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TWO JUDGES: DIFFERING VALUES AND VISIONS

“ADR” TECHNIQUES IN THE REFORMATION MODEL OF CIVIL DISPUTE RESOLUTION

*Judge Robert M. Parker**

*Leslie J. Hagin***

THIS article advocates a break from the past in terms of how civil dispute resolution is conducted in this country — specifically, in the federal district courts. We posit a new model that is public, taxpayer-supported, and inclusive of an array of litigation tracks producing speedy, affordable, fair and reliable decisions. The decisions rendered pursuant to these tracks carry presumptions of finality. The cumbersome and expensive, traditional jury trial is provided for some cases as an initial court-tracking matter, and it is ensured also for those litigants who can overcome the presumption of finality accorded the results of non-traditional track proceedings. Litigants whose cases have initially been placed in non-traditional tracks may demonstrate to the court, essentially through a cost/benefit-fairness analysis, the need to expend additional litigant and judicial resources on their cases. These litigants might show the court that there exists a strong likelihood that a traditional jury trial would produce a substantially different result from that already obtained through a non-traditional litigation track, or that a traditional jury trial is necessary to satisfy another important public interest that would otherwise go unfulfilled. Essentially, we take methods of dispute resolution traditionally considered “alternative,” expand them, and move them to the front line in the battle against litigation cost, delay, and the unfair denial of access to the courts. Under our proposed model, the traditionally “alternative” forms of civil dispute resolution assume the role

Ed. Note: With the authors' concurrence, SMU LAW REVIEW invited a response to this article, which is published in this issue. See G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935 (1993).

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of the institutionally routine, and the traditionally routine form of civil dispute resolution ascends to its appropriate place as the institutionally exceptional.

Our article proceeds as follows. Section I speaks of the deteriorating state of the current, traditional model of civil dispute resolution. Section II addresses the promise, but inadequacy of current alternative dispute resolution (ADR) procedures. We discuss our proposed reformation model in Section III. In Section IV, we address key concerns arguably implicated by our reformation model. Section V rejects other proposed solutions to the problems associated with the currently preferred, traditional jury trial model and discusses the reasons for such rejection. And we take a critical look at the Civil Justice Reform Act of 1990 in Section V. In the end, in Section VI, we are so bold as to recommend to Congress the logical and essential steps that need to be taken in the aftermath of the Civil Justice Reform Act experiment now being conducted: true reform of our system of civil dispute resolution.

I. THE MARKET BREAKDOWN OF THE TRADITIONAL MODEL OF CIVIL DISPUTE RESOLUTION

Our traditional civil dispute resolution regime is typified by market breakdown.¹ Justice costs too much and is unfairly distributed. The federal district court, at least, is effectively off-limits to most members of society.² Given our Constitutional and democratic form of government, this is an unacceptable state of affairs.

The literature describing the modern market breakdown of the courts is voluminous — and it is laden as much with statistics of cost and delay as with sad tales of individual cases sabotaged by the system's collapse. A recent past chair of the ABA Section of Litigation, Theodore R. Tetzlaff, articulated well some of our common concerns:

At least four critical questions require our immediate consideration if the U.S. justice system is to survive in the 21st century: (1) how to preserve and improve the jury trial system so that it can continue to discharge its responsibilities under the Sixth and Seventh Amendments to the U.S. Constitution and their state correlatives; (2) how to secure

1. See generally Michael E. Tigar, *2020 Vision: A Bifocal View*, 74 JUDICATURE 89, 92 (1990) (comments of Professor and then-Chair of the ABA Section of Litigation Tigar, from the May 18-22, 1990, The Future and the Courts Conference in San Antonio, Texas) ("In a distressing number of cases . . . the market behavior of legal services consumers is irrational in two senses. It is irrational in terms of their own interest, which is a crucial market failure. It is also irrational because a small minority of cases and lawyers are chewing up a grossly inflated amount of judicial resources.") [hereinafter Tigar, *2020 Vision*].

2. See Theodore R. Tetzlaff, *Opening Statement: Four Urgent Questions*, 18 LITIG. 1, 2 (1991) (then-Chair of the ABA Section of Litigation Tetzlaff asking: "What middle-American fails to be shocked at our 'regular hourly rates?' Which of us can afford to hire ourselves?") [hereinafter Tetzlaff, *Opening Statement*]. Cf. Shirley S. Abrahamson, *The Consumer and the Courts*, 74 JUDICATURE 93, 94 (1990) (her informal survey of mostly judges and court personnel attending the May 18-22, 1990, The Future and the Courts Conference in San Antonio, Texas asked: "If you had a dispute that you could not resolve amicably and you needed a third party decisionmaker, would you go to court?" The overwhelming majority responded, "No, not if I could possibly avoid it.").

access for litigants, civil or criminal, to a truly satisfactory adversarial hearing; (3) how to reorganize litigation processes and rules to respond to the current forensic revolution in the creation and presentation of evidence at trial; and (4) how to reduce the combativeness that now mars relations between lawyers and clients, lawyers and their colleagues, and even lawyers and judges. . . . A broad, systematic, and fair-minded approach is imperative if the U.S. adjudicatory mechanism is to retain its credibility and efficacy in the next century.³

We will but briefly summarize the monuments of current systemic collapse.

Between 1958 and 1988, the number of cases (both civil and criminal) filed in the federal district courts trebled, and the number filed in the federal courts of appeals increased by more than tenfold.⁴ While the precise causes of the modern federal court caseload surge are not fully understood, they certainly include: the continued growth of federal law — in particular, the creation of many new federal rights both by Congress and by judicial interpretation of the Constitution; and a variety of procedural developments such as expanded use of class actions and “one-way” shifting of attorneys’ fees.⁵ Also, overdiscovery by litigators has been identified as a major saboteur of our traditional adversary system of civil dispute resolution.⁶ Certainly, one

3. Tetzlaff, *Opening Statement, supra* note 2, at 1; see also SENATE COMM. ON THE JUDICIARY, THE JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. NO. 416, 101st Cong., 2d Sess. 123 (1990) (reprinting Louis Harris & Assoc., Inc., *Procedural Reform of the Civil Justice System* (1989)) (finding that 69% of the corporate counsel, 85% of the public interest litigators, 63% of the plaintiffs’ litigators, 52% of the defense litigators, and 56% of the federal trial judges surveyed agreed that transaction costs of federal litigation unreasonably impede the use of the civil justice system by the ordinary citizen) [hereinafter *Harris Survey*].

4. Judicial Conf. of the United States, REPORT OF THE FEDERAL COURTS STUDY COMM. 5 (April 2, 1990) [hereinafter STUDY COMMITTEE, REPORT]. In response to mounting public and professional concern with the federal courts’ congestion, delay, expense, and expansion, this committee of diverse membership was appointed by the Chief Justice of the United States at the direction of Congress. See *Judicial Improvements and Access to Justice Act of 1988*, Pub. L. No. 100-702, 102 Stat. 4642 (titled the “Federal Courts Study Act,” effective Jan. 1, 1989). The Committee was directed to “examine problems and issues currently facing the courts of the United States” and to “develop a long-range plan for the future of the Federal Judiciary.” *Id.* § 102(b)(1), (2). The Committee conducted a fifteen month study of the problems of the federal courts and presented a report of its analysis and recommendations. The Committee was chaired by Third Circuit Judge Joseph F. Weis, Jr., and its members were: J. Vincent Aprile II, Esq.; United States District Court Judge Jose A. Cabranes; Washington State Supreme Court Justice Keith M. Callow; First Circuit Judge Levin H. Campbell; Edward S. G. Dennis, Jr., Esq.; Senator Charles E. Grassley; Morris Harrell, Esq.; Senator Howell Heflin; Representative Robert W. Kastenmeier; United States District Court Judge Judith N. Keep; Brigham Young University President Rex E. Lee, Jr.; Representative Carlos J. Moorhead; Diana Gribbon Motz, Esq.; and Seventh Circuit Judge Richard A. Posner.

5. *Id.*

6. See, e.g., William W. Schwarzer, *Mistakes Lawyers Make in Discovery*, 15 LITIG. 31, 31 (Winter 1989) (“For many lawyers, discovery is a Pavlovian reaction.”); Tigar, *2020 Vision, supra* note 1, at 92 (remarking on his perception of complex litigation in particular that, no matter what amount of discovery and motions practice a case inherently requires, “[t]he ‘bottom line’ mentality of law firms means that if you have a litigation budget of \$1 million, the law firm will do that much discovery and then shamelessly come back for more.”); see also *Harris Survey, supra* note 3, at 128, 132; BROOKINGS INSTITUTION TASK FORCE, JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (Brookings Institution 1989) (task force chaired by Judge Robert Peckham. Judges John Nangle, Aubrey Robinson, and Sarah Barker were the other members); Frank L. Easterbrook, *Discovery as Abuse*, 69 B.U.L. REV. 635 (1989).

function of the excessive adversarialness associated with litigation today is excessive delay.

