case proceedings, and outcomes.⁵³ Canons of ethics and statutes on disqualification elaborate standards of conduct, from permissible sources of outside income to constraints on participating in partisan activities.⁵⁴

Public processes thus shape judges’ understandings of their own obligations by placing judges in a structured, deliberate relationship not only with disputants but also with the body public. This performative facet of judging is reflected in the phrase “the appearance of justice.”⁵⁵ In order to fulfill the mandate that justice both be and appear to be fair, justice has actually to “appear,” to be visible. The ambitions that democracies have for courts require that procedural systems be seen, accessible, and knowable—confirming Bentham’s insistence on publicity’s centrality in and to justice.

Fourth, the practices of judging once made publicity a relatively unself-conscious aspect of adjudication—built from a mix of customs, practices, and rights, such as jury trials and evidentiary obligations to permit in-person confrontation of adverse witnesses in criminal cases.⁵⁶ When, in the 1980s, Supreme Court justices elaborated the law of public access to courts, they referenced this history as a natural artifact of trials, always “open to all who

⁵² Volumes of case law and commentary debate the contours and structural arrangements that produce and protect judicial independence. See JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002); Judith Resnik, *Interdependent Federal Judiciaries: Puzzling About Why & How to Value the Independence of Which Judges*, DAEDALUS, Fall 2008, at 28.

⁵³ What is available is far from all that is needed. Yet the idea of openness produces presumptions of how much more data ought to be generated. See Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Important Courts*, DAEDALUS, Summer 2014, at 129.

⁵⁴ See Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, 18 & 28 U.S.C.); MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2010).

⁵⁵ See generally JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974). The American Bar Association’s model rules for judicial conduct commend judges to attend to how others perceive their actions. See, e.g., MODEL CODE OF JUDICIAL CONDUCT pmbl. (2010) (urging judges to “avoid both impropriety and the appearance of impropriety in their professional and personal lives”).

⁵⁶ See generally Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

care to observe.”⁵⁷ The material instantiations were the buildings; courthouses became recognizable structures and icons of government. As localities sought to mark their own identities, they invested in courthouses to embody their authority, shape their communities, and attract commerce.

The nexus of adjudication to economic development is exemplified by the placement of courthouses at the center of towns.⁵⁸ In some of the oldest county courthouses, everyone entered the one-room building through the same door.⁵⁹ In others, courtrooms sat in multi-function municipal centers, often termed town halls. Localities competed as well to be named the “seat of justice” within a county, just as cities sought to be state capitals as a way to garner recognition and expand their commercial base.⁶⁰

Openness has also been routine for appellate courts. Several state constitutions directed their supreme courts to write or to publish opinions, to make them freely available, to let others publish them, and to explain reasons for dissent. For example, Kentucky’s 1792 Constitution imposed a “duty of each judge of the Supreme Court, present at the hearing of such cause, and differing from a majority of the court, to deliver his opinion in writing.”⁶¹ West Virginia instructed judges in its 1872 Constitution to “prepare a syllabus of the points adjudicated” in those cases with written opinions.⁶² Arizona, California, and Michigan insisted that opinions “shall be free for publication by any

⁵⁷ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980). Chief Justice Burger wrote the plurality opinion for the Court. The concurrence by Justice Brennan, joined by Justice Marshall, offers a parallel account. *Id.* at 594–98 (Brennan, J., concurring).

⁵⁸ For example, the city planners in Warren County sited the courthouse in the center of town, and only sold the other town lots after it was constructed. See Judith Resnik, *Commentary, “Crack, Jury Chairs, Warren County Courthouse, Warrenton, Missouri,”* DAEDALUS, Summer 2014, at 180.

⁵⁹ The Fulton County Courthouse, one of the oldest courthouses in the country, is one such example. The courthouse building consisted entirely of one courtroom, and a separate building to house the County Clerk was not constructed until more than forty years after the courthouse’s construction. See *Fulton County Courthouse*, N.Y. ST. UNIFIED CT. SYS., http://www.nycourts.gov/history/legal-history-new-york/documents/Courthouse_History-Fulton-County.pdf (last visited June 30, 2015).

In contrast, courtroom space occupies less than 10 percent of the John Joseph Moakley United States Courthouse in Boston, which opened in 1998. See U.S. GENERAL SERVICES ADMINISTRATION, *JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE AND HARBORPARK, BOSTON MASSACHUSETTS* 32 (2003); Douglas P. Woodlock, *Dedication Ceremony of the John Joseph Moakley United States Courthouse: Boston, Massachusetts, April 18, 2001*, 17 NEW ENG. J. PUB. POL’Y 9, 9 (2001); Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 897–98 (2012) [hereinafter Resnik, *Building the Federal Judiciary*].

⁶⁰ See RESNIK & CURTIS, *supra* note 48, at 134–153.

⁶¹ KY. CONST. of 1792, art. V, § 4.

⁶² W. VA. CONST. of 1872, art. VIII, § 5. West Virginia’s current constitution is an amended version of its 1872 constitution, and includes the same requirement. W. VA. CONST. art. VIII, § 4.

person.”⁶³ Once again, such legal provisions helped to produce public spaces. Just as localities put courts at their towns’ center, states built complexes for their capitals and either included grand courtrooms for their supreme courts in their (often domed) state capital building or erected separate imposing courthouses as part of a government complex.⁶⁴

The federal adjudicatory system was layered on top of the court systems provided by the states. The first Judiciary Act created thirteen federal districts and a barebones federal judicial staff, rendering them relatively inaccessible as contrasted with state courts. Before 1850, no building was called a federal courthouse; about forty lower-court federal judges were dispersed around the country. Federal judges either occupied rooms in federal buildings such as Custom Houses, rented spaces from states, or used commercial buildings; a

⁶³ ARIZ. CONST. art. VI, § 8 (“Provision shall be made by law for the speedy publication of the opinions of the supreme court, and they shall be free for publication by any person.”); CAL. CONST. of 1849, art. VI, § 12 (superseded by the California Constitution of 1879, which did not address the issue, but was later revised in 1966 to state that Supreme Court opinions “shall be available for publication by any person,” CAL. CONST. art. VI, § 14 (1966) (“The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.”)); MICH. CONST. of 1963, art. IV, § 35 (“All laws and judicial decisions shall be free for publication by any person.”). The same provision existed in Michigan’s 1850 Constitution, MICH. CONST. of 1850, art. IV, § 36, but not in Michigan’s initial 1835 constitution. The current Michigan Constitution also provides:

Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

MICH. CONST. art. VI, § 6.

Maryland’s Constitution provides similarly that “[p]rovision shall be made by Law for publishing Reports of all causes, argued and determined in the Court of Appeals and in the intermediate courts of appeal, which the judges thereof, respectively, shall designate as proper for publication.” MD. CONST. art. IV, § 16. In addition, New Jersey’s 1844 Constitution required judges to provide “reasons . . . in writing,” N.J. CONST. of 1844, art. VI, § 2, but neither New Jersey’s original 1776 constitution nor its current constitution, in place since 1947, contain a similar provision.

⁶⁴ The Indiana Statehouse in Indianapolis, constructed in 1888, and the Oklahoma State Capitol in Oklahoma City, completed in 1917, are examples of the decision to place a courtroom for the Supreme Court in the same building where the legislature meets. *The Statehouse Story*, IN.GOV, <http://www.in.gov/idoa/2431.htm> (last visited Sept. 27, 2014); *Oklahoma Capitol*, OKLA. HIST. SOC’Y, <http://www.okhistory.org/publications/enc/entry.php?entry=OK080> (last visited June 30, 2015). Illustrative of the decision to build a separate impressive structure are Connecticut, which built a courthouse for its Supreme Court in 1910, *Virtual Tour of the Connecticut Supreme Court*, CONN. SUPREME CT. HIST. SOC’Y, <http://www.jud.ct.gov/historicalsociety/tour.htm> (last visited June 30, 2015), and Washington, which became a state in 1889 and which also opened an imposing courthouse for its Supreme Court in 1913, *History of the Temple of Justice*, WASH. ST. CAPITOL CAMPUS TEMPLE OF JUSTICE CENTENNIAL, <http://www.templecentennial.wa.gov/index.cfm?fa=home.templeHistory> (last visited May 27, 2015).

single federal trial judge, sitting in a state such as Maryland or Indiana, had little need for a courthouse of his own.

Yet the dominant mode of procedure—trials—built the public into the process. The Judiciary Act of 1789 mandated that “oral testimony and examination of witnesses in open court . . . be the same in all the courts of the United States.”⁶⁵ Juries had to be drawn from the venire in which criminal indictments were lodged, and the Sixth Amendment required a “speedy and public trial” for those facing criminal charges.⁶⁶

The growth in the number and docket of lower federal courts came after the Civil War, as the national economy expanded and Congress enacted new jurisdictional statutes and created the Department of Justice. Rising caseloads produced demands for more judgeships, for more courthouses, and for new procedures to unify federal practice nationwide.⁶⁷

V. ENABLING AND COMPLICATING ACCESSIBILITY: THE 1938 FEDERAL RULES OF CIVIL PROCEDURE

Professor Subrin has provided a history of the enactment of the 1934 Rules Enabling Act,⁶⁸ authorizing the Supreme Court to promulgate procedural rules applicable in federal courts across the country.⁶⁹ The normative goals shaping the 1938 Federal Rules of Civil Procedure facilitated a reconceptualization of federal adjudication by welcoming into court a diverse array of persons who became rights-holders as the century unfolded. Scholars have chronicled the underpinnings of the 1938 Rules—with their functionalist, anti-formalist commitments to easing barriers to entry through trans-substantive, uniform, national provisions that expanded opportunities for information exchange, vested discretion in trial judges, and aimed for efficient decision-making focused on the merits of claims.⁷⁰

⁶⁵ Judiciary Act of 1789 § 30, 1 Stat. 73, 88.

⁶⁶ U.S. CONST. amend. VI.

⁶⁷ Resnik, *Building the Federal Judiciary*, *supra* note 59, at 826–27 figs.2 & 3.

⁶⁸ See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*]; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁶⁹ See Daniel R. Coquillette, Mary P. Squiers & Stephen N. Subrin, *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62.

⁷⁰ See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Subrin, *How Equity Conquered Common Law*, *supra* note 68; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494–98, 502–15 (1986) [hereinafter Resnik, *Failing Faith*]; Burbank, *supra* note 68, at 1131–1163. David Shapiro provided a caveat on identifying purposes of a diverse group; he also concluded that the goals included restructuring civil process, achieving more uniformity in federal practice, escaping “rigidities and technicalities” through flexibility, and embracing adversarialism in litigation but without a focus solely on trials. See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972–1977 (1989).

Those rules intersected with waves of new statutory rights and with funding for dozens of construction projects that enlarged the federal courthouse footprint. Congress substantially increased the number of federal life-tenured judgeships and, during the second half of the twentieth century, chartered new kinds of auxiliary personnel—magistrate and bankruptcy judges working in federal courts and administrative judges deployed in agencies.⁷¹

To return to the two facets of “open courts,” the 1938 Rules were door-opening in facilitating case filings. Yet the Rules also created obstacles for the other aspect of “open courts”—the potential for third parties to observe directly the proceedings. Through fashioning new pretrial procedures, the Federal Rules enabled the development of a litigation system in which trials became rare and key exchanges took place outside the courtroom.⁷² “Trial lawyers” came to be replaced by “litigators,” focused on pretrial motions and discovery, and by “problem-solving lawyers,” aiming for resolutions without trials. Judges became managers of both cases and lawyers.⁷³ Over the decades, civil trial rates and the absolute number of trials declined—prompting judges to record their concerns that the phrase “trial judge” was becoming anachronistic.⁷⁴ In 2012, fewer than 1.2 percent of cases reached trial.⁷⁵

Yet the 1938 Rules also provided new routes for information about claims to reach the public. The litigations that the Rules helped to spawn generated a wealth of public information. Until 2000, Rule 5 provided that discovery was to be filed with courts,⁷⁶ and common law practices (with their constitutional overtones) made materials filed in court presumptively available for public

⁷¹ 28 U.S.C. §§ 151, 157–158, 631–636 (2012). See generally Judith Resnik, “Uncle Sam Modernizes His Justice”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002).

⁷² See Stephen C. Yeazell, Essay, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

⁷³ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*].

⁷⁴ Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture: So Why Do We Still Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002); William G. Young, *An Open Letter to U.S. District Judges*, FEDERAL LAWYER, July 2003, at 30; see also Jordan M. Singer and William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565 (2014).

⁷⁵ *Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2012*, U.S. CTS., <http://www.uscourts.gov/file/10298/> (last visited May 29, 2015); see also Marc Galanter & Angela M. Frozema, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, DAEDALUS, Summer 2014, at 115.

⁷⁶ Federal Rule of Civil Procedure 5(d) had provided that discovery materials were to be filed “within a reasonable time.” See FED. R. CIV. P. 5(d), 308 U.S. 645, 669 (1939) (submitted in 1937 to be effective in 1938).

review.⁷⁷ The opportunities to obtain documents from opponents (including governments and commercial enterprises) turned discovery into what my colleague Owen Fiss termed the “poor person’s FBI.”⁷⁸ Revisions in the 1960s opened doors to class actions, and a federal statute enacted in 1968 authorized coordination across districts in large-scale litigations. As another renowned proceduralist—Professor Benjamin Kaplan—commented at the 1988 commemoration of fifty years of the Federal Rules, the Rules “have worked to considerable (if not universal) satisfaction to support revolutions of the substantive law. The much criticized discovery function and class action remain together the scourge of corporate and governmental malefactors.”⁷⁹

Kaplan’s description of the Rules as “much criticized” reflects the role courts play in the public sphere. Rights to public courts and rights in public courts generated conflicts about what obligations law ought to impose and the scope of the remedies. Vivid examples include mass litigation against injuries from cigarettes, asbestos, and pharmaceuticals, as well as individual cases focused on violence inside households.⁸⁰ The many public disclosures prompted debates on what ought to constitute cognizable harms, who ought to be seen as deserving of what remedies, whether aggregation through class actions helped pool claimants or inappropriately altered defendants’ incentives, and what forms of relief ought to be available. Politically-charged exchanges ensued about litigation, lawyers, and rights, as the platforms of national parties advocated for or against curbing access to courts—often argued in terms of costs, delays, and claims about whether litigation undercut economic growth and imposed unduly high needs for insurance or enabled wrongdoers to be brought to justice.⁸¹

Those conflicts, coupled with the cost of lawyers during decades when the demand for federal adjudication appeared unending,⁸² put pressures on the

⁷⁷ See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802–05 (2014) [hereinafter Resnik, *Privatization of Process*].

⁷⁸ Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2003).

⁷⁹ Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1881 (1989). He added that “fundamental faults of litigation procedure—for example, the handicapping of the weak, despite statutory help for them here and there—should be attributed not to the Rules, but rather to the state of the nation.” *Id.*

⁸⁰ One example, related to asbestos, comes from the information about the “Sumner Simpson papers,” demonstrating that executives in asbestos manufacturing companies were aware in the 1930s–1950s of the dangers of asbestos but did not inform workers of those risks. A deposition of a company executive’s son and efforts to prevent the disclosure brought the information to light. See *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1372–74 (3d Cir. 1991).

⁸¹ See Stephen C. Yeazell, *Unspoken Truths and Mismatched Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752 (2013).

⁸² See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 18 (1995), available at <http://www.uscourts.gov/file/2826/>. Some aspects of this report have been superseded by JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE

procedures the Federal Rules provided. Various sectors, with different agendas, argued for revisions. Celebrants of adjudication wanted to protect it and sought alternatives to divert some disputes to different venues. Some critics hoped for a friendlier “alternative” that would be less adversarial and more generative.⁸³ Others promoted ADR from a perspective critical of adjudication, seen by corporate and government sectors as a drag on innovation and intrusive on decision-making.⁸⁴ These various strands produced a national movement seeking changes in rules, statutes, law school courses, and legal practice. A sequence of revisions of the Federal Rules (in what Thomas Main and Stephen Subrin have termed a “fourth wave” of procedural reform⁸⁵) have now combined to limit the opportunities members of the public have to watch the interactions between judges and disputants in courthouses.

