

# Article

## An Old Judicial Role for a New Litigation Era

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## INTRODUCTION

The judicial role today is not what it used to be, or so we are told. The traditional judicial role was characterized by two guiding principles: Judges relied on the parties to frame disputes and on legal standards to help resolve them.<sup>1</sup> In pretrial practice today, however, overcrowded dockets and overzealous litigants have led judges to stray from this passive role. Rather than sit back and wait for parties to frame legal disputes, many judges take an active, largely discretionary approach to pretrial case management. In class action litigation as well, judges have adopted a new role, albeit for somewhat different reasons. In this context, the problem is not that plaintiffs' attorneys are *too* zealous on behalf of their clients, but that they often are not zealous enough. It therefore falls upon judges to look out for the interests of absent class members and to balance those interests, often without any meaningful legal guidance.

Litigation is changing so rapidly that even new models of judging designed to update traditional ones have quickly become outdated. In an influential article in the 1970s, Abram Chayes pointed out how the role of the judge had evolved in the mid-twentieth century, as judges presided over new "public law" actions.<sup>2</sup> By the late 1990s, however, Professor Chayes's model itself was outdated. Chayes may have succeeded in addressing the civil rights class actions of the 1960s and 1970s, but he failed to anticipate and "capture the dynamics of modern mass tort litigation," which came to dominate the litigation landscape in the 1980s and 1990s.<sup>3</sup> Given the tremendous uncertainty that surrounds the judicial role in mass tort actions, and in the settlement of mass tort suits in particular,<sup>4</sup> scholars have challenged the academy to develop yet another new model of litigation, one

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1. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-87 (1978).

2. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); see also Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 45 (1979) ("Th[e] transformation in the character of litigation necessarily transforms the judge's role as well."); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39-44 (1979) (criticizing traditional conceptions of judging and defending judicial involvement in "structural reform" litigation); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (describing evolution in the judicial role similar to Chayes's observations, albeit with less enthusiasm).

3. Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 414-15 (1999) [hereinafter Mullenix, *Resolving Mass Tort Litigation*]; see also Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994).

4. See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 749 (2002) ("Commentators do not exaggerate when they say that class settlements are 'the most controversial subject in the civil process today.'" (quoting Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000))).

that can guide judges in mass tort litigation as well as in public law class actions.<sup>5</sup>

Instead of continually searching for new models of litigation, I suggest that we reexamine old ones. Contemporary civil litigation no doubt looks different from classic understandings of adjudication, but if judges preside over a different litigation landscape today, this does not mean that the judge's traditional adjudicative role is irrelevant. When we reconsider traditional conceptions of judging, we see that some of the most important controversies in civil procedure today arise not because judges preside over new types of disputes, but rather because judges too often have failed to structure their new responsibilities in a manner that reflects their traditional adjudicative role.

Sometimes judges do find ways to structure new responsibilities so as to remain within the confines of their traditional role, and when they manage to do so their conduct generates very little controversy. In pretrial practice, for example, some judges rely on the summary judgment mechanism—rather than informal case management strategies—to cope with the problems of overzealous attorneys and clogged dockets. Unlike informal case management techniques that are judge-initiated and allow judges broad discretion, the summary judgment mechanism relies on the parties to frame disputes and gives judges legal standards upon which to base their decisions. In class action practice as well, judges sometimes have taken on new responsibilities without straining the boundaries of their traditional adjudicative role. In certain categories of class action litigation that aggregate large numbers of small claims, such as antitrust or securities suits, judges called upon to decide whether to certify a class for litigation ordinarily need not *themselves* frame arguments on behalf of absent class members but instead can rely on plaintiffs' attorneys and defendants to do so. Moreover, because plaintiffs' attorneys and defendants so often battle over the propriety of class certification, a rich body of case law has developed that can assist judges in making their certification decisions.

But if judges sometimes have structured new responsibilities so as to provide themselves with the litigant input and legal criteria they need to perform their traditional adjudicative role, very often they have not. In pretrial practice, many judges rely on informal case management techniques like the settlement conference, which allow them a level of control and a degree of discretion that strain the boundaries of their traditional role. In class action litigation, judges sometimes are willing to approve "settlement" class actions—actions where lawyers for both sides agree to a settlement even before a class has been certified—without meaningful input from

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5. See, e.g., Mullenix, *Resolving Mass Tort Litigation*, *supra* note 3, at 414-15; William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001).

affected parties or well-defined legal standards to guide their analysis. In coping with new partisanship problems in pretrial practice or new agency problems in class action litigation, judges often are willing to ignore their traditional role, rather than to update it.

When judges ignore their traditional adjudicative role and proceed without the litigant input or legal criteria to which they are accustomed, their conduct invites controversy. It is no coincidence that the two areas of civil procedure that arguably have generated the most intense controversy in recent years—judicial management of pretrial practice and judicial review of class action settlements—also are areas where judges have strayed furthest from their traditional adjudicative role. Yet critics of contemporary judicial conduct in these two fields rarely are willing to invoke tradition directly in support of their arguments. If these scholars would like to see the judiciary hew more closely to its traditional adjudicative role, they do not openly embrace this as their goal. In an age when it is out of vogue to invoke tradition for tradition's sake, and when the traditional adversarial process has come to be viewed with considerable skepticism,<sup>6</sup> scholars are reluctant to rely on an old judicial role to tackle new litigation problems.

The failure among scholars, judges, and lawyers to pay more attention to the traditional judicial role has been costly. When we compare judicial conduct today with traditional judicial behavior, we not only better understand contemporary controversies in pretrial practice and class action litigation, but also can make progress toward resolving these controversies. Indeed, this Article uses a traditional model of judicial behavior that has been overlooked in contemporary scholarship to advance solutions to some of the most pressing doctrinal problems in civil procedure today. My goal is not to turn back the clock on civil litigation or to deprive litigants of the many benefits that have come along with evolutions in the judicial role. But I do advocate a degree of fidelity to tradition that is sorely missing from contemporary judicial practice and legal scholarship.

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6. See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 12-24 (1996). One can find this suspicion of the adversarial process in literature on alternative dispute resolution, see, e.g., Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 82-95 (describing and critiquing negative assumptions about the adversarial process); Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 42 (2002) [hereinafter Menkel-Meadow, *When Litigation Is Not the Only Way*] (arguing that "one 'size' of dispute resolution process—adjudication—does not fit all"), and in literature on the legal profession, see, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 11-49 (1988); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 788-92 (1999). But see ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 315-52 (1993) (lamenting judicial departures from a traditional, deliberative role).

When we reconsider a traditional judicial role that has been neglected in recent decades, we find three strong reasons why judges should remain faithful to it, even as they respond to new challenges. First, the judiciary's traditional adjudicative role reflects its core institutional competence. Judges are ideally suited to resolve party-framed disputes, rather than to frame disputes themselves, because they lack the institutional capacity that other government officials have to initiate and conduct factual investigations. As politically insulated officials, judges also are better equipped to render judgments when they can look to some identifiable body of law to guide them. When judges ignore these features of their traditional adjudicative role they strain the boundaries of their institutional abilities.

Second, the traditional judicial role reflects the judiciary's place in the constitutional structure. The characteristics of the judicial role that legal process scholars like Lon Fuller identified in the mid-twentieth century are the very same characteristics that dominated the Founders' thinking two centuries earlier when they first included an independent judiciary in the constitutional framework. Like mid-twentieth-century scholars, the Founders expected judges to rely on parties to frame disputes and on an identifiable body of law to supply rules of decision. This Article demonstrates that if these characteristics of the judicial role are not constitutionally required, they are at least constitutionally inspired.

Third, precisely because the traditional judicial role reflects the judiciary's institutional competence and constitutional authority, nineteenth- and twentieth-century judges went to great lengths to preserve its essential attributes even as they responded to new challenges. Although scholars today tend to assume that in a new litigation era we cannot confine judges to their old manner of doing things, this assumption overlooks that the problems judges face in pretrial practice and class action litigation bear a striking resemblance to problems that judges confronted, and largely overcame, in the past.

Judicial management of pretrial practice may *seem* new, largely because pretrial practice itself is new, but we should not forget that judges have been responsible for managing *trial* practice for quite some time. During the formative years of judicial trial management in the nineteenth century—when judges developed their now-formidable powers over the evidence litigants present and the weight that juries may accord it—judges confronted a dilemma similar to the one they face today. While some people defended a more active judicial role to rein in partisan attorneys and confused jurors, others questioned the wisdom and fairness of allowing judges to stray from their traditional, passive role and interfere with the rights of litigants to present their cases to juries.

The controversy that surrounds the judicial role in class action settlements today also has strong historical parallels. The principal-agent

relationship between class members and class attorneys that causes so much trouble for judges is not the first principal-agent relationship that judges have been required to monitor. Judges have long had to second-guess the actions of agents on behalf of principals whenever they reviewed challenges to government action.<sup>7</sup> Moreover, when called upon to decide whether an executive official or administrative agency has been true to Congress's instructions, judges in the post-New Deal era often have had to take into account the interests of a wide variety of affected citizens, and often have found themselves weighing into policy disputes that are not easily susceptible to doctrinal analysis.

Nineteenth- and twentieth-century judges found ways to cope with partisanship and agency problems while remaining faithful to their traditional adjudicative role. In both contexts, judges took on new responsibilities and expanded their powers dramatically, but they went to great lengths to craft procedural and substantive doctrines that would enable them to rely on affected parties to help frame disputes, and on an identifiable body of law to help resolve them. Judicial doctrine was structured to afford judges the litigant input and legal criteria they needed to stay within the confines of their traditional adjudicative role. In each instance, judges chose to update their traditional role rather than to discard it.

By resurrecting an old judicial role to cope with new litigation problems, this Article pursues two objectives, one practical and the other theoretical. First, on a practical level, the Article provides much-needed support to stalled reform proposals, offering a conceptual framework for scholars, judges, and lawyers who seek major doctrinal revisions in pretrial practice and class action litigation. Indeed, the Article uses overlooked historical parallels not only to bolster the case for reform generally, but also to support specific reforms, such as modeling judicial review of class settlements after the record review judges undertake in administrative law. The Article suggests that just as nineteenth-century trial practice and

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7. John Coffee has used the principal-agent relationship in corporate law (between officers or directors, on one hand, and shareholders on the other) to urge a reconceptualization of the principal-agent relationship in class action litigation. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 375-76 (2000) [hereinafter Coffee, *Class Action Accountability*]. I focus in this Article on the principal-agent relationship that dominates administrative law, rather than corporate law, not because the analogy is inherently better, but because it provides valuable insights into the specific role of judges in monitoring principal-agent relationships. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 340 ("By focusing more clearly on these cases [*Amchem Products v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)] as governance problems, the Court's analysis may be reconceptualized as a classic principal-agent problem in which there are insufficient checks on opportunistic or self-serving behavior by agents."); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 902-03 (1995) (highlighting parallels between judicial review of agency action and judicial review of class settlements).

twentieth-century administrative law updated the judicial role while remaining true to its core attributes, so too should we structure judicial supervision of pretrial practice and class action litigation so as to be faithful to the traditional judicial role.

Second, on a theoretical level, the Article sheds new light on grander questions regarding the role of the judge in our system of government and our society more broadly. When scholars like Abram Chayes challenged Lon Fuller over adjudication's limits a quarter century ago, they initiated a valuable conceptual inquiry into the role of the courts in tackling important social problems.<sup>8</sup> This Article points out that the question of *how* judges respond to new social problems can be just as important as the question of *whether* judges respond to them, and that when it comes to deciding how judges should structure their assigned tasks, Fuller's traditional model of adjudication not only remains relevant, but may ultimately be more powerful than even he himself envisioned.

The Article is organized as follows: Part I highlights the relevance of the traditional judicial role to contemporary procedural controversies. It suggests that some of the most important debates in civil procedure today are driven by an underlying disagreement over the value and vitality of the judiciary's traditional adjudicative role. Part II then identifies the values that underlie the traditional judicial role, exploring its institutional, constitutional, and historical underpinnings. Part II argues that the judiciary's traditional adjudicative role is not just traditional but also reflects the judiciary's core institutional competence, its place in the constitutional structure, and the considered judgment of two centuries of judges who faced problems comparable to those that judges confront today. Finally, Parts III and IV explore specific instances in the past in which judges have responded to new challenges while remaining faithful to their traditional adjudicative role, highlighting overlooked parallels between the problems judges confront in pretrial practice and class action litigation today and the problems judges confronted in nineteenth-century trial practice and twentieth-century administrative law.

## I. FRAMING CONTEMPORARY PROBLEMS WITH A TRADITIONAL JUDICIAL ROLE

When Lon Fuller described adjudication half a century ago,<sup>9</sup> he thought that judges should rely on affected parties to frame disputes, rather than

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8. See Chayes, *supra* note 2, at 1283-84; see also Fiss, *supra* note 2, at 39-44; *infra* note 18 (discussing the Fuller-Chayes debate).

9. *The Forms and Limits of Adjudication* was first presented to Harvard Law School's Legal Philosophy Discussion Group in 1957. Fuller, *supra* note 1, at 353.



frame disputes themselves,<sup>10</sup> and should resolve disputes by reference to an identifiable body of governing law, rather than exercise freewheeling discretion.<sup>11</sup> These two core features of litigation were by no means novel. Fuller did not invent a judicial role; instead, he captured a judicial role that had prevailed for centuries. Judges had long relied on parties to frame disputes and on law to guide their resolution.<sup>12</sup>

By the time Fuller's classic description of adjudication appeared in print twenty years later, however, it was already considered outdated.<sup>13</sup> Whereas Fuller had written in the 1950s that adjudication would not work for "polycentric" disputes among diverse interests typically resolved through political or contractual bargaining,<sup>14</sup> judges in the succeeding decades presided over just these sorts of "polycentric" disputes as "public law" class actions became increasingly common.<sup>15</sup> Indeed, two years before *The Forms and Limits of Adjudication* was published in the *Harvard Law Review*, Abram Chayes published his own influential work, *The Role of the Judge in Public Law Litigation*, which effectively discredited Fuller's model.<sup>16</sup> For most scholars, Chayes won the Fuller-Chayes debate and Fuller's influence over contemporary scholarship has been comparatively weak ever since.<sup>17</sup>

10. *Id.* at 364.

11. *Id.* at 363-81.

12. See *infra* Sections II.B, III.A-D.

13. Although circulated in the 1950s, *The Forms and Limits of Adjudication* was not published until 1978. Fuller, *supra* note 1, at 353.

14. *Id.* at 393-405.

15. See generally sources cited *supra* note 2. Although representative litigation evolved considerably during this period, it existed in varying forms much earlier. See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing YEAZELL, *supra*).

16. Chayes, *supra* note 2.

17. See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 648 (1988) (noting that Chayes's article "was promptly embraced as a classic, perhaps an icon"); cf. Fiss, *supra* note 2, at 39-44 (reinforcing Chayes's descriptive critique of Fuller's model with a normative critique that defends judicial involvement in "structural reform" litigation). But cf. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) (contending "that since trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate").

Scholars who study public law litigation directly sometimes consider Fuller's arguments along with those of Chayes and Fiss. See Diver, *supra* note 2, at 106; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995-97 (1999); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1384-87 (1991) [hereinafter Sturm, *Normative Theory*]; Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 984-85 (1993); Daniel A. Farber, *Stretching the Adjudicative Paradigm: Another Look at Judicial Policy Making and the Modern State*, 24 LAW & SOC. INQUIRY 751, 753-54 (1999) (book review). Moreover, some scholars see Fuller's model as a useful one for civil procedure scholarship generally. See Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995) (emphasizing the manner in which scholars have misunderstood Fuller's ideas); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil*

Scholars have overlooked, however, that any victory Chayes enjoyed over Fuller, and any defeat suffered by Fuller, was only partial. Chayes may have succeeded in discrediting Fuller's arguments regarding the *types* of disputes courts could handle (which Fuller dubbed adjudication's "limits"), but he did not discredit Fuller's observations regarding the *adjudicative process* (which Fuller dubbed adjudication's "forms").<sup>18</sup> Fuller could not have anticipated how litigation would evolve in the decades after he wrote, let alone how changes in litigation would alter judicial behavior.<sup>19</sup> But simply because Fuller wrote in a different litigation age does not mean that his model of judging is obsolete.<sup>20</sup>

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*Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 988 (1987) ("As Lon Fuller and others have taught us, it is resolving disputes through reasoned and principled deliberation, based on rules, that is at the heart of adjudication."). However, with few exceptions, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 n.13 (1982) [hereinafter Resnik, *Managerial Judges*]; Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1726-31 (1992), scholars have generally overlooked the continuing force of Fuller's ideas for contemporary procedural problems not directly touched by the Fuller-Chayes debate—such as the managerial judging techniques and settlement class actions that are the focus of this Article.

18. It was Fuller's description of adjudication's limits that Chayes largely discredited. Chayes pointed out that courts presiding over public law actions in the decades after Fuller wrote were indeed presiding over just the sort of polycentric disputes that Fuller had thought were beyond adjudication's limits. See Chayes, *supra* note 2, at 1284; see also Fiss, *supra* note 2, at 39-44 (criticizing Fuller and defending judicial involvement in such disputes). But Chayes said nothing to discredit Fuller's observations regarding the *adjudicative process*, or adjudication's "forms." Nor did Chayes advance an alternative model of the *adjudicative process* to replace Fuller's. To the contrary, when Chayes and Fiss challenged Fuller's ideas on adjudication's limits, they embraced many—but not all—of Fuller's ideas on litigation's forms. See Chayes, *supra* note 2, at 1302, 1308 (acknowledging the role of parties in framing disputes and highlighting the importance of party representation to ensure that the court has access to relevant information); Fiss, *supra* note 2, at 39 (arguing that in *The Forms and Limits of Adjudication* Fuller seemed "largely motivated by a desire to establish the limits of adjudication"); *id.* at 14 (conceding that a judge "must be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of the self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision"); Sturm, *Normative Theory*, *supra* note 17, at 1391-403 (demonstrating that Fuller and Fiss place similar emphasis on "participation," "judicial independence and impartiality," and "reasoned decisionmaking"); see also Bone, *supra* note 17, at 1312 ("I am virtually certain that Fiss would agree with Fuller that courts should not create public values out of whole cloth, but instead locate those values already implicit in social practice.").

19. See Tidmarsh, *supra* note 17, at 1726 ("When Lon Fuller wrote *The Forms and Limits of Adjudication* in 1959, the concept of complex litigation was in its infancy, its full scope still dimly understood."). In addition to changes in the types of cases judges preside over, some scholars have noted a broader shift from a law-oriented system to one modeled more after equity. See Subrin, *supra* note 17, at 912-13; Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 649-50, 654, 661.

20. See CARRIE MENKEL-MEADOW, DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY (forthcoming 2003) (noting Fuller's continuing relevance to mediation literature); Carrie Menkel-Meadow, *Introduction to MEDIATION: THEORY, POLICY AND PRACTICE*, at i, xxi (Carrie Menkel-Meadow ed., 2001) (noting that Fuller "gave us what is probably still the deepest and most 'classic' statement of what mediation is"); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 13-22 (2000) (describing and evaluating Fuller's work on mediation); Menkel-

Although scholars today rarely invoke Fuller when they criticize or defend judicial practices,<sup>21</sup> contemporary procedural debates are best understood using Fuller's model. Scholars who criticize judicial conduct in such areas as pretrial practice and class action litigation, and who urge doctrinal reforms in those areas, ultimately would like to see judges hew more closely to the adjudicative role that prevailed in this country for its first two centuries and that Fuller captured in the 1950s. Like Fuller, they would like to see judges rely more on the parties to frame disputes and on the law to help them resolve disputes. Scholars who defend current judicial practices and are skeptical of reform proposals generally believe that litigation has changed too much to limit judges to their old way of doing things, and that the costs of restricting judges in this manner would outweigh the benefits. Disagreements on such diverse topics as pretrial case management and judicial review of class action settlements often boil down to the same core question: How faithful should we be today to a model of judicial behavior that prevailed in this country for centuries but has come under considerable strain over the last several decades? Our best hope of understanding—and ultimately resolving—contemporary doctrinal debates in pretrial practice and class action litigation may ultimately turn on a model of judging that has received scant attention in contemporary scholarship.

#### A. *The Judicial Role in Pretrial Practice*

When initially adopted in 1938, the limited discovery provisions of the Federal Rules of Civil Procedure were designed not to change the nature of civil litigation, but rather to eliminate surprises at trial and ensure that litigation outcomes turned on facts rather than on maneuvering by lawyers.<sup>22</sup> As the discovery provisions of the Federal Rules expanded, however,<sup>23</sup> and lawyers learned to make use of these new provisions,<sup>24</sup> pretrial practice became a substitute for trial in many cases.<sup>25</sup> Most cases came to be settled based on the evidence revealed in discovery and on the

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Meadow, *When Litigation Is Not the Only Way*, *supra* note 6, at 42 (relying on Fuller to support the argument that different processes should be used for different types of disputes).

21. *But see supra* notes 17, 20 (noting exceptions).

22. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947); Subrin, *supra* note 17, at 986. *But cf.* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000) [hereinafter Resnik, *Trial as Error*] (noting that “rules alone rarely change behavior”).

23. The 1970 amendments expanded discovery substantially. *See* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 987 (1998) [hereinafter Molot, *Changes*].

24. *See* Resnik, *Trial as Error*, *supra* note 22, at 942.

25. *See id.* at 936-37; Yeazell, *supra* note 19, at 639.

expense and delay associated with completing the pretrial process and proceeding to trial.<sup>26</sup>

Given this shift from trial to pretrial, if judges wanted to ensure a fair, efficient litigation process, they no longer could sit back and wait for litigants to proceed to trial, but rather had to become involved earlier.<sup>27</sup> Indeed, as discovery grew more expensive and time consuming, and partisan litigants took advantage of the discovery rules not only to obtain evidence, but also to inflict expense and delay on opponents,<sup>28</sup> judicial intervention during pretrial came to be seen by many judges and scholars as necessary to rein in overzealous litigants and keep pretrial litigation focused on the merits.<sup>29</sup> By the late twentieth century, scholars and judges were well aware of litigants' strong incentives to abuse the pretrial process in an effort to improve their settlement positions. Litigants might enhance their bargaining leverage by refusing to turn over evidence to which an opponent is entitled, by inflicting expenses on opponents through excessive discovery requests, or by delaying proceedings through some combination of these tactics.<sup>30</sup> Whereas judges once had been able to leave it to the litigants to

26. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1998 REPORT OF THE DIRECTOR 166-68 (1998); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 677 (1997) (noting that "95% of cases in the federal system are resolved prior to trial"); Resnik, *Trial as Error*, *supra* note 22, at 927-28 (analyzing data to conclude that about 6% of civil cases filed in federal court go to trial); Subrin, *supra* note 17, at 987 ("[T]he most astonishing development is the current emphasis on case management, settlement, and methods of alternative dispute resolution."); Yeazell, *supra* note 19, at 633 (noting that "in 1990, only 4.3% of filed civil cases resulted in trials, a proportional decline of almost four-fifths from the pre-Rules world"). A substantial portion of cases still are adjudicated, albeit often through pretrial motions, rather than trials. See Yeazell, *supra* note 19, at 637.

27. See Resnik, *Managerial Judges*, *supra* note 17, at 379 (describing how "supervision of discovery became a conduit for judicial control over all phases of litigation and thus infused lawsuits with the continual presence of the judge-overseer").

28. For a discussion in the legal profession literature of how partisan attorneys may use procedural rules "to thwart the enforcement of the substantive rules," see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 44.

29. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 15 (1984); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 191 (1997) [hereinafter Resnik, *Changing Practices*]; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 507 (1986) [hereinafter Resnik, *Failing Faith*]; Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1915 (1989). *But cf.* Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?*, 16 JUST. SYS. J. 139, 141 (1993) (distinguishing among different types of cases which require more or less discovery).

30. See, e.g., Molot, *Changes*, *supra* note 23, at 995-96. Compare Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989) (highlighting the widespread belief among federal judges that discovery abuse is a serious problem), with Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1394 (1994) (seeking to debunk the "myth of . . . pervasive discovery abuse"), Weinstein, *supra* note 29, at 1915 (arguing that "almost all discovery

prepare their cases for trial, by the end of the twentieth century many judges no longer believed that litigants could be trusted to perform this function.<sup>31</sup> The litigant partisanship that traditionally had been the centerpiece of the adversary system now threatened to undermine its effectiveness.

Moreover, unchecked partisanship in contemporary litigation could have sabotaged the rights not only of a partisan litigant's opponent, but also of future litigants. In an overcrowded court system, partisanship's tendency to string out the litigation process meant fewer court resources for other pending cases.<sup>32</sup> This problem became especially acute at the end of the twentieth century, as a confluence of factors contributed to an overcrowding of judicial dockets.<sup>33</sup> The Federal Rules' liberalization of pleading and discovery made lawsuits easier to pursue;<sup>34</sup> an expansion in substantive theories of liability broadened the grounds upon which plaintiffs could recover;<sup>35</sup> a routinization of contingent-fee arrangements and lawyer advertising made lawyers available to many more plaintiffs;<sup>36</sup> societal changes rendered litigation an increasingly acceptable way to resolve civil disputes;<sup>37</sup> and an expansion of federal criminal law associated with the 1980s "war on drugs" crowded federal courts with a steady stream of criminal cases.<sup>38</sup> As a result, judges with too little time on their calendars

abuse can be controlled or prevented"), and Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 653 (1989) (noting that it is "unlikely that many cases involve real abuse").

31. See Miller, *supra* note 29, at 21; Resnik, *Changing Practices*, *supra* note 29, at 179-85; Weinstein, *supra* note 29, at 1915.

32. See, e.g., Burbank & Silberman, *supra* note 26, at 676; Resnik, *Managerial Judges*, *supra* note 17, at 379, 415.

33. See KRONMAN, *supra* note 6, at 320-25; RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 77-93 (1985); Marc S. 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, 5 (1983); Miller, *supra* note 29, at 2-12; Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669-76 (1979). *But see* Mullenix, *supra* note 30, at 1394 (seeking to debunk the "myth of American litigiousness"); Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 320 (1985) (questioning the "widely held view that America is suffering from a litigation explosion"); Weinstein, *supra* note 29, at 1907-08 ("Concern over excess litigation in the federal courts is . . . typically exaggeration.").

34. See Miller, *supra* note 29, at 8-9.

35. See Elliott, *supra* note 29, at 309; Miller, *supra* note 29, at 5-8; *see also* Resnik, *Failing Faith*, *supra* note 29, at 512 (noting that the Federal Rules were drafted in an "era before implied private causes of action, before the rise of civil rights litigation, before much federal court hospitality towards rights seekers, before intensive litigation against federal agencies, before the reformulation of the class action rule, before the 'due process' revolution").

36. See Miller, *supra* note 29, at 3-5, 10.

37. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Miller, *supra* note 29, at 4; Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1350 (1972).