As the Federal Courts Study Committee's Report of April 2, 1990 recognized: "whereas in 1960 it would have taken district courts only nine months to dispose of all of their pending cases (if no new cases had been filed) at their then rate of terminations, by 1989 this figure had risen to 11.7 months."⁷ The Administrative Office of the United States Courts released figures in June of 1992 showing that more than 28,421 cases across the country were still awaiting trial more than three years after they were filed.⁸

The modern caseload burden clearly exerts a negative impact upon the quality of justice dispensed by the courts. This is something about which people from all over Law's philosophical planet agree.⁹

As Second Circuit Judge Jon O. Newman has pointed out, the list of those who suffer from our continued adherence to the traditional model of civil dispute resolution is long.¹⁰ At the top of the list are the litigants who wait years for their day in court. The list also includes *conscripted* participants in the system:

jurors who wait for hours that turn into weeks, witnesses who give up days of work to testify to facts of slight dispute and often less relevance, business executives who endure days of deposition questioning that yield little to the resolution of disputes in some of which their companies are not even involved. Perhaps the major impact is on the citizenry in general, whose attitudes toward law and the legal system cannot help

7. STUDY COMMITTEE, REPORT, *supra* note 4, at 5. The corresponding rate of terminations for the courts of appeals are 7.2 months in 1960 and 9.2 months in 1989. *Id.*

8. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES OF March 12, 1991 and September 23-24, 1991 and 1991 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Appendix I to 1991 ANNUAL REPORT OF THE DIRECTOR (Detailed Statistical Tables), at 212 (Table C 6. U.S. District Courts, Civil Cases Pending, by District and Length of Time Pending).

9. See, e.g., *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting to underscore his disapproval of the Court's apparent reaction to its increasing caseload: "By deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances."); William H. Rehnquist, *1991 Year-End Report on the Federal Judiciary*, in THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1992, at 2 (Chief Justice Rehnquist's remarks respecting the federal courts' caseload crisis: "Unless actions are taken to reverse current trends, or slow them down considerably . . . [t]he circumstances will lead judges to have less of a sense of personal responsibility and accountability for the work they produce. Unless checked, the result will be a degradation in the high quality of justice the nation has long expected of the federal courts"); see also Carolyn D. King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 963 (1991) ("[W]hen there is simply not enough judicial time to go around, the temptation is to give shorter shrift to the cases brought by our most vulnerable citizens. . . . In my view, no judge would specifically condone a two-track justice system: one for the haves and one for the have-nots. The problem is that a two-track system can slip into the *modus operandi* of even a conscientious but overloaded judge without the judge even being aware of it."); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 132 (1985) (the amount of litigation is rapidly rising and "seriously threatening the quality of the federal judiciary's output").

10. Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) [hereinafter Newman, *Rethinking Fairness*].

but be profoundly and negatively influenced by a litigation system that voraciously consumes time and money.¹¹

The system probably takes a toll on our international competitiveness too. Foreign businesses are generally not hampered by the litigation morass too often enveloping United States businesses.¹² This was one of the concerns motivating creation of the legislative package of the President's Council on Competitiveness, placed in the Access to Justice Act of 1992.¹³ We know that the regular expense of commercial litigation has become so great that industry now looks seriously at alternatives to traditional litigation.¹⁴

Under the continued reign of the traditional civil litigation model, there is no reason to expect an abatement of these unwelcome attributes of civil dispute resolution. For example, the Administrative Office of the Federal Courts forecasts that court of appeals caseloads (obviously, a function of district court filings) will nearly triple in the next twenty-five years.¹⁵ Meanwhile, filings in the district courts *will* triple.¹⁶ And filings in bankruptcy courts — whose decisions are, with a possible exception in the Ninth Circuit, appealable to the district courts and on up the federal court hierarchy — should more than triple.¹⁷

11. *Id.*

12. See Alfred W. Cortese, Jr. and Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity With Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 14 (1992) (voicing concern about the adverse effects upon United States business in terms of international competitiveness of the United States' traditional civil dispute resolution model, and specifically comparing that model with comparable models in Germany and Japan: "even though foreign businesses will be subject to the U.S. civil justice system for a small share of their products and activities, American firms will be subject to it for most, if not all, of their products and activities. Absent reform of the American civil justice system then, American businesses will continue to incur disproportionately greater liability and legal costs than their international competitors."); see also Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REVIEW 1, 1-2 (1990) ("every dollar American business spends on litigation and every hour United States executives spend in depositions are money and time diverted from developing or producing better products at lower prices.") [hereinafter Kaufman, *Reform*].

13. S. 2180, 102d Cong., 2d Sess. (1992); H.R. 4155, 102d Cong., 2d Sess. (1992); see also A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991); 28 U.S.C. § 519 (Supp. 1992) (codifying Exec. Order No. 12778, which partially implemented Competitiveness Council proposals in federal government litigation); Vice President J. Danforth Quayle, Prepared Remarks at the Annual Meeting of the American Bar Association (Aug. 13, 1991).

14. See, e.g., Louis Fernandez, *Let's Try Cooperation Instead of Confrontation*, in BUSINESS AND THE ENVIRONMENT 513, 513-19 (Kent Gilbreath ed., 2d ed. 1984). For a background on alternative dispute resolution in commercial contracts, see Robert Coulson, BUSINESS ARBITRATION: WHAT YOU NEED TO KNOW (American Arbitration Association 1980); Robert Coulson, BUSINESS ARBITRATION: WHAT YOU NEED TO KNOW (3d Ed., 1986); Center for Public Resources, MINI-TRIAL HANDBOOK FOR CORPORATE DISPUTE RESOLUTION (1986).

15. STUDY COMMITTEE, REPORT, *supra* note 4, at 9.

16. *Id.*

17. *Id.*; see Gordan Bermant and Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181-83 (1989) (describing the Ninth Circuit bankruptcy appellate panels (BAPs), comprised of three bankruptcy judges to hear and decide initial appeals from decisions of the Ninth Circuit's bankruptcy courts).

II. PROMISING BUT CURRENTLY INADEQUATE ADR PROCEDURES

Certain fundamental changes to our civil litigation system are needed in order to truly ensure that federal court litigants enjoy a system of civil dispute resolution unencumbered by undue expense and delay — one which also maintains a level of fairness and reliability sufficient to instill public confidence in the system. The legal profession must abandon the idea that every method of deciding civil controversies that deviates from the traditional jury trial is relegated to “alternative” or “second-class” status. The modern ADR movement has taught us some important lessons. Yet current ADR programs and procedures are themselves inadequate to *solve* the problems of our civil litigation system.

Well over 90% of all cases filed in the federal district courts never actually go to trial.¹⁸ While current ADR procedures often move settlement “up” in time, they are too often deployed too late to be of much assistance in the fight to reduce litigation cost and delay. Such procedures are many times used after the modern, undisciplined pre-trial practices of lawyers have already run up a substantial bill and produced a significant delay in dispute resolution. Thus, current ADR procedures often simply *add* a layer of litigation cost and delay.

Moreover, current ADR procedures are almost always accorded too little binding authority; they are generally too *little*, in addition to being too often too late.¹⁹ For example, as the Pittsburgh, Pennsylvania arbitration program was described:

The court administers the arbitration process. . . . Informal hearings, with relaxed rules of evidence, are conducted outside of a regular courtroom. After a hearing is concluded, the arbitrators deliberate for a short time and return a judgment, which is communicated to the litigants within the next few days. If the parties accept the arbitrators' verdict, it is entered as a judgment of the court and is legally enforceable.²⁰

After all this, if one of the litigants rejects the arbitrators' decision, she may demand that the court schedule a full-blown traditional trial — *i.e.*, with no more justification than dissatisfaction with the results of the arbitrators' particular decision. The case is returned to the court's regular trial calendar. And when the trial is held it is heard *de novo* — with no reference to either

18. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES of March 12, 1991 and September 23-24, 1991 and 1991 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Appendix I to 1991 ANNUAL REPORT OF THE DIRECTOR (Detailed Statistical Tables), at 206 (Table C 4. U.S. District Courts, Civil Cases Terminated, by Nature of Suit and Action Taken).

19. *See, e.g.*, AMERICAN BAR ASSOCIATION ACTION COMMITTEE TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY 16 (1984) (noting that when an ADR procedure designed to speed a case's development is *voluntary*, the procedure is rarely used); Thomas B. Metzloff, *Reconfiguring the Summary Jury Trial*, 41 DUKE L.J. 806 (1992) [hereinafter Metzloff, *Reconfiguring*].

20. JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH ARBITRATION PROGRAM vii (Institute for Civil Justice 1983).

the findings or the outcome of the earlier arbitration hearing. There sometimes exist cost-shifting disincentives to demanding trial *de novo* after an arbitration ruling. But such disincentives are generally too insignificant to truly discourage such demands.²¹

Finally, *private* ADR procedures — even when effective — are not subsidized through tax dollars like court actions are. Sanford Jaffe, Director of the Center for Negotiation and Conflict Resolution at Rutgers University — for one — has articulated his fear that stagnant, unresponsive courts will become but “second-class” civil dispute resolution centers, while *wealthy* litigants will seek “first-class” alternative dispute resolution services in the private sector.²²

Despite their current systematic failings, however, ADR procedures have exhibited great promise. They can allow for the “steady, slow, unhurried” attention essential to Article III adjudication.²³ And they are capable of providing it at an affordable cost. Accordingly, ADR procedures, corrected or reformed so as to maximize their potential, enjoy a prominent place within the reformation model of public civil dispute resolution advocated in this article.

III. THE NECESSARY AND APPROPRIATE REFORMATION MODEL OF CIVIL DISPUTE RESOLUTION

The much-needed, reformed system of civil adjudication will require the deployment of a battery of dispute resolution mechanisms. However, the reformation model corrects several inadequacies associated with current alternative dispute resolution procedures. In our view, such corrections are necessary if federal courts are truly to be considered “comprehensive justice centers” — as we think they should be.²⁴

21. See, e.g., BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 119 (1990) (“The programs do have disincentives to demands for trial *de novo*. At a minimum, all require payment of the arbitrators’ fees if the party who demands a trial *de novo* does not receive a judgment more favorable than the arbitration award, and eight of the ten pilot courts require that these fees be posted along with any demand [for trial *de novo*].”) [hereinafter MEIERHOEFER, COURT-ANNEXED ARBITRATION].

