Mediation: An Unlikely Villain

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I. INTRODUCTION

We are currently in the fourth era in the history of American civil procedure. In this era, plaintiffs in federal court confront a rigorous pleading standard. Defendants benefit from a summary judgment standard that grew teeth. Adjudication is routinely outsourced to private providers. Trials have

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1 Stephen N. Subrin & Thomas O. Main, The Fourth Era of American Civil Procedure, 162 U. PA. L. REV. 1839 (2014). See also Tidmarsh, infra note 7; see also infra notes 8 and 63.


nearly vanished. And settlement is the new polestar. None of these characteristics of the fourth era has improved access to justice for plaintiffs. All of these reforms are fairly reviled for their anti-litigation, anti-law-enforcement, and pro-business effects.

Although the ideological explanations for these reforms have purchase, this article explores a non- (or at least a far less) ideological explanation. Moving beyond the familiar ideological explanations is important because such accounts do not fully explain the reforms that brought us into the fourth era. Indeed, the fingerprints of judges appointed by Republicans and Democrats are on all of these reforms. Moreover, by bringing into relief the

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7 See Jay Tidmarsh, Resolving Cases “On the Merits”, 87 DENV. U.L. REV. 407, 418 n.47 (2010) (observing that there has been “no major reform to the Federal Rule over the past forty years in which the idea of deciding cases ‘on the merits’ was the principal motivation behind the reform”).


9 See Subrin & Main, supra note 1. Although ideology can often help explain judicial outcomes at the appellate level, empirical studies support the conclusion that there are little or no political effects at the trial court level. See, e.g., Orley Ashenfelter et al., Politics and
non-ideological forces that triggered these reforms, we thereby expand the set of solutions to reverse those reforms. Because if the fourth era reforms were purely ideological, then the only realistic solution is to appoint judges with a pro-plaintiff and anti-business orientation; and that strategy is impractical if not also unseemly.

I offer an alternative history of the cause of the fourth era. Specifically, I argue that the mediation movement of the late 1970s deserves blame for the fourth era. To be sure, mediation is an unlikely villain. Mediation’s pursuit of voluntary agreements is self-evidently productive and noble. Rooted in traditions of party self-determination, collaborative participation, and creative problem-solving, mediation itself is hardly villainous. Yet the popularity of mediation may have precipitated the fourth era of civil procedure and all its attendant woes.

The linchpin of my argument is that federal courts abandoned their commitment to trials around 1985. The timing is important because it allows me to trace the cause of that development to the modern alternative dispute


See infra notes 108–26 and accompanying text.
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resolution (ADR) movement, which began in 1976. The modern ADR movement—and mediation in particular—promoted the idea that disputes could be resolved through intervention by trained professionals. If mediators could resolve cases without trials, why not judges? A new regime of judicial case management authorized judges to intervene in a manner akin to mediators. Moreover, courts adopted mediation’s message that trials were slow, expensive, and invasive; in this mindset, trying a case was a failure of judicial case management.

When courts abandoned their commitment to trials, judges needed other tools to dispose of cases. After all, judges could get out of the business of trying cases, but they could not get out of the business of disposing of cases. Some cases could be sent to ADR—by strictly enforcing arbitration clauses or by requiring parties to mediate, for example. Some cases could also be resolved by insourcing ADR, with judicial settlement conferences, for example. But not all cases could be sent to arbitration, resolved in mediation, or settled in a judicial settlement conference. So how would judges dispose of cases where the parties would not settle if the case could not be tried?

To appreciate the judges’ dilemma, it is important to appreciate that the modern ADR movement emerged while civil procedure was still in its third era. In the third era, judges tried cases; in fact, it is not much of an exaggeration to say that judges only tried cases. In 1976, cases were rarely dismissed for failure to state a claim. Summary judgments were extraordinary. Trial was a realistic option, and parties either went to trial or they settled in the shadow of a trial date.

The vast majority of cases settled. In that sense, the fundamental model of formal adjudication was highly passive-aggressive. In the third era, for example, courts tried a fraction of cases (approximately ten percent), and the parties settled the remainder in the shadow of those dispositions. Accordingly, when courts abandoned their commitment to trials, they lost the “aggressive” component of the passive-aggressive couplet. Passive-passive
dispute resolution is not a workable model because judges need some way to dispose of cases—or at least to threaten the disposition of cases.

Two key reforms—heightened pleading and a new summary judgment standard—restored that essential "aggressive" component. These fourth era reforms, which were predominantly a product of case law (as opposed to rules amendments), created necessary leverage for trial judges to credibly threaten dispositions that, in turn, allowed them to manage their cases for settlement.24

The argument, then, is that the modern ADR movement (and mediation in particular), rather than some (other) ideology, beget the pleading and summary judgment standards that exemplify contemporary practice and procedure in the fourth era. The other key reforms of the fourth era—the vanishing trial, the embrace of ADR, judicial case management and the pursuit of settlement by any means necessary—are more obviously tied to the modern ADR movement.25 Blame for all of the key fourth era reforms is thus traceable to the modern ADR movement. This, in turn, matters because it is generally accepted that the modern ADR movement had origins in both the political "left" and "right."26

Part II describes the birth of the modern alternative dispute resolution movement in 1976. Part III locates the emergence of the modern ADR movement within the third era of civil procedure. Part IV establishes how the judicial establishment enthusiastically embraced ADR, including its anti-trial narrative. Part V explains how the fourth era reforms were an ineluctable systemic response to the abandonment of trials. Finally, the Conclusion addresses three criticisms of the thesis that I anticipate.

II. THE MODERN ADR MOVEMENT BEGAN IN 1976

Histories of the modern ADR movement usually begin with the famous Pound Conference of 1976.27 This periodization itself is interesting historiography. The principal modes of ADR—arbitration and mediation28—had existed for centuries.29 The year 1976 was pivotal because, ironically, formal adjudication shed new light on alternative dispute resolution.

