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THE FOURTH ERA OF AMERICAN CIVIL PROCEDURE

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INTRODUCTION

Every contemporary American lawyer who has engaged in litigation is familiar with the now fifty-four-volume treatise, *Federal Practice and Procedure*.[1] Both of that treatise's named authors, Charles Alan Wright and Arthur Miller,[2] have mourned the death of a Federal Rules regime that they spent much of their professional lives explaining and often celebrating. Wright shared a sense of gloom about federal procedure that he compared to the setting before World War I.[3] Miller has also published a series of articles that chronicled his grief.[4]

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1 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1987). Justice Ruth Bader Ginsburg praised the treatise as "by far the most-cited treatise in the United States Reports; it has been called the procedural Bible for federal judges and those who practice in our federal courts." Ruth Bader Ginsburg, Symposium, *In Celebration of Charles Alan Wright*, 76 TEX. L. REV. 1581, 1583 (1998); *see also* Douglas Laycock, *Charles Alan Wright and the University of Texas School of Law*, 32 TEX. INT'L L.J. 367, 373 (1997) ("[The treatise is] the essential reference work on federal courts . . . . It is hard to overstate the importance of this work.")

2 For the uninitiated, Charles Alan Wright was the judicial law clerk to Charles Clark who, in turn, was the Reporter to the Advisory Committee on Civil Rules that drafted the original Federal Rules of Civil Procedure. Wright was a "Colossus" of our profession. Ginsburg, *supra* note 1, at 1586. For symposia tributes chronicling the manifold contributions of Professor Charles Alan Wright, see, for example, *id.* at 1583 (noting that "Professor Wright's career is crowded with signal achievements"); William H. Rehnquist, *In Memoriam: A Tribute to Charles Alan Wright*, 79 TEX. L. REV. 1, 2 (2000) (noting Professor Wright's "prodigious legal writing," as well as his career as "a skilled advocate" and his contributions to federal practice). Arthur Miller worked closely with Wright, joining him as a coauthor in 1969. Miller, who has taught civil procedure for nearly fifty years at several elite law schools, is not only a treasure of the academy, but also a celebrity. For tributes collected in symposia, see, for example, Ruth Bader Ginsburg, *Tribute to Arthur Miller*, 67 N.Y.U. ANN. SURV. AM. L. 1 (2011); Mary Kay Kane, *Foreword*, 90 OR. L. REV. 913, 914 (2012) (mentioning Professor Miller's achievements and his "awe-inspiring" career).

3 Wright condemned, in particular, (1) the growing lack of uniformity in the Rules as a result of local rule proliferation and the Civil Justice Reform Act of 1990, (2) the attack on the adversary system as a result of mandatory disclosure, and (3) the increasing complexity of the Rules. *See* Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 1-2, 7 (1994) (noting the "great disorder" in rulemaking, the challenges to the adversary system, and the fact that the original Rules were "most admired for their simplicity"). Wright noted:

> It is not a happy picture. When I survey the federal rulemaking scene, the words of Sir Edward Grey, looking out his Foreign Office window on August 3, 1914, come inevitably to mind: "The lamps are going out all over Europe; we shall not see them lit again in our lifetime." I share that sense of gloom.

Id. at 11.

4 Miller has bluntly condemned (1) the dramatic transformation of the use of summary judgment, (2) the abandonment of notice pleading, (3) the constriction of discovery, (4) limitations on personal jurisdiction, (5) the expansion of mandatory arbitration, and (6) the limits on expert evidence. *See* Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 592-93 (2011) [hereinafter Miller, *Doors Closing?*] (describing procedural obstacles to including expert testimony); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on The Federal Rules of Civil Procedure*, 60 DUKE

We agree that something has fundamentally changed.[5] In fact, we believe that we are in the midst of what should be labeled a new era—the fourth in the history of American civil procedure. The first three eras are rather conventional: the first era began with the country's founding; the second era began in the middle of the nineteenth century with the introduction of code pleading; and the third era commenced in 1938 with the Federal Rules of Civil Procedure.

In Part I, we defend the thesis that we are now in a distinct, fourth era. This era is not defined, for the most part, by the introduction of a new set of formal procedural rules; indeed, the formal procedural rules of the third era are largely intact. But if the core values of those rules have been eviscerated by judicial decisions, interred by antipathy, and eulogized by none other than Wright and Miller, we should acknowledge that the third era has, in fact, yielded to a fourth. In Parts II, III, and IV, respectively, we untangle the many forces that conspired to produce this fourth era, offer an unflattering appraisal of it, and begin to plot a strategy for escaping its clutches.

I. RECOGNIZING THE FOURTH ERA

Periodization may be the most important thing historians do.[6] The process of understanding facts or data requires some organization;[7] this is how

L.J. 1, 17 (2010) [hereinafter Miller, *A Double Play*] (discussing changes to pleading standards); Arthur R. Miller, Keynote Address, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 467 (2012) [hereinafter Miller, McIntyre *in Context*] (noting that "the summary judgment motion began to replace that possibility of trial"); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 346 (2013) [hereinafter Miller, *Simplified Pleading*] (criticizing "[t]he Supreme Court [for] mov[ing] the system from a notice pleading structure . . . to a fact pleading structure, which is exactly what the Federal Rules were drafted to reject"); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1044 (2003) [hereinafter Miller, *The Pretrial Rush*] (discussing changes in summary judgment after the 1986 trilogy).

5 This is a popular position. Paul D. Carrington, the other living former reporter to the Advisory Committee on Civil Rules, has been just as forthcoming, frank, and critical as Arthur Miller. *See generally* Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637 (2012); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010); *see also infra* note 91 and accompanying text (noting that the system has shifted towards "constricting access to courts, limiting discovery, and denying trials").

6 *See generally* IGOR M. DIAKONOFF, THE PATHS OF HISTORY (1999); KARL JASPERS, THE ORIGIN AND GOAL OF HISTORY (1953).

7 *See* Jason Scott Smith, *The Strange History of the Decade: Modernity, Nostalgia, and the Perils of Periodization*, 32 J. SOC. HIST. 263, 263 (1998) ("[P]eriodization has its own long history . . . .").

humans think.[8] The organization of historical facts and data into eras provides essential context for scholars, teachers, and students of a subject.[9] To be sure, one must be self-conscious about periodization, as it "is both the product and the begetter of theory."[10]

The history of American civil procedure divides rather naturally into three eras.[11] The first era commenced with the founding of the United States. In the seventeenth and eighteenth centuries, English substantive and procedural laws were transplanted.[12] Ironically, the reception of English law continued even after the Revolution.[13] As a practical matter, however, this was all the colonists knew.[14] The inherited characteristics of procedure included the divergent yet complementary systems of law and equity.[15] Furthermore, because the new federal government introduced a layer of federal courts to complement the pre-existing layer of state courts, the law–equity dynamic endured on both of these levels.[16]

In 1848, the State of New York launched the second era of American civil procedure history by enacting what has since been called the Field Code. The Code merged law and equity into a unified procedural system, deliberately tried to reduce the steps and procedural technicality of a

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8 *See* Marshall Brown, *Periods and Resistances*, 62 MODERN LANGUAGE Q. 309, 312 (2001) ("Without categories—such as periods—there can be no thought and no transcendence beyond mere fact toward understanding.").

9 *See* Dietrich Gerhard, *Periodization in European History*, 61 AM. HIST. REV. 900, 900 (1956) (referring to periodization as "the backbone of the organization of instruction").

10 William A. Green, *Periodizing World History*, 34 HIST. & THEORY 99, 99 (1995).

11 By labeling the status quo as the fourth era we are implicitly concluding that none of the prior three eras should be subdivided into separate eras. We recognize that this is a debatable proposition. Civil procedure was different at the beginning and end of the founding era, and the experience of code pleading in the second era was neither uniform nor constant. Although these matters deserve more attention than the scope of this article allows, we are fairly confident that the variation within those earlier eras is more evolutionary than revolutionary.

12 *See generally* ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 39 (1952); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

13 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987) ("After 1776 . . . English common law procedures continued in force.").

14 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 33-58 (2d ed. 1984) (discussing the state and development of American law during the colonial period); MILLAR, *supra* note 12, at 39 (noting the colonists' "acceptance more or less complete of the English legal system and . . . English civil procedure").

15 *See generally* WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th ed. 1956); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW (1895).

16 *See generally* MILLAR, *supra* note 12; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1036-39 (1982); Subrin, *supra* note 13, at 927.

lawsuit, and articulated a distinct role for procedure, trying to ensure that substantive rights would be vindicated consistently, predictably, and correctly.[17]

Around the turn of the twentieth century, reformers demanded a new procedure that would apply uniformly across all federal district courts.[18] A well-chronicled, decades-long effort ultimately led to the passage of the Rules Enabling Act of 1934.[19] The Federal Rules of Civil Procedure became law four years later, launching the third era.

The drafters of the Federal Rules wanted cases to be resolved on the merits. Yet it appears that the drafters had little faith in the ability of procedural rules to engineer that result. In the first and second eras, procedure was so rigid and technical that it led to dismissals based upon technicalities and, more generally, enabled a "sporting theory of justice."[20] In the third era, the drafters cast procedure moreso as a villain or a necessary evil, rather than as a solution or a savior.[21] The Federal Rules thus minimized judicial interference with the natural course of litigation as dictated by the attorneys.

The Federal Rules were premised on the notion that, once the parties learned the relevant facts, cases would either settle or go to trial.[22] Procedure had a limited role in this process. It ensured that the parties had the mechanisms to obtain the relevant facts and, for those cases that did not settle, that the parties had access to a trial. According to those involved with the drafting and early interpretations of the Federal Rules, judges had the authority to dismiss the case prior to the discovery of relevant facts only in

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17 *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 327 (1988) ("The major goal of the Code was to expedite the predictable enforcement of discretely articulated rights.").

18 *See* Subrin, *supra* note 13, at 943-44 (recounting the American Bar Association's (ABA) attempts to pass uniform federal rules at the turn of the century).

19 *See* Burbank, *supra* note 16, at 1050-98 (noting the history behind the enactment of the Rules Enabling Act); Subrin, *supra* note 13, at 948-56 (describing the ABA Enabling Act Movement).

20 In 1906, Roscoe Pound famously indicted the "sporting theory of justice," "our exaggerated contentious procedure," and "our [archaic] system of courts." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 739, 742 (1906).

21 *See, e.g.*, William Q. deFuniak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 57 (1948) ("A growing worship of formalism and technicality also began to obsess the courts of law."); George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 30 (1924) ("The Common Law made a feti[s]h of procedure.").

22 *See* Edson R. Sunderland, *Foreword* to GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL, at iii (1932) ("[D]iscovery was expected to reduce the number of trials . . . . If both sides knew the full truth and each other's strengths and weaknesses, they would settle the case and avoid the costs and uncertainties of trial."); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 864 (1933) ("[F]rom the beginning until the end, the question of settlement is always involved in a litigated case.").

exceptional circumstances.[23] Furthermore, judges were given the authority to enter a summary judgment after the discovery of relevant facts and before a trial only in very limited circumstances.[24]

While the precise rate of dismissals in those early decades under the new Federal Rules remains something of a mystery,[25] we can fairly surmise that the number was very small. Even as late as the 1980s, the Advisory Committee reviewed and discussed a draft proposal to *abrogate* the 12(b)(6) motion because it was never used and, therefore, served no purpose.[26]

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23 *See* David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 983 ("No committee member identified case screening as a proper function for pleading.").

24 *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J EMPIRICAL LEGAL STUD. 591, 594-603 (2004) ("Summary judgment prior to the Federal Rules was in fact a collection of very different tools of very different (and usually very limited) scope . . . ."); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 138 (1988) ("[S]ummary judgment cannot be granted in cases in which the facts conflict, even when the movant appears to have the better of the argument."); *see also* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929) (explaining that summary judgment was designed as a tool for plaintiff creditors to obtain a judgment upon which they could collect without the delay of trial in cases where the liability of the debtor and the amount were uncontested).

Of course, Judge Charles Clark and Judge Jerome Frank famously disagreed about the proper standard for summary judgment, with Judge Clark advocating for the more aggressive use. *See* Arnstein v. Porter, 154 F.2d 464, 480 (2d Cir. 1946) (Clark, J., dissenting) (noting the issue with "deny[ing] or postpone[ing] judgment where the ultimate legal result is clearly indicated"). Judge Frank thought that the "slightest doubt" about an issue of fact should defeat the motion. *Id.* at 468. Clark worried that such a liberal standard would facilitate the use of litigation as a tool for plaintiffs to harass defendants and to extract extortionate settlements. *See* Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 579 (1952) (noting that such standard would "allow harassment of an equally deserving suitor . . . by a long and worthless trial"). But one should not overstate Clark's enthusiasm for summary judgment; he envisioned a more active role for the motion only in cases where the material facts were not contested by either party. *See id.* at 567-69 (1952) (explaining that summary judgment may be granted when "no defense is shown or when the defense appears to be sham or frivolous" and that summary judgment relies upon "uncontested facts").

25 Readers unfamiliar with the Administrative Office's data might be surprised to learn that, although statistics regarding the number and timing of terminations were gathered, the nature of the terminations—for example, terminations by dismissal or by summary judgment—were not systematically measured. That methodology may, in fact, be as telling as it is frustrating: after all, judicial interference (by way of motions to dismiss and motions for summary judgment, for example) was simply not the focal point of the then-brand-new procedural schema.

26 *See* THOMAS E. WILLGING, USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS 1 (1989) (proposing the abrogation of Rule 12(b)(6)). *See generally* Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1500-01 (2013) (discussing the results of Willging's study and the Advisory Committee's response).

Around that time, Arthur Miller joked that the motion "was last effectively used during the McKinley administration."[27]

Summary judgment was the other dispositive motion that the new Federal Rules institutionalized yet also tempered. Once again, the activity of the rulemaking committee may provide the most useful insight about how the motion was (not) used in its early years. In the 1980s, reformers tried to amend the rule because judges were not using the summary judgment rule to its full effect.[28] That was probably an accurate assessment since judges exhibited "extreme vigilance against treading on contested fact issues or mixed questions of law and fact—even arguable ones—reserving them for evidentiary hearings . . . . This was especially true in cases applying indeterminate legal standards, such as reasonableness."[29] Unless the parties settled, disputes regarding intent, state-of-mind, and credibility were virtually always tried, often before a jury.[30]

Judges in the third era tried cases. In 1951, the federal courts tried 5085 civil cases—12.5 percent of the total number of terminated cases.[31] In 1962, the federal courts tried 6202 cases—11.4 percent of all terminated cases.[32]

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27 ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 8 (1984). Of course, we now know that, when Miller made this statement, an era of heightened pleading (enforced through 12(b)(6) dismissals, especially in civil rights cases) was newly underway. *See infra* note 42 and accompanying text.

28 *See* Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 722 (1984) (noting that the summary judgment doctrine "has increasingly been ignored or paid mere lip service" by courts); Stuart R. Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419, 420 (1985) (criticizing the strongest standards used by appellate courts for reviewing summary judgment); William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 466 (1984) (suggesting a new analysis by the court for summary judgment). *See generally* JOE S. CECIL & C.R. DOUGLAS, SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS 1 (1987).

29 Paul W. Mollica, *Federal Summary Judgment at High Tide,* 84 MARQ. L. REV. 141, 147 (2000).

30 *Id.* at 149. The proposed amendment was abandoned as unnecessary once the summary judgment trilogy cases (and their predecessors) achieved the desired reform. *See infra* notes 66-70 and accompanying text (discussing changes in the summary judgment doctrine).

31 ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 138 tbl.C-4, 140 tbl.C-5 (1951) [hereinafter 1951 ANNUAL REPORT]. There were 1892 jury trials, representing approximately thirty-seven percent of the total number of trials. *Id.* at 140 tbl.C-5.

32 ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 204 tbl.C-4 (1962) [hereinafter 1962 ANNUAL REPORT]. There were 2925 jury trials, representing approximately forty-seven percent of the total number of trials. *Id.* at tbl.C-5.

Throughout this timeframe, there were an average of twenty to twenty-four civil trials per year for each federal district judge.[33]

Nearly all of the remaining cases were resolved by settlement. When the parties settled, it was because both parties agreed that the settlement was preferable to the alternative. Importantly, the alternative was a trial—because motions to dismiss and motions for summary judgment posed no meaningful threat to plaintiffs. Moreover, trial was a realistic alternative because the costs of taking cases to trial were not prohibitive to the parties; for example, the amount and costs of discovery were non-existent, modest, or (except for the extraordinary "mega cases"[34]) commensurate with the stakes of the litigation.[35] Further still, courts tried cases at such a relatively swift pace that delay did not impose undue pressure to settle. For example, in 1951, the median time interval from filing to disposition for cases that were tried was 12.2 months.[36] In 1962, the median for tried cases was 16 months.[37] Of course, for cases that were not tried, the time to disposition was much shorter.[38]

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33 *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl.C-4 (1951-1962). The number of authorized federal district court judgeships was 212 in 1951, and 301 in 1962. *Authorized Judgeships*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/all-judgeships.pdf.

