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Mediation: An Unlikely Villain

THOMAS O. MAIN^{*}

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I. INTRODUCTION

We are currently in the fourth era in the history of American civil procedure.¹ In this era, plaintiffs in federal court confront a rigorous pleading standard.² Defendants benefit from a summary judgment standard that grew teeth.³ Adjudication is routinely outsourced to private providers.⁴ Trials have

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.

² *See generally* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C.L. REV. 431 (2008); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

³ *See generally* Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705 (2012); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crises," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 1047 (2003); Melissa Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53 (1988); 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); Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007).

⁴ *See generally* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C.L. REV. 605 (2018); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983 (2018); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241 (1996); Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765 (2017).

nearly vanished.⁵ And settlement is the new polestar.⁶ None of these characteristics of the fourth era has improved access to justice for plaintiffs.⁷ All of these reforms are fairly reviled for their anti-litigation, anti-law-enforcement, and pro-business effects.⁸

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.⁹ Moreover, by bringing into relief the

⁵ See generally Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99 (2010); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L.L. REV. 399 (2011); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006).

⁶ See generally E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491 (2016); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1 (1984); Judith Resnik, *Changing Practices, Changing Roles: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133 (1997); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

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").

⁸ See generally Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U.L. REV. 286, 304, 357 (2013) ("The consequences of the procedural movements of the last twenty-five years are seismic . . . [T]here is no secret about what is happening, or frankly why, and whom it all benefits."); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010) (observing that the animating value in contemporary reforms is an "interest in excluding or discouraging claims rather than supporting and encouraging them"); Subrin & Main, *supra* note 1.

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.¹⁰ 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 1985.¹¹ The timing is important because it allows me to trace the cause of that development to the modern alternative dispute

the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. LEGAL STUD. 257, 281 (1995) (finding that the judges' political preferences do not affect the outcome of summary judgment motions in civil rights cases); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 840–41 (2010) (finding no effect of the judges' political party on class action settlements and their fee awards); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 193 (2010) (finding that the “[political] party of the deciding judge bears no relation to outcome”). For political effects on rulemaking, legislation, and appellate case law, see STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017). Even at the appellate level, ideology can be confounding—especially in the field of procedure. For example, the alignment of justices in the summary judgment trilogy cases defies simple ideological characterization. Chief Justice Burger joined Justice Brennan's dissenting opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 (1986). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 268 (1986), a case that made summary judgments more likely, Chief Justice Burger authored a dissent joined by Justice Rehnquist. In the pleading context, Chief Justice Rehnquist wrote the opinion for a unanimous court in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (affirming the notice pleading standard). In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), Justice Thomas wrote the opinion for a unanimous court.

¹⁰ See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* (1984); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (3d ed. 2004).

¹¹ See *infra* notes 108–26 and accompanying text.

resolution (ADR) movement, which began in 1976.¹² 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.¹³

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.¹⁴ Some cases could be sent to ADR—by strictly enforcing arbitration clauses or by requiring parties to mediate, for example.¹⁵ Some cases could also be resolved by insourcing ADR, with judicial settlement conferences, for example.¹⁶ 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.¹⁷ In the third era, judges tried cases; in fact, it is not much of an exaggeration to say that judges *only* tried cases.¹⁸ In 1976, cases were rarely dismissed for failure to state a claim.¹⁹ Summary judgments were extraordinary.²⁰ Trial was a realistic option, and parties either went to trial or they settled in the shadow of a trial date.²¹

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.²² Accordingly, when courts abandoned their commitment to trials, they lost the "aggressive" component of the passive-aggressive couplet.²³ Passive-passive

¹² See *infra* notes 27–57 and accompanying text.

¹³ See *infra* notes 106–07 and accompanying text.

¹⁴ See *infra* notes 127–55 and accompanying text.

¹⁵ See *infra* notes 129–35 and accompanying text.

¹⁶ See *infra* notes 136–40 and accompanying text.

¹⁷ See *infra* notes 58–96 and accompanying text.

¹⁸ See *infra* notes 69–77 and accompanying text.

¹⁹ See *infra* notes 79–81 and accompanying text.

²⁰ See *infra* notes 82–84 and accompanying text.

²¹ See *infra* notes 89–96 and accompanying text.

²² See *infra* notes 73–78 and accompanying text.

²³ See *infra* notes 153–55 and accompanying text.