A central example in the federal system is the evolution of Rule 16, governing pretrial activities. The Rule, coupled with statutes and local practices, has redirected judges away from public adjudication and towards becoming case managers promoting settlement.⁸⁶ When first drafted as part of the 1938 Federal Rules, the possibility of a “pre-trial” meeting between judges and lawyers was innovative.⁸⁷ As I have detailed elsewhere, the initial conception was not to put judges in the business of pressing for settlement but to help focus the disputants on what would be needed, if the case were to proceed to trial.⁸⁸ However, the 1983 amendments to Rule 16 reflect the success of promoters of managerial judging, who changed the mandate for judges by tasking them with taking control of lawyers and cases, so as to structure the process and encourage the parties to settle their differences rather than litigate.

In the 1983 amendments, “pre-trial” lost its hyphen, which had served to signal its function as a predicate to a trial; the noun “pretrial” became an event unto itself. The 1983 revision detailed what judges could do during pretrial,

FEDERAL JUDICIARY (2010), available at <http://www.uscourts.gov/file/2748/>, archived at <https://perma.cc/5NBF-SG9C?type=pdf>; see also Resnik, *Privatization of Process*, *supra* note 77, at 1799 figs.1 & 2, 1821–23.

⁸³ See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

⁸⁴ The terrain is mapped in Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003).

⁸⁵ Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

⁸⁶ See Resnik, *Privatization of Process*, *supra* note 77, at 1803–06; Resnik, *Managerial Judges*, *supra* note 73, at 399–402. See generally Resnik, *Failing Faith*, *supra* note 70.

⁸⁷ State court judges sometimes held what were then termed “pre-trial” conferences, and those became models for the 1938 rules. See Resnik, *Managerial Judges*, *supra* note 73, at 384–85 nn.50–51.

⁸⁸ Resnik, *Managerial Judges*, *supra* note 73, at 384–86; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935–37 (2000).

including proposing that litigants use what the rule termed “extrajudicial” efforts—various forms of ADR.⁸⁹

By 1993, what the Federal Rule drafters had situated a decade earlier as “extrajudicial” was reconceived to be internal to the judicial role; pretrial conferences became occasions for judges themselves to “consider and take appropriate action” on a host of activities, from “settling the case and using special procedures to assist in resolving the dispute” through forms of ADR⁹⁰ to “disposing of pending motions” and organizing the presentation of evidence.⁹¹ This pro-settlement stance is featured in materials the federal judiciary provides to the public. The judiciary’s website, adorned with an eagle at its top, offers help in “Understanding the Federal Courts” by explaining how the Federal courts work. In 2015, the text chosen to be set off in a separate box stated: “To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.”⁹²

Local rules provide additional directions to put settlement at the forefront.⁹³ For example, the U.S. District Court of Massachusetts (where Northeastern University Law School hosted the symposium in honor of Professor Subrin) directs that, at “every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations.”⁹⁴

Clarity on six points is required before turning to an analysis of the relationship between these new ADR procedures, publicity, and adjudication in democracies. First, under the umbrella of ADR come various procedures, some focused on conciliation, either by way of bilateral negotiations or with the assistance of third parties, including judges, mediators, or other “neutrals.” Some of the programs entail structured exchanges, such as “mini-trials” in

⁸⁹ See FED. R. CIV. P. 16(c)(2) (providing that “[a]t any pretrial conference, the court may consider and take appropriate action on the following matters,” including “settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule”).

⁹⁰ *Id.* R. 16(c)(2)(I).

⁹¹ *Id.* R. 16(c)(K), (N).

⁹² *Civil Cases*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/types-cases/civil-cases> (last visited May 29, 2015).

⁹³ Rulemaking at the local level is also a topic Professor Subrin has analyzed. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Coquillette, Squiers & Subrin, *supra* note 69.

⁹⁴ See D. MASS. CIV. R. 16.4, available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf> (“(a) The judicial officer shall encourage the resolution of disputes by settlement or other alternative dispute resolution programs. (b) Settlement. At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances. Assistance may include a reference of the case to another judicial officer for settlement purposes. Whenever a settlement conference is held, a representative of each party who has settlement authority shall attend or be available by telephone.”).

which each side is present and advocates present summaries of the arguments to help the principals understand the strengths and weaknesses of their and their adversary's positions. Another alternative, styled "court-annexed arbitration," occurs after cases are filed; courts invite a third party (generally chosen from a panel of pre-selected lawyers) to decide an outcome.⁹⁵ This type of arbitration is to be distinguished from a contractual agreement not to use courts, as well as from recent interpretations of the Federal Arbitration Act under which courts enforce clauses in documents governing the purchase of consumer goods and job applications mandating the use of private providers in lieu of courts.⁹⁶

Second, the use of all kinds of ADR could be voluntary or mandatory, and court rules range from mentioning the options to requiring their use.⁹⁷ For example, in the federal system, judges can insist that disputants attend settlement discussions but cannot require disputants to settle.⁹⁸ Similarly, some states have rules requiring disputants in certain kinds of cases (such as those involving family dissolution) to mediate as a predicate to adjudication, available only if mediation does not resolve the issues. In some jurisdictions, court-annexed arbitration is optional, and in others, required.

The third issue is the impact of whatever resolutions are reached. If parties agree to end their disputes by settling them, those agreements preclude returning to court. But the use of mediation or arbitration may be "non-binding"—even when mandated—and hence not preclusive of a trial or additional litigation thereafter.

Fourth, to seek resolutions through court-encouraged settlements and other forms of ADR does not, intrinsically, require private processes. Criminal law is also replete with ADR, called in that context "plea bargaining" and "diversion."

⁹⁵ In a few jurisdictions, arbitrations are functionally short-form trials, in which thousands of cases are sent to panels of lawyer-arbitrators, operating under rules incorporating many of the state's civil rules while shaping a presumptively brief (a few hours) hearing. As Illinois's Uniform Arbitrator Reference Manual explains, the state mandated arbitration "for some types of civil disputes" to help reduce "court congestion, costs, and delay. . . . The goal of the process . . . is to deliver a high quality, low cost, expeditious hearing in eligible cases, resulting in an award that will enable, but not mandate, parties to resolve their dispute without a formal trial." ALT. DISPUTE RESOLUTION COORDINATING COMM. OF THE ILL. JUDICIAL CONFERENCE, COURT-ANNEXED MANDATORY ARBITRATION PROGRAM: UNIFORM ARBITRATOR REFERENCE MANUAL 2 (2010), available at <http://www.dupageco.org/courts/33051/>, archived at <http://perma.cc/4BRF-UAAJ> [hereinafter ILLINOIS UNIFORM ARBITRATOR REFERENCE MANUAL].

⁹⁶ The Supreme Court's interpretation of the Federal Arbitration Act is the subject of much discussion. See Resnik, *Fairness in Numbers*, *supra* note 41, at 118–54; Resnik, *Diffusing Disputes*, *supra* note 7, at 2874–93.

⁹⁷ A helpful overview of the procedures used across the country is provided by DONNA STIENSTRA, FED. JUDICIAL CTR., ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf). Additional research for another report is underway. See *Dispute Resolution in Federal Courts: New Study to Look at How It's Working*, U.S. CTS. (Jan. 23, 2014), <http://www.uscourts.gov/news/2014/01/23/dispute-resolution-federal-courts-new-study-look-how-its-working>.

⁹⁸ See FED. R. CIV. P. 16(f).

Yet aspects of these processes are mandatorily brought before the public. Pre-trial hearings and plea bargains are both “on the record,” exemplifying that trials are not the only procedural format providing rights of audience. On the civil side, judges can convene conferences (whether in person or via teleconferencing) in open court where strangers can walk in, or judges can locate such exchanges in chambers to which the public has no access.⁹⁹ Similarly, court-annexed arbitrations could be held in courtrooms, other public venues, or not.

Fifth is the question of costs. ADR procedures may be offered as part of the packet of state-paid and state-subsidized services when cases are filed, or ADR may be separately priced. Staffing may come from full-time court employees (judges included), or from third parties who either volunteer or are paid by the court or by disputants. For example, the policymaking body for the federal courts provided in 1999 that local rules should address the compensation of court-appointed “neutrals” and whether they would serve “pro bono or for a fee.”¹⁰⁰ The related commentary called for participants “unable to afford the cost of ADR [to be] excused from paying.”¹⁰¹ Pursuant to this mandate, for example, the Eastern District of Pennsylvania has specified that the hourly fees were to be paid by funds from the federal judiciary.¹⁰²

Sixth, given the array of processes and the combinations among the different facets outlined above, a positive accounting of all the variations is difficult. My focus here is on the relationship of the public to court-based ADR in terms of whether the processes are, in practice, open for strangers to attend and the outcomes made available through publication or otherwise. My question is whether constitutional obligations of access to courts ought to be

⁹⁹ See Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 858–59 (2013).

¹⁰⁰ See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 53 (Sept. 1999), available at <http://www.uscourts.gov/file/2130/> [hereinafter SEPT. 1999 REPORT OF THE PROCEEDINGS]. The statute authorized the Conference to regulate compensation. See 28 U.S.C. § 658 (2012). The “non-mandatory principles” included making known rates and limits of compensation and requiring fee disclosures. Thanks to Donna Stienstra for pointing us to these sources. See also Jason Bertoldi, *Compensating ADR Neutrals in the Federal Courts* (Feb. 10, 2015) (unpublished manuscript) (on file with author).

¹⁰¹ SEPT. 1999 REPORT OF THE PROCEEDINGS, *supra* note 100, at 53–54.

¹⁰² E.D. PA. LOCAL R. CIV. P. 53.2(2) (calling for compensation of \$150 per hour for single arbitrators). In the Eastern District of New York, local rules provide compensation, to “be paid by or pursuant to the order of the Court subject to the limits set by the Judicial Conference” of “\$250 for services in each case,” unless protracted, and if three arbitrators are used, the compensation is “\$100 for service” for each. E.D.N.Y. LOCAL CIV. R. 83.7(b); see also D.N.J. LOCAL CIV. R. 201.1(c) (calling for compensation of “\$250 for service in each case” unless the proceeding is protracted); M.D. GA. LOCAL R. 16.2.2(C) (providing that “arbitrators shall be compensated for their services in such amounts and in such manner as the Chief Judge shall specify from time to time by standing order”); N.D. CAL. ADR LOCAL R. 4-3(b) (calling for compensation of \$250 per day for single arbitrators and \$150 per day for each member of a panel of three).

read to govern the alternatives to adjudication that judges promote and superintend.

VI. FINDING THE PUBLIC IN COURT-BASED ADR

Debate exists about how much ADR is used in courts, as well as what metrics to use to assess its impact. Yet, on two measures—the volume of rulemaking and the privatization of court-based interactions—the results are unambiguous: courts have promulgated hundreds of rules governing various forms of ADR, and those rules do not protect rights of the public to observe the processes or to know much about the results.

Locating rules addressing court-based ADR required reviews of statutes, national and local rules, doctrine, manuals, overviews, ad hoc databases, and interviews with court staff.¹⁰³ Despite a good deal of overlap, in part shaped by model rules,¹⁰⁴ specifying the current state of public access to court-based ADR is difficult because rules regulating ADR generally do not take that issue as a category of analysis. To the extent that third parties are referenced, the context is usually an admonition that confidentiality is required of participants in ADR processes.

Given my discussion of the evolution of Federal Rule 16 governing “pretrial” procedures in the federal courts, a first example comes from that Rule. Court-convened conferences with judges could be on the record in open court, just as in criminal proceedings, “pleas, sentencing, case conferences, and adjournments” are generally held in courtrooms.¹⁰⁵ But the federal civil rules

¹⁰³ Once again, acknowledgement of tireless work by the students cited above is in order, as they combed a host of sources and called many courts in the quest for this information.

¹⁰⁴ See, e.g., NINTH CIRCUIT STANDING COMM. ON ALT. DISPUTE RESOLUTION, ADR GUIDEBOOK (2003); STIENSTRA, *supra* note 97, app. 2 (Court Admin. & Case Mgmt. Comm. of the Judicial Conference of the U.S., Attributes of a Well-Functioning Court ADR Program and Ethical Principles for ADR Neutrals (1997)); UNIF. ARBITRATION ACT (2000), available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf; UNIF. MEDIATION ACT (2003), available at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf; see also *Alternative Dispute Resolution in Civil Actions*, LEXISNEXIS, May 2013, <http://advance.lexis.com> (search for “Alternative Dispute Resolution in Civil Actions”; then filter to “Secondary Materials”; then view entry titled “Alternative Dispute Resolution in Civil Actions (May 2013)”).

¹⁰⁵ Simonson, *supra* note 56, at 2175; see also *Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984); *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986); *El Vocero de Puerto Rico (Caribbean Int’l News Corp.) v. Puerto Rico*, 508 U.S. 147 (1993). Simonson argued that the U.S. Constitution obliges judiciaries to keep all non-trial criminal adjudication open and that, given the decline of jury trials, this right is sometimes under-enforced. Simonson, *supra* note 56, at 2177–79; 2206–21. Her examples included the routine closing of arraignments and misdemeanor courtrooms in certain localities and ad hoc exclusions, sometimes based on limited space for observers. *Id.* at 2191–93. Further, she argued that an “audience of locals” was particularly important in that defendants are disproportionately from minority communities, under-represented in the professional participants in courtrooms. *Id.* at 2202–05.

do not specify that pretrial meetings be open to the public or on the record.¹⁰⁶ Indeed, the literature on mediation and settlement generally identifies private exchanges as central to facilitated agreements; privacy is seen as useful to induce uninhibited discussions, freed from concerns that concessions proposed or explored will later be used as evidence at trial or otherwise.

Yet the rationales supporting privacy when negotiating do not readily apply either to outcomes or to court-annexed arbitration, in which a third party renders a decision based on presentations by the disputants. That process is available in state and in federal courts. In 1988, for example, in the “Judicial Improvements and Access to Justice Act,”¹⁰⁷ Congress selected ten district courts that could mandate court-annexed arbitration for a limited set of cases involving monetary damages under \$100,000; in addition, the statute permitted judges to refer to arbitration cases involving civil rights and constitutional claims—if the parties consented and if the issues were not novel.¹⁰⁸

The 1988 statute regulated the use of arbitration by including provisions governing the appointment of arbitrators, their certification, and their obligations. Arbitrators, described by 1998 as “performing quasi-judicial functions,”¹⁰⁹ were subject to the rules of disqualification that applied to federal judges.¹¹⁰ Congress also specified the possibility of trial *de novo*, with assessment of fees for arbitration if the outcome at trial was less favorable than had been achieved in arbitration.¹¹¹

The 1988 provisions neither addressed the role of the public at such proceedings nor spoke in general about confidentiality but did provide that awards were not to be “made known” to judges assigned to the cases, so as to insulate them if litigation resumed.¹¹² Further, the information adduced during

¹⁰⁶ Conferencing by telephone is mentioned as an option for scheduling conferences. *See* FED. R. CIV. P. 16(b)(1)(B).

¹⁰⁷ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901, 102 Stat. 4642, 4659 (1988) (codified as amended at 28 U.S.C. §§ 651–658 (2012)).

¹⁰⁸ *Id.* Note that the 1998 revision, discussed *infra* notes 114–20 and accompanying text, does not include the limitation precluding cases that include novel issues. In the 1998 Amendment, as well as the original 1988 statute, if the court’s jurisdiction rested on 28 U.S.C. § 1343, which is available for cases filed under 42 U.S.C. § 1983, arbitration is not permitted. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 6, 112 Stat. 2993, 2995 (codified at 28 U.S.C. § 654(a)(3) (2012)).

¹⁰⁹ Alternative Dispute Resolution Act of 1998, § 7, 112 Stat. at 2996 (codified at 28 U.S.C. § 655(c) (2012)).

¹¹⁰ Also provided was authority for courts to compensate them. Judicial Improvements and Access to Justice Act, § 901(a), 102 Stat. at 4662 (codified as amended at 28 U.S.C. §§ 656–657 (2012)).

¹¹¹ In the 1988 provisions, Congress had provided that if a party did less well in the *de novo* trial, fee-shifting was permissible. *See* Judicial Improvements and Access to Justice Act, § 901(a), 102 Stat. at 4661. That provision is not replicated in the 1998 statute.