24 See infra notes 145–55 and accompanying text.
25 See infra notes 43–53 and accompanying text.
26 See infra notes 43 and accompanying text.
27 See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds. 1979). See also infra note 99.
28 Other modes include small claims courts, community justice centers, negotiation, conciliation, med-arb, grievance committees, rent-a-judge, and consumer complaint panels.
29 See JEROLD S. AUERBACH, JUSTICE WITHOUT LAW (1983); Jeffrey W. Stempel,
At the Pound Conference, Chief Justice Warren Burger convened leaders of the bench, the bar, and the academy to find “new machinery for resolving disputes.” One of the presenters, Professor Frank Sander, surveyed a “diverse panoply of [alternative] dispute resolution processes.” These processes already existed, but each served discrete constituencies and had narrow ambition. Sander contemplated whether broader deployment and reliance on these alternative modes could be useful and beneficial. The birth of the modern ADR movement is the enduring legacy of the Pound Conference. The Google Books Ngram Viewer, which depicts how frequently a term appeared in a corpus of five million books, likewise suggests that something important about “alternative dispute resolution” happened in the mid- to late-1970s (and also suggests that ADR continued to generate ever more attention over the next 20 years).
One consequence of the Pound Conference was the creation of a Follow-Up Task Force "to assure proper consideration of the proposals made at the conference, to provide the impetus for experimentation and, where appropriate, implementation."\textsuperscript{35} Indicative of the infatuation with ADR, the Task Force issued a lengthy report just four months later.\textsuperscript{36} The report’s first item, titled “New Mechanisms for the Delivery of Justice,” lauded the untapped potential of both arbitration and mediation.\textsuperscript{37}

The popularity of ADR exploded. As Professor Jeffrey Stempel described:

In the wake of the Pound Conference, ADR continued to advance: (1) as part of the legal profession’s lexicon; (2) as a source of continued experimentation—both by private entities and the courts; (3) as a growing industry; (4) as a source of authority for altering litigation procedure, sometimes streamlining it (managerial judging) and sometimes enlarging it (through the proliferation of local rules and detailed standing orders that create a de facto second set of local rules); (5) as a wellspring for legal


\textsuperscript{37} Id. at 301, 306–13.
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doctrine more solicitous of the application of ADR; and (6) as a reference point for criticizing courts, lawyers, and adversarialism.\textsuperscript{38}

It is noteworthy that the modern ADR movement emerged "[i]n the wake of the Pound Conference," as opposed to emerging in the wake of, say, the work of the neighborhood justice centers funded by the Ford Foundation in 1968,\textsuperscript{39} or because of the Institute for Mediation and Conflict Resolution, which was founded in the late 1960s.\textsuperscript{40} Professors Soia Mentschikoff, Lon Fuller, and others were carefully studying and distinguishing modes of dispute resolution in the 1950s and 1960s.\textsuperscript{41} The National Mediation Board had been successfully mediating labor disputes in the railroad industry since 1934.\textsuperscript{42}

Yet the broad-based movement was triggered by the Pound Conference, when courts and professional elites embraced ADR. Prominent judges, the American Bar Association, corporate counsel, the media, academics, consumer advocates, the left, the right, and research and philanthropic institutes viewed ADR as a solution.\textsuperscript{43} A few months after the

\textsuperscript{38} Stempel, \textit{supra} note 29, at 317 (citations omitted).


\textsuperscript{40} See Gary L. Gill-Austern, \textit{Faithful}, 2000 \textit{J. DISP. RESOL.} 343, 359 n.70 (2000) (quoting Albie M. Davis, \textit{Community Mediation in Massachusetts} 19 (Jan. 1986), Salem, Mass. Administrative Office of the District Court (explaining the 1975 origins of Dorchester's Urban Court Program that, in turn, was based on the Institute for Mediation and Conflict Resolution of New York City which joined the dispute resolution skills of labor mediators to address community-based conflicts)).


47 The efficiency argument itself had multiple strains. For some, ADR offered an escape from the formality of court processes; rigidity can create inefficiency. Others saw efficiency gains based on predictability, by substituting expert decisionmakers for lay
believed that informal dispute resolution mechanisms would improve access to justice. And others saw ADR's potential for more creative and enduring solutions to disputes than formal adjudication's binary outcomes. That these different interest groups were trying to solve different problems was less important than that they were allied in their quest for more ADR.

It makes sense that a broad-based ADR movement found traction only after Chief Justice Burger and the courts generally offered their imprimatur. States have a monopoly on the legitimate use of coercive force. In the context of dispute resolution, governments alone have authority to vindicate rights and to assign responsibilities. Without the infrastructure provided by courts, participation in ADR would be optional, ADR neutrals would have no meaningful authority, and the outcomes of many ADR proceedings would be non-binding and unenforceable.

Although welcomed by the courts as a partner in the enterprise of dispute resolution, ADR providers had to compete with (publicly-subsidized) courts in the market for resolving disputes. Accordingly, ADR providers emphasized their competitive advantage over formal adjudication. ADR providers emphasized—or exaggerated, as the case may be—the costs, time delays, and other pathologies associated with trials. In mediation, for example, the more that a trial could be characterized as a monster, the more that could be achieved by avoiding it.

juries. Still others viewed ADR as an opportunity to offload a public expense.

This argument also splinters, with some emphasizing access and others justice. If ADR is cheaper and less formal than adjudication, poor or marginalized groups may be more likely to pursue relief. For others, the processes of ADR could better ensure privacy or protect trade secrets. See Miranker, supra note 43.


See generally Max Weber, Politics as a Vocation, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth and C. Wright Mills eds., 1946).


The proclaimed demerits of trials include: binary outcomes; unpredictable results; publicity and lack of privacy; generalist (non-expert) judges; ignorant, emotional, and/or biased juries; and formalities that can intimidate, marginalize, and chill. See generally Thomas J. Stipanowich, Arbitration: The "New Litigation," 2010 U. Ill. L. Rev. 1, 4 (2010) (recounting "[c]onventional wisdom" about litigation).

An essential component of the mediation process is ensuring that each of the disputing parties appreciates their best alternative to a negotiated agreement (BATNA). A mediation resolution is more attractive when the alternatives are ugly. The BATNA is not some platonic ideal of success in court, but rather an outcome that takes into account the monetary and nonmonetary costs of formal adjudication. See Kovach, supra note 10, at 31–34; Moore, supra note 33, at 19–24; Folberg, supra note 33 at 3.
Complete histories of the ADR movement are available elsewhere. In this Part, I intend to establish only a timing issue, which should be relatively non-controversial. For purposes of my argument, the modern ADR movement need not have started precisely in the year 1976. The Pound Conference appears to be the inflection point, though even that may be a product of groupthink. There can be little doubt, however, that sometime in the late-1970s the modern notion of alternative dispute resolution as a constellation of processes emerged and flourished.

Finally, throughout this paper I refer frequently to "ADR" and to "mediation." Mediation is a form of ADR—arguably the paradigmatic form. But the terms are not substitutes. Yet there is no need here to chronicle separate histories for mediation, arbitration, or other distinct alternative processes. Sander discussed both mediation and arbitration. The following Ngram suggests that, compared to arbitration, mediation received the more significant bump in notoriety after 1976. As the modern ADR movement accelerated, arbitration, mediation, and other processes were in the slipstream.