34 The term "mega case" is a loose descriptor for the unusually large and complex case. *See* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 80-81 n.17 (1983) (using the term to describe cases "excluded as 'too big' to be handled within the scope of the research); *see also infra* note 60 and accompanying text (discussing discovery costs).

35 In 1951, the use of discovery was very modest. A study of the use of discovery in five United States district courts revealed that formal discovery occurred in only 25.5% of all civil cases. 1951 ANNUAL REPORT, *supra* note 31, at 105. Document requests were used in only four percent of all cases. *Id.* Depositions were used in fourteen percent of all cases. *Id.* Interestingly, this data was reported as showing that "the discovery rules are popular." *Id.* at 104. Yet "[i]n appraising this one-quarter use it should be remembered that much discovery is carried on without filing the papers and much information is furnished voluntarily under pressure of the rules." *Id.* at 104-05; *see also* William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1134-38 (1951) (discussing contemporary views on the use of discovery through an analysis of its utilization in different types of cases).

As there is very little mention of discovery abuse or even of discovery generally in the Annual Reports in the 1950s, 1960s, and even well into the 1970s, it appears fair to conclude that discovery was neither a serious problem nor perceived to be a serious problem in these decades. *See generally* Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Proposals*, 52 SMU L. REV. 229, 246-49 (1999) (citing data from studies conducted in 1960 by The Columbia Project for Effective Justice and in 1978 by the Federal Judicial Center).

36 1951 ANNUAL REPORT, *supra* note 31, at 140 tbl.C-5.

37 1962 ANNUAL REPORT, *supra* note 32, at 206 tbl.C-5.

38 In 1963, fifty-three percent of all of the civil terminated cases were resolved without any court action. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 206 tbl.C-4 (1963). The

As is well documented elsewhere, the third era's promise of a liberal pleading standard went unfulfilled.[39] In the 1990s, Congress passed legislation requiring heightened pleading in litigation involving prisoners' rights and securities.[40] But more significant pleading reform occurred through judicial decisions rather than through rulemaking.[41] The pleading standard first began to erode in the mid-1970s, when trial and appellate courts throughout the federal system imposed a heightened pleading standard for certain types of cases, most notably civil rights actions.[42] In 1993,[43] and then again in 2002,[44] the Supreme Court reviewed the lower courts' practice of imposing heightened pleading in civil rights cases, and found that only Congress or other rulemakers—not the courts—could deviate from the "notice pleading" standard required by Federal Rule 8(a).[45]

Defense counsel pursued (and lower courts allowed) alternative mechanisms to impose heightened pleading, including requiring a more definite

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median time to disposition for these cases was five months. *Id.* at 209 tbl.C-5. Twenty-one percent of the cases involving court action were resolved before pretrial. *Id.* at 206 tbl.C-4. The median time to disposition for these cases was four months. *Id.* at 209 tbl.C-5; *see also infra* note 112 (discussing concern for delays in judicial procedure).

39 *See infra* note 51.

40 *See* 18 U.S.C. § 1964(c) (2000); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.); Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 77-78 (2000)). *See generally* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 521-22 (1996) (discussing the tightening of pleading requirements as an effort to reduce frivolous litigation).

41 *See infra* notes 42-51, 66-70 & 84-90 and accompanying text.

42 *See* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 939 (1990) (observing that "an increasing number of federal courts require that civil rights plaintiffs meet stricter or heightened standards of pleading in complaints"); David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 391 (1980) (noting the shift to fact pleading in civil rights cases). *See generally* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 331-32 (2001) (explaining that, during the 1970s and 1980s, "all federal courts of appeals applied a standard demanding factual specificity of civil rights plaintiffs filing cases in federal court").

43 Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993). Justice Thomas wrote the opinion for a unanimous Court.

44 Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). Chief Justice Rehnquist wrote the opinion for a unanimous Court.

45 *See Swierkiewicz*, 534 U.S. at 514-15 ("[T]he Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"); *Leatherman*, 507 U.S. at 168 ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.").

statement or demanding that plaintiff reply to the defendant's answer.[46] The Supreme Court, like a drum major whose band was no longer following, sprinted to get back in front of the parade and preserve the appearance of leadership. With its recent *Twombly* and *Iqbal* opinions, the Court "retire[d]" key language from the seminal notice pleading case of 1957,[47] instructed judges to ignore conclusory allegations,[48] expanded the definition of conclusory allegations,[49] and replaced notice pleading with a scheme labeled plausibility pleading.[50] Plausibility pleading—together with its predecessor, heightened pleading—is nothing less than a "revolutionary" departure from notice pleading and from the original vision of the Federal Rules.[51]

It is difficult to measure the practical effect of the shift in the Court's pleading jurisprudence because there are many confounding factors.[52] For example, the evolution of the pleading standard (1) increases the likelihood

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

47 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

48 Ashcroft v. Iqbal, 556 U.S. 662, 679-81 (2009).

49 *Id.* at 696-99 (Souter, J., dissenting).

50 *Id.* at 678 (majority opinion); *Twombly*, 550 U.S. at 570.

51 *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823-24 (2010) (stating that *Iqbal* and *Twombly* "revolutionized" the law on pleading); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010) (noting that *Twombly* "started a revolution in pleading"); Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1254 (2013) (labeling *Twombly* as "revolutionary"); *see also* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (claiming that *Iqbal* and *Twombly*'s plausibility pleading was a "sea change"); Miller, *A Double Play*, *supra* note 4, at 331 (noting the changes caused by *Iqbal* and *Twombly* and arguing that the cases "turn their back on over sixty years of federal pleading jurisprudence"); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 121 (2011) ("*Iqbal* and *Twombly*, by many accounts, two-stepped the Court from notice to heightened 'plausibility' pleading for all civil cases."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 466 (2008) (arguing that plausibility pleading departs from the previous emphasis on justice in order to improve judicial efficiency); Stephen N. Subrin, Ashcroft v. Iqbal*: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 575 (2012) (criticizing the *Iqbal* majority's reasoning and departure from the Federal Rules); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 175 (2010) (explaining plausibility pleading as an attempt to address the mismatch between new substantive law and old procedural rules).

52 *See generally* David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss,* 6 FED. CTS. L. REV. 1 (2011); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2285 (2012).

that defendants file motions to dismiss (thereby complicating comparison of grant rates between the third and fourth eras), (2) has some in terrorem effect that may motivate some plaintiffs to settle before a motion to dismiss is even filed (thereby complicating comparison of filing and grant rates), and (3) has some in terrorem effect that may discourage some plaintiffs from filing suit (thereby complicating comparison of filing and grant rates, while also affecting the composition of the civil caseload).[53]

Many empirical studies have been conducted, and the results vary considerably.[54] One observation upon which experts agree is that certain types of cases are significantly affected by the evolution of the pleading standard.[55] But broader conclusions about the effects of *Twombly* and *Iqbal* are harder to draw because, inter alia, at least some lower courts were already applying stricter pleading standards at the time of the decisions.[56]

Let us turn next to discovery, another hallmark of the third era.[57] Dismissals at the pleading stage deny discovery that the third era would have allowed. The fact that the cases most likely to be dismissed are those characterized by asymmetrical information (where only the defendant knows many of the essential relevant facts) makes the denial of discovery especially potent since some of these cases are likely meritorious.[58]

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53 *See generally* Hoffman, *supra* note 52 (discussing these and other confounding factors); Gelbach, *supra* note 52 (same).

54 *See* Engstrom, *supra* note 52, at 1231-32 (summarizing the empirical studies of *Twombly* and *Iqbal*).

55 *See id.* at 1226 (summarizing the effects on job discrimination, civil rights, and other types of cases by *Twiqbal*).

56 *See supra* notes 42-51 and accompanying text.

57 *See* Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 633 (1988) (noting the differences between the lack of discovery under the old common law and discovery under the Federal Rules); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1613-14 (2003) (describing the revolution of discovery under the Federal Rules); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 30 (1994) (explaining why discovery is especially necessary when lawyers do not want to turn over information); *see also supra* note 22 (discussing the relationship between discovery and settlement).

58 *See* Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 535 (2012) (recognizing that a lack of resources will likely prevent plaintiffs from bringing their claims); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1261-62 (2008) (noting that the information needed to make a claim is often in the possession of the defendant); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 87 (2010) (noting that the factual allegations needed in civil rights claims make them particularly vulnerable to dismissal); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 195 n.59 (2010) (finding that plaintiffs without access to "smoking gun" documents and without the help of a whistleblower will be burdened by the "fact skepticism endorsed in *Iqbal*").

Even for the cases that survive the pleading challenge, discovery has been curtailed. Since 1980, the Federal Rules have been amended numerous times: the scope of discovery was narrowed; numerical limits restricted the amount of discovery; and new discovery conferences, pre-trial conferences, mandatory disclosures, and sanction rules encouraged closer judicial supervision of discovery.[59]

Contrary to the popular narrative, the problem with excessive discovery is—and has always been—more pervasive with respect to a particular slice of "mega cases," approximately five to fifteen percent of the civil caseload.[60] In the majority of cases there is very little or no discovery and, in the other cases, the amount of discovery is, by any reasonable measure, proportionate to the stakes.[61] Especially galling is the fact that many of the discovery reforms that impose additional costs (e.g., mandatory disclosure, conference obligations) permit opting out by stipulation; yet the "mega cases" are those where the parties may be most likely to opt out.[62] Thus the cases where

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59 *See generally* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1211-12 (2005) (summarizing changes introduced in the 1980s to limit certain forms of discovery); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 544 (2001) ("[B]y the mid-1970s and certainly by 1980, things had changed enough that the Rulemakers were beginning to cut back on the model of broad discovery that they had endorsed only a decade earlier.").

60 See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 5.2, at 288 & n.7 (5th ed. 2001) (citing authorities for the proposition that discovery abuse does not occur "in the great bulk of cases"); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 791 (1998) ("Cases involving extensive discovery are in fact relatively rare—the studies using actual file reviews uncovered very few cases involving more than ten discovery requests, perhaps 5-15% depending on the sampling method. In the 1978 FJC study, less than 5% of the case files examined recorded more than ten discovery requests; of cases with at least some discovery, 90% had no more than ten requests."); Thornburg, *supra* note 35, at 246-49 nn.107-25 (citing studies that indicate that discovery does not take place in more than fifty percent of cases).

61 *See* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684-86 (1998) (indicating that most studies find little to no discovery in the majority of cases); Thornburg, *supra* note 35, at 246-49 & nn.109, 113 & 123 (reporting the Federal Judicial Center's finding that cases involve "little discovery, conducted at costs that are proportionate to the stakes of the litigation," and reporting on empirical studies' findings on the amount of discovery conducted in litigation).

62 A number of rules authorize the parties to stipulate out of the discovery requirements on disclosure and authorize party agreements regarding the timing, amount, and scope of discovery. *See, e.g.*, FED. R. CIV. P. 26(a), 26(b), 29, 30(a), 33(a). In mega cases with massive amounts of discovery, the parties stipulate, or a judge orders, that numerical limits do not apply. Based upon conversations with our former students and other practitioners, we found that counsel often stipulate out of the mandatory initial disclosure requirements. *See, e.g.*, Town of Gramercy v. Blue Water Shipping Services, Inc., 2009 WL 799738, at *2 (E.D. La. 2009) (stating that parties stipulated that initial disclosures pursuant to Rule 32(a)(1) would not be made).

discovery abuse is most likely are also least likely to be constrained by the new discovery rules. Meanwhile, cases in which there is little or no discovery will suffer the additional transaction costs. Moreover, the *scope* of formal discovery, which establishes the parameters for both formal *and non-formal* exchanges of information,[63] has been curtailed in all cases, even though in eighty-five to ninety-five percent of those cases formal discovery was either nonexistent or proportionate to the stakes.

The massive expansion of filing and granting of summary judgment motions has also wreaked havoc on third-era ideals.[64] For the drafters of the Federal Rules, summary judgment was an exceptional remedy with a very limited role.[65] At some point between 1975 and 1986, judicial decisions transformed it into a focal point of litigation.[66] This fundamental shift is enormously significant,[67] arguably unconstitutional,[68] probably inefficient,[69] and especially unfair to certain plaintiffs.[70]

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63 *See supra* note 35 and accompanying text.

64 *See* Mark W. Bennett, Essay, *From the "No Spittin', No Cussin', and No Summary Judgment" Days of Employment Discrimination to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y. L. SCH. L. REV. 685, 697 (2012) (noting an "increasing judicial preference for motions to dismiss and summary judgment").

65 *See supra* note 24.

66 *See* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882, 890 (2007) (tracking the developments in summary judgment activity over time); *see also* Burbank, *supra* note 24, at 620 (noting that summary judgment "started to assume a greater role in the 1970s"); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1265 (2005) (noting an increase in the percentage of federal civil cases "terminating at various procedural stages").

67 *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 541-43, 547-50 (2007) (discussing the inherent judicial biases against plaintiffs in motions for summary judgment and the constitutional issues ensuing from this bias); Miller, *The Pretrial Rush*, *supra* note 4, at 1041-42 (noting the strategic significance of summary judgment motions).

68 *See* Stempel, *supra* note 24, at 162-65 (noting possible Seventh Amendment issues with judges granting summary judgment motions); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 145-54 (2007) (arguing that summary judgment is unconstitutional under the Seventh Amendment and common law).

69 Bronsteen, *supra* note 67, at 533 ("[I]n most cases, the cost of litigating to summary judgment exceeds the cost of settling by a greater amount than the cost of trial exceeds the cost of litigating to summary judgment."); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 101-03 (1990) (explaining how summary judgment generally increases litigation costs); Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 680 (2012) ("It appears to be an inefficient anti-democratic exercise in result-oriented judicial activism."); Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 250 (2011) (suggesting a way to deal with summary judgment motions more efficiently).

70 *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 72 (1999) (discussing the use of summary judgment and the challenges it poses for plaintiffs in the context of Title VII harassment cases); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and*

Once again, it is difficult to measure the practical effect of the shift in the Court's jurisprudence. The transformation of the summary judgment motion also changes filing rates and has in terrorem effects that complicate any conclusions about causation.[71] Even though a relatively small percentage of cases are terminated by summary judgments (approximately 7.7% in 2000, an increase from 1.8% in 1960, according to one careful scholar's conservative estimate[72]), what is most alarming is that considerably less than half of the cases that encounter a summary judgment motion will survive it.[73] Some district courts granted summary judgment motions in employment discrimination cases as much as ninety-five percent of the time.[74] As with

ADEA Cases, 34 B.C. L. REV. 203, 208 (1993) (same). *See generally* Issacharoff, *supra* note 69, at 92 (noting that, in 1988, summary judgment was never granted to plaintiffs in district courts); Stempel, *supra* note 24, at 159 (noting a shift in the relative power of the litigants).

It is worth mentioning that, although the trilogy of summary judgment cases likely had a disproportionate effect on civil rights and discrimination cases, the alignment of justices in those cases defies simple ideological characterization. Chief Justice Burger joined Justice Brennan's dissenting opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 (1986). Chief Justice Burger authored a dissent joined by Justice Rehnquist in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 268 (1986). *See also supra* notes 43-44.

Similarly, we have been unable to find any evidence that the early, aggressive use of motions to dismiss and motions for summary judgment by trial judges (prior to the Supreme Court decisions) is uniquely the product of Republican-appointed judges. As Professor Theodore Eisenberg brought to our attention, although ideology can often help explain judicial outcomes at the appellate level, empirical studies support the conclusion that there are little or no political effects in civil rights cases at the trial court level. *See, e.g.,* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (finding that the judges' political preferences do not affect the outcome of summary judgment motions in civil rights cases); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 840-41 (2010) (finding no effect of the judges' political party on class action settlements and their fee awards); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 193 (2010) (finding that the "party of the deciding judge bears no relation to outcome"); *see also* Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 233 (2009) (suggesting that studies of political effects may be complicated by differences in judicial decisionmaking in published as opposed to unpublished opinions). Of course, the increasing politicization of all judicial appointments could change the outcome of such studies going forward.

71 *See supra* note 53 and accompanying text.

72 Burbank, *supra* note 24, at 617-18.

73 *See* Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 710 (2012) (citing Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson 1 (Apr. 12, 2007, rev. June 15, 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (stating that defendants win fifty-five to sixty-eight percent of their summary judgment motions).