¹¹² Judicial Improvements and Access to Justice Act, § 901(a), 102 Stat. at 4661 (1988) (codified as amended at 28 U.S.C. § 657(b) (2012) (“Sealing of Arbitration Award”).

arbitration and the awards made were not to be admitted as evidence if a trial took place subsequent to the arbitration.¹¹³

A decade later, the “Alternative Dispute Resolution Act of 1998”¹¹⁴ required that all federal district courts “shall authorize, by local rule . . . , the use of alternative dispute resolution processes in all civil actions,” including the “use of arbitration.”¹¹⁵ Those provisions altered somewhat the category of cases for which arbitration was permissible.¹¹⁶ Further, Congress specified court authority to appoint additional personnel (“neutrals”¹¹⁷ and “arbitrators”¹¹⁸) as staff and called on the Federal Judicial Center (“FJC”) and the Administrative Office of the U.S. Courts to “assist the district courts in the establishment and improvement” of programs.¹¹⁹

Congress also required district courts to protect the “confidentiality of alternative dispute resolution processes” through prohibitions on “disclosure of confidential dispute resolution communications.”¹²⁰ The statute could be read to suggest, but does not speak directly to, the question of whether arbitration proceedings themselves constituted “confidential dispute resolution communications,” and little reported case law addresses the issue.¹²¹

¹¹³ *Id.* § 901(a), 102 Stat. at 4660 (codified as amended at 28 U.S.C. § 657(c)(3) (2012) (“Limitation on Admission of Evidence”). This constraint adds arbitration proceedings to the limits imposed by federal evidentiary rules which have, since 1975, precluded admission of information obtained in a mediation or settlement conference. *See* FED. R. EVID. 408.

¹¹⁴ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (2012)).

¹¹⁵ 28 U.S.C. § 651(b) (2012). The statute explained that its provisions were not to affect existing programs under the 1988 statute. *See id.* § 654(d). This provision means that districts that had the authority, under the 1988 act, to mandate arbitration for eligible cases, could continue to do so.

¹¹⁶ *See id.* § 654(a) (authorizing referrals of “any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except . . . [actions] based on an alleged violation of a right secured by the Constitution of the United States [or when] jurisdiction is based in whole or in part on section 1343 of this title,” or when the relief sought in monetary damages exceeds \$150,000).

¹¹⁷ *Id.* § 653.

¹¹⁸ *Id.* § 655.

¹¹⁹ *Id.* § 651(f).

¹²⁰ *Id.* § 652(d) (“Confidentiality Provisions”). Congress called on districts to adopt local rules implementing confidentiality and in the interim provided this provision. *See infra* notes 128–30 for discussion of some federal court local rules on arbitration and on confidentiality more generally.

¹²¹ One 2007 lower court decision referenced the statute as if it was a congressional mandate that court-annexed arbitrations be confidential. In *Stepp v. NCR Corp.*, 494 F. Supp. 2d 826, 836–37 (S.D. Ohio 2007), an employee who had lost a job and alleged age discrimination, and the employer sought confidential compulsory arbitration outside of the courts. The district court rejected the claim that closure failed to vindicate his statutory rights by citing not only the case law on the Federal Arbitration Act but also 28 U.S.C. § 652(d) (1948), which the court read as providing “confidentiality in court mandated arbitration.” *Id.* at 837 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991)).

Forays into rules promulgated at the district court level were therefore in order. As noted, Congress in 1988 permitted ten districts to create mandatory court-annexed arbitration programs.¹²² Thus, one way to learn about whether rules carved out places for the public in ADR was to review the 2014 local rules in the ten district courts that have had statutory authority to provide court-annexed arbitration for about twenty-five years.

Having such authority does not necessarily translate into using it. As of the spring of 2015, four of the original ten district courts licensed to mandate court-annexed arbitration had rules providing for it, and three districts continued their mandatory arbitration programs.¹²³ Another of the original ten districts—the Western District of Michigan—had repealed its obligations to arbitrate, and explained its decision with the comment that the “Court’s experience with alternative means of dispute resolution in this district shows that attorneys and clients rarely resort to court-annexed arbitration, as they prefer other methods of dispute resolution, especially voluntary facilitative mediation.”¹²⁴ Four of the remaining five districts had no rules directing mandatory court-annexed arbitration,¹²⁵ and in the one that did, staff indicated in interviews that no arbitrations had been held in the last two years.¹²⁶

¹²² As noted, in its 1998 amendments, Congress specified that the revisions did not “affect any program in which arbitration is conducted pursuant to [the 1988 statute].” 28 U.S.C. § 654(d)(2012).

¹²³ See D.N.J. LOCAL CIV. R. 201.1(d)(1) (“Subject to the exceptions set forth in [the local rules], the Clerk shall designate and process for compulsory arbitration any civil action pending before the Court where the relief sought consists only of money damages not in excess of \$150,000 exclusive of interest and costs and any claim for punitive damages.”); E.D.N.Y. LOCAL CIV. R. 83.7(d)(1) (requiring that the Clerk of the Court “designate and process for compulsory arbitration all civil cases . . . wherein money damages only are being sought in an amount not in excess of \$150,000.00 exclusive of interest and costs.”); E.D. PA. LOCAL R. CIV. P. 53.2(3)(a) (explaining that the Clerk shall “designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy, excluding, however, (1) social security cases, (2) cases in which a prisoner is a party, (3) cases alleging a violation of a right secured by the U.S. Constitution, and (4) actions in which jurisdiction is based in whole or in part on 28 U.S.C. §1343) wherein money damages only are being sought in an amount not in excess of \$150,000.00 exclusive of interest and costs”). The fourth district, the Northern District of California, continued to have a rule related to arbitration but had not used that provision for some time. See N.D. CAL. ADR LOCAL R. 3-2 (“Litigants in certain cases designated when the complaint or notice of removal is filed are presumptively required to participate in one non-binding ADR process offered by the Court (Arbitration, Early Neutral Evaluation, or Mediation) or, with the assigned Judge’s permission, may substitute an ADR process offered by a private provider.”); Telephone Interview with Donna Stienstra, Senior Researcher, Fed. Judicial Ctr. (June, 2015).

¹²⁴ See Paul L. Maloney, Chief Judge, W.D. Mich., Administrative Order Re: Proposed Amendments to Local Civil Rule 16 to Eliminate Court-Annexed Arbitration, Admin. Order No. 12-028 (March 8, 2012) (“After consulting with this Court’s Standing . . . Advisory Committee, the Court has concluded that court-annexed arbitration should no longer be offered as a method of alternative dispute resolution in this district.”).

¹²⁵ See M.D. FLA. LOCAL R. 8.02(a) (“Any civil action may be referred to arbitration in accordance with this rule if the parties consent in writing to arbitration [with exceptions].”);

In addition to focusing on how the ten, 1988-authorized districts were dealing with court-annexed arbitration, these courts also offer a window into rules about the public's role in other kinds of ADR. In general, the rules of these districts protect confidentiality. To the extent the public comes into view, it is as an entity to be avoided. The texts varied: some spoke about the confidentiality of ADR per se, and others directly mentioned specific kinds of ADR. Three districts provided that any alternative dispute resolution proceeding be confidential, but did not specify which forms of ADR were encompassed within the rule.¹²⁷ Four districts required that mediation and/or

W.D.N.C. L.Cv.R. 16.3(B)(1) ("If a mediated settlement conference is ordered, the conduct of the ADR proceeding shall be governed by the *Rules Governing Mediated Settlement Conferences in Superior Court Civil Actions* promulgated by the North Carolina Supreme Court pursuant to N. C. Gen. Stat. 7A-38 (the 'Mediation Rules'), and by the supplemental rules set forth herein." The statute these rules incorporate indicates that "[t]he senior resident superior court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by the local superior court rules, in lieu of attending a mediated settlement conference. . . . Nothing in this section shall prohibit the parties from participating in, or the court from ordering, other dispute resolution procedures, including arbitration to the extent authorized under State or federal law." N.C. GEN. STAT. § 7A-38.1(i)); W.D. OKLA. L.Cv.R. 16.1(c) ("The court authorizes Alternative Dispute Resolution methods, including mediation, judicial settlement conferences, and summary jury trials."); W.D. TEX. LOCAL R. CV-88(c) ("The court may refer a case to ADR on the motion of a party, on the agreement of the parties, or on its own motion; however, the court may refer a case to arbitration only with the consent of the parties (including but not limited to their consent by contract to arbitration)."); General Order, Western District of Missouri Mediation and Assessment Program § II.B. (2012), available at http://www.mow.uscourts.gov/district/map/MAPGeneralOrder_2013-08-01.pdf [hereinafter MAP General Order, W.D. Mo.] ("If the parties are unable to agree, the Director in his or her discretion, after consultation with one or all the parties, may select some other form of ADR.").

¹²⁶ Telephone Interview with Jill Morris, Mediation and Assessment Program Dir., W. Dist. Mo. (June 2015).

¹²⁷ The Western District of Michigan's rule "Confidentiality" provides: "All ADR proceedings are considered to be compromise negotiations within the meaning of Fed. R. Evid. 408." W.D. MICH. L.CIV.R. 16.2(d). The rules define ADR proceedings to include Voluntary Facilitative Mediation (L.CIV.R. 16.3); Early Neutral Evaluation (L.CIV.R. 16.4); Case Evaluation (L.CIV.R. 16.5); Summary Jury Trials, Summary Bench Trials (L.CIV.R. 16.7); and Settlement Conferences (L.CIV.R. 16.8). In addition, the rule references "other ADR methods proposed by the parties." W.D. MICH. L.CIV.R. 16.2(a).

In the Western District of Missouri's "General Order, Western District of Missouri Mediation and Assessment Program," Part VIII addresses the confidentiality of ADR proceedings, and authorizes the mediator to "ask the parties and all persons attending the mediation to sign a confidentiality agreement." MAP General Order, W.D. Mo., *supra* note 125, § VIII.E ("Confidentiality Agreement"). Further, that rule provides:

1. This Court shall treat as confidential all written and oral communications, not under oath, made in connection with or during any Program session except as otherwise noted in this Section.
2. Any communication not under oath made in connection with any proceeding in this Program shall not be disclosed to anybody unrelated to the Program by the parties, their counsel, Mediators or any other participant in the Program and shall not be used for any purpose in any pending or future proceeding in this Court except by consent of the parties or as allowed under the Federal Rules of Evidence or this Section. Communications made in connection with any proceeding in this Program include the comments, assessments, evaluations or

early neutral evaluation be confidential but did not address court-annexed arbitration.¹²⁸ Three districts had different rules for mediation and for arbitration and imposed mandates of confidentiality on mediation; in contrast, the arbitration rules focused on the inadmissibility of information at trial¹²⁹—

recommendations of the Mediator. Mediators shall not discuss any matter communicated to them during any Program proceeding except with the permission of the parties

Id. § VIII.A. The rule also explains that discussions can take place between the program directors and others, including judges and evaluators. *Id.* § VIII.B. Further, “[a]ny information furnished under oath, whether by affidavit, testimony or otherwise, may be used for impeachment purposes in this Court or elsewhere. Nothing in this Order is intended to provide any protection from the criminal consequences of making a false statement under oath.” *Id.* § VIII.C.

The Western District of Texas provides that ADR proceedings shall be confidential, but does not specify whether its rule applies to arbitration and mediation but states that the “court may approve any ADR method the parties suggest or the court believes is suited to the litigation.” See W.D. TEX. LOCAL R. CV-88(a). Rule CV-88(h) on “Confidentiality” provides that “[e]xcept as otherwise provided herein, or as agreed by the participants, a communication relating to the subject matter of any civil or criminal dispute made by any participant during an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, may not be disclosed, may not be used as evidence against the participant in any judicial or administrative proceeding, and does not constitute a waiver of any existing privileges or immunities.” *Id.* R. CV-88(h). Further, the rule provides that any “record made at an alternative dispute resolution procedure is confidential.” *Id.* R. CV-88(h)(1). However, “[a]n oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.” *Id.* R. CV-88(h)(2). Moreover, “[i]f this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.” *Id.* R. CV-88(h)(3).

¹²⁸ See N.D. CAL. ADR LOCAL R. 5-12 (“Early Neutral Evaluation: Confidentiality”) (also permitting parties to stipulate to disclosures); *Id.* R. 6-12 (“Mediation: Confidentiality”) (again permitting stipulated disclosures by the parties; and also permitting mediators to “ask the parties and all persons attending the mediation to sign a confidentiality agreement on a form provided by the court” and in commentary noting that law sometimes permits disclosures, for example to protect against crimes or bodily harms); M.D. FLA. LOCAL R. 9.07(b) (“Restrictions on the Use of Information Derived During the Mediation Conference”) (“All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the conference, unless a settlement is reached.”); M.D.N.C. LOCAL R. 83.9e (“Procedures for Mediated Settlement Conferences”); W.D. OKLA. L.CV.R. 16.2(f) (providing for the confidentiality of judicial settlement conferences); *id.* R. 16.3(f) (providing for the confidentiality of court-ordered mediation).

¹²⁹ In the District of New Jersey, Appendix Q (“Guidelines for Mediation”) provides that: “Neither the parties nor the mediator may disclose any information presented during the mediation process without consent. The only exception to this rule of confidentiality is when disclosure may be necessary to advise the compliance judge of an apparent failure to participate in the mediation process.” D.N.J. LOCAL R. app. Q § II.B. In addition, the Appendix explains that “appropriate sanctions may be imposed on any party or attorney who

sometimes by referencing federal evidentiary rules that preclude admission of information related to settlement at trial and then specifying that information developed through court-annexed arbitration was likewise not to be admitted.¹³⁰

fails to participate in a meaningful manner or to cooperate with the mediator or who breaches confidentiality.” *Id.* § III. In contrast, Appendix M (“Guidelines for Arbitration”) does not provide that arbitration shall be confidential. It does explain, however, that evidence produced during an arbitration proceeding may only be used in limited circumstances in a *de novo* trial: “[N]either the fact that the case was arbitrated nor the amount of the arbitrator’s award is admissible. However, testimony given upon the record of the arbitration hearing may be used to impeach the credibility of a witness at any subsequent trial *de novo*. In light of the limitation placed by the Court upon the use of exhibits at subsequent Court proceedings, the arbitrator should return all exhibits to counsel at the conclusion of the arbitration hearing.” D.N.J. LOCAL CIV. R. app. M § III.

The rules for the Eastern District of New York address mediation as confidential and permit mediators to ask for confidentiality agreements absent a different agreement; court-annexed arbitration is not discussed in terms of confidentiality but the evidence adduced is not admissible at a *de novo* trial. *See* E.D.N.Y. LOCAL CIV. R. 83.8 (“Court-Annexed Mediation”); *id.* R. 83.7 (“Court-Annexed Arbitration”). Moreover, the E.D.N.Y. rules provide for parties to record the proceeding. *See id.* R. 83.7(f)(6) (“A party may have a recording and transcript made of the arbitration hearing . . .”). The rule does provide that, should there be a trial *de novo*, “the Court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding.” *Id.* 83.7(h)(3).

The Eastern District of Pennsylvania local civil rule 53.3(3) provides that “[a]ll ADR processes subject to this Rule shall be confidential, and disclosure by any person of confidential dispute resolution communications is prohibited unless confidentiality has been waived by all participants in the ADR process, or disclosure is ordered by the assigned judge for good cause shown.” E.D. PA. LOCAL R. CIV. P. 53.3(3). However, Rule 53.3(7) provides that “[n]othing in the Rule shall be construed to amend or modify the provisions of Local Civil Rule 53.2 (compulsory and voluntary arbitration with right of trial *de novo*).” *Id.* R. 53.3(7). Rule 53.2, which governs arbitration, does not discuss confidentiality. *Id.* R. 53.2.