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55 The Pound Conference may be simply the mascot. For example, contemporaneous with the Pound Conference, the National Center for State Courts had undertaken its own study of alternative dispute resolution mechanisms. See generally Earl Johnson Jr., Valerie Kantor & Elizabeth Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases (Nat'l Center for State Courts ed., Jan. 1977). The coincidental publication of several books and articles was surely also instrumental. See, e.g., The Disputing Process: Law in Ten Societies (Laura Nader & Harry F. Todd, Jr. eds., 1978); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978). See also supra note 41. See also Mathews v. Eldredge, 424 U.S. 319 (1976).

56 See generally Fuller, supra note 41, at 314–15 (discussing the non-authoritarian emphasis of mediation).

57 See Sander, supra note 31, at 65, passim.
III. THE THIRD ERA OF PROCEDURE

The modern ADR movement emerged in 1976, when formal adjudication was still in its third era. This timing is important because my thesis is that the modern ADR movement eventually pushed formal adjudication into its fourth era.

In our contribution to a symposium that celebrated the seventy-fifth anniversary of the Federal Rules of Civil Procedure, Professor Stephen Subrin and I observed that "[t]he history of American civil procedure divides rather naturally into three eras."58 The first era commenced with the founding of the United States and the transplantation of English substance and procedure.59 In 1848, the State of New York launched the second era by enacting what has since been called the Field Code.60 Around the turn of the twentieth century, reformers demanded a new procedure that would apply uniformly across all federal district courts.61 A well-chronicled decades-long effort ultimately led to the passage of the Rules Enabling Act of 1934.62 The Federal Rules of Civil Procedure became law four years later, launching the third era.

Although the corpus of the Federal Rules of Civil Procedure that launched the third era has remained more or less intact since 1938, there is broad consensus that we are now in a fourth era.63 The fourth era was wrought

58 Subrin & Main, supra note 1, at 1842.
59 Id.
60 Id. at 1843.
62 See, e.g., Miller, supra note 8; Doug Rendleman, The Triumph of Equity Revisited: The Stages of Equitable Discretion, 15 NEV. L.J. 1397 (2015); Judith Resnik, Procedure
by a combination of congressional legislation, amendments to the Federal Rules of Civil Procedure, and especially case law. Two of the key reforms—reinterpretations of the pleading and summary judgment standards—were entirely a product of case law.\textsuperscript{64} Periodization is difficult because both of those key reforms occurred in the lower courts before Supreme Court decisions ratified the emergent practices.\textsuperscript{65} Accordingly, a la Sorites Paradox, it is difficult to identify the moment of transition from the third to the fourth era.\textsuperscript{66} At this point it is necessary to observe only that none of the key laws, amendments, or court decisions that constitute the fourth era predate 1976. Accordingly, when the distinguished judges, lawyers, and academics returned from the Pound Conference and went back to work, the practice and procedure of the third era prevailed in the courts. What exactly did that mean?

The three hallmarks of procedure in the third era were (1) notice pleading, (2) broad discovery, and (3) trials. First, "notice pleading" . . . required only that a pleading give the defendant notice of the plaintiff's grievance. Notice pleading reflected a deliberate break from prior pleading regimes, whose cumbersome requirements were seen as traps for the unwary. Rather than having courts decide cases based on the niceties of pleading, the liberal ethos of the FRCP required only the barest of allegations, so that cases could be decided on the merits, by jury trial, after full

\textsuperscript{64} See infra notes 146–52 and accompanying text [Part V.B].
\textsuperscript{65} See infra notes 148–50 and accompanying text [Part V.B].
\textsuperscript{66} Put another way, the fourth era had no Pound Conference. Unless it was the Pound Conference. See infra notes 127–55 and accompanying text [Part V].
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disclosure through discovery.67

Second, "[d]iscovery is a means for the parties, prior to trial, to learn the substance of each other's cases. The theory is that once both sides know the full truth, they can either settle the case themselves, or can at least agree on which issues are material to decision."68 Third is trial:

The drafters wanted to give people access to a meaningful day in court and believed that the procedural process should effectuate those aspirations. The system the rule-makers created was designed with that in mind, and many believed that the Federal Rules represented a Gold Standard that envisioned a trial and, when appropriate, one before a jury.69

Judges tried cases in the third era; this task is surely the "highest and best use of [their] time."70 Trials represent the gold standard for the meaningful integration of law and fact.71 And, of course, the positive externalities of trials include the development of the law, the declaration of social values, and in jury cases, civic participation.72

In 1950, the percentage of civil cases terminated during or after trial in the U.S. District Courts was approximately eleven percent.73 In 1976, the

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70 Thomas O. Main, Procedural Constants: How Delay Aversion Shapes Reform, 15 NEV. L.J. 1597, 1628 (2015); Young, supra note 5, at 89.
72 See Robert M. Ackerman, Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital, 2006 J. DISP. RESOL. 165 (2006); Burbank & Subrin, supra note 5.
73 See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-4 (1950). See also Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L.
percentage was approximately nine percent.\textsuperscript{74} The commitment to jury trials is evident in the printed materials from the seminars for newly-appointed judges. In his session on case management at the 1961 seminar, U.S. District Judge George L. Hart, Jr.\textsuperscript{75} taught judges how to juggle the demands of simultaneous jury trials.\textsuperscript{76} “It is common for a judge to have one jury out deliberating in a case, while he is trying the next case and, on occasion, a judge will have two juries deliberating on their verdict while he is trying a third case.”\textsuperscript{77}

In the third era, nearly all civil cases resulted in one of two outcomes: settlement or trial. If a case was not tried, it was because the parties settled. Because approximately ten percent of cases were tried, nearly all cases were resolved by settlement.\textsuperscript{78} Cases were rarely dismissed for failure to state a claim for which relief could be granted. While the precise rate of dismissals in those early decades under the Federal Rules remains something of a mystery, we can fairly surmise that the number was likely very small.\textsuperscript{79} “Even as late as the 1980s, the Advisory Committee on Civil Rules reviewed and discussed a draft proposal to abrogate the Rule 12(b)(6) motion because it was never used and, therefore, served no purpose.”\textsuperscript{80} Arthur Miller joked that the motion “was last effectively used during the McKinley administration.”\textsuperscript{81}


\textsuperscript{75} Judge Hart was appointed to the federal bench in 1958, served as chief judge from 1974–75, and took senior status in 1979. FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/hart-george-luzerne-jr.