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.”³⁰ One of the presenters, Professor Frank Sander, surveyed a “diverse panoply of [alternative] dispute resolution processes.”³¹ 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.³² The birth of the modern ADR movement is the enduring legacy of the Pound Conference.³³ 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).³⁴

Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–10 (1996). See generally Henry T. King, Jr. & Marc A. LeForestier, *Arbitration in Ancient Greece*, 49 DISP. RESOL. J. 38 (1994); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U.L. REV. 443 (1984). See also Henry T. King, Jr. & Marc A. LeForestier, *Papal Arbitration: How the Early Roman Catholic Church Influenced Modern Dispute Resolution*, 52 DISP. RESOL. J. 74, 78–79 (1997).

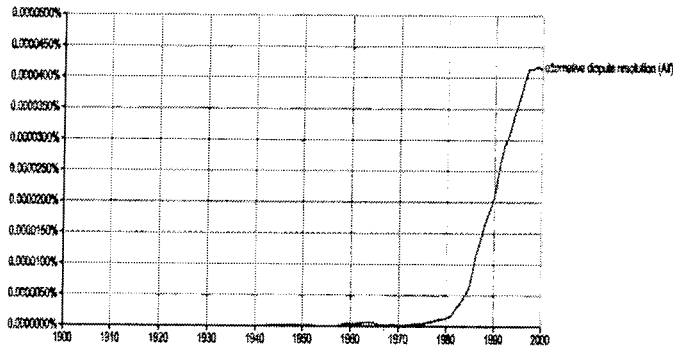
³⁰ WARREN E. BURGER, *Agenda for 2000 A.D. - A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 25 (A. Leo Levin & Russell R. Wheeler eds. 1979).

³¹ FRANK E.A. SANDER, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 83 (A. Leo Levin & Russell R. Wheeler eds. 1979).

³² *Id.* at 80–87.

³³ See generally KOVACH, *supra* note 10, at 31–34; CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 19–24 (2d ed. 1996); Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 3 (1983); Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1592 (1995); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 n.17 (1986); Laura Nader, *The ADR Explosion - The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. 269 (1988); *Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1851, 1853 n.9 (2000); Frank E.A. Sander, *Developing the MRI (Mediation Receptivity Index)*, 22 OHIO ST. J. ON DISP. RESOL. 599, 599 (2007); Stempel, *supra* note 29, at 309, 312 n.42; Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 289 n.3 (2002).

³⁴ See GOOGLE BOOKS, <http://books.google.com/ngrams> (last visited Nov. 5, 2018). See generally Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 SCIENCE 176 (2010).



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.”³⁵ Indicative of the infatuation with ADR, the Task Force issued a lengthy report just four months later.³⁶ The report’s first item, titled “New Mechanisms for the Delivery of Justice,” lauded the untapped potential of both arbitration and mediation.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

³⁵ A. Leo Levin & Russell R. Wheeler, *Epilogue*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 289, 290–91 (A. Leo Levin & Russell R. Wheeler eds. 1979).

³⁶ American Bar Association, *Report of Pound Conference Follow-Up Task Force*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 295 (A. Leo Levin & Russell R. Wheeler eds. 1979).

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.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 1968,³⁹ or because of the Institute for Mediation and Conflict Resolution, which was founded in the late 1960s.⁴⁰ Professors Soia Mentschikoff, Lon Fuller, and others were carefully studying and distinguishing modes of dispute resolution in the 1950s and 1960s.⁴¹ The National Mediation Board had been successfully mediating labor disputes in the railroad industry since 1934.⁴²

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.⁴³ A few months after the

³⁸ Stempel, *supra* note 29, at 317 (citations omitted).

³⁹ See generally Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systemizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 850 (1996); Joseph B. Stulberg & Sharon Press, *Variations on a Theme By Sander: Does a Mediator Have a Philosophical Map?*, 31 OHIO ST. J. ON DISP. RESOL. 101 (2016).

⁴⁰ See Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343, 359 n.70 (2000) (quoting Albie M. Davis, *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)).

⁴¹ See, e.g., Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604 (1966); Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3 (1963); Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961); Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698 (1952). See generally Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

⁴² See generally Robert A. Baruch Bush, *Dispute Resolution—The Domestic Arena: A Survey of Methods, Applications and Critical Issues*, in BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA 9 (John A. Vasquez et al., eds., 1995); KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 16–34 (2003).