¹³⁰ Federal Rule of Evidence 408 (“Compromise Offers and Negotiations”) reflected a common law protection of negotiations, predicated on the ideas of the irrelevancy of discussion to findings of liability and of the desirability of encouraging negotiations. FED. R. EVID. 408. Protected are the conduct and statements made during compromise negotiations. Amendments in 2008 specify a somewhat different approach for criminal cases. *See Id.* R. 408(a)(2) (indicating that “conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority”). Moreover, the rule provides that evidence can come in for “another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” *Id.* R. 408(b). Whether in practice Rule 408 suffices and whether it should be more or less protective are questions.

Three courts’ local rules incorporate the Federal Rules of Evidence when discussing arbitration proceedings. *See* N.D. CAL. ADR LOCAL R. 4-12(b) (“Limitation on Admission of Evidence. At the trial *de novo* the Court shall not admit any evidence indicating that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless: (1) The evidence would otherwise be admissible in the trial under the Federal Rules of Evidence, or (2) The parties have otherwise stipulated.”); W.D. MICH. L.CIV.R. 16.2(d) (“Confidentiality - All ADR proceedings are considered to be compromise negotiations within the meaning of Fed. R. Evid. 408.”); E.D. PA. LOCAL R. CIV. P. 53.2(7)(C) (“At the trial *de novo*, the court shall not admit evidence that there had been an arbitration trial, the nature or amount of the award, or

To expand the analysis, we undertook a broader search of local rules that included districts beyond the initial ten identified in the 1988 statute on court-annexed arbitration. As noted, in 1998 revisions to the 1988 statute, Congress provided an expanded mandate for ADR, altered its requirements somewhat for court-annexed arbitration, and authorized its use in any district complying with the requirements.¹³¹ That review yielded about thirty districts in which, as of 2014, rules could be read to permit court-annexed arbitration.¹³² Inquiries identified eight districts (including the three noted in the discussion of the 1988 legislation, above) that had programs for court-annexed arbitration. Use varied widely, from districts in which hundreds of cases went through its program yearly to those in which no court-annexed arbitrations had been held.¹³³

any other matter concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence.”).

¹³¹ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (2012)). See 28 U.S.C. § 651 for authorization of dispute resolution processes.

¹³² See Kelly, Milione & Porter, Memo, Court-Annexed Arbitration, *supra* note 13, at 2. This list of thirty was culled from tables provided through an FJC review of “local rules, general orders, CJRA plans, internal operating procedures, web sites, and any other written source” on a district’s ADR procedures. See STIENSTRA, *supra* note 97, at 3–4.

The Stienstra review suggested that fifty districts could have some kind of arbitration program. We reduced the number to thirty by eliminating districts that reference arbitration but do not have programs, and conducted telephone interviews to confirm that court-annexed arbitration programs exist. Examples of districts with rules that we did not include in the thirty in which staff were contacted are E.D. CAL. LOCAL R. 271(a)(1) (“It is the Court’s intention [to] allow the participants to take advantage of a wide variety of alternative dispute resolution methods. These methods may include, but are not limited to, mediation, negotiation, early neutral evaluation, and settlement facilitation. The specific method or methods employed will be determined by the Neutral and the parties and may vary from matter to matter.”); S.D. CAL. CIV. R. 16.1(c)(2) (“If no settlement is reached at the [Early Neutral Evaluation] conference, the judicial officer may . . . [d]iscuss the parties’ willingness to agree to non-binding arbitration or mediation within forty-five (45) days (1) in any case where the judicial officer believes arbitration or mediation might result in a cost-effective resolution of the lawsuit, or (2) in any case where the parties have indicated an interest in arbitration or mediation.”); D. COLO. L.CIV.R. 16.6(a) (“A district judge or a magistrate judge exercising consent jurisdiction may direct the parties to engage in an early neutral evaluation or other alternative dispute resolution proceeding.”); D.S.D. LOCAL R. 53.1 (“Alternative Dispute Resolution: Parties are encouraged to use alternative dispute resolution procedures to try to settle their cases without a trial. Magistrate judges are available as mediators to facilitate alternative dispute resolution procedures.”); N.D. GA. CIV. LOCAL R. 16.7(B)(1) (“A judge may in his or her discretion refer any civil case to a non-binding ADR process, e.g. early neutral evaluation, mediation, or non-binding arbitration. Upon the consent of the parties, the judge may refer any civil case to binding arbitration, binding summary jury trial or bench trial, or other binding ADR process.” However, the rules also state that “[t]his program has not been funded by Congress and will not be implemented until funded.” R. 16.7(B)(2)).

¹³³ Interviews conducted in April of 2014 provide some insight into frequency of court-annexed arbitrations. The District of New Jersey, Eastern District of New York, and the Eastern District of Pennsylvania reported robust court-annexed arbitration programs: staff described such arbitrations as “not unusual” in the District of New Jersey, and noted that

Honing in on this set of eight, we sought to understand whether the public was permitted to attend court-annexed arbitrations or whether the general reference in the 1998 act to the confidentiality of ADR processes, coupled with other sources, has been read to preclude observers, including when arbitration hearings were held in courtrooms. A mix of reading rules and discussions with court staff yielded the conclusion that, as of 2014, court-annexed arbitrations were or would be private (if held) in five federal district courts,¹³⁴ and open to the public in three,¹³⁵ including in two districts reporting hundreds of court-annexed arbitrations yearly.¹³⁶

they took place about 180 times a year in the Eastern District of New York, and 784 times in 2013 in the Eastern District of Pennsylvania.

In contrast, staff in one district—the Western District of Missouri—described such proceedings as “rare” or “very rare,” or that none had taken place in the past year. In the District of Delaware, staff estimated similarly low frequency—5 or 6 times in the past 20 years; staff in the District of Idaho reported about 5 court-annexed arbitrations in the past 10 years. In the District of Connecticut, the program had operated from 1978 until about 1982, D. CONN. LOCAL R. 28 (not in use) (on file with author), and no court-annexed arbitrations had taken place for more than twenty years. Interview with Janet Hall, Chief Judge, D. Conn. (June 2015); Kelly, Milione & Porter, Memo, Court-Annexed Arbitration, *supra* note 13, at 5–6.

¹³⁴ Two districts’ local rules—in the Western District of Missouri and the Western District of Pennsylvania—specified that sessions were private. *See* MAP General Order, W.D. Mo., *supra* note 125, § VIII.A (“This Court shall treat as confidential all written and oral communications, not under oath, made in connection with or during any Program session except as otherwise noted in this Section.”); W.D. PA., ADR POLICIES & PROCEDURES § 6(A) (“Except as provided in subsection D of this Section 6, this Court, the ADR Coordinator, all neutrals, all counsel, all parties and any other person who participates (in person or by telephone) in (i) any ADR process described in Sections 1 through 5 of these Policies and Procedures, or (ii) any private ADR process pursuant to Court order, shall treat as ‘confidential information’ (i) the contents of all documents created for or by the neutral, (ii) all communications and conduct during the ADR process, and (iii) all ‘communications in connection with’ the ADR process.”).

In three other districts—the Middle District of Georgia, District of Idaho, and Eastern District of New York—clerks informed students working on this project that sessions were private. *See* Telephone Interview by Mark Kelley with Holly McCarra, Arbitration Clerk, Middle Dist. of Ga. (Apr. 2014); Telephone Interview by Devon Porter with Susie Headlee, ADR/Pro Bono Coordinator, Dist. of Idaho (Apr. 14, 2014); Telephone Interview by Devon Porter with Rita Credle, Arbitration Clerk, E. Dist. of N.Y. (Apr. 24, 2014). As noted, the Northern District of California has not held arbitrations but staff commented that, were they to be held, they would be private. Interview by Chris Milione with Tim Smagacz, ADR Program Adm’r, N. Dist. of Cal. (Apr. 23, 2014).

¹³⁵ *See* Telephone Interview by Chris Milione with Mary Pat Thyng, Chief Magistrate Judge, Dist. of Del. (Apr. 17, 2014); Telephone Interview by Chris Milione with Jim Quinlan, Arbitration Clerk, Dist. of N.J. (Apr. 9, 2014); Telephone Interview by Chris Milione with Michael E. Kunz, Clerk of the Court, E. Dist. of Pa. (Apr. 11, 2014). The Clerk of the Court of the Eastern District also explained that requiring arbitration proceedings to take place in a courtroom, open to the public, was meant in part to lend dignity to the proceedings. *Id.*

¹³⁶ *See* STIENSTRA, *supra* note 97, at 15 tbl.7. Stienestra reported that 2,799 cases had been referred to arbitration in her review of forty-nine federal district courts in a year period ending June 30, 2011; the District of New Jersey recorded 1,668 court-annexed arbitrations and the Eastern District of Pennsylvania listed 826 court-annexed arbitrations. *Id.* at app. 5.

The decision about where to hold an arbitration may be influenced by the economics of programs for court-annexed arbitration. Unlike judges, resident in courthouses, court-annexed arbitrators are often practicing lawyers, who may be paid between \$150 to \$250 per arbitration. Convening the proceeding in that lawyer's office can be time-saving for that arbitrator, even as it makes public access to the proceeding functionally implausible.

In addition to looking at rules in particular jurisdictions, other routes into learning about whether the public has a place in ADR was through research on ADR and on model rules for ADR. In 2011, the Federal Judicial Center published an overview to provide an "initial report" on district court practices.¹³⁷ That monograph detailed what kinds of programs federal district courts offered as ADR, how references to ADR were made, the neutrals deployed, and the funding for such proceedings. The report did not include discussion of where ADR procedures took place or of who could attend.¹³⁸

Another overview comes from an entity called Resolution Systems Institute ("RSI"), supported in part by the private ADR-provider JAMS (once the acronym for that group's name—Judicial Arbitration and Mediation Services). RSI has created a database to provide a guide on state and federal rules and search tools for court-based ADR.¹³⁹ Like the FJC's 2011 overview, the RSI materials do not use "the public" or "access to ADR proceedings" as discrete topics of analysis. To locate rules addressing the participants in ADR, we searched the database using terms such as "attendance" and

¹³⁷ STIENSTRA, *supra* note 97, at 4–15, app. 5. As noted, we used this monograph to identify the thirty jurisdictions that might provide court-annexed arbitration. *See supra* note 132.

¹³⁸ STIENSTRA, *supra* note 97, at 4–15, app. 5.

¹³⁹ *See Court ADR Across the U.S.*, RESOL. SYS. INST. (2015), <http://courtadr.org/court-adr-across-the-us/search.php>, archived at <http://perma.cc/MA84-ZYYM> (last visited May 27, 2015). This guide offers a searchable database for both state and federal ADR resources, with separate inputs for Resource Type (such as "Academic Program," "Advisory Opinion," "Article," and "Audiotape"), Case Type (such as "Administrative," "Adult Guardianship," "Aging - Elderly," and "Agriculture"), Process Type (such as "Arbitration," "Case Evaluation," "Case Management," and "Collaborative Law"), and Topics Covered (such as "Access to Justice," "ADR Orientation," "Advanced Degree Program," and "Advocacy"), as well as inputs for Scope (State or Federal) and Court Type (Trial, Appellate, Supreme) and a scroll-box for State. The database itself does not provide a list of which federal court rules are included. By scrolling down on the search page and searching for "Federal" scope while leaving all other categories unmarked, the database referenced eighty-nine federal districts. Included were the districts in all of the states (except the Western District of Oklahoma) and the D.C. district court; excluded were rules for Guam, Virgin Islands, Puerto Rico, and Northern Mariana Islands. *See id.* Through discussions with RSI staff, we learned that its focus was on the states and hence federal district courts in states. The staff at RSI assembles the materials and then culls rules to limit its database to rules directly related to court ADR. Interview by Benjamin Woodring with Mary Novak, Dir., RSI Res. Ctr., (Sept. 17, 2014).

The page on RSI's history indicates it has received some support from the JAMS Foundation. *History 2011–2012*, RESOL. SYS. INST., <http://www.aboutrsi.org/history.php?ID=13> (last visited May 27, 2015).

“confidentiality,”¹⁴⁰ and found many state rules about maintaining confidentiality, often referencing mediation.¹⁴¹ In addition, some rules required

¹⁴⁰ For example, by searching Resource Type: “Rules - Court”; unmarked Case Type; Process Type: “Arbitration”; and Topics Covered: “Attendance”, we found forty-six mentions of attendance, of which twenty-six were from state courts (at the county or state level) and twenty were from federal courts.

Reviewing the rules on arbitration for state courts, two of these states expressly limit non-party attendance at ADR. *See* N.D. R. CT. 8.8(d) (“The ADR processes are confidential and not open to the public.”); S.C. ADR R. 5(d) (“ADR conferences are private. Other persons may attend only with the permission of the parties, their attorneys and the mediator.”).

Two provide confidentiality requirements generally for ADR. *See* ME. R. CIV. PROC. 16B(k) (“A neutral who conducts an alternative dispute resolution conference pursuant to this rule, or an alternative dispute resolution process pursuant to subsection (b)(6), shall not, without the informed written consent of the parties, disclose the outcome or disclose any conduct, statements, or other information acquired at or in connection with the ADR conference.”); MO. 11TH CIR. CT. R. 38.6 (“The proceedings [ADR] shall be private, confidential, and regarded as settlement negotiations as provided in Supreme Court Rules 17.05 and 17.06. No stenographic, electronic or other record of an A.D.R. process shall be made.”).

One state provides a confidentiality provision explicitly for arbitration. *See* GA. SUP. CT. ADR R. VII.A (“Unless a court’s ADR rules provide otherwise, the confidentiality herein applies to non-binding arbitration conferences as well. A written and executed agreement or memorandum of agreement resulting from a court-annexed or court-referred ADR process is not subject to the confidentiality described above.”).

Three jurisdictions focus on the inadmissibility, in subsequent proceedings, of certain information gained from arbitration. *See* CAL. STANISLAUS CNTY. SUPER. CT. R. 3.06 (citing CAL. EVID. CODE § 703.5, which states, “no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding”); N.D. R. CT. 8.8(d) (“When persons agree to conduct and participate in ADR processes for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the ADR processes is inadmissible as evidence and disclosure of confidential ADR communications is prohibited, except as authorized by the court and agreed to by the parties or as permitted under N.D.C.C. §§ 31-04-11 and 14-09.1-06.”); HAW. CIRCUIT CT. R. 12.2(f) (“Unless the parties otherwise agree in writing or it is otherwise authorized and approved by the adjudicating court pursuant to the Uniform Mediation Act or other law, the neutral, counsel, the parties, and other participants in any mediation [or arbitration, by implication of Rule 12.2(a)], shall not communicate with the civil court adjudicating the merits of the mediated matter (including the settlement or trial judge) about the substance of any position, offer, or other matter related to mediation, nor shall a court request or order disclosure of such information unless such disclosure is required to enforce a settlement agreement, adjudicate a dispute over mediator fees, or provide evidence in any attorney disciplinary proceeding, and then only to the extent required to accomplish such purpose. However, the neutral may disclose to a court whether the ADR process is concluded or terminated; who attended; and, if applicable, whether a settlement or resolution was reached with regard to some or all issues presented.”).

Two jurisdictions require complaints against arbitrators to remain confidential until the complaint has been resolved. *See* CAL. S.F. CNTY. SUPER. CT. R. 4.1(E)(2)(e) (“All complaint procedures and complaint proceedings shall be kept confidential. No information or records regarding the receipt, investigation, or resolution of a complaint may be open to the public or disclosed outside the course of the complaint proceeding except as provided in Rule 4.1E.2.(d)(5) above [“After the decision on a complaint, the Presiding Judge or his/her

that grievances filed against arbitrators be confidential, at least until decisions were made about them.¹⁴²

designee may authorize public disclosure of the name of the ADR panel member against whom action has been taken, the action taken, and the general basis on which the action was taken.”] or as otherwise required by law.”); CAL. STANISLAUS CNTY. SUPER. CT. R. 3.14(I) (“Except as provided in paragraphs (C) [memorandum record of frivolous complaint] and (G) [complainant to be notified about receipt and disposition of complaint], all papers filed and proceedings conducted on a complaint against a mediator, arbitrator or neutral evaluator should be confidential until disciplinary action is ordered by the court.”).