\textsuperscript{77} Id. at 268. The Program for the 1975 Seminar for Newly Appointed United States District Judges allocates two and one-half days to civil matters generally. One-half of one of those days (or twenty percent of the total) is devoted to a discussion of “The Civil Nonjury Trial” and “The Trial of the Civil Jury Case.” See PROGRAM, SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES (1975).

\textsuperscript{78} This value of ten percent refers to an approximate average of the eleven percent in 1950, supra note 73 and accompanying text, and the nine percent in 1976, supra note 74 and accompanying text.

\textsuperscript{79} See Conley v. Gibson, 355 U.S. 41, 4546 (1957) (holding that unless a plaintiff can prove no set of facts in support of his claim, a complaint should not be dismissed for failure to state a claim); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (finding “no pleading requirement of stating facts sufficient to constitute a cause of action” under the new rules of civil procedure).

\textsuperscript{80} Subrin & Main, supra note 1, at 1844 n.26 (citing THOMAS E. WILLGING, USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS 1 (1989)).

\textsuperscript{81} Id. at 1845 n.27 (citing ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO
Summary judgments technically were available under the Federal Rules. But in the third era, a summary judgment was “an extraordinary remedy, one that should only be granted when there was not the ‘slightest doubt’ as to the actual facts.”\textsuperscript{82} Some of the drafters of the original Federal Rules anticipated that summary judgment would be most useful to plaintiffs as “a simple and quick way of disposing of . . . debts or liquidated demands.”\textsuperscript{83} Again, the activity of the Advisory Committee on Civil Rules provides interesting perspective about how the motion was (not) used: Around 1980, reformers tried to amend Rule 56 because judges were not using the summary judgment rule to its full effect.\textsuperscript{84}

Further, as motions to dismiss and motions for summary judgment posed no formal obstacle to trials, there were also few practical obstacles. Cases were resolved swiftly. In 1966, the median time interval from filing to disposition for a civil action was just nine months.\textsuperscript{85} in 1976 it was still nine months.\textsuperscript{86} Even among the subset of cases that went to trial, the median time interval from filing to disposition was just seventeen months in 1966;\textsuperscript{87} in 1976...
it was sixteen months. Thus, a party who wanted a trial could actually see the opportunity for one on the horizon.

Nor was the cost of taking a case to trial prohibitive. A 1951 study of the use of discovery in five U.S. district courts revealed that formal discovery occurred in only 25.5 percent of all civil cases. Document requests were used in only four percent of all cases, and depositions in only fourteen percent.98 There is very little mention of discovery abuse or even of discovery generally in the Administrative Office of the U.S. Courts’ Annual Reports in the 1950s, 1960s, and even well into the 1970s.99 Prior to 1980, amendments to the discovery rules were still expanding the scope and amount of discovery. Accordingly, it is fair to conclude that, with the exception of the five to fifteen percent of cases that were so-called “mega cases,” discovery in the third era was neither a serious problem nor perceived to be a serious problem.92 Instead,
the amount and costs of discovery were non-existent, modest, or commensurate with the stakes of the litigation.

Nor was there undue pressure from judges to settle. Judges decided motions, of course. And judges held a pretrial conference—usually ten days before the scheduled trial date. But most cases settled. In fact, approximately fifty percent of the civil cases settled without any court action. The contemporary notion of judicial case management had not been invented. When parties settled, it was because both parties agreed that the settlement was preferable to a trial.

One might fairly describe this as a passive-aggressive model of adjudication. Ten percent or so of the civil cases were tried, and in that set of cases, the parties' rights and responsibilities were formally (aggressively) declared therein. The looming prospect of a trial in all cases enabled parties to negotiate settlement agreements in lieu of formal adjudication. Settlements were reached in the vast majority of cases without direct judicial intervention. But in each such case the threat of a trial played an essential even if indirect (passive) role in generating the settlement.

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94 See Peter T. Fay, Settlement Approaches, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES, 67, 71–72 (1973); Warren K. Urbom, Calendar Control—Organizing the Flow of Cases, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 7, 9 (1973).

95 See Main, supra note 70, at 1625.

96 In summary, Rule 16 was significantly overhauled in 1983 (and has been amended again many times since). Since 1983, the Federal Rule requires scheduling and planning conferences at much earlier stages in the litigation process. Specifically, a scheduling order must issue within 120 days of service of the complaint. FED. R. CIV. P. 16(b)(2). That scheduling order, in turn, must “set dates for pretrial conferences and for trial.” FED. R. CIV. P. 16(b)(3)(v). Note the plural use of the term pretrial conferences. These pretrial conferences now regard subjects much more preliminary than the trial, including “eliminating frivolous claims,” “amending the pleadings,” and “scheduling discovery.” FED. R. CIV. P. 16(c)(2)(A)–(B), (F).

Id. at 1622 n.129.
IV. THE JUDICIAL HIERARCHY EMBRACES ADR

The ADR movement generally, and mediation in particular, suggested that a professional’s insight and guidance could lead parties to resolve their disputes without trials. The notion that disputes could be resolved by mediators without trials coincided neatly with Chief Justice Burger’s call for “new machinery for resolving disputes.”

He long had reasoned that, if hospitals and corporations could take advantage of business management techniques, so could judges; mediation was an even better role model.

The judiciary prescribed “improved case management efficiency,” and the goal was settlement. The message to district courts favoring case management and trial avoidance around 1978 was particularly strong. At a program for newly-appointed judges, Judge Hubert Will of Chicago told his colleagues not to think of themselves as “skilled referees who ... step into the ring when the lawyer combatants said they were ready to fight,” for that will not “produce the highest quality of justice in the shortest possible time at the lowest cost.”

As Judge James Lawrence King put it, “[t]he philosophy of caseflow management presented here is one of active judicial control.” Judge William Schwarzer “urge[d] that judges intervene in civil litigation and take an appropriately active part in its management from the beginning.”