38. See Yeazell, *supra* note 19, at 634 (noting the "much-publicized increase in the criminal caseload"). *But see id.* at 635 (arguing that "the federal courts are not—comparatively speaking—being overwhelmed by a crime wave" (emphasis omitted)).

to hold trials for all of their civil cases felt obligated to intervene during pretrial not only to ensure that the main event in litigation was efficient and fair, but also to ensure that pretrial was indeed the main event.<sup>39</sup> If judges did not intervene, overzealous litigants might not only inflict harm on their immediate adversaries, but also clog dockets and thereby deprive future litigants of their day in court.

Whether to dispose of cases prior to trial, to make sure that pretrial practice was efficient and fair, or some combination of the two, the federal judiciary in the closing decades of the twentieth century transformed its role from a passive arbiter that waited for parties to proceed to trial into an active manager of pretrial practice.<sup>40</sup> Partly on their own initiative,<sup>41</sup> partly at the urging of superiors,<sup>42</sup> and partly in accordance with legislative directions<sup>43</sup> and amendments to the Federal Rules,<sup>44</sup> judges utilized a variety of measures to control pretrial litigation.<sup>45</sup> Some judges sought to make litigation speedier and less costly by actively regulating the numerous

39. See Elliott, *supra* note 29, at 323; Miller, *supra* note 29, at 14.

40. See Resnik, *Managerial Judges*, *supra* note 17, at 404. This transition has not been confined to the United States. See Resnik, *Trial as Error*, *supra* note 22, at 943 n.58 (discussing case management in England, Australia, and Canada).

41. See Resnik, *Failing Faith*, *supra* note 29, at 529-30; cf. Burbank & Silberman, *supra* note 26, at 700 (describing the increase in power of federal judges over civil cases).

42. See Warren Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 92-93 (1983); Elliott, *supra* note 29, at 310 (citing MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.1 (1985)); Resnik, *Changing Practices*, *supra* note 29, at 178-79; Resnik, *Failing Faith*, *supra* note 29, at 530; Resnik, *Managerial Judges*, *supra* note 17, at 395, 399 (citing the speeches and writings of the late Chief Justice Burger); Resnik, *Trial as Error*, *supra* note 22, at 934.

43. See Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (2000); James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 17-20 (1997). Compare JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 10, 15 (1996) (noting a RAND study concluding that "implementation often fell short" and that "in practice, there was much less change in case management after CJRA than one might have expected from reading the plans"), with Resnik, *Changing Practices*, *supra* note 29, at 154-56 (parting with the conclusions of the RAND study on the ground that the Act in effect codified "changes long underway in the civil process").

44. See FED. R. CIV. P. 16(c), 26(b)(2). As Judith Resnik has explained, "By the 1980s, the loosely structured mandate for pre-trial meetings was rewritten, and judicial case management became codified as a part of the pretrial process and as a facet of judging." Resnik, *Trial as Error*, *supra* note 22, at 942-43; see also Elliott, *supra* note 29, at 322; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 491-92 (1985); Resnik, *Failing Faith*, *supra* note 29, at 528; Resnik, *Managerial Judges*, *supra* note 17, at 379, 400; Yeazell, *supra* note 19, at 657. These rule changes may have been driven in part by positive attitudes among attorneys toward greater judicial involvement. See Menkel-Meadow, *supra*, at 497.

45. See Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1336-37 (1994) (noting variations in approach among judicial districts and among judges within districts); Elliott, *supra* note 29, at 316-17 (describing disparate judicial approaches in a workshop); Molot, *Changes*, *supra* note 23, at 1004-05 ("Judges deciding how to manage cases on their dockets have a wide array of tactics available and, indeed, choose to exercise their supervisory discretion in widely disparate ways . . .").

depositions, interrogatories, and document requests that parties undertake during pretrial discovery,<sup>46</sup> often with the use of magistrates.<sup>47</sup> Other judges promoted alternative dispute resolution, often requiring parties to participate in settlement conferences in their chambers, and sometimes even urging settlement in ex parte meetings with each party.<sup>48</sup> Still other judges embraced a newly aggressive approach to summary judgment in order to dispose of cases before trial—or at least narrow the issues in dispute.<sup>49</sup>

This new managerial role for judges has generated intense controversy. Indeed, because judicial case management seems like a new response to a new problem, one where old models of judging seem no longer to apply, scholars have been unable to agree on a vantage point from which to evaluate judicial practices.<sup>50</sup> Scholars critical of managerial judging have done a good job highlighting its problems.<sup>51</sup> They point out that judges often lack the understanding that lawyers have regarding important pretrial decisions,<sup>52</sup> that judicial efforts to reduce costs may have just the opposite effect,<sup>53</sup> that judicial haste to clear dockets often renders litigation outcomes

46. See, e.g., Molot, *Changes*, *supra* note 23, at 1020-21; Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 772 (1981); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 69-71 (1995).

47. See, e.g., Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 609 (2002) [hereinafter Resnik, *Uncle Sam*]; Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2132 (1989).

48. See, e.g., Burbank & Silberman, *supra* note 26, at 695-99; Menkel-Meadow, *supra* note 44, at 490-93, 506; Molot, *Changes*, *supra* note 23, at 1021; Resnik, *Managerial Judges*, *supra* note 17, at 376-77.

49. See, e.g., Elliott, *supra* note 29, at 320; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73, 78-79 (1990); Resnik, *Failing Faith*, *supra* note 29, at 529-30.

50. See Burbank & Silberman, *supra* note 26, at 701 (noting that "there was no longer a shared vision of justice, substantive or procedural").

51. Scholars have debated what should be deemed part of "managerial judging." Compare Resnik, *Managerial Judges*, *supra* note 17, at 392 (distinguishing judicial rulings on discovery orders from judicial rulings on pretrial motions), with Yeazell, *supra* note 19, at 673-74 ("Because decisions on pretrial motions are likely to evade appellate review, such decisions also have large doses of the uncontrolled discretion that marks 'management.'").

52. See Marvin E. Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975); Molot, *Changes*, *supra* note 23, at 1024; cf. Resnik, *Managerial Judges*, *supra* note 17, at 427 (noting managerial judging's tendency to "deprive[] the opposing party of the opportunity to contest the validity of information received").

53. Compare Peterson, *supra* note 46, at 44 (questioning the efficacy of management efforts), Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367, 393 (1986) (questioning efficiency), Resnik, *Changing Practices*, *supra* note 29, at 184-85 (noting managerial judging's tendency to increase lawyer work hours), and Resnik, *Managerial Judges*, *supra* note 17, at 380, 422-24 (questioning the effectiveness of managerial judging), with Elliott, *supra* note 29, at 315-16 (noting that "at least some managerial techniques are effective in reducing the amount of time and effort invested in processing a given case").

less fair<sup>54</sup> or accurate,<sup>55</sup> and that discretionary management tactics that vary inordinately from judge to judge may threaten litigants' due process rights<sup>56</sup> and even send the wrong message to lawyers about the value of the rule of law.<sup>57</sup> But defenders of managerial judging respond that these problems may be the lesser of evils when compared to the problems that would ensue if litigation decisions were left entirely to litigants. If judges did not intervene in the morass that is modern litigation, this would clog dockets, increase litigation costs, and free litigants to use litigation's expense and delay to gain unfair tactical advantages over their adversaries.<sup>58</sup> For every excess that managerial judging's critics identify, its defenders identify other cases in which judicial case management has facilitated efficient resolutions and saved valuable court resources.<sup>59</sup> Without a conceptual framework to weigh these costs and benefits, scholars have been unable to agree on a course of reform.

If we wish to make true progress toward solving the problems that managerial judging's critics have identified, we must move beyond simply weighing the tradeoffs that surround new judicial practices and develop a framework to help us decide which costs are worth bearing and which are not. Fortunately, the framework we require has been there all along, but simply overlooked. Although litigation and the judicial role have evolved considerably over the last half-century, the traditional judicial role

54. See Hensler, *supra* note 6, at 89-90 (noting that "litigants' satisfaction with the dispute resolution system and the court was strongly dependent on perceived procedural fairness" and that "litigants liked trials" and "had rather negative perceptions of the fairness of judicial settlement conferences" (citing E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990))); Menkel-Meadow, *supra* note 44, at 507-08 (finding that "[f]or those [judges] who seek to use the settlement conference as a docket-clearing device, the conference becomes most problematic in terms of the . . . quality" of the settlement reached (emphasis omitted)).

55. See, e.g., Molot, *Changes, supra* note 23, at 1024.

56. See Elliott, *supra* note 29, at 316-18 (noting the "potential for arbitrariness inherent in managerial judging"); Molot, *Changes, supra* note 23, at 1004-05, 1019-20; Peterson, *supra* note 46, at 76; Resnik, *Managerial Judges, supra* note 17, at 411-12, 430; Yeazell, *supra* note 19, at 652; cf. Menkel-Meadow, *supra* note 44, at 506 (noting wide variations in judges' conceptions of their roles); Weinstein, *supra* note 29, at 1916 ("Some courts of appeals have permitted iron-handed judicial control of settlement and the use of devices such as informal mini-trials, while others have rejected them. Some courts of appeals have permitted judges to require the parties to resort to alternative dispute resolution methods, while others have rejected such orders.").

57. See KRONMAN, *supra* note 6, at 317-28 (highlighting the importance of the example that judges set for lawyers and lamenting the judiciary's move from legal deliberation to extralegal management); William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on The Practice of Justice*, 51 STAN. L. REV. 991, 992-93 (1999) (noting a potential correlation between the determinacy of legal rules applied by judges and the willingness of the bar to respect ethical obligations).

58. See Elliott, *supra* note 29, at 317-18; Miller, *supra* note 29, at 19; Peckham, *supra* note 46, at 772.

59. See Elliott, *supra* note 29, at 328 ("[T]he admission that there are costs to managerial judging in terms of real or perceived procedural unfairness should not by itself be dispositive. The proper issue is whether the benefits of managerial judging in enhancing substantive justice exceed its costs.").



described by Fuller in the 1950s remains a useful lens through which to evaluate contemporary controversies. Indeed, our best hope of understanding—and ultimately resolving—doctrinal debates over managerial judging lies in a traditional model of judging that has lurked in the background of these debates, but has rarely been invoked explicitly.

When we look beyond the criticisms that have been leveled against judicial case management and ask what it is that the critics affirmatively embrace, we find a core commitment to the traditional judicial role that prevailed in this country before the evolution of modern pretrial practice. It is not that managerial judging's critics want us to return to a bygone era. The judicial role has evolved along with litigation itself and it would be foolish to embrace a static conception of judging at a time when litigation is changing. But critics do advocate a degree of fidelity to tradition that is generally lacking in the federal bench. Critics of managerial judging would allow judges to update their traditional role to cope with new circumstances, but not to ignore or abandon that traditional role completely.<sup>60</sup> These critics may not say so, but what they really are advocating is fidelity to tradition.

One need only glance at the range of activities that judges undertake in pretrial practice to see that the debate over managerial judging is at its core a debate about fidelity to tradition. Judges have developed a host of management tools to cope with overcrowded dockets and overzealous litigants, not all of which depart equally from the traditional judicial role and not all of which spark the same level of controversy.<sup>61</sup> The most controversial of all judicial management tools—the judicial settlement conference—is the one that strays furthest from the judiciary's traditional adjudicative role. When a judge calls parties into his or her chambers to urge a settlement, his or her actions bear almost no resemblance to the traditional judicial role.<sup>62</sup> Parties do not file motions to trigger, or prevent, judicial intervention.<sup>63</sup> There are no legal standards to govern judicial

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60. Cf. KRONMAN, *supra* note 6, at 325 (agreeing with Judith Resnik, Owen Fiss, and Joseph Vining that “the bureaucratization of the judiciary and the rise of the managerial judge are developments that threaten to transform the activity of judging in essential ways,” but emphasizing that the “most disturbing consequence” of this departure from tradition lies in “the stifling of deliberative imagination on which the work of judging centrally depends”).

61. See Elliott, *supra* note 29, at 311; Resnik, *Managerial Judges*, *supra* note 17, at 391. *But cf.* Yeazell, *supra* note 19, at 673-74 (“Seen from a more distant historical perspective, virtually all of modern litigation is more ‘managerial’ than was litigation in earlier periods.”).

62. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 940-41 (1996); Molot, *Changes*, *supra* note 23, at 1003-04.

63. See Yeazell, *supra* note 19, at 657 (“This [settlement negotiation] stage differs from discovery and joinder motions because it is controlled by the judge rather than the parties; parties can suggest that settlement would be useful, but the judge has almost unbounded discretion to conduct such proceedings whether or not the parties think it useful.”).

conduct in settlement negotiations.<sup>64</sup> And there generally is no appellate review either of the judge's tactics or of the judge's views regarding the merits of the case.<sup>65</sup> Judges who actively promote settlements thus play a role very different from the one judges historically performed; they refuse to sit back and wait for the parties to frame disputes or to be bound by conventional legal doctrine.<sup>66</sup> Although critics of managerial judging do not often invoke tradition directly as their basis for attacking the settlement conference (and do not cite Lon Fuller to support their arguments) contemporary critics nonetheless have taken aim at judicial settlement efforts as among the worst offenders in the arsenal of tools judges employ to manage their dockets.<sup>67</sup>

The summary judgment mechanism, in contrast, represents a judicial response to the problems of contemporary litigation that strays very little, if at all, from the traditional judicial role and accordingly triggers less controversy.<sup>68</sup> By forcing parties to focus on the merits of their positions, and by educating parties regarding a suit's likely value, summary judgment opinions can serve some of the same purposes as the settlement conference. Indeed, even in the course of explaining why a trial is necessary, a decision denying summary judgment (or granting partial summary judgment) can put nonissues to one side and induce the parties to address only those aspects of the case that present a genuine issue of material fact. But if the summary judgment mechanism serves some of the same purposes as the settlement conference, it represents much less of a departure from the judiciary's core adjudicative role. In the summary judgment context, judges generally rely on the parties to file summary judgment motions and look to

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64. See *id.* at 657; see also *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) (noting the "inherent authority" of district courts to promote settlement).

65. See Resnik, *Managerial Judges*, *supra* note 17, at 411; Yeazell, *supra* note 19, at 656-57.

66. See Resnik, *Managerial Judges*, *supra* note 17, at 407 (contrasting informality of judicial conduct pretrial with formality of judicial conduct at trial).

67. See Hensler, *supra* note 6, at 90; Resnik, *Managerial Judges*, *supra* note 17, at 425-26; Yeazell, *supra* note 19, at 657 n.90 (noting this debate over judicial settlement efforts); cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis."); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) (arguing that although settlements can fulfill values such as "openness, legal justice, and the creation of public goods," they can do so "only if they are crafted with this end in mind—and only if we are prepared to oppose settlements that defeat these values"); Simon, *supra* note 28, at 47 ("In the vast majority of cases which are settled, there is not even a pretense that the result has been determined by the application of a system of substantive rules to given factual premises.").

68. See Elliott, *supra* note 29, at 311 ("A judge who narrows the issues in a case by granting a motion to dismiss or for partial summary judgment must act according to law and provide a reasoned justification, subject to appellate review."); cf. Resnik, *Managerial Judges*, *supra* note 17, at 391-93 (distinguishing between judicial rulings on legal motions and managerial decisions that are inherently discretionary).

a governing body of substantive law in ruling on these motions.<sup>69</sup> Not surprisingly, the controversy that surrounds judicial use of the summary judgment mechanism is more tepid than that surrounding the settlement conference. Scholars disagree over how frequently it should be employed and over the precise standards that should govern it, but no one questions that summary judgment is an important part of contemporary pretrial practice.<sup>70</sup>

Once we see what critics of managerial judging really mean to advance—a return to a more traditional judicial role—we also can better evaluate the responses of those who defend managerial judging. When they attempt to justify judicial departures from the traditional judicial role, managerial judging's advocates really are saying that it would be too costly to confine judges in a new litigation era to their old manner of doing things. If educating parties on the merits through summary judgment opinions, rather than settlement conferences, would go a long way toward keeping judges within the bounds of their traditional role, such a shift also would impose greater burdens on judicial and litigant resources. A judge may have to devote a great deal of time to learn enough about a case to set forth his or her views in a formal summary judgment opinion that hones issues for trial and advises parties on the strengths of their positions. Less preparation may be required if a judge decides instead to convey his or her general impressions of a case in informal meetings in chambers.<sup>71</sup> The summary judgment mechanism also requires significant time and expense on the part of litigants, who are responsible for educating judges on the merits of their positions. Moreover, the summary judgment mechanism may not only require a greater investment of resources than the settlement conference, but also offer a more modest return on that investment. Whereas successful efforts on the part of a judge to settle a case will dispose of the case entirely, a successful summary judgment opinion may only narrow the issues in dispute and hone those issues for further litigation or a subsequent settlement. The summary judgment mechanism is capable of terminating only the meritless case. In the vast majority of cases where some factual

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69. See Molot, *Changes*, *supra* note 23, at 1004; cf. Elliott, *supra* note 29, at 317 (noting that “when judges make legal decisions, the parties have an opportunity to marshal arguments based on an established body of principles” (emphasis omitted)).

70. Compare, e.g., Molot, *Changes*, *supra* note 23, at 1030-33 (advocating greater emphasis on summary judgment), with Issacharoff & Loewenstein, *supra* note 49, at 93 (raising questions about the fairness of aggressive use of summary judgment), and Weinstein, *supra* note 29, at 1914 (“The Supreme Court’s recent trilogy of cases interpreting Rule 56 undoubtedly will add to the difficulties plaintiffs face in getting to trial.” (citation omitted)).

71. See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 634 (1994). But see Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 649, 651 (1994) (conceding that “most federal judges favor and actively promote settlement” but arguing that “settling cases is generally at least as hard, if not harder, work for judges than trying cases”).

dispute remains, the summary judgment mechanism is significantly less valuable. When one takes into account that the problem of limited resources is precisely what drives managerial judging today and makes the problem of managerial judging so vexing,<sup>72</sup> the summary judgment mechanism becomes substantially less appealing.

This tradeoff between tradition and efficiency pervades the judicial role not only in summary judgment and settlement promotion, but also in the discovery process.<sup>73</sup> In discovery, judicial actions sometimes are quite formal, as when judges rule on discovery motions after an exchange of briefs based on established legal standards. Sometimes, however, judges act on their own initiative and exercise broad discretion. When judges proceed formally, they hew more closely to the traditional role that Fuller described, but their intervention may be more costly. When judges proceed informally, they may stray more significantly from their traditional role, but they may at the same time gain some flexibility to respond expeditiously to the dynamics of the case before them. Just as the summary judgment mechanism and the settlement conference pit tradition against expediency, so too do the discovery management tools that lie between these formal and informal extremes.

In sum, the debate over judicial case management today boils down to a debate over the value of an old judicial role that has been largely forgotten. We will never be able to decide whether managerial judging's detractors or defenders are right, or where the truth lies in between, if we do not first revisit the judiciary's traditional role and examine its origins and importance. We cannot simply adhere to tradition for tradition's sake, given the resource problems that fidelity to tradition would create. Nor, on the other hand, can we dismiss a traditional judicial role that prevailed for centuries without first examining why judges played the role they did for so long and whether that role is flexible enough to accommodate changing circumstances. If we want to make true progress toward resolving the controversies that surround the judicial role in pretrial practice today, we must reexamine its roots.

## B. *The Judicial Role in Class Action Litigation*

In class action practice as well, the solution to contemporary problems may ultimately lie in our reexamination of an old judicial role. Although the issues at stake in contemporary class action litigation appear quite different

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72. See *supra* notes 32-39 and accompanying text.

73. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 632 (1998) (noting the "patchwork reforms of discovery that inexorably draw the judge deeper into the investigatory process" and take us further away from the traditional adversarial model).

at first glance from those that arise in pretrial practice, upon closer analysis both contexts require us to decide on the value and vitality of a traditional judicial role that has been largely forgotten by contemporary scholars.

In class action practice it is agency problems, rather than partisanship problems, that have driven most departures from the traditional judicial role.<sup>74</sup> Although the class action mechanism may in some instances aggravate partisanship problems by giving plaintiffs' attorneys additional leverage over defendants,<sup>75</sup> more often the problem is that these attorneys are not zealous enough on behalf of their clients.<sup>76</sup>

When Lon Fuller referred to adjudication's reliance on the "affected party" to frame issues, he drew no distinction between the "affected party" and his or her attorney.<sup>77</sup> Fuller assumed, as courts long have assumed, that a judge need not look behind an attorney's statements to discern what is in the client's best interests.<sup>78</sup> In the class action context, however, the judge *is*

74. For an argument that agency costs are in large part responsible for judicial management of pretrial proceedings as well, see Elliott, *supra* note 29, at 330 (noting that "many lawyers spend too much of their time and their clients' money in pretrial discovery").

75. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1297 (2002); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 521 (1997) ("Class certification in a mass tort case confers extraordinary negotiating power even where the underlying claim is meritless."); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 2 (2001) (noting the problem of "windfall settlements" for asbestos "claimants who are at best mildly impaired," which "reduce the amount of funds available to pay the claims of those who are truly sick or who may become truly sick"); see also Hay & Rosenberg, *supra* note 4, at 1402-07 (exploring the problem of "blackmail" settlements).

76. See Coffee, *Class Action Accountability*, *supra* note 7, at 371; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346 (1995) [hereinafter Coffee, *Class Wars*]; Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 811-13 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1111 (1996); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3, 7-8 (1991); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1149 n.1 (1998). Hay and Rosenberg refer to instances in which the defendant gets off too easily as the problem of "sweetheart" settlements. See Hay & Rosenberg, *supra* note 4, at 1394-402; see also Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 137, 138 (noting instances in which defendants pay "too much" or "too little" in settlements).

77. See Fuller, *supra* note 1, at 364.

78. See, e.g., Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" (citation omitted)); Nagareda, *supra* note 7, at 930. *But cf.* Macey & Miller, *supra* note 76, at 14 (noting that even in "the traditional lawsuit, monitoring the lawyer is likely to be costly and therefore incomplete" because "much of the lawyer's work is performed outside of the client's supervision").

largely responsible for monitoring the attorney-client relationship.<sup>79</sup> In each case, the judge must ask whether a class representative and his or her attorney will adequately represent the interests of absent class members.<sup>80</sup> Where judges once could sit back and rely on affected parties to frame the issues in dispute—ordinarily through their lawyers—there is now the very real possibility that class lawyers will not adequately represent the interests of their clients.<sup>81</sup>

In some instances, judges have been able to rise to this challenge, and to monitor the principal-agent relationship between class members and class attorneys, without straying very far from their traditional manner of doing things.<sup>82</sup> Consider, for example, the certification decision in an antitrust or securities-fraud action that aggregates large numbers of small claims that otherwise would not be viable as individual lawsuits. In these sorts of “small-claim” cases,<sup>83</sup> judges generally can rely on *defendants* to oppose class certification and, in so doing, to raise questions regarding the class attorney’s and named plaintiff’s ability to represent absent plaintiffs.<sup>84</sup> Defendants may have selfish reasons for arguing that a class action would not adequately represent the interests of these absent class members—namely, a desire to eliminate claims that would not be viable individually—but their input on behalf of absent class members nonetheless relieves judges of having to frame arguments themselves on behalf of those

79. See Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 655 (2002); Issacharoff, *supra* note 76, at 805; Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 781 (1998); Koniak & Cohen, *supra* note 76, at 1104-05; cf. Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1188 (1995) [hereinafter Menkel-Meadow, *Settlement of Mass Torts*] (observing that professional responsibility rules “do not really contemplate either the kind of lawyer-client relations that exist in the settlement of mass torts or the kinds of tasks and activities engaged in by the legal actors in these situations”); Nagareda, *supra* note 4, at 771-72 (noting the “hypothetical nature” of “delegation” to “class counsel”). Scholars have sometimes characterized the judge’s role as that of an agent for class members, and have noted the judiciary’s shortcomings in performing this function. See Fisch, *supra*, at 690; Koniak & Cohen, *supra* note 76, at 1122-28.

80. John Coffee has explored the way in which different theories of representation may bear upon this inquiry. See Coffee, *Class Action Accountability*, *supra* note 7, at 384-85.

81. For discussions of a RAND study concluding that the relative success of the class action mechanism (in terms of social costs and benefits) turns on what judges do to prevent attorney self-dealing, see Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 205-06 (2001); and Hensler & Rowe, *supra* note 76, at 149.

82. As Robert Bone has pointed out, “[I]t was not an axiom of Fuller’s theory that the judge should remain simply a passive umpire, a view that the dispute resolution model assumes and that most people attribute to Fuller.” Bone, *supra* note 17, at 1309.

83. They may also be referred to as “negative value” suits, because if each claim were filed individually, the costs of litigation would exceed the value of the claims. For literature distinguishing “small-” from “large-claim” class actions, see Coffee, *Class Wars*, *supra* note 76, at 1351-53; Nagareda, *supra* note 4, at 749-50; David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923-24, 926-27 (1998).

84. See Coffee, *Class Wars*, *supra* note 76, at 1352.

absent parties. Indeed, judges can rely on defendants in small-claim suits not only to argue against class certification, but also to argue that even if certification is appropriate, the plaintiffs' attorney at least should be required to give class members notice of the suit and the right to opt out. In deciding whether to certify an action as a Rule 23(b)(3) damages class action (which requires such notice and the right to opt out) or as a 23(b)(1) or (b)(2) action (which does not so require) the judge can look to the defendant to advance arguments on behalf of the absent class members. Although the defendant may once again do so for selfish reasons—such as making the class smaller and making the plaintiffs' attorney bear the time and expense of identifying and notifying class members<sup>85</sup>—the defendant's efforts nonetheless help to maintain the judiciary's traditional adjudicative role.

Moreover, perhaps because the class-certification inquiry in small-claim cases has been characterized by a traditional adversarial process, a relatively well-developed body of law has emerged to assist judges in evaluating competing arguments on certification. Judges can evaluate arguments using a set of tangible legal criteria, which include such considerations as numerosity, commonality, typicality, and adequacy of representation.<sup>86</sup> Judges also can look to an evolving body of case law distinguishing among types of classes and indicating when class members must receive notice and the right to opt out. In short, judges deciding whether to certify small-claim class actions perform a function very much in keeping with their traditional role. They rely on parties to frame disputes and look to an identifiable body of governing law in resolving those disputes. Not surprisingly, the judicial role in this aspect of class action practice triggers little controversy today.<sup>87</sup>

This stands in marked contrast to the judicial role reviewing class settlements,<sup>88</sup> particularly settlement class actions in the mass tort context.<sup>89</sup>

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85. *See id.*

86. *See* FED. R. CIV. P. 23(a).