⁴³ See J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION* 69–74 (1984); Laura Nader, *The Globalization of Law: ADR as “Soft” Technology*, 93 AM. SOC’Y INT’L L. PROC. 304, 309 (1999) (“The idea of ADR

Follow-Up Task Force issued its report, its chair, Griffin Bell, became the Attorney General of the United States; this put a strong advocate for ADR in the executive branch.⁴⁴ Chief Justice Burger led the judiciary,⁴⁵ and Congress immediately joined the effort.⁴⁶

Many of these ADR proponents believed that informal dispute resolution would be more efficient than adjudication.⁴⁷ Other proponents

attracted strange bedfellows that ranged in political position from right to left.”); Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 336 nn.25–26 (2005) (collecting authorities); Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 143–44 (1999); *Dispute Resolution*, 88 YALE L.J. 905 (1979); Jim Miranker, *Silicon Valley Courts Alternatives to Lawsuits*, S.F. EXAMINER, Dec. 1, 1985, at D-1, col. 1. For examples of conservative threads of this history, see Warren Burger, *Our Vicious Legal Spiral*, 16 JUDGES J. at 23 (Fall 1977); Warren Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982); Brett Cattani, *From Courthouses of Many Doors to Third Party Intervention*, CHRIS. SCI. MONITOR, Jan. 17, 1979, at 12, 13. For examples of progressive threads of this history, see Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 L. & Soc'y Rev. 247, 255 (1976); FORD FOUNDATION, CURRENT INTERESTS OF THE FORD FOUNDATION (1978). Of course many have long expressed concerns about ADR, including at the Pound Conference. See, e.g., A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 87, (A. Leo Levin & Russell R. Wheeler eds., 1979); Laura Nader, *Commentary*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 114, 115–19 (A. Leo Levin & Russell R. Wheeler eds. 1979). See also THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Fiss, *supra* note 6; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

⁴⁴ See generally Griffin Bell, *The Pound Conference Follow-Up: A Response from the Department of Justice*, 76 F.R.D. 320 (1978). See also William Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1978).

⁴⁵ See Burger, *supra* note 43, at 276–77. See also Dina R. Janerson, *Representing Your Clients Successfully in Mediation: Guidelines for Litigators*, N.Y. LITIGATOR, Nov. 1995, at 15 (quoting Chief Justice Burger at the 1985 Chief Justice Earl Warren Conference on Advocacy: Dispute Resolution Devices in a Democratic Society (Roscoe Pound-American Trial Lawyers Foundation 1985)) (“The notion that ordinary people want black-robed judges and well-dressed lawyers and fine courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”), as quoted in Scott H. Blackmand & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1711 n.4 (1998). See generally Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 2 & n.9 (1987); Stempel, *supra* note 29, at 312–17.

⁴⁶ See Stempel, *supra* note 29, at 318 (discussing 1977 legislation).

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.⁴⁸ And others saw ADR's potential for more creative and enduring solutions to disputes than formal adjudication's binary outcomes.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² In mediation, for example, the more that a trial could be characterized as a monster, the more that could be achieved by avoiding it.⁵³

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

⁴⁸ 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.

⁴⁹ See generally Carrie J. Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, FJC DIRECTIONS 8, 11 (Dec. 1994).

⁵⁰ 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).

⁵¹ See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Brunet, *supra* note 45, at 47; Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107 (1983).

⁵² 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).

⁵³ 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.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.

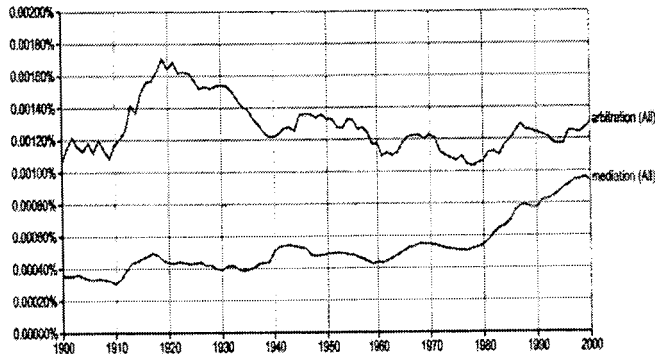
⁵⁴ See generally JEROME T. BARRETT AND JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (2004); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, & OTHER PROCESSES 2–3 (6th ed. 2012); Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1 (1996); Main, *supra* note 43, at 332 n.7 (collecting authorities).

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*.

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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.*

⁶¹ *Id.* at 1843.

⁶² *Id.* (citing Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1050–109 (1982)); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 948–956 (1987).