74 *See id.* at 710 n.35; *see also* BARRETT & FARAHANY, LLP, JUSTICE AT WORK, ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS FOR CASES IN WHICH AN ORDER WAS ISSUED ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN 2011 AND 2012 IN THE U.S.

pleading and discovery, the transformation of summary judgment has been labeled a "revolutionary" departure from prior practice.[75]

One virtue of the fourth era is that cases are resolved promptly. Since 1990, the median time to disposition for all terminated civil cases is about seven or eight months.[76] This efficiency is achieved because more cases are resolved earlier in the litigation process. With trial in the fourth era being a "pathological event,"[77] the reduction in the number of cases surviving motion for summary judgment improves the overall time to disposition numbers. For the one percent of cases in 2012 that reached the trial stage, the median time to disposition was twenty-three months.[78]

We emphasize the reforms to the pleading standard from 1976 forward, to the discovery rules from 1980 forward, and to summary judgment practice from 1975 forward—but, of course, these are not the only procedural reforms. The other reforms largely illustrate more of the same—in fact, there has been "no major reform to the Federal Rules over the past forty years in which the idea of deciding cases 'on the merits' was the principal motivation behind the reform."[79] With more pages, we would emphasize, as others have documented, the attack on class actions (which is an affront to the drafters' vision of liberal joinder),[80] the transformation of Rule 11 (into a

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DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326697 (reporting grant rates of ninety-five percent for partial summary judgments and eighty-three percent for full summary judgments).

75 *See* D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 38 (1988) (discussing the "new" use of summary judgment); *see also supra* notes 67-70 and accompanying text.

76 *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2012 tbl.C-5 (2012) [hereinafter 2012 FEDERAL JUDICIAL CASELOAD STATISTICS], *available* at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C05Mar12.pdf (seven months); ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 157 tbl.C-5 (1990) (eight months).

77 *See* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 n.200 (1995) ("[W]e are approaching a time when many a civil trial will be characterized as a 'pathological event.'").

78 2012 FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-5. There were 3147 trials in 2012. Of these, 2205 (or approximately seventy percent) were jury trials. *Id.* at tbl.C-4, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C04Mar12.pdf; *see also infra* note 112 (discussing delays in civil cases).

79 Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 DENV. U. L. REV. 407, 418 n.47 (2010).

80 *See* Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 MICH. J. L. REFORM 537, 538, 546 (2013) (noting the Court's "subversion of Rule 23(b)(3)" and "hostility to the aims stated in Rule 1"). *See generally* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 627 (2012) (discussing how companies can position themselves "beyond the reach of aggregate litigation"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L.

rule that chilled access to courts, also undermining the drafters' vision),[81] the retrenchment on the recovery of attorneys' fees by plaintiffs,[82] and the installation of broad judicial case management, often designed and implemented to dispose of cases without trial.[83]

Other reforms that deserve to be mentioned as evidence of transition to a new, fourth era are not directly tied to the Federal Rules of Civil Procedure. Summary judgments have been even easier to obtain because rules regarding the admissibility of evidence have been tightened.[84] The enforcement of

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REV. 729, 731 (2013) (describing the decreasing willingness of courts to allow plaintiffs to bring class actions).

Given our periodization, we must add an additional note on timing. The original class action rule spawned many interpretation problems, leading in 1966 to a substantial revision that essentially created a new, more expansive, and more useful rule. *See* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1752–1753, at 18-54 (3d ed. 2005) (recounting the history of this rule). But the backlash was swift—dating, once again, to the 1970s. *See generally* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and "The Class Action Problem*," 92 HARV. L. REV. 664, 666-67 (1979) (describing growth of, and backlash against, class actions in federal court).

81 *See* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11-13 (1989) (discussing misconceptions about the purpose of the rule); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941 (1989) (discussing the further unpredictability of Rule 11); *see also* Melissa L. Nelken, *Sanctions Under Federal Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1337-38 (1986) (noting the uncertainty of Rule 11 changes in terms of chilling certain actions).

Given our periodization, we note that the transformation of Rule 11 occurred in 1983. Unlike the many fourth-era reforms introduced by judicial (re)interpretation, this is an example of a formal rule amendment. *See generally* Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 564-66 (2004) (describing the creation of the rule as a response to corporate concerns).

82 *See generally* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1096 (2007) ("[A] second, more subtle erosion of fee-shifting provisions has come from the courts under the guise of promoting settlement . . . ."); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 206 (2003) (criticizing "parsimonious fees decisions" in such cases).

83 *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 670 (2010) (recognizing that "[j]udging changed thirty years ago" with the introduction of active case management); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 45 (1995) (noting how managerial judges subvert inherent checks in the judicial system); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) (discussing trial judges as "case managers"); Subrin, *supra* note 57, at 27-50 (discussing weaknesses in the system that are subverted); *infra* notes 117-127 and accompanying text (discussing judicial case management).

84 One particular limitation—introduced in 1993 by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)—is a "summary judgment substitute[]." JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 719

arbitration clauses has also denied access to federal courts in an enormous number of cases;[85] litigants redirected to arbitration may or may not receive access to facts and to the trial that the drafters of the Federal Rules enshrined.[86] Personal jurisdiction doctrine has evolved in a manner that increasingly restricts easy access to courts.[87] Justiciability and Eleventh Amendment doctrines have also conspired to deny access.[88] The substantive law itself has been modified as well, sometimes under the guise of procedure,[89] to make liability harder to prove and remedies harder to obtain.[90]

(2004); *see also* Schneider, *supra* note 51, at 551-52 (explaining how *Daubert* has changed the way federal courts deal with summary judgment).

85 *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1040 (2012) ("[I]n the 1980s the Court began to revolutionize federal arbitration law."). *See generally* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 235 (2008) (noting a change in the judicial system because of the increase in arbitration); Deborah R. Hensler, *Our Courts Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 188 (2003) (discussing the uncertainty in new mediation programs).

86 *See generally* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 4 (1987) (indicating skepticism with alternative dispute resolution (ADR)); Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (1986) (same); Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 391 (2005) (equating the ADR system with the concept of equity in the courts); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1649 (2005) (arguing that arbitration eliminates the rights of a consumer to appear in court before a judge).

87 *See generally* Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision*, *in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 368-77 (2012) (criticizing *Nicastro*'s reasoning); Miller, McIntyre *in Context*, *supra* note 4, at 478 (criticizing the judiciary for "moving the specter of case termination forward in time, denying access to discovery, [and] limiting forum choice," thus empowering defendants); David E. Seidelson, *A Supreme Court Conclusion and Two Rationales that Defy Comprehension:* Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 53 BROOK. L. REV. 563, 578-79 (1987) (discussing *Asahi*'s additional conduct rationale).

88 *See generally* Erwin Chemerinsky, *Closing the Courthouse Doors: October Term 2010*, 14 GREEN BAG 2D 375, 389 (2011) (noting a "distrust of the courts" underlying some Supreme Court decisions); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1114 (2006) (describing "the Court's jurisprudence as 'hostility' to 'litigation'"); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 331 (2012) (discussing the split in the Supreme Court decisions limiting plaintiff access to the courts).

89 *See, e.g.*, Walmart Stores, Inc. v. Dukes, 131 S. Ct. 2531, 2552 (2011) (refusing to allow certification in a suit where the commonality was part of the alleged discrimination); Ashcroft v. Iqbal, 556 U.S. 662, 688 (2009) (Souter, J., dissenting) (suggesting that the Court's decision eliminates supervisory liability); Martin v. Wilks, 490 U.S. 755, 768 (1989) (allowing petitioners not party to a consent decree to reopen the case); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982) (refusing to certify a class for lack of reasonable specificity). *See generally* Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 216 (1992) ("[S]ubstantive law largely affects behavior through procedure.").

Rule systems and interpretations of rules invariably change and evolve. We call this a new era, however, because these reforms are profound, correlated, and enduring. These changes are profound because they have eviscerated the core values of the Federal Rules, namely simplicity, uniformity, access to courts, decisions on the merits, and attorney latitude. These changes are correlated and enduring because, since the 1970s, they have pointed largely in one direction: constricting access to courts, limiting discovery, and denying trials.[91]

II. DECONSTRUCTING THE FOURTH ERA

Conspicuously absent from the history of the fourth era of procedure is the policy debate that should occur when lawmakers and the public are presented with a choice between the competing visions of the third and fourth eras. Procedure is power, of course, so the stakes of choosing one over the other produces different winners and losers.[92] In a debate, the

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90 *See generally* Miller, *Doors Closing?*, *supra* note 4, at 593 ("[H]eightened class action certification requirements have become a form of pre-trying the merits of the plaintiff's cause."); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003) (arguing recent holdings instruct judges only to grant remedies where they possess "express congressional permission").

91 *See supra* notes 88-89. *See generally* Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 31, 33-34 (1988) ("[I]t is the judges who have been closing the courthouse doors."); Galanter, *supra* note 66, at 1265 (documenting the shift away from trials); Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) (describing a general search for alternatives to law); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts,* 162 U. PA. L. REV. 1731, 1760 (2014) (discussing how the Roberts and Rehnquist courts pushed against certifying class actions with "traditional" reasoning that plaintiffs deserve their "day in court"); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 541 (1985) (noting a "decline in the valuation of procedure"); Schneider, *supra* note 51, at 527 (explaining how judges used pleading burdens to disfavor plaintiffs in civil rights cases); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 701, 717-20 (1993) (describing a shift from an "open" to "restrictive" courts paradigm); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 312-17 (1996) [hereinafter Stempel, *Multi-Door Courthouse*] (describing Justice Warren Burger's role in the shift to alternative dispute resolution); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-96 (1989) (discussing changes in the Rules from the 1970s onward); Jack B. Weinstein, *The Ghosts of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 3, 23-30 (1988) (noting the Rules may have become "stingier"); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 636 ("Instead of trials, judges are making rulings on other dispositive motions . . . .").

92 *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1711 (2004) ("The messages that Congress was likely to derive from this evidence of the changing role of the federal courts . . . [included] the power of procedure in aid

trade-offs between the two visions would be explored, the empirical data gathered, and the interested constituencies consulted. Yet that debate never happened. Indeed, it is all-too-fitting that the third era itself was denied notice and the right to be heard before it was interred by judges.

The absence of such a debate also makes a history of the fourth era more difficult to write: there was no specific moment when it was passed, no legislative history revealing its purpose, and no anointed leaders personifying it.[93] Another barrier to a complete understanding of the historical origins of the fourth era is the fact that we are still in it. Because we have advocated against many of its reforms, we surely lack the objectivity and distance that tend to improve historical accounts. Nevertheless, much work has already been done by many careful scholars, including judges,[94] who

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of that enhanced role."); *see also* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818-22 (2010) (opining that procedure is an instrument of power and social control that can favor certain groups over others).

93 By contrast, the second and third eras were subject to transparent democratic processes that yielded speeches, reports, and records. For the legislative background of the Field Code as part of a statutory codification movement, see Subrin, *supra* note 17, at 316-17, 337. For the legislative background of the original Federal Rules of Civil Procedure, see Burbank, *supra* note 16, at 1050-98, and Subrin, *supra* note 13 at 910, 969-70.

It is likely that many different individuals are responsible for the transition from the third to the fourth era but, because most of them are still alive, we lack relevant archives. It is quite likely that Warren Burger, Chief Justice of the Supreme Court from 1969 to 1985, is the single most responsible person for this transition; he died in 1995, but his papers are closed to researchers until 2026. SWEM LIBRARY, WARREN BURGER COLLECTION, https://swem.wm.edu/research/special-collections/warren-burger-collection (last visited May 13, 2014).

94 *See, e.g.*, Bennett, *supra* note 64, at 704 (examining the effect of a change in focus to summary judgment motions); Patrick E. Higginbotham, *Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501, 502 (2006) ("[T]he work of the United States District Court, the trial court, has changed."); D. Brock Hornby, *Stepping Down*, 8 J. APP. PRAC. & PROCESS 265, 266 (2006) ("[F]ederal trials—particularly civil trials—have become a luxury . . . ."); William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT'L & COMP. L. REV. 305, 309, 312 (2009) (examining the decay of the American jury system, as well as the changes in discovery); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 83 (2006) [hereinafter Young, *Vanishing Trials*] (advocating a return to trials); *see also* Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 207-12 (2005) (surveying the costs in the decline of trials); Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 308 (2012) (defending the role of the jury); James E. Gritzner, *In Defense of the Jury Trial: ADR Has Its Place, But it is Not the Only Place*, 60 DRAKE L. REV. 349, 364 (2012) (criticizing ADR as a system where "no one wins everything"); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 182 (2005) (advocating for "better advertising" of the jury trial); David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1383-85 (2010) (analyzing summary judgment); Stanley Marcus, *Wither the Jury Trial*, 21 ST. THOMAS L. REV. 27, 33 (2008) (lamenting a decline in "public support for the rule of law"); Terry R. Means, *What's So Great About a Trial Anyway? A Reply to Judge Higginbotham's Eldon B. Mahon Lecture of October 27, 2004*, 12 TEX. WESLEYAN L. REV. 513,

have identified the narrative threads that we weave together here as a first draft of the history of the fourth era.

We also draw upon our experience as litigators (née trial lawyers) in the third and fourth eras, respectively. The older of us prepared and tried cases in the critical years between 1963 and 1970,[95] and saw the increases in lawyer time and client expense occurring when Massachusetts adopted oral depositions by court rule in 1966, thereby making discovery a lucrative industry.[96] The younger of us clerked for a federal appeals judge, litigated for a few years in the late 1990s with a prestigious Boston law firm, and then managed litigation as an in-house corporate counsel.[97] Only one of us remembers a time when litigation routinely began with ex parte orders freezing the defendant's assets and often ended with trials, and only one of us experienced Rule 16 conferences, discovery conferences, and mandatory mediation as routine components of litigation, with arbitration as the only realistic possibility for "trial" experience.

Our disparate practice experiences and overlapping research agendas have convinced us of three things. First, just as prior to the third era all signs pointed to liberal equity procedure for the new Federal Rules,[98] as one looks back to the 1970s, most paths instead lead to a more constrictive procedure and a reduction of live, oral participation in the civil litigation process.[99] Second, the very liberality of the original Federal Rules, accompanied by rights-granting federal legislation and the civil and consumer

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520-21 (2006) (responding to Judge Higginbotham's concerns); Craig Smith & Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 295-98 (2012) (criticizing the rise of private legal solutions).

95 Subrin practiced law, first as an associate and then as a partner, at Burns & Levinson.

96 *See* Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model* (explaining the causes and effects of adopting the Rules), *in* THE HISTORY OF LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692–1992 393 (Russell K. Osgood ed., 1992); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2032-33 (1989) ("[I]n 1966, after a lengthy lobbying effort by Chief Justice G. Joseph Tauro of the Massachusetts Superior Court . . . the Supreme Judicial Court promulgated a rule for oral depositions and other types of discovery . . . .").

97 Main clerked for Judge Ruggero J. Aldisert of the U.S. Court of Appeals for the Third Circuit, practiced with the law firm of Hill & Barlow, and then served as associate general counsel for the privately-held company Platinum Equity, LLC.

98 *See* Subrin, *supra* note 13, at 957 ("Virtually every intellectual, cultural, and political signpost pointed to equity.").

99 One exception to this is the periodic growth of the use of class actions. *See* STEPHEN N. SUBRIN & MARGARET WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 205-06 (2006) (detailing the "roller-coaster" history of the device). For current attempts to curtail the growth of class actions, see generally Tidmarsh, *supra* note 79, at 418-28.

rights movements, provides one cluster of causal links to the intense backlash of constriction.[100] Third, although conservative ideology and actors played a significant role in bringing the fourth era to fruition, conservatives did not act alone.[101] In the sections that follow, we identify the protean, multidimensional, and overlapping forces that powered the transition from the third era to the fourth.

A. *Growth in Civil Caseloads*

In the 1970s, the federal judiciary witnessed massive growth on a number of fronts. First and foremost, the civil caseload exploded. Between 1962 and 1975, the number of civil filings doubled, yet the number of federal district judges increased only by a factor of 1.2.[102] Between 1975 and 1983, the number of civil filings doubled again, and the number of federal district judges increased only by a factor of 1.3.[103]

This increase in the number of filings was fueled in part by plaintiffs seeking vindication under statutory rights that had not previously existed.[104] Between the 1960s and the 1990s, Congress created hundreds of jurisdictional grants.[105] Vindicating the substantive mandate of these new statutory rights would have been difficult without the liberal Federal Rule regime to complement their enforcement.[106]

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100 *See supra* notes 20-24; *infra* notes 113-154 and accompanying text.

101 *See supra* note 70; *infra* notes 142-148 & 159 and accompanying text.

102 1962 ANNUAL REPORT, *supra* note 32, at 198 tbl.C-3; ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 349, tbl.C-3 (1975) [hereinafter 1975 ANNUAL REPORT].

103 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 548 tbl.A-12.

The number of civil filings has largely stabilized in the thirty years since. The number of new filings in 2012 is only eighteen percent higher than the number of new filings in 1983. *See* 2012 FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-3, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C03Mar12.pdf.

104 For a discussion in real time of courts' reaction to this phenomenon, see 1975 ANNUAL REPORT, *supra* note 102, at 211-25. The surge after 1975 cannot be explained solely by population growth or by increases in the gross domestic product. *See* Galanter, *supra* note 103, at 549 tbl.A-13 (listing civil filings along with the U.S. population for a period of forty years).