87. *But see* Bone & Evans, *supra* note 75, at 1251-52 (advocating change in certification procedures that would permit judges to consider the merits of suits in deciding whether to certify classes for litigation). In claiming that judges deciding whether to certify small-claim class actions perform a function very much in keeping with their traditional role, I do not mean to ignore other judicial functions in small-claim cases that may depart in important respects from the traditional judicial role. *See, e.g.*, Fisch, *supra* note 79, at 692 ("In conducting a lead counsel auction, the court may . . . bias itself with respect to the future course of the litigation.").

88. Judges can have difficulty reviewing settlements of all kinds of class actions, including settlements that do not involve an exchange of money. *See, e.g.*, Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, LAW & CONTEMP. PROBS., Autumn 1989, at 97, 119-24.

89. Professor Geoffrey Hazard defines a settlement class suit as "a proceeding brought after negotiations between plaintiffs' representatives and the defense have concluded, in which the purpose and effect of the suit is not litigation but a binding, judicially approved contract that will govern all future cases." Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1258 (1995). Some mass tort suits are certified as a class for litigation, and only settle later

Where each individual class member's claim is large enough to proceed independently—which often is the case in mass tort suits—a class action may be the best way for a defendant to minimize its exposure to liability from a multitude of potential claimants.<sup>90</sup> Rather than oppose class certification, defendants may therefore choose to work together with plaintiffs' attorneys to certify and settle a class action right at the outset. Indeed, defendants may even go so far as to instigate such actions by seeking out plaintiffs' attorneys who are willing to settle for a palatable amount, sometimes conducting informal auctions among plaintiffs' attorneys who have inventories of individual suits against them to see which attorney will settle claims on a class basis most cheaply.<sup>91</sup> Defendants may offer class attorneys a premium in legal fees in exchange for a cheap resolution of the claims of absent class members<sup>92</sup> and may distinguish between present claimants, who are in a position to object to low settlements, and future claimants, who have been exposed to toxic substances but have not yet suffered injury and therefore are unlikely to voice any objection to a low settlement.<sup>93</sup>

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on in the proceedings. See Monaghan, *supra* note 76, at 1165 n.73 (noting important differences between the settlement-only class actions and those certified for litigation which later settle, and arguing that “[c]lasses certified for settlement only in the mass and toxic tort context place an intolerable strain upon existing conceptions of judicial power”). Still other mass tort suits proceed with some aggregation, but without ever being certified as a class under Rule 23. These suits present problems as well. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 893 (2001); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 300-02 (1996); see also Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1465 (1998) (distinguishing between “consensual” and “nonconsensual” groupings of plaintiffs).

90. See Coffee, *Class Wars*, *supra* note 76, at 1349-50; John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851-52 (1995); Deborah Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1050 (1993); Issacharoff, *supra* note 7, at 345; Monaghan, *supra* note 76, at 1155-56.

91. See Coffee, *Class Wars*, *supra* note 76, at 1350, 1354, 1372-73; Issacharoff, *supra* note 76, at 813; John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995); Monaghan, *supra* note 76, at 1155-56.

92. See Coffee, *Class Wars*, *supra* note 76, at 1367-84. Such a payment to the plaintiffs' firm may escape the attention of the court where the plaintiffs' firm has a large inventory of individual suits. A defendant may compensate a plaintiffs' firm for agreeing to a cheap settlement of the class action in exchange for an attractive settlement of the firm's inventory of individual cases. See *id.* at 1373-75, 1388-99, 1442-43; Issacharoff, *supra* note 76, at 832; Nagareda, *supra* note 4, at 780; Nagareda, *supra* note 7, at 933.

93. See Coffee, *Class Action Accountability*, *supra* note 7, at 387; Coffee, *Class Wars*, *supra* note 76, at 1350; Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1910-11 (2002); Issacharoff, *supra* note 76, at 814; see also Coffee, *Class Wars*, *supra* note 76, at 1353 (“Clearly, the most vulnerable, and least protected litigant in mass tort litigation is the future claimant.”). But see Silver & Baker, *supra* note 89, at 1535 (demonstrating that plaintiffs' attorneys, at least, “have little incentive to apportion an aggregate



When judges review proposed class settlements in these mass tort cases under the Federal Rules of Civil Procedure,<sup>94</sup> they perform a function dramatically different from the traditional adjudicative role Fuller described.<sup>95</sup> Instead of evaluating arguments advanced by the litigants, judges often must frame arguments themselves,<sup>96</sup> as plaintiffs' attorneys (who stand to receive large fees)<sup>97</sup> and defendants (who stand to achieve "global peace")<sup>98</sup> have little incentive to argue on behalf of absent class members whose rights might be undermined by a proposed settlement.<sup>99</sup>

settlement in order to benefit some group members by providing others less than the expected net values of their claims in individual litigation").

94. Federal Rule of Civil Procedure 23(e) provides that a "class action shall not be dismissed or compromised without the approval of the court." FED. R. CIV. P. 23(e).

95. See Coffee, *Class Wars*, *supra* note 76, at 1348 (observing that "courts have little ability or incentive to resist the settlements that the parties in class action litigation reach"); *id.* at 1421 ("[T]he traditional levers used by courts to align the interests of plaintiffs' attorneys and class members work poorly in the mass tort context."); Fisch, *supra* note 79, at 656 ("There are reasons to question the judge's ability to act effectively as agent for the class."); Hensler & Peterson, *supra* note 90, at 963 (noting the "lack of fit between traditional civil procedure, with its reliance on individualized case treatment, and the demands imposed on courts by massive numbers of claims which, in practice, cannot be treated individually"); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 529 (1998) ("[T]he modern mass tort looks little like a contest between two litigants before a jury of peers. Rather, it is a complex social and economic problem and the numbers of players often defy court rules, not to mention courtroom architecture.").

96. See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999) ("In the world of mass tort litigation, at least, we have sneaked away from the traditional U.S. adversarial model of justice, and towards the inquisitorial model common in the civil law countries of continental Europe and, to a lesser extent, Latin America." (citations omitted)); Koniak & Cohen, *supra* note 76, at 1105 ("A recent empirical study by the Federal Judicial Center of class actions in four federal district courts found that 42% to 64% of the fairness hearings were concluded without any presentation of objections to the proposed settlement by 'class members and other objectors.'" (quoting Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 140 (1996))); Macey & Miller, *supra* note 76, at 46 (observing that "settlement hearings are typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel"); Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 635 (2003) ("Lacking fully effective assistance from others, the judge has no alternative but to investigate the settlement herself.").

97. See Coffee, *Class Action Accountability*, *supra* note 7, at 371-72, 388-89; Coffee, *Class Wars*, *supra* note 76, at 1347; Issacharoff, *supra* note 76, at 813; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1153 (1995); Koniak & Cohen, *supra* note 76, at 1111-12; Nagareda, *supra* note 4, at 780; Rubenstein, *supra* note 5, at 380. For a discussion of agency costs in class actions, see generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883-89 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*]; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; and Macey & Miller, *supra* note 76, at 19-27.

98. See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION* 163 (2002); Coffee, *Class Wars*, *supra* note 76, at 1450.

99. For a broader argument that repeat players may do better than nonrepeat players not just in class settlements, but in litigation and alternative dispute resolution generally, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*,

Objectors—either rival plaintiffs’ attorneys or class members themselves—may sometimes alleviate this problem by raising questions about the adequacy of proposed settlements.<sup>100</sup> But potential objectors are “hampered by inadequate incentives to come forward, lack of information about the merits of a settlement, time constraints and an inability to conduct discovery, and a dynamic favoring approval of settlement once notice has gone out and a final fairness hearing has been scheduled.”<sup>101</sup>

Moreover, when judges review class settlements in mass tort suits, they lack not only the litigant input to which they are accustomed, but also the legal criteria. Once judges get into the business of second-guessing the parties before them and trying to evaluate and weigh a variety of interests beyond those immediately present in court, they have very little law to guide them.<sup>102</sup> Although objectors sometimes speak up against proposed settlements,<sup>103</sup> and in some cases judges may reject settlements despite overwhelming pressure to approve them,<sup>104</sup> these instances are too few and

9 LAW & SOC’Y REV. 95, 107-09 (1974). See also Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 38-57 (1999) (exploring how Galanter’s hypothesis for litigation bears upon ADR).

100. See Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 244 (“Class objectors to the settlement, if there are any, may also provide information bearing on the fairness of the settlement.”); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 186 n.155 (2003) (describing the right of objectors to intervene in fairness hearings under *Devlin v. Scardeletti*, 536 U.S. 1 (2002)).

101. Kahan & Silberman, *supra* note 100, at 244; see also Miller, *supra* note 96, at 635-36.

102. Courts have applied a “fair, adequate, and reasonable” standard which may entail consideration of a number of factors, including

(1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members.

*Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. Unit A 1982) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978)); see also *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 316-24 (3d Cir. 1998); *Malchman v. Davis*, 761 F.2d 893, 900-04 (2d Cir. 1984), *overruled on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179 (5th Cir. 1979); *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); *Hazard*, *supra* note 89, at 1259-68; *Miller*, *supra* note 96, at 635-36; *Nagareda*, *supra* note 7, at 930.

103. See *Koniak & Cohen*, *supra* note 76, at 1105; *Willging et al.*, *supra* note 96, at 140.

104. Even where judges are able to ascertain the interests of absent class members—either because someone objects to certification or settlement on behalf of those class members, or because judges themselves can identify conflicts of interest between the class attorneys and a subset of class members—judges are relatively poorly equipped to evaluate proposed settlements because of the very strong incentives they have to favor certification and settlement of large-claim actions. Unlike the aggregation of small claims that are not viable as individual suits, the aggregation of large claims tends to conserve judicial resources. Rather than having to preside over a multitude of individual lawsuits, a judge who certifies a large-claim class action will face just one, and thereby free up judicial resources for other cases on already crowded court dockets.

far between to have yet developed a body of law on class settlements that compares to the body of law that has evolved on class certification.<sup>105</sup> Perhaps the necessary legal doctrine will develop over time, just as the law governing class certification evolved, but in the meantime judges must proceed with little meaningful legal guidance.

Recognizing that judges are ill-suited to look out for the interests of absent class members when none of the major players in the litigation process is willing to assist them in this endeavor—and when judges themselves have strong incentives to approve settlements and clear dockets<sup>106</sup>—scholars have advanced a variety of proposals to alleviate the problem.<sup>107</sup> Some scholars emphasize the need to improve representation for absent class members. They would revise fee structures to align better

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Furthermore, where defendants and class attorneys agree not only to certify a large-claim action but also to settle it at the outset, so much the better. A single settlement class action may in one fell swoop eliminate hundreds or thousands of potential cases. The judge need only approve the settlement under Rule 23(e)—something that both sides favor—and his or her work will be done.

105. See Issacharoff, *supra* note 7, at 352-55 (noting that the certification criteria in Rule 23(a) are not all that helpful when it comes to evaluating the adequacy of representation in mass tort settlements like those reviewed in *Amchem*, 521 U.S. 591, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)); Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 79, at 1164-65 (noting that “[o]ur laws . . . are remarkably silent” regarding both the procedural and substantive fairness of mass tort settlements); Miller, *supra* note 96, at 637 (noting “sanguine fantasies that ‘well-developed’ caselaw can ensure accurate fees”); Miller & Singer, *supra* note 88, at 124 (highlighting the need for a better defined standard for judges reviewing non-pecuniary settlements). The Supreme Court’s recent decisions in *Amchem* and *Ortiz* reveal a tendency among courts to shift the emphasis from settlement under Rule 23(e) to certification under Rule 23(a). *Ortiz*, 527 U.S. at 856; *Amchem*, 521 U.S. at 622-27; see also Nagareda, *supra* note 4, at 782. *Amchem* and *Ortiz* instruct judges who face settlement class actions to focus on the certification process as the best way to protect absent class members. The cases suggest that, where different categories of plaintiffs—such as present and future claimants—have conflicting interests, judges should create different subclasses with separate representation. What a judge is supposed to do when separate representatives for separate subclasses agree to a class settlement remains unclear. See Macey & Miller, *supra* note 76, at 4 (criticizing the lack of administrative standards governing judicial review of settlements); Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 79, at 1218 (arguing that we should “shift some of the present scrutiny of . . . ‘process’ issues to greater scrutiny of the outcomes of settlements”); Nagareda, *supra* note 4, at 784 (arguing that “the fundamental flaw in the Court’s current approach” is “its strict separation of class certification procedure from class settlement structure”).

106. See Coffee, *Class Action Accountability*, *supra* note 7, at 413, 415; Coffee, *Class Wars*, *supra* note 76, at 1350, 1445; Fisch, *supra* note 79, at 656; Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1602 (1995); Issacharoff, *supra* note 76, at 808, 829; Koniak & Cohen, *supra* note 76, at 1105; Macey & Miller, *supra* note 76, at 45. For a debate over the existence of judicial incentives to promote settlement, compare Macey, *supra* note 71, at 634, with Alexander, *supra* note 71, at 650-51.

107. Menkel-Meadow has discussed the wide variance among judges in their approaches to class settlements. See Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 79, at 1183 (“They must decide whether to take an activist role such as Judges Jack B. Weinstein (E.D.N.Y.[.]), Robert R. Merhige (E.D. Va.), S. Arthur Spiegel (N.D. Ohio), Charles Weiner (E.D. Pa.), Samuel C. Pointer (D. Alabama), Robert Parker (E.D. Texas), Thomas Lambros (N.D. Ohio), Richard Ensalen (W.D. Mich.), and others who actively engage in the settlement or case management process, or whether to remain more passive and disinterested from the settlement.”).

the interests of attorneys and class members,<sup>108</sup> appoint guardians ad litem to second-guess class attorneys and protect class members in the settlement process,<sup>109</sup> or assign different attorneys to represent different subclasses where plaintiffs have conflicting interests.<sup>110</sup> Other scholars would rely less on attorney representation<sup>111</sup> and more on empowering class members to protect themselves.<sup>112</sup> Their proposals would give absent class members

108. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 97, at 690-92; Hay & Rosenberg, *supra* note 4, at 1395-98; Issacharoff, *supra* note 76, at 828; Issacharoff, *supra* note 7, at 387; John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 473-74 (1981). Although "the court's primary regulatory tool in the class action context has been its ability to adjust its fee award to reflect the plaintiffs' attorney's success (or lack thereof)," Professor Coffee points out that "in the mass tort context, the popularity of inventory settlements [which accompany class settlements] undercuts this judicial lever and permits . . . side payments." Coffee, *Class Wars*, *supra* note 76, at 1421. For this reason, Professor Coffee would disqualify lead counsel who had engaged in an inventory settlement with the defendants. See *id.* at 1445-46.

A more unorthodox approach, advanced by Jonathan Macey and Geoffrey Miller, would give attorneys the right to buy out their clients. See Macey & Miller, *supra* note 76, at 6; see also Jonathan R. Macey & Geoffrey P. Miller, *A Market Approach to Tort Reform via Rule 23*, 80 CORNELL L. REV. 909, 915 (1995) (suggesting that their approach would work for mass tort suits). For descriptions and critiques of proposals for judicially administered auctions among plaintiffs' attorneys for the lead counsel spot, see Fisch, *supra* note 79; and Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423 (1993). See also Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 NW. U. L. REV. 458 (1993) (responding to Thomas and Hansen).

109. See Koniak, *supra* note 97, at 1092 & n.216 (proposing the use of a guardian ad litem to protect class members against class attorney collusion with the defendant); Macey & Miller, *supra* note 76, at 4, 6 (embracing the use of a guardian ad litem, among other proposals, but also suggesting a more unorthodox auction among those vying to be class counsel).

110. In the recent cases of *Amchem* and *Ortiz*, the Supreme Court embraced separate representation for subclasses of plaintiffs with different interests, such as present and future claimants. See *Ortiz*, 527 U.S. at 856 (noting that "class settlements must provide 'structural assurance of fair and adequate representation for the diverse groups and individuals affected'" (quoting *Amchem*, 521 U.S. at 627)); see also Coffee, *Class Action Accountability*, *supra* note 7, at 393-94 ("[T]he strong implication of *Amchem* was that allocations have to be bargained out among subclasses."); *id.* at 394 ("*Ortiz* is far clearer than *Amchem* that subclassing must be accompanied by separate representation."); Coffee, *Class Wars*, *supra* note 76, at 1445 (advocating "subclasses with separate representation for present and future claimants"); Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1940 (2002) ("*Amchem* and *Ortiz* are best understood as a doctrinal repudiation of use of the class action device to achieve closure under circumstances in which current claimants stood to gain at the expense of the inevitably remote future claimants and where there were insufficient guarantees that the interests of the latter would be fully protected.").

Fee arrangements and subclassing are not mutually exclusive alternatives. John Coffee has pointed out that to promote attorney loyalty, "the attorney for the subclass should be compensated based on the recovery to the subclass—not based on the recovery to the class as a whole." Coffee, *Class Action Accountability*, *supra* note 7, at 405.

111. See, e.g., Coffee, *Class Action Accountability*, *supra* note 7, at 397 ("Not only is multiple counsel costly, its imposition still does not assure adequate representation. . . . [T]he counsel in these actions may simply decide to organize and subdivide the class action among themselves."); *id.* at 378 ("Because some low-level, less visible conflicts will necessarily escape judicial detection, the loyalty of the agent to the principal can never be absolute.").

112. Professor Coffee points out that "existing law" affords not only absent class members, but even the class representative "very little, if any, real authority." *Id.* at 406-11 (discussing cases).

new powers to object or opt out at the settlement stage of a suit<sup>113</sup> or to challenge settlements collaterally,<sup>114</sup> would allow future claimants to opt out years after a settlement has been finalized when they begin to experience symptoms,<sup>115</sup> and would permit class members (via their own attorneys) not only to opt out themselves, but also to take other consenting class members with them to continue the action and pursue larger recoveries.<sup>116</sup> In addition to improving representation of, or participation by, class members, scholars also have sought to improve the class settlement process by better defining the substantive standards that govern judicial review.<sup>117</sup>

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113. See *id.* at 420 (proposing “an additional, delayed opt-out right that begins upon the approval of the settlement”); Nagareda, *supra* note 100, at 154-55 (emphasizing the importance of opt-out rights and offering a new principle to guide and explain decisions about when the right to opt out should be afforded). For an example of an alternative proposal that focuses on enhancing class members’ rights of participation, see Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 629 (1997).

114. See Monaghan, *supra* note 76, at 1173 (noting that jurisdiction “is not finally established until the [first forum] proceedings have been concluded in accordance with due process,” and arguing that “following standard preclusion law, the lack of in personam jurisdiction can be collaterally attacked by nonappearing class members”); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 394-96 (2000). *But see* Kahan & Silberman, *supra* note 79 (arguing for a limitation on federal collateral attacks of state court settlements involving federal claims); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167 (1998) (questioning Kahan and Silberman’s characterization of the state of the law, but largely agreeing with their arguments). Susan Koniak and George Cohen rely on subsequent litigation of a different kind to have the desired effect on class representation. They would permit, and indeed promote, later suits against class counsel as “necessary to deter class action misconduct.” Koniak & Cohen, *supra* note 76, at 1102.

115. See Coffee, *Class Action Accountability*, *supra* note 7, at 432-33; Coffee, *Class Wars*, *supra* note 76, at 1354, 1446-53. For discussions regarding the right to opt out more generally, see, for example, Issacharoff, *supra* note 76, at 833; Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1061 (2002); and Monaghan, *supra* note 76, at 1174.

Richard Nagareda has proposed a solution modeled after the fen-phen settlement, under which fen-phen users could choose between bringing individual claims and joining the class settlement either during an opt-out period following negotiation of the settlement, or, in the case of future claimants, much later upon diagnoses of an ailment. Nagareda, *supra* note 4, at 796-828. If class members chose to proceed in an individual suit, however, punitive damages would not be available. *Id.* at 805-22.

116. See Coffee, *Class Action Accountability*, *supra* note 7, at 423 (“The more modest and practical alternative would be for counsel to solicit dissatisfied class members to opt into a parallel class action filed by it, but consisting only of those class members who wish to opt out of the original class action.”); Miller, *supra* note 96, at 639 (proposing auction under which objectors could bid for the lead counsel position).

117. See, e.g., Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 79, at 1183 (noting that judges must decide if “settlements are fair” in “current seas of ambiguity” and advocating better-defined procedural and substantive standards). A proposed amendment to Federal Rule of Civil Procedure 23 would require that settlements be “fair, reasonable, and adequate,” codifying the language that courts have begun to use in carrying out their Rule 23(e) responsibilities. See *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), *overruled on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179 (5th Cir. 1979); *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); Nagareda, *supra* note 7, at

As in pretrial practice, there are costs and benefits to reform in general, and to each proposal in particular.<sup>118</sup> Proposals designed to improve attorney representation—whether through new fee structures, guardians ad litem, or subclassing—would impose significant burdens on players in the class action process and make the cheap, quick resolution of large-claim class actions less likely. These proposals—just like proposals to beef up the substantive standards governing judicial review of settlements—would effectively restrict plaintiffs’ attorneys and defendants from allocating settlement amounts among attorneys and different categories of class members as they deem fit, and in so doing would make quick settlements less likely.<sup>119</sup> Similar problems surround proposals designed to empower class members to protect themselves. If expanding and enhancing the right to opt out or to challenge class settlements collaterally would benefit some class members, it also would undermine the utility of settlements for defendants who seek “global peace,” thereby making settlement less likely.<sup>120</sup> Moreover, to the extent that opt-out proposals would make settlement less likely or permit some litigants to proceed individually, they would also impose significant burdens on already overcrowded court dockets.<sup>121</sup> Indeed, there is even the risk that reformers bent on protecting

930. This standard is sufficiently vague, however, that without further elaboration by courts, it will not alter the leeway that judges currently enjoy when they review proposed settlements.

118. See Coffee, *Class Action Accountability*, *supra* note 7, at 377-78 (“Sometimes, the optimal answer may be an enhanced right to ‘exit’ the class and pursue an individual action; other times, greater voice in the form of an expanded opportunity to participate in class decisionmaking or to select class counsel may be the superior remedy; across all contexts, some heightened duty of loyalty on the part of the agent to its principal is probably also needed. But the balance among these elements logically should depend on the costs of reform.”); Hensler, *supra* note 81, at 206 (noting that the tasks required of judges to protect against attorney self-dealing “require[] substantial resources that are often not available to judges”).

119. See Coffee, *Class Action Accountability*, *supra* note 7, at 398 (“[A] fragmented class might be unmanageable, certainly would reduce the economic incentives for legal entrepreneurs to act as private attorneys general, and could be extremely difficult to settle if each subclass (and its attorney) had an incentive to hold out for more.”); Issacharoff, *supra* note 7, at 369 (“Class actions depend on entrepreneurial lawyers not only for their leadership . . . but for their formation.”); *id.* at 380 (“In an extreme form, . . . *Amchem* would create a spiral of subclasses and sets of counsel that would not only swamp the incentives to invest in bringing a class action, but would impose tremendous transactional costs on an already vulnerable procedure that turned heavily on its ability to realize economies of scale.”); Nagareda, *supra* note 7, at 938 (noting the risk that fee limitations “may leave the plaintiff’s bar with insufficient incentives to undertake the time-consuming negotiations necessary to fashion a large-scale settlement”); Silver & Baker, *supra* note 89, at 1468 (“Our conclusion is that lawyers representing both consensual and nonconsensual litigation groups must be allowed to make inter-plaintiff tradeoffs in the course of litigation and should also be allowed to participate in the allocation process.”).

120. See Coffee, *Class Wars*, *supra* note 76, at 1450 (noting the “defendants’ fundamental objection” that “the value of the settlement to them is undercut if it does not ensure global peace”).

121. See TIDMARSH & TRANGSRUD, *supra* note 98, at 162; Coffee, *Class Action Accountability*, *supra* note 7, at 420. For a discussion of the burdens that mass tort suits place on courts, see Hensler & Peterson, *supra* note 90, at 961; Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463 (1991); and Nagareda, *supra* note 4, at 768.

the rights of absent class members might go so far as to make class actions too cumbersome for plaintiffs' attorneys to pursue effectively, thereby sabotaging the rights of the tort victims they hope to protect.<sup>122</sup>

In important respects, the contemporary controversy over mass tort settlements resembles the contemporary controversy in pretrial practice. Scholars have been able to identify the tradeoffs that surround judicial conduct, but, believing that we are in a new litigation age where traditional models do not apply, they have lacked the conceptual framework they need to weigh those tradeoffs or build a case for doctrinal reform.<sup>123</sup> When one considers the burdens that various reform proposals would impose upon powerful political forces—corporate defendants,<sup>124</sup> the plaintiffs' bar, and the federal judiciary<sup>125</sup>—this only heightens the need for a conceptual framework to explain why reform is needed.<sup>126</sup> Absent a strong, affirmative case that our system is broken, the chances of fixing it remain quite slim.

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122. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, LAW & CONTEMP. PROBS., Autumn 1997, at 167, 182 (noting that permitting competition among attorneys for control of an action "has the potential to undercut the incentive to commit resources [to] investigating possible corporate wrongdoing"); Issacharoff, *supra* note 7, at 378 ("Class actions may resemble corporations in that there is a separation between ownership and control, but the operational capital in a class action comes not from the owners, but from the managers. This in turn means that absent some presumptive return to counsel, such as the right to lead the class and profit from any successes the class may enjoy, there will be no investment in the development of the case."); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 395-96 (2000) (criticizing the Supreme Court's "reluctance" to embrace the mass tort action in *Amchem* and *Ortiz*).

As David Rosenberg has pointed out, by aggregating the claims of individual tort victims, the mass tort action helps to offset economic imbalances between defendants and plaintiffs that would otherwise undermine tort law's twin goals of deterrence and compensation. See Rosenberg, *supra*, at 394-96; see also Hay & Rosenberg, *supra* note 4, at 1379-81 (highlighting the virtues of class action mechanism for plaintiffs); Shapiro, *supra* note 83, at 928 ("[I]t is important to stress the considerations of efficiency that serve in the aggregate to offer a substantial promise of a better substantive outcome for a class member—and certainly for the average class member—than as a litigant in a series of individual actions.").

123. Reform is elusive not only because the various reform proposals can be costly, but also because their utility is often questionable. See, e.g., Issacharoff, *supra* note 7, at 367-68 (discussing the limited utility of the right to opt out in many contexts); *id.* at 373 (questioning the utility of "ex post individual challenges to a settlement"); *id.* at 375-79 (highlighting the shortcomings of proposals designed to promote attorney loyalty).

124. See Coffee, *Class Wars*, *supra* note 76, at 1346-47; *cf. id.* at 1463 (observing that "reformers are best advised to . . . place little hope in legislative reform" because in "any lobbying contest before the legislature, corporate defendants are far better positioned and equipped to do battle than are public interest representatives on behalf of inchoate future claimants").