“[J]ustice is not better served,” Judge Schwarzer emphasized, “by the passive judge who by inaction permits litigation to blunder along its costly way toward exhaustion of the litigants, when it might have long been settled or at least controlled to everyone’s benefit.” This non-formal messaging was ultimately

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97 BURGER, supra note 30, at 25.
101 Id. at 261 (citing Hubert L. Will, Judicial Responsibility for the Disposition of Litigation, 75 F.R.D. 89, 121, 124–25 (1976)).
102 James Lawrence King, Management of Civil Case Flow From Filing to Disposition, 75 F.R.D. 89, 166 (1976).
104 Id. See also Alvin B. Rubin, The Managed Calendar: Some Pragmatic Suggestions
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concretized in waves of amendments to the Federal Rules of Civil Procedure, beginning in 1983, that required judges to get involved earlier and more aggressively in each case.\(^{105}\) Rule 16 was amended to make “case management an express goal of pretrial procedure.” Through judicial education programs and policies, the clear message to trial courts was that trials were a “mistake”\(^{106}\) and a “‘failure’ of the judicial system to properly perform its mission of resolving disputes.”\(^{107}\)

Trial judges heeded the message. As Figure 1 shows, in 1985, the total number of civil cases disposed at trial in federal courts peaked. Then, beginning in 1986, the absolute number of trials began a precipitous decline—dropping ultimately to current levels, where there are now considerably fewer civil trials each year than there were in the 1940s.

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\(^{105}\) The rule codified a practice that was already underway. Professor Judith Resnik saw this and famously warned of its consequences in 1982. See Resnik, supra note 6.

\(^{106}\) Samuel R. Gross & Kent R. Syverud, Don’t Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. REV. 1, 3 (1996) (“Trial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost.” (citation omitted)); Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 MICH. L. REV. 107, 107–08 (1994) (suggesting that most judges believe “trials represent mistakes—breakdowns in the bargaining process—that leave the litigants and society worse off than they would have been had settlement been reached.” (footnote omitted)). Cf. Judith Resnik, Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 n.200 (1995) (criticizing the inclination to perceive of “trial as a pathological event”).

\(^{107}\) Anderson, supra note 5, at 105 (attributing the language quoted in the text to the Administrative Office of the U.S. Courts).
To be clear, it is not conventional wisdom that courts abandoned their commitment to trials in the mid 1980s. Rather the common narrative is that trials have been vanishing since at least the 1960s. Indeed, as Figure 2 shows, the percentage of civil case disposed at trial shows such a decline.

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108 Figure 1 reflects some dramatic spikes for outlier events in 2007 and 2009. The events involved the resolution of consolidated cases in the Middle District of Louisiana arising out of the explosion of an oil refinery. For an explanation of these spikes, see Main, supra note 70, at 1617 n.109.
The denominator in the percentage calculations in Figure 2 is the total number of terminated cases. Beginning in the 1960s, Congress significantly expanded the scope of federal jurisdiction and created many new causes of action. As a result, caseloads grew at unprecedented rates. In the 1970s the average annual rate of growth was 7.4 percent. From 1980 to 1985, the average annual rate of growth was 10.1 percent. In the long decade between 1969 and 1983, the civil caseload of the federal courts more than tripled. Importantly, however, even during that long decade, the numerator (i.e., the total number of trials) also climbed, as demonstrated in Figure 1.

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109 Figure 2 reflects some dramatic spikes for outlier events in 2007 and 2009. The events involved the resolution of consolidated cases in the Middle District of Louisiana arising out of the explosion of an oil refinery. For an explanation of these spikes, see id.


111 In the three decades leading up to 1969, the civil caseloads of federal courts grew at a modest average annual rate of approximately 3.4 percent. See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-1 (1942–1969).


113 See Id.

114 See Id.
As the civil caseloads grew, the total number of federal judges expanded too, albeit at a slower rate. Figure 3, below, demonstrates that in 1947 the typical federal judge tried, on average, 1.7 civil cases per month. Nearly forty years later, in 1985, the typical federal judge still tried, on average, 1.7 civil cases per month. Accordingly, even during the long decade from 1969 to 1983, when the average judge’s civil caseload doubled, judges still tried, on average, about 1.7 cases per month. Again, the mid-1980s is pivotal.

**FIGURE 3**

Average Number of Civil Trials Per Judge Per Month

![Graph showing the average number of civil trials per judge per month from 1947 to 2017.](Source: Admin. Office of the U.S. Courts, Annual Reports of the Director of the Administrative Office of the United States Courts tbl. C-1 (1947-2017))

115 For example, during the long decade when the number of civil cases tripled, the number of federal district judges increased by about seventy percent. See id.

116 See id.

117 Today the average federal judge has one civil trial every three or four months. But even that may overstate the actual number since a trial is defined as “a contested proceeding where evidence is introduced.” See Civil Statistical Reporting Guide, Tech. Training & Support Div. & Statistics Div. of the Admin. Office of the United States Courts i, 3:18 (July 1999), available at http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Using_Court_Records_Appendix/Civil_Statistical_Reporting_Guide.pdf. A contested motion for a preliminary injunction (where evidence or taken) or an evidentiary hearing on a motion to dismiss for personal jurisdiction thus could be coded as a trial.

118 Figure 3 reflects some dramatic spikes for outlier events in 2007 and 2009. The events involved the resolution of consolidated cases in the Middle District of Louisiana arising out of the explosion of an oil refinery. For an explanation of these spikes, see Main, supra note 70, at 1617 n.109.
The absolute number of trials may be more important than the percentage of cases that are terminated by trials. Trials ground our normative standards, allow the law to develop, publicize something, and preserve a role for juries. For decades these positive externalities were achieved with each judge trying approximately 1.7 cases per month. Importantly, that absolute number of trials also casts a sufficient shadow for all other cases to settle. If instead judges tried the same percentage of cases through the litigation explosion in the 1970s, judges would have tried three or four cases per month rather than just one or two. The marginal gains of those additional trials might be difficult to find except for the parties in the one or two cases each month that were deprived of the gold standard for the integration of law and fact. It is the absolute number of trials that sets the tone.

Figures 1 and 3 demonstrate that judges abandoned their commitment to jury trials in the mid-1980s. Attributing this development to the increased attention given judicial case management (and the professed allergy to trials) is not only a plausible explanation, but an obvious one. Alternative explanations often mention the pressure that the criminal docket has put on the civil docket, but the size of criminal dockets did not change dramatically during this period. To be sure, The Speedy Trial Act required judges to give priority to criminal cases, but that legislation was passed in 1974 (not in, say, 1985).