⁶³ 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.⁶⁴ Periodization is difficult because both of those key reforms occurred in the lower courts before Supreme Court decisions ratified the emergent practices.⁶⁵ Accordingly, a la Sorites Paradox, it is difficult to identify the moment of transition from the third to the fourth era.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

as *Contract*, 80 NOTRE DAME L. REV. 593 (2005); Spencer, *supra* note 8. See also Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010); Harold Konglu Koh, “*The Just, Speedy, and Inexpensive Determination of Every Action*”?, 162 U. PA. L. REV. 1525 (2014); Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493 (2015); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018); James Maxeiner, *The United States Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?*, 30 GA. ST. U.L. REV. 983 (2014); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016); Margaret Y.K. Woo, *Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation-State*, 15 NEV. L.J. 1261 (2015); Sternlight, *supra* note 33; Yamamoto, *supra* note 4; Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305 (2003).

⁶⁴ See *infra* notes 146–52 and accompanying text [Part V.B].

⁶⁵ See *infra* notes 148–50 and accompanying text [Part V.B].

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].

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

⁶⁷ William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 695 (2016).

⁶⁸ James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1278 (2010).

⁶⁹ Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard*, 78 LA. L. REV. 739, 740 (2018).

⁷⁰ Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1628 (2015); Young, *supra* note 5, at 89.

⁷¹ See Miller, *supra* note 69. See generally Elizabeth M. Schneider, *Revisiting the Integration of Law and Fact in Contemporary Federal Civil Litigation*, 15 NEV. L.J. 1387 (2015); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004).

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.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.⁷⁵ taught judges how to juggle the demands of simultaneous jury trials.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.”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.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.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.”⁸⁰ Arthur Miller joked that the motion “was last effectively used during the McKinley administration.”⁸¹

REV. 4, 44 tbl. 2 (1983).

⁷⁴ 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 (1976). See also Galanter, *supra* note 73.

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>.

⁷⁶ *Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 266–70 (1961).

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).

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.

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).

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)).

⁸¹ *Id.* at 1845 n.27 (citing ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO

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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.”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.”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.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;⁸⁵ in 1976 it was still nine months.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;⁸⁷ in 1976

THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 8 (1984)).

⁸² Stempel, *supra* note 3, at 155 (citing *Tomalewski v. State Farm Life Ins. Co.*, 494 F.2d 882 (3d Cir. 1974); *Clausen & Sons, Inc. v. Hamm Brewing Co.*, 395 F.2d 388 (8th Cir. 1968)).

⁸³ Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 602 (2004) (citing Memoranda with Reference to Certain Problems Under Preliminary Draft III (1/14/37), microformed on Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935–88, No. CI-5320-17, at 3). *See also* Stephen N. Subrin, *supra* note 62, 980 (stating that “the Rules gave so many tools to the [plaintiff] ‘that it would be cheaper and more to the self-interest of the defendant to settle for less than the cost to resist’” (quoting Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A.J. 809, 810 (1936))).

⁸⁴ Subrin & Main, *supra* note 1, at 1845 n.28 (citing Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 722 (1984) (noting that the summary judgment doctrine “has increasingly been ignored or paid mere lip service” by courts); JOE S. CECIL & C.R. DOUGLAS, SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS 1 (1987). The Supreme Court’s trilogy of summary judgment cases in 1986 re-interpreted the mandate of the rule, thereby obviating the need for any textual reform. *See generally infra* note 150.

⁸⁵ *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-5 (1966).

⁸⁶ *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-5 (1976).

⁸⁷ *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-5 (1966).

it was sixteen months.⁸⁸ 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.⁸⁹ 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.⁹⁰ Prior to 1980, amendments to the discovery rules were still *expanding* the scope and amount of discovery.⁹¹ Accordingly, it is fair to conclude that, with the exception of the five to fifteen percent of cases that were so-called "mega cases,"⁹² discovery in the third era was neither a serious problem nor perceived to be a serious problem.⁹³ Instead,

⁸⁸ See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-5 (1976).

⁸⁹ Subrin & Main, *supra* note 1, at 1846 n.35 (citing ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 105 (1951)). Interestingly, this data was reported as showing that "the discovery rules are popular." *Id.* at 104. Of course, non-formal "discovery" was also happening informally through exchanges of information outside the framework of the Federal Rules. See *id.* at 104–05.

⁹⁰ 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 (1950–1979).

⁹¹ Hon. Paul V. Niemeyer, *Revisiting the 1938 Rules Experiment*, 71 WASH. & LEE L. REV. 2157, 2165 (2014) ("discovery was expanded in scope and facility through amendments made in 1946, 1963, 1966, and 1970.") See generally Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery Reform*, 64 LAW & CONTEMP. PROBS. 197, 207–09 (2001).