125. See Resnik, *Trial as Error*, *supra* note 22, at 995 (describing the organization of the judiciary as a political entity that lobbies Congress); Resnik, *Uncle Sam*, *supra* note 47, at 657-58 (same); see also Resnik, *Changing Practices*, *supra* note 29, at 197 (noting that "procedural changes that augment trial court discretion in the service of ease and economy are hard to undo" (emphasis omitted)).

126. *Cf.* Rubenstein, *supra* note 5, at 424 ("Despite Resnik's warnings, the managerial judicial function seems only to have expanded in the succeeding years, rendering the hypothetical managerial examples she posed in 1982 tame in comparison to the real transactional examples available from the annals of the 1990s.").

The tendency among scholars to assume that traditional models of judging no longer apply, and to proceed without a conceptual framework, is even stronger in the class action context than in pretrial practice. After all, it was the evolution of group litigation that led scholars like Abram Chayes in the 1970s to conclude that the traditional judicial role described by Fuller two decades earlier was obsolete.<sup>127</sup> As noted at the outset, scholars have failed to distinguish between adjudication's "forms" and "limits," or to see that Fuller's description of the adjudicative process remains quite useful even as judges take on new responsibilities and preside over new types of lawsuits.<sup>128</sup>

When we examine the contemporary controversy in class action litigation using Fuller's model, we find that this controversy, just like the one that rages in pretrial practice, is at its core a disagreement over the value and vitality of the traditional adjudicative process and traditional judicial role. Scholars who seek to improve representation for—and participation by—absent class members are, in essence, seeking to make judicial review of class settlements look more like traditional adjudication. Instead of relying on judges to look out for the interests of absent class members, these scholars would like to see attorneys or class members themselves perform this function. Proposals designed to strengthen the substantive criteria that govern judicial review of class settlements likewise would make the class settlement process look more like traditional adjudication. Just as in pretrial practice, reformers seem to be promoting fidelity to tradition, even if they do not say so expressly.

Moreover, just as in pretrial practice, fidelity to tradition would be quite costly. Imposing additional procedural and substantive hurdles on the settlement process might give judges the litigant input and legal criteria to which they are accustomed, but it also would make settlement a less efficient alternative to trial. The same core dilemma thus underlies doctrinal debates in pretrial practice and class action litigation. Both contexts present the same fundamental tradeoff between tradition and efficiency. Both sets of controversies can be framed using the question I posed at the outset: How much should we devote in litigant and judicial resources to ensure that judges have the litigant input and legal criteria they need to perform their traditional adjudicative role?

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127. See sources cited *supra* note 18.

128. See *supra* notes 18-20 and accompanying text.



## II. THE VALUES THAT UNDERLIE THE TRADITIONAL JUDICIAL ROLE

When we reexamine a traditional judicial role that has been overlooked in contemporary scholarship, we find more than just tradition at stake. When judges play the role that Fuller described, and rely on parties to frame disputes and on law to inform judicial decisions, they perform a function that reflects their core institutional competence and their place in the constitutional structure.<sup>129</sup> Conversely, when judges stray from their traditional adjudicative role, they trigger questions regarding the effectiveness and legitimacy of their actions. This is not to say that judges are entirely incompetent to perform tasks beyond those envisioned by Fuller, or that strict adherence to Fuller's model is constitutionally required.<sup>130</sup> To the contrary, any decision regarding the appropriate course for judges in contemporary litigation must take into account *both* the institutional and constitutional values that underlie the traditional judicial role *and* the resource problems that have led judges to update that role. But once we consider the institutional and constitutional roots of the judicial role Fuller described, the case for reforming contemporary practice and requiring greater fidelity to tradition becomes stronger.<sup>131</sup>

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129. There is also the possibility that when judges play their traditional role by resolving party-framed disputes based on an identifiable body of law, they will better satisfy the preferences of disputants who "want neutral third parties to resolve their disputes *on the basis of the facts*." Hensler, *supra* note 6, at 95; *see also* Menkel-Meadow, *supra* note 95, at 522-23 ("I join Judge Weinstein in my belief, based on experience, that catharsis—an ability to tell one's story, to know that someone will hear it, to know that what one has suffered is meaningful, even though painful—is an important part of how we must deal with mass torts." (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61-66 (1988); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 9-11 (1995); and Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, *LAW & CONTEMP. PROBS.*, Autumn 1990, at 199, 203-04)).

130. As Robert Bone has demonstrated, scholars critical of Fuller's model have sometimes misrepresented his work, attributing to Fuller more severe limitations on adjudication than Fuller himself would have embraced. *See* Bone, *supra* note 17, at 1314-20.

131. In isolated instances, scholars of pretrial practice and class action litigation have raised questions about whether judges are institutionally competent to handle some of the new tasks they have been assigned. *See, e.g.,* Coffee, *Class Wars*, *supra* note 76, at 1422; Erichson, *supra* note 96, at 2011. Scholars ask, for example, whether judges actually do any good when they manage pretrial practice, *see, e.g.,* Resnik, *Managerial Judges*, *supra* note 17, at 417-33, and whether judges are capable of protecting the rights of class members in the class settlement process, *see, e.g.,* Coffee, *Class Wars*, *supra* note 76, at 1349 (seeking in the mass tort context to place "prudential limits on the problems that courts can competently handle"). Moreover, scholars sometimes reinforce these institutional criticisms of judicial behavior with constitutional ones. Critics of managerial judging, for example, have rallied against heavy-handed efforts to promote settlement not only because these efforts often lead to unfair settlements, but also because they tend to deprive litigants of due process and the right to a jury trial. *See, e.g.,* Resnik, *Managerial Judges*, *supra* note 17, at 430. In class action practice as well, a judge's willingness to approve class settlements may sometimes raise constitutional questions. In evaluating the interests of future claimants who have not yet suffered an injury—and who do not yet have a concrete "case" or "controversy"—judges may not only test the boundaries of their institutional competence, but

### A. *Institutional Underpinnings*

The dual characteristics of adjudication identified by Fuller are not just traditional, but also make institutional sense. The adjudicative process that Fuller described is a process that plays to the judiciary's institutional strengths.<sup>132</sup>

Take Fuller's observation that judges should rely on litigants to frame disputes. This traditional characteristic of adjudication is not arbitrary, but rather is largely a product of the judiciary's institutional competence. Judges are relatively poorly equipped to identify social problems or undertake their own factual investigations into those problems.<sup>133</sup> Unlike political officials, who engage in a continuous give-and-take with their constituents over which matters government should address, and who ordinarily have the authority and resources to conduct factual investigations on their own, courts generally rely on others to initiate cases and to build the factual records upon which those cases will be resolved.<sup>134</sup> Judges may

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also exceed the limits of their Article III power. See Coffee, *Class Wars*, *supra* note 76, at 1422-33. But see Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066, 1076-82 (1996). Such actions may also invade the due process rights of affected parties. See Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 472 (1997); Coffee, *Class Wars*, *supra* note 76, at 1451; cf. Issacharoff, *supra* note 7, at 352 ("The fundamental strength of *Amchem* and *Ortiz* inheres in the subtle revisitation of the law governing due process in the resolution of representative actions.").

To date, however, these arguments regarding the judiciary's institutional competence and constitutional authority have been limited to discrete doctrinal contexts. Scholars have not systematically examined the way in which the judiciary's traditional adjudicative role reflects its institutional competence and constitutional authority. Nor have they systematically explored the institutional and constitutional problems that arise when judges ignore their traditional role.

132. See Bone, *supra* note 17, at 1294 ("What was important [to Fuller] was that . . . choices be made through those institutions—for example, courts, legislatures, agencies, and markets—best designed to handle them.").

133. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38 (1968) ("The court, not being a representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution."); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551-55 (1988) (observing that "courts act on cases brought to them by litigants, and thus have a very limited control over their agenda"). For an argument linking this limitation on the judiciary's institutional competence to our common law—as opposed to civil law—tradition, see Erichson, *supra* note 96, at 2011-15.

134. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essential factual issues . . . those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on . . . an issue." (citations omitted)). Henry Monaghan has highlighted Congress's superiority over courts in this respect:

Congress has, for example, a special ability to develop and consider the factual basis of a problem. More importantly, it has the ability to make either rough or finely tuned distinctions, justified by practical considerations though perhaps not by principle, in a manner not generally thought open to a court. In addition, Congress has at its command a range of remedies exceeding those available to a court from which it can craft a

sometimes play an active role in the framing of disputes, for example, by employing special masters or experts,<sup>135</sup> but the judiciary's ability to do so is rather limited when compared to that of other public officials.<sup>136</sup> If we wanted to equip judges to play the active part in framing disputes that nonjudicial officers (and judges in civil law countries) traditionally play, we would have to make significant adjustments to our litigation system and our legal culture.<sup>137</sup>

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solution for a problem. These include wholesale suspension of offending state law, the formulation of rules to be enforced by courts, education programs, administrative schemes, and spending programs. In contrast, even taking into account the far-reaching changes resulting from modern class action practice, a court is limited in its capacity to affect the behavior of those not before it. And a common law court can seldom do more than announce a rule and create a sanction for its violation.

Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975) (citations omitted).

135. See, e.g., Erichson, *supra* note 96, at 1986-94 (describing how some judges have employed court-appointed experts in mass tort cases).

136. See Chayes, *supra* note 2, at 1308 (conceding that courts rely on parties for information); Shapiro, *supra* note 133, at 551-55 (observing that "courts are limited in their ability to investigate issues on the periphery of those brought to them by the litigants" and that "courts find it more difficult than do legislatures to experiment, to monitor the results, and to revise the experiment in the light of those results"); Bradford R. Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1987-88 (1984) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)). But see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170 (2001) (challenging the assumption "that as a matter of comparative institutional competence, the Court is better at sorting out the law and legislators are better equipped to get the facts right" and observing that "while Congress has superior factfinding capacities, it often lacks the institutional incentives to take factfinding seriously").

137. See Erichson, *supra* note 96, at 2011-15; Kakalik et al., *supra* note 73, at 632 ("Shifting the conduct of discovery to judges in the United States would require a radical rethinking of the virtues of the adversarial process."); see also Horowitz, *supra* note 2, at 1304 ("[D]espite the willingness of courts to innovate in handling [new] litigation, they are still very much courts, bound for the most part by a process devised for the adjudication of individual disputes and not especially apt for coping with large questions of policy and administration."); Tidmarsh, *supra* note 17, at 1722 (describing the argument that "procedural systems are a function of two independent variables: the nature of the authority exercised by the adjudicatory tribunal and the political objectives of the state" in MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986)).

Such a transformation of adjudication and the judicial role could be conceptualized as bridging several different divides: between law and equity, judicial and nonjudicial officers, and common law and civil law systems. For a discussion focusing on the first of these dichotomies—and of the problems associated with a shift from law to equity—see Subrin, *supra* note 17; and Yeazell, *supra* note 19. For a discussion of the role of administrative officials—including non-Article III administrative law judges—in informal adjudication, see Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976). For a comparativist perspective on the evolution of the judicial role, see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). Professor Langbein suggests that the adjustments required to bring American judges into line with civil law judges need not be so dramatic:

In principle, managerial judging is more compatible with the theory of German procedure than with our own. Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process. In the success of managerial judging, I see telling evidence

Likewise, Fuller's observation that judges should look to some governing body of law in resolving disputes also can be linked to the judiciary's comparative institutional competence. Whereas elected representatives may legitimately make normative choices and strike political compromises on behalf of their constituents—simply by virtue of the fact that they are elected by the people to reflect their views<sup>138</sup>—there is no comparable argument for vesting policymaking discretion with politically insulated judges.<sup>139</sup> Judges are on stronger footing when they purport to be interpreting and applying law—and thus exercising bounded

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for the proposition that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure.

*Id.* at 825.

138. See Fuller, *supra* note 1, at 367; see also Fiss, *supra* note 2, at 14 (agreeing—despite other disagreements with Fuller—that the “legislature or the school board or the warden of a prison is entitled to express the preferences of the citizenry, a function not entrusted to the courts”).

One might view this contrast between legislators and judges as a difference in institutional legitimacy as much as institutional competence, see Diver, *supra* note 2, at 89-94 (noting the overlap between questions of legitimacy and competence); *infra* Section II.B (discussing constitutional legitimacy), but elected representatives are also more competent than unelected officials to make normative decisions that reflect popular will. Then again, scholars have observed that the distinction between the political and judicial processes may not be as sharp as Fuller believed. For one thing, the judicial process may not be quite as insulated from political influence as it appears at first glance. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 67, 71, 79 (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 648 (1993) (“The populace certainly feels the impact of judicial decisions; but . . . the converse also is true.”); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1301-04 (2002) [hereinafter Molot, *Reexamining Marbury*]. Furthermore, public choice scholarship has cast doubt on the traditional assumption that legislative outcomes reflect majority preferences. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 165 (1997); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 275-76 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223-24 (1986); cf. Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1628-30 (1999) (noting that a variety of “intermediaries”—“like political parties, political action committees, civic groups, [and] corporations”—may stand between the electorate and even directly elected officials). It therefore is not surprising that scholars have sometimes defended judicial forays into what were previously deemed political matters. See, e.g., Diver, *supra* note 2, at 90; Fiss, *supra* note 2, at 39-44.

139. See Fletcher, *supra* note 17, at 637 (arguing that unchecked judicial discretion in political matters is “presumptively illegitimate”); Shapiro, *supra* note 133, at 556 (“[T]he fact that judges are protected in significant ways from the popular will does make it inappropriate for them to reach outcomes on the basis of their personal (and possibly idiosyncratic) values.”); Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1323-24 (1992) (“Holmes’ truth remains: judicial processes are simply not adapted to accommodating the competing social interests of broad groupings of citizens.”). But see Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1018 (1997) (describing a “polyphonic” conception of representation under which “multiple voices speak[] of and for the people”).

discretion<sup>140</sup>—than when they seem to be resolving disputes on their own initiative and exercising unbounded discretion.<sup>141</sup>

Once we see that judges are institutionally well-suited to rely on parties to help frame disputes and on law to help resolve disputes, we should hesitate before abandoning these core characteristics of the traditional judicial role. New litigation demands may require judges to take on new responsibilities, but institutional considerations weigh heavily in favor of structuring those new responsibilities with the traditional judicial role in mind.

### B. *Constitutional Underpinnings*

The constitutional underpinnings of the judicial role that Fuller described are less obvious than the institutional underpinnings. Indeed, scholars generally have not connected the judicial role described by Fuller to the “judicial Power” the Constitution vests with federal judges,<sup>142</sup> and Fuller himself never intended to ground his vision of adjudication in the

140. Cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (“[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” (internal quotation marks omitted)); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990) (noting the failure of theories that rely on “objective” standards to “constrain the discretion of judicial interpreters”); Shapiro, *supra* note 133, at 556 (arguing that “[d]espite all the palaver” that judges “reach outcomes on the basis of their personal (and possibly idiosyncratic) values . . . the truth is that they really do not”); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (arguing that “open acknowledgment of reasoned discretion is wholly consistent with the Anglo-American legal tradition” and that “discretion need not mean incoherence, indeterminacy, or caprice” but rather “can lead to the development of effective guidelines and, yes, even rules”).

141. See Bone, *supra* note 17, at 1313; see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116 (1998) (noting that “at least under classical schools of interpretation, courts deciding statutory cases are bound to follow commands and policies embodied in the enacted text—commands and policies that the courts did not create and cannot change”); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (“Judges must be honest agents of the political branches. They carry out decisions they do not make.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) (“In our constitutional system, it is widely assumed that federal judges must act as Congress’s faithful agents.”); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187 (1986) (“Statutory and constitutional law differs fundamentally from common law in that every statutory and constitutional text . . . is in some important sense not to be revised by the judges.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (“According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature.”); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990) (“Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature’s intent.”).

142. *But cf.* Sturm, *Normative Theory*, *supra* note 17, at 1391-92 (linking Fuller’s and Fiss’s emphasis on participation to deeper notions of “individual dignity”).

Constitution. His project was an institutional analysis, not a constitutional argument.

Nonetheless, in describing a judicial role that prevailed in this country since well before the Founding, Fuller incidentally described a judicial role with constitutional significance. Fuller did not dream up a new judicial role, but rather captured an age-old judicial role that influenced the Founders' thinking when they decided to include a federal judiciary in the constitutional framework.<sup>143</sup> Although the Founders did not define the judicial role as carefully as Fuller, the Founders' thoughts were dominated by the same notions that judges should rely on litigants to initiate and frame disputes and should look to the law in rendering decisions. The two core characteristics of the judicial role described by Fuller are reflected in a number of constitutional provisions and in the Founders' background understandings regarding the role of the federal judiciary in the constitutional structure.

### 1. *Judicial Reliance on Litigants To Frame Disputes*

When they vested the "judicial Power of the United States" in a new federal judiciary, the Founders made clear that federal judges must rely on others to bring disputes and may not themselves reach out and decide legal questions on their own initiative. Under Article III, the entirety of "the judicial Power" flows from the judiciary's power to resolve "cases" regarding specified subject matters or "controversies" between specified parties. Courts can take no action unless someone first files a "case" or "controversy" fitting within one of the specified categories.<sup>144</sup> Although Article III does not further define "the judicial Power"<sup>145</sup>—or directly

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143. There is a debate over one important aspect of the Founders' understanding of the judicial role—namely, how judges would be expected to approach statutory interpretation. See Manning, *supra* note 141, at 8-9; William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 991-95 (2001) (criticizing Manning); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1651-53 (2001) (responding to Eskridge); see also WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 35 (1999); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 19-41 (2000) [hereinafter Molot, *Judicial Perspective*].

144. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For an example of the Justices' historical antipathy toward advisory opinions, see Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 488, 488-89 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1891) (refusing to answer questions posed by President Washington's Secretary of State, Thomas Jefferson).

145. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) ("The constitutional text is itself spare and unhelpful on . . . critical questions, providing only that 'the judicial [P]ower of the United States' shall extend to certain enumerated 'cases and controversies' . . .").

embrace or reject the host of subsidiary functions that traditionally have been considered part of the “judicial Power,” such as the power to regulate the manner in which litigation proceeds, to fashion appropriate equitable remedies, and to interpret substantive rules reflected in the common law and in statutes—it does indicate that these subsidiary functions stem from the judiciary’s power over “cases” and “controversies.”<sup>146</sup> As *Marbury v. Madison* long ago made clear, “It is emphatically the province and duty of the judicial department to say what the law is,” *precisely because* “[t]hose who apply the rule to particular *cases*, must of necessity expound and interpret that rule.”<sup>147</sup> Under the constitutional framework, judges would be empowered to resolve disputes initiated by others, not to initiate suits themselves.<sup>148</sup>

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146. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Monaghan, *supra* note 145, at 1365 (“In important part, *Marbury* found the power of constitutional exposition to be an incident of the Court’s obligation to decide the particular ‘case or controversy’ before it.”); see also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (noting *Marbury*’s significance for statutory, as well as constitutional, interpretation). *But cf.* Resnik, *Uncle Sam*, *supra* note 47, at 609-11 (describing the judiciary’s evolution into a bureaucratic institution that engages in lobbying and rulemaking). Jack Rakove has noted, and challenged, “the primacy of *Marbury*” in our thinking about judicial review (in part because judicial review was originally more significant for its effect on federalism than on separation of powers). Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1037 (1997).

147. *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added). *But cf.* Monaghan, *supra* note 145, at 1368-71 (noting that the “private rights” model of judicial competence has given way to a “special function” model, which seems somewhat less confining of judicial authority to resolve constitutional questions).

148. See Resnik, *Managerial Judges*, *supra* note 17, at 381. The Founders made this clear not only by embracing the constitutional “case” and “controversy” language, but also by repeatedly rejecting proposals for a “Council of Revision,” which would have empowered select judges, working with the Executive, to review pending legislation at will, without waiting for injured parties to file a lawsuit upon being subjected to the new law. See James Madison, Journal (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15, 21 (Max Farrand ed., 1937); James Madison, Notes on the Constitutional Convention (July 21, 1787), in 2 *id.* at 71, 73 [hereinafter Madison, Notes].

The Founders worried that authorizing the judiciary to review pending legislation without a live case or controversy would undermine the core insight behind their separation of powers jurisprudence, namely that no man ought to be “judge in his own cause.” THE FEDERALIST NO. 80, at 448 (Alexander Hamilton) (Isaac Kramnick ed., 1987); see also THE FEDERALIST NO. 78, *supra* at 437 (Alexander Hamilton) (“[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.” (quoting 1 BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 181 (1748))); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 364 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“If a separate executive will enforce the law even against the lawmakers, the lawmakers will not have a distinct interest from the rest of the Community.” (internal quotation marks omitted)); James Madison, Notes on the Constitutional Convention (July 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 75 (“Mr. Strong thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established.”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434 (1987); *cf.* THE FEDERALIST NO. 80, *supra*, at 448 (Alexander Hamilton) (defending federal jurisdiction over disputes between two states on the ground that “no man ought certainly to be a judge in his own cause, or in any cause, in respect to which he has the least interest or bias”). For a historical analysis connecting this maxim to judicial review in early eighteenth-century England, see Philip A. Hamburger,

Moreover, the Founders expected judges not only to wait for others to *initiate* disputes, but also to rely on affected parties to *frame* disputes.<sup>149</sup> One can find evidence of this in the original ratification debates and, ultimately, in the Seventh Amendment.

In late eighteenth-century America, the respective roles of judges, litigants, and jurors significantly favored the latter two groups over the former. In part because of American judges' relative inexperience and lack of education,<sup>150</sup> in part because of a tradition of mistrust for colonial judges appointed by English colonial governors,<sup>151</sup> and in part because Americans placed greater confidence in local juries to resolve local disputes,<sup>152</sup> early American litigation relied more on litigants to present cases to juries and gave less power to judges.<sup>153</sup> Where English judges had begun to exert

*Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091-93 (1994).

Opponents of the proposed provision warned that "[t]he Judges in exercising the function of expositors [of law] might be influenced by the part they had taken, in framing the laws [as members of the Council of Revision]." Madison, Notes, *supra*, at 75; see also *id.* (paraphrasing Strong and arguing that "the power of making ought to be kept distinct from that of expounding, the laws"). The Founders also worried that the Council of Revision would establish "an improper coalition between the Executive & Judiciary departments." *Id.* (paraphrasing Gerry).

149. See Resnik, *Managerial Judges*, *supra* note 17, at 381.

150. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903-06 (1994); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 515-16 (1996). The quality and prestige of the eighteenth-century American bench was quite mixed when compared to England. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 18-35 (1975); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 299-300 (1996); Molot, *Judicial Perspective*, *supra* note 143, at 13.

151. See Molot, *Judicial Perspective*, *supra* note 143, at 16-17 ("Indeed, the Declaration of Independence lists as one of its justifications that the king 'has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'" (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776))). Although the esteem of the American judiciary rose somewhat in the years between the American Revolution and ratification of the Constitution, American judges at the time of the Founding by no means had attained the prestige or power of their English counterparts. See DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 96 (1980); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 454 (1969); Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 636, 684 (1996); Molot, *Judicial Perspective*, *supra* note 143, at 13.

152. See Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 213 (1998); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 385-92.

153. See Yeazell, *supra* note 19, at 641. Even when colonial judges were subject to removal by the English Crown, "[i]n practice an overbearing Crown did not impose slavish justices of the peace on a resentful population; judges were drawn from the same communities whose customary law they followed and defended." RAKOVE, *supra* note 150, at 299. Regardless of who appointed American judges, they by and large acted with a sense of local accountability that was reinforced by their interactions with juries. See NELSON, *supra* note 150, at 19-21; RAKOVE, *supra* note 150, at 299.



some control over the evidence litigants presented,<sup>154</sup> American judges at the time of the Founding generally did not regulate litigants in their presentation of evidence.<sup>155</sup> Where English judges had made some progress toward establishing their monopoly over legal questions,<sup>156</sup> American judges often deferred to juries on legal—as well as factual—matters.<sup>157</sup> Indeed, in America, judges generally permitted lawyers to present their cases to juries as they deemed fit.

Those who opposed ratification of the Constitution, and rallied specifically against its provision for a federal judiciary, feared that new federal judges would be more ambitious than their counterparts in state courts. In arguing against the creation of a federal judiciary, these so-called Anti-Federalists warned that federal judges would emulate the English example and invade the rights of litigants to present their cases to juries. They decried the new Constitution's omission of any express guarantee of

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154. In the sixteenth and seventeenth centuries, judges did so as a matter of course, because attorneys participated infrequently and in a limited manner in pre-eighteenth-century English litigation. See J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 221 (1991); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282-83 (1978). Later, as attorneys played a more significant role, judges maintained their influence over the presentation of evidence by developing rules designed to restrict the evidence that attorneys could introduce. See Beattie, *supra*, at 228-29; T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 524-30 (1999); Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1160-75 (1990); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 548, 595-602 (1990). Adversary procedures in civil courts followed the rise of such procedures in criminal courts. See Gallanis, *supra*, at 550; John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1201-02 (1996) [hereinafter Langbein, *Historical Foundations*].

155. John Langbein explains: "Our sources allow us to see that as late as the middle of the eighteenth century, the decisive steps had yet to be taken toward . . . the modern Anglo-American law of evidence." Langbein, *Historical Foundations*, *supra* note 154, at 1202; see also Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 444 (1996). But see Resnik, *Managerial Judges*, *supra* note 17, at 382 (noting that judges in early America could sometimes "summon or exclude witnesses").

156. Jack Rakove has observed that, in the eighteenth century, "a movement to restrict the law-finding power of juries and enlarge that of judges was well under way in England." RAKOVE, *supra* note 150, at 298.

157. Chief Justice Jay instructed a jury just a few years after the Founding that courts may be the best judges of law and juries the best judges of facts, but "you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). Although practice varied from state to state, Chief Justice Jay captured a relationship between judges and juries in late eighteenth-century America that significantly favored the authority of the latter over that of the former. In Massachusetts, for example, juries not only "tried nearly every case," but also "had vast power to find both the law and the facts in those cases." NELSON, *supra* note 150, at 21. In Rhode Island, it was reported that in 1699 no instructions were given to the jury at all, because the role of the judge was merely "to preserve order, and see that the parties had a fair chance with the jury." Alschuler & Deiss, *supra* note 150, at 904 (citation omitted).

the common-law right to a jury trial,<sup>158</sup> and warned that even if federal trial judges did deign to allow jury trials, appellate judges nonetheless would “retry virtually every aspect of every civil case and reach fresh verdicts unconstrained by the decisions of juries below.”<sup>159</sup>

The Anti-Federalists were not entirely irrational in their fears. By the late eighteenth century, American judges had indeed borrowed from their English counterparts some important tools of control over litigants and juries. In addition to ruling on matters of law, English judges in the late eighteenth century sometimes exerted influence over factual determinations by jurors. It was not unusual for an English judge to tell jurors what he thought of the evidence,<sup>160</sup> and, if he disagreed with the jurors’ verdict, to question the jury on its reasoning,<sup>161</sup> or even send jurors back for further deliberations.<sup>162</sup> In some American jurisdictions,<sup>163</sup> judges embraced the English practice of trying to influence jurors by commenting on the evidence.<sup>164</sup> As Chief Justice Parker of the Massachusetts Supreme Judicial Court observed, “We know of no rule requiring the judge to conceal his opinion [about the evidence] . . . [I]f the evidence on one side is strong, compared with that on the other side, I think it my duty to make the jury comprehend that it is so.”<sup>165</sup> Moreover, in at least one American jurisdiction

158. See RAKOVE, *supra* note 150, at 186; Eskridge, *supra* note 143, at 1042; Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 181-89 (2001); Molot, *Reexamining Marbury*, *supra* note 138, at 1300.