Two jurisdictions have other specifications. *See* CAL. CONTRA COSTA CNTY. SUPER. CT. R. 3.202(e) (allowing parties to select non-essential attendees, stating: “As long as all trial attorneys, parties, and other people needed to present the case and answer the arbitrator’s questions are included, the parties may choose who will attend arbitration”); D.C. SUPER. CT. R. CIV. ARB. IV(b) (requiring that the selection procedure for arbitrators remain open to the public, stating: “The parties may agree among themselves to select a particular arbitrator from a roster of eligible arbitrators provided by the Multi-Door Division. Otherwise, when a Judge assigns a case to arbitration an arbitrator shall be assigned pursuant to procedures designated by the Presiding Judge of the Civil Division. The Multi-Door Division shall make available to the public copies of the current assignment procedures.”).

Many states provide specific confidentiality provisions for mediation or judicial settlement conferences. *See, e.g.*, OHIO CUYAHOGA CNTY. COMMON PLEAS CT. LOCAL R. 21.2(E)(9) (“The entire mediation process is confidential.”); WASH. PIERCE CNTY. SUPER. CT. LOCAL R. 16(c)(2)(C) (“Proceedings of the settlement conferences shall, in all respects, be privileged and not reported or recorded. Without disclosing any communications made at the settlement conference, the settlement conference Judicial Officer may advise the assigned judicial department in writing as to whether the use of further or alternative dispute resolution procedures, or the appointment of additional investigators or the development of additional evidence would be advisable prior to trial.”).

Thirteen state court rules provide confidentiality provisions for mediation or judicial settlements but do not expressly address confidentiality and attendance of non-parties at arbitration. *See* CAL. SAN DIEGO CNTY. SUPER. CT. R. Div. II, Ch. 3; MO. 22D CIR. CT. R. 38.10; N.M. 3D DIST. CT. LOCAL R. 3-704(B)(11); N.Y. WESTCHESTER CNTY. ADR R. 5; N.C. MECKLENBERG CNTY. FAM. ADR R. exhibit D; N.C. DIST. CT. 17B FAM. CT. DIV. SETTLEMENT R. 11.3; N.C. IREDELL CNTY. ADR R. 5(E); N.C. SUP. CT. FAM. SETTLEMENT R. 4(D); N.C. SUPER. CT. MSC R. 4(F); OHIO CUYAHOGA CNTY. COMMON PLEAS CT. R. 21.2; OHIO LUCAS CNTY. COMMON PLEAS CT. R. 6.01(E); OHIO RICHLAND CNTY. COMMON PLEAS CT. R. 2.02; WASH. PIERCE CNTY. SUPER. CT. LOCAL R. 16(c).

¹⁴¹ Many rules, for example, include a definition of “ADR” as including arbitration, mediation, mini-trials, and other procedures, but go on to describe only the specific rules and procedures that apply to mediation.

¹⁴² Examples of provisions making grievances against either mediators or arbitrators confidential (up to a point when sanctions are imposed or other screenings) include N.D. R. CT. 8.9 (g)(6) (“Unless and until sanctions are imposed, all [materials arising out of a] complaint [against mediators] shall be confidential” unless waived); CAL. S.F. CNTY. SUPER. CT. R. 4.1(E)(2)(d)(5), (e) (“All complaint procedures and complaint proceedings shall be kept confidential. No information or records regarding the receipt, investigation, or resolution of a complaint may be open to the public or disclosed outside the course of the complaint proceeding” until after “the decision on a complaint, the Presiding Judge or his/her designee may authorize public disclosure of the name of the ADR panel member against whom action has been taken, the action taken, and the general basis on which the action was taken,” or “as otherwise required by law”); CAL. STANISLAUS CNTY. SUPER. CT. R. 3.14(I) (“[A]ll papers filed and proceedings conducted on a complaint against a mediator, arbitrator or neutral evaluator should be confidential until disciplinary action is ordered by

Another way to look for a public dimension of ADR is through the model acts on ADR promulgated by the Uniform Law Commission (“ULC”), whose impact is reflected in many of the rules described above. In 2000, the ULC replaced its 1955 Uniform Arbitration Act; the 2000 Revised Uniform Arbitration Act has been enacted in seventeen states and the District of Columbia.¹⁴³ The Uniform Mediation Act, completed in 2001 and amended in 2003, has been adopted by eleven states and the District of Columbia.¹⁴⁴

The Prefatory Note for the Mediation Act explains that “a central thrust of the Act is to provide a privilege that assures confidentiality in legal

the court.”); MINN. GEN. R. PRAC. 114 App.: Code of Ethics Enforcement Procedure § IV.A (“Unless and until final sanctions are imposed, all files, records, and proceedings of the Board that relate to or arise out of any complaint shall be confidential [with limited exceptions.]”); S.C. REG. FOR THE COMM. ON ADR V(D)(10)(a) (“Except as otherwise provided in the ADR Rules and these Regulations or ordered by the Supreme Court, all complaints, proceedings, records, information or orders relating to an allegation of misconduct shall be confidential and shall not be disclosed to the public.”); *see also* GA. SUP. CT. ADR R. app. C, ch. 2 § III(A), (C) (providing that a “mere grievance” be kept confidential unless and until a complaint is “forwarded” to an Ethics Committee).

The relevant federal statute provides that individuals “serving as arbitrators” under court-run programs have “the immunities and protections that the law accords to persons serving” that “quasi-judicial” function. *See* 28 U.S.C. § 655(c). Local federal rules reiterate the provisions. *See, e.g.*, E.D.N.Y. LOCAL CIV. R. 83.7(c) (“Immunity of Arbitrators. Arbitrators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.”); *Id.* R. 83.8(g) (applying immunity to mediators); N.D.N.Y. LOCAL R. PRAC. 83.11-5(d)(6). Turning then to judicial discipline, under 28 U.S.C. §§ 351–360, allegations against federal judges for misbehavior are not made public by the courts unless certain sanctions are imposed by the Judicial Conference. 28 U.S.C. § 355(b)(1) (requiring House of Representatives and Clerk of the House of Representatives to “make available to the public the determination and any reasons for the determination” of the judicial council that consideration of impeachment of an Article III judge may be warranted). The provision does not bar (nor might it be able to, under First Amendment doctrine) complainants from making their concerns public.

States have parallel provisions. *See, e.g.*, MONT. CT. R. ARB. FEE DISPUTES 9.2. An example of a provision applying immunity to those staff evaluating the complaint proceedings against a mediator is N.D. R. CT. 8.9(g)(7)(B) (“Board members and staff are immune from suit for any conduct in the course of their official duties [in the ethics enforcement procedure].”).

¹⁴³ The Uniform Arbitration Act has been enacted in Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington, and West Virginia, and in 2015 was introduced in Massachusetts and Pennsylvania. *See Legislative Fact Sheet—Arbitration Act (2000)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)) (last visited June 30, 2015).

¹⁴⁴ The Act has been adopted in the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. *See Legislative Fact Sheet—Mediation Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act> (last visited June 30, 2015).

proceedings.”¹⁴⁵ In contrast, the Uniform Arbitration Act does not include a provision on confidentiality; a comment on judicial enforcement of arbitral awards reminds users that “[b]ecause of the involvement of important legal rights, a court should review more carefully claims of confidentiality, trade secrets, privilege, or other matters protected from disclosure than other assertions that a preaward order of an arbitrator is invalid.”¹⁴⁶

In short, research into the rule structures of the different kinds of ADR demonstrates both the breadth of regulation and the invisibility of the public as a category in need of attention. While a few rules provide for inclusion, more often implicit mention is made of exclusion through obligations of confidentiality. To the extent that the public emerged, the context was generally to insulate mediations and settlement discussions from disclosure. Finding affirmative clear rules on public access to ADR proceedings is difficult.

On the other hand, court-annexed arbitration, as practiced in some of the high-volume jurisdictions, exemplifies the capacity for ADR to include a public dimension. In Illinois, arbitrations are open and often conducted in courthouses or special centers,¹⁴⁷ and the outcomes become part of a court-created database.¹⁴⁸ An example from the federal system comes from the federal

¹⁴⁵ UNIF. MEDIATION ACT prefatory note (2003). The act also notes that state laws regulating the confidentiality of proceedings may have an impact, as it provides for references to transparency requirements, by offering square brackets—as in this quote—to reference the possibility of statutory obligations of open process. *See id.* § 8 (“CONFIDENTIALITY. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.”).

¹⁴⁶ UNIF. ARBITRATION ACT § 18 cmt. 1 (2000), available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf.

¹⁴⁷ *See, e.g.,* ANN B. JORGENSEN & HOLLIS L. WEBSTER, STATE OF ILL., CNTY. OF DUPAGE COURT-ANNEXED MANDATORY ARBITRATION PROGRAM, ARBITRATOR’S BENCH BOOK 13–14 (3d rev. 2011), available at <http://www.dupageco.org/Courts/Docs/34145/>. According to a telephone interview with the 18th circuit arbitration administrator, arbitration hearings are public in all counties in Illinois. Telephone Interview by Chris Milione with Loretta Glenny, Arbitration Admin., Ill. 18th Judicial Dist. (Sept. 29, 2014). The proceedings take place either in courthouses that sometimes have “Mandatory Arbitration Centers” or the proceedings are held in other buildings. ILLINOIS UNIFORM ARBITRATOR REFERENCE MANUAL, *supra* note 95, at 8; *Locations and Contact Information*, CIRCUIT CT. COOK COUNTY, <http://www.cookcountycourt.org/aboutthecourt/OfficeoftheChiefJudge/CourtRelatedServices/MandatoryArbitration/LocationsandContactInformation.aspx>, archived at <http://perma.cc/GL6M-2PXN>. The rules of the Supreme Court of Illinois are not clear on public access. The comment to Illinois’s supreme court rule regarding scheduling arbitration hearings explains that the “use of courthouse facilities provides a desirable quasi-judicial atmosphere” and centralization offers efficiencies as well as monitoring of the progress of cases. *See* ILL. SUP. CT. R. 88 cmt.

¹⁴⁸ Posted reports from 2004 to 2011 can be found on the Illinois courts’ websites. *See Court-Annexed Mandatory Arbitration Annual Reports*, ILL. CTS., <http://www.state.il.us/court/Administrative/ManArb/default.asp>, archived at <http://perma.cc/L984-J7VJ>. Further, as noted *supra* note 95, Illinois’ mandatory arbitration is akin to abbreviated trials. As of 2011, 41,302 cases were referred to arbitration; about three-quarters were settled or dismissed prior to arbitration, and about 600 of those that did arbitrate proceeded from

district court in the Eastern District of Pennsylvania, which also locates its arbitrations in open courtrooms in its courthouse.¹⁴⁹ In addition, rules occasionally mention the possibility of creating a stenographic record of a court-annexed arbitration.¹⁵⁰ Yet even in these instances, local rules do not always make clear that the proceedings are open. More generally, as currently constituted, court-based ADR does little to build publicity into the new processes that it promotes, even as those processes are located in and increasingly equated with what courts “do.”¹⁵¹

VII. VALUING PUBLICITY: CONSTITUTIONAL MANDATES AND REGULATORY OBLIGATIONS

I have mapped the changing content over hundreds of years in the “values and goals” of procedural systems. The idea of expansive rights of access—to bring claims to courts and to watch courts—came to be secured during the past three centuries. Constitutional texts enshrine “open courts” and “public trials” as obligations, and the political ideology of one’s “day in court,” “rights to court,” and right to “open courts” continues to hold sway in popular discourse, awash with media presentations of trials. Yet the practices that anchor the idea

arbitration to trial. *See* SUPREME COURT OF ILLINOIS, COURT-ANNEXED MANDATORY ARBITRATION: ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY FOR STATE FISCAL YEAR 2011, at 5 (2011), *available at* <http://www.state.il.us/court/Administrative/ManArb/2011/ManArbRpt11.pdf>, *archived at* <http://perma.cc/9FDM-BK9H>.

¹⁴⁹ *See* Kelly, Milione & Porter, Memo, Court-Annexed Arbitration, *supra* note 13, at 3. The location of court-annexed arbitration in courtrooms ought not to be equated with public access; as staff explained, in some districts, courtrooms may be used, while the proceedings are nonetheless closed to the public.

¹⁵⁰ *See, e.g.*, N.C. IREDELL CNTY. ADR R. 5(f) (“There shall be no record made of any ADR proceedings under these Rules, unless the parties have agreed to binding arbitration, in which case any party may request that a record be made.”); MONT. CT. R. ARB. FEE DISPUTES 7.9 (providing that either party can, at its own expense, “have the entire proceeding recorded by a court report or by mechanical means,” and if so, that the other party has a right to the transcript if bearing the expense of obtaining one.); ILLINOIS UNIFORM ARBITRATOR REFERENCE MANUAL, *supra* note 95, at 12 (explaining that a court reporter is not provided but parties may arrange for stenographic records at their own expense); *cf.* MO., 11TH CIR. CT. R. 38.6, providing that “[n]o stenographic, electronic, or other record of an A.D.R. process shall be made,” and including arbitration in Rule 38.1(2) as an “A.D.R. program”. In contrast, Utah provides that records of proceedings “shall be destroyed at such time as an award becomes final or upon a demand for a trial de novo.” *See* UTAH R. COURT-ANNEXED ADR 102(g).

¹⁵¹ The process of reaching agreement is, however, distinct from the agreements made; keeping outcomes confidential requires different arguments about one or more of the parties’ interests in nondisclosure—to avoid, for example, others bringing similar claims or people knowing about funds received. Law sometimes intervenes, based on what is often termed the public’s “need to know,” to insist on “sunshine.” For example, the Fair Labor Standards Act provides that settlements not be sealed—animated in part by the view that similarly-situated co-workers would benefit from the information and employers ought not be able to impose silence as the price of a settlement. Some states require that medical malpractice payments over a certain amount be posted on the web. *See* Fla. Stat. Ann. § 456.041(4) (West Supp. 2015) (requiring reporting of payments of malpractice claims that exceed \$100,000).

of courts as “open” are on the wane. While substantial energies have been directed to reformatting court-based procedures, those efforts have generally not inscribed a place for the public.

The question that emerges is the relationship of constitutional open-court obligations to the privatizing modes of government-based, non-trial adjudication, quasi-adjudication, and mediated dispute resolution. Below I provide an account of the law, followed by an analysis of what law could mandate and why. The doctrine puts into sharp relief the stakes of procedural rule changes, revising the experiences of courts in service of particular logics.

The federal law of open courts starts with the Sixth Amendment, which guarantees criminal defendants a “speedy and public trial” before a jury drawn from the “district wherein the crime shall have been committed.”¹⁵² Judges interpret this Sixth Amendment guarantee when addressing the legality of the exclusion of the public in criminal proceedings from the vantage point of the defendant.¹⁵³ (Article III, rarely referenced in open-court law, references that no person can be convicted of treason unless on the “Testimony of two Witnesses . . . or on Confession in open Court.”¹⁵⁴) In addition, in cases brought by the press and the public seeking to attend criminal proceedings, judges discuss public rights of audience based on First Amendment speech, assembly, and petition rights;¹⁵⁵ Seventh Amendment civil jury rights; and common law English and American practices. State constitutions offer additional bases through their textual guarantees of “open courts.”

Although the Supreme Court has not ruled directly on access to civil trials and related proceedings, the Court’s jurisprudence in the criminal context—requiring public access for trials, voir dire, and pre-trial suppression hearings¹⁵⁶—has prompted lower court judges to conclude that civil proceedings are presumptively open. Using a mix of constitutional and common law doctrine, circuit courts have found constitutional access rights to civil trials, to related court-based proceedings, and in some circuits, to most of the documents filed in court.¹⁵⁷

¹⁵² U.S. CONST. amend. VI.

¹⁵³ See, e.g., *Presley v. Georgia*, 558 U.S. 209 (2010).

¹⁵⁴ U.S. CONST. art. III, § 3.

¹⁵⁵ See *Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); discussion *infra* notes 157–77 and accompanying text. The Sixth Amendment right of the defendant is sometimes said to produce a right—or the “freedom” of the public to “listen.” See *Richmond Newspapers*, 448 U.S. at 576.

¹⁵⁶ See *Presley*, 558 U.S. 209; *Waller v. Georgia*, 467 U.S. 39 (1984). Simonson analyzed the uneven application of these rulings in the lower courts. Simonson, *supra* note 56, at 2195–96.