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

106 *See* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54-55 (1997) (discussing how the shift from bureaucratic to civil litigation since the 1950s was partly made possible by liberalized discovery rules); Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997) ("Over the years access to the powerful federal engine of discovery has become central to a wide

The increase in the number of filings was also fueled in part by an increase in the number of lawyers. The number of lawyers nearly doubled between 1970 and 1984—a growth rate three times faster than that of other professions and four times faster than the general population during the same period.[107] The size of large law firms and their fees similarly escalated.[108] Much of the growth was in litigation departments, as the appetite for discovery in big cases proved insatiable.[109] Meanwhile, an entrepreneurial plaintiffs' bar developed techniques to manage large-scale, expensive litigation.[110] Moreover, technology was transforming litigation generally, and discovery in particular.[111] There was also widespread concern among judges and lawyers that civil cases could not be processed without inordinate delay.[112] Even the casual observer of the American legal scene, let alone

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array of social policies."); *see also* Coleman, *supra* note 58, at 528 (arguing that private civil litigation forces organizations to conform to laws and social mores).

107 RICHARD L. ABEL, AMERICAN LAWYERS 75-77, 280-81 (1989).

108 *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 24, 46, 87-88 (1991) (discussing the tremendous expansion and lucrative profits realized by large law firms during the period); George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1658-59 (2006) (demonstrating that another period of growth in the number of lawyers and large law firms occurred between 1998 and 2004).

109 *See* Galanter, *supra* note 108, at 51 (noting the growth of litigation departments in big firms).

110 *See* Roger S. Fine & Theodore M. Grossman, *Mass Torts* ("The organized plaintiffs' bar has been candid about both their coordination and their intent to focus aggregate liability tactics on various industries." (internal citations omitted)), *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL §73:4 (2000); John C. Coffee, Jr., *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669, 676 (1986) (identifying plaintiffs' attorneys as "profit-motivated" and "risk-taking" entrepreneurs).

111 *See* Alan Blakley, *Differences and Similarities in Civil Discovery of Electronic and Paper Information*, FED. LAWYER, July 2002, at 32, 32 ("Photocopying machines changed civil discovery as drastically as the Industrial Revolution changed manufacturing.").

112 *See, e.g.*, Warren E. Burger, *Preface* to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 5-6 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter POUND CONFERENCE] (articulating these concerns about the prospect of excessive delays in civil litigation); Edward H. Levi, The Business of Courts: A Summary and a Sense of Perspective, Address at National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 9, 1976), *in* POUND CONFERENCE, *supra* at 269-70 (same); Leonard S. Janofsky, *ABA Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323, 1323 (1979) (describing the initiatives of the ABA's Action Program to Reduce Court Costs and Delays); Miller, McIntyre *in Context*, *supra* note 4, at 477 (recounting the cost and delay rhetoric from the late 1970s and early 1980s when he served as Reporter to the Advisory Committee).

Notwithstanding the popular narrative of court delays, the time to disposition remained fairly constant throughout the transition from the third to fourth eras. The median time to disposition for all terminated cases was eight months, ten months, nine months, nine months, and nine months, respectively, in 1963, 1967, 1971, 1975, and 1979. ADMIN. OFFICE OF THE U.S. COURTS,

judges, felt that the rapidly rising flood waters of more cases, new causes of action, the surfeit of lawyers, big law firms, and increasing fees demanded action, or at least serious attention.

B. *Case Management as a Solution*

The judges' reaction to the perception that things were "out of control" was to "take control." Even as early as the 1950s, judges realized that procedural rules that gave attorneys wide latitude could lead to expansive, expensive, and protracted litigation in mega cases.[113] In 1951, after a series of meetings of federal judges concerned about the handling of protracted cases, the Judicial Conference of the United States on Procedure in Anti-Trust and Other Protracted Cases issued their report.

This excerpt reveals the early history of what would later be labeled "case management":

> It is not practical to proceed in these cases as in a lawsuit of ordinary complexity and bulk; that is, to let the parties exhaust the cross fire of pleading, to conduct open-court pre-trial hearings, or to let counsel try the case as they please. The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed.[114]

Warren Burger, who later became Chief Justice of the U.S. Supreme Court, was an early advocate of case management. In 1958, just two years after his appointment by President Eisenhower to the U.S. Court of Appeals, Burger spoke publicly about the need for better "management

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ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl.C-5 (1963–1979). The median time to disposition for cases that were tried was sixteen months, eighteen months, sixteen months, sixteen months, and nineteen months, respectively, in 1963, 1967, 1971, 1975, and 1979. *Id.*

113 *See* Wayne O. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1313-14 (1978) (explaining that many attorneys viewed the use of obstructionist tactics during discovery as a means to secure the best results for their clients as well as their own bottom lines); *see also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1041 (1975) (detailing what the author calls "adversary excess" and offering solutions that bring truth-finding more into focus).

114 JUDICIAL CONFERENCE OF THE UNITED STATES, THE REPORT: PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1951), *reprinted in* Leon R. Yankwich, *"Short Cuts" in Long Cases*, 13 F.R.D. 62, 65-66 (1951).

machinery."[115] He would later urge that, if hospitals and corporations could take advantage of business management techniques, so could the court system.[116]

While case management became the norm for mega cases during the 1970s, it has increasingly become the prescription for all cases.[117] The federal judiciary taught effective case management to new federal judges who were brought "to the Federal Judicial Center in Washington for an intensive indoctrination with experienced Federal judges as their mentors."[118] As one judge-instructor explained, the purpose of case management was to promote settlement:

> [M]y goal is to settle all my cases. I don't subscribe to the theory at all that we should take hold of a case at its inception and labor mightily to bring it to trial only . . . . Most of the time when I try a case I consider that I have somehow failed . . . . [T]he judge must not only explore settlement but must actively pursue it with all the vigor at his command . . . . [U]ntil every last road to settlement has been traveled, I will not try the case.[119]

The emphasis on case management and settlement was part of a larger movement to hold businesses and government entities accountable by requiring the collection of data.[120] The judiciary switched from a master-calendar system to an individual-calendar system to hold each judge

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

116 Warren E. Burger, Deferred Maintenance of Judicial Machinery, Speech at the National Conference on the Judiciary (Mar. 12, 1971), *in* BURGER, *supra* note 115, at 56 ("I do not suggest that justice can ever become automated . . .[,] yet [in] the medical profession . . . [it is] possible today for one physician or surgeon . . . to do three to ten or fifteen times what his counterpart could do.").

117 Our reference to the 1970s is an occasion to note that the legal system never operates in a vacuum. We wonder whether the judicial urge to control and manage things might also be, in part, a reaction to the turbulent events of the preceding decade, which had experienced the assassinations of President Kennedy, Senator Robert Kennedy, and Reverend Martin Luther King, Jr. The 1960s and 1970s also contained the protest movements against the Vietnam War and racism, accompanied by long hair, communes, drugs, and promiscuity, and in some instances, violence and crime. All of these factors may well have instinctively enforced a sense that matters were out of control. As Arthur M. Schlesinger, Jr., wrote, history has its cycles. *See generally* ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY (1999).

118 Warren E. Burger, Remarks to the Economics Club of New York (Jan. 23, 1974), *in* BURGER, *supra* note 115, at 98.

119 Fred J. Cassibry, *The Role of the Judge in the Settlement Process*, *in* SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 271 (1971).

120 *See, e.g.*, William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 60-62 (2013) (describing the incorporation of data-driven productivity analysis from private sector manufacturing, into the private service sector, and finally into government services like courts).

accountable for the pace at which their dockets were cleared.[121] Data collection focused on details that could be counted, such as the length of time from case commencement to termination and the number of terminated cases each year, by each judge, and each federal district court.[122] Not surprisingly, judges turned their attention to the variables by which they were being evaluated.[123]

There was also much faith in alternatives to litigation. Preaching to a choir of members of the American Arbitration Association, for example, then-Judge Burger gave this skeptical view of the value of formal litigation: "One thing an appellate judge learns very quickly is that a large part of all the litigation in the courts is an exercise in futility and frustration. Most civil disputes which are in the courts could be disposed of more satisfactorily in some other way."[124] He similarly complained about the excessive use of discovery and the unethical behavior of some lawyers, especially in pretrial practice.[125] He opined about the "flood" of cases reaching federal courts,[126] our "mass neurosis" in thinking that "courts were created to solve all the problems of mankind,"[127] and stated that "[w]e live up to the statement that we are the most litigious people on the globe."[128] In a 1970 speech, shortly after becoming Chief Justice, Burger suggested that the state could save

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121 Resnik, *supra* note 91, at 522-23 n.127 (citing MAUREEN SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 9 (1973)) (suggesting that the calendar system creates a competitive atmosphere that motivates active case management); *cf. Chief Judge Motley Describes Court, Career; Reflects on National Impact of Landmark Cases*, THE THIRD BRANCH, Dec. 1985, at 6 ("[T]he single-judge calendar system is the greatest invention since the wheel . . . . [H]aving an individual calendar system is the incentive for everybody to keep working so that he is not the last man on the totem pole.").

122 Young & Singer, *supra* note 120, at 62-65.

123 *See id.* at 77 n.113 (suggesting that "[w]hat gets measured gets done").

124 Warren E. Burger, Remarks to the American Arbitration Association (Nov. 26, 1968), *in* BURGER, *supra* note 115, at 27.

125 *See, e.g.*, Warren E. Burger, Remarks to the American Law Institute (May 15, 1984), *in* BURGER, *supra* note 115, at 142-43 (discussing discovery abuse); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 235 (1973) ("Another aspect of inadequate advocacy . . . is the failure of lawyers to observe the rules of professional manners and professional etiquette . . . ."); Martin Arnold, *Burger to Press Judicial Reform: Pledges to Make Off-Bench Effort in Drive to Improve Administration of Justice*, N.Y. TIMES, July 2, 1969, at 1 ("[T]he legal profession must condemn—and I repeat that—must condemn as unprofessional conduct every tactic . . . in which delay is used as a . . . weapon . . . .").

126 Warren E. Burger, Remarks at the American Newspaper Publishers Association Convention (May 7, 1985), *in* BURGER, *supra* note 115, at 148, 151.

127 Warren E. Burger, Remarks to the American Arbitration Association (Nov. 25, 1968), *in* BURGER, *supra* note 115, at 27, 29.

128 Warren E. Burger, Remarks at the Arthur T. Vanderbilt Dinner (Nov. 18, 1982), *in* BURGER, *supra* note 115, at 121, 123.

money by reducing the number of jurors from twelve to six, calling the Constitutional right to jury trial "a dubious provision."[129]

In 1976, Chief Justice Burger presided over *The Pound Conference: Perspectives on Justice in the Future*, a conference planned at his request.[130] The conference assembled many of the detractors to the third era. For example, former Federal District Court Judge Simon H. Rifkind, at the time a named partner in the renowned firm of Paul, Weiss, Rifkind, Wharton and Garrison, suggested that discovery may be a luxury that an overtaxed judicial system could not afford.[131] Robert Bork, then Solicitor General of the United States, gave an address entitled *Dealing With the Overload in Article III Courts*. He saw the problem as stemming from the fact that:

> [w]e, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state . . . . The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model.[132]

Probably the most forthright attack at the Pound Conference on the third era was given by Francis R. Kirkham, then chair of the Antitrust Section of the American Bar Association.[133] He stridently complained about notice pleading,[134] juries,[135] class actions,[136] abusive discovery,[137] and forced settlement of meritless claims due to the high cost of litigating.[138] He suggested requiring a recitation of facts showing "a discrete violation which has inflicted a discrete injury" at the complaint stage.[139]

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129 Warren E. Burger, Agenda for Change, Remarks before the Philadelphia Bar Association (Nov. 14, 1970), *in* BURGER, *supra* note 115, at 46, 49. Burger achieved this reform. *See* Colgrove v. Battin, 413 U.S. 149, 159-60 (1973) (holding that a six-person jury satisfies the Seventh Amendment).

130 *See* Warren E. Burger, *Preface* to POUND CONFERENCE, *supra* note 112, at 5.

131 Simon H. Rifkind, Are We Asking Too Much of Our Courts?, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 51-52, 61-62.

132 Robert H. Bork, Dealing with the Overload in Article III Courts, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 150-51.

133 Francis R. Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 209.

134 *Id.* at 211-12.

135 *Id.* at 212-13.

136 *Id.* at 214-17.

137 *Id.* at 217.

138 *Id.* at 216-217.

139 *Id.* at 219.

It was also at the Pound Conference that Frank Sander famously introduced the idea of the "multi-door courthouse," where litigants would have a choice of (or perhaps be redirected to) other types of dispute resolution, such as mediation and arbitration.[140] The movement for alternative dispute resolution had, from its inception, proponents from the left as well as the right.[141] The left saw potential in community justice centers as a forum for claims that were too expensive or too local for formal adjudication.[142] By contrast, the right saw the potential in binding arbitration agreements to redirect a large swath of cases away from the courts.[143]

There were also some dissenting voices (or, one might say, some defenders of certain components of the third era) at the Pound Conference. Federal District Judge A. Leon Higginbotham, Jr., quoted Roscoe Pound, noting that "in discouraging litigation we encourage wrongdoing."[144] Judge Slade Gorton, Attorney General of the State of Washington, similarly pointed out that procedural suggestions of the main speakers were in fact substantive and would "severely limit court enforcement of widely accepted norms of economic conduct against major business enterprises."[145] Laura Nader, a renowned professor of sociology, bemoaned the "lack of data

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140 Frank E.A. Sander, Varieties of Dispute Processing, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 65, 83-84.

141 *See* SUBRIN & WOO, *supra* note 99, at 216-17 (discussing the different players in the ADR movement, including the community judgment movement); Main, *supra* note 86, at 336-37 ("The ADR movement found traction because it intertwined threads of the political left and right . . . ." (footnotes omitted)).

142 *See generally* FORD FOUNDATION, CURRENT INTERESTS OF THE FORD FOUNDATION: 1978 AND 1979, at 6-7 ("The [Ford] Foundation plans to support investigations of new ways of settling disputes that may be more equitable, cheaper, and less divisive than the adversary process."); Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC'Y REV. 247, 255 (1976); William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 384-87 (1985); Laurence H. Tribe, *Too Much Law, Too Little Justice*, ATLANTIC, July 1979, at 25, 29-30.

143 SUBRIN & WOO, *supra* note 99, at 217-18; *see also* Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985) (stating that "Chief Justice Burger [was] not moved by love, or by a desire to find new ways to restore or preserve loving relationships, but rather by concerns of efficiency and politics. He seeks alternatives to litigation in order to reduce the caseload of the judiciary or, even more plausibly, to insulate the status quo from reform by the judiciary"); Stempel, *Multi-Door Courthouse*, *supra* note 91, at 344 ("ADR's biggest boosters are commercial organizations, employers, insurers, political conservatives, and Republicans.").

144 A. Leon Higginbotham, Jr., The Priority of Human Rights in Court Reform, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 87, 88.

145 Wade H. McCree, Jr. et al., Commentary, Speeches at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 220, 225-26.

undergirding statements by several people here" and the lack of attention to issues of power, empathy, and the less fortunate.[146]

So far as we can tell, the increased utilization of case management, accompanied by emphasis on efficiency, did not have pure political underpinnings in its origins or growth. Although Chief Justice Burger was the most vocal proponent, other case management hawks (quoted above) included Judge Cassibry, who was appointed to the bench by President Johnson, and Simon Rifkind, who was a New Deal enthusiast that served in the Kennedy and Johnson administrations.[147] Joe Biden, a Democrat first elected to the U.S. Senate in 1972 (and presently the Vice President), spearheaded the drive to force federal district courts to experiment with ways to make civil litigation more efficient.[148] Meanwhile, the case management doves quoted above included the famously liberal Judge Leon Higginbotham, but also Slade Gorton, who would later represent Washington State in the U.S. Senate as a member of the Republican party.

After the Pound Conference, the drive toward case management continued, largely unabated. In 1980, Federal Rule 26 was amended to require an early discovery conference in all but a handful of excluded cases.[149] In 1983, Rule 16 was amended to explicitly include settlement and alternative dispute resolution as topics for discussion at pretrial conferences.[150] In the Civil Justice Reform Act of 1990,[151] Congress ordered all ninety-four federal district courts to promulgate measures to expedite the resolution of cases on their dockets; this, in turn, promoted case management and alternative dispute resolution.[152] In 1993, Rules 16 and 26 were amended yet again to

146 Erin Griswold et al., Commentary, Speeches at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976), *in* POUND CONFERENCE, *supra* note 112, at 110, 114-19; *see also id.* at 119 (concluding her speech by quoting Hon. Leon Higginbotham's remark that "[w]hile there is an essential place for non-judicial forums in resolving disputes, the cutting edge of the move to remedy the results of dehumanization must have a sharp judicial component").

147 *See generally* JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 165 (1990) (highlighting the prominence of Jewish lawyers, including Simon Rifkind, in New Deal circles).

148 *See* Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677, 1708 (1994) (citing 136 CONG. REC. S415 (daily ed. Jan. 25, 1990) (statement of Sen. Biden)) (describing Senator Biden's establishment of a "task force" in order to develop judicial reform).