159. RAKOVE, *supra* note 150, at 321 (citing Letter from the Federal Farmer (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 319 (Herbert J. Storing ed., 1981)); see also Debates (June 19, 1788) (statement of George Mason), in 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1387, 1407 (John P. Kaminski & Gaspare J. Saladino eds., 1993); Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 19, 70-71. For a discussion of whether the reexamination clause of the Seventh Amendment might have been viewed by the Anti-Federalists (but not necessarily the Federalists) as a way to solve this problem, see Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 514-15 (1998). I discuss the Seventh Amendment below. See *infra* notes 169-170 and accompanying text.

160. See MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 259-60 (Fred B. Rothman & Co. 1987) (1713); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE 188-89 & n.2 (Boston, Little, Brown & Co. 1898); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2551, at 664 (James H. Chadbourne ed., 1981); George M. Hogan, *The Strangled Judge*, 14 J. AM. JUDICATURE SOC’Y 116, 117 (1930).

161. According to Renée Lettow Lerner, “Informal questioning of jurors was a fixture of English trial courts.” Lettow, *supra* note 150, at 527.

162. *Id.* at 522-23.

163. Cf. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299 (1966) (noting that at the time of the Founding, “the power of the civil jury and the extent of judicial control over its verdicts varied enormously and unsystematically from state to state”).

164. See THAYER, *supra* note 160, at 188 n.2; 9 WIGMORE, *supra* note 160, § 2551, at 664; Hogan, *supra* note 160, at 117; Kenneth M. Johnson, *Province of the Judge in Jury Trials*, 12 J. AM. JUDICATURE SOC’Y 76 (1928).

165. *Commonwealth v. Child*, 27 Mass. (10 Pick.) 252, 256 (1830); see also Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

(Connecticut), judges occasionally questioned jurors informally when they returned verdicts, and ordered new trials when their answers cast doubt on the accuracy of the verdicts.<sup>166</sup>

It is important to recognize, however, that the Anti-Federalists' dire predictions were just that: predictions, which the Constitution's supporters did not take very seriously.<sup>167</sup> The Founders assumed that jury trials would be afforded, and jury verdicts respected, regardless of whether any express constitutional provision so required.<sup>168</sup>

Moreover, soon after ratification of the Constitution, the Founders made explicit their implicit understandings regarding the rights of litigants to present their disputes to juries. With the ratification of the Seventh Amendment, the Founding generation ultimately acceded to the Anti-Federalists' demand and amended the Constitution to preserve expressly the historical right to a jury trial in cases at law.<sup>169</sup> Indeed, to prevent judges from interfering with this right, the Seventh Amendment not only preserved the right to a jury trial but also prevented judges from "reexam[in]g" facts found by jurors other "than according to the rules of the common law."<sup>170</sup> Although the Seventh Amendment left many questions unresolved—such as how to distinguish "law" from "equity" and how precisely to allocate tasks between judges and juries in cases at law—it nonetheless constitutionalized the Founders' background understanding that judges not only would leave it to litigants to initiate cases and controversies, but also would permit litigants to present their cases to jurors.

## 2. *Judicial Reliance on an Identifiable Body of Law*

Under the constitutional plan, federal judges were expected not only to wait for others to frame disputes, but also to follow applicable legal

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166. See Lettow, *supra* note 150, at 523.

167. See Eskridge, *supra* note 143, at 1054 ("It seems doubtful that the judicial tyranny arguments had any traction in the convention."); Henderson, *supra* note 163, at 292 ("Trial by jury in civil cases was touched upon in debate only to be intentionally left out of the final document; the question of jury powers in relation to those of the judge was not mentioned at all.").

168. Alexander Hamilton made this point in the course of responding to Anti-Federalist objections. He explained that federal judges would respect the common-law jury tradition regardless of whether the Constitution expressly required jury trials. Although it was not until the Bill of Rights that the Constitution's guarantee of a jury trial in the criminal context was extended to civil trials as well, Hamilton nonetheless assured that the common law right to a jury trial would be respected in federal courts. See THE FEDERALIST NO. 81, *supra* note 148, at 450-52 (Alexander Hamilton) (responding to Anti-Federalist claims that the Supreme Court's appellate jurisdiction would somehow undermine the jury's fact-finding power). For a discussion of why the Constitution's supporters were reluctant to include a Bill of Rights in the original document, see Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1 (1994).

169. U.S. CONST. amend. VII.

170. *Id.*; see also Peterson, *supra* note 46, at 52.

doctrine in the course of handling those disputes.<sup>171</sup> Federal judges would rely on congressional enactments to establish their jurisdiction and follow relevant statutory instructions in the course of deciding cases.<sup>172</sup> Under the Constitution, it was the prerogative of Congress to define federal jurisdiction<sup>173</sup> and to establish the “supreme Law of the Land.”<sup>174</sup>

That the Constitution gave Congress, rather than the courts, power to define federal jurisdiction and make federal law did not reassure all members of the Founding generation. Having inherited a tradition in which most law was made by judges, rather than by legislatures,<sup>175</sup> and having seen judges in England take rather creative approaches to interpreting even statutory law,<sup>176</sup> the Anti-Federalists worried that federal judges would abuse their power of law declaration. They warned that rules of interpretation “give a certain degree of latitude,” and predicted that judges would “not confine themselves to any fixed or established rules.”<sup>177</sup> The Anti-Federalists expected that judges would create law, rather than obey it, and in so doing would act on strong institutional incentives to favor federal over state interests.<sup>178</sup>

The debate over judicial obedience to law, just like the debate over judicial respect for juries, reflected to some extent the different traditions of judging found on opposite sides of the Atlantic in the late eighteenth

171. See Peterson, *supra* note 46, at 55 (characterizing *Marbury v. Madison* as holding that “courts may act only when there is law, based on precedent, to apply. Courts do not possess authority to assert their own will”).

172. See Resnik, *Managerial Judges*, *supra* note 17, at 381.

173. See U.S. CONST. art. III, § 1.

174. *Id.* art. VI, cl. 2; see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1403 (2001) (“By design, the Constitution insulates federal judges from the political process and assigns them no role in adopting ‘the supreme Law of the Land.’”).

175. Gordon Wood has described “a basic ambiguity in the American mind about the nature of law.” WOOD, *supra* note 151, at 295. While Americans may have emphasized the importance of positive law created by the people, they had not completely abandoned traditional English notions of “fundamental law.” *Id.* at 291-305. Indeed, the Founders’ understanding that important legal principles might be found outside any positive law continued to permeate American jurisprudence in the decades following the Founding. *Swift v. Tyson* provides a nineteenth-century example of this prevailing belief. 41 U.S. (16 Pet.) 1 (1842); see also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1274-75 (1996).

176. See POPKIN, *supra* note 143, at 45; Eskridge, *supra* note 143, at 995-96; Molot, *Judicial Perspective*, *supra* note 143, at 13-14.

177. Essay of Brutus (Jan. 31, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 159, at 417, 419-20; see also Eskridge, *supra* note 143, at 1042-49; Molot, *Judicial Perspective*, *supra* note 143, at 27-28. “Brutus” was the leading Anti-Federalist writer to make this point, but not the only one. See Letter from a Federal Farmer, *supra* note 159, at 319-23; see also Eskridge, *supra* note 143, at 1046-47 (discussing arguments of the Federal Farmer); Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 308 & n.259 (1989); Peterson, *supra* note 46, at 49-51.

178. See, e.g., RAKOVE, *supra* note 150, at 148; Eskridge, *supra* note 143, at 1042; Hamburger, *supra* note 177, at 308; Molot, *Judicial Perspective*, *supra* note 143, at 27-41; Peterson, *supra* note 46, at 49-51; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 911 (1985).

century.<sup>179</sup> In England, there was a grand tradition of relying on esteemed jurists not simply to follow legislative commands but also to serve as what Blackstone termed “one main preservative of the public liberty.”<sup>180</sup> Although in theory English judges were bound by the law as it existed in the books, this was not always the reality.<sup>181</sup> Accustomed to a common law tradition in which judges were responsible for making law, English judges had become active, creative interpreters of even statutory law.<sup>182</sup>

In America, however, the experience was quite different. Unlike the “inherited English tradition of judging that expected judicial discretion in the process of discovering and applying the law,” there was “an American conception of ‘common sense’ that was accessible to judges as well as to others.”<sup>183</sup> William Nelson has observed that, at least in Massachusetts, “Americans of the prerevolutionary period expected their judges to be automatons who mechanically applied immutable rules of law to the facts of each case.”<sup>184</sup> American “judges were drawn from the same communities whose customary law they followed and defended,” and they worked together with juries to apply the law in a plain, common-sense fashion.<sup>185</sup>

To the extent that new federal judges would follow this American tradition of limited judicial authority, the Federalists felt comfortable rejecting the Anti-Federalists’ dire predictions as overblown and exaggerated. Under the American tradition, after all, judges could be

179. William Popkin has pointed to “two different traditions” that gave content to the idea of a “separate” power of judicial judgment: (1) an inherited English tradition of judging that expected judicial discretion in the process of discovering and applying the law; and (2) an American conception of “common sense” . . . . The relevance of these traditions for American judging and statutory interpretation was controversial, but that is exactly the point. No single view of judging predominated.

POPKIN, *supra* note 143, at 41; *see also* WOOD, *supra* note 151, at 291-305.

180. 1 WILLIAM BLACKSTONE, COMMENTARIES \*259.

181. For a discussion of the relationship between common law and legislation, and of judicial attitudes toward statutory law in eighteenth-century England, see James Oldham, *From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth-Century Britain*, 89 MICH. L. REV. 1637 (1991).

182. *See* Eskridge, *supra* note 143, at 995-96; Manning, *supra* note 141, at 8. As William Popkin explains,

[J]udges did not limit their aggressive interaction with statutes to judicial review [for constitutionality]. They also injected substantive values into the process of statutory interpretation. Somewhere between Coke’s voiding of statutes [in *Bonham’s Case*] for violation of common right and absolute parliamentary sovereignty lay a middle way in eighteenth-century England whereby courts “changed the meaning of statutes, refused to give them the effect intended, or to apply a rule . . . until the [legislature issued] an unmistakable mandate, which the courts reluctantly at times conceded it was their duty to obey.”

POPKIN, *supra* note 143, at 46 (quoting CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 36 (1959)).

183. POPKIN, *supra* note 143, at 41.

184. NELSON, *supra* note 150, at 19; *see also* RAKOVE, *supra* note 150, at 300 (discussing Nelson).

185. RAKOVE, *supra* note 150, at 299.

counted on to exercise interpretive leeway based on straightforward common sense.<sup>186</sup> Moreover, even if the judiciary developed in accordance with the grander English tradition, the Federalists countered that the Anti-Federalists' characterization of this tradition was inaccurate.<sup>187</sup> English judges did not simply make law as they deemed fit, but rather were guided by prior decisions and well-established canons of construction.<sup>188</sup> Indeed, the Federalists repeatedly emphasized these powerful constraints on judicial discretion.<sup>189</sup> They observed that *stare decisis* binds judges in most cases,<sup>190</sup> and that in cases of first impression, where *stare decisis* has no influence, judges nonetheless must follow well-established interpretive practices.<sup>191</sup> "Most of the Americans influential in the framing, ratification, and early

186. "The rules of legal interpretation," Alexander Hamilton explained, "are rules of *common sense*, adopted by the courts in the construction of the laws." THE FEDERALIST NO. 83, *supra* note 148, at 462 (Alexander Hamilton).

187. Whereas the Anti-Federalist Brutus cited Grotius and Blackstone for the proposition that judges were free to make up their own law where positive law supplied no definite answer, the Founders generally did not share Brutus's exaggerated reading. As Hadley Arkes has observed, Grotius was not saying that the judges would be left on their own, without the guidance of principles of judgment, whenever they encountered a case that strained the terms of a statute—or a case that could hardly have been anticipated by the men who had framed the legislation. . . . [T]he judges were not free to shape the law according to their own enthusiasms. They were obliged, rather, to move from the stipulations of the *positive* law to the guidance of the natural law, or what Blackstone called at different times "common reason," or "the law of nature and reason."

HADLEY ARKES, BEYOND THE CONSTITUTION 22-23 (1990) (quoting 1 BLACKSTONE, *supra* note 180, at \*91; and 4 *id.* at \*67).

188. See THE FEDERALIST NO. 78, *supra* note 148, at 442 (Alexander Hamilton) (arguing that judges would be "bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"); Molot, *Judicial Perspective*, *supra* note 143, at 27-41.

189. See ARKES, *supra* note 187, at 23 ("[I]t was assumed by [the] Founders, that when the judges were forced to leave the text of a statute, they had access to principles of judgment quite apart from the things that were set down in the positive law."); Molot, *Judicial Perspective*, *supra* note 143, at 27-41; Peterson, *supra* note 46, at 52 (arguing that to "restrain judicial power" the Founders relied both on the "nature of the judicial process" and on "internal checks within the judicial branch").

190. "As Madison explained, although 'new laws' are inherently 'equivocal,' they remain so only 'until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.'" Molot, *Reexamining Marbury*, *supra* note 138, at 1295-96 (quoting THE FEDERALIST NO. 37, *supra* note 148, at 245 (James Madison) (emphasis added)); see also THE FEDERALIST NO. 82, *supra* note 148, at 458 (Alexander Hamilton); NELSON, *supra* note 150, at 20-21 (noting that "the doctrine of precedent" was "viewed as a means of controlling judges' discretion and restraining their possible arbitrary tendencies"); Molot, *Judicial Perspective*, *supra* note 143, at 34; Peterson, *supra* note 46, at 52 (observing that "the system of *stare decisis* and controlling precedent limited what Professor Rosenberg has identified as the 'primary discretion' of trial judges" (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971))).

191. See Molot, *Judicial Perspective*, *supra* note 143, at 27-41. *But cf. id.* at 12-13 (noting that "the Founders by and large did not focus specifically on judicial interpretation of statutes as a central issue in framing the Constitution, and so 'if we are to learn much about statutory interpretation from what happened between 1776 and 1789, we must construct a sense of judicial role from those features of the constitutional structure that dealt with the legislative-judicial relationship' more generally" (quoting POPKIN, *supra* note 143, at 35)).

interpretation of the federal Constitution were intimately familiar with the common law, and they gleaned from it not only a general approach to . . . interpretation . . . but also a variety of specific interpretive techniques."<sup>192</sup> If law often was ambiguous and judicial power inevitably was significant,<sup>193</sup> the Constitution's defenders nonetheless understood the judicial enterprise to be constrained by judicial practices that predated the Constitution and would continue uninterrupted.<sup>194</sup> It was Hamilton who made the point most powerfully. He reassured skeptics that while "[p]articlar misconstructions and contraventions of the will of the legislature may now and then happen," judicial leeway "can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system."<sup>195</sup>

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192. Powell, *supra* note 178, at 901-02 (footnote omitted). As William Eskridge has explained:

The strongest hypothesis is that the delegates [at the Philadelphia Convention] both assumed and accepted the traditional rules and canons of statutory interpretation and did not see the 'judicial Power' to interpret statutes as deviating from the general methodology laid out in the traditional cases and treatises that were considered authoritative by the state judiciaries and that would have been known by most of the thirty-four delegates who had legal training. . . . Most of these relatively learned lawyers would have been familiar with Coke's *Institutes*, Bacon's *Abridgment* and its list of interpretive canons, Blackstone's *Commentaries*, Plowden's comment on *Eyston v. Studd*, the mischief rule of *Heydon's Case*, the holding and dictum of *Bonham's case*, and *Rutgers and Trevett*.

Eskridge, *supra* note 143, at 1036-37. Pufendorf's treatise offers an example of a text familiar to the Founders that set forth well-known interpretive rules. See SAMUEL VON PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO* 83-86 (James Brown Scott ed. & Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682); see also Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 427 (1991); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 695 n.39 (1997).

193. See THE FEDERALIST NO. 37, *supra* note 148, at 245 (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal . . ."); Molot, *Judicial Perspective*, *supra* note 143, at 20-27; Powell, *supra* note 178, at 904 ("The framers were aware that unforeseen situations would arise, and they accepted the inevitability and propriety of construction.").

194. Although canons of construction might not entirely eliminate judicial leeway, the Federalists nonetheless expected judges to exercise "judgment" based on these canons, rather than simply to impose their political "will." See THE FEDERALIST NOS. 78, 81, *supra* note 148, at 437, 451-53 (Alexander Hamilton).

195. THE FEDERALIST NO. 81, *supra* note 148, at 453 (Alexander Hamilton). Hamilton explained that "liberty can have nothing to fear from the judiciary alone." THE FEDERALIST NO. 78, *supra* note 148, at 437 (Alexander Hamilton); see also *id.* at 437 n.64 ("Montesquieu, speaking of them, says, 'of the three powers above mentioned, the judiciary is next to nothing.'" (quoting 1 MONTESQUIEU, *supra* note 148, at 186)).

### C. *Competing Values and Historical Accommodations*

Fuller and the Founders teach us that when judges cease to rely on others to frame disputes or to look to an identifiable body of law in resolving disputes, they stray from a traditional judicial role that reflects their core institutional competence and their place in the constitutional structure. But if Fuller and the Founders lend support in this manner to the traditional judicial role, it is important not to overstate the value of their ideas. I have not established (nor do I claim) that judges must adhere precisely to the judicial role envisioned by Fuller or the Founders for judicial conduct to be effective or legitimate.<sup>196</sup> When judges respond to new challenges—managing pretrial practice or reviewing mass tort settlements as described in Part I—they may sometimes strain the boundaries of their institutional competence and constitutional authority, but this does not mean that judges are entirely incompetent to perform nontraditional functions or that the Constitution prohibits them from doing so. To the contrary, judges arguably have an obligation to update their role and take on new responsibilities as they confront new litigation demands.<sup>197</sup> If judges were to follow tradition blindly, and ignore that litigation today is itself very different from what Fuller or the Founders envisioned, they might abdicate their responsibility to afford justice.

The central dilemma in contemporary civil procedure is not whether judges should cling to their traditional role or else abandon it for a completely new one, but how judges should respond to new challenges and whether judges can do so without losing sight of their core institutional competence and constitutional role.<sup>198</sup> The question requires us to consider

196. Although the discussion thus far has demonstrated that the traditional judicial role is constitutionally inspired, I have not made the more extreme claim that particular judicial approaches in pretrial practice and class action litigation are constitutionally required. Cf. Fiss, *supra* note 2, at 32-35 (arguing that judges should preside over structural reform litigation, even if they are not ideally suited to handle these types of disputes, in part because they arguably are as well equipped as other actors to perform this function).

197. Although scholars may be wrong to ignore the traditional judicial role—and wrong to assume that judges inevitably must abandon adjudication's traditional "forms" simply because of an expansion of adjudication's "limits"—there is no escaping the tension between contemporary litigation demands and the traditional judicial role. See Miller, *supra* note 29, at 14 ("The strong judicial activity throughout pretrial that is required to control this phase of litigation is contrary to . . . the traditional conception of the judge as a neutral and passive arbiter . . ."); Shapiro, *supra* note 83, at 940 ("The need for the judge to play a more active part than in conventional litigation at the critical stages of a class action, and especially in passing on the fairness of a settlement, is reflected in Rule 23 itself, in the cases, and in the literature." (citations omitted)).

198. See Sturm, *Normative Theory*, *supra* note 17, at 1444-45 (seeking to develop a "model of remedial decisionmaking that is tailored to the goals and functions of the remedial stage, and yet remains in keeping with the norms of judicial legitimacy"); cf. Coffee, *Class Wars*, *supra* note 76, at 1422 (recognizing that "idealism and pragmatism must be balanced"); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 126-27 (1982) (noting the need to accommodate the tension between traditional notions of the judicial role and new modes of litigation).



*both* the institutional and constitutional considerations that counsel in favor of fidelity to tradition *and* the contemporary demands that counsel in favor of adjusting the judicial role.<sup>199</sup>

To some scholars, myself included, merely framing the question in this manner helps to resolve it. When discrete doctrinal debates over the virtues and vices of current practices and proposed reforms are linked with more fundamental arguments about the judiciary's institutional competence and constitutional authority, the case for reform becomes much stronger. At issue is no longer just a policy tradeoff in a particular doctrinal context, but rather a broader question regarding our fidelity to a judicial role of institutional and constitutional import. When viewed in this light, the problems described in Part I that surround contemporary judicial behavior in pretrial practice and class action litigation take on a new urgency. The case for abolishing—or at least substantially revising—the judicially imposed settlement conference becomes much stronger,<sup>200</sup> as does the case for improving representation for, or participation by, mass tort plaintiffs and defining the legal criteria that govern judicial review of class settlements.<sup>201</sup> The institutional and constitutional underpinnings of the traditional judicial role reinforce the arguments of contemporary scholars who seek to supply judges with the litigant input and legal criteria they require.

But there is an additional value to framing contemporary debates using the traditional judicial role. For the reader who remains unsure about how we should accommodate the institutional and constitutional arguments in favor of tradition and the resource problems of contemporary litigation, or about how my *general* observations regarding the judiciary's institutional competence and constitutional authority bear upon the judiciary's ability and power to handle *specific* tasks in pretrial practice and class action

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199. Cf. Rubenstein, *supra* note 5, at 435 (asking whether “the efficiency and equality advantages of transactional adjudication justify th[e] trend” toward transactional adjudication or whether “the costs to individuality, particularly to the individual ideal that cases should be determined by reference to pre-existing *legal* norms, outweigh these advantages”). One can find a similar dilemma resulting from the rise of the administrative state and its expansion in the New Deal. See Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165, 1166, 1265 & n.368 (1993) (seeking to translate original constitutional commitments in changed circumstances); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 633 (1996) (“The real task is to determine the relevance of original structural commitments to a world whose constitutional assumptions are so different.”); Molot, *Judicial Perspective*, *supra* note 143, at 53-68 (discussing the relevance of original constitutional structure to changed circumstances in the modern administrative state); Sunstein, *supra* note 148, at 452 (“The current task is to devise institutional structures and arrangements that will accomplish some of the original constitutional purposes in an administrative era.”); see also *infra* Part IV (exploring parallels between the judicial role in class action litigation and the judicial role in the administrative state).

200. See *supra* notes 62-67 and accompanying text; *infra* notes 276-282 and accompanying text.

201. See *supra* notes 106-117 and accompanying text; *infra* notes 362-372 and accompanying text.

litigation today, there are historical analogues available that strengthen the case for reforming current practice and reinvigorating the traditional judicial role. The traditional judicial role described by Fuller was embraced not only by the Founders in the late eighteenth century, but also by judges in the nineteenth and twentieth centuries who faced challenges strikingly similar to those found in pretrial practice and class action litigation today.<sup>202</sup> One need not take my word for it that the traditional judicial role is worth saving. Rather, one can look to more than two centuries of judicial experience to support this proposition.

This is not the first time that judges have updated their role in response to new challenges. Nineteenth-century trial practice witnessed evolutions in the judicial role just as significant as the evolutions underway today in pretrial practice. Twentieth-century administrative law likewise saw changes in the judicial role that are comparable to recent changes in class action practice. In deciding how much energy to dedicate to restoring the traditional judicial role—and ensuring that judges have the competence and authority to act—we should consider not only the judiciary's traditional role and the contemporary forces that have led judges to stray from it, but also the manner in which judges have balanced comparable considerations in the past.

When we examine this history, we see that judges have worked hard to maintain the core attributes of their traditional adjudicative role even as they have responded to new challenges. The very fact that Fuller in the mid-twentieth century and the Founders in the late eighteenth century embraced roughly similar models of judging—despite two intervening centuries of evolution—reinforces this point. The traditional judicial role is not a historical artifact from a prior era, but rather is a model that judges repeatedly have chosen to update, rather than to discard. When we examine the lengths to which judges went in nineteenth-century trial practice and twentieth-century administrative law to remain faithful to their traditional adjudicative role, this not only strengthens the case for reform, but also provides specific guidance on how doctrinal reform should be structured. Parts III and IV accordingly turn to specific examples of judicial innovation in the nineteenth and twentieth centuries that bear directly on the dilemmas judges face today in pretrial practice and class action litigation.

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202. Cf. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 6 (1998) (“[T]he relevant history is not just that of the Founding, it is that of *all* American constitutional history.”); Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1628, 1638-39 (1997) (expressing a similar sentiment).

I am not arguing that we should maintain the traditional judicial role just because it is one that has strong historical roots—an argument that Chayes and Fiss have rejected. See *Chayes*, *supra* note 2, at 1313-16; Fiss, *supra* note 2, at 35-44. Instead, I am relying on historical examples to show that the traditional judicial role is sufficiently flexible to be updated to meet new litigation demands and that it would be worth the effort to update, rather than discard, that role.

### III. OVERLOOKED PARALLELS BETWEEN CONTEMPORARY PRETRIAL PRACTICE AND NINETEENTH-CENTURY TRIAL PRACTICE

When we compare contemporary pretrial practice with trial practice as it emerged over the course of the nineteenth century, we see different judicial responses to surprisingly similar problems. Just like judges today in pretrial practice, nineteenth-century judges updated their role in trial practice to respond to new challenges. To rein in overzealous lawyers and confused jurors, judges developed an array of new trial-management tools, including evidentiary rules, jury instructions, and the directed verdict. But at the same time, nineteenth-century trial practice reflected a degree of fidelity to the judiciary's traditional role that is lacking in contemporary practice. Not wanting to give judges too much leeway to substitute their judgment for that of litigants or jurors, nineteenth-century reformers embraced formal tools of control that were party-initiated and governed by law, but rejected informal tools that did not rely on litigants for input and were not controlled by any identifiable body of law. At the end of this evolution, when judges exercised power over litigants and jurors at trial, they did so after hearing arguments from both sides and based on established legal standards. Despite dramatic changes in litigation over the course of the nineteenth century, the judicial role remained very much in keeping with the model embraced by the Founders a century earlier and described by Fuller a century later. Judges intervened largely at the initiation of the parties, and did so subject to applicable legal standards that were accessible to both sides.

When one considers the sacrifices that were made in the nineteenth century to keep judges within their traditional limits—and compares these sacrifices to those that would be required to achieve the same goal today—this substantially bolsters the case for contemporary reform. Rather than allow judges flexibility to promote justice in individual cases, as we currently do, we arguably should follow the nineteenth-century example and place a strong emphasis on cabining judicial discretion and ensuring that judges respect the confines of their traditional adjudicative role.