22. *Institutionalizing Court ADR Programs* (panel discussion), in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 17, 18 (ABA Section of Litigation 1991) (summarizing comments and noting comparison drawn between dispute resolution services and mail services, with an emphasis upon development of the FAX and Federal Express).

23. Cf. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) (“Judges alone are required to act with deliberation — a steady, slow, unhurried task.”) [hereinafter Resnik, *Managerial Judges*].

24. As Chief Justice Rehnquist remarked recently:

On one end of the spectrum is a view of future federal courts as comprehensive justice centers, offering consumers a whole menu of dispute resolution procedures. Under this view federal judges would serve as a sort of managerial *maitre d'*, steering the litigant to the most appropriate form of dispute resolution. This would alter the traditional model wherein the federal system tolerated the excesses of the adversarial process, including long delays and high expenses. Under this new model, the system would set up incentives — for judges and litigants — to swiftly channel disputes into a whole host of alterna-

A. ESSENTIAL ELEMENTS OF THE REFORMATION MODEL

The following are fundamental components of the reformation model of civil dispute resolution.

1. *The System Must Be Public*

The courthouse stands as a symbol that in our country it is deemed important that there be a place dedicated to ensuring fairness and civility in societal arrangements. The fact that it is set apart conveys, in bricks and mortar, the Constitutional concept of separation of powers. What transpires in the courthouse does not take place behind locked doors, but rather, is available for public consumption with the therapeutic effect of such openness.²⁵ The business conducted in the courts is not only subject to legal review within the court system; it is subject as well to the higher review of the people who come, watch and enter judgment on the system. We submit that such openness has had a soothing effect on the national psyche and that it has made a not insignificant contribution to the survival of the Republic. As Senator Daniel Patrick Moynihan said recently upon the groundbreaking for a new federal courthouse in White Plains, New York:

[O]urs is the only civilization in the world where there is something conspicuous and central to our urban arrangements called a courthouse. Think about it. When you wander across Europe looking at cathedrals, do you ever see a courthouse? No. You can walk around Canada, and you will not see a courthouse, a place of justice, a hallowed place which we uniquely set aside in our arrangements. It speaks well of us. It speaks to the world about how things can be different. It reminds us how very, very fragile any society is, and how strong the courts have to be to ensure its continued strength.²⁶

tive dispute resolution options, even though traditional adversarial justice would still be available.

This model contemplates that the majority of entrants into the federal legal system neither expect nor need extensive pre-trial procedures and a full-blown jury trial. Instead, the model posits that many litigants may have a greater need for an inexpensive and prompt resolution of their disputes, however rough and ready, than an unaffordable and tardy one, however close to perfection.

Chief Justice William H. Rehnquist, Address at the Kastenmeier Lecture, University of Wisconsin, Madison (Sept. 15, 1992). See also generally Gladys Kessler and Linda J. Finkelstein, *The Evolution of the Multi-Door Courthouse*, 37 CATH. L. REV. 577 (1988); Access to Justice Act of 1992, S. 2180, 102d Cong., 2d Sess.; H.R. 4155, 102d Cong., 2d Sess. (President's Council on Competitiveness conception of the "multi-door courthouse").

25. "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (10th ed. 1934). See also H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 RUTGERS L. REV. 431, 433 (1986) (noting that some settlements may well be contrary to the public interest, denying the opportunity for court-enunciated guidance of future conduct and concealing from the public improper practices and dangerous products).

26. Sen. Daniel Patrick Moynihan, Speech at White Plains, New York (December 4, 1992) (remarks at the ground-breaking for a new United States District Court for the Southern District of New York) (copy of remarks on file with *SMU Law Review*).

2. *A Managerial Must: Early Judicial Involvement (Tracking) With a Meaningful Opportunity for Litigants to Be Heard*

Future civil dispute resolution in the federal courts must in fact be *court-driven*. It is critical to our highly evolved system of civil dispute resolution that judges play a role significantly more active — or managerial — than the one they have traditionally assumed.²⁷ The traditional role of the judge in our adversarial system of justice has been akin to an umpire — a judge who participates minimally in the pre-trial process.²⁸ In recent years, however, federal district court judges have, out of necessity, assumed a more managerial role in the pre-trial stages of cases. They have been taking on an increasing amount of responsibility for assisting litigants in getting their cases into and through the system. These judges have demanded more responsibility from the lawyers and litigants commanding scarce litigant and judicial resources.²⁹

The Civil Justice Reform Act of 1990 institutionalizes managerial judging measures.³⁰ The reformation model we are advocating calls for more measures of this sort. Although such additional institutionalization of managerial judging measures would move our system closer to an inquisitorial system of civil dispute resolution, these measures would not turn our essentially adversarial system into an essentially inquisitorial one. Litigants will not lose control over those aspects of their cases that are essential to an adversarial system of justice.³¹

27. See generally Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case From Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1978); William B. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978). Of course, litigators will need to adjust, or upgrade the adversarial weapons in their arsenals as well. See Edward F. Sherman, *Reshaping the Lawyer's Skills for Court-Supervised ADR*, 51 TEX. B.J. 47, 47-49 (1988). Fortunately, law schools have started telling this to the country's future litigators. See RICHARD L. MARCUS ET. AL, CIVIL PROCEDURE: A MODERN APPROACH 414-24 (West 1989) [hereinafter MARCUS ET AL.].

28. Cf. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

29. See Resnik, *Managerial Judges*, *supra* note 23, at 391-403 (identifying reasons for the emergence of the managerial judge: (1) changes in the role of judges necessitated by procedural innovations (e.g., the creation and development of pretrial discovery rights) and the articulation of (other, substantive) new rights and remedies; and (2) changes initiated by judges themselves in response to rising workload pressures). It is probably most obvious that managerial judging assists litigants in getting their cases *through* the system. But given the scarcity of judicial resources, when judges ensure that cases do not linger unduly in the system, they are also making room for more cases to come *into* the system.

30. See generally *infra* at Section V.C.

31. In a *purely adversarial* system, the litigants are in charge; they control the pace and shape of litigation, investigate, prepare, and present evidence and arguments to a neutral, third party decisionmaker. See Resnik, *Managerial Judges*, *supra* note 23, at 380-381, n.23, and authorities cited therein. In a *purely inquisitorial* system, the judge is in charge, actively seeking evidence from both sides, directing the litigants' actions in the litigation, and providing commentary on the quality of the case, including likely outcome. However, as Professor Resnik has noted, the actual demarcation between inquisitorial and adversarial proceedings is not a bright line. *Id.* at 445 n.275 (citing John H. Merryman, *On the Conversion (and Divergence)*

Early judicial involvement is essential to the effectiveness of the reformation model. It is contemplated that a case will be scheduled for a track-placement hearing, or management conference soon after issue is joined. The judicial officer should provide counsel and litigants an opportunity for meaningful input into the court's tracking decision. Because of the early procedural juncture of the hearing, the court's tracking decision clearly must be made in light of somewhat limited information. Still, among the guidelines for the court to follow in its tracking determination are: (1) apparent case complexity (e.g., the number of parties involved, the general subject matter of the litigation, and the anticipated type and volume of evidence); (2) the apparent need for information exchange (disclosure) and/or discovery, and the evident necessary extent of such; (3) the relative financial resources of the parties; (4) the degree to which the case appears to possess public policy externalities; and (5) whether the case involves novel questions of law or fact.³² The court's tracking decision, and the reasons underlying it, should be placed in the record — and this adjudication should be reviewable under the abuse of discretion standard.

3. *There Must Exist a Presumption of Finality*

Because of the fair and reliable, public and formal nature of the procedures under the reformation model, it is proper — and necessary — that a presumption of finality attach to whatever decision is reached through a non-traditional track proceeding.

4. *The Traditional Jury Trial Must Be Preserved; and a Second, Even More Meaningful Opportunity to Be Heard Needs to Be Provided for Litigants Seeking to Demonstrate Their Entitlement to a Traditional Jury Trial*

Access to the traditional paradigm of the formalistic jury trial is *ensured when justified*. Of course, a case might be placed on the traditional track at the initial hearing. But if a case is not traditionally tracked originally, after a decision is reached through a non-traditional track the litigants should be afforded a second procedural safeguard: another meaningful opportunity to be heard about why they are *yet* entitled to a traditional trial.

The second hearing is even more meaningful than the first, because at this point the participants are able to view the case through the prism of all the information developed during the previous proceedings: disclosure; discov-

of the Civil Law and the Common Law, 17 STAN. J. INT'L L. 387 (1981); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974)).

32. Cf. generally 28 U.S.C. § 652(b) (1988) (exempting from compulsory arbitration in the ten congressionally authorized pilot districts for court-annexed arbitration those claims based on constitutional violations and all civil rights claims); 28 U.S.C. § 652(c) (1988) (requiring the ten pilot districts to establish local rules for a system for exempting, *sua sponte* or by motion of a party, any case from arbitration in which the objectives of arbitration would not be realized: (1) because the case involves complex or novel legal issues; (2) because legal issues predominate over factual issues; or (3) for other good cause).

ery (when appropriate); the information presented at the non-traditional track proceeding, as well as the result reached in that proceeding. With all of this information, the court can undertake a thorough cost/benefit-fairness analysis of whether the case warrants the *additional* litigant and court resources implicated by the post-decision, traditional litigation. Most basically, this post-decision hearing operates as an “exemption procedure,” or safeguard, for any cases that might have been inappropriately tracked initially. The court should reconsider the factors analyzed at the tracking conference. Also, the court should consider whether it is likely that a result substantially different from that reached through the non-traditional track will be reached by allowing the case to continue through an additional, traditional litigation track.

