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### Contracting Access to the Courts: Myth or Reality? Bane or Boon?

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# CONTRACTING ACCESS TO THE COURTS: MYTH OR REALITY? BOON OR BANE?

Jeffrey W. Stempel\*

## INTRODUCTION: DEFINING DISCUSSION TERMS, TOPICS, AND CONSIDERATIONS

The question posed in this program: "Are Recent Actions That Have Narrowed the Courts' Jurisdiction Wise?" can be read narrowly, but this narrow reading would not really address the major chasm that divides lawyers, judges, scholars, government officials, and the public.<sup>1</sup>

For example, if jurisdiction is defined only as federal subject matter jurisdiction per se, the scope of the topic becomes relatively smaller.<sup>2</sup> However, if "jurisdiction" is interpreted to mean "access to adjudication," substantially more is implicated. Similarly, one can take a narrow view of what constitutes an "action"

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1. Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688-690 (1993) (arguing that the major division of opinion on civil litigation issues is between "preservationists" committed to the "open courts" model of the 1938 Federal Rules of Civil Procedure and "reformers" who see increased controls on access, streamlined process, and revision of substantive law as essential to the continued adequate functioning of the system). See *infra* notes 4-6 and accompanying text for development of this division of the profession.

2. "Jurisdiction," of course, can mean either subject matter or personal jurisdiction. Subject matter jurisdiction is the power of the court to hear a particular type of matter (for example, a federal antitrust claim) and render a binding decision. Personal jurisdiction is the power of the judicial tribunal to render decision binding on a particular party (for example, an enforceable judgment against a particular defendant). See ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* § 4.5 (3d ed. 1994) (defining differences in the types of jurisdiction and implications for pretrial procedure); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 2.1 (3d ed. 1985) (defining jurisdiction as judicial authority and further defining authority of subject matter and personal jurisdiction).

narrowing “jurisdiction.” If we address only congressional legislation, the topic becomes smaller. If, instead, we mean the wider array of court actions and initiatives of the private bar, social actors, regulatory agencies, interest groups, and executive—at both the state and local level, including state legislatures—as well as acts of Congress, the topic can become quite broad.<sup>3</sup>

For purposes of this Comment, I adopt a relatively broad focus. In particular, I want to address the question of access to the courts generally, especially access to federal courts. Under this operative inquiry, the topic under consideration includes a discussion not only of subject matter jurisdictional limits on courts but also encompasses any significant development that makes it more difficult for a litigant to be heard on the merits by a court or to have a full and complete adjudication of a claim by the judicial system.

As more broadly defined, the topic of access to the courts includes not only the parameters of judicial power over the subject of the case but also includes consideration of the:

- exercise of personal jurisdiction by the courts;
- power to apply the law of a variety of jurisdictions to a variety of claimants;
- power to adjudicate large controversies involving multiple jurisdictions and parties;
- capacity of courts to hear and decide cases within their jurisdiction;
- degree to which statutes or judicial doctrine encourage or discourage privatization of disputes—and whether this has the effect of a net increase or decrease in access to dispute resolution and of development of the law;
- judicial receptiveness or resistance to certain types of claims;
- judicial willingness to resolve disputes on bases other than the merits or upon a record short of full adjudication; and

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3. Most discussions of jurisdiction in cases or legal periodicals address matters of federal jurisdiction, as federal courts are designed in our system as tribunals of limited authority who have judicial power over the subject matter of the case only when it implicates significant federal interests, such as a substantive federal legal question, the fate of federal entities, or the availability of a federal forum to adjudicate claims touching on citizens or property of different states. *See JAMES & HAZARD, supra* note 2, §§ 2.1–2.4. By contrast, state courts are considered courts of general jurisdiction generally available to hear and decide disputes. There are limitations on state court power imposed by the Constitution (for example, limits on the state’s exercise of personal jurisdiction). *See id.* § 2.3.

Consequently, discussions of whether “jurisdiction” should expand or contract are usually implicitly concerned with federal jurisdiction. But if “jurisdiction” is broadly defined to include judicial receptiveness to fully adjudicating disputes, both state and federal judicial systems are part of the discussion.

- degree to which pursuit of dispute resolution in the courts has become more or less arduous, including the time and cost required for adjudication.

Applying this broadened roster of factors, an examination of the topic suggests that although the record of the past two decades is mixed, the net trend of the times has been toward increasing barriers to access.

It is over the issue of the availability of adjudication (rather than “jurisdiction” narrowly defined) that most of the legal profession divides. To sketch a perhaps cartoonish summary of current political views:

- On one end of the spectrum are those who see an expansive and open judiciary as a luxury that we cannot afford or should not be willing to shoulder because of its inefficiency or other negative effects.<sup>4</sup>
- On the other end of spectrum are those who endorse a model of access to courts equal to or exceeding the more sanguine views of litigation efficacy that prevailed during the 1950s through early 1970s and that has roots in the 1938 Federal Rules of Civil Procedure as well as the early 20th Century judicial reform movement.<sup>5</sup>
- In between are various compromise positions and hybrids—as well as some seeming inconsistencies. For example, some in the political community are in favor of reducing the federal courtload by encouraging alternative dispute resolution or eliminating diversity jurisdiction while they simultaneously

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4. In an earlier examination of this divide in the profession, I termed these commentators “reformers.” See Stempel, *supra* note 1, at 688–90. Examples of the reformist perspective are E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (suggesting that the Federal Civil Rules of Civil Procedure fail to provide sufficiently adequate mechanisms for early elimination of weak claims and efficient processing of cases required judges to engage in more aggressive extra-Rule management of matters); Peter W. Huber, *Safety and the Second-Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985) (arguing that adjudication of broad product liability substantive law has created inefficiencies affecting both individual dispute resolution and commercial behavior).

5. I have termed this group “preservationists.” Stempel, *supra* note 1, at 688–90. Examples of a preservationist perspective are Owen W. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (contending that the current infatuation with promoting settlement and ADR is short-sighted in that it tends to remove from courts important matters that require adjudication and reduces the important judicial role of defining law and articulating normative public policy); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that increased extra-Rule management of cases by judges tends to produce outcomes less grounded in the law and strips disputants of rights enjoyed under regime of full adjudication).

support the expansion of federal subject matter jurisdiction to include drug-related crimes or other specific misconduct.<sup>6</sup>

Many of the isolated questions of current dispute resolution debates are explained by reference to this open-versus-restricted matrix. Those favoring more regulated access to adjudication tend to support discovery reform, promote Alternative Dispute Resolution ("ADR"), endorse more pretrial disposition of cases, criticize notice pleading, argue for a reduced jury role and seek more limited review of trial level determinations. Those endorsing more open courts tend to be on the opposite sides of these subissues.

Before addressing the issue of which perspective is "right" on these subissues, we also need to take a broad perspective in assessing recent developments affecting the judiciary and at least ask the introductory question: Has access to adjudication really been subject to a net decrease in the modern era? It is, of course, possible that this idea is based on a foundation of myth and that court access generally has not contracted. However, to the extent that there has been significant curtailment of access, it is incumbent upon the profession to reflect seriously on whether this is prudent for either the legal system or society.

## I. ACCESS TO COURTS: A RECAP OF DEVELOPMENTS

Many scholars of the dispute resolution system perceive a sea change in attitudes toward adjudication that took place in the mid-1970s.<sup>7</sup> Among the events

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6. Although "Congress" or the "legislature" is the aggregation of its members, an individual votes on particular matters. Congress serves as an example of this type of seeming inconsistency.

For example, Congress during the 1990s has passed legislation limiting the jurisdiction of federal appellate courts over trial court rulings compelling arbitration. *See* 9 U.S.C. § 16 (1994) (enacted in 1990 and originally § 15) (permitting no appeal of order compelling arbitration until after arbitration is completed but permitting immediate appeal of trial court decision not to compel arbitration). This statutory provision is obviously designed to move more litigation out of federal court and into ADR.

But during the same 1990s Congress has also passed legislation making it a federal crime to have a gun too near a school. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010 (codified at 18 U.S.C. § 922(x)(2) (1994)). *See also* United States v. Lopez, 514 U.S. 549 (1995) (invalidating provision in the Act making it a federal crime to possess gun within 1000 feet of a school yard).

Acts of this sort are at least facially inconsistent. On the one hand, judicial access is limited; on the other hand, judicial access/burden is increased. Resolving the inconsistency requires that one find a unified thread of consistent national interest in having the federal forum available for low-level gun busts but less available as a practical matter for job discrimination claims, securities fraud claims, and large commercial disputes where arbitrability may be a serious issue. Although an argument for consistency can be made, a good deal of sophistry is required.

7. *See* Stephen Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1158 (1993) (arguing "sea change" attitude took place in judicial decisions of 1970s that "began requiring precise pleading [rather than more

of the time included the Pound Conference, which put the Chief Justice of the United States and the national judicial establishment on record in favor of at least some refinement, if not restriction, on access to courts.<sup>8</sup> In addition, Chief Justice Burger, the driving force behind the Pound Conference, also used his bully pulpit as Chief Justice of the Supreme Court to promote ADR, particularly court-annexed arbitration.<sup>9</sup> The availability of judicial adjuncts such as court-annexed arbitration

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liberal notice pleading] for certain types of cases,” and elite leaders of bench and bar took the view that “liberality of pleading, wide-open discovery and attorney latitude was no longer feasible”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (arguing 1970s and 1980s ushered in the view that the open access to courts model was not working well and was costly).

8. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297, 310–12 (1996) (finding that the mid-1970s saw an upsurge in reformist court decisions and commentary, with 1976 Pound Conference serving as largely an accurate milepost of when the tide in litigation attitudes turned); Subrin, *supra* note 7, at 1156–58.

The Pound Conference reflected its thrust in its full title: “National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice,” taking the title from Roscoe Pound’s famous criticism of the system made at the 1906 Annual Meeting of the American Bar Association (published at 29 A.B.A. REP. 395 (1906)). The Pound Conference proceedings were published in *Federal Rules Decisions*, producing several influential articles that continue to be cited. Examples of contributions to the Pound Conference reflecting the reformist perspective and criticizing the preservationist preference for open courts are Robert H. Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976) (arguing that the courts have become a repository of a host of increasingly trivial claims or disputes that are better treated within political or market systems); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976) (noting that the attorney tendency to overlitigate—combined with large cases presenting opportunity to overlitigate—has produced considerable waste, expense, and delay).

A more moderate and even more significant contribution was Frank E.A. Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 111 (1976), which introduced the notion of the “multi-door courthouse” and was the most influential and oft-cited contribution to the Pound Conference articles. See Stempel, *supra*, at 324, n.90 (“Sander’s article is by far most cited Pound Conference Article.”). Sander’s article can reasonably be viewed as sitting astride the preservationist-reformer gulf. See *id.* at 324–25. It is access-enhancing by suggesting expansion of adjunct adjudicative services for disputes, but it also can be read as access restricting in that it endorses ADR in lieu of traditional litigation; scholars have tended to see Sander’s article as more access restricting. *Id.* at 324–33.

9. See Stempel, *supra* note 8, at 313; Warren E. Burger, *Reflections on the Adversary System*, 27 VAL. U. L. REV. 309, 310–11 (1993) (arguing that the overlawyering of cases was increasing the cost of justice without a corresponding improvement in quality); Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274 (1982) (endorsing court-annexed arbitration and voluntary arbitration as a means of reducing court caseload without an adverse impact on quality); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973) (criticizing lack of training and acculturation of advocates to

or the multi-door courthouse can be regarded as increasing disputant access to some form of hearing and decision that would otherwise be delayed or, as a practical matter, eliminated due to the pressure toward settlement that results when disputes must wait in line for full adjudication or even decisions on motions.<sup>10</sup> But at the same time, these adjuncts to adjudication also reduce in the first instance the litigant's "right" to a judicial hearing by imposing interim steps (one must mediate, arbitrate, or have early neutral evaluation before one can go to court) and creating incentives to settle other than mere delay.<sup>11</sup>

Contemporaneous with the Pound Conference and the Chief Justice's initiatives, the Supreme Court was restricting the reach of class actions and exhibiting something of a counter-revolution against the 1966 expansion of Federal Civil Rule 23.<sup>12</sup> Lower courts were erecting increased barriers to access through heightened pleading requirements. The 1980 Amendments to the Civil Rules included a modest effort to control or restrict discovery,<sup>13</sup> with the 1983 Amendments including a substantially beefed up Rule 11.<sup>14</sup> Judicial decisions of

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possess higher trial skill and judgment about prudent limits on disputing; suggesting increased specialized training).