#### A. *A Nineteenth-Century Expansion of Judicial Power*

Just as judges in the late twentieth century enhanced their control of the pretrial process, so too did nineteenth-century judges enhance their power over trial practice.<sup>203</sup> If American judges at the time of the Founding played

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203. See Yeazell, *supra* note 19, at 640-41. As Carrie Menkel-Meadow has observed, On a historical level we know that courts have often done more than adjudicate in the pristine fashion described by Fiss and Resnik. Professors Schwartz, Eisenberg, Yeazell, and Chayes tell us that courts have always managed and administered not only

a more passive role in litigation than their English counterparts,<sup>204</sup> the American judiciary bolstered its power dramatically over the century that followed. In part because of growing concerns that juries could not be trusted to do justice without guidance from judges,<sup>205</sup> and in part because of changes in the legal profession that yielded an ever greater number of upstart lawyers who “elevated emotional intensity over intellect or traditional doctrinal authority” and actively sought to play upon juror emotion and confusion,<sup>206</sup> judges felt a need to exert a greater influence over the trial process. Although attorney partisanship back then undermined justice via a different mechanism from attorney partisanship today—i.e., by confusing jurors rather than inflicting expense and delay on opponents—partisanship nonetheless was largely responsible for a similar shift in judicial approach. Just as in recent decades, excessive partisanship in the nineteenth century drove judges to enhance their control over litigation.

Nineteenth-century judges expanded their control in part by regulating the evidence litigants could present and jurors could hear.<sup>207</sup> Where judges once had “freely admitted” hearsay evidence, for example, judges now excluded it, and the rule regulating hearsay became one of the “dominant rules” of the law of evidence.<sup>208</sup> Where judges once had left it to the

themselves, but also the criminal justice system, probate matters, and other matters as well.

Menkel-Meadow, *supra* note 44, at 503; *see also* Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 466 (1980); Murray L. Schwartz, *The Other Things That Courts Do*, 28 UCLA L. REV. 438, 438 (1981).

204. *See supra* notes 150-157 and accompanying text.

205. Juries were criticized for being unpredictable or for being predictably pro-plaintiff and antibusiness. *See* 2 ROBERT E. KEHOE, JR., *JURY INSTRUCTIONS FOR CONTRACT CASES* 1131-32 (1995); SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 62 (1990); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 96 (2001); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605 (1993).

Negative sentiments toward jurors flowed in part from a change in the makeup of juries. Jurors were drawn from voter registration lists that reform legislation had expanded during the nineteenth century to include the lower echelons of society. *See* 2 KEHOE, *supra*, at 1135; *see also* James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 640-48 (1998) (describing the rise and fall in a number of states of the use of juries with special qualifications chosen via special procedures); James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137 (1983) (tracing the rise and fall of the special jury in England through the eighteenth and nineteenth centuries). Heightened suspicion of juries also flowed from the fact that the nineteenth century was an era of dramatic economic expansion. With the growing number of tort cases against American industry, businesses were especially concerned about a perceived tendency among jurors to award verdicts against defendants with “deep pockets.” Lawrence M. Friedman, *supra* note 152, at 208-09 (1998).

206. Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 234 (2000).

207. *See* Yeazell, *supra* note 19, at 642 (“By insisting that offered proof could generally be subjected to prior judicial screening and by deploying a variety of increasingly esoteric doctrines to perform that screening, courts could control the information that came before juries.”).

208. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 134-35 (1973).

litigants to decide which witnesses to call, judges developed a variety of rules on witness qualifications.<sup>209</sup> By developing and applying rules of evidence—which sometimes followed, and sometimes departed from, those that had evolved in England over the preceding century<sup>210</sup>—judges asserted greater control over lawyers and litigants during trial.<sup>211</sup>

Judges further enhanced their power by developing a monopoly over matters of law. The entrenchment of our modern distinction between matters of law and matters of fact—and the movement to secure judicial control over legal matters—began in the late eighteenth century and continued through the early twentieth century.<sup>212</sup> This evolution was by no means uniform. Although in 1835 Justice Story expressed strong disapproval of jurors deciding questions of law,<sup>213</sup> many states still had legislation expressly authorizing juries to do so as late as the 1850s, and in still other states judges themselves continued to grant juries the authority to decide legal questions.<sup>214</sup> By the end of the nineteenth century, however, the evolution was largely complete.<sup>215</sup> Whereas in the late eighteenth century, American judges had routinely permitted jurors to second-guess judges on matters of law—and permitted lawyers to capitalize on this juror leeway—a century later, judges routinely instructed jurors on legal matters and took away from jurors those cases that judges believed could be resolved as a matter of law.

Judges initially wrested control over legal matters by developing the law of jury instructions.<sup>216</sup> Rather than leave it to jurors to decide cases as they deemed just—and to lawyers to shape the jury's notions of justice—judges began routinely to instruct juries on the legal rules that would govern their decisions. While jurors continued to have leeway to find facts within the legal bounds established by judges, and lawyers still had leeway to play upon juror sympathy within these bounds, judges at least had begun to impose important limits on juror discretion. By the end of the

209. *Id.* at 135-36. *But see* Resnik, *Managerial Judges*, *supra* note 17, at 382 (suggesting that judges could sometimes “summon or exclude witnesses” even before this nineteenth-century evolution).

210. *See* Langbein, *Historical Foundations*, *supra* note 154, at 1194-95.

211. *See* Yeazell, *supra* note 19, at 642 (“The law of evidence did to trials in the nineteenth century what the innovations of the Federal Rules have done to litigation today: they brought it under judicial regulation.”).

212. *See* SWARD, *supra* note 205, at 95-98.

213. *See* United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (“I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.”).

214. *See* Alschuler & Deiss, *supra* note 150, at 910; Smith, *supra* note 155, at 452.

215. *See* Sparf v. United States, 156 U.S. 51, 102 (1895) (requiring juries “to take the law from the court”).

216. *See* Yeazell, *supra* note 19, at 642.

nineteenth century, the law of jury instructions had grown to be of great importance.<sup>217</sup>

Moreover, to solidify control over legal matters, judges also made a practice of deciding for themselves those cases about which reasonable jurors could not disagree.<sup>218</sup> When the Bill of Rights was adopted in 1791, the Seventh Amendment guaranteed that “the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”<sup>219</sup> At that time, there were two ways a party could ask a judge to take a case away from a jury. First, a defendant could ask the judge for a demurrer.<sup>220</sup> Under the demurrer procedure, the defendant would concede the plaintiff’s factual allegations and argue as a matter of law that those facts did not entitle the plaintiff to relief. If the judge agreed with the defendant on the law, then the judge would grant a demurrer for the defendant. If, however, the judge disagreed with the defendant on the law, he would enter a judgment for the plaintiff. Having conceded the facts for purposes of its demurrer, the defendant could not then challenge the plaintiff’s factual allegations at trial.<sup>221</sup> To request a demurrer was to sacrifice one’s right to a jury trial of the facts.

Alternatively, if a defendant was not sufficiently confident of winning a demurrer as a matter of law, the defendant would instead allow the case to proceed to a jury and then, if the jury returned an adverse verdict, would ask the judge to set it aside.<sup>222</sup> However, even if the judge agreed that the jury’s verdict was wrong and against the clear weight of the evidence, the most the judge could do was order a new trial. The judge could not enter a judgment contrary to the jury’s verdict.<sup>223</sup>

Over the course of the nineteenth century (and into the early twentieth century), judges expanded their power by combining elements of the demurrer and the new trial. No longer content with their power to grant demurrers for legally baseless claims or new trials for factually erroneous verdicts, judges developed two new procedures, the “directed verdict” and “JNOV,”<sup>224</sup> which gave judges much greater control over the outcomes of trials. With the development of the directed verdict, parties for the first time could move for judgment as a matter of law while retaining the right to a

217. See 2 KEHOE, *supra* note 205, at 1201-02.

218. See Yeazell, *supra* note 19, at 642 (“The law of evidence and of jury instructions coalesced in two new procedural devices: the directed verdict and the new trial order. These two devices policed the line between jury discretion and the developing concept of rational proof.”).

219. U.S. CONST. amend. VII.

220. *Galloway v. United States*, 319 U.S. 372, 390 (1943).

221. *Id.* at 393 n.28.

222. See generally Lettow, *supra* note 150 (describing the evolution of the new trial motion).

223. See *Galloway*, 319 U.S. at 393 n.29; Lettow, *supra* note 150, at 522 & n.105.

224. JNOV stands for judgment *non obstante veredicto*, or judgment notwithstanding the verdict.

trial of the facts in the event that the judge disagreed with their legal arguments. This new flexibility logically rendered motions for directed verdict much more common than motions for demurrer. And the more routine directed verdict motions became, the more often judges decided cases as a matter of law and took cases away from juries.<sup>225</sup>

Moreover, by the early twentieth century, judges began to enter judgments as a matter of law even *after* the jury had returned a verdict. Initially, judges accomplished this feat by reserving decisions on motions for directed verdict until after juries had reached their decisions. The judge would postpone his consideration of a directed verdict motion, allow the jury to reach a verdict, and then overrule the jury and enter a JNOV if the jury returned an unreasonable verdict.<sup>226</sup> By the mid-twentieth century, however, judges no longer needed to resort to this fiction. The Federal Rules of Civil Procedure provided:

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.<sup>227</sup>

### B. *Reining In Trial Judges as Well as Litigants and Jurors*

If judicial power expanded during the nineteenth century, it also was channeled so as to render it more predictable and subject to greater control by litigants and appellate judges.<sup>228</sup> The evolving laws on evidence, jury instructions, and directed verdicts may have enhanced judicial authority vis-à-vis litigants and juries, but they also cabined the leeway of individual trial judges.

Consider the evolution of the modern rules of evidence. Although these rules tended to bolster judicial power over litigants, as the rules became more entrenched they also provided litigants and appellate judges with a

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225. Cf. Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 238-46 (noting increased willingness on the part of twentieth-century appellate judges, as well as trial judges, to overrule jury verdicts). *But see* Subrin, *supra* note 17, at 937 (noting that “[t]here was no directed verdict provision in the [Field] Code,” which was designed to restrict judicial discretion, but that “judges ignored” some aspects of the Code).

226. See, e.g., *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656, 658-60 (1935).

227. FED. R. CIV. P. 50(b).

228. See Yeazell, *supra* note 19, at 641 (“Trial courts began to regulate trials more elaborately, and appellate courts kept pace, creating new procedures and scrutinizing trial courts’ use of them.”); *id.* at 646 (“Nineteenth- and early twentieth-century litigation operated under a degree of appellate scrutiny probably greater than had ever been known in the common law world.”). Judicial power also gave way to legislative power with the movement to codify. See Subrin, *supra* note 17, at 937.

way to control trial judges.<sup>229</sup> If an attorney properly objected to his opponent's line of questioning or introduction of evidence, and the trial judge erroneously overruled the objection, the attorney could appeal the decision and, if the error affected the course of the suit, the trial judge's decision would be reversed.<sup>230</sup>

A similar evolution surrounded the law of jury instructions.<sup>231</sup> Whereas early in the nineteenth century a judge might tailor jury instructions to his views of a particular case, standard jury instructions subsequently emerged that substantially limited a judge's ability to affect outcomes in particular cases. A trial judge was required to consider jury instructions proposed by the attorneys for each side and to model his instructions after standard instructions developed by colleagues and appellate courts in prior cases.<sup>232</sup> By the early 1900s, many state legislatures had passed statutes requiring that instructions be written so that they would be subject to appellate review,<sup>233</sup> and a few states even codified mandatory standard instructions.<sup>234</sup> Judges thus knew that if they did not adhere to the standard form jury instructions proposed by the parties they risked reversal on appeal.<sup>235</sup> Moreover, the likelihood of a judge's evidentiary rulings or jury instructions being reversed on appeal was higher in the nineteenth century than it is today—the result of the “Exchequer Rule,” which presumed trial court errors to be prejudicial unless they were shown to be harmless.<sup>236</sup>

The power to take a case away from the jury through a directed verdict or JNOV also was structured so as to provide individual judges with as little discretion as possible. Whereas a trial judge's evidentiary rulings and jury instructions might receive some deference on appeal—either because an appellate court would allow the trial judge some discretion or because it would affirm even an erroneous decision after finding the error to be

229. See 2 KEHOE, *supra* note 205, at 1134, 1202.

230. Cf. Yeazell, *supra* note 19, at 642 (observing that judicial control over evidence “was exercised by a reciprocal relationship between trial and appellate courts—the appellate courts created the new procedural rules that trial courts applied, and that application was in turn scrutinized by the appellate courts”). As Lawrence Friedman has observed, the law of evidence in the nineteenth century was “founded in a world of mistrust and suspicion of institutions; it liked nothing better than constant checks and balances; it was never sure whether anyone, judge, lawyer, or jury, was an honest or competent man.” FRIEDMAN, *supra* note 208, at 350.

231. See Yeazell, *supra* note 19, at 642.

232. See 2 KEHOE, *supra* note 205, at 1134, 1202; Yeazell, *supra* note 19, at 642 (“Much of the work product of nineteenth-century appellate courts took the form of elaborate statements of the law that were to be read to juries before they began deliberation. Appellate courts created these statements in the first instance and reversed trial courts either for deviations from them or for failure to anticipate the need for change or adaption of these instructions.”).

233. See R.J. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 204-05 & n.59 (1932).

234. See FRIEDMAN, *supra* note 208, at 137.

235. See Yeazell, *supra* note 19, at 642.

236. See *id.* at 645 (describing the “Exchequer rule,” which prevailed in England until it was overruled by Parliament in 1873 and in the United States until Congress overruled it in 1919); Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450, 450 (1947).



harmless<sup>237</sup>—a trial judge’s decision to direct a verdict or grant a JNOV was subject to de novo review. Indeed, the nineteenth century witnessed a remarkable expansion in the willingness of appellate courts to review trial court decisions regarding the soundness of jury verdicts.<sup>238</sup> Although historically appellate judges would reverse a trial court only if it erroneously overturned a jury verdict, by the early twentieth century appellate courts were willing to reverse trial court decisions allowing erroneous jury verdicts to stand as well.<sup>239</sup>

Each of the management tools judges developed in the nineteenth century was thus designed just as much to rein in trial judges as to rein in partisan litigants and lay juries.<sup>240</sup> Evidentiary rulings, jury instructions, and judgments as a matter of law provided the boundaries within which litigants were to proceed. If litigants stayed within these boundaries—by bringing meritorious claims and defenses, offering admissible evidence, and proposing standard jury instructions—judges would have little cause to intervene or interfere with litigant strategies.<sup>241</sup> It was largely up to the parties themselves to trigger judicial intervention, either by testing the applicable boundaries themselves, or by requesting judicial intervention when an opponent decided to test those boundaries. Moreover, once litigants did trigger judicial intervention, they generally could expect judges to intervene in accordance with an identifiable body of governing law. Despite significant changes in the balance of power among judges, litigants, and jurors, trial practice in the late nineteenth century generally required judges to follow the model of judging embraced by the Founders a century earlier and described by Fuller nearly a century later.

237. As noted above, however, the presumption under the “Exchequer rule” was that such errors *were* prejudicial. See *supra* note 236 and accompanying text.

238. See generally Yeazell, *supra* note 19, at 640–46 (describing the nineteenth-century rise in appellate power).

239. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 434 (1996) (noting that “appellate review of a federal trial court’s denial of a motion to set aside a jury’s verdict as excessive is a relatively late, and less secure, development”); Schnapper, *supra* note 225, at 237–38.

240. Stephen Yeazell explains:

Appellate opinions set forth the doctrines of evidence and jury instructions, and they placed increased emphasis on directed verdicts and new trials. . . . Trial courts applied them, but did so under the watchful eye of appellate review. The result was that to a large extent the new “procedural” rules were both a product of appellate rulemaking in the first instance and subject to appellate review after their application.

Yeazell, *supra* note 19, at 643.

241. The rules of evidence regulate the presentation of evidence at the margins but leave it to parties to decide how best to present their cases within those margins. The law of jury instructions provides jurors with relatively slight guidance in their deliberations, leaving juries to reach decisions based largely on their gut instincts about justice and on presentations made by lawyers. The judgment as a matter of law prevents jurors from acting unreasonably, and from being fooled by meritless, or unsupported, claims or defenses. It imposes no limits on jurors or litigants in cases about which people could reasonably disagree.

### C. *A Rejection of Informal Trial Control Mechanisms*

In comparing the evolution of the judicial role in the nineteenth century to the evolution of judicial power today,<sup>242</sup> it is important to note that not all of the trial control tools familiar to nineteenth-century judges were susceptible to formalization in the way that rules of evidence, jury instructions, and the directed verdict were. In some instances, at least, judges had gone beyond boundary-setting, substituting their judgment for that of litigants and trying to influence jury deliberations. Recall that at the time of the Founding, American judges had borrowed from their English counterparts some informal trial-control mechanisms.<sup>243</sup> It was not uncommon for eighteenth-century American judges to comment on the evidence or question jurors regarding their reasoning.<sup>244</sup> In one or two American jurisdictions, judges would even send jurors back for further deliberations when they disagreed with the jury's initial verdict.<sup>245</sup> When a judge chose to comment on the evidence, or to question jurors or send them back for further deliberation based on a disagreement with their first impression, the judge did not do so upon motion from the parties, or based upon settled legal rules, but rather on his own initiative and without standards. It was up to the judge to decide when such informal intervention was necessary to prevent unjust results. In this respect, the informal tools of control judges exercised in the late eighteenth century bear some resemblance to the informal tools of control that are so controversial in pretrial practice today. Like eighteenth-century efforts to influence outcomes by commenting on the evidence or sending jurors back for further deliberations, judicial efforts to influence outcomes in settlement conferences represent a wildcard beyond the control of the litigants or the law.<sup>246</sup>

Unlike contemporary pretrial practice, however, nineteenth-century trial practice largely rejected informal judicial management tools precisely because they were difficult to formalize. During the very same period that judges expanded their influence over trial practice, judges also experienced a significant cabining of their power.

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242. Of course, I am only comparing the evolution of the judge's procedural role. For a comparison of substantive law evolutions in the nineteenth and twentieth centuries (focusing on tort law), see Robert L. Rabin, *The Torts History Scholarship of Gary Schwartz: A Commentary*, 50 UCLA L. REV. 461, 476 (2002).

243. See *supra* notes 160-166 and accompanying text.

244. See *supra* notes 163-166 and accompanying text.

245. See *supra* note 166 and accompanying text.

246. It is not that judicial comments on the evidence were utterly immune from appellate review, but that their open-ended, case-specific character rendered them less susceptible to control by appeals courts and the rule of law than other trial control mechanisms.

Scholars have explored the populist sentiments that led many states in the nineteenth century to begin electing their judges, rather than appointing them.<sup>247</sup> Less well known, but equally important, was a movement in many states to restrict the manner in which judges could control trials. The populist political sentiments that drove the American Revolution<sup>248</sup> and drove Anti-Federalist fears of the judiciary at the time of the Founding<sup>249</sup> also drove a number of people in the early nineteenth century to decry judicial overreaching as a dangerous problem. Even though the esteem of judges rose relative to that of jurors in the nineteenth century,<sup>250</sup> and even though a Revolutionary era characterized by “fear of judges” had passed,<sup>251</sup> this did not mean that the legal system would tolerate an unchecked expansion of judicial power.<sup>252</sup>

In the South and West in particular, lawyers prone to “emotional speechifying” did not want judges to stand between them and juror sentiments.<sup>253</sup> These lawyers considered it their right to appeal on behalf of their clients to the sentiments of jurors without judicial interference.<sup>254</sup> Moreover, because they were “deeply involved in politics,”<sup>255</sup> these southern and western lawyers were able to utilize the political process to preserve their right to appeal to jurors’ emotions. Powerful lawyers obtained prohibitions against judicial commenting on the evidence through constitutional provisions in some states and ordinary legislation in others.<sup>256</sup>

Moreover, as the tide turned against judicial power to comment on trial evidence in western and southern states, other states began to follow suit. The judicial practice of commenting on the evidence became a target of criticism among those who continued to have greater confidence in juries than judges and who worried that if juries were given the opportunity to follow a judge’s lead they would do so, in effect transferring the jury’s fact-

247. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-25 (1995); Lerner, *supra* note 206, at 220-25; Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); cf. Roy A. Schotland, *Comment on Professor Carrington’s Article “The Independence and Democratic Accountability of the Supreme Court of Ohio,”* 30 CAP. U. L. REV. 489 (2002) (discussing elected versus appointed judiciaries).

248. See Molot, *Judicial Perspective*, *supra* note 143, at 16-17.

249. See *supra* notes 158-159 and accompanying text.

250. See *supra* note 151. An important function of the pre-Revolution era jury had been to protect Americans from the English Crown and its colonial governors. This function no longer was necessary after the Revolution, a time when the relative esteem of judges was on the rise. See SWARD, *supra* note 205, at 95-96. Moreover, the trend toward elected judiciaries further alleviated suspicion of judges because citizens expected them to be “more responsive to popular sentiments.” 2 KEHOE, *supra* note 205, at 1133.

251. Farley, *supra* note 233, at 203.

252. See 2 KEHOE, *supra* note 205, at 1133-34.

253. Lerner, *supra* note 206, at 233.

254. See *id.* at 234.

255. *Id.* at 239.

256. See *id.* at 242-57.

finding powers to the judge.<sup>257</sup> Even where it was not expressly prohibited, as in the federal system, the practice of commenting on the evidence fell into relative disuse. If, in the eighteenth century, judges in America—and not just in England—had provided jurors with their own personal sense of the evidence, over the course of the nineteenth century the practice was largely abandoned.<sup>258</sup> Judges also gave up the practice of sending jurors back for further deliberations upon hearing their verdict, a practice that was less common in the United States than in England even from the start.<sup>259</sup> As the distinction between law and fact solidified, and the allocation of responsibilities between judge and jury became clearer, judicial leeway to invade the province of the jury on factual matters diminished.

#### D. *Sacrifices Made To Cabin Judicial Leeway*

The formalization of the judicial role in nineteenth-century trial practice was not without its costs. In favoring formal over informal trial control mechanisms, nineteenth-century trial practice deprived judges of some management tools that likely would have improved resolutions in a great many cases. Consider, for example, the manner in which the law of jury instructions developed. Because it was designed to constrain trial judges, the law of jury instructions imposed much less meaningful limits on jurors and litigants than it might have. Rather than instructing jurors regarding the legal standard to be applied to particular cases before them—by tailoring jury instructions to the facts of the specific cases—judges generally followed standard forms, formulated for other cases by their peers and superiors, and in some instances by state legislatures. As a result, the single

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257. See Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595, 596 (1985). While this sort of criticism pervaded a variety of states, unique circumstances also led to the decline in a judge's ability to comment on the evidence in particular states. In North Carolina, for example, a raging feud developed between the bench and the bar, and members of the bar came to attack judges for being "poorly educated and arrogant." *Id.* at 608. In Massachusetts, it was a personal battle between a state representative, Benjamin Butler, and a state judge that led to the drafting of legislation outlawing the judicial practice of commenting on the evidence. *Id.* at 609. For a variety of reasons, by 1913, forty-one states or territories prohibited judges from commenting on the evidence, either through constitutional provision, statute, or judicial decision. For detailed discussion on when and how various states abandoned commenting on the evidence, see ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 310-13 (1952); Hogan, *supra* note 160, at 120-21; Johnson, *supra* note 164, at 78-81; Krasity, *supra*, at 608-09; and Lerner, *supra* note 206, at 242-62.

258. As Renée Lettow Lerner explains, the populist concerns that drove the election of judges did not entirely overlap with those that drove the restriction of judicial power. See Lerner, *supra* note 206, at 225. While efforts to elect judges were part of a broader populist movement to elect virtually all government officials, the movement to restrict judicial power was driven largely by lawyers. See *id.* at 225, 234-42.

259. See Lettow, *supra* note 150, at 523 (observing that "with the notable exception of Connecticut judges, [American judges] tended not to send jurors back for reconsideration").

greatest problem that jurors experienced in their deliberations was confusion over the legal standards they were supposed to apply.<sup>260</sup>

Judges no doubt could have eliminated, and still could eliminate, a great deal of the confusion that jurors experience during deliberations by drafting plain-language jury instructions tailored to the specifics of the case at hand. But if allowing judges greater flexibility to instruct juries would likely increase the chances of just resolutions in many cases—and arguably promote rule-of-law values by rendering jury verdicts more accurate—it also would increase the risk of judicial overreaching.<sup>261</sup> In striking a balance between promoting fair, accurate resolutions and cabining judicial discretion, the law of jury instructions has placed a strong emphasis on the latter.

### E. *Lessons for Contemporary Pretrial Practice*

The nineteenth-century example teaches us that even where attorney partisanship threatens to undermine the traditional, adversarial model of adjudication—and prevents us from leaving it entirely to litigants to prepare their cases for trial and to present their cases to juries—we can structure judicial tasks so that judges continue to rely on the litigant input and legal criteria to which they are accustomed. Moreover, the nineteenth-century example demonstrates not only that we *can* update the traditional judicial role to cope with the problem of partisanship, but also that we *should* do so. Judicial intervention that is party-initiated and governed by established legal standards does not pose the same risks of judicial overreaching as ad hoc intervention left to each individual judge's discretion. If the nineteenth-century example cannot provide complete answers to contemporary problems, it at least provides strong support for cabining judicial leeway and defining the judicial role more closely. In balancing the need for a strong judicial role against the risks of judicial overreaching, we should

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260. “[J]ury research reveals that even where juries accurately assess the evidence presented, in many cases jurors will misunderstand or misapply the judge’s legal instructions.” Molot, *Changes*, *supra* note 23, at 1000; *see also* VALERIE P. HANS & NEIL J. VIDMAR, *JUDGING THE JURY* 120-27 (1986); Phoebe Ellsworth, *Are Twelve Heads Better than One?*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 205, 218-19, 223; A. Elwork & Bruce D. Sales, *Jury Instructions*, in *THE PSYCHOLOGY OF EVIDENCE IN TRIAL PROCEDURE* 280 (S.M. Kastin & L.S. Wrightsman eds., 1985); Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 225, 233; Valerie P. Hans, *The Jury’s Response to Business and Corporate Wrongdoing*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 177, 185; Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 137, 151-52 (Robert E. Litan ed., 1993).

261. *Cf.* Molot, *Changes*, *supra* note 23, at 998-1005 (noting problems posed by both juror and judicial discretion).

consider the nineteenth-century example and distinguish formal from informal strategies of judicial intervention.