¹⁵⁷ A list of the circuits, as of 2013, which had found access rights to civil trials is provided in *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014). See also *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (citing *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684

The test commonly deployed is that “[a] proceeding qualifies for the First Amendment right of public access”¹⁵⁸ when “there has been a tradition of accessibility” to that proceeding and when “access plays a significant positive role in the functioning of the particular process in question.”¹⁵⁹ Thus, when a closure is challenged, current doctrine charges judges with assessing the history of a given proceeding (experience) and examining the utilities of openness or closure (logic).¹⁶⁰ If a proceeding qualifies as open, the next decision is whether special considerations justify a narrowly tailored closure.

As discussed, the practices of adjudication have been transformed over the last two centuries, and courthouses have expanded accordingly. Early courthouses, such as that in Fulton County, New York, were a single room; today, courtrooms can be less than ten percent of the footprint of a courthouse, and judges do much of their work off the bench—on the phone or in meetings in their chambers.¹⁶¹ Indeed, a recent study found a “steady year-over-year decline in total courtroom hours” from 2008 to 2012 that continued into 2013. Federal judges spent less than two hours a day on average in the courtroom, or about “423 hours of open court proceedings per active district judge” annually.¹⁶² As a consequence, an account of the history of “place and process”¹⁶³ requires acknowledging that the “judgment of experience”¹⁶⁴ is

F.3d 286, 305 (2d Cir. 2011)); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (“We hold that the First Amendment does secure a right of access to civil proceedings.”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (finding a right of access to litigation committee reports in shareholder derivative suits); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm’n*, 710 F.2d 1165, 1177 (6th Cir. 1983) (holding that the First Amendment limits judicial discretion to seal documents in a civil case)). Access to documents—at least those deemed “judicial” documents filed in civil cases as part of lawsuits—has likewise received protection. See *United States v. Erie Cnty.*, 763 F.3d 235 (2d Cir. 2014); *Courthouse News Serv.*, 750 F. 3d 776; *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004).

¹⁵⁸ *Strine*, 733 F.3d at 514.

¹⁵⁹ See *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986). This test was developed from Justice Brennan’s concurring opinion, joined by Justice Marshall, in *Richmond Newspapers*, 448 U.S. at 584–98 (Brennan, J., concurring).

¹⁶⁰ The Third Circuit explained: “Under the experience prong of the experience and logic test, we ‘consider whether ‘the place and process have historically been open to the press and general public,’ because such a ‘tradition of accessibility implies the favorable judgment of experience.’” *Strine*, 733 F.3d at 515 (quoting *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 211 (3d Cir. 2002), which in turn quoted *Press-Enterprise II*, 478 U.S. at 8).

¹⁶¹ D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 462 (2007).

¹⁶² See Singer & Young, *supra* note 74, at 565–67.

¹⁶³ *Press-Enterprise II*, 478 U.S. at 8.

¹⁶⁴ *Id.* A related point is whether the historical record needs to be “unbroken.” See *Petition for Writ of Certiorari* at 18–21, *Strine v. Del. Coal. for Open Gov’t, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 262086, *cert. denied* [hereinafter *Strine* *Petition for Certiorari*].

uncoupling the ready equation of judges and courts with work in open courtrooms.

The evaluation of the logic prong requires deciding whether “access plays a significant positive role in the functioning of the particular process in question.”¹⁶⁵ One answer could be to return to (or to collapse logic into) the “judgment of experience”¹⁶⁶: if those conducting court-annexed arbitration, for example, make the process private, one could rely on that experience as the basis for keeping the procedures closed. The troubling circularity—turning what is into what ought to be—is not the kind of logic that logicians admire, let alone normative theorists looking for criteria by which to decide how to assess new procedures.

Alternatively, the “logic” of public processes could be independent of history—grounded in empirical arguments that public proceedings do, in identified circumstances, produce useful results or in normative views of the contributions of openness. With or without data, deciding whether openness plays a “significant positive role” entails choosing a vantage point—individual litigants, courts, the public, or social welfare more generally—from which to take that measurement, as well as deciding on what counts as a “positive” value.

If the goal is dispositions and if both disputants and commentators argue (or demonstrate) that confidentiality facilitates resolutions, then closure plays a “significant positive role.” If one offers Benthamite claims of public education and of the disciplinary force that observers impose on judges and litigants, then closure has a negative impact. If, as I have argued, public courts provide opportunities to practice the democratic norms of respectful engagement in conflicts about what justness requires, then open courts serve as one of democracy’s sites, not to be closed off.¹⁶⁷ In short, choices abound about which values to adopt; which perspectives to privilege; what empirics to use to shape the cost/benefit analysis and how to weigh the tradeoffs and marginal utilities; and whether to embrace or rebuff utilitarian accounts.

Returning to the case law, judges—occasionally referencing Bentham¹⁶⁸—regularly deploy his concerns, as they posit that openness supports informed discussions of government, fosters perceptions of fairness, checks corruption, enhances performance, facilitates accountability, discourages fraud, and

¹⁶⁵ *Press-Enterprise II*, 478 U.S. at 8.

¹⁶⁶ The Court looked to whether the “particular *type* of government processing had historically been open in our free society.” *PG Publ’g Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir. 2013).

¹⁶⁷ RESNIK & CURTIS, *supra* note 48, at 288–337; Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. art. 1, at 52 (2011).

¹⁶⁸ See, e.g., *In re Oliver*, 333 U.S. 257, 271 (1948); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566, 569–70 (1980). The plurality opinion in *Richmond Newspapers*, cited here, was written by Chief Justice Burger.

permits communities to vent emotions.¹⁶⁹ When doing so, judges use a loose amalgam of empirical claims and normative assessments, often without delineating or specifying the criteria for either.

Discussions of a few cases illustrate the application of the doctrine and the challenges posed by court-based ADR. A 1980s state court ruling offers one example of the judiciary's willingness to reject even long-standing practice in favor of public access to criminal proceedings. At that time, the rule in New York, "almost universally applied," was to close and lock courtroom doors when a judge charged a jury in a criminal case.¹⁷⁰ The proffered rationale was to protect jurors from distraction.¹⁷¹ Yet an intermediate appellate bench ruled that "however hoary and time-honored such a practice may be," it did not pass constitutional muster because of the centrality of public trials in generating confidence in courts.¹⁷²

In October of 2014, another effort at closure—this time of civil proceedings—was rebuffed. The issue was the legality of "forcible cell extractions" of detainees at Guantánamo Bay, who were taken from their cells and placed in restraints to be force-fed. Abu Wa'el Dhiab sought to enjoin the U.S. government from doing so, and the government filed a motion to seal the hearing on the preliminary injunction.¹⁷³ District Judge Gladys Kessler rejected the request. The judge quoted the 1984 ruling in *Press-Enterprise I*, which stated that:

The value of openness lies in the fact that people not actually attending trials [and other proceedings] can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the . . . trial and the appearance of fairness so essential to public confidence in the system.¹⁷⁴

In a related decision about access to videotapes that had been sealed, the district court further explained that limits on access had to be justified by an "overriding interest based on findings that closure is essential to preserve

¹⁶⁹ United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994) (quoting United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986)).

¹⁷⁰ New York v. Venters, 511 N.Y.S. 2d 283 (N.Y. App. Div. 1987).

¹⁷¹ *Id.* at 284.

¹⁷² *Id.* at 283–85.

¹⁷³ Memorandum Opinion to the Order Denying Government's Motion to Close Hearing, Dhiab v. Obama, No. 05-1457(GK), 2014 U.S. Dist. LEXIS 140049 (D.D.C. Oct. 2, 2014). A related request, on the unsealing twenty-eight videotapes, was decided on October 3, 2014 and is discussed *infra* notes 175–177. In November of 2014, the district court denied the petitioner's preliminary injunction motion (as modified as the "Government had taken several positive actions which responded to his complaints"). Memorandum Opinion to the Order Denying Petitioner's Application for Preliminary Injunction, *Dhiab*, docket item no. 366, at *4 (D.D.C. Nov. 7, 2014).

¹⁷⁴ Memorandum Opinion to the Order Denying Government's Motion to Close Hearing, *Dhiab*, 2014 WL 4942239, at *3 (alterations in original).

higher values.”¹⁷⁵ Judge Kessler explained that the law requires the government to specify what information required protection, and why, when it attempted to seal court records relating to Guantánamo Bay litigants.¹⁷⁶ Even in the context of claims for security, the court held that generic sealing was not appropriate, and that, instead, tailored rationales for narrow categories of closure requests were required.¹⁷⁷

The videotape sealing question is illustrative of the issues raised when the closure of court-based adjudication moves across a spectrum from the convention of trials and court-based proceedings to a variety of newly fashioned processes. These variations have prompted judges to reflect on access rights to “trials and related proceedings” in contexts blurring the line between courts and their alternatives.¹⁷⁸ In 2011, for example, the Second Circuit considered the limited access accorded to proceedings conducted by the New York City Transit Authority (“NYCTA”), which had come to function as a low-level, criminal court. When individuals failed to pay fares, jumped turnstiles, or were otherwise misbehaving in the New York City transit system, the NYCTA issued notices of violations, totaling in one year about 125,000.¹⁷⁹ Of that number, some 20,000 citations were contested at in-person hearings in which Transit Authority officers (lawyers appointed by the Authority’s President and paid per-diem) presided.¹⁸⁰

¹⁷⁵ Memorandum Opinion to the Order Granting Intervenors’ Motion to Unseal Videotapes, *Dhiab*, 2014 U.S. Dist. LEXIS 140684, at *8 (D.D.C. Oct. 3, 2014) (citing *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984)).

¹⁷⁶ *Id.* at *9.

¹⁷⁷ *Id.* at *10–11. The district court watched the videos, reviewed the government arguments for sealing, and held that the videos had to be unsealed, with some specific conditions. *Id.* at 18–29.

¹⁷⁸ Limited access to decisions of the Foreign Intelligence Surveillance Court is another arena in which the question of the relationship of openness to courts is contested. *See* 50 U.S.C. § 1803(c) (2012); *N.Y. Times Co. v. U.S. Dep’t of Justice*, 752 F.3d 123 (2d Cir. 2014) (holding that the government must disclose redacted documents concerning the government’s legal analysis of drone strikes, in response to a FOIA request). As of June 2015, seventy opinions of the FISA court had become public, some through leaks. *See NSA Documents: FISA Court Orders/Opinions*, AM. CIV. LIBERTIES UNION, [https://www.aclu.org/nsa-documents-search?f\[0\]=field__nsa_documents_type_of_doc%3A466](https://www.aclu.org/nsa-documents-search?f[0]=field__nsa_documents_type_of_doc%3A466) (last visited June 22, 2015).

Members of Congress along with several commentators have argued that the failure to publish FISA rulings is a source of the diminished confidence in that court. *See, e.g.*, David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT’L SEC. L. & POL’Y 209, 277 (2014); Alan Butler, *Standing Up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENG. L. REV. 55 (2013); Jillian Rayfield, *Senators Push Bill to Declassify FISA Court Rulings*, SALON (June 11, 2013), http://www.salon.com/2013/06/11/senators_push_bill_to_declassify_fisaCourtRulings/. In 2014, Senator Leahy joined several other co-sponsoring senators in seeking to revise the procedures of the FISA Court. *See* S. 2685, 113th Cong. (2014).

¹⁷⁹ *See* *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 290 (2d Cir. 2011).

¹⁸⁰ *Id.*

In order to attend, a prospective observer had, under Transit Authority rules, to obtain permission from respondent-defendants; each respondent had to agree, twice.¹⁸¹ The Transit Authority argued that requiring permission was necessary to protect privacy and to avoid “chilling” individuals from requesting hearings. The plaintiff, the New York Civil Liberties Union, argued that closure prevented the public from obtaining necessary information about police practices; for example, the Civil Liberties Union alleged that investigations into the “demographic characteristics of those stopped and frisked by the New York City Police Department officers on public transit” suggested that “minorities receive[d] a disproportionate number of citations” for violating the rules.¹⁸² The Second Circuit concluded under the “experience and logic” test that a qualified First Amendment right of access existed.¹⁸³ While bracketing the reach of its ruling to other administrative proceedings, the Second Circuit held that the NYCTA’s “‘quasi-judicial’ administrative proceedings” were so like criminal trials that openness was obligatory.¹⁸⁴

New York’s use of the NYCTA as a court aimed to dispose of a high volume of low-level infractions. Closed procedures in the Delaware Chancery Court had a different purpose; the Delaware legislature, worried about maintaining the state’s “preeminence” in corporate dispute resolution, created a special program in 2009 to attract high-end users.¹⁸⁵ The legislature offered what it called an “arbitration” program, run by the Chancery Court’s judges and held in their courthouses; eligibility turned on at least one of the disputants being incorporated in Delaware, one million dollars or more at stake, and the parties’ willingness to pay \$12,000 in filing fees and \$6,000 daily thereafter. Filings were not on the public docketing system, and the public was not permitted to attend. The Chancery judges’ decisions were enforceable as judgments, subject to review by the Delaware Supreme Court, which had not, as of 2013, provided rules about whether any such appeals would be confidential.¹⁸⁶ Thus, unlike the “court-annexed arbitrations” in various state and federal district courts, Delaware authorized courts-as-arbitration.

A group called the “Coalition for Open Government” argued that Delaware’s legislation violated the First Amendment’s right of the public to observe court proceedings; the lawsuit, *Delaware Coalition for Open*

¹⁸¹ *Id.* at 292.

¹⁸² *Id.* at 293.

¹⁸³ *Id.* at 298–303 & n.9 (also noting that six Justices in *Richmond Newspapers* shared these views on civil trial access rights).

¹⁸⁴ *Id.* at 299–303.

¹⁸⁵ H.R. 49, 145th Gen. Assemb. (Del. 2009); *see also* DEL. CODE ANN. tit. 10, § 349 (West Supp. 2015); DEL. CT. CH. R. 96–98.

¹⁸⁶ Del. Coal. for Open Gov’t, Inc. v. Strine, 894 F. Supp. 2d 493, 503 (D. Del. 2012).; *see also* Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349 (2013). He described confidentiality as the “most notable feature” of the Delaware program. *Id.* at 354.

Government, Inc. v. Strine, named Leo E. Strine, Jr., then the Chancellor of the Delaware Court of Chancery, as the lead defendant. After a federal district judge agreed that the program was “essentially a civil trial” that could not be closed,¹⁸⁷ Delaware’s Chancery Court judges appealed and lost again. The Third Circuit concluded that “Delaware’s government-sponsored arbitration” could not constitutionally be held in a courthouse and bar the public.¹⁸⁸

In reaching that conclusion, Judge Dolores Sloviter, writing for the majority, relied on the experience and logic test. Declining to accept at “face value” the state’s designation of its program as an “arbitration,” the opinion excavated the history of both arbitrations and trials.¹⁸⁹ That account ran from English common law trials in 1267 through the American Revolution to the current time, as she documented that civil trials were—and are—public.¹⁹⁰ The question of public access to arbitration before the twentieth century was more complex, as some proceedings were open.¹⁹¹ Closed arbitrations became common after the advent of the 1920 New York arbitration law, the 1925

¹⁸⁷ *Strine*, 894 F. Supp. 2d at 502.

¹⁸⁸ *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 521 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

¹⁸⁹ *Id.* at 515–18.

¹⁹⁰ *See id.* at 733 F.3d at 516. (“[E]vidence was delivered ‘in the open Court and in the Presence of the Parties, their Attorneys, Council, and all By-standers, and before the Judge and Jury’” (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068 (3d Cir. 1984))).

¹⁹¹ *Id.* at 517 (citing Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 468 (1984)). Knowing the degree to which arbitrations were open to third parties is impossible. Historians have identified examples in which eighteenth and nineteenth century arbitrations were akin to trials, albeit without juries, and many proceedings included spectators. *See* Mann, *supra*; *see also* AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877* ch. 4 (forthcoming) (on file with author). Moreover, a rich history of English arbitrations pre-Roman Britannia through the Elizabethan Age documents the mélange of public and private that endowed third-party arbitrators with authority to resolve disputes and public access to many of the proceedings. *See* DEREK ROEBUCK, *EARLY ENGLISH ARBITRATION* (2008); DEREK ROEBUCK, *THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I* (2015). My thanks to John Langbein for suggesting this resource.