10. See Stempel, *supra* note 8, at 332-34, 361-69; Craig A. McEwen & Richard Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 L. & SOC'Y REV. 439 (1986); Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983).

11. For example, court-annexed arbitration may be required of certain claims (usually those seeking monetary damages only under a certain amount), but the resulting award is not binding. Either party may demand trial de novo. See *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (D. Pa. 1979) (holding Pennsylvania Rule requiring compulsory arbitration does not violate Seventh Amendment because either party may demand trial de novo).

As a practical matter, however, a party required to undergo the arbitration process is unlikely to shoulder the costs of trial de novo if the resulting award is moderately acceptable. Thus, awards tending to split the difference or finding liability but awarding low damages may tend to become the final disposition of matters that otherwise would have proceeded to trial. This may also, of course, be quite a good thing—but it undoubtedly has the practical impact of making it more difficult to get to trial on matters than was the case prior to court-annexed arbitration.

12. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979) (describing 1970s controversies and key cases related to class actions and noting judicial restrictions on reach of class action).

13. See Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980) (adopting modified Rule 26 that expressly grants courts power to limit even relevant discovery on basis of cost-benefit analysis). According to two dissenting Justices, this was too modest an effort. See *id.* at 998-1001 (Powell, J., dissenting) (referring to Rule revision as "tinkering changes," *id.* at 1000). See also Mary P. Schroeder & John P. Frank, *Discovery Reform: Long Road to Nowheresville*, 68 A.B.A. J. 572 (1982). But see Jack Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806 (1981) (criticizing Powell's dissent).

14. See GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* Ch. 1 (1990) (discussing the development of the 1983

the 1970s and 1980s endorsed some restrictions on the civil jury,<sup>15</sup> increased the availability of summary judgment,<sup>16</sup> endorsed certain legal defenses to previously less impeded claims,<sup>17</sup> and dramatically expanded the scope of the Federal

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Amendment to Rule 11); Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplications of Rule 11 by Harmonizing It With Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257 (1991) (describing the background of Rule 11 and arguing that it was being overly aggressively applied rather than interpreted in light of other procedural rules and policies).

15. See, e.g., *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980) (holding that in a complex antitrust suit likely to involve a lengthy trial, the Due Process Clause required an exception to the Seventh Amendment that would otherwise require a jury trial in an action for money damages). Decisions upholding court-annexed arbitration and enforcing arbitration agreements against Seventh Amendment challenges can also be seen as a reduction in the availability of jury trial. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

16. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This trilogy of Supreme Court cases is generally regarded as expanding the applicability of summary judgment in civil actions. See 11 MOORE'S FEDERAL PRACTICE § 56.03 (3d ed. 1998); EDWARD J. BRUNET, ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1.01 (1994); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (criticizing effective expansion of summary judgment prompted by the Supreme Court trilogy).

17. See, e.g., *St. Mary's Honor Soc'y v. Hicks*, 509 U.S. 502 (1993) (holding it insufficient for a job discrimination plaintiff to prove that employer lied about the reason for discharge; plaintiff must also prove that the real reason for discharge was discrimination; defendant falsehoods do not make for an adverse inference of discrimination sufficient to shoulder the burden of persuasion); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (holding defendant's discharge of plaintiff employee mere weeks before pension vests was insufficient to create an inference of age discrimination to satisfy the burden of persuasion); *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (adopting "government contractor defense" that precludes liability for a product maker who builds product subject to government specifications); *Visser v. Packer Eng'g Assocs.*, 924 F.2d 655 (7th Cir. 1991) (en banc) (holding employer's harsh treatment and discharge of an older worker was insufficient to prove age discrimination; employer may simply have been unpleasant); Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145 (1993) (describing judicial willingness to accept defense to employment claims based on information not known at the time of an adverse employment decision even though, by definition, adverse employment action was not based on this information and may have been the product of illegal discrimination); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (describing misapplication of the enhanced availability of summary judgment due to the 1986 Supreme Court trilogy to eliminate discrimination claims based on judicial weighing of evidence); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991)



Arbitration Act and the enforceability of arbitration agreements.<sup>18</sup> In addition, certain classes of claims were removed from the federal courts altogether, made subject to prior exhaustion of administrative remedies, or made subject to substantial incentives to pursue administrative remedies rather than litigation.<sup>19</sup>

One cannot regard the continuing growth in federal court caseloads as indicating an increase in access.<sup>20</sup> Growing populations, increasing commercial activity, increasing legal complexity, a more heterogeneous society, and other factors of modernity can easily create more litigation even if barriers to adjudication are simultaneously raised. The question to ask is whether in the absence of access restrictions there would have been still greater growth. Answering this question becomes a practical impossibility as well as a point of political divisiveness. Within the mainstream of the American legal and political community are both those who regard discouraged litigation as justice denied<sup>21</sup> and

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(criticizing courts for eliminating job discrimination claims merely because an employer proffers a nondiscriminatory reason for discharge without testing the veracity of the defendant's posited reason).

18. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing arbitration clauses required to be signed by all workers in securities brokerage houses pursuant to New York Stock Exchange practice); *Rodrigues de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling prior adverse precedent of *Wilko v. Swann*, 346 U.S. 427 (1953), and enforcing arbitration clause as to customer claims of violations under Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing arbitration agreement and requiring arbitration of customer claims under Securities Exchange Act of 1934, overruling lower court cases to the contrary); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (finding that no public policy exception to arbitrability prevents arbitration of antitrust claims involving international commercial dispute); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding the Federal Arbitration Act creates substantive law that pre-empts contrary state law if the arbitration clause at issue involves an interstate transaction); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (holding that defenses to enforceability of arbitration clause such as estoppel or laches are to be narrowly construed).

On the development of increased judicial favor for arbitration generally, see Sternlight, *supra* note 15; Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991).

19. See, e.g., 42 U.S.C. § 300aa-1-aa-34 (1994) (National Childhood Vaccine Injury Act establishing administrative compensation and making claimants subject to election of remedies); 30 U.S.C. §§ 901-45 (1994) (Black Lung Benefits Act establishing administrative compensation scheme). See *infra* notes 42-50 and accompanying text for further discussion of these alternative programs to traditional adjudication.

20. Indisputably, there has been growth. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 57-70 (1996) (originally published as *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)). District court case filings totalled 79,200 in 1960. *Id.* at 57. In 1995, the figure was 283,688. *Id.* at 60-61.

21. See, e.g., Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Fiss, *supra* note 5.

others who find some degree of reduced or discouraged litigation essential to prevent the system from collapsing under the weight of growing caseload.<sup>22</sup>

While the overall numbers show continuously growing litigation, and while popular culture speaks of a "litigation explosion,"<sup>23</sup> it does not follow that there has been a relative increase in access to the courts.<sup>24</sup> Evidence exists suggesting that per capita litigiousness, although higher now than at many periods in American life,<sup>25</sup> is today lower than was the case in the late nineteenth and early twentieth centuries<sup>26</sup> or during the colonial period.<sup>27</sup> Marc Galanter has suggested that the tendency to view modern litigation rates as high may result because litigation rates during the 1930s and 1940s were historically low, thus making recent increases appear artificially high.<sup>28</sup>

Common sense assessment of the empirical history of caseloads also suggests that gross caseloads and aggregate litigation may have more to do with factors external to the judicial system itself. For example, it makes sense that there might be more litigation in a new land where property rights and commercial arrangements are less established, where the culture and even the markets are in embryonic stage. Similarly, litigation is less likely during a depression or a World War. But as we also know, the 1930s saw the culmination of two important litigation movements: the 1938 Federal Civil Rules and the Rules Enabling Act of 1934.<sup>29</sup> To some extent, the modern era of civil litigation was "born" in the 1930s (which also included *Erie v. Tompkins*, the New Deal, and the consequent constitutional revolution). Treating the low litigation rates of the depression and war era as the baseline is understandable, but it hardly proves that today's higher rates indicate a failure of the system born in the 1930s.

On the contrary, higher caseloads may be exacerbating any other trends toward restricted access. If the caseload is heavy, the docket clogged, and the

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22. See, e.g., Elliot, *supra* note 4; Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Sander, *supra* note 8.

23. See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 2-3 (1984).

24. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5-9 (1986).

25. See POSNER, *supra* note 20, at 57-70, 85.

26. See Galanter, *supra* note 24, at 5; Wayne McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 L. & SOC'Y REV. 823 (1980-81).

27. See DAVID THOMAS KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692* (1979); George B. Curtis, *The Colonial Country Court, Social Forum and Legislative Precedent, Accomack County, Virginia, 1633-1639*, 85 VA. MAG. HIST. & BIOGRAPHY 274 (1977).

28. See Galanter, *supra* note 24, at 6, n.12, citing Lester G. Seacat, *The Problem of Declining Litigation*, 8 U. KAN. CITY L. REV. 135 (1940). But see POSNER, *supra* note 20, at 83-86 (conceding the force of Galanter's observation but finding rapid growth of caseload since 1960 nonetheless a source for serious concern).

29. For extensive background on this judicial reform movement, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

procedure baroque or fractured, prospective litigants may be more inclined to opt for ADR or forbearance. Again, one can debate without proof whether this is the useful attrition of weak or small cases and the apt channeling to more appropriate forums or whether instead it only confirms the degree to which current access has become an impediment to vindication of legal rights.

Procedure has indeed become fractured. During the 1980s and 1990s there has occurred a mushrooming of local rules of court, standing orders for individual judges, and local Delay and Expense Reduction Plans as a result of the Civil Justice Reform Act of 1990,<sup>30</sup> and variants induced by the popularity of managerial judging.<sup>31</sup> Even if each variant standing alone provided access, the variety of additional and occasionally inconsistent requirements arguably impedes access by increasing confusion, complexity, expense, and uncertainty—exactng a further “tax” on disputants who pursue litigation.<sup>32</sup>

When the focus is shifted from the overall picture to individual procedural rules or groupings of rules, the impact remains unclear. However, it seems more likely that court access has been impeded rather than facilitated. For example, information gathering in civil cases was both increased through mandatory disclosure and been made more burdensome by mandatory disclosure.<sup>33</sup> Although disclosure arguably increased the information available to litigants, the 1993 Amendments also placed presumptive limits on party-controlled discovery.<sup>34</sup> The Supreme Court rejected the rationale of particularized pleading for cases other than fraud,<sup>35</sup> but some lower courts appear not to have received the message.<sup>36</sup> Congress

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30. Civil Justice Reform Act of 1990, Pub. L. No. 01-650, §§ 101-06, 104 Stat. 5089, 5089-98 (codified at various sections of 28 U.S.C., principally in §§ 471-482, 1367 (1994)).

31. See Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

32. See Robel, *supra* note 31; Tobias, *supra* note 31.

33. See 1993 Amendments to the Federal Civil Rules, particularly FED. R. CIV. P. 26(a)(1) (establishing required initial disclosures); FED. R. CIV. P. 26(a)(2) (establishing required disclosures in connection with expert testimony); FED. R. CIV. P. 26(a)(3) (requiring certain disclosures prior to trial); FED. R. CIV. P. 37(c) (establishing stringent sanctions for failure to observe disclosure requirements).