⁹² Subrin & Main, *supra* note 1, at 1846 n.34 (citing David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 80–81 n.17 (1983) (using the term to describe cases "excluded as 'too big' to be handled within the scope of the research")); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C.L. REV. 785, 791 (1998) ("Cases involving extensive discovery are in fact relatively rare—the studies using actual file reviews uncovered very few cases involving more than ten discovery requests, perhaps 5–15% depending on the sampling method.").

⁹³ See Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Proposals*, 52 SMU L. REV. 229, 246–49 (1999) (rebutting the public perception of discovery concerns by reference to studies conducted in 1960 by The Columbia Project for Effective Justice and in 1978 by the Federal Judicial Center). To be sure, broad discovery has always had its critics. Even at the Pound Conference it was "alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements." *Report of the Follow-Up Task Force, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 318 (A. Leo Levin & Russell R. Wheeler eds. 1979). The empirical data has never supported such anecdotal accounts. See Thornburg, *supra* note 93, at 246.

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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.⁹⁴ But most cases settled. In fact, approximately fifty percent of the civil cases settled without *any* court action.⁹⁵ The contemporary notion of judicial case management had not been invented.⁹⁶ 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.

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."⁹⁷ He long had reasoned that, if hospitals and corporations could take advantage of business management techniques, so could judges;⁹⁸ mediation was an even better role model.

The judiciary prescribed "improved case management efficiency," and the goal was settlement.⁹⁹ The message to district courts favoring case management and trial avoidance around 1978 was particularly strong.¹⁰⁰ 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."¹⁰¹ As Judge James Lawrence King put it, "[t]he philosophy of caseload management presented here is one of *active judicial control*."¹⁰² Judge William Schwarzer "urge[d] that judges intervene in civil litigation and take an appropriately active part in its management from the beginning."¹⁰³ "[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."¹⁰⁴ This non-formal messaging was ultimately

⁹⁷ BURGER, *supra* note 30, at 25.

⁹⁸ Hon Warren E. Burger, The Courts on Trial, Speech at the American Bar Association (Feb. 21, 1956), in WARREN E. BURGER, *DELIVERY OF JUSTICE* 4, 6 (1990).

⁹⁹ Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 546 (2002). See also Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003, 1016–18 (2007); FED. R. CIV. P. 16(c)(7) advisory committee's note to 1983 amendment (stating that "settlement should be facilitated at as early a state of the litigation as possible."); see also D. MARIE PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 8–9 (1986).

¹⁰⁰ Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986) (discussing judicial ethos in the 1970s and 1980s).

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).

¹⁰³ William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400, 402, 404 (1978).

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

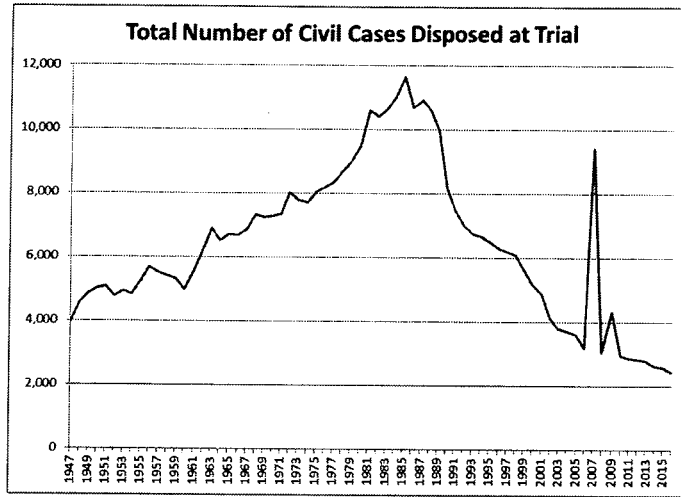
Trial judges heeded the message. As Figure 1 shows, in 1985, the total number of civil cases disposed at trial in federal courts peaked. Then, beginning in 1986, the absolute number of trials began a precipitous decline—dropping ultimately to current levels, where there are now considerably fewer civil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

About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts, 4 JUST. SYS. J. 136, 136 (1978) (“The judicial role is not a passive one.”).

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).