Recent research on English and colonial practice also requires reassessing the view of the role played by the judiciary in enforcing arbitration agreements in earlier centuries. Under a 1698 statute, the British Parliament created a mechanism for parties to obtain referrals to arbitration and for the court to enforce awards through contempt powers. This approach was adopted in more than twenty American jurisdictions, including both before and after colonies became states. James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241, 246–51 (2013).

In contrast, by the time of the enactment of the federal legislation on arbitration in 1925, the argument for the statute was that courts did not enforce arbitration agreements. Moreover, by then, arbitrations were styled as closed processes, and since its founding in 1926, the AAA has described privacy as a central feature of arbitrations. *See* FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 72, 88 (1948).

United States Arbitration Act (later named the Federal Arbitration Act¹⁹²), and the growth of the market for arbitrators.¹⁹³

Given the historical divergence between trial and arbitration, a key to the majority decision was to categorize what Delaware judges were doing as trials.¹⁹⁴ “Delaware’s proceedings are conducted by Chancery Court judges, in Chancery Court during ordinary court hours, and yield judgments that are enforceable in the same way as judgments resulting from ordinary Chancery Court proceedings. Delaware’s proceedings derive a great deal of legitimacy and authority from the state.”¹⁹⁵ As the concurring opinion by Judge Julio Fuentes put it, “the air of [an] official State-run proceeding” made the limit on public access unconstitutional.¹⁹⁶

In terms of the “logic” of privacy, the majority underscored the benefits to the public of knowing how “Delaware resolves major business disputes.”¹⁹⁷ The court discounted arguments about the harms that public access would cause, in part by noting that other methods existed to enable businesses to protect their trade secrets and by arguing that even if court-based “arbitration” was public, it would continue to offer flexibility and informality.¹⁹⁸ In the end, public “faith in the Delaware judicial system” was the more weighty consideration in deciding the “First Amendment right of access to Delaware’s government-sponsored arbitrations.”¹⁹⁹

A competing application of the experience/logic test came from the dissent, written by Judge Jane Roth,²⁰⁰ that approach illustrates the ways in which the

¹⁹² In 1947, Congress repealed the United States Arbitration Act and enacted a revised version, entitled the Federal Arbitration Act. *See* Pub. L. No. 80-282, 61 Stat. 669 (1947).

¹⁹³ The presumption of contemporary arbitration as confidential is central to the discussion in both the majority and the dissent in *Strine*, 733 F.3d at 517–18; *id.* at 524–26 (Roth, J., dissenting).

¹⁹⁴ *Strine*, 733 F.3d at 518 (“Proceedings in front of judges in courthouses have been presumptively open to the public for centuries.”).

¹⁹⁵ *Id.* at 520.

¹⁹⁶ *See id.* at 522–23 (Fuentes, J., concurring).

¹⁹⁷ *Id.* at 519 (majority opinion).

¹⁹⁸ *Id.* at 519–521.

¹⁹⁹ *Id.* at 521.

²⁰⁰ *See id.* at 523 (Roth, J., dissenting). Her views were reiterated forcefully in a petition for certiorari that, despite the support of a host of amicus law firms and institutions, was denied in the winter of 2014. *See Strine* Petition for Certiorari, *supra* note 164. Amici included the Chamber of Commerce and the Business Roundtable, TechNet, a large group of law firms, and NASDAQ OMX Group, Inc. and NYSE Euronext. *See* Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners, *Strine v. Del. Coal. for Open Gov’t, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 709719 [hereinafter *Strine* Chamber Brief]; Brief for TechNet as Amicus Curiae Supporting Petitioners, *Strine*, 134 S. Ct. 1551, 2014 WL 709721 [hereinafter *Strine* TechNet Brief]; Brief for Law Firms as Amici Curiae in Support of Petitioners, *Strine*, 134 S. Ct. 1551, 2014 WL 768323 [hereinafter *Strine* Law Firms Brief]; Brief of NASDAQ OMX Group, Inc. and NYSE Euronext as Amici Curiae in Support of Granting the Petition, *Strine*, 134 S. Ct. 1551, 2014 WL 787212 [hereinafter *Strine* NASDAQ Brief].

current constitutional doctrine permits widely varying assessments of the history and values at stake.²⁰¹ The dissent focused on the centrality of privacy, insulating both the process and the outcomes of arbitrations from public scrutiny.²⁰² In the dissent's account, confidentiality was "one of the primary reasons why litigants choose arbitration."²⁰³ What the dissent described is what economists call the potential "wealth effects," as management may be concerned about the impact on valuation of a corporation when knowledge of its conflicts become public, and shareholders, the government, and consumers react to claims made in litigation.²⁰⁴ In addition to protecting corporations from adverse publicity, the dissent also argued for the desirability of closure, in that excluding outsiders would ensure a collegial setting, conducive to producing resolutions.²⁰⁵

Moving from the participants' interest in closure to that of the state, Judge Roth explained why closure had a "logic" from the state's vantage point. Given that leading purveyors of ADR offered confidentiality,²⁰⁶ Delaware could be at a competitive disadvantage, as it needed to attract business to its courts so as to

²⁰¹ Further, the concurring opinion by Judge Fuentes insisted that the court had not expressed views on the "constitutionality of a law that may allow sitting Judges to conduct private arbitrations if the system set up by such a law varies in certain respects" (unspecified in his opinion) from what Delaware had provided. *Strine*, 733 F.3d at 523 (Fuentes, J., concurring).

²⁰² *Id.* at 524–26 (Roth, J., dissenting). As Judge Roth explained, because the concurring opinion by Judge Fuentes otherwise would have upheld judges functioning as arbitrators and rested his objection on the unconstitutionality of confidentiality, her dissent focused on where she departed from his concurrence. *Id.* at 525.

²⁰³ *Id.* at 525.

²⁰⁴ See Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 945, 961–66 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

²⁰⁵ See *Strine*, 733 F.3d at 525 (Roth, J., dissenting).

²⁰⁶ *Id.* at 525–26; see, e.g., AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES, R-25 (2013) (explaining that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings," and that the arbitrators shall have the power to exclude anyone who is not "essential" to the proceedings); NAT'L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES, principle 12(2) (1998), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014; *Rules of Conditionally Binding Arbitration, Rule 31: Confidentiality of Records*, BETTER BUS. BUREAU, <https://www.bbb.org/council/programs-services/dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/#ConfidentialityofRecords> (last visited June 30, 2015) ("It is our policy that records of the dispute resolution process are private and confidential."); *JAMS Comprehensive Arbitration Rules and Procedures, Rule 26, Confidentiality and Privacy*, JAMS (July 1, 2014), <http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2026> (limiting public access to proceedings before the Judicial Arbitration and Management Services). *But see* *Pokorny v. Quiztar, Inc.*, 601 F.3d 987, 996–1002 (9th Cir. 2010) (finding unenforceable ADR provisions including confidentiality that created one-sided advantages).

maintain its “prestige and goodwill.”²⁰⁷ Because parties volunteered for the program, the dissent saw the judicial power as derivative of the parties, rather than the state,²⁰⁸ parties’ consent to the process was another reason why no constitutional impediment existed to the closure. In short, the dissent’s approach mixed empirical claims about what prospective users would do (“go elsewhere” if Delaware’s proceedings were not closed) and normative views of the importance of states being able to compete successfully in the marketplace of dispute resolution by offering what the private sector proffered—privacy—as a selling point for the court-based procedure as well.²⁰⁹

Another facet of the state’s efforts to gain a competitive edge was not mentioned by any of the three opinions: Delaware was offering below-market prices. Private arbitrators often charge fees significantly in excess of the \$6,000 per day for which Delaware was renting the expertise and status provided by its judges and courthouses.²¹⁰ Through that pricing, the state both hoped to put its judges on the global stage, poised to attract business, and to enable the state to attract more corporations to pay charter fees (of hundreds of thousands of dollars, in some instances) to incorporate in Delaware so as to be eligible to use its court-based program.²¹¹ Moreover, as Professor Tom Stipanowich has noted, judges had a personal reason to promote the program. They could use their experience as a “sterling entrée into a post-judicial career as an arbitrator and mediator—the retirement plan *du jour* for American judges.”²¹²

Although the 2013 decision—and the Supreme Court’s decision not to grant review in 2014—stopped the Delaware confidential arbitrations, the pressures to use that model have not abated. Professor Stipanowich explained that the “impetus” for Delaware’s efforts²¹³—the volume of litigation, delays in some courts, and public discovery rights—continues. Yet, while looking for

²⁰⁷ *Strine*, 733 F.3d at 519. The dissent did not offer an argument that my colleague, Roberta Romano, suggested: that if more cases were decided by Delaware’s judges than by private arbitrators, Delaware could protect the application and integrity of its law through having its judges be the repeated sources of its application—albeit in private. Professor Romano also noted that corporations were more likely to select venues for incorporation because of substantive legal obligations than for this form of a procedural opportunity. *See generally* Roberta Romano, *The Market for Corporate Law Redux*, in *OXFORD HANDBOOK OF LAW AND ECONOMICS* (Francesco Parisi, ed., forthcoming 2015).

²⁰⁸ *Strine*, 733 F.3d at 525, n.4 (Roth, J., dissenting).

²⁰⁹ *Id.* at 526.

²¹⁰ Judge Roth’s opinion could also have drawn on a range of lower court decisions permitting closures in other contexts. *See, e.g.*, *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d. Cir. 2002) (upholding closing of deportation hearings out of concerns about national security).

²¹¹ Stipanowich, *supra* note 186, at 350–57.

²¹² *Id.* at 350.

²¹³ *Id.* at 351–52.

alternatives, private arbitration outside of courts has not provided the kind of control and discipline that some businesses seek when facing disputes.²¹⁴

Thus, as one amicus had argued to the Third Circuit, as it urged the appellate court to overturn the district court's invalidation of the court-based closed proceedings, businesses were "weary of private arbitration" and sought "predictability" by turning to the Chancery judges.²¹⁵ As Professor Stipanowich put it, Delaware's judges were "first-rate adjudicator[s]," schooled in the state's law, well known for their "efficient case management" (with rules setting forth times for hearings within three months of filing). Further, unlike arbitrators paid by the day, the fees went to the state and therefore created no incentives for the Delaware judges to permit arbitrations to proceed slowly.²¹⁶ In other words, the "faith in the Delaware Judicial System" that Judge Sloviter described in *Strine* to be at risk by closure²¹⁷ was the very attribute that these disputants wanted, albeit outside the purview of the public.

One response to the interest in judicial oversight would be to draft arbitration contracts that include the opportunity for either party to go to court to obtain review of the merits. But in 2008, the U.S. Supreme Court rejected contractual provisions seeking to do so; the Court refused to interpret the Federal Arbitration Act to permit court review as consistent with the grounds authorized by the statute for the vacature of awards, and the Court declined to permit parties, under federal law, to expand the bases of courts' jurisdiction to review arbitrations beyond those specified in the statute.²¹⁸

Yet market pressures for court-based closed proceedings have not abated. After the Third Circuit held the Delaware program unconstitutional, the judges petitioned for certiorari, and they were joined by several amici briefs in seeking to overturn the lower courts. The filings repeatedly extolled the value of confidentiality. Twenty-three law firms "from throughout the [n]ation" insisted on the importance of "confidentiality, flexible procedures, and access to

²¹⁴ *Id.* at 353 (citing a survey he and others had done to evaluate perspectives by Fortune 1,000 corporations on ADR).

²¹⁵ *Strine* TechNet Brief, *supra* note 200, at 10 (quoting Jessica Tyndall, *The Delaware Arbitration Experiment: Not Just a "Secret Court,"* 6 J. BUS. ENTREPRENEURSHIP & L. 395, 408 (2013)).

²¹⁶ Stipanowich, *supra* note 186, at 350, 356. He was critical of the Delaware program and supportive of the ruling finding it unconstitutional. *Id.* at 351.

²¹⁷ *Strine*, 733 F.3d at 521.

²¹⁸ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Yet the majority added the caveat that parties could provide for "enforcement under state statutory or common law, . . . where judicial review of different scope is arguable." *Id.* at 590. As a consequence, a few state courts have read *Hall Street* to permit them the un-preempted leeway to accord review (as a matter of state "procedure," rather than arbitration's "substance") more expansive than does the Federal Arbitration Act. *See, e.g.*, *Cable Connection Inc. v. DIRECTV, Inc.*, 190 P. 3d 586, 594, 604–05 (Cal. 2008); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 93–94 (Tex. 2011), *cert. denied*, 132 S. Ct. 455 (2011). A few state courts have reached the opposite conclusion. *See, e.g.*, *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725 (Me. 2011); *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663 (Ga. 2011).

arbitrators with expertise in Delaware corporate law.”²¹⁹ The Chamber of Commerce and the Business Roundtable added that closure was “of great importance to the nation’s business community.”²²⁰ Echoing Judge Roth’s dissent in *Strine*, the Chamber asserted that “businesses, like anyone else, will rarely agree to arbitrate without the assurance of confidentiality.”²²¹ “[O]pen proceedings” were “incompatible” with commercial arbitration.²²² As another amicus put it, the point was to avoid the “reputational damage that could flow from highly adversarial and public disputes.”²²³ Further, an amicus filing by TechNet, a group of technology and venture capital companies, linked Delaware’s program to “America’s global leadership in technology and innovation.”²²⁴

One amicus pointed to another program that Delaware had pioneered in 2003, seeking to attract “technology disputes” to its Chancery courts. That statute, providing a confidential mediation petitioning process, was promoted by Leo Strine who, when Vice Chancellor, sought legislation to enable “mediation-only filings” so that disputants could enlist judges as mediators. Going to a courthouse impressed upon the parties the “dignity and importance” of the process. His view was that the state should offer judges to “businesses hoping to achieve a just settlement without making their dispute public.”²²⁵

The program, as enacted, requires that potential disputants have more than a million dollars at stake, that the parties consent to Delaware’s jurisdiction, and that at least one party be a business entity formed or organized under Delaware law or having its principal place of business in Delaware.²²⁶ Disputants can then file a confidential petition “not of public record” to specify the issues to be mediated. Chancery judges or masters are authorized to serve as

²¹⁹ *Strine* Law Firms Brief, *supra* note 200, at 1–2.

²²⁰ *Strine* Chamber Brief, *supra* note 200, at 2. In addition, NASDAQ OMX Group, Inc., the “principle stock exchange operators” in the United States also filed in support of overturning the Third Circuit. *See Strine* NASDAQ Brief, *supra* note 200.

²²¹ *Strine* Chamber Brief, *supra* note 200, at 4–5.

²²² *Id.* at 12.

²²³ *Strine* NASDAQ Brief, *supra* note 200, at 3; *see Romano*, *supra* note 207.

²²⁴ *Strine* TechNet Brief, *supra* note 200, at 1 (explaining that it was “an association of the chief executive officers and senior executives of the Nation’s leading technology companies” in technology, e-commerce, venture capital, and other fields, and the group of businesses employed more than two million people and had revenue in excess of \$800 billion). TechNet argued that the Third Circuit’s decision was both a “novel” constitutional holding and in conflict with the Supreme Court’s expansion of the reach of mandates to arbitrate under the Federal Arbitration Act. *Id.* at 3–4; *see also, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

²²⁵ Leo E. Strine, Jr., “Mediation-Only” Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America’s Business Courts?, 53 *DUKE L.J.* 585, 592–94 (2003).

²²⁶ DEL. CODE ANN. tit. 10, § 347(a) (West 2006).

mediators—at \$10,000 for the first day and \$5,000 for every day thereafter.²²⁷ In other words, in addition to the procedure struck in *Strine*, Delaware currently has another path for certain disputants to obtain private access to its courts and its judges.