34. See FED. R. CIV. P. 30(a)(2)(A) (establishing presumptive limit of 10 oral depositions per side); FED. R. CIV. P. 33(a) (establishing presumptive limit of 33 interrogatories to each adverse party).

35. See *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993) (holding that FED. R. CIV. P. 8(a), which requires only a short and plain statement of claim, governs civil rights actions brought pursuant to 42 U.S.C. § 1983 and that FED. R. CIV. P. 9(b)'s requirement of particularized pleading is inapplicable to such cases).

36. See, e.g., *Jordan v. Jackson*, 15 F.3d 333, 340 (4th Cir. 1994) (Despite *Leatherman*, courts should be vigilant to “ferret out before trial unmeritorious suits against municipalities” but should rely on discovery controls and summary judgment more than particularized pleading.); *Feliciano v. Dubois*, 846 F. Supp. 1033 (D. Mass. 1994) (requiring particularized pleading of pro se prisoner complaint); *Chiron Corp. v. Abbott*

endorsed strict particularized pleading for fraud in the Private Securities Litigation Reform Act of 1995.<sup>37</sup>

In short, there has been a push-and-pull of expansion and contraction of jurisdiction and access during the past twenty years. Since the mid-1970s, however, the greater gravitational force has exerted itself in the direction of higher barriers to court access and full adjudication, particularly in federal court.

### A. Subject Matter Jurisdiction

Regarding subject matter jurisdiction per se, the modern record is mixed. In recent years, federal jurisdiction was expanded to include a number of matters not traditionally seen as matters for federal court.<sup>38</sup> Simultaneously, court decisions

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Labs., 156 F.R.D. 219 (D. Cal. 1994) (requiring heightened pleading in patent infringement case); *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993) (requiring particularized pleading by prisoner claiming he was muzzled in attempts to reach media with his story of selling marijuana to former vice-president Dan Quayle), *vacated*, 515 U.S. 321 (1995), *and overruled by* *Crawford-El v. Britton*, 93 F.3d 813 (1996). *See also* *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892 (D. Mass. 1991) (pre-*Leatherman* case requiring heightened pleading for CERCLA claim).

37. *See* Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.). *See also* Elliot J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675 (1996); John F. Olson, et al., *Pleading Reform, Plaintiff Qualification, and Discovery Stays Under the Reform Act*, 51 BUS. LAW. 1101 (1996).

Although the Act was promoted by the securities industry and businesses, particularly high technology companies, as an antidote to allegedly excessive securities fraud litigation, the Act, in practice, has not appeared to dramatically reduce claims, although it has tended to move claims from federal court toward state court and has required additional lawyering activity to keep claims alive. *See* Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998); Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year's Experience (A Statistical and Legal Analysis of Securities Fraud Litigation Under the Private Securities Litigation Reform Act)*, John M. Olin Program in Law and Economics Working Paper Series, Stanford Law School, Working Paper No. 140, Feb. 1997 (manuscript on file with author); U.S. Securities Exchange Commission Office of the General Counsel, *Report to the President and Congress On the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, SEC REP. (April 1997); Denise M. Martin, et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?*, Nov. 1996 (printed copy available by emailing GretchenPolk@nera.com, abstract available at <<http://www.nera.com/papers/security/welcome.html#p1>>) (manuscript on file with author).

38. *See* Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 175-76 (1995). Examples include the Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 101(b), 106 Stat. 3384 (codified at 18 U.S.C. § 2119 (1994)) (making car-jacking a federal crime); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010 (codified at 18 U.S.C. § 922(x)(2) (1994)) (establishing federal crime

have found concurrent jurisdiction for statutes that might have been interpreted as mandating exclusive federal jurisdiction.<sup>39</sup> Arguably, this is a net expansion of access to courts even if it has the potential for decreasing the total federal court caseload. In 1990, Congress enacted a statute of "supplemental jurisdiction" that provides for federal jurisdiction over an entire case alleging both federal question and state claims where the claims are "so related" that they "form part of the same controversy."<sup>40</sup> Thus, under the federal removal statute's general provisions, such cases may ordinarily be removed to federal court even if filed in state court because the case could have been filed in federal court in the first instance.<sup>41</sup> In addition, 1990 revisions to the Judicial Code permit removal of a case where there exists a separate and independent claim involving federal jurisdiction even if the case contains otherwise nonremovable state claims that made up the remainder of the lawsuit,<sup>42</sup> although this provision may be merely duplicative of the general removal provision in the wake of the expansively codified supplemental jurisdiction.<sup>43</sup> Currently, legislation has been suggested that would make any class action removable to federal court.<sup>44</sup>

However, upon closer examination, it may be that some of these actions expanding federal jurisdiction did little or nothing to expand the net access to

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for possessing weapons within 1000 feet of school; provision struck down in *United States v. Lopez*, 514 U.S. 549 (1995)).

39. See, e.g., *Donnelly v. Yellow Freight Sys.*, 494 U.S. 820 (1990) (holding state and federal courts have concurrent jurisdiction over Title VII job discrimination claims); *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding state and federal courts have concurrent jurisdiction over RICO claims).

40. See 28 U.S.C. § 1367(a) (1994).

41. See 28 U.S.C. § 1441(a) (1994); 16 MOORE'S FEDERAL PRACTICE § 107.14[6][b] (3d ed. 1998).

42. See 28 U.S.C. § 1441(c) (1994). Prior to the 1990 Amendment, this section of the removal statute had permitted removal from state to federal court of a "separate and independent" claim that, if sued upon alone, would have satisfied federal jurisdiction. Until 1990, removal of a federal legal claim was not possible if it was so intertwined with nonremovable state law claims as to constitute essentially the same claim. See *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). After 1990, the assertion of a valid federal claim made the entire action removable, no matter how many interrelated state claims were part of the case. See also MOORE'S FEDERAL PRACTICE, *supra* note 41, § 107.14[6][a]–[g].

43. See MOORE'S FEDERAL PRACTICE, *supra* note 41, § 107.14[6][a] & [b] (It is "questionable whether the amended Section 1441(c) will have any utility." *Id.* § 107.14[a].).

44. See Class Action Jurisdiction Act of 1998, a draft bill in circulation by various congressional proponents (copy on file with author). The prospective legislation would amend 28 U.S.C. § 1332 to add an additional provision making any class action eligible for original federal jurisdiction regardless of the underlying amount of individual claims or the nature of the substantive law invoked. Section 1441 of Title 28 (the removal statute) would be amended to permit removal of such actions even if complete diversity of citizenship between plaintiffs and defendants is lacking, which is usually the case because most classes involve citizens of more than one state. Section 1446 of the removal statute would also eliminate for such removals the ordinary requirement that all defendants join in the removal petition.

adjudication. Almost by definition, conferring federal jurisdiction does not open courts to matters previously barred from adjudication. Rather, expanding federal jurisdiction merely provides an additional forum. This may be important if state forums are hostile to federal interests. In addition, lawyers and litigants undoubtedly prefer to have a choice of forum whenever possible (which explains some of the popularity of diversity jurisdiction). But federal jurisdiction alone may not constitute an increase in access unless the already available state courts were inadequate, hostile to the claim, or unduly backlogged. With the exception of perhaps violence against women, where local enforcement is thought problematic to some degree,<sup>45</sup> none of the recent expansions in federal jurisdiction seems to meet the criteria for making additional federal jurisdiction equivalent to additional access to the overall judicial system. For example, if there were no federal court consideration of issues like guns-in-schools or car-jacking, we could be relatively confident that state authorities would nonetheless be taking action to prosecute these matters.

In addition, most of the efforts to expand federal jurisdiction have been on behalf of criminal matters. Although this has expanded "access" to courts for prosecutors and defendants, this is a quite different form of entry to the courts than takes place when a discrimination plaintiff or securities fraud victim may pursue relief that was previously unavailable or available only with some restrictions (for example, limited court jurisdiction, exhaustion of administrative remedies requirements, survival of extended motion practice). In addition, the increased burden on federal courts created by cases involving weapons, car-jacking, student loan collection and the like must—all other factors held constant—make federal courts less available for deciding matters of civil rights, securities fraud, or constitutional interpretation. Arguably, federal courts should be doing more of this latter type of litigation and little or none of the former. Thus, while federal jurisdiction may have expanded, access seems not to have expanded.

Along the way, there have also been some pure restrictions on federal subject matter jurisdiction or effective curtailments of access to federal courts. For example, the habeas corpus reforms of 1996 established a firm one-year statute of limitations for bringing such claims and limited a petitioner's ability to seek

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45. For example, local officials and jurists less trained in civil rights and discrimination litigation may take less seriously the complaints of battered women. On a local level, the alleged perpetrator may more likely have influence due to local prominence. For example, many were appalled to discover during the infamous trial of alleged wife-murderer O.J. Simpson that years earlier Nicole Brown Simpson had called police in response to physical abuse but that the star-struck attending officers did little more than ask the former football hero for his autograph. See Kathleen Parker, *Wife Beating Not Domestic, It's Violence*, ARIZ. REPUBLIC, Oct. 27, 1995, at B5; Ralph Fammalino & Jim Newton, *Simpson Had Long Fraternized With LAPD Officers; Nicole Simpson Felt Powerless as a Result, Prosecutors Say*, HOUSTON CHRON., Feb. 13, 1995, at A1. Although the federal system is hardly immune from these factors, it is thought more resistant to local favoritism and prejudice than state tribunals.

additional consideration after denial of a petition.<sup>46</sup> In another example, Congress in 1991 established a fixed statute of limitations for fraud claims of one year from the date of discovery of the facts constituting the violation and no more than three years from the date of the fraud<sup>47</sup> (and left it unchanged in the 1995 Securities Reform Act),<sup>48</sup> codifying a Supreme Court decision<sup>49</sup> adopting a limitations period more restrictive than that of many lower court decisions.<sup>50</sup>

In addition, whole classes of cases have been removed from the judicial system and placed within an administrative law regime for presentment and resolution. Examples are claims for Black Lung benefits,<sup>51</sup> injury from childhood vaccines,<sup>52</sup> swine flu vaccine injury,<sup>53</sup> atomic accident liability,<sup>54</sup> and AIDS contracted from contaminated blood.<sup>55</sup> Although administrative compensation

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46. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, §§ 101, 103 (1996) (codified as amended at 28 U.S.C.A. §§ 2244, 2254, 2255 (West Supp. 1998) and FED. R. CIV. P. 22).

47. See 15 U.S.C. § 78aa-1 (1994); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (striking down congressional attempt to avoid retroactive impact of *Lampf* for pending cases but leaving codification of *Lampf* time limit undisturbed). See also *infra* note 49 and accompanying text.

48. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified at various sections of 15 U.S.C.).

49. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (adopting 1 year/3 year rule).

50. Prior to *Lampf*, many federal courts had taken the view that the statute of limitations for federal securities claims was analogized to a state contract or fraud claim for statute of limitations purposes. In addition, a number of federal courts had determined that the statute of limitations did not begin to run until the allegedly fraudulent activity was discovered by the plaintiff. Under *Lampf*, the 3-year maximum limitations period begins to run when the fraudulent conduct is complete irrespective of discovery. See *id.* at 354, n. 1.

51. See 30 U.S.C. §§ 901-45 (1994).

52. See 42 U.S.C. § 300aa-1-aa-34 (1994).

53. The Swine Flu vaccine compensation program was established through amendment to the Federal Tort Claims Act ("FTCA") when insurers refused to provide insurance for a federally purchased and privately manufactured vaccine designed to fight a potential outbreak of swine flu perceived as catastrophic. Certain FTCA defenses were waived, but claimants were required to seek compensation outside the courts. When Guillian-Barre Syndrome was linked to the vaccine, some 4165 claims resulted. See generally Dan L. Burk & Barbara A. Boczar, *Biotechnology and Tort Liability: A Strategic Industry at Risk*, 55 U. PITT. L. REV. 791, 852-54 (1994).