However, the court’s post-decision, traditional trial entitlement analysis is guided by a presumption of finality in the decision already rendered pursuant to the non-traditional track. The litigant seeking to consume still more (litigant and judicial) resources must overcome this presumption. In addition, a network of incentives and disincentives should operate to discourage litigants from challenging the presumption. Thus, post-decision challenges should be relatively few.

B. A SPECIFIC PROTOTYPE OF THE REFORMATION MODEL

The specific prototype of the reformation model described next is simply one of the many that could be developed according to the essential elements just discussed. We emphasize that the following version of the reformation model is not intended to be definitive; it should not be seen to foreclose other essentially consistent reformation model prototypes.

1. *Litigation Track I*

At the lowest level of the evolved system’s sliding scale of litigation options, or tracks, the litigants would suffer no detriment for lacking lawyers as advocates. There would be no complex formalisms to burden the free communication of grievance and resolution. In essence, claims and defenses could be presented by litigants — without the necessity of counsel — to a judicial officer or to a professional, non-judicial decisionmaker. The rules of evidence and the rules of civil procedure would not apply, and the case could be presented by permitting the litigants and any witnesses to tell their stories. The decisionmaker’s role would be closer to “inquisitorial” than has been traditional in our system, in order to assure the full development of relevant facts.

2. *Litigation Track II*

At the next level of litigation, claims and defenses could be presented to judicial or non-judicial decisionmakers, either individually or sitting as a panel. The case could be presented in summary form, by live testimony, or by affidavit. The proceeding would take place after court-ordered, case-tailored disclosure and exchange of essential information by the parties.

This litigation track most resembles what is now known as court-annexed arbitration. Court-annexed arbitration is generally expected to take place early in the litigation, with little discovery.³³

3. *Litigation Track III*

Litigation Track III permits the submission of claims and defenses to a judge or jury without the cost and delay associated with the traditional jury trial. The proceeding would take place after court-ordered disclosure and the exchange by the litigants of essential information (again, tailored to the needs of the case). The case could be presented in summary form, by live testimony, or by affidavit. It is contemplated that each side would be subject to court-imposed presentation time limitations dependent upon the complexity of the case.

If the submissions are to a jury, this litigation track most resembles what is now known as the summary jury trial (SJT) developed by Judge Thomas D. Lambros of the Northern District of Ohio — except that this track is expected to take place early in the litigation, with a limited amount of discovery after initial disclosure.³⁴ Professor Thomas B. Metzloff has written recently about the evident potential inhering in *binding* SJTs — potential reflected in findings from an experimental program implemented by the North Carolina state court system.³⁵ He reports that the North Carolina litigants reacted more positively to binding SJTs than they did to non-binding ones, and he argues that further attention to the SJT's potential as a binding process is warranted by the results of the North Carolina state court experiment: "Although at first blush binding SJTs may seem inconsistent with its purpose and structure, a binding approach overcomes most of the current criticisms of the SJT. Accordingly, it offers a promising ADR opportunity for resolving certain high-stakes disputes."³⁶ We agree.

4. *Litigation Track IV*

Herein lies the traditional jury trial conception of civil dispute resolution. However, this traditional trial track should itself be *reformed* pursuant to a significant, comprehensive Civil Justice Reform Act plan controlling the type and extent of discovery available in particular cases.³⁷

5. *Mediation's Overarching Appropriateness*

Finally, mediation — court-annexed or voluntary — should be available

33. See generally MEIERHOEFER, COURT-ANNEXED ARBITRATION, *supra* note 21 (overview of court-annexed arbitration as it is used in 10 federal district courts).

34. Respecting the current configuration of the SJT, see generally Thomas D. Lambros and Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984); and S. Arthur Spiegel, *Summary Jury Trials*, 54 U. CINN. L. REV. 829 (1986).

35. See generally Metzloff, *Reconfiguring*, *supra* note 19.

36. *Id.*

37. See discussion *infra* Section V.C.

for any case, regardless of its litigation track assignment. However, in order to avoid the traditional "too late" cost inefficiency weakness of mediation-assisted case terminations, mediation should be utilized early in the reformation model process — after disclosure has taken place but before pre-trial process costs have taken their now too customary toll.

6. *Incentive/Disincentive and Presumption Framework*

Incentives inhere in the reformation model — in terms of reduced cost and delay — for litigants to be satisfied with the essentially fair, reliable decision produced pursuant to the non-traditional litigation track to which their case has been assigned. Relative cost and delay also work as *disincentives* for litigants to seek more process after the presumptively correct decision is rendered pursuant to a non-traditional track proceeding. It appears quite likely that most litigants who have been originally placed on a non-traditional track will not consider the additional process (benefit) of a traditional trial *worth* the additional cost and delay inherent in such litigation. This seems especially true given that the litigant would have to overcome a presumption against entitlement to such a trial before she could start expending the additional time and money associated with the traditional trial itself.

We have considered that another, more stringent disincentive could be added: a litigation cost-shifting measure — similar to those currently provided by Federal Rule of Civil Procedure 68, "English Rule"-inspired local court rules, and court-annexed arbitration programs.³⁸ But we do not think a more stringent, "pure disincentive" is necessary — in light of our model's presumption of finality, and the time and cost incentives/disincentives at work within the model.

C. MORE SPECIFIC: HOW A CASE MIGHT PROCEED THROUGH OUR REFORMATION MODEL PROTOTYPE

As stated above, under the reformation model, a case should be scheduled for a litigation track-placement hearing or management conference soon after issue is joined. The judicial officer provides the parties a fair opportunity

38. See FED. R. CIV. P. 68; UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 10 (Article Six: Miscellaneous Matters, (9)) (defining the "litigation costs" that can be shifted under the plan — if an offer of judgment is refused and the refusing party fails to better the offer through trial by at least 10% — as costs directly related to preparing the case for trial, as well as actual trial expenses such as reasonable attorneys' fees, deposition costs and fees for expert witnesses); John L. Barkai and Gene Kas-sebaum, *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 PEPP. L. REV. 43, 54 (1989) (describing provision of a Hawaii state program, whereby, if the arbitration award is not bettered through a trial *de novo* by at least 15%, legal fees and costs up to \$5,000 may be shifted against the party demanding the trial); MEIERHOEFER, COURT-ANNEXED ARBITRATION, *supra* note 21, at 119 ("The programs do have disincentives to demands for trial *de novo*. At a minimum, all require payment of the arbitrators' fees if the party who demands a trial *de novo* does not receive a judgment more favorable than the arbitration award, and eight of the ten pilot courts require that these fees be posted along with any demand [for trial *de novo*].").

for meaningful input into the court's tracking decision. Apparent case complexity, need for information exchange and/or discovery, relative financial resources of the parties, public policy, case externalities, and whether the case involves novel questions of law or fact, are critical considerations guiding the court's tracking decision.

For example, at the early tracking conference, the court might decide after hearing from the litigants and/or their counsel that the case does not appear to present novel questions of law or fact, exists in a simple one-on-one, adversarial posture, and is not especially complex in terms of subject matter or particular issues. The court might also decide after input from the litigants and/or their counsel that the case really only requires the depositions of the parties and the disclosure between the parties of information bearing significantly on the claims and defenses of the litigants. The court might then decide to place the case in Litigation Track II, with the case to be presented to a single judicial officer through a combination of live testimony and affidavits.

As we have said, this track most resembles what is known now as court-annexed arbitration. It is likely that the litigants will be quite satisfied with the process they receive pursuant to this non-traditional litigation track. As the Federal Judicial Center reported to Congress (in fulfillment of the former's obligation to evaluate the performance of the mandatory, court-annexed, non-binding arbitration programs statutorily created in 1988):

Eighty percent of all parties in cases mandatorily referred to arbitration agreed that the procedures used to handle their cases were fair. . . . Among parties who had prior trial experience, 84% agreed that the procedures were fair. Furthermore, half of all parties who participated in an arbitration hearing selected arbitration as their preferred method of decision making when asked to choose among judges, juries, arbitration, or "makes no difference."³⁹

In addition to an appreciation for the cost and time savings inhering in civil dispute resolution programs comprised of simpler procedures, these findings may reflect recognition of at least some possibility that there can exist serious shortfalls in the rationality of the process by which *juries* reach verdicts in a traditional trial. The findings may also reflect an appreciation for the facts: (1) that arbitration, like other ADR techniques, often affords litigants more of an opportunity to participate directly in dispute resolution than do relatively alienating traditional trials; and (2) that compared to traditional trials, ADR processes expose litigants to substantially less stress over a shorter period of time.⁴⁰

39. MEIERHOEFER, COURT-ANNEXED ARBITRATION, *supra* note 21, at 119-120.

40. See generally Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303 (identifying — in addition to the relatively low transaction costs and delay — the low-stress, litigant empowerment, and catharsis values inhering in three different court-sponsored ADR programs in the Northern District of California: (1) Magistrate Judge-hosted settlement conferences, (2) early neutral evaluation, and (3) mandatory, non-binding arbitration); E. ALLAN LIND ET. AL, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SET-

Suppose that in the case we have described the losing party decided, despite the presumption of finality and the cost associated with challenging the presumption (not to mention the cost associated with an additional, traditional trial), that seeking a traditional trial was in her best interest. She might think, for example, that while the case may not be complex or novel in any sense, it does "deserve" more discovery and fact-finding than was provided by the court's initial tracking of the case. Were this party to demand a hearing on the issue of her entitlement to a post-decision, traditional trial, the court would conduct the hearing and listen to the arguments for and against the expenditure of additional litigant and court resources on the case.