Another explanation—indeed, the most frequently-cited cause—for the vanishing trial is the so-called “litigation explosion.” But as established above, judges continued to try the same number of cases even during the period of explosive growth. Moreover, judges abandoned trials in the mid-1980s as their caseloads lightened. In five of the six years from 1986 to 1991, there was a year-over-year decline in the number of newly-filed civil cases. In fact, in the more than three decades since 1985, the average annual rate of growth in the civil caseload of the federal courts is less than one-half of one

119 See Ackerman, supra note 72.
120 See supra notes 69 and 71.
121 In 1980, Federal Rule 26 was amended to require an early discovery conference in all but a handful of excluded cases. FED. R. CIV. P. 26(f) advisory committee’s notes to the 1980 amendments. In 1983, Rule 16 was amended to explicitly include settlement and ADR as topics for discussion at pretrial conferences. FED. R. CIV. P. 16(c) advisory committee’s notes to the 1983 amendments. Of course, these are just the formal reform efforts. See also supra notes 97–114 and accompanying text.
percent. Further still, the size of judicial budgets and the staff of the judiciary (magistrate judges, bankruptcy judges, judges with senior status, law clerks, and interns) have expanded dramatically since 1985; yet none of this institutional investment is reflected in the number of trials.

V. THE EMERGENCE OF THE FOURTH ERA

With the embrace of the modern ADR movement, judges were either inclined or directed to get out of the business of trying cases—even though presiding over trials was the family business. Throughout the third era, judges tried cases and managed cases in anticipation of trial, but did little else to dispose of cases. And this passive-aggressive approach worked: by trying approximately ten percent of the cases, the others settled. But if these third era judges were not going to try cases, how would they dispose of them?

A. Institutionalization of ADR

With the anti-trial narrative finding traction, judges in the third era needed to dispose of cases without trying them. In three different respects, judges used ADR “aggressively” to achieve this end.

First, by facilitating the development of private ADR, courts kept many cases out of formal adjudication altogether. Newfound interest in ADR had led to the development of an industry that provided mediation, arbitration, early neutral evaluation, and other dispute resolution services for a fee. But

127 See supra notes 58–96 and accompanying text.
128 See supra note 78 and accompanying text.

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without the enforcement infrastructure provided by courts, participation in ADR would have been optional, ADR neutrals would have had no meaningful authority, and the outcomes of ADR proceedings would have been non-binding and unenforceable. To paraphrase Maitland, ADR without courts would be a “castle in the air, an impossibility.” The unmistakable takeaway from the Pound Conference was that the ADR movement could commence construction of its castle on terra firma with government subsidies, with fast-track regulatory approval, and without preparing an environmental impact statement.

Second, courts outsourced dispute resolution to ADR providers. Although the courts originally envisioned ADR as a solution for the “garbage cases” that were clogging the dockets, ADR gained legitimacy as “a more general solution for handling conflicts of any kind.” This was a dream come true for Chief Justice Burger who, years earlier, remarked, “One thing an appellate judge learns very quickly is that a large part of all the litigation in the courts is an exercise in futility and frustration. Most civil disputes which are in the courts could be disposed of more satisfactorily in some other way.” New mandates required parties to participate in mediation or non-binding arbitration, even if the parties resisted. Agreements to arbitrate that

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130 See Thomas O. Main, Arbitration, What Is it Good For?, 18 NEV. L.J. 457, 460–61 n.18 (2017) (quoting F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 19 (A.H. Chaytor & W.J. Whitaker eds., rev. ed. 1936) (“Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. . . . Equity without common law would have been a castle in the air, an impossibility.”)).

131 Laura Nader, A Reply to Professor King, 10 OHIO ST. J. ON DISP. RESOL. 99, 100–01 (1994) (“Those of us who were privileged to attend the Pound Conference can remember the press, the television crews, and the fanfare surrounding what anthropologists in other contexts would call a social drama. It was argued that the ‘garbage cases,’ as they called them, should come before alternative forums; the courts should be reserved for more important case.”).


were previously void as against public policy were enforced. Thus, many cases were sent to ADR, and never returned.

Third, courts also brought ADR into the courthouse—and judges brought ADR into their chambers. Rather than outsourcing dispute resolution to an ADR provider, courts offered their own mediation program, for example, and required parties to use it. The notion of having ADR and formal adjudication under one literal roof was Professor Sander’s vision of the multi-door courthouse. An especially common type of insourcing was the judicial settlement conference, where parties were required to participate in settlement negotiations that were facilitated by a judge.

This institutionalization of ADR was part of the transition from the third to the fourth era. Courts had to dispose of cases without trials, and ADR presented several avenues. As ventilated extensively and persuasively

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135 Courts enforce arbitration agreements (1) in routine transactions (2) involving customers and other vulnerable parties who (3) entered into contracts of adhesion (4) where the choice of arbitration had nothing to do with resolving uncertainty, (5) the drafter of the clause chose the arbitrator, and (6) the claims concerned statutory rights. Each of those enumerated items was once a hurdle to enforcement of an arbitration clause. See Main, supra note 130, at 466.


139 Many ADR programs fit into more than one of the three categories described. Programs are often combinations of insourcing and outsourcing, court-ordered and court-sponsored, public and private, internal and external, voluntary and involuntary. The definitional parameters of the many forms of institutionalization are not significant here. See generally Judith Resnik, Mediating Preferences: Litigant Preferences for Process and
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elsewhere, different aspects of the institutionalization of ADR are profoundly problematic.\textsuperscript{140} Hence the inclusion of this item on the list of woes that attend the fourth era of civil procedure.

It is important to observe that what the courts have done with and to ADR has often been inconsistent with ADR orthodoxy. Requiring mediation, for example, is inconsistent with mediation's core values that recognize autonomy and party self-determination.\textsuperscript{141} Systematizing mediation is inconsistent with mediation's core value that even the process of mediation is subject to negotiation.\textsuperscript{142} Further, when judges host settlement conferences, there are serious policy problems and ethical concerns.\textsuperscript{143} Pressuring a party to settle is inappropriate in mediation.\textsuperscript{144} And of course few judges are adequately trained in the art and science of mediation yet feel eminently qualified to practice it. All this is to say that, often, when the courts "use" mediation or ADR, it is not the real thing. Put more generously, courts embraced ADR with the zeal of the converted. In any event, when I blame mediation or ADR, it is the court's perversion of the practice that is most problematic. The modern ADR movement merely seeded the idea.

B. Invigorating Pretrial Motions

The institutionalization of ADR did not provide judges with the tools necessary to dispose of all cases. If the parties did not sign an arbitration agreement, binding arbitration was not thrust upon them. Even in court-ordered mediation, the parties were not obligated to reach an agreement. And


\textsuperscript{141} See generally Welsh, \textit{supra} note 10.


\textsuperscript{143} See generally Welsh, \textit{supra} note 140; Deason, \textit{supra} note 138.

settlement judges could pressure the parties, but either party could resist settling. How would judges dispose of these cases without trials?