54. See 42 U.S.C. § 2210-2210a (1994). The Price-Anderson Act is designed to limit a nuclear facility owner's liability for catastrophic events by capping damages at \$500 million. However, strict liability is imposed for liability caused by a nuclear incident. See *In re TMI [Three-Mile Island] Cases* Consol. II, 940 F.2d 832, 851-54 (3d Cir. 1991) (reviewing history of original legislation, intervening amendments, and current status of law).

55. See CAL. HEALTH & SAFETY CODE § 121270 (West 1996) (establishing victims' compensation fund).

schemes are not new,<sup>56</sup> they have received continued congressional support through amendment and are frequently cited as potential models for future reform.<sup>57</sup> However, the Black Lung benefits program proved to be significantly more expensive than anticipated, suggesting that reforms designed to replace adjudication, whatever their overall merit, may not be significantly less expensive than litigation.<sup>58</sup> The swine flu program is subject to similar concern.<sup>59</sup>

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56. The Black Lung Benefits law was enacted in 1972. The National Childhood Vaccine Act was enacted in 1986 in response to fears that materialized when all but two manufacturers stopped making polio vaccine in response to presumed litigation fears.

The Vaccine Injury Act established a no-fault compensation program funded by an excise tax on vaccines, with compensation limited to 150 injuries per year. Claimants have an election of remedies option of sorts and an exhaustion of remedies formula. A claimant under the program cannot bring suit until filing a petition for compensation from the trust fund established by the Act. Claims are assigned to a special master whose determinations are guided by an official table indicating the types of side reactions occasioned by particular vaccines. The compensation system provides for an award of otherwise unreimbursable medical costs, retraining costs, related costs, lost earning capacity, and pain and suffering damages capped at \$250,000. Death benefits are also capped at \$250,000. *See generally* Burk & Boczar, *supra* note 53, at 850–52.

57. *See id.* at 850 (citing the Vaccine Injury Act as a model for legislative alternatives to the tort system for other biotechnological industries and products).

58. In terms of the cost and value as a model for future reform, Burk and Boczar note that:

By late 1980, the BLDTF [Black Lung Disability Trust Fund] had a deficit of nearly one billion dollars. In order to revitalize the BLDTF, the Black Lung Benefits Amendments of 1981 doubled the dedicated excise tax on coal. This temporary increase has a termination date of either January 1, 2014, or the first January after 1981 when there is no balance of repayable advances made to the BLDTF.

Current observers suggest that the program is winding down, as fewer workers file claims and state workers' compensation programs begin to broaden compensation. The federal involvement experience in this area is generally not viewed as an unqualified success primarily because the black lung compensation benefit program has been plagued by overinclusive provisions resulting in huge numbers of claims, many of which are fraudulent and abusive....Accordingly, its value as a negative model of a tort compensation alternative may be as great or greater than its value as an affirmative model for future legislation.

*Id.* at 856–57.

59. Burk and Boczar explain:

The success of the Swine Flu Program is difficult to measure, as is its potential as a model for biotechnology liability legislation. The injuries caused by the swine flu vaccine were costly both in terms of dollars and of human suffering. On the benefits side, the program's benefits are in dispute because the expected epidemic did not materialize. Had the epidemic begun as feared, however, with no preventative measures in place, the cost in dollars and lives might have been much higher because no preventative program would have been in place had Congress not intervened.



Currently, Congress is considering legislation that will codify a settlement regime for resolution of claims by the states against the tobacco industry.<sup>60</sup> This resolution, if it occurs,<sup>61</sup> will clearly have its roots in litigation but will also represent legislative activity removing a matter from the courts by facilitating settlement in part because of the ability of Congress to provide global peace to defendants. But without doubt, the genesis of a potential national tobacco settlement was in the state courts.<sup>62</sup> Federal courts and the federal government largely spurned the opportunity to act in this area or were unable—through

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*Id.* at 853–54.

60. See Harry Berkowitz & Susan Benkelman, *Big Tobacco's Concessions/Industry to Pay \$368B, Issue Warnings That Smoking Kills*, NEWSDAY, June 21, 1997, at A4; John M. Broder, *The Tobacco Agreement: An Overview; Cigarette Makers in a \$368 Billion Accord To Curb Lawsuits and Curtail Marketing*, N.Y. TIMES, June 21, 1997, at A1.

61. See James Toedtman, *Tobacco Money Tug-of-War; Congress Leaps Into Federal, State Fray*, NEWSDAY, Dec. 9, 1997, at A17; House Commerce Committee Subcommittee on Health and the Environment, 104th Cong., Dec. 8, 1997, (testimony of Mississippi Attorney General Michael Moore); John M. Broder & Barry Meier, *Tobacco Deal in Jeopardy*, WILMINGTON STAR-NEWS (N.C.), Sept. 14, 1997, at 1A.

62. See, e.g., *Agency for Health Care Admin. v. Assoc. Indus. of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996) (holding statutory amendments designed to permit state action against tobacco companies for medicare and medicaid reimbursement upheld against constitutional challenge by industry trade association). State judicial systems received some help from the legislature, however, in that these and other actions against the tobacco industry were based on state laws authorizing the state to sue any tortfeasor that had caused the state to incur medicare or medicaid costs. See, e.g., FLA. STAT. ANN. § 409.910 (West 1998). These laws removed the assumption of risk defense as well as the contributory negligence defense that had historically plagued private plaintiffs. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (focusing primarily on the question of whether the federally required warning label on cigarettes preempts state tort claims but also reviewing the history of the case). But see *Carter v. Brown & Williamson*, No. 95-00934-CA (Fla. Cir. Ct., Aug. 9, 1996) (awarding \$750,000 to estate of smoker in first case where jury returned verdict for individual smoker).

But the legislative boost also underscored the utility of the judicial system for seeking justice against the economically and politically powerful. In Florida, the state legislature responded to the tobacco lobby's overtures to kill the legislation and voted to repeal. Florida Governor Lawton Chiles vetoed the repeal, a decision that stood by a margin of only two votes in the state Senate. Although unsuccessful in repealing the law, the legislature mandated that no state funds be paid to finance the Florida tobacco litigation. The action, which ultimately settled for more than \$300 billion, was funded by the consortium of 12 plaintiffs' personal injury lawyers selected by the Governor as the "Dream Team" to try the litigation. See Don Yeager, *Where There's Smoke...*, FLA. TREND, Oct. 1996, at 62 (describing background of litigation, activities of Chiles administration, and lawyers for state). See also Symposium, *The Florida Tobacco Litigation*, 25 FLA. ST. U. L. REV. 731, 731–890 (1998).

litigation—to force tobacco manufacturers to shoulder the full social costs of their products.<sup>63</sup>

Perhaps the most obvious limitation on jurisdiction is that resulting from the continued ratcheting up of the amount-in-controversy required to obtain federal jurisdiction on the basis of diversity of citizenship. The jurisdictional amount required to invoke diversity jurisdiction has risen from \$10,000 as late as 1988 to \$75,000 today and is likely to continue its incremental rise.<sup>64</sup> Some reasonably significant number of claims has thus been routed out of federal court and into state court or elsewhere, although the exact number is difficult or impossible to calculate absent a database of state court claims involving citizens of different states and controversies of less than \$75,000, which currently does not exist.

Overall, then, one is left with the sense that the net balance shows an increase in federal subject matter jurisdiction over a host of potentially high frequency matters but not large or highly problematic cases. These also appear not to be cases in which there is a compelling need for federal judicial expertise. Although, in some cases an additional federal forum has been provided, there is countervailing evidence suggesting that suing in federal court or elsewhere is more difficult than in the past.

### ***B. Personal Jurisdiction***

The question of judicial power over disputants is also part of the access question. If, for example, a claimant cannot hale into court the defendants necessary for resolution of the dispute, there is arguably a limitation on access. A contracting notion of personal jurisdiction does not eliminate access to the court. Some court somewhere is likely to have personal jurisdiction over a prospective defendant. However, constricted notions of personal jurisdictional reach mean that there will be fewer forums to which defendants are subject and that the existence of a forum for comprehensive litigation of a multiparty dispute is less likely.

On this dimension of access, the judicial system has again shown a mixed record. The Supreme Court decisions since the 1980s have largely restricted the reach of personal jurisdiction, usually reversing more expansive jurisdictional analyses of lower courts in order to render decision.<sup>65</sup> At the same time, however,

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63. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court certification of class of smoker plaintiffs). Traditional individual smoking claims were equally problematic as a means of either compensation or deterrence. See, e.g., *Cipollone*, 505 U.S. at 509–12 (describing background of case). The *Cipollone* action was commenced in 1983 and resulted in 28 judicial opinions, including the important Supreme Court decision. The resulting verdict of \$400,000 was considerably less than the expense of prosecuting the claim.

64. See 28 U.S.C. § 1332 (1996). See POSNER, *supra* note 20, at 60–61 (noting that the number of diversity cases has declined after the jurisdictional amount was raised).

65. See, e.g., *Asahi Metal Industry Co., v. Superior Court*, 480 U.S. 102 (1987) (holding no jurisdiction over Japanese tire valve maker in third-party claim brought by Taiwanese motorcycle manufacturer sued by American plaintiff in California); *World-Wide*

the Civil Rules have provided for more widespread service of process, which can as a practical matter result in more expansive use of the different judicial forums. Rule 4 also now provides for personal jurisdiction of a defendant who is not subject to any one jurisdiction on the basis of a minimum contacts test.<sup>66</sup> But Rule 4's reach of course remains subject to the Constitution as interpreted by the courts. Amendments to the federal venue statute in 1990 also make venue appropriate over corporations wherever the corporate entity would be subject to personal jurisdiction.<sup>67</sup> In addition, a number of important precedents have continued to endorse a broad reach of personal jurisdiction, particularly in contract claims or where an alleged tort involved volitional conduct despite a relatively small tangible contact with the asserted forum state.<sup>68</sup> In addition, "slapping" the transient defendant with a summons and complaint has continued to satisfy the Supreme Court's Due Process calculus.<sup>69</sup>

On the whole, the personal jurisdiction-expanding changes in the rules and statutes would appear to roughly cancel the decisions of the past twenty years. On the personal jurisdictional dimension, court access remains relatively unchanged. But the personal and subject matter jurisdiction law granting seemingly broad adjudicative actions in bipolar cases get messy when transplanted to more complex matters.

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*Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding no personal jurisdiction in Oklahoma over New York local and Northeastern regional auto dealers); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (holding no California jurisdiction over New York father purchasing ticket to send child to California to live with estranged wife); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding insufficient minimum contact to permit exercise of quasi-in-rem jurisdiction over shares of corporate stock deemed constructively in Delaware and "seized" when plaintiff, defendant, and corporation all reside out of state).

66. See FED. R. CIV. P. 4(k)(2):

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

67. See 28 U.S.C. § 1391(c) (1994) ("[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.").

68. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (upholding personal jurisdiction of Florida courts over Michigan resident with negligible physical contact with the state but who contracted with Florida plaintiff in franchise agreement governed by Florida law); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (holding New Hampshire court had personal jurisdiction over Ohio publisher with modest percentage of magazine's circulation in New Hampshire); *Calder v. Jones*, 465 U.S. 783 (1984) (same result for California forum and Florida publisher).

69. See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding physical service of process during isolated visit establishes California court's personal jurisdiction over a New Jersey resident).

*C. Acceptance of the Large, Multiparty, Multijurisdictional Case*

Related to questions of subject matter and personal jurisdiction is the degree to which courts (state or federal) can process and decide disputes involving multiple parties, multiple jurisdictions, and generally complex claims (defined broadly)<sup>70</sup> that pose issues of applicable law, nature and scope of relief, continuing supervision, and enforcement of compliance.