The court might decide — based upon the arguments at the hearing and the record from the earlier, Litigation Track II proceedings — that there is no substantial likelihood that a significantly different result would be reached through a traditional trial. Moreover, the court might find that the demanding party is attempting to "bully" the other with her superior financial and legal resources. Under such circumstances, the court could rule that the demanding party had not demonstrated her entitlement to the traditional trial.

Alternatively, it might become clear to the court at the entitlement hearing that, while the case was not mistracked, and despite substantial disparity in resources between the litigants, the potential for the traditional litigation to generate a significantly different outcome is strong enough that the demanding party should be granted entitlement to a post-decision, traditional trial.

Whatever the court's adjudication at the post-decision, traditional trial entitlement hearing, the ruling and the reasons underlying it must be placed in the record. The court's decision in this respect should be reviewable according to the clearly erroneous standard. This same standard of review should apply to the final, appealable decision rendered through any non-traditional track.

IV. AN ANTICIPATION OF CONCERNS ARGUABLY IMPLICATED BY THE REFORMATION MODEL

A. RESPECTING REASONED ADJUDICATION AND REVIEW

The lack of standards and the lack of a system of review have been the

TLEMENT CONFERENCES 79 (1989) (Institute for Civil Justice) (study of state court litigation) ("court-annexed arbitration appears to give both plaintiffs and defendants what they want from the judicial process."). *But see id.* ("[s]ettlement conferences tended to provoke less favorable reactions than did trial and arbitration hearings. Perceptions of fairness were markedly lower for litigants whose cases were subject to settlement conferences . . ."). *Cf.* Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 918-920 ("The societal goal of ensuring that its governing institutions and structures appear legitimate in the eyes of its members] is essentially a process-oriented and not an outcome-oriented goal. Furtherance of the goal depends on the party's experience of the dispute handling process, not necessarily on the outcome of that process.") [hereinafter Baruch Bush, *Process Choice*]; *see also* Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1989).

primary concerns expressed about management-oriented civil dispute resolution models like the one we have constructed. In her 1982 *Harvard Law Review* article on managerial judges, Professor Judith Resnik discussed her concern: "Proponents of management may be forgetting the quintessential judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review — characteristics that have long defined judging and distinguished it from other tasks."⁴¹ We agree with Professor Resnik that these are vital characteristics of any just system of civil dispute resolution. And our reformation model ensures that litigants will have their cases heard under a regime of fair, reasoned, public inquiry — including appellate review applying basic principles of freedom and fairness at numerous procedural stages.⁴²

As we have discussed, the court's initial tracking decision takes place within the framework of a public, fair hearing, at which the litigants are afforded the opportunity to argue for case-placement on the litigation track they think appropriate. The court's tracking decision is on the record, is guided by set principles of fair consideration, and should be subject to abuse of discretion review. The litigation track proceedings themselves — in the courthouse, on the record, and open to the public — each meet at least the minimum requirements of procedurally just, deliberate, adversarial adjudication. The hearing to determine whether a litigant initially placed on a non-traditional track can overcome the presumption against her entitlement to a traditional jury trial also takes place in the courthouse, on the record, and in public — and again, the court's decision is adjudicated according to set principles of fairness. This decision, and the final judgments rendered pursuant to any of the litigation tracks, should be subject to review under the clearly erroneous standard.

In short, the reformation model's procedural regime should not generate an onslaught of new appellate issues. But it should answer important questions about reasoned adjudication and reviewability raised by scholars in similar contexts. Moreover, this procedural regime *presents* an important question: which model of civil dispute resolution threatens to turn our courthouses into Dickensian *Bleak Houses*⁴³ — the traditional model or the reformation model proposed by this article?

B. RESPECTING THE SEVENTH AMENDMENT RIGHT OF TRIAL BY JURY IN CIVIL CASES

The above-described, evolved civil dispute resolution model should, at least, go far toward fulfilling the fundamental premise underlying the modern Federal Rules of Civil Procedure and the Civil Justice Reform Act of

41. Resnik, *Managerial Judges*, *supra* note 23, at 431.

42. *Cf.* Tigar, *2020 Vision*, *supra* note 1, at 91 ("I yield to no one in my regard for alternative dispute methods, arbitration, mediation, and informal resolution. But the perceived legitimacy of such devices — against a backdrop of hundreds of years of popular demand for justice — depends vitally upon the existence of a system of review that will apply basic principles of freedom and fairness.")

43. CHARLES DICKENS, *BLEAK HOUSE* (1853).

1990.⁴⁴ The reformation model is typified by increased information and by increased public, formal hearings for litigants — all in order to increase actual access to fair, affordable and reliable, public civil dispute resolution. We recognize, however, that the highly evolved civil dispute resolution system posited by this article arguably implicates the Seventh Amendment.

According to the Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁴⁵

The right of trial by jury is clearly crucial to our common notion of a just system of civil dispute resolution.⁴⁶ But in this aspect of civil litigation too, we must strike a healthy balance of interests; a balance sensitive to current demands placed upon vital societal interests as well as to the peculiar interests of those individuals who happen to be standing at the front of the line into the courthouse.

While by its terms (“the right of trial by jury shall be preserved”), the Seventh Amendment might appear to call for static, historical inquiry, the Supreme Court’s jurisprudence is typified by a pragmatic, evolving approach to Seventh Amendment issues. Essentially, the Court’s Seventh Amendment caselaw acknowledges the truth recognized by Professor Austin Wakeman Scott in his 1918 *Harvard Law Review* article about history, change and the Seventh Amendment: if the institution of trial by jury is to survive, it must adapt to societal needs of the present and the future.⁴⁷ “This means that it must be something more than a bulwark against tyranny and corruption: it must be an efficient instrument in the administration of justice.”⁴⁸ Both his-

44. As Judge Kaufman has pointed out, “faced with ever-burgeoning caseloads and essentially static resources, the nation’s courts fall further and further behind the promise of the Federal Rules of Civil Procedure: ‘the just, speedy, and inexpensive determination of every action.’” Kaufman, *Reform*, *supra* note 12, at 1 (quoting FED. R. CIV. P. 1). The Civil Justice Reform Act of 1990 takes as its objectives: “to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and *ensure* just, speedy, and inexpensive resolutions of civil disputes.” Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (Supp. III 1991) (emphasis added).

45. U.S. CONST. amend. VII (emphasis added).

46. See generally JOHN GUNTHER, *THE JURY IN AMERICA* (1988); Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964). See also ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 312 (4th ed. 1841) (“I think that the practical intelligence and the political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.”); 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 347-50 (7th ed. 1956) (describing the basic advantages of the civil jury as: (1) the jury can bring “average common sense” to bear upon facts; (2) jury findings do not result in the creation of binding precedent — and thus, juries can decide “hard” cases without making “bad” law; (3) a jury helps to preserve the dignity of the bench by relieving the judge of the responsibility of decision; (4) the jury members themselves are educated by their exposure to and participation in the administration of justice; and (5) the jury makes the law intelligible by constantly bringing rules of the law to the touchstone of their collective common sense).

47. Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 691 (1918) [hereinafter Scott, *Trial by Jury*].

48. *Id.*

torical and modern analyses illuminate the pragmatic nature of the Seventh Amendment right to trial by jury.

Historical inquiry reveals that the streamlined, non-jury, public civil dispute resolution format is by no means new. A concern that access to courts of general jurisdiction was beyond the means of poor plaintiffs with small claims can be traced back in English legal history at least to the fifteenth century.⁴⁹ History teaches us that there were various special, juryless, small claims tribunals in England and the American colonies, territories, and states before 1791.⁵⁰ Indeed, in the years preceding 1850, a litigant was not necessarily "entitled" to a jury even if the claim at issue was legal and could alternatively have been brought in a common law court and heard by a jury.⁵¹ As Professor Margreth Barrett has discussed, under the English system:

when remedies were available simultaneously in both [the common law court and a special small claims tribunal], the prevailing practice not only permitted summary relief in the juryless small claims tribunals but strongly encouraged it: in some jurisdictions there were laws expressly penalizing the litigant who persisted in seeking the common-law procedure for a small monetary claim. The very purpose of small claims courts was to provide the kind of relief the common-law courts provided — money judgments — through a procedure simplified to accommodate the small amount-in-controversy.⁵²

The cost/benefit-fairness intent was "to provide speedy, inexpensive, and informal disposition of small actions through simple proceedings conducted with an eye on compromise and conciliation."⁵³ The court was designed particularly to help the poorer litigant. It was thought that the securing of justice for ordinary citizens accomplished through the streamlined resolution procedures meaningfully demonstrated the integrity of the judicial system.⁵⁴ The small claims movement led to the statutory creation of a small debt court in London in 1605.⁵⁵ In 1846, the new county courts were created in England.⁵⁶

Thus, under a historical approach to Seventh Amendment issues, it appears that this early practice of resolving small claims without a jury would justify comparable juryless procedures today.⁵⁷ Indeed, in the 1899 case of *Capital Traction Co. v. Hof* the Supreme Court found that a long line of

49. See 1 WILLIAM HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 186-187 (7th ed. rev. 1956).

50. See ROSCOE POUND, ORGANIZATION OF COURTS 150-56, 245-46 (1940).

51. See generally Margreth Barrett, *The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims*, 39 HASTINGS L. J. 125, 154 (1987) (discussing state small claims procedures specifically, and advocating — through historical and cost-benefit analyses — a jury trial exception for small claims cases) [hereinafter Barrett, *Historical Exception*].

52. *Id.* (footnote omitted).