These judges were like mediators in the sense that voluntary settlements were the objective. But quite unlike a (real) mediation, the parties in these cases had to settle. These judges could not force parties to settle. So they created leverage points within the litigation process (leverage points not wholly dissimilar to trials) to restore the passive-aggressive pressures to settle.

First, summary judgment was transformed from an “exceptional remedy” that was rarely used (in the third era) into the “focal point” of litigation (in the fourth era). The Supreme Court’s trilogy of summary judgment cases in 1986 is credited (and blamed) for giving the summary judgment teeth and for revolutionizing the practice of law. Of course it was trial judges, not the Justices of the U.S. Supreme Court, that were struggling to dispose of cases while also avoiding trials. It is hardly surprising, then, that, as Stephen Burbank’s empirical work has shown, the Supreme Court’s trilogy of summary judgment cases was merely codifying a standard that had swept into the lower courts years earlier—perhaps even into the 1970s. The timing maps neatly onto my thesis.

Second, there was a new, more rigorous pleading standard. Beginning in the late 1970s and 1980s (again, note the timing), many lower courts—and eventually all U.S. Circuit Courts of Appeals—adopted a heightened pleading standard for civil rights plaintiffs. In 1993 (and again in 2002) the Supreme Court unanimously rejected this heightened pleading standard. Many lower courts still required a species of heightened pleading by granting defense motions for more definite statements and by demanding that plaintiffs reply to

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145 Some tried. See Welsh, supra note 140, at 1009; see also Deason, supra note 138, at 87 n.60, 112.
148 See Burbank, supra note 83, at 620 (noting the rise of summary judgments prior to the Supreme Court’s trilogy cases in 1986).
defendants’ answers. Eventually, with its decisions in 2007 and 2009, the Court

retired key language from the seminal notice pleading case of 1957, instructed judges to ignore conclusory allegations, expanded the definition of conclusory allegations, and replaced notice pleading with a scheme labeled plausibility pleading. Plausibility pleading—together with its predecessor, heightened pleading—is nothing less than a “revolutionary” departure from notice pleading from the original vision of the Federal Rules.

The new standards necessary to survive motions to dismiss and motions for summary judgment restored the aggressive component of the passive-aggressive couplet. The passive-aggressive nature of formal adjudication is further reinforced by statistics demonstrating that motions to dismiss and motions for summary judgment do not themselves account for many terminations in court. Although reliable data are notoriously hard to find, one study suggested that approximately eight percent of civil cases in federal court are resolved by summary judgment. Approximately two percent of federal civil cases are dismissed for failure to state a claim. Of course the percentage of cases resolved at trial is between one and two percent. The

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153 Burbank, supra note 83, at 591, 606.

154 See Hubbard, supra note 67, at 733 (citing Joe S. Cecil et al., Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules, at *9, *14 (Federal Judicial Center, Mar. 2011)).

combined value of these numbers is beguilingly close to the percentage of cases resolved by trials in the third era. A number somewhere in the vicinity of ten percent may be the key to a workable model of passive-aggressive adjudication.

VI. CONCLUSION

Heightened pleading standards, the new summary judgment standard, aggressive judicial case management, the obsession with settlement, the vanishing trial, and the privatization of dispute resolution are all traceable to the court’s abandonment of its commitment to jury trials. Courts abandoned their commitment to jury trials when Chief Justice Burger adopted the mindset of mediation that trials should be avoided—and that trials could be avoided with professional intervention. The mediation movement is to blame for the fourth era. This is significant from a historical perspective because, to the extent that that causal argument is correct, the ADR movement was a bipartisan effort that had broad support. The fourth era was simply a consequence of that movement, even if an unintended one.

There are at least three reasons to question my conclusion and, in anticipation of future conversation on these topics, I respond to each of them below.

i) If ideology is not the principal driver of the fourth era reforms, why do all the fourth era reforms cut against plaintiffs and favor defendants? First, my thesis focuses on the origins of the heightened pleading and new summary judgment standards; I blame mediation and ADR for those reforms. The other problematic fourth era reforms are ADR; obviously, the ADR movement is to blame for ADR, no matter the courts’ perversions of it.

So, let us focus on motions to dismiss and motions for summary judgment. The premise of the critique is surely correct: by redefining the pleading and summary judgment standards, the courts made it tougher only for plaintiffs. But the systemic pressure on trial judges was to find ways other than the threat of a trial to sharpen the parties’ attention to the point of serious settlement negotiations. Because the plaintiff carries the ultimate burden of proving her case at trial, the natural response is to test at earlier stages in the litigation process the plaintiff’s progress with respect to that burden.

Put another way, there was not a plaintiff-friendly version of the reform to the motion to dismiss that courts rejected in favor of the defendant-friendly version of the reform that they implemented. The previously-dormant version of a 12(b)(6) motion could not have been activated and interpreted to

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156 See supra note 43 and accompanying text.
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put pressure on defendants to settle. Indeed, the motion to dismiss only moves cases in one direction, to-wit: dismissal.

Of course, unlike dismissals, summary judgments can be granted for both plaintiffs and defendants. Yet here too there is no obvious plaintiff-friendly version of the reform to summary judgment practice that would have created pressure on the parties to settle or would otherwise have avoided trials. In typical litigation, a summary judgment in favor of the plaintiff would be a partial summary judgment as to certain elements of the plaintiff’s case, or summary judgment on a defendant’s affirmative defense. But in neither of those situations, would an order granting the plaintiff’s motion for summary judgment dispose of the case. Rather, it would create momentum for a trial.

One must also appreciate that trial judges implemented these fourth era reforms from the trenches. These reformers could nudge the applications of the rules by reinterpreting their mandates, but they could not create new rules nor amend rules. To be sure, a smarter and more creative person (the reader, for example!) might see a more plaintiff-friendly re-interpretation of these pretrial motions. But judges in the trenches more closely resemble me. And reforming the pretrial motions to avoid trials seems to work in only one direction, to-wit: placing burdens on plaintiffs just as trials had placed burdens on plaintiffs.

ii) How can we be sure that, rather than the ADR movement triggering the other fourth era reforms, there was not some larger ideological effort that brought us all these reforms (even if those reforms landed in two waves)? This alternative hypothesis would need to be that the broad bipartisan support for ADR was a serendipitous development for a movement that already had ADR (or something like it that could cull the docket) on its agenda. According to this theory, the fact that progressives also supported ADR just made the institutionalization of those reforms faster and easier. This is a plausible theory and, indeed, is essentially the conventional history.