149 FED. R. CIV. P. 26(f) advisory committee's notes to the 1980 amendments.

150 *See* FED. R. CIV. P. 16(c) advisory committee's notes to the 1983 amendments.

151 Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82 (2012)).

152 The Civil Justice Reform Act sought "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." 28 U.S.C. § 471-82. *See generally* A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S

expand the judges' case-management authority.[153] By the mid-1990s, "individualized case management [had taken] hold as a central feature of the federal civil pretrial process."[154]

C. *Business and Political Responses*

Beginning in the 1950s, and intensifying over the next thirty years, the business community, especially the insurance industry, responded with fury to the allegedly pro-plaintiff aspects of civil litigation.[155] Insurance companies spent $10 million in advertisements in *Time*, *Newsweek*, *Sports Illustrated*, and other publications attacking greedy plaintiffs and runaway juries.[156] The advertising campaign continued in the mid-1980s, with ads proclaiming "The Lawsuit Crisis is Bad for Babies" and "The Lawsuit Crisis is Penalizing High School Students."[157] The mass media likewise contemplated, "[w]hy [e]verybody is [s]uing [e]verybody."[158]

This narrative, in turn, was integrated into the 1988 presidential campaign:

> Almost all the grievances that conservatives would advance against civil justice delivery in the United States found expression during the Bush-Quayle administration, culminating in a report from the President's Council

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L. REV. 877, 878 (1993) (arguing that the law's framers believed specific goals would be key to its success).

153 *See supra* notes 149-150; *see also* Gensler, *supra* note 83, at 679 ("Even Rule 1 was amended to embrace the emerging case-management ethos.").

154 Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 854 (2013).

155 *See, e.g.*, Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 466-72 (2000) (discussing marketing campaigns highlighting excessive damage awards); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 725-33 (1998) (pointing to both "global characterizations" and "atrocity stories" as mechanisms through which proponents of tort reform mischaracterize the civil justice system); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (discussing ways in which the myth of discovery abuse has spread in American society); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 406-07 (1992) (suggesting corporate and insurance interests enjoyed too much influence in shaping the Civil Justice Reform Act).

156 Daniels & Martin, *supra* note 155, at 461 (quoting Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68, 69 (1979)).

157 *Id.* at 467.

158 David F. Pike, *Why Everybody is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50; *see also* Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647, 660 (2000) (quoting a *Washington Post* article noticing that, "[a]cross the country, people are suing one another with abandon; courts are clogged with litigation; lawyers are burdening the populace with legal bills . . . . This massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting cost to the nation.").

> on Competitiveness delineating obstacles to a competitive economy and outlining proposals for civil justice reform.[159]

Ironically, the only direct legislative product of the Bush-Quayle attempt for reform of civil litigation in federal courts was then-Senator Biden's handiwork: the Civil Justice Reform Act of 1990.[160]

With the election of a Republican majority in Congress in the 1994 midterm elections, Congressman Newt Gingrich became Speaker of the U.S. House of Representatives and the chief spokesperson for the conservative civil justice reform movement.[161] Newt Gingrich proposed a "Contract with America" that was signed by three hundred Republican legislators; the document criticized an overly-litigious society, and called for drastic legislative measures to restrict access to courts and deter plaintiffs from filing suit.[162] While the effort had rhetorical effect, it generated little legislation,[163] except for the Private Securities Litigation Reform Act of 1995, which created heightened pleading requirements and imposed automatic discovery stays in securities lawsuits.[164]

Reformers painted a portrait of American civil litigation extrapolated from memorable anecdotes or isolated problems.[165] Setting aside much of its falsity,[166] this antilitigation narrative found and still enjoys traction. Demonizing plaintiffs, lawyers, juries, and the legal system has been an effective strategy for corporate America. Citizens, politicians, law students, lawyers, and judges have internalized the notion that the civil litigation process was (and still is) "out of control."[167]

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159 Linda S. Mullenix, *Strange Bedfellows: The Politics of Preemption*, 59 CASE W. RES. L. REV. 837, 847-48 (2009).

160 *See supra* note 148 and accompanying text.

161 Mullenix, *supra* note 159, at 849.

162 *See* NEWT GINGRICH, CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 144-45 (1994) (discussing why the fact that "[w]e sue each other too often and too easily . . . carries high costs for the American economy").

163 *See generally* David S. Broder, *When Unity Becomes Division: Party's 'Contract With America' Is Now a Footnote*, WASH. POST, Mar. 1, 1996, at A1 (highlighting the Republicans' failure to enact much of the "Contract with America" legislation).

164 *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67 § 101, 109 Stat. 737, 738-40 (1995) (codified in scattered sections of 15 U.S.C.). *See generally* Mullenix, *supra* note 159, at 852 (citing the Private Securities Litigation Reform Act as the only Gingrich civil justice reform initiative enacted during the Clinton presidency).

165 *See generally* Stempel, *supra* note 59.

166 *See infra* notes 276-80 and accompanying text.

167 Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1116-32 (2012) (offering extensive citations in a section titled "Explaining the Resilience of the Cost-and-Delay Narrative").

D. *Conservative Ideology*

Substantial segments of the population favor withdrawing the social safety net installed by the New Deal and the Great Society.[168] These individuals, who passionately believe in free market solutions, also despise the growth of tort law and the dozens of federal statutes granting private rights of action.[169] One might offer as something of a caricature that conservatives' "Plan A" was to dismantle the "welfare state" and its "socialist" policies. "Plan B" might have been to achieve, through amendments to procedural rules and procedural statutes, what was harder to achieve substantively. "Plan C" might have been to undermine the procedural platform upon which substantive rights rely, but to have done so through the back door—incrementally, through judicial decisions.[170] The fourth era demonstrates that Plan C worked.[171]

During the 1960s and early 1970s, the concern of conservatives about the political, economic, and social condition of the country intensified.[172] They were especially frustrated by the liberal capture of law schools and public interest legal organizations.[173] Even when conservatives won at the voting

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168 *See generally* CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT (J. Z. Muller ed., 1997); ROBERT NISBET, CONSERVATISM: DREAM AND REALITY 35-36, 50-52 (1986) ("[M]ost forms of equality—or better, of mechanisms of achievement of equality—seem to the conservatives to threaten the liberties of both individual and group . . . ."); Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia, and Kennedy*, 49 RUTGERS L. REV. 219, 240-41 (1996) ("A modern conservative hybrid . . . reflects the . . . notion of providing for the general welfare so that people could flourish, in favor of withdrawing public safety nets and insisting people rely on themselves."); Mark Tushnet, *The Supreme Court, 1998 Term-Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 35-36 (1999) ("[T]hese principles include scaling back the welfare state . . . .").

169 *See, e.g.*, DAVID HALBERSTAM, THE FIFTIES 4, 216-17 (1993) (discussing Colonel McCormick's hatred of Roosevelt and the New Deal); JEFF SHESOL, SUPREME POWER 49-50 (2010) (noting Cardozo's view of a judge's role as "respecting precedent but . . . always serving the public good"). *See generally* LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974–1980 (2010); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, THE BATTLE FOR CONTROL OF THE LAW (2008).

170 *See supra* notes 42-52 & 84-90 and accompanying text.

171 *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1582 (2014) (presenting quantitative evidence of the influence of ideology on Supreme Court decisionmaking in cases involving the Federal Rules of Civil Procedure).

172 *See* Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2208 (2013) (noting the conservative backlash against federally funded legal services).

173 *See* TELES, *supra* note 169, at 31-46 (discussing the rise of legal aid and the transformation of law students and curricula); Charn, *supra* note 172, at 2209-11 ("The culture in the 1960s supported an overtly political agenda for 'a new breed of lawyers . . . dedicated to using the law as an instrument of orderly and constructive social change.'").

booth, as they had in the Eisenhower, Nixon, and Reagan years, they felt stymied by federal judges who were educated by liberals.[174] As a countermovement, in the 1970s, conservatives founded the Pacific Legal Foundation;[175] and with the backing of conservative foundations in the 1980s, conservatives invested in their own public interest law firms and think tanks.[176] The anti–big government, anti-regulation, anti-judicial-expansion-of-rights, free-market ideology that animated the conservative legal movement was not unique to the United States. Daniel Yergen and Joseph Stanislaw explained in exquisite detail how the end of the Cold War and the defeat of Russian communism heralded a global attack on large government and regulation.[177]

In 1981, a couple of brave conservative law students at the predominantly liberal Yale Law School decided that they needed a way to connect with other conservatives.[178] Antonin Scalia, then a professor at the University of Chicago Law School, put them in touch with similarly-minded law students there, and together these students planned the first conference of the Federalist Society, at Yale, in 1982.[179] Today, there are student chapters of the Federalist Society at every law school in America in addition to sixty-five lawyer chapters spread throughout the country and Europe.[180]

Four of the five justices who constituted the majority in *Iqbal* were members of the Federalist Society.[181] Moreover, when conservatives become

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174 *See* TELES, *supra* note 169, at 56-61 (noting the spread of legal liberalism in the courts).

175 *See* Cara Sandberg, *Getting Parents Involved in Racially Integrated Schools*, 2012 BYU EDUC. & L.J. 449, 477 n.195 (citing Mark Tushnet, Op.-Ed., *Who's Behind the Integration Decision? It's the Pacific Legal Foundation, Champion of Right-Wing Causes for 35 Years*, L.A. TIMES, July 7, 2007, at 19, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-tushnet7jul07,0,3003625.story) (noting that the Pacific Legal Foundation was created after Justice Lewis Powell, in 1971, wrote a memo to a friend worrying that liberal groups had nurtured specialist lawyers and litigation strategies to defend government regulation; in response, the business community helped create not-for-profit law firms, like the Pacific Legal Foundation, to argue conservative perspectives).

176 *See* TELES, *supra* note 169, at 60-89 (discussing the origin of conservative public interest organizations).

177 *See generally* DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS—THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD (1998).

178 TELES, *supra* note 169, at 56-61.

179 *See generally id.* at 137-80 (discussing the background and foundation of the Federalist Society); George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J.L. & PUB. POL'Y 623, 646-50 (2006) (discussing the founding of the Federalist Society at Yale).

180 For a history of the founding and growth of the Federalist Society, see generally TELES, *supra* note 169, at 137-80.

181 *See generally* Michael Avery, *Book Review: The Rise of the Conservative Legal Movement*, 65 GUILD PRAC. 37, 40-41 (2008) (noting the influence and connection of the Federalist Society with the Supreme Court members).

federal judges, they often invoke Federalist Society connections and acquaintances to find their judicial clerks. Federalist Society members then find their way into federal administrative agencies and into high positions in the executive branch.[182] The Federalist Society powers a revolving door between and among the executive and judicial branches, think tanks and law firms, and law school faculties.[183]

Conservative ideology in law schools found a new energy resource with law and economics. Richard Posner's *Economic Analysis of the Law*, published in 1972, brought economic thought to bear on virtually every legal field.[184] The movement's emphasis on wealth maximization and efficiency fits easily into, and readily supported, the conservative agenda to reduce regulation and curtail civil litigation.[185]

The Olin Foundation grew into a hundred-million dollar fund in the 1980s as a result of an inheritance given by the successful businessman John M. Olin. Its director, James Pierson, noted that the Federalist Society had given voice to conservative law students, observing that "[t]he Law and Economics thing now seemed like a way to work on the faculty side and the curriculum."[186] Pierson is candid about using law and economics as a conservative entry into the law school world:

> If you said to a dean that you wanted to fund conservative constitutional law, he would reject the idea out of hand. But if you said that you wanted to support law and economics, he would see that as a program with academic content and he would be much more open to the idea. Law and economics

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182 TELES, *supra* note 169, at 158.

183 *See id.*; Terry Carter, *The In Crowd: Conservatives Who Sought Refuge in the Federalist Society Gain Clout*, 87 A.B.A. J. 46, 48 (2001) (discussing the influential position of society members); Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 PUB. RES. Q. 366, 366-68 (2009) (same).

184 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007) (1973); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); *see also* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 502-06 (1980) (noting the efficiency of common law); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 105 (1979) (discussing wealth maximization as distinct from utilitarianism).

185 Judge Posner has made clear that he understands that there is more to determining justice than economics and efficiency. *See, e.g.*, Richard A. Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 U. KAN. L. REV. 261, 265 (1988). Moreover "many of the [law and economics] field's most prestigious practitioners are quite liberal . . . . That said, there can be no doubt that many conservatives, especially foundation patrons, saw in law and economics a powerful critique of state intervention in the economy . . . ." TELES, *supra* note 169, at 90.

186 *Id.* at 188; *see also* Sidney Blumenthal, *Quest for Lasting Power: A New Generation is Being Nurtured to Carry the Banner for the Right*, WASH. POST, Sep. 25, 1985, at A1 (describing the conservative's plan to nurture "a new generation of youthful cadres").

> is neutral, but it has a philosophical thrust in the direction of free markets and limited government. That is, like many disciplines, it seems neutral but isn't in fact.[187]

E. *The Federal Judiciary*

Robert Bork was an avid supporter of the Federalist Society from its inception, and his jurisprudence was as aggressive as it was erudite. An AFL-CIO study released "during the [Supreme Court] confirmation controversy found that in seventeen of seventeen access cases in which the judges disagreed, [D.C. Circuit Judge Bork] voted to keep the plaintiff out of court."[188] His failed confirmation for the Supreme Court appointment in 1987 angered many conservatives and mobilized a very successful effort to stock the federal judiciary with conservatives.[189]

Some of the attempts to constrict civil litigation took place through rulemaking at the Advisory Committee, Standing Committee, and Judicial Conference levels even before reaching the Supreme Court on the way to acceptance or rejection by Congress.[190] Generally speaking, the chairpersons and members of the key rulemaking committees are appointed by the Chief Justice; the last three Chief Justices have been appointed by Republican presidents. Since 1985, about eight of the thirteen members of the Advisory Committee have been members of the federal judiciary.[191] In contrast, the original Advisory Committee had no sitting judges and was composed of nine lawyers and five law professors.[192] Professor Stempel's research on the 2000 discovery amendments demonstrated how appointments to the Advisory Committee tended to be judges nominated by Republican

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187 TELES, *supra* note 169, at 188-89. *See generally* JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996).

188 HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 129 (1988).

189 *See* Mullenix, *supra* note 159, at 843 (citing Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, at 38) ("[The transformation of the Supreme Court] was no accident. It represents the culmination of a carefully planned, behind-the-scenes campaign over several decades to change not only the courts but also the country's political culture."); *see also Has The Supreme Court Limited Americans' Access to Courts?: Hearing before the Comm. on the Judiciary, U.S. Senate*, 111th Cong. 316 (2009) (comments of Sen. Sheldon Whitehouse).

190 For background on the rulemaking process, see 28 U.S.C. § 2072.

191 *Past Members of the Rules Committees*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/RulesAndPolicies/rules/archives/past-committee-members.aspx. In 1966, there were three judges, four academics, and ten practitioners on the Advisory Committee. Starting in 1985, the judges were increased to four and the number of practitioners reduced to six. *Id*.

192 Subrin, *supra* note 13, at 971.

presidents and lawyers with long-standing affiliations with the business community.[193] Records of the Advisory Committee meetings since 1970 reveal considerable sympathy to reform efforts that would (or did) restrict access to courts and limit discovery.[194]

Ironically, at the same time that the fourth era was institutionalizing an anti-trial, anti-litigation, and anti-plaintiff bias, and even as these conservatives railed against administrative agencies, the federal judiciary itself was becoming more bureaucratic and more agency-like.

> [A] three-decade expansion program . . . has resulted in the creation of a fourth tier within the federal judiciary, comprised of magistrate and bankruptcy judges. The workforce within the federal judiciary has in turn been augmented by the expansion of the aegis of the administrative judiciary. Together, magistrate, bankruptcy, and administrative judges shoulder a proportion of the federal docket numerically far larger than that of the life-tenured judiciary.[195]

Moreover, judges can delegate a portion of their judicial duties to an expanding number of senior judges, law clerks, staff attorneys, and externs.[196] Federal judges today spend significant time supervising their staffs. As Judge Posner described in 1985, upon review of the astounding growth in the number of non-Article III employees in the federal judiciary, judges have become

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193 Stempel, *supra* note 59, at 612-37 ("At the metaphorical end of the day, the proposal to limit discovery scope is explained less by the cerebral power of an idea whose time has come and more by the political structure of the rulemaking process and the socio-political structure of the elite bar and the current federal bench, particularly conservative Chief Justice Rehnquist, who selects the Advisory and Standing Committees.").

194 Stempel, *supra* note 59, at 542-52. Yet attempts to formalize more rigorous pleading requirements failed. *See* Hoffman, *supra* note 26, at 1490-96 (describing deliberations around pleading standards in the early twentieth century).

195 Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998).