53. Carl R. Pagter et al., Comment, *The California Small Claims Court*, 52 CAL. L. REV. 876, 876-77 (1964).

54. *Id.* at 877.

55. *Id.* at 876.

56. Barrett, *Historical Exception*, *supra* note 51 at 138-39.

57. *Cf. generally id.*

decisions in the original states maintained the position that the Constitutional right of trial by jury is not infringed by a statute: (1) setting the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was when the particular constitution was adopted; (2) allowing a trial by jury for the first time upon appeal from the judgment of the justice of the peace; and (3) requiring of the appellant a bond with surety to prosecute the appeal and to pay the judgment of the appellate court.⁵⁸ In *Hof*, the Court concluded that the Seventh Amendment right of trial by jury "does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it."⁵⁹ Accordingly, the Court held: "The legislature, in distributing the judicial power . . . must have a considerable discretion . . . provided always the right of trial by jury is not *taken away* in any case in which it is secured by the Constitution."⁶⁰

More recent Supreme Court decisions further demonstrate the pragmatic, evolving nature of Seventh Amendment jurisprudence. In the 1959 case, *Beacon Theatres, Inc. v. Westover* the Court broke from its past practice of applying *strictly* historical analysis to Seventh Amendment questions.⁶¹ The *Beacon Theatres* Court established the necessity of taking into account the merger of law and equity, and other changes effected by the Federal Rules of Civil Procedure, when analyzing whether a party is entitled to the right of trial by jury — albeit it then did so in the course of declaring that the jury trial right is to be *preserved for an individual case wherever possible*.⁶² While the Court's 1970 case, *Ross v. Bernhard*, is partly rooted in historical analysis, it at least intimates movement away from that base in its statement that "the practical abilities and limitations of juries" is a factor relevant to the determination of the Constitutional right of trial by jury.⁶³ Before *Ross*, it had not been thought that the presence of the Constitutional right of trial by jury was to be determined by an assessment of a jury's capabilities except in the case of an accounting. In 1973's *Colgrove v. Battin*, the Court upheld the

58. *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899) (discussing *inter alia* *Keddie v. Moore*, (2 Mur.), 41, 45 (N.C. 1811) (North Carolina Supreme Court upholding 1803 state statute raising the pecuniary limit of justice of the peace jurisdiction from twenty shillings and under, to thirty pounds and under — "subject nevertheless to right of appeal" to a court of record — against attack as violative of the 1776 North Carolina constitutional provision for trial by jury)). "In passing upon those [Seventh Amendment] questions, the judicial decisions and the settled practice in the several States are entitled to great weight, inasmuch as the constitutions of all of them had secured the right of trial by jury in civil actions . . ." *Id.* at 23. It should be noted that trials before justices of the peace were of a quite different character from the common law trial by jury. "A justice of the peace, having no other powers than those conferred by Congress . . . was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record." *Id.* at 38.

59. *Id.* at 23.

60. *Id.* at 44-45 (emphasis added).

61. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

62. *Id.* at 509-10; see also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (clarifying in this respect the significance of *Beacon Theatres*); cf. John C. McCoid II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 11 (1967) (asserting that *Beacon Theatres* "fits well with the conception of the Constitution as a durable document providing continually useful standards for an evolving society.>").

63. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

Constitutionality of a District of Montana local rule providing for a six-member jury in all civil cases; and in so doing, reaffirmed that while the Seventh Amendment protects the right of trial by jury, it does not enshrine "the various incidents of trial by jury."⁶⁴ And in 1979's *Parklane Hosiery Co. v. Shore*, the Court held that a defendant who has had issues of fact adjudicated adversely to it in an equitable action may, consistent with the Seventh Amendment, be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party. And the Court granted trial courts broad discretion to determine when to apply offensive collateral estoppel.⁶⁵

Simply put, our reformation model does not unreasonably obstruct the right of trial by jury, let alone "*strip*" parties of their Constitutional right of a jury trial.⁶⁶ Rather, under this model, the right of trial by jury is *preserved* for and rationally, fairly distributed to those cases *entitled* to it. There is nothing new or particularly onerous about our entitlement theory of the Seventh Amendment right of trial by jury. Any litigant must already jump through the entitlement hoops of actually filing a lawsuit with the court, requesting a jury trial in accordance with the federal and applicable local rules, and surviving possible collateral estoppel, qualified immunity, dismissal, and summary judgment challenges to the merits of his suit — in order to *realize* his individual right of trial by jury.⁶⁷ And the cost/benefit-fairness analysis we have described concerning the appropriate amount of litigant and judicial resources warranted by a case is similar to the sorts of decisions routinely made by judges — *e.g.*, whether to certify a class, or whether a litigant is substantially likely to prevail on the merits of a claim so as to be entitled to a temporary restraining order. The reformation model simply imposes additional rational and fair adjudicatory guidelines for distribution of the Seventh Amendment right of trial by jury in order to ensure a vitally important public end: the conservation and rational, fair distribution of scarce litigant and judicial resources (*including* the right of trial by jury).

64. *Colgrove v. Battin*, 413 U.S. 149, 155-56 (1973).

65. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (holding that the plaintiffs in a securities fraud action could use offensive collateral estoppel to rely on the findings of an earlier suit brought by the SEC against the defendants).

66. *Cf. generally* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989) (Congress "lacks the power to strip parties contesting matters of private right of the Constitutional right to a trial by jury. As we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears.") (citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 457-58 (1977)).

67. *See generally* *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) ("[M]any procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment.") (citations omitted — respecting directed verdict, the retrial of damages questions, and summary judgment); *id.* at 337 ("The law of collateral estoppel, like the law in other procedural areas defining the scope of the jury's function, has evolved since 1791. . . . [T]hese developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791.").

C. RESPECTING THE RIGHT OF ACCESS IN CIVIL CASES

There exists a clear body of law delineating a Constitutional right of access in criminal cases and cases brought by prisoners.⁶⁸ But the general existence of a Constitutional right of access in civil cases is much more muddled. In the 1960s and 1970s, the Supreme Court, in *dicta* at least, described the right of access to the courts as a fundamental right within the protection of the First Amendment.⁶⁹ And yet this approach to questions of access in civil cases seems to have been abandoned in recent years, in favor of a property analysis.⁷⁰ In the 1982 case, *Logan v. Zimmerman Brush Co.*, the Supreme Court held that one has a due process property interest in a civil cause of action.⁷¹ The due process right articulated by the Court's jurisprudence appears to be simply "the right to pass through the courthouse door and present one's claim for judicial determination."⁷² The reformation model ensures access to the courts for fair, affordable and reliable civil dispute resolution.

An equal protection analysis also affords the legislature significant latitude in regulating judicial proceedings. As Judge Irving R. Kaufman recognized, access to the courts has been afforded heightened protection only when the right asserted in the underlying action is itself fundamental and when there is *no other forum in which that right can be enforced*.⁷³ The "rational basis

68. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that, under the Fourteenth Amendment, jail officials must take affirmative steps to assure inmates meaningful access to the courts; noting that adequate law libraries are one Constitutionally acceptable method of assuring such access to the courts, but that other alternatives could meet Constitutional standards as well); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (holding that the Fourteenth Amendment guarantees indigent individuals a right to provision of counsel in order to appeal a criminal conviction); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that due process and equal protection were violated when indigent criminal defendants could not obtain adequate appellate review because they were unable to pay for the transcripts of their trials).

69. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971) ("collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) ("it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors."); *NAACP v. Button*, 371 U.S. 415, 430 (1963) ("litigation may well be the sole practicable avenue open to a [racial] minority to petition for redress of grievances").

70. See generally Martin D. Brier, Comment, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PA. L. REV. 1175, 1176 (1990) [hereinafter Brier, Comment, *Economics Awry*].

71. 455 U.S. 422 (1982).

72. *Los Angeles County Bar Assoc. v. Eu*, 979 F.2d 697, 706 (9th Cir. 1992); see *Logan*, 455 U.S. at 437. ("nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to adjudication . . .") (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), for the proposition that what the Due Process Clause does require is an opportunity, granted at a meaningful time and in a meaningful manner, for a hearing *appropriate to the nature of the case*).

73. Kaufman, *Reform*, *supra* note 12, at 25-26 (discussing *Boddie v. Connecticut*, 401 U.S. 371 (1971)); see also *Maher v. Roe*, 432 U.S. 464, 471 (1977) ("this Court has never held

test" should govern the reformation model's procedures.⁷⁴ The measures imposed by the reformation model clearly accord with this standard of equal protection analysis.

V. OTHER PROPOSED PROBLEM-SOLVING MODELS

In order to fully appreciate why the highly-evolved model posited by this article is appropriate, one must understand the inadequacies of other proposed problem-solving models. In this section, we will discuss: (1) why we reject other problem-solving models; and (2) why the Civil Justice Reform Act of 1990 is but the first step toward necessary, true reformation of the country's civil dispute resolution system.

A. THE SUPPLY-SIDE PROBLEM-SOLVING PRETENDER: INCREASE JUDICIAL RESOURCES

There might appear to be a ready solution to problems associated with modern litigation — one that does not require significant reformation measures. There is an obvious temptation to simply call for an increase in the number of judges and other court personnel in order to supply the rising demand for civil dispute resolution. Indeed, in an effort to cope with the ever-expanding universe of civil case filings, Congress has significantly expanded the number of federal district court and appellate judgeships.⁷⁵ But the universe of judicial resources is incapable of the sort of practically infinite expansion needed to keep pace with unchecked, lawyer-driven, civil case demands. Moreover, expanding the federal judiciary beyond a certain point — which point appears to be very near, if it has not already been reached — causes at least as many problems as it solves.