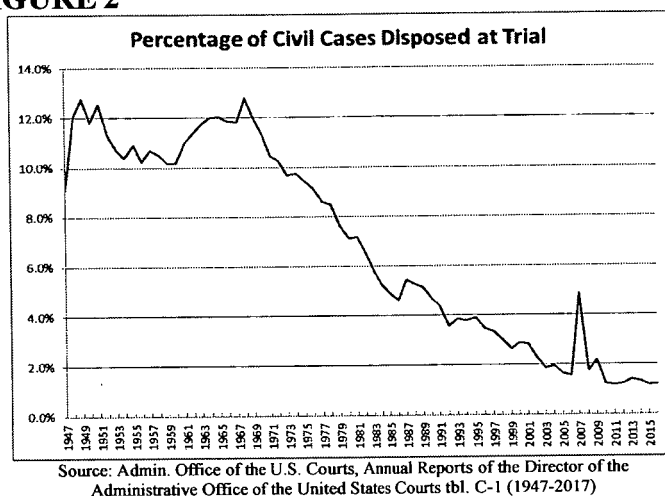
FIGURE 1¹⁰⁸

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)

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.

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.

FIGURE 2¹⁰⁹



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.¹¹⁰ As a result, caseloads grew at unprecedented rates.¹¹¹ In the 1970s the average annual rate of growth was 7.4 percent.¹¹² From 1980 to 1985, the average annual rate of growth was 10.1 percent.¹¹³ In the long decade between 1969 and 1983, the civil caseload of the federal courts more than tripled.¹¹⁴ Importantly, however, even during that long decade, the numerator (i.e., the total number of trials) also climbed, as demonstrated in Figure 1.

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.*

¹¹⁰ See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 956 at n.110 (2000) (citing *Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload* (Sept. 18, 1998) (memorandum) (on file with the Harvard Law School Library)).

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).

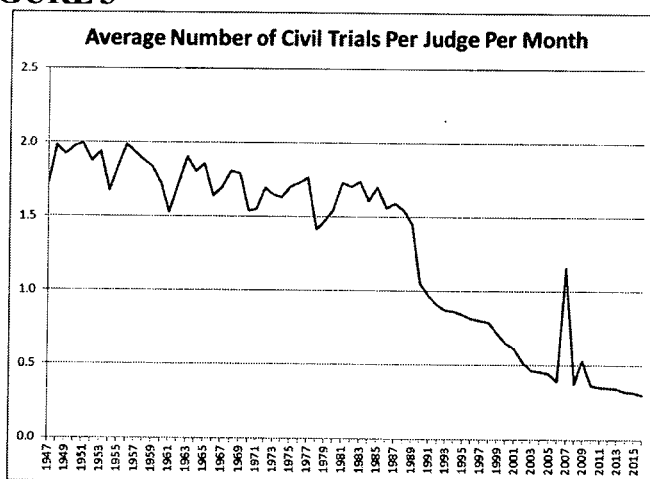
¹¹² See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-1 (1969-1983).

¹¹³ See *Id.*

¹¹⁴ See *Id.*

As the civil caseloads grew, the total number of federal judges expanded too, albeit at a slower rate.¹¹⁵ 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,¹¹⁶ judges still tried, on average, about 1.7 cases per month. Again, the mid-1980s is pivotal.¹¹⁷

FIGURE 3¹¹⁸



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 is 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.

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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.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²² 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).¹²³

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.¹²⁴ 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.

¹²² 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 (1960–2017).

¹²³ Speedy Trial Act of 1974, 18 U.S.C. § 3161(f).

¹²⁴ 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 (1986–1991).

percent.¹²⁵ 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.¹²⁶

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.¹²⁷ And this passive-aggressive approach worked: by trying approximately ten percent of the cases, the others settled.¹²⁸ 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.¹²⁹ But

¹²⁵ The average annual growth rate between 1985 and 2017 is approximately 0.3 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 (1985–2017).

¹²⁶ See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983); Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1189–90 (2015); Richard A. Posner, *The Federal Courts: Challenge and Reform* 27–28 (1996); Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 93 (2012) (noting that, in 2009, senior district judges accounted for 21.2 percent of case terminations and 26.8 percent of all trials); Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted for*, 16 NEV. L.J. 783 (2016); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998); Judith Resnik, *supra* note 110, at 949.

¹²⁷ See *supra* notes 58–96 and accompanying text.

¹²⁸ See *supra* note 78 and accompanying text.

¹²⁹ See DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE (1989) (discussing case studies of 15 companies); ALAN F. WESTIN & ALFRED G. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION (1988) (discussing profiles of 12 organizations using ADR); Thomas Donahue & Barbara

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.”¹³⁰ 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,¹³¹ ADR gained legitimacy as “a more general solution for handling conflicts of any kind.”¹³² 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.”¹³³ New mandates required parties to participate in mediation or non-binding arbitration, even if the parties resisted.¹³⁴ Agreements to arbitrate that

Reinhardt, *Survey: ADR Use Increasing*, 15 ALTERN. HIGH COSTS OF LITIG. 66, 75 (1997); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 869 (2004) (citing ELIZABETH S. ROLPH, ERIK MOLLER & LAURA PETERSEN, *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* 2–3 (1994)).