The recent record here again is mixed. The initial resistance to adjudicating tort claims via class action has subsided, resulting in a new subspecies of complex litigation that, thirty years ago, was "avoided" by requiring such claims to be individual state and federal court actions.<sup>71</sup> This new genre of vibrant complex cases continues to produce problems and inconsistent results. For example, there has been a certified class of recipients of silicon breast implants,<sup>72</sup>

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70. See Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781 (1998).

71. Although it is impossible to be precise given the relative paucity of reported opinions denying class certification during the 1966–1986 period and the relatively small computerized case database existing prior to the 1980s, there is no doubt that courts were less receptive to class action mass torts prior to the 1980s. The Advisory Committee Note to the 1966 Amendment to FED. R. CIV. P. 23 specifically characterized mass tort claims as usually too individualized and insufficiently common in nature to merit class action treatment. See United States Judicial Conference Advisory Committee on the Federal Civil Rules, Committee Note to 1966 Amendment:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

A stroke of supreme irony that underscores the profession's drift away from this sentiment is the Committee Note's citation of an article by Judge Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960). In the 1980s and 1990s, Judge Weinstein presided over the Agent Orange class action litigation and became a strong advocate of more classwide resolution of tort claims. See, e.g., PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986) (describing in detail Weinstein's activist role in keeping the class suit together and moving toward settlement); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. DISP. RESOL. 241 (1996) (reviewing author's opinions and writings in favor of greater aggregate disposition of mass tort claims) [hereinafter Weinstein, *Benefits*].

In addition, it should be noted that while a "mass accident" such as a bus, airplane, or train crash may have more individual questions of causation and damage predominating over the common questions of duty and negligence, the modern mass tort cases tend to be product liability actions in which the common questions of defective design and failure to warn may more readily predominate over questions of individual use and damage.

72. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.), No. CV94-P-11558-S, 1994 WL 578353 (D. Ala. Sept. 1, 1994).

but similar attempts to obtain class action treatment for tobacco claims have been rejected by the courts.<sup>73</sup> Even where class treatment is accorded, problems exist in applying differing applicable law that may vary between class members or may tempt states to unreasonably favor forum state law in seeking uniformity.<sup>74</sup> The choice of law problems are sometimes considered so problematic as to force denial of class certification.<sup>75</sup> Although efforts such as the ALI's *Complex Litigation Project*<sup>76</sup> have attempted to articulate means of processing such cases, there has been no substantive legal change to give courts greater discretion and power over such matters. Although no change is, of course, no change, the practical impact of retaining the status quo may be to shrink the role of courts to the extent that a greater percentage of today's cases involve actual or prospective multiparty, multistate, complex, class action matters.

#### *D. Judicial Capacity as an Access Question*

Although my focus in this paper is largely doctrinal—what courts may do in light of the legal system in which courts function—access to a significant degree may be a matter of logistics. *Ceteris paribus*, access to adjudication is effectively curtailed if there are not enough judges or if those judges are saddled with inadequate facilities, insufficient staffing, poor technical support, or other deficiencies of the infrastructure of adjudication.

In today's current regime where judicial vacancies—particularly at the federal level—remain unfilled for extended periods of time, the practical impact is reduced access and reduced adjudicative capacity.<sup>77</sup> One might add to this list of logistical or practical constrictions on access the degree to which filling vacancies or attracting the most able judges and staff are discouraged by the pay and benefits of the judiciary or the increasing microscope—both personal and political—under which nominees are viewed.

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73. See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Barnes v. American Tobacco Co.*, No. 96-5903, 1997 U.S. Dist. LEXIS 16181 (D. Pa. Oct. 17, 1997).

74. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (remanding class action involving natural gas royalties of approximately 33,000 plaintiffs located in all 50 states and some foreign countries to determine if need to apply differing law precluded certification); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 64-66 (1986) (suggesting that "rough justice" of selecting federal common law or refraining from finding conflict of laws in close cases may be better than disaggregating claims).

75. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (finding class action unmanageable because of need to apply differing substantive law to different class members rather than adopting "esperanto" of generic tort law). *But see* Weinstein, *Benefits*, *supra* note 71, at 268-69 (disagreeing and finding that some "fudging" of the state law-*Erie* problem may be necessary to reach "satisfactory resolution" of complex disputes).

76. See AMERICAN LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994).

77. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON FEDERAL COURTS, *REPORT ON JUDICIAL VACANCIES IN THE SECOND CIRCUIT* (Nov. 1997).

The 1980s and 1990s have, by these measures, been decades of discouragement. Judicial salaries have declined in real terms during much of the twentieth century.<sup>78</sup> Staff and quartermaster support has grown but not nearly so greatly as caseload.<sup>79</sup> Nominees are opposed for reasons many might regard as irrelevant or picayune, such as hiring and compensation of domestic help, club memberships, employment prior to a legal career (recall the titters that accompanied the revelation that federal trial judge and Attorney General candidate Kimba Wood once worked at the gaming tables of a Playboy casino), or having had minimal involvement on one side of a controversial issue.<sup>80</sup> In addition, political posturing and partisanship has resulted in long delays or rejection for even the most qualified of nominees.<sup>81</sup> Most of all, there are the vacancies, many and unfilled for months or even years on end.

Coupled with the constriction created by political, bureaucratic, and budgetary pressures, there also exists a significant movement in favor of limiting the size of the federal judiciary. Proponents of limitation argue that federal courts—and judgeships—need to remain limited not only in jurisdiction but in size.

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78. See POSNER, *supra* note 20, at 21–27. “Despite the big pay raise that all federal judges received in 1991, a glance at the constant-dollars column reveals that Supreme Court justices’ salaries, net of inflation, are little more than they were between 1900 and 1940 and actually lower than they were in 1913.” *Id.* at 21. See also *id.* at 37–39 (noting state court judges overall had worse salary situation than federal judges).

79. See *id.* at 53–64.

80. For example, Supreme Court Justice Stephen Breyer was not nominated during the first Court vacancy of the Clinton Presidency (Ruth Bader Ginsburg was appointed to that vacancy) in part because he apparently had not paid social security wage taxes to a part-time housekeeper. See Richard L. Berke, *Judge’s Friends Try To Save Candidacy for High Court*, N.Y. TIMES, June 14, 1993, at A11. This mini-blemish became more of an issue because the nomination for Attorney General of Aetna general counsel Zoe Baird was derailed in part because of nonpayment of social security tax to an illegal alien babysitter she employed, an event that stopped a similar possible nomination of Judge Kimba Wood (N.Y.) because she had used an illegal alien babysitter, albeit legally. See *id.*

A more defensible inquiry, but one that verges on the hypercritical, is the recent phenomenon of refusing to confirm judicial nominees who belong to restrictive private clubs. See Bob Cohn, *There Goes the Judge*, NEWSWEEK, Apr. 22, 1991, at 31 (describing the candidacy killing impact of membership in a restrictive club on 11th Circuit nominee Kenneth L. Ryskamp, a federal judge in the Southern District of Florida).

81. See Marcia Coyle, *Confirmations—At Last? The Stalemate Over Appointing Federal Judges May Finally Be Over*, NAT’L L.J., Mar. 2, 1998, at A1 (describing Republican opposition, three-year delay without confirmation of Ninth Circuit nominee University of California Professor William Fletcher, and strained invocation of anti-nepotism law as part of opposition in view of his mother, Betty Fletcher’s seat on Ninth Circuit; not coincidentally, both Fetters are regarded as liberals) (but also reporting predicted Senate improvement on confirmation). Accord Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1223–24 (1996). See also W. John Moore, *From Shoo-in to Shutout?*, NAT’L J., Dec. 17, 1994, at 2 (describing withdrawal of Georgetown Law Professor Peter Edelman as nominee for D.C. Circuit due to GOP opposition to his perceived liberalism).

Second Circuit Judge Jon Newman has argued for a maximum of 1,000 federal judges.<sup>82</sup> Needless to say, this proposal is controversial.<sup>83</sup> But it has its adherents of stature, such as Judge Newman himself, which alone suggests that it enjoys and will enjoy a substantial following. Other noted jurists and commentators such as Chief Justice Rehnquist and Justice Scalia have argued for limited jurisdiction rather than limiting the size of the federal judicial core.<sup>84</sup>

Taken together, these proposals for limited scope and capacity of the federal courts are, of course, proposals for limited access to federal courts. The success of this movement would not necessarily shrink national adjudicative capacity generally. Some federal cases would presumptively shift to state court, and remaining federal cases could perhaps be more expeditiously resolved by the elite corps of judicial specialists implicitly envisioned by Justices Rehnquist and Scalia and Judge Newman. But to the extent that greater efficiencies do not obtain or state judicial systems do not increase capacity to meet demands created by limitations on the federal forum, a net decrease in access to the courts would occur.

But the vision of the more limited, specialized, elite federal judiciary remains, to some extent, an idealized goal, as its proponents would be quick to note. During the past two or three decades, federal jurisdiction per se has largely expanded rather than contracted, as has the size of the federal Article III bench, notwithstanding the confirmation delays that have characterized the past decade. There has also been a substantial increase in the Article I federal bench of Magistrate Judges and Bankruptcy Judges. At the same time, the federal bench may have become less attractive to prominent lawyers, perhaps adding fuel to Judge Newman's argument. But at this juncture, the available information seems to suggest that any difficulty recruiting Article III federal judges stems not from any pedestrian quality to the work but more from matters of pay, working conditions, uncertainty over confirmation,<sup>85</sup> and the chilling effect of potential microscopic examination of the nominee.

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82. See Jon O. Newman, *Determining the Size of the Federal Judiciary Requires More than a Mission Statement*, 27 CONN. L. REV. 865 (1995) [hereinafter Newman, *Mission Statement*]; Jon O. Newman, *1,000 Judges—The Limit for an Effective Judiciary*, 76 JUDICATURE 187 (1993) [hereinafter Newman, *1,000 Judges*].

83. See, e.g., Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J., Jan. 1993, at 52 (registering disagreement with Newman proposal and arguing for substantial increase in number of judges).

84. Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990) (reviewing views of Justices Rehnquist, Scalia and others and disagreeing with the philosophy of stringent limitations on the scope and size of the federal judiciary).

85. See Coyle, *supra* note 81, at A1 (describing the disgruntlement of judicial nominee Michael Schattman, who declined to run for re-election as a Texas state court judge in order to avoid conflicts of interest and then was kept waiting for confirmation for more than two years, experiencing considerable difficulty practicing law while in limbo of pending but uncertain nomination).

***E. Judicial Encouragement of Exit: The Problematic Side of Modern Alternative Dispute Resolution***

Access to the courts can also be constricted by the actions of those outside the courts. The most obvious and troubling example is the case of and the industry-wide imposition of arbitration agreements. Prior to the 1980s, the Federal Arbitration Act had a restricted scope and was thought by many (perhaps most) observers as a matter governing enforceability of commercial contract arbitration clauses and enforcement procedure in federal actions only.<sup>86</sup> Beginning in 1984, the Act was deemed substantive federal law by the Supreme Court, controlling in both state and federal courts.<sup>87</sup> In addition, the courts broadly enforced arbitration clauses without regard to the context of the situation, the consent of the parties, state law, or federal statutes and public policy.<sup>88</sup> Even where "contracting" for arbitration is required as a condition of employment or membership in an organization, arbitration has been required.<sup>89</sup>

In short, arbitration clauses have been given far greater reach and enforcement since the mid-1980s, effectively restricting access to the courts by establishing arbitration as a privatized means by which actors themselves can shrink the reach of courts.<sup>90</sup> This judicially created supremacy of arbitrability would seemingly apply to hybridized forms of dispute resolution. In addition, contracts restricting access to the courts but not involving arbitrability also appear enforceable,<sup>91</sup> adding an additional means of privatized jurisdictional curtailment.

***F. Playing Disfavorites: Judicial Receptiveness or Resistance to Certain Types of Claims***

In theory—at least the theory of high school civics—justice is sufficiently blind that the scales are not tipped for or against particular litigants or particular

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86. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (holding Federal Arbitration Act inapplicable in Vermont state court proceeding; implying Federal Act procedural statute governing federal court cases).

87. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

88. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (enforcing arbitration clause in franchise agreement notwithstanding state law requiring sufficient disclosure of arbitration agreements for enforceability).

89. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (requiring arbitration of a stockbroker's age discrimination claim pursuant to a signed agreement required as a condition of his working in the brokerage industry).

90. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* (1992); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996).

91. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing a forum selection clause in small print on the back of a cruiseship ticket).



types of cases. More sophisticated learning instructs that some types of cases are indeed disfavored, defamation actions being the archetypical example.<sup>92</sup>

One can argue that anything other than evenhanded treatment of claims is wrong and should be eliminated, but at least the standard disfavored claims are subject to reasonably strong arguments that they deserve their second-echelon status. For example, defamation actions chill free expression, a constitutional value "codified" in the First Amendment. Malicious prosecution actions also tend to chill the citizen's right to approach courts for redress.

In relatively recent times, however, other actions have come to be unfavorably treated by ostensibly neutral rules of procedure. In addition, the rules have been made less neutral. The most controversial example today is Federal Rule of Civil Procedure 9(b), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."<sup>93</sup> Rule 9(b) was of course an original part of the 1938 Federal Civil Rules. For decades it was given an essentially non-onerous interpretation requiring that parties pleading fraud allege "something more" than "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>94</sup> Beginning in the mid-1970s (not coincidentally in the midst of the posited counter-revolution against liberal access to the courts), decisional law increasingly required more detail and specificity to satisfy the particularity requirement.<sup>95</sup> The trend was particularly strong in the Second Circuit, site of many securities and corporate fraud claims.<sup>96</sup>

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92. Another historically disfavored claim is malicious prosecution. In the modern era, courts have treated civil rights claims, securities claims, antitrust matters, and civil actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO") as though they were disfavored actions, even though the accepted interpretative indicators suggest that these claims are favored rather than disfavored as a matter of public policy. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 471-73 (1986) (disapproving disfavored treatment and imposition of higher pleading for all but historically disfavored claims such as defamation and abuse of process). Implied rights of actions (*Bivens* actions) and prisoner civil rights claims can also be seen as disfavored by modern courts. See Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 CATH. U. L. REV. 59, 73-75, 79-82 (1994).

93. FED. R. CIV. P. 9(b).

94. FED. R. CIV. P. 8(b). See, e.g., *In re GlenFed, Inc.*, 42 F.3d 1541 (9th Cir. 1994) (en banc); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975) *overruled on other grounds* by *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990); *Denny v. Carey*, 72 F.R.D. 574 (D. Pa. 1976).

95. See Marcus, *supra* note 92; William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959 (1987) (observing the increased use of 9(b) to dismiss complaints during 1980s). See also *infra* note 97 (reviewing number of reported Rule 9(b) cases by decade and finding significant upsurge during 1980s).

96. See, e.g., *Ross v. A.H. Robins Co. Inc.*, 607 F.2d 545 (2d Cir. 1979); *Denny v. Barber*, 576 F.2d 465, 468-70 (2d Cir. 1978). See also Marcus, *supra* note 92; David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980); Note, *Pleading Securities Fraud with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432 (1984).

The more stringent approach to particularized pleading under 9(b) acquired additional steam culminating in the Private Securities Litigation Reform Act of 1995, which statutorily adopted the Second Circuit approach to securities claims, effectively pre-empting the decisional law of other courts interpreting Rule 9(b).<sup>97</sup> That movement, and the tendency of some courts to interpret the 1995 Act as something beyond the stringency required under the Second Circuit's 9(b) jurisprudence, has affected a participant in this Symposium, William Lerach, Esq., in the widely publicized *Silicon Graphics* case.<sup>98</sup> Although perhaps not as committed to broad-based pleading as Mr. Lerach, I also must register disagreement with the *Silicon Graphics* holding. Beyond that case and the 1995 Securities Reform Act, I having considerable reservation about the efficacy and utility of Rule 9(b) and particularized pleading altogether.<sup>99</sup>

A substantial drawback of Rule 9(b) is its apparent tendency to cast penumbras upon claims other than those involving fraud or mistake. As Rick Marcus and other scholars have chronicled, "fact pleading" made something of a comeback during the 1970s and 1980s<sup>100</sup> even though the Civil Rules were designed to establish a regime of "notice pleading." Courts dismissed claims for insufficient factual detail or "particularity" even though the claims did not involve fraud. The targets of this expanded, *sub silentio* approach were job discrimination and civil rights, and antitrust and securities claims (even those involving mismanagement or breach of fiduciary duty rather than fraud).<sup>101</sup>

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97. See 15 U.S.C. § 78u-4(b) (Supp. 1995) (Pub. L. No. 104-67, 109 Stat. 737 § 21D(b) (1995)). A review of the annotations to Rule 9 of the U.S.C.A. reflects only 26 reported Rule 9(b) cases during the entire 1960s. By contrast, the 1970s saw 74 reported 9(b) cases, with 354 cases in the 1980s and 627 cases during the as yet uncompleted 1990s. See U.S.C.A. § 78u-4 (West 1995, Supp. 1998). Without doubt, Rule 9(b) practice has been a growth industry.

98. See *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746 (D. Cal. 1997) (dismissing securities fraud claim for failure to plead with sufficient particularity, requiring the plaintiff's counsel to set forth all sources of information, even confidential informants, to support allegations of the complaint if the case is to go forward); D.M. Osborne, *Getting Back at Lerach*, AM. LAWYER, Sept. 1997, at 48, 49-50 (noting that the district court opinion in *Silicon Graphics*, if affirmed, could dramatically raise barriers to securities fraud claims beyond the original intent of 1995 Securities Reform Act).

99. My misgivings about Rule 9(b)'s general efficacy are shared by other scholars. See, e.g., Blum, *supra* note 92 (questioning the utility of any heightened pleading standard for any type of case); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990) (same); Richman et al., *supra* note 95 (criticizing particularized pleading requirements generally). But see Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143 (1985) (expressing more sympathy for Rule 9(b) than other commentators).

100. See Marcus, *supra* note 92, at 444-51. See also sources cited *supra* note 99.

101. See Marcus, *supra* note 92, at 470-80. See also *supra* notes 85-92 and accompanying text.

In effect, these matters became a new category of disfavored claims—but without any justification. In fact, a strong argument can be made that these matters enjoyed favored status in the law, particularly job discrimination and civil rights actions. Viewed from any reasonable perspective, the heightened pleading standards applied by many courts appear to be only the raw exercise of substantive political preferences by judges who are supposed to act neutrally and in accordance with the written civil rules. Access to adjudication was reduced or limited based on the nature of the claim and individual judicial hostility.

Fortunately, the Supreme Court's 1993 *Leatherman* decision<sup>102</sup> unanimously rejected this ad hoc upping the ante for civil rights claims. The Court held that such claims are governed by Rule 8(a) and thus require no special pleading beyond the short and plain statement of the claims sufficient to notify defendants of the nature of the claim and to show that the plaintiff would have a right to relief if its pleaded facts were true.<sup>103</sup> At this juncture, a reasonable observer might have expected *Leatherman* to entomb the judiciary's effort to expand the reach of particularized pleading. But post-*Leatherman*, one continues to find such decisions requiring particularized pleading of claims involving RICO, antitrust, prisoners' claims, constitutional rights, and civil rights actions generally.<sup>104</sup> In other words, courts are still playing favorites.

Subsequently, the legislature and the executive have also played favorites by codifying the more stringent line of Rule 9(b) cases in the 1995 Securities Act.<sup>105</sup> While legislative actions of this sort may solve the legitimacy problem created when courts alone begin ratcheting up pleading standards beyond those provided for in Rule 9(b), it nevertheless remains a reduction in access to the courts for certain sorts of claims.

In a manner similar to the Rule 9 jurisprudence of some courts and the thrust of the 1995 Securities Reform Act, there has also occurred a contraction of shareholder's derivative suits due in part to both judicial resistance to such claims and the imposition of an additional procedural barrier to such claims. Unlike the procedural barriers discussed in the following subsection, this procedural requirement is unique to the derivative suit. A derivative suit is one in which a suit is brought by shareholders on behalf of and for the direct benefit of the corporation to redress harm to the corporation and is normally brought by a disgruntled shareholder against the incumbent leadership of the company.<sup>106</sup> Although the law has long permitted such suits, courts since the 1960s have increasingly permitted a

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102. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

103. *Id.* at 168.

104. See Blum, *supra* note 92, at 80–82 (finding lower courts after *Leatherman* continuing to apply heightened pleading standards of Rule 9(b) to cases that do not involve fraud).

105. See 15 U.S.C. § 78u–4 (Supp. 1995).

106. See George W. Dent, *The Power of Directors To Terminate Shareholder Derivative Litigation: The Death of the Derivative Suit?*, 75 NW. U. L. REV. 96, 97–98 (1980).

board of directors, a special litigation committee of disinterested directors, or others to require dismissal of such litigation if, in the opinion of the board, continued prosecution of the suit is not in the corporation's "best interests."<sup>107</sup> Even when the voting directors are not the alleged wrongdoers in the litigation and even when respected outsiders are chosen by the incumbent management under attack, this device has more than a little potential for whitewashing any corporate wrongdoing and discouraging prosecution of such claims.<sup>108</sup> This part of legal doctrine evolving during the past 30 years, whatever its collective pros and cons, appears to have dramatically curtailed the number of shareholder derivative suits being filed.<sup>109</sup>

### *G. Procedural Barriers to Full Adjudication or Adjudication on the Merits*

Along with the current tendency toward expanding the number of disfavored claims, there has been a general trend favoring pre-trial disposition of cases rather than adjudication at trial. Examples of this trend include the seemingly increasing use and success of Rule 12 motions to dismiss and Rule 56 summary judgment motions.<sup>110</sup> In addition, the 1993 Amendments to the Federal Civil Rules established disclosure requirements and discovery duties that can have the practical effect of making it more burdensome to pursue a claim through litigation.<sup>111</sup> Changes like the 1993 discovery amendments may be necessary for more accurate adjudication or fairness. For example, requiring more detailed expert witness

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107. *Id.* at 97-109.

108. *Id.* at 144-47. Dent also argues:

If directors and officers know that any charge of wrongdoing on their part will be weighed by their colleagues on the board and not by a court with the assistance of an aggressive attorney for the plaintiffs, the temptation of directors and officers to line their pockets at the expense of the shareholders will be greatly increased, and some will succumb to the temptation.

*Id.* at 144.

109. See, e.g., Annotations to FED. R. CIV. P. Rule 23.1 (requiring security for expenses in derivative actions).

110. See MOORE'S FEDERAL PRACTICE, *supra* note 16, § 56.03; EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1.05 (1994) (finding summary judgment considerably more likely to be obtained due to favorable Supreme Court decisions of 1986); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Stempel, *Distorted Mirror*, *supra* note 16 (expanding the use of summary judgment after a trio of 1986 Supreme Court decisions alters balance of power between parties in pretrial litigation by imposing more costs on plaintiffs, who bear burden of persuasion at trial).

111. See 1993 Amendments to FED. R. CIV. P. 26 (requiring initial disclosures, requiring more detailed pretrial disclosures after discovery and before trial and more detailed expert witness reports as a condition of discovery and generally creating more opportunities for conducting conferences related to discovery and expert witness discovery in general).

reports<sup>112</sup> should reduce the degree to which charlatan experts “bamboozle” opposing counsel, the court, or the jury by surprise and jargon, but this reform also makes it more expensive to use an expert, potentially decreasing access to adjudication, at least at the margin.