There is a point of diminishing returns reached by increasing the size of the federal judiciary — in terms of administration and adjudicative ambigu-

that financial need alone identifies a suspect class for purposes of equal protection analysis."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 27-29 (1973) (refusing to recognize wealth as a suspect classification for equal protection purposes). *But see* Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part II*, 1974 DUKE L.J. 527, 534-540 (positing that under equal protection, the right of access to the courts is essentially analogous to the fundamental right to vote); Morris B. Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247, 259 (1972) ("Just as the equal protection clause prohibits conditioning the right to vote on wealth, it should also prohibit the use of wealth to control access to the courts. Both voting and access to the courts are forms of enfranchisement, of participation in the political process."); ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 285-291 (4th ed. 1841) (trial by jury in the United States considered as a political institution).

74. *See Eu*, 979 F.2d at 708 ("In 1986, California passed the Trial Court Delay Reduction Act, Cal. Gov't Code §§ 68600-68620 (West Supp. 1992), which concentrates on delay reduction through case management techniques. The statistics in the record suggest that the Delay Reduction Act has helped reduce, though it surely has not eliminated, California's civil backlog. We cannot say that the California legislature's decision to address court delays primarily through case management techniques rather than multiplication of judicial positions is irrational."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-18 (1973) (when no fundamental right or suspect class is involved, a court need only determine whether the program rationally furthers some legitimate, articulated governmental purpose).

75. STUDY COMMITTEE, REPORT, *supra* note 4, at 5.

ity. As the Federal Courts Study Committee noted, even if a highly competent federal judiciary consisting of thousands of judges could be created and maintained, the coordination of so many judges would be extraordinarily difficult.⁷⁶ Additional district court judges would necessitate the creation of more appeals judges (because of the higher rate of appeals flowing from more district court judges). And the more appeals judges there are, the more difficult it is for the Supreme Court to maintain uniformity of federal decisional law (because of the Court's limited capacity to review decisions of the lower courts). The maintenance of the necessary minimum uniformity of law within a *single circuit* becomes difficult if there are a great many judges in a circuit. Problems of size and intracircuit decisional ambiguity led to the division of the Fifth Circuit, and they now threaten to have the same effect upon the Ninth. While this problem can be alleviated by increasing the number of circuits, the result inevitably is to increase the number of *intercircuit* conflicts, and hence, ultimately to increase the burden on the Supreme Court.⁷⁷ Chief Justice William H. Rehnquist emphasized these concerns in his 1991 Year-End Report on the Federal Judiciary:

As one of my colleagues on the court of appeals has noted, a federal judiciary rising above 1,000 members will be of lesser quality and could be dominated by a bureaucracy of ancillary personnel. It could also end up being divided into an almost unmanageable number of circuits or plagued by appellate courts of unmanageable size, with an increasingly incoherent body of federal law and a Supreme Court incapable of maintaining uniformity in federal law. The time has come to reexamine the role of the federal courts.⁷⁸

There are other problems inhering in the continued expansion of the federal judiciary. An ever-expanding federal judiciary becomes less and less consistent with the fundamental Constitutional concept of limited federal government, and then grows more and more inconsistent with that concept. Also, many of the situations most deserving of federal intervention involve protection of individual liberties against the actions of the political branches of government. "Such intervention is more likely to win public acceptance if the federal judiciary is perceived as a small and special corps of men and women whose talents are reserved for issues that transcend local concern, rather than as a faceless, omnipresent bureaucracy," or just another court of general jurisdiction that happens to be funded by the federal government.⁷⁹

In short, it appears clear that the size of the federal judiciary is very near its feasible limit, if it has not already reached it (at least, in terms of the maintenance of basic characteristics litigants look for in the federal courts). Yet real solutions to the civil litigation problems of cost and delay are nowhere in sight.

76. *Id.* at 7.

77. *Id.* at 8.

78. William H. Rehnquist, *1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1992, at 2.

79. STUDY COMMITTEE, REPORT, *supra* note 4, at 8.

B. THE DEMAND-SIDE PROBLEM-SOLVING PRETENDER: THE REGRESSIVE TAXATION OF JUDICIAL RESOURCES

There is another, demand-side — or privatization — pretender to the title of systemic problem-solver. The demand-side school of thought teaches that a solution to the problem of overcrowded dockets, at least, is to increase court access fees so as to ration access — to charge most users of the system a more significant portion of the amount now largely subsidized by taxpayers.⁸⁰ Seventh Circuit Judge Richard A. Posner has written that stiff access fees would tend to divert cases with relatively small monetary stakes from the federal court system toward “*more suitable* dispute-resolution processes.”⁸¹ Essentially, a fixed user fee would constitute a higher percentage tax on such cases than on cases with “big stakes.” “There would thus be a shift in the composition of the nonindigent civil docket toward litigants who have a big stake in the outcome of their lawsuit — and they are the best kind of litigants to have in a court system [because financially significant cases make good law].”⁸²

However, we doubt that the “bigness” or “littleness” of the “stakes” involved in federal civil litigation necessarily equates for all purposes with the amount of money in controversy. And we find the proposed regressive taxation of the federal court resource to be unfair. This unfairness is not, in our view, adequately alleviated by Judge Posner’s recognition that cases with significant positive externalities (*i.e.*, possessing substantial precedential value for taxpayers/potential litigants) — should be encouraged through public subsidization.⁸³ In anticipation of such criticism, Judge Posner argues that “the principle of using money to ration access to particular courts is implicit in the diversity jurisdiction’s minimum amount in controversy requirement, and until a few years ago there was a minimum amount requirement in many classes of federal question cases.”⁸⁴ But the limited existence of this principle within the federal court system does not necessarily mean that the principle should be extended across the federal case landscape.

Judge Posner admits that if fewer cases involving issues of federal law are litigated in federal courts, and more in state courts, there will likely be fewer conflicts between federal circuits but *more* conflicts between states.⁸⁵ “[A]nd

80. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 131-34 (1985). Judge Posner argues that, under the crisis circumstances in the federal courts, the current public subsidy of civil litigation “is far too great,” and that “we ought to stop encouraging federal litigation; and realistic user fees are a natural and attractive method of doing so with regard to civil litigation between nonindigents.” *Id.* at 132.

81. *Id.* at 132 (emphasis added).

82. *Id.*

83. [W]e subsidize litigation by making the taxpayers rather than the litigants bear some litigation costs, namely the costs of the judicial system itself, on the theory that the taxpayers as potential litigants benefit from the forensic exertions of the actual litigants.

There is nothing wrong with this theory; the interesting question is what the optimum subsidy is today. *Id.* at 131-32.

84. *Id.* at 133.

85. *Id.* at 133-35.

since there are almost four times as many states as there are circuits, the potential for conflicts that only the Supreme Court can resolve will be greater.”⁸⁶ We perceive this to be a significantly inefficient function of Judge Posner’s proposal. And our concern in this respect is not lessened by Judge Posner’s statement that the *exact amount* of increased interstate conflicts heading for the Supreme Court under his proposal “is uncertain; and the problem would not exist with respect to those reallocated cases that were diversity cases.”⁸⁷

Moreover, litigants taxed out of the federal courts under the demand-side model would presumably try to go to state courts or private, “alternative” dispute resolution forums. Yet, even assuming the existence of enough state courts and private ADR forums to meet the demand flowing away from the fee-barricaded federal courts, someone still must pay for this litigation. What if the state courts raise their fees stiffly as well? How much will private arbitration cost then?⁸⁸ Who will monitor the *quality* of the justice dispensed by private ADR decisionmakers? Even if small claims courts and the like are available for litigants looking for a courtroom, as Judge Posner posits,⁸⁹ will *they* be adequate?⁹⁰

We think the demand-side, or privatization model fails to pay sufficient attention to the fact that federal court causes of action are largely products of the country’s democratic processes. And the federal courts play a vital role in our Constitutional conception of government. Thus, we think it is clear that federal judicial resources are more properly understood as public, rather than private goods.⁹¹ Given the public import of federal cases and courts, “[w]e should be very suspicious of proposed solutions that permit people with dollars to get to the head of the line and not share the burdens of overloaded systems” of civil dispute resolution.⁹² Indeed, Congress has sought to ensure general, meaningful access to federal court services. At

86. *Id.* at 135.

87. *Id.*

88. *See id.* at 134 (“some of the federal cases would be shunted to private arbitration, especially if the states followed the lead of the federal government and raised their court filing fees.”).

89. *Id.* (“Admittedly, if [state courts followed the lead of the federal government and raised their court filing fees] there would be a danger of overdiscouraging litigation, especially by persons just above the indigence level. But this is not an imminent danger; and even if some state courts begin to charge stiff filing fees, others — small claims courts, for example — will not.”).

90. Judge Posner admits that “there may be a reduction in the quality of adjudication if cases involving federal claims are shunted to state courts.” *Id.* at 135.

91. *See supra* Section III. A. 1.; Brier, Comment, *Economics Awry*, *supra* note 70, at 1197-1207, and authorities cited and discussed therein (criticizing Judge Posner’s proposition on this ground).