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. Whittaker 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.”).

¹³² Calvin Morrill & Danielle S. Rudes, *Conflict Resolution in Organizations*, 6 ANN. REV. L. & SOC. SCI. 627, 635 (2010).

¹³³ Warren E. Burger, *Remarks to the American Arbitration Association* (Nov. 26, 1968), in WARREN E. BURGER, *DELIVERY OF JUSTICE* 27 (1990).

¹³⁴ See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004); Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L.

were previously void as against public policy were enforced.¹³⁵ 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.¹³⁶ The notion of having ADR and formal adjudication under one literal roof was Professor Sander's vision of the multi-door courthouse.¹³⁷ 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.¹³⁸

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.¹³⁹ As ventilated extensively and persuasively

REV. 775, 799–823 (1998); Welsh, *supra* note 10; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 789 (2001).

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.

¹³⁶ *See generally* Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002); James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001); Thomas Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513 (2016).

¹³⁷ *See* Frank E.A. Sander, *The Multi-door Courthouse*, NAT'L FORUM, Fall 1983, at 24. *See generally* Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65, 84 (A. Leo Levin & Russell R. Wheeler eds. 1979).

¹³⁸ *See generally* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73 (2017); Harold J. Baer, Jr. *History Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131 (2001); Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RES. 1 (1987); Resnik, *supra* note 6; Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010); Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994).

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*

elsewhere, different aspects of the institutionalization of ADR are profoundly problematic.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.¹⁴¹ Systematizing mediation is inconsistent with mediation's core value that even the process of mediation is subject to negotiation.¹⁴² Further, when judges host settlement conferences, there are serious policy problems and ethical concerns.¹⁴³ Pressuring a party to settle is inappropriate in mediation.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

Judicial Preferences for Settlement, 2002 J. DISP. RESOL. 155, 157 (2002).

¹⁴⁰ On the problematic nature of court-ordered ADR, see Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the "Semi-Formal,"* in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419 (Felix Steffek et al. eds., 2013); Fiss, *supra* note 6, at 1075; Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014); Resnik, *supra* note 63; Resnik, *supra* note 4; Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U.L. REV. 1101 (2006); Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13–14 (2006). On the problematic nature of judges managing cases for settlement, see Resnik, *supra* note 6; Deason, *supra* note 138; Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983 (2016).

¹⁴¹ See generally Welsh, *supra* note 10.

¹⁴² See generally Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002).

¹⁴³ See generally Welsh, *supra* note 140; Deason, *supra* note 138.

¹⁴⁴ See generally Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

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.¹⁴⁵ 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).¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ In 1993 (and again in 2002) the Supreme Court unanimously rejected this heightened pleading standard.¹⁵⁰ 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

¹⁴⁵ Some tried. See Welsh, *supra* note 140, at 1009; see also Deason, *supra* note 138, at 87 n.60, 112.

¹⁴⁶ Miller, *supra* note 3, at 1016; Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 240 (2011).

¹⁴⁷ See D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court’s New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 38 (1988); Bronsteen, *supra* note 3; Miller, *supra* note 3, at 1044.

¹⁴⁸ See Burbank, *supra* note 83, at 620 (noting the rise of summary judgments prior to the Supreme Court’s trilogy cases in 1986).

¹⁴⁹ See, e.g., *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979) (stating civil rights complaint must state more than simple conclusions); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976) (“[P]laintiffs in civil rights cases are required to plead facts with specificity.”). See generally Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 331–32 (2001).

¹⁵⁰ *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

defendants' answers.¹⁵¹ 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.¹⁵²

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.¹⁵³ Approximately two percent of federal civil cases are dismissed for failure to state a claim.¹⁵⁴ Of course the percentage of cases resolved at trial is between one and two percent.¹⁵⁵ The

¹⁵¹ See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 618–19 (2002) (noting that lower courts found ways to circumvent Supreme Court precedent and require heightened pleading). The Supreme Court suggested these methods (and others) in *Crawford-El v. Britton*, 523 U.S. 574, 595–98 (1998). See Subrin & Main, *supra* note 1, at 1848.