196 *See generally* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) ("The proliferation of staff and subjudges and the delegation of power to them weaken the judge's individual sense of responsibility."). On the important role assigned to senior judges, see Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 93 (2012) (noting that, in 2009, senior district judges accounted for 21.2 percent of case terminations and 26.8 percent of all trials).

administrators instead of decision-makers.[197] He even predicted this bureaucracy would be put to the task of avoiding trials.[198]

Professor Resnik has recognized the construction of a "corporate identity of the federal judiciary."[199] She describes how "[d]uring the course of the twentieth century, the federal courts became an *agency*, [meaning] an entity that not only organizes itself but also represents—and in practice defines—a set of interests."[200] The judiciary has furthered these interests in two important respects. First, as an educational and rulemaking organization, the federal judiciary has adopted an anti-adjudication and pro-settlement agenda.[201] Second, in what may seem perverse in light of the increasing caseloads and the pressing demand for some meaningful response thereto, the federal judiciary, as a lobbying organization, has formally and consistently opposed expanding the number of Article III judges.[202]

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197 RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 27-28 (1985) [hereinafter POSNER, CRISIS AND REFORM]. *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996).

198 POSNER, CRISIS AND REFORM, *supra* note 197, at 66-67 ("One response of district judges to workload pressures might be to make it more difficult for litigants to get a trial—since a trial takes more time than disposing of a case before trial—by granting motions to dismiss and motions for summary judgment more freely and by putting more pressure on the parties to settle their case before it gets to trial.").

199 Resnik, *supra* note 105, at 949.

200 *Id.*

201 *Id.* at 995.

202 *See, e.g.*, WILLIAM H. REHNQUIST, CHIEF JUSTICE'S 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *reprinted in* THIRD BRANCH, Jan. 1992, at 1, 2 ("[A] federal judiciary rising above 1,000 members will be of lesser quality and could be dominated by a bureaucracy of ancillary personnel."); Resnik, *supra* note 105, at 984-86, 1020-21 (recognizing that many judges argued against expansion of the federal judiciary to preserve selectivity and minimize inconsistencies).

Professor Resnik, alluding to Weber, has noted that the federal judiciary, like other bureaucracies, generated "agendas for its own growth." Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 842 (2012). She explores the phenomenon of the enormous expansion of federal courthouse space, often in exquisite buildings designed by renowned architects, at the same time the Rehnquist court was restricting the ability of ordinary citizens to successfully litigate in federal courts. *See id.* at 926 (identifying "a tension between the reluctance of Chief Justice Rehnquist . . . to license federal court power and the expansion, during his tenure, of federal administrative power measured in term of staff, search, rule making, and courthouses"). Beautiful courtrooms increased; trials dramatically decreased. *Id.* at 903-04. She suggests that this irony may be explained by Chief Justice Rehnquist's wearing two different hats, each with its own agenda. *Id.* at 927 (discussing Rehnquist's position as the chair of the Judicial Conference and as part of a bureaucracy able to generate agendas). As a Supreme Court Justice deciding cases, he had a conservative, anti-access agenda; as the head of the Federal Judiciary, he fought for building expansion and improvements, often at the urging of other federal judges. *Id.* at 926-27. The fact that federal congressmen wanted beautiful, large courthouses in their own districts, named after prominent politicians, helps explain—according to Professor Resnik—how Congress appropriated funds for

F. *Other Contributing Factors*

We have approached the task of crafting a preliminary history of the fourth era with some trepidation. We appreciate that there may be no comprehensive explanation for such a broad and profound transformation. We conclude this part by simply outlining some additional factors that may have contributed to this phenomenon.

First, the criminal docket has put pressure on the civil docket. This may well be true, but the data is less compelling than the conventional wisdom suggests.[203] Between 1962 and 1975 (a period of time during which the civil docket doubled[204]), the total number of criminal defendant dispositions increased by a factor of 1.5.[205] Between 1975 and 1983 (when the civil docket doubled again[206]), the total number of dispositions in criminal cases decreased.[207] To be sure, however, the Speedy Trial Act of 1974 required criminal cases to be terminated within sixty days of arraignment, adding pressure on judges and lawyers trying to handle the burgeoning civil caseload.[208]

Second, the changing mix of cases in the civil docket may help explain the diminution of trials. For example, in 1962, more than one-third of the civil filings were tort cases, cases especially likely to go to trial.[209] By 1982, tort cases had dropped to just seventeen percent of the total civil filings.[210]

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the courthouse building splurge at the same time they refused to grant salary increases to federal judges. *Id.* at 933.

There may be a psychological component to building magnificent spaces while the major reason for a structure is distorted, diminished, or eliminated. In the famous story by H.G. Wells, *The Pearl of Love*, the king wishes to memorialize his beloved, deceased queen with a magnificent architectural gem, but finds that the queen's sarcophagus detracts from the glorious design. H.G. WELLS, *The Pearl of Love*, *in* SHORT STORIES 162, 164-66 (1924). The story ends with the king's order: "Take that thing away." *Id.* at 166.

203 *See* John B. Meixner & Shari Seidman Diamond, *Does Criminal Diversion Contribute to the Vanishing Civil Trial?*, 62 DEPAUL L. REV. 443, 469 (2013) (finding little evidence to support the popular notion that the criminal docket explains the vanishing civil trial).

204 *See supra* note 102 and accompanying text.

205 1975 ANNUAL REPORT, *supra* note 102, at 420 tbl.D-4; 1962 ANNUAL REPORT, *supra* note 32, at 234 tbl.D-4.

206 *See supra* note 103 and accompanying text.

207 *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl.D-4 (1975–1983).

208 The Speedy Trial Act of 1974, 18 U.S.C. § 3161(f) (2012).

209 1962 ANNUAL REPORT, *supra* note 32, at 147 tbl.C-2.

210 ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 216 tbl.C-2 (1982). Interestingly, since 1992, tort cases have regained a significant share of the mix of cases. In 2011 and 2012, tort cases comprised twenty-nine, and twenty-five percent respectively, of the overall civil caseload. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS:

Types of cases that, at one time, gave young lawyers valuable litigation experience largely disappeared from the civil docket because of no-fault insurance or other insurance coverage.[211]

Third, the changing composition of the bar may help explain some of the indifference to trying cases. The trial bar used to be heavily populated by street-smart, feisty sons of immigrants, most of whom could not get jobs in the more prestigious Yankee firms.[212] The growth of larger law firms in the 1970s and 1980s generated demand for smart, aggressive young lawyers; furthermore, more progressive attitudes toward race, national origin, and ethnicity brought more of these talented, newly-minted lawyers into the big firms. This social progress may have redirected talented and trial-friendly lawyers into positions where cases were not tried.[213]

Lastly, some cases can be either too expensive or too risky to try. The expanding reach and operations of corporations have increased their potential to cause more harm to more people in more places.[214] Moreover, scientific advances have expanded our understanding of the dangers of toxic

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MARCH 31, 2011 tbl.C-2 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf; 2012 FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C02Mar12.pdf.

Although the number of trials has decreased significantly in the transition from the third to the fourth era, the percentage of jury trials as opposed to bench trials has increased significantly. *See supra* notes 31-32 and accompanying text.

211 *See, e.g.*, Randall Bovbjerg, *The Impact of No-Fault Auto Insurance on Massachusetts Courts*, 11 NEW ENG. L. REV. 325, 359-60 (1976) (noting that it is "completely clear" that no-fault insurance in Massachusetts has "significantly reduced the courts' civil caseload"); *see also* DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS, THE INSTITUTE FOR CIVIL JUSTICE 8 tbl.2.1 (1987) (showing declines in the percentage of auto cases filed in both state and federal courts); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 368-69 (2012) (citing studies between 1970 and 2005 that show a decline in auto filings per year).

212 *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 184-85 (1976) (chronicling how immigrants and religious minorities entered the legal profession against stiff resistance from the establishment).

213 *See, e.g.*, MALCOLM GLADWELL, OUTLIERS 116-58 (2008) (recounting the instructive story of Joe Flom, a named partner at Skadden, Arps, including how he could not get a job in the large Yankee firms in New York); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1844-45 (2008) (describing the paradigm shift in the underlying ideology of large law firms); Abe Krash, *The Changing Legal Profession*, D.C. BAR (Jan. 2008), http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/january-2008-law-changes.cfm (recognizing a significant increase in the employment opportunities for black law graduates since the 1950s).

214 *See* Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 119 (2009) (noting that "[t]he large scale reach of corporations today have the potential to inflict tremendous harm on individuals, the environment, and the international community").

products like asbestos, tobacco, and pharmaceuticals.[215] Cases involving very high stakes may be too risky for either party to try; and complexity may fuel the judges' inclination to manage their cases more aggressively and find ways to get rid of them altogether.[216] Meanwhile, at the other extreme—cases where the stakes are relatively small—litigation may be too expensive for either party to try.

III. EVALUATING THE FOURTH ERA

There is no established scorecard for evaluating a procedural system. We propose the following four questions: (1) Does the system vindicate the rights and assign the responsibilities prescribed by substantive law? (2) Does the system engender a sense of fairness and legitimacy both for its participants and for society? (3) Does the system pursue the first two objectives efficiently? (4) Does the system reflect the underlying structural values of the society?

A. *Procedure's Instrumental Purpose*

While "some substantive laws may be merely aspirational or symbolic,"[217] "[t]he best laws in the world are meaningless unless they can be meaningfully enforced."[218] It surely follows that meaningful enforcement requires that the relevant facts be ascertained before the law is applied to them.[219] Accordingly, one way of measuring the extent to which procedure is fulfilling its instrumental purpose is to evaluate when cases are resolved and the extent to which the facts are then fully known.

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215 *See generally* Deborah Young, *Introduction* to Symposium, *The Impact of Science and Technology on the Courts*, 43 EMORY L.J. 853 (1995).

216 *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 554, 559 (2007) ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . . ."); McCauley v. City of Chi., 671 F.3d 611, 616-17 (7th Cir. 2011) ("The required level of factual specificity rises with the complexity of the claim.").

217 Main, *supra* note 92, at 822 (citing LON L. FULLER, THE MORALITY OF LAW 5-7 (rev. ed. 1969)); *see also* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 246 (1990) ("[S]ome legislators will propose or support symbolic legislation such as section 112 [of the Clean Air Act] because it minimizes political costs and maximizes political credit."); James N. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1432 (1978) (recognizing the importance of aspirational conduct in the legal system).

218 Jean R. Sternlight, *Dispute Resolution and the Quest for Justice*, 19 EXPERIENCE 14, 15 (2009). *See generally* Baumann, Brown & Subrin, *supra* note 89.

219 *See generally* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004).

Let us first establish the baseline.[220] In 1962, in the midst of the third era, eleven percent of all terminated civil cases were tried.[221] A trial is probably the ideal for applying the law to facts that are fully known: law professors, lawyers, judges, and mediators consistently use trial outcomes as the baseline for determining the value of cases. In the eighty-nine percent of cases that were not tried, we must speculate as to how fully the facts were known prior to termination. Yet we know that if a factual record was not developed at the time of settlement, it was both parties—not a judge, nor even the threat of judicial action—who agreed to forego any further investigation into the facts.

The large percentage of cases resolved without any court action in 1962 (fifty-three percent[222]) also dilutes what is already an impressively high percentage of cases that are tried. If one removes the cases resolved without any court action from the denominator, the trial rate jumps from eleven percent to twenty-four percent. Thus, in nearly one in four cases where judges in the third era did anything, they also tried the case. It is instructive that seminars for federal judges in 1961 taught judges how to juggle the demands of simultaneous jury trials.[223]

Now we turn to our most recent figures from the fourth era—2012 data. We know that only one percent of all terminated civil cases were tried, and we know that the other ninety-nine percent of cases were terminated by dismissals, summary judgments, and settlements.[224] Some scholars have posited that the absence of trials is evidence that the liberal discovery regime of the third era has worked so well that there is no need for trials.[225] To be sure, trial is not the only way to unearth all of the relevant facts prior to the application of law; indeed, that was our experience in the third era.

Yet the data suggest that the fourth era does not improve—and in fact detracts from—the instrumental purpose of procedure. First, dismissals at the pleading stage deny plaintiffs access to discovery; indeed, avoiding

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220 *See supra* Part I.

221 *See supra* note 32.

222 *See supra* note 38.

223 PROCEEDINGS OF THE SEMINAR ON PROCEDURES FOR EFFECTIVE JUDICIAL ADMINISTRATION, 29 F.R.D. 191, 268 (1961) ("It is common for a judge to have one jury out deliberating in a case, while he is trying the next case, and, on occasion, a judge will have two juries deliberating on their verdict while he is trying a third case.").

224 *See supra* note 78.

225 *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 548 (2012) ("Because discovery allows such far-reaching disclosure of the strengths and weaknesses of each side's case . . . [it] serves to displace rather than to prepare for trial.").

costly and invasive discovery is often the express justification for dismissal.[226] Of course, the in terrorem effect of a dismissal also leads to settlements that are entered into without a full factual record.[227]

The fourth era has also invigorated the summary judgment motion. Summary judgment poses less of a threat to the development of facts because the factual record may (and in most cases should) be developed prior to consideration of the motion. Here, our concern is that juries, not judges, should be applying the law to that factual record; we are also concerned that judges are making value judgments about the sufficiency of evidence without the educational benefit of a trial.

There is an abundance of evidence of cognitive biases and illusions to which we know judges are not immune.[228] Further, much adjudication turns not on the revelation of whether a fact is true or false—for example, the traffic light was or was not red. Instead, many contemporary disputes turn on nuanced, mixed questions of law and fact—such as unreasonable care, proximate cause, intent, material breach, or unfair competition.[229] In the third era, the integration of law and fact of this sort was the critical task of juries; the assignment to juries was not simply to get the facts right, but also to tap society's judgment.[230]

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226 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 684-85 (2009) (discussing concerns about the burdens of discovery on the government where the pleadings are too broad); Bell Atl. Corp. v. Twombly, 550 U.S. 554, 558-59 (2007) (suggesting the conclusive pleadings are especially problematic where the case involves massive factual discovery).

227 *See also supra* note 53 and accompanying text.

228 *See* Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 227 (1986) (perceiving a "systematic discrepancy" between the correct answer and the answer intuited through legal judgment); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001) ("Our study indicates that judicial decision making, like the decision making of other experts and laypeople, is influenced by the cognitive illusions we tested."); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1085 (2002) (citing studies that have found a consistent bias in human predictions); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 100 (2000) ("Although it is possible that judges make better decisions than juries, there is little evidence to support this belief."); Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 334 (1986) (stating that the "legal analyst is not given the luxury of time" and thus must make decisions based on the "world as we know it, not as we would like it . . . to be"). *See generally* JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS (2012).

229 *See* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401-02 (2011) (discussing the importance of the citizenry's role in deciding questions of mixed fact and law).

230 *See id.* ("[T]hey are concepts of mixing elements of fact and law that become legitimate behavioral norms when the citizenry at large, acting through jury representatives, decides what the community deems acceptable.").

The forces that suppress the development of a factual record also undermine fidelity to substantive law in that we may not even know the relevant laws that apply when the case is terminated. Lawyers frequently discover additional claims and parties during discovery. The drafters of the Federal Rules recognized and accommodated this with generous rules allowing amendments to pleadings.[231] Obviously, this dimension of a procedural system is lost when cases are dismissed for failure to state a claim, are settled in light of the threat of such a dismissal, or are never filed in light of the threat of a dismissal.

Finally, if the development of a factual record is an important value, one must take account of the jurisprudence of binding arbitration that is redirecting cases from courthouses to suburban office parks.[232] How many of these cases are tried in a fashion that ensures that the law is applied to a fully developed factual record? It is troubling that these cases are decided not by public officials vetted by a Constitutional process, but rather before arbitrators dependent on the business of repeat players.[233] Moreover, one of the celebrated attributes of arbitration is its potential to streamline the resolution of a dispute without obsessing over the subtle nuances and needless complexities of the substantive law.[234]

B. *Procedure's Inherent Value*

Procedure also guarantees participants that they will be treated fairly and with dignity. A procedural system that is evenhanded, impartial, and respectful might also reach more accurate decisions; but the treatment of litigants is significant for its own sake.[235]

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231 *See, e.g.*, Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 456 (1934) (comparing the Federal Rules of Civil Procedure governing amendments to pleadings to foreign and state systems).

232 *See supra* notes 85-86 and accompanying text.

233 *See Developments in the Law: Access to Courts*, 122 HARV. L. REV. 1151, 1174 (2009) (examining "the incentives for bias by the arbitrator in favor of the repeat-player corporation"); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1253-1358 (2001) (discussing the potential bias caused by the repeat player phenomenon); Sternlight, *supra* note 86, at 1650 (discussing arbitration selection bias).

234 *See* Main, *supra* note 86, at 366-72 (discussing the flexibility of substantive law in ADR regimes).

235 *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (Melvin J. Lerner ed. 1988); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 20-27 (1974); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

At the core of our due process clause is the *right to be heard*.[236] Dismissals at the pleading stage diminish that right. Reduced or eliminated discovery deprives parties of facts they need in order to have a fair hearing, and summary judgment motions limit access to trials.