If we were to follow the pattern established in nineteenth-century trial practice—and reconcile the judicial role in contemporary *pretrial* practice with the judicial role embraced by the Founders, described by Fuller, and still found today in *trial* practice—we would promote formal tools of control like summary judgment,<sup>262</sup> formalize those management tools that are susceptible to formalization, like those governing discovery,<sup>263</sup> and either reject or substantially revise management tools that are not susceptible to formalization, like the settlement conference.

First, in order to ensure that judges take summary judgment seriously as a way to dispose of meritless cases and narrow disputed issues while remaining within the confines of their traditional role, we should no longer permit judges to issue single-sentence opinions denying summary judgment because “genuine issues of material fact remain.” Simply because summary judgment denials are interlocutory orders immune from appellate review<sup>264</sup> does not mean that judges should be excused from explaining these denials, just as they currently explain grants of summary judgment.<sup>265</sup> If we want judges to favor the summary judgment mechanism over informal management techniques like the settlement conference—just as nineteenth-century trial practice ultimately favored the directed verdict and JNOV over informal efforts to control litigation outcomes—it is not enough simply to strengthen summary judgment standards, as the Supreme Court did in its 1986 *Celotex* trilogy.<sup>266</sup> We must also induce judges to apply those standards uniformly, despite strong incentives in many instances to pursue less time-consuming alternatives.<sup>267</sup>

262. See Elliott, *supra* note 29, at 321-22 (“To improve the issue-narrowing capacity of our present procedural system, we need to fill the gaping hole that now exists between the overly scrupulous standard for summary judgment and the essentially standardless procedures of managerial judging.”).

263. See, e.g., Resnik, *Managerial Judges*, *supra* note 17, at 440-42; see also sources cited *supra* note 43 (discussing the effects of the Civil Justice Reform Act of 1990).

264. See 28 U.S.C. §§ 1291-1292 (2000).

265. See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion To Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 125-30 (2002) (suggesting that judges be required to explain denials of technically appropriate summary judgment motions, but defending limited judicial discretion to deny summary judgment even where it would be appropriate); Molot, *Changes*, *supra* note 23, at 1030-33.

266. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *But see* Issacharoff & Loewenstein, *supra* note 49, at 74-75, 93 (criticizing the more aggressive use of summary judgment). See generally Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988) (praising the trilogy).

267. See John F. Lapham, Note, *Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f)*, 24 U. MICH. J.L. REFORM 253, 254, 259 (1990) (arguing that judicial discretion to deny or delay summary judgment to allow further discovery “has undermined [a] basic purpose of the summary judgment procedure,” which should

The most effective manner of promoting uniformity among trial judges—and the one embraced in the nineteenth century—would of course be to subject such trial court decisions to appellate review.<sup>268</sup> But the costs of subjecting *pretrial* decisions to appellate review are much higher than the costs of appellate review of decisions at trial. If every denial of summary judgment were automatically subject to an interlocutory appeal, this could substantially slow the pretrial process. The less drastic reform of simply requiring judges to write opinions when they deny summary judgment—just as they do when they grant summary judgment—might suffice to cabin judicial leeway and promote uniformity in judicial approach.<sup>269</sup>

A second component of reform, albeit one that is more difficult to pursue, would entail the regularization of judicial management tactics that fall between formal and informal extremes. As noted in Part I, when judges intervene in discovery they sometimes do so at the instigation of the parties based on applicable legal standards and sometimes do so on their own initiative in a discretionary manner.<sup>270</sup> To date, efforts to bolster the substantive criteria governing discovery—for example, by setting presumptive limits on the numbers of interrogatories and depositions that parties may impose on their opponents—have run into problems. If stronger substantive criteria in the discovery process have the benefit of reducing disparity among judges, they have the corollary drawback of inhibiting judges from tailoring discovery to meet the needs of particular cases.<sup>271</sup> One potential way to resolve this tension would be to establish substantive criteria for discovery that flow from the claims and defenses asserted in the case at hand. Although scholars sometimes assume that any move away from trans-substantive procedure would be a move toward giving judges additional procedural discretion,<sup>272</sup> this need not always be true. One could

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be “to prevent the waste of resources not only on useless trials but also on useless discovery”); *cf. supra* notes 71-72 and accompanying text (noting the resource burden associated with the summary judgment mechanism).

268. See Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 *MIL. L. REV.* 145, 206-16 (1995) (exploring the possibility of making denials of summary judgment appealable).

269. See Fletcher, *supra* note 17, at 642 (“Though our society generally looks to external controls—such as elections and appellate courts—to legitimate the exercise of power, internal controls are also an important mechanism for channeling and legitimating the exercise of power. Though a particular judicial action may be beyond the reach of an appellate court, it may nonetheless be governed by legal criteria that make it non-discretionary.”); Molot, *Changes, supra* note 23, at 1030-33.

270. See *supra* note 73 and accompanying text.

271. For this reason the Federal Rules permit judges to depart from presumptive limits. See *FED. R. CIV. P.* 30(a), 33(a).

272. Compare Tidmarsh, *supra* note 17, at 1747 (noting that “the discretion to fashion case-specific rules . . . threatens trans-substantivism—not at the level of formal rule, but at the level of rule implementation in individual cases”), with Weinstein, *supra* note 29, at 1911 (arguing that “it is no disgrace to the Rules to find incomplete judge-to-judge uniformity”).

imagine a regime designed to vary from case to case but not from judge to judge.<sup>273</sup> If judges were required to justify significant discovery orders in published opinions, they would begin to set precedent regarding the sequence and quantity of discovery for particular categories of cases (e.g., commercial disputes, products liability claims, or employment discrimination suits) and particular types of disputes within those categories (e.g., complex facts, multiple parties, high dollar amounts at stake).<sup>274</sup> As in the summary judgment context, merely requiring judges to write opinions for important pretrial decisions might not promote uniformity as effectively as subjecting those decisions to immediate appellate review, but given the costs of interlocutory appeals, a requirement of written opinions seems like a sensible first step.<sup>275</sup>

Finally, and most important, if we wish to reconcile the judicial role in pretrial practice today with a traditional judicial role that reflects the judiciary's institutional competence, constitutional authority, and historical practices, we should abolish, or at least substantially revise,<sup>276</sup> the worst offender in the arsenal of judicial management tools—the judicially imposed settlement conference. This is not to say that judges should not be permitted to do anything to promote settlements. Attorney surveys reinforce assertions by many scholars and judges that judicial efforts to promote settlement often do more good than harm, and it would be unwise to deprive the settlement process of any judicial input.<sup>277</sup> But simply because

273. Indeed, nineteenth-century developments in the law of evidence arguably accomplished just that. The evidentiary rules established standards for judges such as “relevance” and “prejudice,” which varied depending upon the cases before them. See FED. R. EVID. 401-403.

274. See Kakalik et al., *supra* note 73, at 627 (“Courts may have more success implementing numerical and time limits [on discovery] when these are coordinated with differentiated case management (‘DCM’) plans, if those plans are fully implemented. Incorporating numerical limits on discovery activity into DCM plans may also permit courts to specify more modest amounts of activity for ordinary cases, while preserving higher limits for more complex cases.”); Molot, *Changes*, *supra* note 23, at 1045 (discussing merits-based limitations on discovery); Silberman, *supra* note 47, at 2132 (“[T]he debate can be seen as one between those who are satisfied with an individual case-by-case customized procedure put in place by judicial adjuncts versus those who advocate more formal rules that do not slavishly adhere to a uniform and trans-substantive format.”); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 93-94 (1997) (favoring presumptive limits on discovery over ad hoc management, based in large part on the time they would save judges); Weinstein, *supra* note 29, at 1910 (“The proponents of the Rules Enabling Act were not interested in uniformity for its own sake; they saw uniformity as a tool for streamlining litigation and for arriving promptly at an assessment of the merits.”).

275. See *supra* notes 268-269 and accompanying text.

276. Cf. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2664-65 (1995) (“For me, the question is not ‘for or against’ settlement (since settlement has become the ‘norm’ for our system), but *when, how, and under what circumstances* should cases be settled?” (citations omitted)).

277. See Menkel-Meadow, *supra* note 44, at 497 (noting that “lawyers overwhelmingly seem to favor judicial intervention”). This stands in contrast to lawyers’ attitudes in the nineteenth



judicial efforts to promote settlement can be a productive part of the pretrial process does not mean that judges should be free to promote settlements in whatever manner they deem fit. If the goal is to promote settlement without regard to the terms, then authorizing the judge to appoint a nonjudicial mediator may be almost as effective as relying on the judge herself to oversee settlement negotiations, albeit without the same dangers.<sup>278</sup> If the goal is not just to promote settlement for settlement's sake, but instead to educate parties on the merits and ensure that settlements are fair, then the summary judgment mechanism offers a less dangerous (though more burdensome) substitute for the settlement conference.<sup>279</sup> Moreover, both goals could be pursued via alternative dispute resolution mechanisms that hew more closely to tradition than the judicial settlement conference.<sup>280</sup> We could try, for example, to make court-based alternative dispute resolution look more like traditional adjudication, albeit in perhaps a more efficient and abbreviated form.<sup>281</sup> Innovations like the summary jury trial may not afford parties all the same procedural protections as a full-blown jury trial, but they at least resemble the traditional adjudicative process and do not require judges to play a managerial role that strains the boundaries of their institutional competence and constitutional authority.<sup>282</sup>

Of course, there would be costs associated with all of these reforms. To harmonize the judicial role in pretrial practice with the judicial role in trial practice, and to reinvigorate the judicial role embraced by the Founders and described by Fuller, we would risk increasing the judicial workload and depriving judges of some of the flexibility they currently enjoy to tailor management techniques to the unique challenges of each case. But the benefits of fidelity to tradition would outweigh the costs, just as they have

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century toward informal judicial efforts to control trial practice by commenting on the evidence. See *supra* text accompanying notes 253-257.

278. See Menkel-Meadow, *supra* note 44, at 511 (arguing that settlement "conferences should be managed by someone other than the trial judge so that interests and considerations that might effect a settlement but would be inadmissible in court will not prejudice a later trial"); Resnik, *Managerial Judges*, *supra* note 17, at 436-38 (noting the costs and benefits of such an alternative).

279. Alternatively, judges might not need to tell parties what is "fair" but instead might try to manage discovery so as to eliminate or assuage the factors that might otherwise lead parties to settle for amounts that are not fair. See *supra* notes 270-275 and accompanying text.

280. But see Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1619 (1997) (arguing that what we have "learned from the field of ADR" is that "one size does not fit all" and that "different configurations of disputants, issues, and stakes in disputes may militate in favor of different forms of disputing").

281. See Hensler, *supra* note 6, at 96-99; cf. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956-57 (2000) (seeking to incorporate constitutional norms into ADR); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 589-90 (1997) (challenging the bipolar distinction between ADR and traditional court adjudication and noting that much of ADR can be characterized as state action).

282. But cf. Posner, *supra* note 53, at 393 (questioning the efficiency of such a scheme).

in trial practice. One need only contrast the virtually unfettered discretion that judges enjoy to manage and settle cases in *pretrial* practice with the sacrifices made to cabin judicial discretion and prevent judicial overreaching in *trial* practice to see that contemporary managerial judging is in need of reform.

The benefits of allowing judges broad discretion to manage pretrial practice and promote pretrial settlements are more tenuous than the benefits that would arise from allowing judges additional discretion to influence outcomes at trial, say by granting them wider leeway in instructing jurors. Whereas empirical work on jury deliberations reveals juror confusion on legal matters to be a serious problem<sup>283</sup> (a problem that a more active judicial role instructing the jury presumably would alleviate), there is no comparable empirical evidence on the need for judicial intervention in pretrial practice.<sup>284</sup> Indeed, scholars have questioned whether judicial intervention in pretrial practice actually reduces litigation expenses<sup>285</sup> and increases the likelihood of a settlement.<sup>286</sup> They suggest that many of the cases that settle after judicial prodding might have settled anyway.<sup>287</sup> Critics also question whether judicial intervention promotes fair settlement terms in particular, or whether it simply promotes settlement without regard to whether settlements are fair or accurate.<sup>288</sup> Law and economics scholarship teaches us that parties left to their own devices generally will not settle on anything other than terms they deem economically attractive.<sup>289</sup> To support the argument that judicial efforts improve the quality of settlements, one would have to show both that bargaining imbalances routinely lead to inequitable settlements<sup>290</sup> and that these imbalances are of a kind that judges are institutionally equipped to offset.<sup>291</sup>

283. See *supra* note 260.

284. However, as noted earlier, see *supra* note 277 and accompanying text, lawyers do tend to favor some sort of judicial intervention.

285. See Resnik, *Changing Practices*, *supra* note 29, at 195 (noting that "judicial discretionary control of the pre-trial docket and the various management techniques do not, in and of themselves, achieve the congressional goals of cost savings").

286. See Menkel-Meadow, *supra* note 44, at 494 ("One of the most interesting and seldom noted implications of the Rosenberg study is that if parties achieve settlement with equal frequency in mandatory, voluntary, and nonconference cases, judicial settlement management may indeed be an inefficient use of judicial time."); Resnik, *Managerial Judges*, *supra* note 17, at 380 ("Little empirical evidence supports the claim that judicial management 'works' either to settle cases or to provide cheaper, quicker, or fairer dispositions.").

287. See, e.g., Menkel-Meadow, *supra* note 44, at 494.

288. See, e.g., Resnik, *Managerial Judges*, *supra* note 17, at 380, 431.

289. See also William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) (discussing settlement dynamics in criminal law). See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

290. See Resnik, *Failing Faith*, *supra* note 29, at 519-20 ("Upon a recognition of widespread imbalance (and particularly of frequent disputes between government and the poor), parity is required to sustain belief in adversarialism."). See generally Galanter, *supra* note 99, at 107-10

While the benefits of judicial discretion in pretrial are more tenuous than those associated with greater judicial leeway to influence juries at trial, the dangers of judicial discretion in pretrial are more pronounced. A relaxation of the law of jury instructions might increase the risk of judicial overreaching, but such a change would not alter the fundamental dynamics that surround judicial power in trial practice. Litigants and appellate courts would continue to impose meaningful constraints on judicial behavior. If a judge were to instruct a jury in a way that departed too far from relevant legal standards, or that trod too heavily on the jury's historical control over factual matters, litigants would be free to appeal and appellate courts would have the power to reverse. The question in trial practice is *how much* power litigants and appellate courts will relinquish to trial judges. There is no risk of unbridled judicial discretion because judges would continue to rely on litigants for input and on an identifiable body of law for guidance, albeit one that is more open-ended.

In pretrial practice, by contrast, judges often enjoy an unbounded discretion that poses dangers well beyond what might be posed by allowing judges additional leeway in instructing juries. There often is no meaningful opportunity for litigants to control judicial behavior, no meaningful standard of law to cabin judicial leeway, and no meaningful opportunity for appellate review. Although a litigant certainly is free to refuse to settle on terms he or she knows to be unfair, a litigant asked by a judge to settle a case has strong incentives to agree to a settlement and thereby avoid trying the case—or proceeding with discovery—before a potentially hostile judge. A judge's erroneous views of a case may significantly alter settlement dynamics between parties.<sup>292</sup>

When we consider the lengths to which nineteenth-century trial practice went to remain faithful to the judiciary's traditional adjudicative role, the case for reforming judicial behavior in pretrial practice today—and limiting judicial discretion to promote settlements in particular—becomes very strong indeed. If we wish to reconcile judicial behavior in pretrial practice

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(describing suits between repeat players and one-time participants); Menkel-Meadow, *supra* note 99, at 38-57 (doing the same for alternative dispute resolution).

291. *But see* Menkel-Meadow, *supra* note 44, at 504 (“Marc Galanter’s work suggests that courts may not be particularly good equalizers of disparate resources.”). Given that judges during pretrial ordinarily know a great deal less about the merits of cases than do attorneys, there is the risk that a judge will not be able to determine when a party’s refusal to settle on proposed terms reflects the party’s honest views of the merits as opposed to an attempt to extract bargaining surplus from the opponent. *See* Frankel, *supra* note 52, at 1042 (noting the judge’s lack of information compared to that of lawyers).

292. Moreover, to the extent that judicial decisions appear to be driven by personal whim rather than binding legal doctrine, they aggravate one of the underlying causes of attorney zealotry—namely, a belief that the law is malleable and that attorneys therefore are virtually unconstrained in their efforts on behalf of their clients. *See* KRONMAN, *supra* note 6, at 315-28 (noting the poor example set by judges for attorneys); Simon, *supra* note 57, at 992-93 (linking perceptions of legal indeterminacy to perceived weaknesses in lawyer ethics).

with judicial behavior at trial—and to ensure fidelity to a traditional judicial role with institutional, constitutional, and historical underpinnings—we must significantly revise contemporary judicial conduct.<sup>293</sup>

#### IV. OVERLOOKED PARALLELS BETWEEN CONTEMPORARY CLASS ACTION LITIGATION AND TWENTIETH-CENTURY ADMINISTRATIVE LAW

Historical parallels tend to bolster the case for reform not only in pretrial practice, but also in class action litigation. If the class action has required judges to stray from their traditional role in order to protect the interests of affected parties who cannot adequately represent themselves, historical parallels may assist us in grappling with this problem, just as they can help us better understand the judge's role handling partisanship problems in pretrial practice. This is not the first time that judges have been required to second-guess agents' claims on behalf of principals.<sup>294</sup> Nor is it the first time that judges have presided over disputes that require them to consider the interests of a broad array of affected parties who are not actually present in court. Judicial review of administrative action likewise has required judges to second-guess the claims of an agent on behalf of a principal (an administrative agency implementing Congress's instructions) and, in so doing, to take into account the interests of a wide variety of affected citizens.<sup>295</sup>

Some scholars have noted parallels between class action litigation and administrative regulation, and even between the roles of judges in the two contexts.<sup>296</sup> In important respects, class action litigation and administrative

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293. See Resnik, *Managerial Judges*, *supra* note 17, at 432 (advocating the use in civil cases of criminal law's prohibition against judicial involvement in settlement); *id.* at 407 (contrasting the informality of judicial conduct pretrial with the formality of judicial conduct at trial).

294. See *supra* note 7 (noting John Coffee's observation that judges monitor principal-agent relationships in corporate law as well).

295. See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1240 (1989) ("The Supreme Court bears much of the burden of ensuring the continuing vitality of the principal-agent relationship between the people and government.").

296. Richard Nagareda has argued that "the rise of [mass] settlements in tort mirrors the development of public administrative agencies earlier in this century." Nagareda, *supra* note 7, at 902; see also *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government."); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 5 (2000) ("I focus on class actions because as representative litigation they share an essential attribute of government actions . . ."); Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 470-71 (1991) ("The use of administrative models to resolve the allocation of damages in class actions has become fairly well established, at least in principle."); Issacharoff, *supra* note 7, at 338 (arguing that "it is useful to think of the class action mechanism as fundamentally a centralizing device designed to accomplish some of the same functions as performed by the state, particularly in those situations in which the state has not or cannot perform its regulatory function, or it would

regulation can be viewed as substitutes for one another; they offer alternative avenues for creating and implementing social policy.<sup>297</sup> But if scholars have drawn general comparisons between litigation and regulation as mechanisms of social ordering, they have not explored specific procedural parallels between the two contexts.<sup>298</sup> Scholars have only scratched the surface of a body of law that may be of great assistance in defining the role of the judge in class action litigation. The features of class action litigation that distinguish it from traditional adjudication and create great uncertainty regarding the judicial role—its reliance on judges to monitor an agent's actions on behalf of a principal, to weigh diverse interests rather than just apply legal rules, and thus to depart from their traditional adjudicative role—characterized the administrative process for much of the twentieth century. Yet the law governing judicial review of government action evolved over the course of the twentieth century so as to supply judges with the litigant input and legal criteria they needed to perform their assigned functions and to make the judicial role in the administrative state resemble the judicial role in conventional adjudication. It is for this reason that administrative law may be of great assistance to judges and scholars in the class action context. The law governing judicial review of government action teaches us that even when disputes do not comfortably fit Lon Fuller's classic definition of adjudication, the judicial

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be inefficient for the state to undertake such regulation directly"); Nagareda, *supra* note 4, at 751 (noting that mass tort settlements "aspire to create some form of private administrative system"); *id.* at 771 ("For both aggregate settlements and legislation, there exists a delegation of power that constitutes the agent as decisionmaker: a consensual delegation from client to lawyer upon the retention of legal counsel or from 'the People' as a whole to Congress via Article I of the Constitution."); Nagareda, *supra* note 100, at 186 (noting that "the 'fairness hearings' typically convened by courts to examine the handiwork of class counsel in a proposed settlement resemble the notice-and-comment process employed by administrative agencies to guard against arbitrariness in their consideration of proposed rules"). For an argument contrasting the adjudicative process Fuller described with the "consultative process" found in administrative decisionmaking (but not necessarily in judicial review of administrative decisions), see Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 414-23 (1978).

297. See, e.g., Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1967 (1992); Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 495-96 (2001); Horowitz, *supra* note 2, at 1267 (noting the "administrative" and "legislative" character of structural judicial decrees in structural reform litigation); Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813, 827 (1989) (book review).

For an argument against settlement class actions on the ground that they "involve judicial approval of the creation of what are in effect private administrative agencies," see Monaghan, *supra* note 76, at 1165 n.73.

298. One arguable exception to this can be found in Nagareda, *supra* note 7, which is discussed below. See *infra* notes 369, 371 and accompanying text. Jim Rossi explores the parallel from a different perspective. See Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1016 (2001) (focusing on the settlement of lawsuits challenging agency action).

role nonetheless can be structured to alleviate this problem and bring judicial conduct back into line with traditional conceptions of judging.

In exploring the parallels between judicial review of agency action and judicial review of class settlements, I do not mean to overlook important differences between the two. For one thing, judges are called upon to monitor agents with very different incentives. In class action litigation, judges review the actions of profit-seeking entrepreneurs,<sup>299</sup> whereas in administrative law, judges review the actions of public servants.<sup>300</sup> For another thing, judges are asked to look out for the interests of very different principals. Class attorneys owe their allegiance to an identifiable group of absent class members, whereas administrators owe fealty to Congress and, more broadly, to the American public as a whole.<sup>301</sup> Moreover, not only do the principal-agent relationships differ, but so do the formats in which these relationships present themselves to judges. In civil litigation, a settlement represents an alternative to adjudication, negotiated by the parties in the “shadow of the law.” In the administrative state, by contrast, a final agency decision is not a substitute for the judicial process, but rather a necessary precursor to that process.<sup>302</sup> Although the administrative process may be influenced *ex ante* by the prospect of judicial review *ex post*, administrators proceed in the “limelight,” rather than the “shadow,” of the law, developing a public record upon which judicial review can proceed.<sup>303</sup>

These differences are not so great, however, as to overshadow important parallels that may offer direct lessons for judicial review of class action settlements.<sup>304</sup> The central dilemma that judges confront in class

299. See generally Coffee, *Entrepreneurial Litigation*, *supra* note 97; Macey & Miller, *supra* note 76.

300. See Erichson, *supra* note 296, at 24, 26 (noting how “the role of the government lawyer differs from the role of the private class action lawyer” and how “different incentives and mindsets drive their conduct”); Issacharoff, *supra* note 7, at 366 (noting that in the class context “there is no preexisting political or organizational vehicle that can claim an independent source of authority to speak for the collective”); Nagareda, *supra* note 7, at 939 (noting that administrators have “received delegations of power from politically accountable institutions”).

301. See Erichson, *supra* note 296, at 24-25 (“The public lawyer represents the employing government agency or entity, which in turn represents the public . . . . In contrast to the duties of government lawyers, private class counsel owe a duty of loyalty to the members of the particular class.”).

302. See 5 U.S.C. §§ 701, 704 (2000).

303. See *infra* Subsection IV.C.1; see also *infra* note 375 (discussing “reg-neg”).

304. Administrators may not have the same financial inducements as plaintiffs’ attorneys, but their incentives often differ from those of the legislators and citizens to whom they owe allegiance, and agency problems can be just as intense in administrative law as in class action practice. See Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 179 (1992); Eben Moglen & Richard J. Pierce, Jr., *Sunstein’s New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1213 (1990); Richard J. Pierce, *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2231-32 (1997); Rossi, *supra* note 298, at 1017; Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 434 (1989). Moreover, when one takes into account that trial is not a realistic alternative in most mass tort actions—and that the settlement is more accurately viewed as a precursor to the

action litigation today is virtually the same dilemma that judges faced in administrative law in the mid-twentieth century—namely, how to structure judicial review of an agent’s actions on behalf of a principal so as to give judges the litigant input and legal criteria they need to perform this function. When we examine the hurdles we have overcome and the resources we have expended in administrative law to ensure that judges do indeed have the litigant input and legal criteria they require—and to keep them within the bounds of their institutional competence and constitutional authority—the dilemma posed by contemporary class action practice becomes clearer. Fidelity to the traditional judicial role may not be easy to achieve, but history suggests that it is worth the effort.

#### A. *Judicial Review of a Principal-Agent Relationship in Administrative Law*

Judges have long been responsible for monitoring a principal-agent relationship in the course of reviewing government action. Throughout our nation’s history, people injured by government action have sought relief in the courts and the courts therefore have had to decide whether government officials were acting within the scope of their authority.<sup>305</sup> Although the President has some leeway in deciding how to “take Care that the Laws be faithfully executed,”<sup>306</sup> the courts have always been called upon to ensure that executive officials do indeed remain “faithful” to Congress’s instructions.<sup>307</sup>

Historically, courts could evaluate the principal-agent relationship between Congress and executive officials without straining their traditional adjudicative role. When the Founders established an independent federal judiciary and empowered it to hear cases arising under federal law or involving the United States, they understood that judges would be responsible for reviewing government action.<sup>308</sup> But, as noted in Part II, the

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judicial process rather than a substitute for the judicial process—the differences between the two contexts fade significantly. *See infra* notes 378-380 and accompanying text.

305. *See* Monaghan, *supra* note 146, at 14-17 (chronicling nineteenth-century judicial review of government action on statutory grounds).

306. U.S. CONST. art. II, § 3.

307. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Monaghan, *supra* note 146, at 2 (emphasizing *Marbury’s* relevance for judicial review of administrative action on statutory, as well as constitutional, grounds); *see also* Molot, *Reexamining Marbury*, *supra* note 138, at 1249 (same).

308. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 15 (2d ed. 1986) (“[I]t is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several states.”); Monaghan, *supra* note 146. *But see* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 10 (2001) (observing that, in the Founders’ view, the “Constitution was *not* ordinary law, *not*

Founders also understood that the judges would do so at the instigation of others and based on applicable law.<sup>309</sup>

Traditionally, judges did not themselves have to monitor the actions of government officials, but rather relied either on injured citizens to bring challenges against these officials or on the officials to initiate enforcement actions against the relevant citizens. Although judges were responsible for ensuring that officials respected legislative directions, and, in this respect, judges acted on Congress's behalf,<sup>310</sup> judges generally could rely on a citizen actually affected by government action to monitor official conduct and to point out where government officials had exceeded the bounds of their statutory authority. In evaluating the principal-agent relationship between Congress and its agents, judges could rely on opposing parties to frame disputes.