¹⁵² See generally Subrin & Main, *supra* note 1, at 1847–48 (quoting/citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679–81 (2009)); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 823–24 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010); Dodson, *supra* note 2, at 54; Spencer, *supra* note 2, at 466; Stephen N. Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 575 (2012)).

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)).

¹⁵⁵ 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 (2016–2017).

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.¹⁵⁶ 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

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.¹⁵⁷ 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.”¹⁵⁸ 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*.¹⁵⁹

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,¹⁶⁰ inhibiting recovery of statutory attorney fees,¹⁶¹ tightening the admissibility of

¹⁵⁷ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 (1986) (Brennan, J., dissenting). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (Brennan, J., dissenting).

¹⁵⁸ Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 51, 61 (A. Leo Levin & Russell R. Wheeler eds., 1979).

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

¹⁶⁰ In 1983, Rule 11 was amended. See FED. R. CIV. P. 11, 1983 amendments. See generally Paul A. Batista, *Symposium: Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans*, 54 *FORDHAM L. REV.* 1 (1985); STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 *F.R.D.* 181 (1985); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 *BUFF. L. REV.* 485 (1988). Much of the bite of the 1983 amendment was removed by 1993 amendments. See FED. R. CIV. P. 11, 1993 amendments. See generally Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 *IND. L.J.* 171 (1994); Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 *F.R.D.* 383 (1995).

¹⁶¹ See, e.g., *Marek v. Chesny*, 473 U.S. 1 (1985); *Evans v. Jeff D.*, 475 U.S. 717

expert evidence,¹⁶² narrowing the reach of personal jurisdiction,¹⁶³ constraining discovery,¹⁶⁴ and curbing class actions.¹⁶⁵

(1986); *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001). One might include *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), on this list. In *Alyeska*, the Court held that it was inappropriate for the court to award fees without legislative authorization. Although this case also made it harder for plaintiffs to recover their attorney fees, Congress responded to *Alyeska* by enacting new statutes that authorized fee shifting. *See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976). *See generally* Catherine R. Albiston & Laura Beth Neilsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007); William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004); Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle With Access to Justice*, 76 TEX. L. REV. 1863 (1998).

¹⁶² *See* *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). *See also* *Gen. Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See generally* Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 321 (2000); Allan Kanner & M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281 (2007); Jennifer Laser, *Inconsistent Gatekeeping and Federal Courts: Application of Daubert v. Merrell Dow Pharm., Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A.L. REV. 1379 (1997); Leslie A. Lunney, *Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103 (1994).

¹⁶³ *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Walden v. Fiore*, 571 U.S. 277 (2014); *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2018); *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2018). *See generally* Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209 (2015); Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775 (2017); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 368–77 (2012).

¹⁶⁴ Since 1980, the discovery rules have been amended numerous times, including imposing numerical limits on depositions and interrogatories, and narrowing the scope of discovery. *See, e.g.*, FED. R. CIV. P. 26, 1980 amendments, 1983 amendments, 1993 amendments, 2000 amendments, 2006 amendments, 2015 amendments. *See generally* Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 544 (2001); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1211–12 (2005); Stempel, *supra* note 91.

¹⁶⁵ *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.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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

Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Epic Systems v. Lewis, 138 S. Ct. 1612 (2018); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4; Fed. R. Civ. P. 23, 2003 amendments. See generally Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U.L. REV. 511 (2013).

¹⁶⁶ See generally Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the “Stop-and-Think-Again” Rule*, 1993 BYU L. REV. 879 (1993); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65 (1996).

¹⁶⁷ See generally Jeffrey Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435 (1986).

¹⁶⁸ See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8 (1st Cir. 1999). See generally John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U.L. REV. 1567, 1588 (1993); Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317 (1998).

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.”¹⁶⁹ 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*,¹⁷⁰ 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).¹⁷¹ 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-

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).

¹⁷⁰ *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

¹⁷¹ See generally Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495 (2013); Stempel, *Politics and Sociology in Federal Civil Rulemaking*, *supra* note 164, at 542–45; Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 743 (1998); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU L. REV. 579 (1981).

dealing by class counsel.¹⁷² Both of these phenomenon produce settlements (“blackmail settlements” and “sweetheart settlements,” respectively) that critics find objectionable.¹⁷³ 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.¹⁷⁴ Accordingly, curbing class action practice, like the other reforms, tends to have anti-trial effects.

¹⁷² See American Bar Association, *supra* note 36.

¹⁷³ See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475; Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000); Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U.L. REV. 1357 (2003).

¹⁷⁴ See generally John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 430 (2000); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 816–17 (1997).