Materials from the Pound Conference, however, support my historical account. Chief Justice Burger convened that meeting to “take a hard look” at all aspects of the justice system. The Follow-Up Task Force’s report identified seven areas of reform, and their first prescribed broader and more effective deployment of ADR. The Task Force’s fourth recommendation addressed other “Civil Procedure” items, specifically (1) preventing discovery abuse, (2) preventing attorney misconduct, (3) facilitating fee-shifting, (4) stopping class action abuse and blackmail settlements, (5) preventing class counsel from entering into settlements to benefit themselves at the expense of the class, (6) narrowing the scope of the right to a jury trial, and (7) improving the jury experience for jurors. This was Chief Justice Burger’s agenda and wish list.
Conspicuously absent from the report is any mention of heightened pleading or new summary judgment standards. The omission is especially significant because such ideas were floated. For example, the first speaker at the first panel suggested “borrow[ing] from our criminal practice and requir[ing] a civil litigant to show ‘probable merit’ before he cranks into action the prodigious machinery of the judicial process.” Yet this suggestion apparently found no traction. Nor was altering summary judgment part of a larger plot. Indeed, Chief Justice Burger’s votes in the trilogy of summary judgment cases years later suggests unease with the reforms to summary judgment practice: Chief Justice Burger joined Justice Brennan’s dissent in *Celotex*, and Chief Justice Burger authored the dissent in *Liberty Lobby*.

Heightening the pleading standard and modifying the summary judgment standard were not a central part of the predominant reformers’ agenda.

### iii) What about other fourth era reforms that were not discussed in this paper?

With respect to procedure in the fourth era, I have focused on the most common targets of ire: heightened pleading standards, the new summary standard, aggressive judicial case management, the obsession with settlement, the vanishing trial, and the privatization of dispute resolution. While these reforms are all traceable to ADR, these are not the only fourth era reforms.

A second-tier list of problems associated with fourth era procedure would include the following: increasing the likelihood of sanctions, inhibiting recovery of statutory attorney fees, tightening the admissibility of

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159 See *Celotex*, 477 U.S. at 329; see also *Anderson*, 477 U.S. at 257.


expert evidence, narrowing the reach of personal jurisdiction, constraining discovery, and curbing class actions.

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164 See, e.g., Zahn v. Int’l Paper Co., 414 U.S. 291 (1973); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Amchem Products,
Several of these reforms, too, can be explained as efforts to avoid trials, but nothing more ideological than that. Increasing the likelihood of sanctions, for example, chills litigation altogether. Having plaintiffs “stop-and-think” before filing lawsuits means that there will be fewer cases in the litigation pipeline and, therefore, fewer cases going to trial. To be sure, defendants could also be more subject to sanctions for frivolous denials or for pursuing frivolous defenses. But, chilling the assertion of a frivolous denial or a frivolous defense does not prevent the likelihood of a trial; in fact, it probably increases the likelihood of trials because it streamlines the plaintiff’s case and thereby moves it closer to a trial.

Next, inhibiting the recovery of statutory attorney fees has similar effects. Naturally, the prospect of recovering a statutory award of attorney fees as a prevailing party makes litigation more likely. Altering this calculus to make litigation less likely also makes trials less likely. Further, statutory fee awards are a particularly interesting case study of whether courts are anti-plaintiff as opposed to merely anti-trial. Of the hundreds of fee-shifting statutes, most are written as two-way fee shifts yet are interpreted as one-way fee shifts, meaning that courts allow only prevailing plaintiffs (but not prevailing defendants) to recover. One might fairly argue that this generosity showed plaintiffs is some evidence that courts are trying to discourage lawsuits, not punish plaintiffs.

Next, tightening the admissibility of expert evidence also follows the
familiar argument. By tightening the admissibility of evidence on scientific causation, plaintiffs are less likely to survive summary judgment (and reach a trial). In fact, this process—a Daubert challenge—is the "summary judgment substitute." To be sure, a defendant's experts are also subject to Daubert challenges. But when a defendant's expert is not allowed to testify, trial becomes more, not less likely.

Next, the narrowing of personal jurisdiction also follows the familiar argument, because limiting where plaintiffs can sue affects whether they sue. For example, in J. McIntyre Machinery, Ltd. v. Nicastro, a New Jersey citizen who was injured by a machine while on-the-job in New Jersey filed suit in New Jersey against the manufacturer of that machine. That suit was dismissed because the New Jersey courts lacked personal jurisdiction over the English manufacturer. Based upon the Supreme Court's opinion, this plaintiff might have been able to get personal jurisdiction over the defendant in the courts of Ohio or Nevada; otherwise, this plaintiff would need to sue that defendant in England. Expanding the scope of personal jurisdiction would increase the likelihood of litigation and trials; naturally, then, narrowing it has the opposite effect.

Next, constraining discovery also follows the familiar argument. By limiting access to evidence that plaintiffs may need in order to meet their burden of production, plaintiffs are less likely to survive summary judgment (and reach a trial). And once again, limiting access to evidence that defendants may need in order to defend against a claim does not make trials less likely; if anything, it makes trials more likely. In each of these instances, then, we see what could be merely an anti-trial bias, albeit with serious anti-plaintiff effects.

Finally, the curbing of class actions in the fourth era fits the thesis, albeit less neatly. Two motivations for much of the reform to class action practice and procedure are (as evidenced in the report of the Pound Conference Follow-Up Task Force): stopping "litigation blackmail" and preventing self-

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169 JoEllen Lind, "Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values, 37 AKRON L. REV. 717, 719 (2004) (referring to Daubert as a "summary judgment substitute"). See also Schneider, supra note 152, at 551-52 (explaining how Daubert has changed the way federal courts deal with summary judgment).


Both of these phenomenon produce settlements ("blackmail settlements" and "sweetheart settlements," respectively) that critics find objectionable. To be sure, undoing or preventing settlements is not an anti-trial measure: if class actions are harder to settle, then trials would seem more likely. Instead, however, much of the energy of class action reform has been directed at restricting the certification of class actions: if class actions are not certified, then the dangers associated with the settlement of class actions are avoided. The inability to certify a class action also does not necessarily have anti-trial effects. In fact, making certification difficult would have the opposite effect if some or many of the class members file independent actions. As a practical matter, however, in most instances involving class actions, the value of individual suits makes litigation irrational and thus improbable. Accordingly, curbing class action practice, like the other reforms, tends to have anti-trial effects.

172 See American Bar Association, supra note 36.