92. Tigar, *2020 Vision*, *supra* note 1, at 92; *see also* Baruch Bush, *Process Choice*, *supra* note 40, at 919 (“If a disputant feels he is entitled to some assistance in handling his dispute, and none is forthcoming, . . . he may well feel betrayed by society and question the legitimacy of its institutions.”); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1920-21 (1989) (addressing the notion that the legitimacy of the federal judiciary in the view of the people depends upon the people feeling capable of actually vindicating their individual rights through the federal legal system).

least, that is the promise of the Federal Rules and the aim of the Civil Justice Reform Act.⁹³

C. TOWARD REFORMATION: THE CIVIL JUSTICE REFORM ACT OF 1990

The federal courts' institutional response to a general, ever-increasing awareness of the need for fundamental change in our system of civil dispute resolution has been predictably timid.⁹⁴ The Federal Courts Study Committee's Report recommended but "*incremental*" changes to the traditional civil dispute resolution system — amounting to the mere cross-breeding of systemic organisms actually in need of gene-splicing.⁹⁵ The bar's vested economic interest in the *status quo* — with virtually unlimited access to billable hours for overdiscovery and overpreparation of cases generally destined to be settled anyway — has effectively silenced the group that should have been the most vocal protector of the interests of litigants. The only real attempt to secure the change necessary to ensure meaningful access to civil dispute resolution for all of the people has come not from the courts or the bar, but from Congress.

The Civil Justice Reform Act of 1990 (CJRA) represents a necessary first step toward making our system of civil dispute resolution responsive to the needs of the people who use and support it: the taxpayers.⁹⁶ Credit should go where credit is due. Senator Joe Biden, with single-minded determination, secured passage of this controversial legislation. Senator Biden, adopt-

93. See FED. R. CIV. P. 1 ("[These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."); Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (Supp. 1992) (aiming "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.").

94. For example, while the United States Supreme Court has used its authority to make periodic amendments to the Federal Rules of Civil Procedure, such measures have not been aggressive enough to significantly curtail the surging civil litigation costs and delay of recent years. See, e.g., Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., joined by Stewart, J. and Rehnquist, J. dissenting from the Court's adoption of the 1980 amendments to the Federal Rules of Civil Procedure — in order to decry their inadequacy in the face of the courts' *acute* problems of rising costs and delay:

"I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. . . . Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs).

See also *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (experience under the federal discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice."). And respecting the courts' institutional risk-aversion, see Newman, *Rethinking Fairness*, *supra* note 10, at 1646 ("Why is it that the earnest efforts of so many well-intentioned reformers yield such minor alterations? There are several answers plainly in view. One is the institutional resistance to fundamental change. Most institutions are inhospitable to change, and the institutions of the law are especially so.").

95. See STUDY COMMITTEE, REPORT, *supra* note 4, at 9-28.

96. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. III 1991) (enacted as Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 103(a), 104 Stat. 5090-96 (1990)).

ing the attitude of Farragut at Mobile Bay, proceeded full speed ahead in spite of the concern of the judiciary that the bill potentially encroached upon traditional notions of separation of powers.⁹⁷ The vision afforded by hindsight reveals the wisdom of Senator Biden's actions. "Judicial independence" to fashion rules and procedures for a system of civil justice that is "affordable" only for the very rich and the very poor is a hollow concept indeed — one certainly failing to contribute to citizen confidence in the government.

While the Civil Justice Reform Act is unremarkable in the sense that it primarily utilizes recognized case management techniques to control litigation cost and delay, it is quite remarkable in that it takes a substantial step toward transforming civil dispute resolution from a lawyer-driven system to a court-driven one. This change in direction is essential if meaningful access to the courts is to be afforded the average citizen — who too often finds himself in an economic conflict with the person (his lawyer) historically counted on to make decisions regarding the appropriate extent of discovery (the 1980 and 1983 changes to the Rules notwithstanding) and therefore, the extent of billable hours.

The Act incorporates two additional concepts that are noteworthy. First, it attempts to expand the focus of judges, from the narrow perspective of providing a fair and unbiased forum — through a traditional trial — to the recognition that judges also have an equally important role in litigation cost containment. Second, the Act is open-ended; provisions are made for evaluation of the success of the measures adopted and implemented by the district courts. The RAND Corporation (RAND) has been selected as the independent organization to both compile and evaluate data from ten pilot and ten comparison courts. Its report is due in 1995 and will include an analysis of over 30,000 cases. In the meantime, the CJRA provides a remarkable degree of freedom for experimentation by the district courts, the results of which will be fertile ground for evaluation by the Federal Judicial Center, the Judicial Conference, consumer groups, and innumerable academics.

The procedures imposed under the Act require a high level of civil-justice-user input through advisory groups composed of both litigants and lawyers.⁹⁸ It forces examination of cost and delay and an evaluation of court dockets. The ten pilot districts were obligated under the Act to include, and the eighty-four remaining districts were obligated to consider including in their cost and delay reduction plans: systematic, differential treatment of civil cases; early and on-going control through involvement of judicial officers, including the control of the extent of discovery, the encouragement of cost-effective disclosure of information, and mechanisms that force commu-

97. Admiral David G. Farragut, at the Battle of Mobile Bay, Aug. 5, 1864 ("Damn the torpedoes! Full Speed Ahead."), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 28 (4th ed. 1992).

98. See generally Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105-06 (1991).

nication between counsel; and authorization to refer cases to alternate dispute resolution.

While the Act takes a necessary first step in the right direction, it does not go far enough to achieve true reform of our currently inadequate system of civil dispute resolution. Cases filed subject to Civil Justice Reform Act plans adopted by the various courts are still bound by traditional case management techniques and the traditional trial model. It is highly questionable that merely facilitating deliberate adjudication of civil cases on the merits in the traditional manner — even with monitoring, the limiting of discovery, and improved litigation management — will actually “ensure just, speedy, and inexpensive resolution of civil disputes,”⁹⁹ which is the aim of the Act. More is needed.

VI. CONCLUSION: AN HOLISTIC VISION OF THE REFORMATION MODEL OF CIVIL DISPUTE RESOLUTION

When the period of experimentation under the Civil Justice Reform Act has ended, when RAND has compiled its data and made its report in 1995, and when the academics and the bureaucrats have written their articles “pro” and “con,” the focus of attention will once again shift to Congress. Given the important societal interests at stake, Congress is the body that must act to reform our system of civil dispute resolution.¹⁰⁰ If Congress

99. 28 U.S.C. § 471 (Supp. III 1991).

100. See Resnik, *Managerial Judges*, *supra* note 23, at 444 (“[i]f the time to reappraise the process of adjudication has arrived, the work should not be left to the judiciary, its support staff, a handful of academics, or a few American Bar Association committees. Rather, the hard questions about pace . . . , allocation of authority . . . , and the continued existence of the adversary process . . . should be subjected to a more searching and free-ranging public debate.”); Scott, *Trial by Jury*, *supra* note 47, at 671 (“Only those incidents [of trial by jury] which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury . . . is a question of substance, not of form.”); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (because “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”). *But see* Linda A. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 384 (1992) (the first, “factual groundwork” article in a two-part series printed in the *Minnesota Law Review*, which two-part series posits and seeks to demonstrate that the CJRA represents a congressional attempt to “strip the judicial branch of its procedural rulemaking authority under the guise of ‘substantive effects,’” in “violat[ion of] the separation of powers doctrine, which commits control over internal court housekeeping affairs, including the promulgation of procedural rules, to the judiciary.”). Only after we wrote (and titled) our article did we become aware of Professor Mullenix’s *Minnesota Law Review* series. We find ourselves in apparent disagreement with Professor Mullenix relative to whether the CJRA and the procedural justice developments it ushers in are appropriate and positive as a matter of democratic rulemaking. We think it entirely appropriate, for example, that the Advisory Committee on Civil Rules be forced to undergo a reformation in thinking along the lines of the Roman Catholic Church’s 16th century experience — in response to the congressionally-posted reformation of the country’s civil dispute resolution procedural regime. By so reforming itself, we are of the opinion that the Committee can prevent the doom prophesied by Professor Mullenix: *i.e.*, that the Committee will be transformed “into a quaint, third-branch vestigial organ.” *Id.* at 379. In short, we regard the model of civil dispute resolution envisioned by this article as: (1) the natural, appropriate and necessary fruit of valid CJRA-instigated experimentation; and (2) the culmination of the long preparatory movement toward true

merely institutionalizes and brings uniformity to the incremental, tinkering case management changes permitted under the Civil Justice Reform Act of 1990, Congress will deliver to society "half a loaf" instead of the true reform needed to ensure that fair, efficient, taxpayer-supported civil dispute resolution has a significant place in our country's future. We must break the economic stranglehold the traditional model has on civil litigation and provide an *array* of court-annexed methods to resolve civil disputes — an array of public, cost and time effective methods carrying at least a presumption of finality.

The model posited in this article reflects our attempt to demonstrate at least one way civil dispute resolution would be conducted under the "comprehensive justice center" concept that is increasingly the focus of attention of those of us groping for a solution to the "civil justice problem." However, the debate is not limited to case management techniques or how litigation may be structured in the federal district courts. The line committees and the Long Range Planning Committee of the Judicial Conference are examining proposed structural changes in the judiciary that could contribute to improved administration of justice. Among the proposals under consideration are these: inhibiting the growth or even capping the size of the federal judiciary; redefining or reorganizing districts to be state-wide or circuit-wide, in order to increase efficiency and better enable the courts to provide judge power where needed; creating a national court of appeals or reducing the number of circuits and greatly reducing the number of appellate judges in each circuit — in order to temper conflicts among the circuits and to facilitate a more cohesive body of circuit law; and implementing mechanisms permitting discretionary review at the court of appeals level.

Hopefully, civil justice reform will proceed in terms of both case management techniques and structural changes. We certainly think Congress must address whether the current price extracted from society by the traditional civil litigation system — not only in economic terms, but also in terms of the public's loss of confidence in the ability of government to respond fairly to the needs of the people — compels Congress to at least reform the civil litigation model.

reformation of civil procedural justice, which preparation *began* with the enactment of the Federal Rules of Civil Procedure in 1938.