Moreover, many motions (including some dispositive motions) no longer receive oral argument.[237] Written papers deny an attorney or an unrepresented party the opportunity to speak to the judge and directly answer questions about the judge's concerns.[238] Because humans cannot skim oral presentations, it is easier to get and keep someone's attention when you can speak directly to them. There is abundant evidence on how difficult it is to alter preconceived notions and prejudices.[239] The vividness and drama of a trial, including oral testimony, materially enhance the possibility that the factfinder will comprehend the entirety of the litigated situation and be more open to diverse viewpoints.[240] We understand reality through narratives.[241] Though narratives can be written, there are reasons why attending the performance of a play is different than merely reading

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236 *See* Burbank & Subrin, *supra* note 229, at 401 (calling the right to be heard "the core of the process of law"); Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451 (1974) (discussing the "sanctity of the right to . . . hearing").

237 *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 535 (2006) (discussing effects of "the cut-backs in oral arguments"); Eugene R. Fidell, *A Modest Proposal*, NAT'L L.J., Dec. 22, 2008, at 23 (discussing "[t]he temptation to dispose of matters entirely on paper . . . without laying eyes on counsel").

238 *See* Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 262-64 (2009) (discussing the unique benefits of hearing oral argument on dispositive motions).

239 *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2013).

240 *See, e.g.*, Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 765 n.182 (1989) (citing ROBERT NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 45 (1980) ("Vivid information is more likely to be stored and remembered than pallid information.")); Rebecca M. Todd, *Psychophysical and Neural Evidence for Emotion—Enhanced Perceptual Vividness*, 32 J. NEUROSCIENCE 11201, 11201 (2012) ("Anecdotal and empirical evidence suggests that emotionally important events hold a special place in memory, where they are bestowed with a unique and vivid character."). *See generally* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 121-123, 135 (2009) (discussing the effect of the growth of summary judgment).

241 *See* Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 709-16 (1994) (explaining the powerful impact of legal storytelling); Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2225 (1989) (discussing "the role of narrative in law").

it.[242] A hearing also forces the decisionmaker to appreciate that the law affects real people in palpable ways.

This combination of the loss of both orality and trials is directly related to the question of whether the fourth era engenders a sense of legitimacy from the population. As Senator Whitehouse stated, juries can force powerful members of society to appear on equal footing with the less powerful; by being a thorn in the side of the powerful, juries ensure the integrity of the judiciary's commitment to equality under the law.[243] According to the Founders, juries operate also as an important check or balance against the government.[244] If fewer citizens have an opportunity to see a judge in open court, they may question the importance and the transparency of the American legal system.[245]

Those who disagree with the thrust of this Section might offer four arguments. First, they might say that we are favoring emotions and potential jury nullification over an objective application of law to facts. That argument would require us to accept propositions known to be false: that it is possible to be a blank slate, and that judges do not have emotions that contribute to their decisionmaking.[246] Moreover, it would require us to believe that judges hearing motions to dismiss and motions for summary judgment are not making judgments of a somewhat subjective nature. The fact that the majority opinion in *Iqbal* instructs district judges to draw on

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242 *See* Marcus, *supra* note 240, at 762 ("[R]eading a play is a far different experience from seeing the play performed . . . .").

243 Sheldon Whitehouse, 162 U. PA. L. REV. 1517, 1519 (2014) ("[T]he civil jury is designed to protect the individual against other more powerful and wealthy individuals.").

244 *Id.* at 1518 ("The founders intended the civil jury to serve as an institutional check . . . by giving ordinary American people direct control over one vital element of government.")

245 *See* Marcus, *supra* note 94, at 30 ("I submit to you that what we are talking about is the very legitimacy of our judicial system in the eyes of our citizens . . . .").

246 *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276, 1281 (2002) (applying cognitive psychology literature to posit that judges and juries, like everyone else, are subject to biases and prejudices and advancing strategies for overcoming these traits); Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 474 (2001) ("[B]ehavioralists across the board consistently found it easier to correlate judicial voting behavior with measures of the political ideologies of judges than with measures of legal variables."); *see also* DANIEL GIVELBER & AMY FARRELL, NOT GUILTY: ARE THE ACQUITTED INNOCENT 134-36 (2012) (demonstrating how, in criminal cases, there is empirical evidence that when juries considered the case strong for defendants, judges would convict blacks at five time the rate of juries and they appeared to be most satisfied with case outcomes when the composition of the jury was all white, as opposed to when at least one-third of the jury was black). *See generally* STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2002); Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 185 (Thomas Gilovich et al. eds., 2002).

their "judicial experience and common sense" puts the lie to that assumption.[247] Further, it is important to note here that virtually every study says that juries take instructions seriously, and their verdicts are not largely divergent from judges.[248]

The second objection we might encounter would be that trials are costly, and jury trials even moreso.[249] We will address the economic arguments in the next section, but neither the Constitution nor the Bill of Rights mentions the word efficiency. Moreover, it is impossible to apply law to facts without the opportunity, at someone's expense, to ascertain the relevant information. Some values, such as accuracy, human dignity, and judicial legitimacy, should weigh heavily on the scale that is balancing concerns about efficiency.

A third objection is that, as Mark Twain, Dean Erwin Griswold, and others have said, jurors are often incompetent.[250] There are at least two answers to that. First, we have always expected good advocacy to include the ability to explain complex matters in understandable terms. Second, as explained above, the most complex and vexing matters with the inconsistent and immeasurable values may be the matters that are uniquely appropriate for the public—working in the crucible of narrative, exposure to other viewpoints, and cross-examination to weigh and resolve.[251] In most cases,

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247 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

248 *See* BURNS, *supra* note 240, at 93-94 (debating the perception of rising jury awards); Robert P. Burns, *Some Realism (and Idealism) About the Trial*, 31 GA. L. REV. 715, 755 (1997) ("[T]he studies tell us that the jury is competent, is deeply engaged with the evidence, and seeks to do what seems to do substantive justice."); *see also* John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1684 (2001) (citing a 2001 survey that found both state and federal judges to be nearly unanimous in "believing that jurors did very well or moderately well in actually reaching a just and fair verdict"). *See generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 120, 163 (1986) ("A closer look at the jury decision-making process also confirms the jury's strength as a fact-finder.").

249 The cost differential between bench and jury trials may be relatively modest. *See* Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 614-15 (1993) (reviewing Kalven and Zeisel's data from the 1950s suggesting that jury trials take more time but do not necessarily cost more). *But see* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1502 (1999) (noting that "[t]he direct cost of jury trials plainly exceeds that of bench trials").

250 *See* JEROME FRANK, LAW AND THE MODERN MIND 170-85 (1930) (discussing the "basic myth and the jury"); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 145 (2002) ("Lawyers entertain longstanding perceptions of juries as biased and incompetent, relative to judges.").

251 *See supra* note 228 and accompanying text.

judges and juries reach the same conclusion;[252] but in the small percentage of cases where they do not, who is to say which factfinder is "wrong"?[253]

This leads us to the fourth potential attack on our views: that we are hopeless romantics. The older of us has a former student who is now a judge; this judge remarked that old trial lawyers once enjoyed "being cowboys" in the grand theater of the courtroom.[254] Of course, now the courtrooms are empty,[255] even if the courthouse has not yet closed.[256] But *if* it is important to find out what happened in cases, and *if* the trial is in fact most likely to fully explore the relevant narrative, to cross-examine witnesses, and to force the decision makers to try to be more open to experiences other than their own, then it surely is true that trials support the instrumental purpose of procedure: to ensure that the law is not applied until the facts are known. It is also true that trials support the inherent purpose of procedure: to ensure that litigants are treated fairly and with dignity. Furthermore, it is surely not romantic to believe that everyday Americans should have the opportunity to impart their own meaning into legally-operative words like reasonableness, intent, and fairness.[257] Perhaps most importantly, if this is all a question of romanticism and nostalgia, we romantics are in the good company of Thomas Jefferson, John Adams, Abraham Lincoln, Daniel Webster, and many other celebrated Americans, including those who enshrined them in the U.S. Constitution.[258]

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252 *See supra* note 248 and accompanying text (noting that jury verdicts rarely diverge from the judge's).

253 *See supra* notes 228, 230 & 248 and accompanying text.

254 *See* Jeri Zeder, *Where Have All the Civil Jury Trials Gone?,* 11 NORTHEASTERN L. MAG. 14, 43 (2012) (quoting Hon. Carol Ball).

255 *See* Young & Singer, *supra* note 120, at 63 (noting the decline in the number of trials); *see also* Judith Resnik & Dennis Curtis, *Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMAN. 19, 83 (citing U.S. GENERAL ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING, GAO/GGD-97-39, at 2-3, 10 (1997) (stating that courtrooms were in use about fifty-four percent of the days when courthouses were open)). *See generally* Young, *Vanishing Trials*, *supra* note 94.

256 *See generally* Miller, *Doors Closing?*, *supra* note 4.

257 *See* Burbank & Subrin, *supra* note 229, at 401-02 ("[M]any legal norms need community input . . . the citizenry at large, acting through jury representatives, decides what the community deems acceptable.").

258 *See* BURNS, *supra* note 240, at 40-68 (discussing the historical importance of trial); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 16 (2007) (quoting Thomas Jefferson on the importance of juries).

C. *Procedural Efficiency*

The instrumental and inherent purposes of procedure are well worth pursuing. But a system committed to those ideals could also chase them so vigorously as to undermine them: the system could be so expensive and time-consuming, for example, that cases would not be resolved in a timely manner, generating unfairness for plaintiffs and defendants and causing would-be litigants to lump it rather than file suit.[259] The vigorous pursuit of one set of values could also flout other important values: privacy, for example, is a value at odds with broad discovery and the search for truth.[260]

The approach of the third era was to have cases decided on the merits, by settlement or by trial, after the relevant facts were uncovered. Each judge presided over, on average, twenty to twenty-four trials per year and, for the most part, the rest of the caseload took care of itself as parties entered into voluntary settlements.[261]

However, as the caseloads increased, the judiciary of the new fourth era lost faith in this approach and instead relied on judicial case management—expressly to avoid trials.[262] The goal of avoiding trials has been achieved. The percentage of civil cases that are tried has fallen from eleven percent in 1962 to one percent in 2012.[263] Even the absolute number of civil trials has fallen—from 6202 in 1962 to 3147 in 2012.[264] These numbers are especially stark in light of the fact that the number of federal district judges has more than doubled since 1962.[265]

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259 Much has been written on the "lump it" phenomenon, but the most frequently cited data is from the Civil Litigation Research Project. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 527-28, 536-44 (1980-81) (suggesting that ten percent of perceived grievances were brought to a lawyer and only five percent to a court); *see also* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 20-21 (1983) (noting that "lawyers are regarded as a last resort"); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183-90 (1992) (explaining the process of the decision to file a claim).

260 *See generally* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1675-94 (1998) (explaining intricacies and peculiarities of the American procedure regarding discovery).

261 *See supra* notes 33-38 and accompanying text.

262 *See supra* note 82 and accompanying text; Part II.B (discussing case management).

263 *See supra* notes 32 & 78.

264 The absolute number of jury trials has also fallen, although less dramatically. Of the 6202 trials in 1962, 2925 (about forty-seven percent) were jury trials. *See supra* note 32. Of the 3147 trials in 2012, 2205 (about seventy percent) were jury trials. *See supra* note 78.

265 *See* Galanter, *supra* note 103, at 560 (including a chart that shows the rise in sitting federal district judges); *see also supra* notes 195-202.

The number of cases decided "without court action" has fallen from fifty-three percent in 1963 to nineteen percent in 2012.[266] Thus, although fourth era judges seldom try cases, they are performing some "court action" at a rate that is almost three times the baseline amount. This means that, assuming everything else were held constant, in thirty-four percent of contemporary cases the courts expend precious judicial resources on matters that the third era resolved without any court action at all. Moreover, the fourth era is no faster at resolving cases than was the third era.[267] Query what would happen if, instead of engaging in other "court action," contemporary active district judges simply tried cases at the same rate as their 1962 counterparts—which would generate approximately 13,892 trials per annum. This would not only ensure the development of a full factual record in those cases, but it might well increase the number of cases settled voluntarily and without court action.

Judicial involvement creates new responsibilities and obligations for the parties that were not present in the third era. New scheduling conferences, settlement conferences, discovery conferences, and more robust pretrial conferences have imposed layers of filing requirements for the parties to complete and for the courts to address.[268] A prominent study by the RAND Corporation in 1996 found that early deadlines and obligations of this sort actually increased overall litigation expenditure.[269]

The empirical data confirms that there are two types of this sort of case management that actually work: setting a firm discovery cut-off date and setting a firm trial date.[270] But case management in the fourth era has included much more judicial interference than this; and what have we gained? Potentially meritorious cases are dismissed at the complaint stage or by summary judgment.[271] Fewer cases are tried.[272] Fewer cases settle.[273] For those cases that do settle, the settlement amounts surely reflect the

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266 *See supra* note 38; 2012 FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-4, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C04Mar12.pdf.

267 *See supra* notes 36-38 & 76-77 and accompanying text.

268 *See* Young & Singer, *supra* note 120, at 68 (listing tasks that federal district judges oversee today which they did not in the 1950s).

269 *See* JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 14 (1996).

270 *Id.* at 91. The Report made four recommendations: (1) monitor cases to ensure that deadlines for service and answer are met, (2) wait a short period after the joinder date before beginning judicial case management to see if a case will terminate, (3) set a firm trial date early, and (4) set a reasonably short discovery cutoff time. *Id.* At 91-92.

271 *See supra* notes 39-56 & 71-75 and accompanying text.

272 *See supra* notes 31-33 & 77-78; *infra* note 295 and accompanying text.

273 *See supra* notes 34-38, 71-78 & 254 and accompanying text.

pro-defendant bias of a litigation regime where cases are resolved by motions instead of by trial.[274] The delay factor, except in the big cases, remains the same.[275] And based upon the ongoing rhetoric, the mega cases are still there, still problematic, and still justify reform.

We can imagine four responses. First, someone who disagrees with us might say that we underestimate the effect that these reforms have had on keeping frivolous cases out of the court system. But this begs the question whether frivolous litigation is a serious problem. The specter of frivolous litigation is an important component of the broader narrative about an "out of control" litigation system that is the plaything of greedy lawyers and their clients. Yet most of the components of that broader narrative are demonstrably false: in fact, Americans of the last forty years are not more litigious than their ancestors;[276] Americans are not especially litigious when compared to the citizens of other nations;[277] most litigation matters are resolved within a reasonable period of time, often in less than a year;[278] there is little or no discovery in many cases, and in almost all cases discovery is commensurate with the amount at stake;[279] and punitive damages are infrequently awarded, are generally modest in size, and have not increased substantially over time.[280] To be sure, the fourth era has eliminated some frivolous cases that, under the third era, might have gone to trial. But eliminating trials altogether (much like closing the courthouse doors) is a rather crude way to accomplish this. More importantly, however, there is no evidence that frivolous litigation is or has been a serious problem.[281]

Second, someone might contend that we underestimate the incredible burden on the federal judiciary of the caseload explosion. While it is true

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274 *See supra* notes 53 and accompanying text.

275 *See supra* notes 36-38 & 76-78 and accompanying text.

276 *See* Galanter, *supra* note 259, at 36-51 (reviewing data on litigation); Saks, *supra* note 259, at 1206-10 (summarizing data from the National Center for State Courts); *see also* CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 320-22 (2d ed. 1997) ("[L]ong term studies cast doubt on the proposition that contemporary Americans are uniquely litigious.").

277 *See* SMITH, *supra* note 276, at 330 (debunking the notion that the United States is more litigious than its foreign counterparts); Galanter, *supra* note 259, at 51-56 (summarizing comparative data between the United States and foreign jurisdictions).

278 *See supra* notes 76-78 and accompanying text; *see also supra* notes 36-38 and accompanying text.

279 Thornburg, *supra* note 35, at 246-49 nn.107-25 (citing and summarizing further empirical data).

280 *See* Steven Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 41-42 (1990) ("[T]he median punitive damage award is not at a level that is likely to 'boggle the mind.'"); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 268 (2006) ("[L]ess than 1 percent of civil actions formally commenced resulted in the awarding of punitive damages.").

281 *See* Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 572 (2011) (citing numerous studies).

that the caseload expanded dramatically, there is no data that suggests judicial involvement is the cure. Indeed, it is management for *trial*, as opposed to management for *settlement* that works.[282] Contemporary data demonstrates that those judges who try more cases terminate at least as many cases as those judges who try fewer.[283]

Third, someone might contend that we underestimate how cultural factors have made it difficult for lawyers to negotiate on their own without substantial judicial involvement. This would be an argument in favor of judges helping litigants settle.[284] It would not justify the judicial interference of the fourth era.

Finally, critics might suggest that we fail to give the fourth era credit for the cheaper, faster, and better alternatives to litigation that ADR offers the public. To be sure, ADR has much to offer, and litigants should have the option to pursue it. However, courts need not add layers to their own processes in order to accommodate or integrate ADR; the likely effect of these efforts is simply more expense and delay.[285] Our particular concern is mandatory arbitration because these litigants are denied access to formal adjudication.[286] Interestingly, some of the bloom is off the arbitration rose. The idea of course is that arbitration offers the possibility of a faster and cheaper process by providing the parties with a streamlined procedure, a neutral expert, privacy, and limited rights of appeal.[287] But empirically, it is not at all clear whether or when arbitration is in fact faster or cheaper than litigation.[288]

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282 *See supra* note 269 and accompanying text.