The question is whether this program, if challenged, would be found constitutional. Can documents, styled “mediation petitions” be filed in court but closed to the public? The case law to date on public access to court filings has focused on whether the materials are “judicial documents” related to litigation; some circuits permit more access to documents than do others.²²⁸ How would one characterize Delaware’s “mediation petitions”? Defenders of keeping confidential the documents requesting Delaware’s judge-mediators to participate in a process in which neither the filings nor the activities were “of public record” would argue that such petitions—and the process that results—aim to avoid, rather than be part of, litigation. Thus, this new procedure provides another example of the questions that lace this essay—about the relationship of alternative processes in courts related to commitments that courts be open and public venues.

Delaware’s mediation procedures reflect and then seek to deflect these questions by both creating a confidential filing system and specifying a method of “protecting public access to the Courts.”²²⁹ The rules provide that, when confidentiality is asserted to seal documents, those seeking to seal have to provide a “public version” of the confidential filing; when filing “a complaint confidentially,” plaintiffs have to make their “best efforts” to give notice to each person with an interest and to provide a proposed public version of the complaint. How such “best efforts” can be policed is a question. The rules authorize the public or the press to challenge the closure,²³⁰ but such third parties would need to be informed about the pending matter by those seeking

²²⁷ See *id.*; DEL. CT. CH. R. 94(a)(4) (providing “confidential and not of public record” proceedings); *id.* R. 95(b) (outlining the details of mediation conference confidentiality); COURT OF CHANCERY OF THE STATE OF DEL., MEDIATION GUIDELINE PAMPHLET 3 (Apr. 2011) (explaining that the fees are divided “equally among the parties”); see also *Strine* TechNet Brief, *supra* note 200, at 6–7 (citing this procedure in use since 2003).

²²⁸ Compare *United States v. Erie Cnty.*, 763 F.3d 235 (2d Cir. 2014), with *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 n.1 (8th Cir. 2013).

A related set of questions are about the transparency of non-Article III courts in the federal system, and access to their filings and procedures. See, e.g., *Ballard v. Comm’r*, 544 U.S. 40 (2005) (holding inappropriate the Tax Court’s practice of making the reports of its special judges confidential). See generally Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195 (2008).

²²⁹ See *Protecting Public Access to the Courts: Chancery Rule 5.1*, DEL. ST. CTS., <http://courts.delaware.gov/rules/ChanceryMemorandumRule5-1.pdf> (last visited June 30, 2015).

²³⁰ See Leo E. Strine, Jr., Amendment to Court of Chancery Rules to Delete Rule 5(g) and Adopt Rule 5.1 (Nov. 5, 2012), available at <http://courts.delaware.gov/rules/ChanceryAmendmentRules5-1.pdf>.

the confidential process. Moreover, the rules do not explain whether and how courts are to review whatever efforts are undertaken to provide notice.²³¹

One might want to cabin Delaware as an outlier, famously focused on corporations and, in these proceedings, seeking large-value disputes in part as a way of attracting businesses to incorporate in Delaware and pay the significant required fees to do so. Yet even if the sums involved are unusual, the state's programs are not idiosyncratic. Rather, they are variations on what I have documented is occurring in courthouses around the country, as court rules have effectively moved the public out of the process in tens of thousands of ordinary cases. As my account of local rules, databases, and overviews of ADR has detailed, the practice is increasingly becoming to provide privacy, not publicity. In mediation, other forms of evaluations, and in settlement conferences, whether run by judges or their designated "neutrals," the interactions are confidential.

The rules surrounding court-annexed arbitrations offer, as discussed, another approach. In the high-volume jurisdictions in which court-annexed arbitration functions as a kind of quick trial before appointed lawyers in lieu of judges, the practice has been to provide for these proceedings to be held in courtrooms and to permit the public to attend.²³² Other jurisdictions close their court-annexed arbitrations. Indeed, some of those private court-based proceedings served as examples proffered by advocates arguing the legality of closure in the briefing in *Strine* but were not relied upon by any of the three appellate opinions.²³³

Reflection is therefore in order about the tensions between the case law on First Amendment public access rights and the ADR rules. The decisions on jury charges, Guantanamo Bay, the New York City Transit Authority, and Delaware's Chancery Court illustrate judicial resistance to closing off public access for court-based, trial-like, and trial-related proceedings. Further, the *Strine* decision refused to turn sitting judges into arbitrators—a view shared in the small number of reported decisions in which state or federal judges served as arbitrators.²³⁴ One could build on this case law to argue that court-annexed arbitrations must, as of right, be open, and then mount challenges in those

²³¹ Cf. *Protecting Public Access to the Courts: Chancery Rule 5.1*, *supra* note 229, at 6.

²³² See *supra* note 135.

²³³ In the briefing before the Third Circuit, the confidentiality of court-based ADR programs, including arbitration, was argued. See Brief for Appellee at 10, *Del. Coal. for Open Gov't, Inc. v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 12-3859), 2013 WL 100597; Stipanowich, *supra* note 186, at 365.

²³⁴ See *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163 (7th Cir. 1994) ("General Fire is correct that arbitration is not in the job description of a federal judge, including (see 28 U.S.C. § 636) a magistrate judge."); *Ovadia v. New York Ass'n for New Americans*, No. 95 Civ 10523, 1997 WL 342411, at *10 (S.D.N.Y. June 23, 1997) ("Nevertheless, as noted in *DDI Seamless*, there is inherent difficulty in and serious potential problems with having judicial officers step out of their traditional adjudicatory functions. Arbitrations by magistrate judges should be avoided.").

jurisdictions where that form of ADR is closed. That claim would be relatively straightforward, in that court-annexed arbitrations are trial-like, and the lawyers conducting the proceedings are subjected to disqualification and accorded immunity as judges would have. Moreover, in terms of experience and logic, the track record of jurisdictions providing open arbitration offers a counter to arguments that closure is required for arbitration to succeed.²³⁵

Yet, even if Delaware's court-annexed arbitration and other jurisdictions' offering of this process to ordinary litigants are easy cases when contrasted with mediation and settlements, the split Third Circuit decision illustrates that public access is not secure for ADR's most trial-like version. Moreover, the acculturation of judges to various forms of ADR that entail privatized procedure makes more likely the acceptance, as logical, of a variety of ways in which the public can be excluded. Further, for the formalists, reluctant to rely on law's evolution, all the ADR variations fall outside what was open when the constitutional guarantees about public courts were adopted.

In addition to the limits of historical analogies and the slippery slope of becoming accustomed to closed proceedings in court, the "logic" of most forms of ADR is that private accommodation is preferable to third-party resolutions; hence, judges ought to promote parties' withdrawal from the public purview in service of public and private ends—the efficient resolutions of disputes. With assumptions that consent is an unproblematic preference to be honored, that costs are saved, and that the state's role is policed through rules organizing ADR, no third-party oversight to validate legitimacy is required.

In short, the test of experience and logic is not the equivalent of a norm that access to court-based decision making is required in democracies. But here, as part of a larger project addressing the impact of new procedural forms, I argue for shaping First Amendment doctrine in light of commitments that courts function as open, egalitarian venues. Even if the parties, judges, and other neutrals believe in the benefits of closure, and even when parties consent, court promotion of ADR, as a matter of constitutional interpretation, ought to be accompanied by public accountings of what transpires. The reasons stem from Judge Fuentes's description of what was objectionable in the Delaware program—that it had "the air of [an] official State-run proceeding."²³⁶ His insight merits expansion, for the presence of the state infuses all these forms of ADR, which are mandated, advocated, and structured through hundreds of court rules, government manuals, and websites, and are commended to litigants by judges.

The result of these many new rules is not "bargaining *in the shadow of the law*," but bargaining *as a requirement of the law*. The dispatchers are the

²³⁵ In the context of the federal system, federal judges doing so would either interpret the statute or local rule mandating confidentiality of ADR procedures as not addressing court-annexed arbitration or hold it unconstitutional as applied to this genre of ADR.

²³⁶ *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 522 (3d Cir. 2013) (Fuentes, J., concurring).

judges, who have either designated themselves as “neutrals” or appointed others and cloaked them in “quasi-judicial” authority, complete with immunities from suit and obligations of disqualification akin to that of judges. In some instances, as the certiorari petition on behalf of the Delaware judges explained, “active” or “senior judges” conduct “binding, confidential arbitrations in state courthouses.”²³⁷ In other instances, lawyers do so at judges’ behest. The point of structuring these procedures in courts is that, as both the Delaware judges and their supporters in seeking confidentiality explain, going to court “forces parties to comport themselves civilly, to assess their positions soberly, and to present their cases in a way that respects the other demands on the judge’s time.”²³⁸

When courts offer such important civic moments, they should not be permitted, as a matter of constitutional law, to exclude the public, which has a right to see first-hand how conflicts in democracies can be handled, or to learn that judges and litigants fail to live up to obligations of fair, even-handed treatment and civil exchanges about deeply disputed views of fact and of law. As procedure is increasingly becoming contract, state-promoted contracting—produced at the behest of the state and shaped through judicial intervention—needs regulation through public oversight and participation.

To date, the First Amendment access doctrine has focused on whether proceedings in court are trial-like, or predicates to trials. What the doctrine needs to take into account is that the touchstone of being trial-like is no longer a measure of what judges do in courts.²³⁹ Whether on trial, on the bench, or in less formal settings, judges in courts wield significant power, and many of the rationales supporting access explained.

The issue is which activities ought to have what Justice Brennan termed the “public character of judicial proceedings.”²⁴⁰ A return to the explanations for access in 1980 in *Richmond Newspapers* is thus in order. The context was a closed criminal proceeding, and in finding the blanket closure unconstitutional, Chief Justice Burger, writing for the plurality, spoke about the “nexus between openness, fairness, and the perception of fairness.”²⁴¹ He commented further that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”²⁴² The plurality opinion relied on the First Amendment as

²³⁷ *Strine* Petition for Certiorari, *supra* note 164, at 33.

²³⁸ *Strine* TechNet Brief, *supra* note 200, at 8, citing to and extrapolating from the essay by Vice-Chancellor Strine, *supra* note 225, at 592–93.

²³⁹ See Harold Hongju Koh, Sterling Professor of Int’l Law, Yale Law School, The Just, Speedy, and Inexpensive Determination of Every Action?, Keynote Address at the Pennsylvania Law Review’s “Federal Rules at 75” Symposium (Nov. 16, 2013), in 162 U. PA. L. REV. 1525 (2014); Galanter & Frozena, *supra* note 75.

²⁴⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring).

²⁴¹ *Id.* at 570 (plurality opinion).

²⁴² *Id.* at 572.

implicitly guaranteeing access to criminal trials—prompting Justice Stevens to describe the case as a “watershed” for recognizing constitutional protection of “the acquisition of newsworthy matter.”²⁴³ Justice Brennan, joined by Justice Marshall, focused on how the holding supported the “right to gather information.”²⁴⁴

The question in that case and at that time was the role played by *trials*. The question of our time is what in courts ought to be made public *in the absence of trials*. When, to borrow again from Judge Fuentes, does a process gain “the air of [an] official State-run proceeding?”²⁴⁵ Answers come from the reconfigured work of judges. When they convene meetings in courts, when they take on the role of “neutrals” or authorize others to do so with “quasi-judicial” status, their decisions and their procedures are the state, in action. As more of the activity of “the judicial” moves to become “quasi-judicial,” the public needs to be built in, so as to be able to be present at least some aspects of the proceedings and to know the results.

A brief note on the practical implications is in order. Implementation of this obligation can be modeled after what takes place in the criminal context, just as the law on access to civil litigation regularly draws upon criminal analogues. In criminal cases, the law requires (albeit with uneven implementation) that the sequence of proceedings from arraignment and bail to trials or guilty pleas take place in public.²⁴⁶ While bargaining itself is generally off the record, the formal charges leveled against a defendant *ex ante* and the outcomes *ex post* are on the record. Further, constitutional law requires that before judges accept criminal defendants’ pleas, judges must inform defendants of the alternatives and of the consequences.²⁴⁷ Moreover, before a defendant can be sentenced, federal judges must “address themselves to the defendant” and provide a “personal invitation” for the defendant to speak before sentencing.²⁴⁸ In addition, given the potential for claims of ineffective assistance during plea bargaining,²⁴⁹ both judges and lawyers have incentives to document offers and acceptances by putting them on the record.

The guilty plea model is far from ideal. The recitation of rights to trial and the inquiries on waiver are formulaic, and many defendants do not perceive themselves as having, and do not have, options—in light of the power of prosecutors. Yet the public exchanges at pleas and sentencing create knowledge

²⁴³ *Id.* at 582 (Brennan, J., concurring).

²⁴⁴ *Id.* at 586.

²⁴⁵ *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 523 (3d Cir. 2013) (Fuentes, J., concurring).

²⁴⁶ Simonson, *supra* note 56, at 2216.

²⁴⁷ *McCarthy v. United States* 394 U.S. 459 (1969); *Padilla v. Kentucky*, 559 U.S. 356 (2010). Prosecutors are not, however, always held to the agreements they proposed. *See Puckett v. United States*, 556 U.S. 129 (2009).

²⁴⁸ *United States v. Paladino*, 769 F.3d 197, 202 (3d Cir. 2014).

²⁴⁹ *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

of the decisions made and their consequences. The role of the judge is identified, and the actions taken are sometimes revised through subsequent proceedings.

Thus, the constitutional mandates of rights of audience ought to be understood as entailing the political obligation that democratic orders subject government authority to public oversight, in both criminal and civil contexts. That obligation exists whether courts exercise that power through presiding at hearings and trials, imposing judgments, or through the promotion of private resolutions of claims brought to court.

The alternative—the ADR in the making—is a privatized system of court-based dispute resolution. Instead of functioning as contributors to the public sphere, courts shelter private exchanges that offer no forms of constraints on power or validation aside from participants' reports of satisfaction. Gone are what Jeremy Bentham called "auditors,"²⁵⁰ for no one can assess the interactions between the decision-makers and the disputants and evaluate how resources affect outcomes, whether similarly-situated litigants are treated comparably, the impact of repeat players, and whether one would want to get into (or avoid) court. No outsider can gain "assurance that established procedures are being followed and that deviations will become known."²⁵¹ Instead, control over the meanings of the claims made and the judgments rendered rests with the parties, oftentimes bound by confidentiality agreements about both processes and outcomes.

To conclude, having accepted Professor Subrin's invitation to be "thinking about . . . a country's procedure,"²⁵² I find myself mapping the deterioration of the democratic features that Professor Subrin outlined. As ADR processes come to dominate court-based dispute resolution, the power exercised by the state in civil proceedings retreats from the public purview, in a fashion paralleling the movement that Foucault traced in the shift away from public displays of state punishment and to closed prisons. We are watching (a word chosen deliberately) the dismembering of the procedural adjudicatory system shaped during the last century, when courts widened their doors to include all persons in the social ordering²⁵³ and to give them power through juridical opportunities to make claims in public. The new court-based ADR procedures

²⁵⁰ BENTHAM, *Rationale for Judicial Evidence*, *supra* note 4, at 355–56.

²⁵¹ *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 508 (1984).

²⁵² Subrin, *On Thinking About a Description of a Country's Civil Procedure*, *supra* note 1, at 140–42; *see also* Subrin & Main, *supra* note 85, at 1877–89.

²⁵³ The privatization in courts, explored here, is part of a larger picture in which through limits on pleadings, doctrines of immunity and implied causes of action, and new readings of the Federal Arbitration Act, the ability to pursue claims has been reduced. *See, e.g.*, Stephen B. Burbank and Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement* (Cardozo Legal Studies Research Paper No. 436, Aug. 2014), available at <http://ssrn.com/abstract=2488575>; Resnik, *Fairness in Numbers*, *supra* note 41; Resnik, *Diffusing Disputes*, *supra* note 7.

build in no external vantage point from which to assess the exchanges taking place under their rules and the kinds of outcomes reached. Debates about underlying obligations, the scope of remedies, and the role of the state are silenced.

The foundation of the authority of judges is that their power to impose judgment comes from the structure of adjudication, its constraints, and its public character. Courts cannot shed their regulatory functions and remain robust institutions of authority. If the task of adjudication is replaced with that of shepherding parties toward private conciliation, the independence of judges becomes a goal without a purpose or a constraint. The result is the decline of adjudication's potential to serve and to support democracies.