Although one noted scholar has suggested that the Rule 12(b)(6) motion to dismiss for failure to state a claim was “last effectively used during the McKinley Administration,”<sup>113</sup> the actual track record of efforts to obtain dismissal based on the complaint or the pleadings alone is quite a bit more successful in practice.<sup>114</sup> Although the available empirical data is not comprehensive, the evidence suggests that summary judgment has similarly been accorded a bum rap as to efficacy, particularly since the 1986 Supreme Court “trilogy” of summary judgment cases, a fact that should hardly surprise in light of the Court’s obvious goal of encouraging greater use of summary judgment.<sup>115</sup>

Whether substantial and increasing use of Rule 12 and Rule 56 is wise is a question capable of itself consuming an entire volume of a law review. My point is merely to note that these factors work to reduce full adjudication to litigants. Where the Rule 12 motion is granted, particularly where the pleading defect is one of formality rather than legality, a case is either eliminated or another hurdle placed before the claimant. A grant of summary judgment normally occurs after some pretrial fact development and constitutes a judgment on the merits, but it is considerably less informative adjudication than full-dress trial. Consequently, these developments represent a trend away from full-fledged adjudication on the merits even if this may be a practical necessity if courts are to be accessible and affordable for other litigants.

The 1993 Civil Rules Amendments established a set of mandatory initial disclosures that must be made by litigants.<sup>116</sup> In addition, the Rules now require mandatory expert witness disclosures and mandatory pretrial disclosures,<sup>117</sup> with

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112. See FED. R. CIV. P. 26(a)(2) (requiring detailed expert witness reports as a condition of proffering expert testimony at trial). Although many counsel stipulate to depose one another’s experts rather than insisting on reports (for which the proffering counsel normally compensates the expert for his or her time), counsel need not so stipulate. This can enable the attorney or party with greater resources to insist upon following Rule 26(a)(2) to the letter where this serves to increase the opposing party’s expenses and make it more amenable to an early settlement.

113. See ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 7–8 (1984).

114. 2 MOORE’S FEDERAL PRACTICE § 12.34[1][b] (3d ed. 1997) (Despite liberality of pleading and judicial hesitancy to dismiss claim without discovery, “[l]iberal construction has its limits,” and the Rule 12(b)(6) motion remains an effective vehicle for eliminating legally insufficient or factually unsupported claims. *Id.*).

115. See JOE S. CECIL & C.R. DOUGLAS, *SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS* (1987) (but also noting increase in use and grant of summary judgment motions prior to 1986 Supreme Court trilogy).

116. See FED. R. CIV. P. 26(a).

117. See FED. R. CIV. P. 26 (a)(1) & 26(a)(2).

substantial sanctions for noncompliance.<sup>118</sup> The disclosure rules may be seen as something of a two-edged sword. On one hand, information must be produced by one's opponents, which tends to make information more accessible. On the other hand, the disclosure regime interjects one more process that must be navigated by litigants. This latter concern may be particularly significant to the extent that a litigant is required to expend effort on disclosure but normally receives from disclosure nothing more than it received (prior to December 1, 1993) in response to a first wave of baseline discovery requests such as interrogatories and document production requests. The expert witness reporting provisions are quite stringent as compared to past practice.<sup>119</sup> The pretrial disclosure provisions now tend to move up the date by which a litigant must deliver to the opponent and the court the information formerly required at the final pretrial conference historically held on the eve of trial.

All of this required disclosure may be a useful advance for civil litigation. However, its effect is, at least in part, to discourage litigation and make it more expensive, a factor that may weigh disparately on the antagonists and to some extent be access-constricting.

The December 1993 Amendment also codified substantial changes to Rule 11, which had been substantially modified in the 1983 Amendment. The 1983 version of Rule 11 was marked by a decade of controversy. Enacted to strengthen the longstanding civil rule against frivolous litigation, the 1983 Amendment adopted an objective standard making it sanctionable whenever a court paper was not reasonably investigated prior to filing so that it was "well grounded" in fact, "warranted by existing law," or a good faith law reform argument. This shift from a subjective standard of "good faith" filing produced an avalanche of Rule 11 motions and sanctioning decisions, in turn creating the attorney backlash and substantial academic and judicial concern that spawned the 1993 Amendment. The current version of Rule 11 retains the objective standard and alters some of the nomenclature for defining a frivolous paper, but its main impact is in its de-emphasis on recovery of counsel fees by the Rule 11 movant and in the so-called "safe harbor" provision that allows a Rule 11 respondent three weeks to withdraw a challenged paper or portion of a paper without the motion being filed with the court.<sup>120</sup> Since the 1993 Amendment, Rule 11 practice has slowed to a trickle.<sup>121</sup>

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118. See FED. R. CIV. P. 37(c) (failure to disclose precludes use of evidence at trial as well as enabling court to sanction counsel or party).

119. Current FED. R. CIV. P. 26(a)(2) requires an extensive expert witness report listing the factual bases for the opinion and a detailed description of the opinion, as well as extensive background on the expert witness. Former FED. R. CIV. P. 26 permitted opposing counsel to propound general interrogatories regarding expert background and the general facts and bases of the expert's opinion.

120. On the distinctions between the 1983 version of FED. R. CIV. P. 11 and the 1993 version of FED. R. CIV. P. 11, see generally 2 MOORE'S FEDERAL PRACTICE §§ 11.02, 11.03 (3d ed. 1998).

121. *Id.* at § 11 App.101[1] (explaining that the effect of the 1993 Amendment has been to reduce Rule 11 practice).

Nonetheless, as compared with the pre-1983 form of Rule 11 (which had been unchanged since the original 1938 Rules), both the 1983 Amendment and the 1993 Amendment represent increased procedural hurdles and risk for litigants, resulting in a net shrinkage of access to courts.<sup>122</sup>

In addition, another procedural/logistical trait of the modern era has impeded access for full court consideration of claims. Increasingly, appellate review of trial court decisions has arguably been less searching and less thorough.<sup>123</sup> During the past twenty years, the percentage of matters affirmed on appeal has increased, and the number of cases affirmed without opinion has increased more markedly.<sup>124</sup> In addition, appellate decisions have embraced an affirmance-oriented view of the "clearly erroneous" standard of review in assessing district court findings of fact and a similar view of the "abuse of discretion" standard utilized for trial court matters involving pleading amendments, sanctions, discovery prerogatives, and other matters.<sup>125</sup> In addition, appellate courts have taken a view more deferential to trial courts as to what constitutes "harmless error."<sup>126</sup>

Taken together, these doctrinal changes make searching appellate review or reversal less likely. In effect, for most litigants the trial stage is the practical end of the line for their dispute. As with other aspects of access evolution, this development is not necessarily bad. To the extent that trial courts reach correct results, the efficiency gains of more deferential review may outweigh any marginally greater accuracy that obtains from the more searching quality control of appellate scrutiny. However, this trend toward reduced review clearly limits a litigant's access to full-fledged adjudicatory assessment of a dispute.

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122. *Id.* at §§ 11.01, 11.02, 11 App.01 (discussing the original 1938 version of Rule 11, which required only a good faith belief in the merits of claim or assertion).

123. *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996); Richard B. Saphire & Michael E. Solomine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351 (1995); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985).

124. *See* RICHARD A. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 1008-90 (2d ed. 1995) (presenting key court cases of past 30 years and concluding that right to appeal, particularly interlocutory appeal, is more limited during the 1990s than was case in the 1970s).

125. *See* *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (interpreting FED. R. CIV. P. 52(a) as requiring considerable appellate court deference to trial court's factual determinations). *But see* *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485 (1984) (finding that policies emanating from the First Amendment require reviewing court to make independent inquiry into the accuracy of the trial courts findings of fact in trade disparagement cases).

126. This tendency has caused particular concern regarding the review of criminal convictions. *See, e.g.,* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).

### *H. Practical Barriers to Adjudication*

As the preceding discussion has suggested, substantive and procedural change can make access to adjudication more difficult for a variety of reasons. Even the changes designed to expand access or to enrich the information acquired in litigation can work to impede access to the courts by making the process more expensive or cumbersome. For example, the expansion of federal jurisdiction for drug matters results in more clogged dockets, which generally means longer waits for civil litigation, prompting litigants to forgo matters, exit the system for ADR, or settle on terms different than would have otherwise obtained had the system been working briskly.<sup>127</sup> This impact could occur if the judicial system were to adopt my preferred approach of deciding close questions in favor of more adjudication (for example, allowing discovery rather than dismissing on Rule 9(b) or Rule 12 grounds, holding trial rather than granting the doubtful summary judgment motion). If courts were more receptive to more adjudication and were adequately staffed with judges and infrastructure, this would likely attract more litigation, potentially creating a traffic jam on the new freeway that would drive disputants away from litigation, repeating the cycle. But this sort of congestion would at least have the virtue of resulting from policies that gave disputants more access—more justice, if you will, rather than less. I attempt to elaborate on this point and other concerns about the modern trend away from litigation access in Part II.

## **II. CRUISING DOWN THE WRONG ROAD: CONCERNS ABOUT DECLINING ACCESS**

The net decrease or increase in access to adjudication as I have broadly defined “access” is obviously difficult to calculate. Even calculating with certainty the impact on caseload of “pure” jurisdictional changes remains difficult.<sup>128</sup> For the

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127. See POSNER, *supra* note 20, at 237–41 (noting that party settlement behavior is strongly affected by the system in which disputes operate, including factors of time, costs, and range of outcomes available in system); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 956 (1993) (noting that modern developments of civil procedure and economics of litigation change party calculus as to settlement and have, in past twenty years, created a civil justice system that moves parties more toward settlement rather than full-scale adjudication); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986) (acknowledging ADR’s positive aspects but finding arguable negative impact of discouraging complete pursuit of rights-based claims and full measure of claimed damages).

128. To my knowledge, there are no published empirical studies addressing either of these questions. Available court data, although of course valuable for a variety of reasons, tends to record caseload statistics but not to attempt to explain variance in caseload or caseload trends. Even if such a study were attempted, I am not optimistic as to its chances of success. Because the litigation system is lawyer and party-driven, pleading and filing decisions often reflect attempts to create or avoid jurisdiction or are resolutely uninformative as to the range of jurisdictional options available to the litigants.



reasons discussed above, it seems likely that the availability of full adjudication has declined during the past twenty years. The total number of cases continues to increase as a function of population growth, social complexity, changes in substantive law, litigiousness and the like.<sup>129</sup> However, today's disputant considering litigation to assert a claim seems likely to find the option less attractive than was the case in the 1970s. Although the growth of alternatives to ADR may provide an adequate substitute for trial, obtaining trial itself is a more difficult and cumbersome process.<sup>130</sup>

As the preceding comments make clear, I am generally opposed to access restrictions both de jure and de facto. For the most part, the changing doctrines of the last two decades and greater use of procedure as an impediment to adjudication rather than as a catalyst for adjudication, have been a wrong turn in the law occasioned by an overwrought belief that the system demanded constraint in order to survive the onslaught of cases and controversies. But at the same time one need not be a "litigation explosion" alarmist in order to appreciate that societal resources for thorough dispute resolution are not limitless. The notion that "justice is a pearl beyond price" itself carries a price.<sup>131</sup> Admitting to at least that much of a utilitarian bias, I nonetheless see negative consequences of curtailed access that require more serious reconsideration before the new de jure and de facto barriers to adjudication become permanently institutionalized.

A major drawback of access limitations is its anti-claimant bias. By definition, entities wishing to resort to court have lost or stand to lose something and seek vindication of a right. Their prospective opponents are often, if not typically, happiest if the claim is never made. To the extent claims are turned aside, eliminated, or made more arduous by the modern law of dispute resolution, claimants lose and defendants win.

Sometimes defendants win because the prospective claimant forgoes seeking relief, settles cheaply, or seeks an alternative forum. Sometimes defendants win by shunting claims to a forum viewed as less favorable to the claimant. On occasion, defendants win despite litigation by weathering a war of attrition (usually involving pitched battles of discovery) or avoiding any sustained examination of the merits by obtaining dismissal on Rule 9 or Rule 12 grounds. On other occasions, defendants defeat the claim by using these procedural devices to split the controversy into parts that are less than the sum of the whole or obtain

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Consequently, it is very difficult to attribute any statistical movement to particular statutes, procedural rules, or precedents.