283 *See* Young & Singer, *supra* note 120, at 62-67 (discussing court productivity).

284 *See* Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 207-11 (2003) (listing several of these cultural factors).

285 *See supra* note 268 and accompanying text.

286 *See supra* notes 85-86 and accompanying text.

287 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (citing benefits of arbitration as including informality, efficiency, cost-effectiveness, and procedural flexibility); *see also* Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 3, 6 ("[I]n terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.").

288 *See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008) (stating that the empirical evidence is too limited to draw definitive conclusion about relative costs of arbitration and litigation); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 38 (2003) (noting that "creeping legalism" has made arbitration more costly and a less attractive alternative to litigation); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1268 (2009) (assuming, for the purposes of the author's analysis, that "process costs are, on the whole, less in arbitration than litigation," with the caveat that the author suspects that the "cost savings in arbitration are often exaggerated"); Thomas J. Stipanowich, *Arbitration: The "New Litigation*," 2010

D. *Procedure's Consonance with Structural Values*

The civil litigation system is a key part of a larger American political structure. That structure includes the three branches of government and constitutionally mandated respect for trial by jury.[289] Because we have already talked at length about the fourth era's attack on the American jury,[290] we focus here on each of the three branches of government.

In the fourth era, the legislature has been assailed in two respects. First, the rulemaking process prescribed by the Rules Enabling Act has been circumvented.[291] Indeed, the changes to federal practice and procedure have occurred with essentially no legislative input or public involvement. Second, by constricting access to the courts, the fourth era has effectively deregulated society by undermining the substantive law's mandate at the enforcement stage.[292] Moreover, the causes of action that federal courts have most frequently targeted are the very causes of action for which Congress incentivizes private enforcement through fee-shifting provisions and awards of multiple or exemplary damages.[293]

The executive branch has been similarly undermined. Administrative agencies pass regulations to be enforced in a manner similar to those enacted by the legislative branch. Deregulation by diminished private enforcement happens at the executive level as well.

Finally, perhaps the most dramatic consequence is the impoverishment of the status of Article III judges.[294] In 1789, the expectation was that Article III judges would preside over trials. The contemporary federal judge deviates significantly from that ideal: she is largely a bureaucrat who manages a staff of adjuncts while only presiding over a civil trial once every two or three months on average.[295]

U. ILL. L. REV. 1, 8 (2010) (citing to literature discussing similarities between commercial arbitration and litigation, and referring to arbitration as "the new litigation").

289 For an account of the significance of the jury in our constitutional schema, see Suja A. Thomas, The Other Branch: Restoring the Jury's Role in the American Constitution (forthcoming 2015).

290 *See supra* notes 31-33, 77, 129 & 155-157 and accompanying text.

291 *See supra* notes 43-51, 66-70 & 84-90 and accompanying text.

292 *See supra* notes 168-69 and accompanying text.

293 *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

294 *See generally* Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012*, 118 PENN ST. L. REV. 243, 245-47 (2013) (discussing the "image" of the federal judge).

295 *See supra* notes 259-62 and accompanying text. In 2012, there were 3147 civil trials and 673 authorized district court judgeships. This average of 4.7 trials per district judge per annum is a conservative estimate, given that senior judges and magistrate judges are hosting some of these trials. *See supra* note 196. Moreover, this data is premised on the definition of a *trial* as any

IV. ESCAPING THE FOURTH ERA

If one is inclined to contemplate an escape from the fourth era, we see four significant headwinds that would generate resistance: the bench, the academy, the public, and the deregulation contingent. Rather than proposing specific reforms (as one of us has done in other scholarship[296]), we focus here on how to strategically navigate a course through each of these four forces.

A. *The Mindset of the Federal Bench*

In the 1970s and 1980s, federal judges, facing burgeoning case loads and confronting unprecedented challenges, turned to aggressive case management as a solution. But with those especially volatile times behind us, and with especially powerful empirical data before us, there is no reason that federal judges cannot be convinced that adjustments are in order. Both circuit and district court judges need to consider, for example, as some have already done, whether it is fair to plaintiffs and consistent with the obligation to enforce substantive law to dismiss lawsuits because the complaint fails to allege facts the plaintiff could not realistically possess.[297] Judges should further consider whether it is fair to plaintiffs, consistent with the substantive law, and respectful to the constitutional right to a jury trial, for courts to grant summary judgment in cases where reasonable people do or can rationally differ on factual determinations or on the application of a legal standard to facts.

Educational programs might persuade some judges to adjust their judicial philosophy. Judges who set firm discovery cut-offs, firm trial dates, and try a great number of cases could spread the word that that approach works.[298] Obviously, word would spread even faster if these judges were included on rulemaking committees, programs of the Administrative Office of the U.S. Courts and the Federal Judicial Center, and other platforms.

We also urge judges to join in the debate over whether the current fourth era makes sense. In addition to joining the scholarly dialogue, they

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"contested proceeding before a court or jury in which evidence is introduced." Young & Singer, *supra* note 120, at 91 (internal quotation marks omitted) (citing FORM JS-10, MONTHLY REPORT OF TRIALS AND OTHER COURT ACTIVITY).

296 *See* Burbank & Subrin, *supra* note 229, at 408-14 (proposing a simple case track for the federal district courts); Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 174 (2007) (same); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 394 (2010) (same).

297 *See supra* note 94; *infra* note 306.

298 *See supra* notes 276-81 and accompanying text.

could also share their experiences and opinions.[299] Judge Young, for example, has asked his colleagues to engage in a conversation about improving court productivity measures generally, and the bench presence metric particularly.[300]

Judges might also be encouraged to get further insight in their roles. Are judges content with the profound evolution of their role from trial judges to business managers? They should consider why the public—including Congress—should show them great respect and provide ample financial support if they are largely business executives at the pyramid of a huge bureaucracy that is somewhat disinterested in, or antagonistic to whether ordinary Americans can go to court with a realistic opportunity of having their rights vindicated.[301]

B. *The Mindset of the Legal Academy*

Our colleagues in the academy often criticize teachers of procedure courses (civil procedure, evidence, pretrial litigation, etc.) for overemphasizing traditional litigation in an era when trials are as rare as unicorns. We ask those interlocutors to consider the contrary message that legal educators convey.

We increasingly hire to our faculties new colleagues who have not engaged in litigation of any kind, much less trials. For defensible reasons, we covet professors with doctorate degrees in subjects like math, economics, philosophy, psychology, international relations, and history. The contributions of these brilliant scholars can be immense, but one must also confront the question of whether students who are going to be practicing law should be taught by faculty who practiced law. It would help if the law school culture did not tout appellate clerkships and positions in huge, prestigious law firms representing giant corporations as the major pinnacles of success. These large law firms are also the situs of the huge cases—the ugly ten percent or so of mega cases where discovery costs are high and delays are routine.[302]

The employment crisis facing recent law graduates presents an opportunity to change the dynamics of civil litigation. Young lawyers whose best

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299 Might it be beneficial for district court judges to hear more motions on oral argument? This would both help focus issues for them and provide experience and valuable courtroom skills for lawyers. Should the federal judiciary continue its resistance to increasing the number of judges? The federal judiciary could be encouraged to consider whether it should advocate for more judges, if needed, and for ways to lower the cost barriers to litigation.

300 Young & Singer, *supra* note 120, at 97-98.

301 *See supra* Part III.A.

302 *See supra* note 62 and accompanying text (discussing discovery in mega cases).

option is to start a small or solo practice might charge less to attract clients with legitimate grievances.[303] If these young lawyers are unwilling to accept settlements that do not reflect the litigation's true value and risk, they might find success as lawyers who are actually willing to try cases (that is, assuming they can overcome the hurdles to access imposed by the fourth era). This would surely disturb the ecosystem of litigation that has reached an equilibrium premised on cases being resolved by motions or on settlements under threat of motions. Lawyers, law professors, judges, and friends should encourage and help these brave recent graduates to try cases.

Another important dimension of the academy's role in causing or reinforcing the fourth era is the law and economics movement. This movement is no longer the caricature (if it ever was) of a number- and efficiency-obsessed contingent oblivious to hard-to-quantify values, common sense, and the real world. In 2002, the Nobel Memorial Prize in Economics was awarded to Daniel Kahneman, a behavioral economist who identified the role of heuristics in decisionmaking.[304] Moreover, the doubt shed on unregulated markets might have already softened the pure efficiency strain; now that Judge Richard Posner, one of the leading figures of the law and economics movement, has written about the failures of markets and overzealous deregulation, one might fairly conclude that one ideology of the fourth era is eroding.[305]

Law professors can help by collecting and publicizing cases in which federal district court judges have carefully reasoned why Rule 12(b)(6) and summary judgment motions should be denied, even though in some similar cases other judges disagree. Circuit court decisions with reasoned opinions denying these motions, even when colleagues disagree, also need analysis and distribution. Cases in which trial judges find "plausibility" and deny Rule 12(b)(6) motions despite a dearth of factual support—usually due to the need for discovery—also need wide publication and study.[306]

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303 Professor Subrin's research assistant, Jackie Kaplan, suggested that young lawyers might be more likely to start their own practice in a struggling economy; they might charge less, attract more clients, and even try cases.

304 *See generally* KAHNEMAN, *supra* note 239.

305 *See* RICHARD A. POSNER, A FAILURE OF CAPITALISM 319 (2011) (arguing that the financial markets must be more heavily regulated to avoid economic crises); *see also* RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY 34 (2011) (arguing that the banking industry is inherently risky, but also that it is critical to our economy and thus must be regulated).

306 *See, e.g.*, Pruell v. Caritas Christi, 678 F.3d 10, 15 (1st Cir. 2012) (reversing a denial of a motion for leave to amend); Bagg v. HighBeam Research, Inc., 862 F. Supp. 2d 41, 44 (D. Mass. 2012) (authorizing limited discovery before considering a motion to dismiss); Harris v. Scriptfleet, Inc., No. 11-4561 (SRC), 2011 WL 6072020, at *3 (D.N.J. Dec. 6, 2011) (denying a motion to dismiss a Fair Labor Standards Act claim because, reasoning backwards, "[i]t cannot be the case

Finally, law professors can seek out and explain empirical data that sheds insight on questions about motions to dismiss, motions for summary judgment, promises of mediation and arbitration, and judicial involvement in discovery.[307] Scholars may also take the lead on revisiting the rulemaking process.[308]

C. *The Mindset of the Public and the Legal Profession*

Many of our first year law students tell us that their parents and friends have negative reactions to their decision to become lawyers. Included in this mindset are the negative stereotypes of greedy plaintiffs, runaway juries, and ambulance-chasing lawyers.[309] The public is either largely indifferent or drawn to the anti-litigation doctrine endorsed by the Supreme Court, Congress, and the business community.[310] It is instructive that the insurance companies in their anti-litigation propaganda used polling data that probed the precise contours and depth of this sentiment.[311] This may make legislative inroads into the fourth era difficult to achieve. Yet there are some encouraging signs that the anti-litigation, anti-trial bias could be softening.[312] The public

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that a plaintiff must plead specific instances of unpaid overtime or minimum wage violations before being allowed to proceed to discovery to access the employer's records"). For a list of additional cases, see Miller, *Simplified Pleading*, *supra* note 4, at 344 n.214.

307 There is enormous room for empirical scholarship dealing with civil litigation. We could benefit from carefully collected and analyzed data in a number of areas. What was the actual effect of the Federal Rules amendments attempting to control discovery since 1980? What has been the impact of adding multiple steps to the litigation process? What state procedural amendments and experiments have reduced time and costs? What are the variables that would permit courts and judges to try considerably more cases each year without diminution of case terminations? Would education of pro se litigants increase their success in court? What is the impact of long distance trials using video imaging on lawyer, client, and judge satisfaction? Empirical data on these and a myriad of other similar questions would add much needed intelligence to the rules and decisions concerning the conduct of civil litigation.

308 For example, in 1921, the Harvard Law Review published Benjamin Cardozo's proposal for "a Ministry of Justice," an administrative agency that would combine members of the academy, judiciary, and bar to scientifically review proposals for legislation. *See* Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14, 124 (1921) ("The task of mediation is that of a ministry of justice."). Charles Clark, Cardozo's contemporary, suggested that the Ministry should also study and propose procedural rule modifications. *See* David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 487-88 n.309 (2010) (noting Charles Clark's support for a Ministry of Justice which would formulate procedural rules).

309 *See supra* notes 155-67 and accompanying text.

310 *See supra* notes 165-67 and accompanying text.

311 *See* Daniels & Martin, *supra* note 155, at 462 (discussing the insurance industry's public opinion polling regarding civil litigation).

312 *See, e.g.*, Patricia Lee Refo, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. v, v (2004) (discussing the American Bar Association's project investigation of whether the number of jury

wants their rights enforced and should therefore support procedures that make such enforcement more likely.

We think the public has been misled, and a counter publicity campaign is in order. We would emphasize that substantive law confers a broad range of rights—among them being matters of health, safety, consumer protection, the environment, property rights, civil rights, and so forth. Although some interest groups oppose the very existence of each of these rights, those interest groups lost that fight. When this happened, attention turned to how these rights would be enforced. Among the two basic models for enforcement—public enforcement by the government, and private enforcement by the aggrieved individual—the interest groups opposing the very existence of the rights generally acquiesced to private enforcement. However, with a system now premised on private enforcement, those same interest groups are now using procedural reforms to undermine that enforcement.[313] Lawyers who bring claims to vindicate the substantive rights of individuals

trials is declining and whether this should be a concern); Jonathan M. Judge, Lori Vella & Hudson Jones, *Ongoing Efforts to Preserve Our Unique Right*, FOR THE DEFENSE, Nov. 2012, at 10, 11 (discussing "the nationwide effort to revive the civil jury trial"); *see also* AM. COLLEGE OF TRIAL LAWYERS, THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 1 (2004), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=57 (explaining its mission of reviewing the phenomenon of the skyrocketing number of civil actions, but decreasing number of trials); *supra* notes 195-202, 295, 306 and accompanying text.

If cases like *Twombly* and *Iqbal* have—as we and so many others have argued—gone too far in an anti-litigation direction, then members of the legal profession should continue to urge Congress to reverse them. For two examples of congressional proposals to reverse *Twombly* and *Iqbal*, see Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009). These bills stalled in Congress, and reversal of the Court's decisions seems highly unlikely at this time. However, it took over twenty years, and the death of Senator Thomas Walsh of Montana, for the Rules Enabling Act to pass. *See* Subrin, *supra* note 96, at 2007-11 (discussing Walsh's opposition to the reform of procedural rules and recounting the history of the enactment of the Rules Enabling Act). Times change. It is important to keep important issues alive and before Congress.

Even if legislators do not want to wholly reverse the cases, they could do it partly. If these and similar procedural changes are not congressionally mandated for all civil cases, Congress should be encouraged to include more rights-enhancing procedures in substantive statutes. For example, Congress has added procedural hurdles in substantive areas, such as the securities field. *See, e.g.*, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2006) (requiring plaintiffs to provide a sworn certification along with the complaint). Congress could also add procedural safeguards, as it has done many times in restoration statutes like the Civil Rights Act of 1991. *See, e.g.*, 42 U.S.C. § 1983 (2006).

313 *See supra* notes 166-67 and accompanying text.

are doing something noble, not nefarious. Moreover, the proper enforcement of these laws requires courts to be adequately funded for the task.[314]

D. *The Mindset of Newt Gingrich and His Ilk*

Political and economic views seem to have always been integral to procedural reform. The Field Code was imbued with Field's *laissez-faire* ideology.[315] The Federal Rules were, in part, a product of New Deal thinking.[316] It is unlikely that we can convince deeply-committed conservatives that civil litigation to vindicate rights and assign responsibilities according to the substantive law is a good thing. But we call these deeply-committed conservatives to a debate on what civil procedure should look like and what the role of civil litigation should be. If critics of our work agree with the values we have outlined, then we can debate how best to balance them. If critics of our work do not agree with the values we have offered, then we want to know what values they would add or subtract, and where they think our analysis is inaccurate, unfair, or flawed. Finally, we hope that the "Federal Rules at 75" Symposium, organized by the *University of Pennsylvania Law Review*, will constitute an important turning point in the history and development of federal civil procedure.

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314 *See generally Inadequate Court Resources Hurt Access to Justice, Say Nation's Top Jurists*, ABA NEWS (Aug. 9, 2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/inadequate_courtres.html.

315 *See* Subrin, *supra* note 17, at 323-27 (explaining Field's *laissez-faire* ideology).

316 *See* Subrin, *supra* note 13, at 969-70 (recounting the events that led to the enactment of the Rules Enabling Act and Federal Rules during the New Deal).