129. See POSNER, *supra* note 20; Stempel, *supra* note 70, at 817-21 (collecting federal and state court data showing net increase in both federal and state caseload during each post-War decade).

130. However, this does not necessarily mean that courts should resist providing alternative adjudicatory structures model based on ADR. For example, court-annexed and supervised ADR might be very effective. Litigants appear to prefer a relatively swift, formal hearing before a neutral official to any guarantee of rights to litigation per se in the grand style. See Stempel, *supra* note 8.

131. See Elliot, *supra* note 4, at 321.

summary judgment when more sustained examination of the case as a whole might have produced relief.

To a large extent, this anti-claimant bias of modern civil litigation has obvious class bias as well: the personal injury plaintiff against the manufacturer or construction company; the fired employee against the corporation; the shareholder against the company, the "Big Six" accounting firm, or the millionaire directors on the board. Although my sketch of the realistic impact of access limitations has a cartoonish quality, the "have not" versus "have" character of American litigation is undeniable. The cartoon is relatively accurate if crude.<sup>132</sup>

Nonetheless, society's "haves" are claimants as well. To the extent that claims lacking a "David versus Goliath" quality are reduced because of modern litigation tendencies, this remains troubling despite any generally reduced sympathy for the overdog. Large corporations, governments, and wealthy individuals with claims of course deserve to be heard and to obtain justice just as do wronged widows and orphans. The anti-claimant bias of the modern era thus remains troubling whatever one's politics.

There is, however, some evidence that the generalized anti-claimant bias of the modern trend weighs less heavily upon society's best-heeled.<sup>133</sup> The net impact is that large claimants, particularly large commercial claimants, have access to federal courts in situations where small claimants are turned away.

In addition, the type of claims desired to be asserted by corporate or governmental entities may be less subject to the strictures established by modern trends. We have seen that fraud, discrimination, and civil rights claims are subject to increasing resistance and procedural impediment. However, contract and other commercial claims have not encountered any obvious doctrinal resistance from the courts. Furthermore, the number of commercial claims heard by the courts has remained steady or has grown each year in both state and federal courts.<sup>134</sup> In addition, many discrimination and civil rights claimants will be deterred from prosecuting low damages claims not only by the cost-benefit calculus attendant to such cases but also because of barriers to full adjudication, increased costs of pretrial fact development, and higher risks of loss posed by modern doctrinal developments.

By contrast, "well-heeled" claimants, such as an insurance company seeking a declaratory judgment of no coverage concerning a homeowner's policy, will meet the jurisdictional minimum (even modest homes are today worth more than \$75,000), are not subject to a pleading doctrine aimed at disfavored claims, and have strong economic incentives as "repeat players" to litigate such claims

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132. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95 (1974).

133. For example, the jurisdictional amount required to invoke diversity jurisdiction has risen in little more than a decade from \$10,000 to \$75,000 today (see 28 U.S.C.A § 1332 (West Supp. 1998) and is likely to continue its incremental rise.

134. See Stempel, *supra* note 70 (reviewing caseload data).

irrespective of the cost of prosecuting the individual insurance coverage question at hand.<sup>135</sup>

Furthermore, commercial litigants have a natural economic advantage in litigation with natural persons. The litigation expenditures (indeed, all dispute resolution expenditures) of the commercial litigant are almost certain to be successfully characterized as business expenses deductible in the year in which they are incurred.<sup>136</sup> Thus, the money spent on litigation, painful though it may be to a corporate comptroller, effectively reduces the litigant company's taxes by as much as one-third.<sup>137</sup> By contrast, an individual claiming tortious injury, breach of consumer contract, discrimination, or fraud is normally unable to have his or her disputing costs partially subsidized by the government.<sup>138</sup>

In addition to the anti-claimant bias, constrictions on access to the courts—particularly reduced access to meaningful federal court consideration—tend to have adverse policy consequences apart from any asymmetric impact on particular classes of litigants. Part of the mission of federal courts is to be repositories of expertise.<sup>139</sup> Indeed, this is a central tenet of those wishing to maintain a firm line in favor of limited federal jurisdiction and an elite federal judiciary.<sup>140</sup> But expertise is something like Scrooge's vault: it does little good if hoarded. Rather, the acquired expertise of the federal courts on questions of federal law and policy must be distributed adequately in order to accomplish the goals of federal legislation.

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135. See Galanter, *supra* note 132.

136. See 26 U.S.C. § 162 (1994).

137. See 26 U.S.C. § 162 (1994) (stating that ordinary business expenses may be deducted from income by business or tax return). Civil claims prosecution and defense have long qualified for ordinary business expense deductions.

138. The reasoning is unassailable, if formal, once one accepts the basic premise that individual claimants are not in the "business" of making or defending claims. Thus, a defrauded consumer cannot deduct counsel fees paid to bring a suit for recompense. Similarly, a neighborhood activist sued by a developer for defamation can get no deduction for the counsel fees defending the suit while the suing developer pays its counsel at taxpayer subsidized rates.

While some additional aspects of the American system may ameliorate this asymmetry, they do not eliminate it. For example, the neighborhood activist may have umbrella insurance that covers "personal injury" claims against her, which are in most such policies defined to include defamation claims. A number of one-way fee-shifting statutes may enable successful claimants to recover counsel fees for insurance coverage, civil rights, or job discrimination claims while the insurer, government, or employer can recover only if the claim was frivolous. If the claimant convinces the court that the business defendant acted recklessly, maliciously, or intentionally in committing fraud or other misconduct, many jurisdictions enable the prevailing claimant to seek exemplary or punitive damages. But win, lose, or draw, the business defendant can almost always at least deduct the costs of litigation and obtain a significant tax subsidy for disputing.

139. See JAMES & HAZARD, *supra* note 2, § 2.1.

140. See Newman, *1,000 Judges*, *supra* note 82; Newman, *Mission Statement*, *supra* note 82.

Undoubtedly, there can be a danger that distribution becomes dilution, a danger that counsels against overexpansive federal jurisdiction. But one can make a compelling argument that today's civil litigation regime harbors the worst of both worlds. Federal jurisdiction is diluted by federalizing relatively non-national matters, such as the sale of marijuana on a junior high school playground, an incident of domestic violence, or a local crime involving a gun shipped across state lines. Federal jurisdiction is simultaneously less available for matters such as widespread securities fraud, widely sold dangerous products or other mass torts, and discrimination in violation of the law.

Where a matter assigned to the federal courts has a substantial claim to federal jurisdiction (because of expertise, political independence, or need for national uniformity), the path to meaningful federal adjudication must not be made unduly rocky. Even if the discouraged litigant may obtain relief in state court or ADR, the national policies that gave rise to federal jurisdiction in first instance appear to be undermined as access constricts. For example, a national policy against race and gender discrimination spurs enactment of a statutory cause of action with the understanding that the federal courts will develop and consistently implement this policy through case-by-case adjudication. Even if ADR processing of individual discrimination claims leads to "correct" decisions or settlements in 100 percent of the ADR cases, the national policy is still arguably undermined because the federal bench is neither creating readily accessible precedents for future use nor revising and reforming legal doctrine in the area as may be necessary.

To the extent that prospective litigants frustrated by federal court turn to ADR, an additional problem arises. ADR, whatever their individual methods, continues to be largely confidential and unreported.<sup>141</sup> At a minimum, ADR outcomes are underreported as compared to state and federal litigation. Mediation, by definition, is not an adjudicative enterprise. Arbitration, even with the rise in "reasoned" awards by tribunals such as those of the American Arbitration Association, does not produce the extended discussion and analysis of legal issues reflected in judicial opinions. To the extent that a substantial portion of potential litigation becomes arbitration or a similar ADR hybrid, this tends to prevent a body of law from developing and being kept current and subjected to ongoing, thorough critical analysis by lawyers, courts and commentators. To the degree that some ADR disputants have greater access to informal precedential information, this has strategic and distributional implications as well.

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141. There is, for example, no widely marketed collection of ADR results akin to the West case reporter system. In recent years, many court systems have begun to post opinions on websites generally accessible to the computer-owning population. By definition, arbitration and mediation proceedings are designed to be wholly or partially confidential absent contrary agreement of the parties. To the extent some systemized reporting of securities arbitration has occurred in the Securities Arbitration Reporter newsletter but this publication costs several hundred dollars per year for subscription and is not available on electronic media, as are other specialized reporting services such as the Mealey's and Andrews' insurance reporters.

At the risk of being ponderous to be clear: ADR is by no means a bad thing. Arbitration, mediation, and their hybrids offer significant advantages over adjudication in many cases. Contestants should therefore be able to choose ADR over litigation. Where there is no real choice and selection of ADR but only its legal imposition<sup>142</sup> or practical imposition,<sup>143</sup> and where the judicial system asserts only modest control over the privatized ADR, society is unwisely deprived of the continuing flow of judicial reflection necessary to improve the law and keep it current. To the extent that formal ADR and negotiation<sup>144</sup> both take place with the guidance of the "shadow of the law," society must take care that the river of judicial precedent does not slow to an inadequate trickle.

### CONCLUSION

In short, it does appear that the net impact of developments in the 1980s and 1990s has been a shrinkage of access to the courts, particularly federal courts. Some of this has resulted from a curtailment of jurisdiction, while considerable additional shrinkage has resulted from increased practical and procedural barriers to obtaining full court consideration of claims. Although there have also been some significant additions to federal jurisdiction, these have not served to enhance access to adjudication generally. This contraction of judicial reach and grasp is troubling for a variety of reasons.

Decreased or restricted access to adjudication, particularly federal court adjudication, seems inevitably to adversely affect claimants, particularly those whose claims involve job discrimination, violations of civil rights, securities fraud, environmental degradation, and other matters that have, since the New Deal, been considered the special protectorate of the federal government. What we might broadly term legal misbehavior by corporations and governments is significantly less discouraged as a result of decreased court access.

Regardless of one's view of existing or appropriate national policy, and regardless of one's ideology or political views, we should collectively be concerned about any decline in access to the courts, even if the primary contraction has occurred with federal courts. Less federal court consideration of legal matters touching on federal policy frustrates development and refinement of a coherent body of federal law. It frustrates development of coherent law generally because

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142. Legal imposition results through enforcement of boilerplate arbitration clauses throughout an entire sector of the economy. *See, e.g., Duffield v. Robertson*, 144 F.3d 1182 (9th Cir. 1998) (workers in brokerage houses required as a condition of employment to execute broadly worded arbitration agreements).

143. Partial imposition occurs because of heightened barriers to adjudication. For example, ADR may be required as a prerequisite to adjudication. Even though the ADR result is not final, many disputants will be deterred from investing further resources in the dispute if the ADR outcome is minimally satisfactory.

144. Although not always listed as an ADR device, negotiation is an informal type of ADR that is the most common form of dispute resolution and also, of course, predates modern arbitration and mediation.

federal courts frequently assist the development and refinement of state law questions when sitting in diversity jurisdiction.

However, the fragmentation or submersion of the law stemming from restricted access to federal courts is more problematic in that it removes from federal courts disputes for which the injection of federal court expertise would be particularly helpful. Although certain discrimination or securities fraud suits rejected at the threshold may be brought in state courts because concurrent jurisdiction exists, state courts may lack the expertise, competence, independence, or visibility required for optimal adjudication and development of the law.

In the recent past, federal jurisdiction has paradoxically both increased and decreased, but jurisdiction per se is not the question on which we should focus. The focus of debate should be access to adjudication, particularly federal court adjudication, which does appear to have unwisely contracted. At a minimum, this constriction must stop until we further understand its consequences. The political and judicial systems should recognize that wise creation, implementation, supervision, and revision of public policy requires continued open access to the courts.