Moreover, judges not only could rely on litigants to frame disputes over government action but also could look to a governing body of law to measure the government agent's actions. It has always been up to Congress in the first place to establish executive departments and to define the boundaries of their authority by statute. In evaluating a citizen's arguments that an official had exceeded the bounds of his or her authority, courts could look to Congress's instructions for guidance. Although Congress's instructions might be ambiguous, and might leave some room for doubt regarding the bounds of an official's authority, this interpretive leeway for judges was not viewed as a serious problem for much of our nation's history. As noted in Part II, at the time of the Founding, people understood law to be ambiguous and interpretive leeway to be inevitable,<sup>311</sup> but they generally understood the judicial enterprise to be constrained.<sup>312</sup> In the century that followed, moreover, confidence in the determinacy of law and the constraining force of canons of construction increased. As formalism came into vogue, the leeway inherent in interpretation was downplayed and

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peculiarly the stuff of courts and judges," but rather was "a special form of popular law, law made by the people to bind their governors, and so subject to rules and considerations that made it qualitatively different from (and not just superior to) statutory or common law"). Alexander Hamilton used the courts' relatively uncontroversial power over statutory interpretation to defend its more hotly contested power to review government action for compliance with the Constitution. See THE FEDERALIST NO. 78, *supra* note 148, at 439 (Alexander Hamilton).

309. See *supra* Section II.B.

310. See *supra* note 141 (citing sources on faithful agent theory).

311. They accepted Madison's observation that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal." THE FEDERALIST NO. 37, *supra* note 148, at 179 (James Madison); see also Molot, *Judicial Perspective*, *supra* note 143, at 20-27; Powell, *supra* note 178, at 904 ("The framers were aware that unforeseen situations would arise, and they accepted the inevitability and propriety of construction.").

312. See *supra* notes 186-195.



law often was portrayed as a science.<sup>313</sup> Whether judges were resolving private law disputes between private citizens or public law disputes between a citizen and a government official, judges were expected to apply the law rather than to create it themselves.

#### B. *How the Rise of the Administrative State Threatened To Undermine the Traditional Judicial Role*

If judges in the eighteenth and nineteenth centuries were able to review government action without straying from their traditional role, the twentieth century witnessed enormous changes in the structure of government that placed new demands on judicial review of government action. Institutional changes combined in a way that threatened to deprive judges of the legal guidance and litigant input they traditionally had enjoyed.

First, from the late nineteenth century to the mid-twentieth century, Congress began to regulate so many previously unregulated areas of life that it could not draft by itself the substantive rules to govern these various private activities. Instead, Congress made a practice of passing vague statutes and leaving it to administrative agencies to work out the details of new regulatory regimes.<sup>314</sup> As broad legislative delegations became more common, courts had less and less law to look to in deciding whether a government agency had acted within the scope of its authority.<sup>315</sup> Moreover, this institutional change was accompanied by an intellectual shift that called ever greater attention to interpretive leeway.<sup>316</sup> At the same time that Congress was leaving interpreters more leeway to construe its statutes, legal realists were attacking formalist portrayals of law as a science and raising new doubts about the determinacy of law<sup>317</sup> and the constraining force of canons of construction.<sup>318</sup> As a result, judges reviewing

313. See, e.g., BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 168 (2d ed. 1999) (noting Christopher Columbus Langdell's treatment of law as "science, whose principles and doctrines could be 'discovered' in cases"); Molot, *Judicial Perspective*, *supra* note 143, at 57-58; Molot, *Reexamining Marbury*, *supra* note 138, at 1297.

314. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982); Molot, *Reexamining Marbury*, *supra* note 138, at 1254-56; Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 337 (1990) [hereinafter Stewart, *Madison's Nightmare*]; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671 (1975) [hereinafter Stewart, *Reformation*]; Sunstein, *supra* note 141, at 408-09.

315. See Molot, *Reexamining Marbury*, *supra* note 138, at 1254-56.

316. See *id.* at 1297-98.

317. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 68-98 (1977); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 536 (1992) (noting legal realism's criticism of the formalist approach of the late nineteenth century); Molot, *Judicial Perspective*, *supra* note 143, at 57-58; Molot, *Reexamining Marbury*, *supra* note 138, at 1297.

318. See, e.g., Molot, *Reexamining Marbury*, *supra* note 138, at 1297 n.276. For a discussion of competing conceptions of legal realism, see Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1062-74 (1993).

government action during the New Deal seemed to be less constrained by any identifiable body of governing law and freer to base their decisions on their own policy preferences. Indeed, the growing perception that judges were making up law as they went along may have given President Roosevelt the confidence to attack the Supreme Court as countermajoritarian and to try to pack it with Justices sympathetic to his New Deal policies.<sup>319</sup>

While institutional changes and intellectual shifts threatened to make judicial review of government action seem lawless, other institutional changes threatened to deprive judges of the litigant input on which they traditionally had relied in monitoring government action.<sup>320</sup> The new authority that Congress conferred on executive officials brought with it new responsibilities. Newly created administrative agencies could not always fulfill their broad legislative mandates merely by applying the law on a case-by-case basis. Although administrators sometimes exercised their new powers through conventional adjudication, in many instances administrators chose to implement new regulatory regimes by drafting broadly applicable rules.<sup>321</sup> Judges called upon to review these rules had to consider their impact not just on individual citizens targeted by the agency, but also on broad categories of people who did not yet have any concrete dispute with the agency. Where judges historically had relied on affected parties to challenge agency actions and argue on their own behalf, judges now had to take into account the interests of a wide variety of people, only some of whom might be present in court.

Administrative law in the mid-twentieth century thus presented some of the same challenges that class action practice presents today. In monitoring a principal-agent relationship, judges could not always rely on the affected parties to frame arguments and could not always look to a governing body of law to inform their decisions.<sup>322</sup>

319. Barry Friedman points out that

[t]he institution of judicial review was not perceived to be the problem (as it had been in other times in history); rather, it was the Justices themselves who were seen as out of touch with present needs. Thus, Court-packing made some sense as a remedy, because it involved a change in personnel without tampering with the institution of judicial review itself.

Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 978-79 (2000).

320. Cf. Verkuil, *supra* note 138, at 743 (“[T]here has long been a tension between the adversary system and large-scale government decision making.”).

321. See, e.g., Nagareda, *supra* note 7, at 940; Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375-82.

322. Indeed, as optimism regarding the administrative process gave way to suspicion in the decades after the New Deal, and as “agency capture” was identified as a problem, courts were called upon to prevent collusion between regulators and regulated industries at the expense of the public that the regulators were supposed to represent, very much in the same way that courts are called upon today to prevent collusion between plaintiffs’ attorneys and corporate defendants at the expense of absent plaintiffs. See Robert L. Rabin, *Federal Regulation in Historical*

### C. *Structuring Judicial Review To Reflect the Judiciary's Institutional Competence and Constitutional Authority*

Although the rise of the administrative state placed the traditional judicial role under considerable strain, administrative law doctrine evolved in the decades following the New Deal in a manner that alleviated this strain. If, in the mid-twentieth century, there was the risk that judges would have to frame arguments themselves on behalf of affected parties, and would have to weigh into policy debates without any identifiable body of law to guide them, by the late twentieth century, administrative law was structured to supply judges with the litigant input and legal criteria they needed to play their traditional adjudicative role.<sup>323</sup> Modeling their conduct in administrative law after the role they had played for centuries on courts of appeals, judges reviewed administrative records for compliance with procedural and substantive norms. The procedural and substantive doctrines judges developed during this period were structured to give affected parties the ammunition they needed to challenge agency decisions in court and to provide courts with the criteria they needed to review these challenges.<sup>324</sup>

#### 1. *Securing the Participation of Affected Parties*

Judges facilitated participation in the administrative process, and participation in court challenges to administrative decisions, through two

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*Perspective*, 38 STAN. L. REV. 1189, 1193 (1986) (noting the shift from a judiciary “entranced” with “administrative expertise” to one that exhibited “a renewed skepticism about the regulatory process”); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1398-428 (2000) (describing shifts in political thought and judicial review).

323. The judges who developed these new administrative law doctrines may have been motivated only in part by a desire to facilitate judicial review. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (“What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review.”). Other goals, such as improving the administrative process, certainly contributed as well. But regardless of their motivations, judges ultimately developed a body of administrative law that enabled them to proceed without straining the boundaries of their institutional competence or constitutional authority.

For discussions of various models of administrative behavior and their impact on judicial review, see generally Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 249; Rabin, *supra* note 322; Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385; Schiller, *supra* note 322, at 1417-28; and Stewart, *Reformation*, *supra* note 314.

324. Cf. Stewart, *Madison's Nightmare*, *supra* note 314, at 345 (noting courts’ attempt to make up for departures from the original constitutional model by “creating a judicial forum in which all interests could participate”). For a discussion of judicial creation of implied rights of action, from which the Court seems to have retreated in important respects in recent years, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

principal avenues. First, they relaxed strict doctrines on standing and timing of review and liberally construed the Administrative Procedure Act's (APA's) provision that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>325</sup> In this manner, the courts opened their doors to a broader range of interested parties and permitted those parties to challenge agency rules without having to wait for agencies to institute enforcement actions.

Second, and equally important, courts secured for interested parties elaborate participation rights in the agency rulemaking process and supplied them with a variety of procedural grounds upon which to challenge agency action in court. Under § 553 of the APA, agencies making rules pursuant to legislative delegations must: (1) provide "notice" of the rulemaking, (2) give "interested persons an opportunity to participate in the rule making," and (3) "incorporate in the rules adopted a concise general statement of their basis and purpose."<sup>326</sup> Judges interpreted each of these three provisions expansively, thereby facilitating participation both in the administrative process and in judicial review of agency action.<sup>327</sup> Although the APA notice provisions require that an agency merely describe "the terms or substance of the proposed rule" or "the subjects and issues involved,"<sup>328</sup> courts interpreted this requirement in a manner that secured not just a right to participate, but a right to participate in a meaningful manner. Where an agency proposed one rule, for example, and then in the course of rulemaking proceedings changed its mind and adopted a very different rule, the agency risked reversal by a court for inadequate notice.<sup>329</sup>

325. 5 U.S.C. § 702 (2000); *see, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1403-05 (1996). For an article written in the midst of this transition, *see* Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961). In recent years, the Supreme Court has halted the trend toward an ever more relaxed standing doctrine. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

326. 5 U.S.C. § 553(b)-(c).

327. *See, e.g.*, Strauss, *supra* note 325, at 1406 ("During the 1970s, led by the D.C. Circuit . . . the courts of appeals built the ideas of notice, right to comment, and obligation to explain into the much more elaborate form of a paper hearing."); *cf.* Jaffe, *supra* note 325, at 1267-68 (noting that "[w]hatever the applicable legislation, courts play a crucial role" in the development of administrative law).

328. 5 U.S.C. § 553(b).

329. "[I]f the final rule deviates too sharply from the proposal," explained one court, "affected parties will be deprived of notice and an opportunity to respond to the proposal." *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986). Although agencies are free to change their minds on substantial points, *see, e.g.*, *Am. Med. Ass'n v. United States*, 887 F.2d 760 (7th Cir. 1989); *S. Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), and, indeed, it is *desirable* that agencies would be influenced by the notice and comment process, courts have made a practice of vacating agency rules where the agency does not, in its initial notice, "fairly apprise interested persons of the subjects and issues" to be addressed. *Nat'l Black Media Coalition*, 791 F.2d at 1016, 1022 (quoting *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

Courts also facilitated participation by requiring agencies to make available to interested parties any evidence the agency might substantially rely on in reaching its ultimate decision, reasoning that “to suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether.”<sup>330</sup> The “statement of basis and purpose” requirement of § 553 likewise provided fodder for courts in their efforts to bolster participatory rights. If this provision appeared modest when first enacted,<sup>331</sup> courts subsequently relied on it to make sure that agencies actually took into account the legal arguments and factual submissions of participants in the rulemaking process.<sup>332</sup>

By requiring agencies to address the evidence submitted and statutory arguments advanced by participants in the administrative process, the courts influenced the behavior not only of agencies,<sup>333</sup> but also of those affected

330. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977); *see also Nat'l Black Media Coalition*, 791 F.2d at 1016; *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); Strauss, *supra* note 325, at 1406. Section 553 itself does not prohibit agencies from considering extra-record evidence in reaching decisions. Indeed, this is one of the central features that distinguishes a run-of-the-mill “informal” rulemaking proceeding under § 553 from the rarer “formal” rulemaking proceeding, in which an agency cannot take advantage of *ex parte* communications or extra-record evidence. Compare 5 U.S.C. § 553, with *id.* §§ 556-557. Courts have held that even in *informal* proceedings under § 553, agencies must make available any important extra-record evidence they rely upon. Where an agency deprives affected parties of the opportunity to comment on evidence that the agency ultimately relies on for its decision, courts will strike down the agency decision either as “arbitrary and capricious” under § 706 of the APA, or else as a violation of § 553’s provisions regarding notice and participation by interested parties. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 685 (D.C. Cir. 1984) (Scalia, J.) (explaining that the duty to make important extra-record evidence available for comment “derives not from the arbitrary and capricious test but from the command of 5 U.S.C. § 553(c) that ‘the agency . . . give interested persons an opportunity to participate in the rulemaking.’” (quoting *Portland Cement*, 486 F.2d at 393 n.67 (omission in original))).

331. When the APA initially was adopted in 1946, this statutory provision was not considered to require much of an agency. As the Department of Justice indicated in its contemporaneous interpretation of the APA,

The statement is to be “concise” and “general.” Except as required by statutes providing for “formal” rule making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, the statement is intended to advise the public of the general basis and purpose of the rules.

U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947).

332. In the 1960s and 1970s, courts made a habit of striking down agency rules whenever the agency's “statement of basis and purpose” failed to address major issues raised in the proceeding, to consider significant alternatives advanced in that proceeding, or to take into account the statutory criteria that accompanied Congress's delegation of authority to the agency in the first place. *See, e.g., Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847 (D.C. Cir. 1987); *Nova Scotia Food Prods. Corp.*, 568 F.2d at 240. The related issue of judicial review of the substance of agency policy is discussed in greater detail below. *See infra* notes 339-356 and accompanying text.

333. Of course, judicial review pursuant to the APA is not the only check on administrative discretion. *See, e.g., T. Alexander Aleinikoff, Non-Judicial Checks on Administrative Discretion*, 49 ADMIN. L. REV. 193, 195 (1997) (highlighting the importance of legislative oversight); Molot,

by administrative action.<sup>334</sup> The courts effectively encouraged participation by affected entities, giving them incentives to submit evidence and make statutory arguments in support of their favored positions. Indeed, the greater the burden that courts imposed on agencies to take into account the factual and legal arguments submitted by participants, the greater the incentives of affected parties to participate.

Moreover, by bolstering participants' rights of participation under § 553, judges encouraged affected parties not only to submit comments in the rulemaking process but also to challenge unfavorable rules in court.<sup>335</sup> The evolving doctrine of administrative procedure provided aggrieved parties an arsenal of arguments with which to challenge agency action in the courts, and the corresponding relaxation of the Court's approach to standing and reviewability ensured that these parties could indeed get to court to advance their procedural arguments.<sup>336</sup>

## 2. *Developing Criteria on Which To Base Judicial Decisions*

As courts fleshed out the procedural requirements of the APA, they not only empowered affected parties to participate in the administrative process and to frame court challenges, but also supplied themselves with the criteria they needed to evaluate those challenges, thereby killing two birds with one stone.<sup>337</sup> The law governing agency procedures gave courts a comfortable basis for judicial review of agency decisions.<sup>338</sup>

*Reexamining Marbury*, *supra* note 138, at 1287 (noting the utility and limits of legislative oversight).

334. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225-28 (1990) (describing how the courts "bec[a]me crucial actors in shaping the regulatory environment" and how the "legal culture . . . script[ed] the roles of the other actors in the drama of regulation").

335. See, e.g., *id.* at 224-28 (noting that the "primary demands of the legal culture of regulation—that regulatory policy be subject to the rule of law through judicial review and procedurally open to affected interests"—have been "mutually reinforcing"). *But cf.* Strauss, *supra* note 139, at 1328 (noting important distinctions between participation in agency proceedings and in judicial review).

336. See *supra* note 325 and accompanying text.

337. At least one empirical study casts doubt on whether procedural doctrines do indeed cabin judicial leeway sufficiently. See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717, 1729, 1750 (1997) (studying environmental cases in the D.C. Circuit and finding that procedural review often turns on the political composition of the appeals court panel reviewing the agency decision).

338. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 6.46, at 321 (1999). By the late 1970s, the temptation among courts to encourage party participation and facilitate judicial review through procedural rulings became so great that the Supreme Court finally had to rein in lower courts on this point. Although creating additional procedural rights had the advantage of structuring judicial review to reflect the judiciary's traditional role, the Court in *Vermont Yankee* cautioned "reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 520 (1978). *Vermont Yankee* did not overrule the existing case law fleshing out the APA's "notice," "opportunity to

But to facilitate their review of agency decisions, courts had to develop substantive doctrines as well as procedural ones. Substantive administrative law doctrine developed on two related fronts. First, judges developed legal doctrines to help them decide whether agencies were acting within the bounds of their statutory authority. Initially, courts were torn between allowing agencies some leeway in administering statutes and adhering to *Marbury*'s adage that it is "the province and duty of the judicial department to say what the law is."<sup>339</sup> In its 1944 decision in *NLRB v. Hearst Publications, Inc.*, the Supreme Court opted for the former approach, allowing an administrative agency substantial leeway in interpreting the statutory term "employee."<sup>340</sup> Just three years later in *Packard Motor Car Co. v. NLRB*, however, the Court refused to defer to an administrative interpretation of the same statutory term "employee," adopting instead its own independent reading of the term.<sup>341</sup> For decades, judges and scholars struggled to reconcile *Hearst* and *Packard*,<sup>342</sup> exploring a host of case-specific factors that might counsel in favor of either judicial deference or scrutiny in particular circumstances.<sup>343</sup> This multifaceted, contextual approach to deference proved to be quite unpredictable.<sup>344</sup> Although, in theory, judges were supposed to decide on a standard of review *first* and *then* review agency interpretations using the appropriate (deferential or nondeferential) standard, in practice judges could decide whether they agreed with agency interpretations first and then rationalize their decisions

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participate," and "statement of basis and purpose" requirements, but it did prevent courts from imposing additional procedures beyond those required by Congress. *See id.*; *see also* Strauss, *supra* note 325, at 1393 (characterizing *Vermont Yankee* as a case that "involved a lower court's effort to give the [APA] meaning outside any reasonable possibility offered by the text, rather than a more general refusal to accommodate that text to contemporary understandings").

339. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Molot, *Judicial Perspective*, *supra* note 143, at 69-70; Molot, *Reexamining Marbury*, *supra* note 138, at 1255-57.

340. 322 U.S. 111 (1944). *Hearst* is widely regarded as having given birth to the modern doctrine of judicial deference. *See, e.g.*, Manning, *supra* note 199, at 623; Molot, *Judicial Perspective*, *supra* note 143, at 69-70.

341. 330 U.S. 485 (1947).

342. *See, e.g.*, LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 558-64 (1965).

343. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 972-75 (1992) (describing the "Pre-Chevron" "Multiple Factors Regime"); *cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363, 372 (1986) (finding in pre-Chevron case law "two answers to th[e] question" of why courts should defer and arguing that "[o]ne answer rests upon an agency's better knowledge of congressional intent" while the "other rests upon Congress' intent that courts give an agency legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various 'practical' circumstances").

344. *See* *United States v. Mead Corp.*, 533 U.S. 218, 245 (2001) (Scalia, J., dissenting); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 *CHI.-KENT L. REV.* 1253, 1258 (1997) (discussing Justice Scalia's disapproval of the "unpredictable state of prior law"); Manning, *supra* note 199, at 636; Merrill, *supra* note 343, at 977; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, 521.

as appropriately deferential or aggressive using a rather malleable, contextual doctrine of deference.<sup>345</sup>

In the 1980s, however, the Supreme Court went a long way toward resolving this uncertainty in its landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>346</sup> *Chevron* instructed lower courts to defer based not on a variety of factors but rather on whether the agency's decision represented a reasonable reading of Congress's statute.<sup>347</sup> Of course, *Chevron* did not entirely eliminate the uncertainty that surrounds judicial review on substantive grounds.<sup>348</sup> Scholars and judges continue to debate when *Chevron*'s rule of deference should apply<sup>349</sup> and how it should be applied.<sup>350</sup> But, by setting forth a test for judicial review of agency decisions, *Chevron* rendered judicial intervention in the administrative process more stable and predictable.<sup>351</sup>

345. See Levin, *supra* note 344, at 1259; Manning, *supra* note 199, at 636; Merrill, *supra* note 343, at 977; Scalia, *supra* note 344, at 521.

346. 467 U.S. 837 (1984). At the time, the Justices did not seem to have "realized the full implications of their landmark administrative law decision in . . . *Chevron*," Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,606, 10,613 (Oct. 1993), but there can be no doubt about *Chevron*'s significance. See Molot, *Reexamining Marbury*, *supra* note 138, at 1259 n.78.

347. 467 U.S. at 842-43.

348. For a discussion of the extent to which *Chevron* did indeed cabin judicial leeway, see Molot, *Judicial Perspective*, *supra* note 143, at 82-83 n.333; and Molot, *Reexamining Marbury*, *supra* note 138, at 1263-74. A number of empirical studies have tested the extent to which judges reviewing agency decisions under *Chevron* may be driven by political ideology, rather than legal doctrine. Compare Revesz, *supra* note 337, at 1729, 1750 (concluding that "[i]deological voting is more pronounced with respect to procedural challenges than statutory challenges" and that "in statutory challenges" governed by *Chevron* "there is no support" for the hypothesis that political ideology drives judicial voting), with Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2168-72 (1998) (finding a correlation between political affiliation and applications of *Chevron*).

349. See, e.g., Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 *ADMIN. L. REV.* 771, 780 (2002); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 *ADMIN. L. REV.* 807, 808 (2002); Molot, *Reexamining Marbury*, *supra* note 138, at 1328-36 (discussing *Mead*).

350. See, e.g., Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1411-16 (2000) (discussing how the Court may employ an aggressive understanding of the *Chevron* Step I inquiry to cabin agency discretion and alleviate delegation concerns); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 *RUTGERS L. REV.* 313 (1996) [hereinafter Lawson, *Outcome, Procedure and Process*]; Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 *CHI.-KENT L. REV.* 1377 (1997); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *WASH. U. L.Q.* 351, 366-73 (1994); Molot, *Judicial Perspective*, *supra* note 143, at 82-98 (summarizing and evaluating the literature). As Ronald Levin has observed, "[T]he principal question about judicial deference to administrative constructions has become, not whether the courts can live with *Chevron*, but how they can domesticate it for everyday use." Levin, *supra* note 344, at 1259-60.

351. As Peter Strauss argued several years after it was decided, *Chevron* tended to reduce variability among judges by narrowing the judicial role. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *COLUM. L. REV.* 1093, 1121-22 (1987); see also Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 *GEO. L.J.* 2225, 2234 (1997).



Because agencies were charged by Congress with translating statutory goals to fit real world facts, courts in the mid-twentieth century found themselves reviewing agency decisions not only to keep agencies within the bounds of their statutory authority, but also to make sure that agency decisions accurately reflected administrative records. Under the APA, this latter form of substantive review came to be called “arbitrary and capricious” review,<sup>352</sup> a term that the Supreme Court fleshed out in the *State Farm* case.<sup>353</sup> In *State Farm*, the Court explained that courts should take a “hard look” at administrative exercises of delegated lawmaking authority to ensure that administrators engage in “reasoned decisionmaking.”<sup>354</sup> Whereas under *Chevron*, courts would ask whether an agency decision was one that a reasonable person could have reached as a matter of pure statutory interpretation, under *State Farm*, courts were to ask whether the agency had in fact acted reasonably, given the statutory instructions it faced and the factual record before it.<sup>355</sup> Exactly what counts as “reasoned decisionmaking” is somewhat difficult to define, just as judicial review on statutory grounds under *Chevron* remains the subject of considerable uncertainty. But if the doctrine governing substantive review of agency decisions will always be somewhat unpredictable at the margins, it nevertheless evolved considerably in the mid-twentieth century so as to alleviate the post-New Deal risk that judges would have to review agency decisions without the legal criteria they need to fulfill their traditional adjudicative role.<sup>356</sup>

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352. See 5 U.S.C. § 706 (2000).

353. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

354. *Id.* at 52; see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (requiring “thorough, probing, [and] in-depth review”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (ensuring that an agency had “taken a ‘hard look’ at the salient problems” and had “genuinely engaged in reasoned decision-making”); *Molot, Reexamining Marbury*, *supra* note 138, at 1267. See generally Schiller, *supra* note 322, at 1421-26 (placing *Overton Park* and *Greater Boston* in historical context).

355. The Supreme Court explained:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*State Farm*, 463 U.S. at 43.

356. Some appellate judges and scholars in the last decade or so have made progress toward defining judicial review on substantive grounds by integrating statutory review under *Chevron* and “arbitrary and capricious” review under *State Farm* (in what some would dub a retreat from aggressive “hard look” review). See, e.g., KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4, at 316 (3d ed. Supp. 2000); Lawson, *Outcome, Procedure and Process*, *supra* note 350, at 332 (noting the scholarship and judicial opinions of Judge Silberman). They ask *both* whether a reasonable interpreter theoretically could have selected the agency’s chosen reading *and* whether the agency in fact acted reasonably given the record before it and its stated reasons for its decision. See, e.g., Levin, *supra* note 344, at 1263-77 (arguing that *Chevron* Step II and “hard look” review not only overlap, but essentially are the same inquiry);

#### D. *Costs Associated with Maintaining the Traditional Judicial Role*

Through procedural and substantive doctrines largely of their own making,<sup>357</sup> judges in the mid-twentieth century transformed an alien enterprise into a familiar one. Judges at the appellate level had long been called upon to ensure that trial judges respected the procedural rights of litigants and reached decisions that were consistent with law and supported by evidence. Judges called upon to review agency decisions in the mid-twentieth century simply structured the relevant doctrine so that they would perform roughly the same functions. Judges shaped their review of agency decisions so as to resemble traditional appellate review of trial court decisions.

This transformation of the judicial role in the administrative state ultimately was quite costly. Judicial decisions developing the procedural requirements for notice-and-comment rulemaking may have succeeded in promoting participation by affected parties, but they also rendered the administrative process much more cumbersome. The resources required of agencies to comply with judicial decisions interpreting the APA's rulemaking procedures—and to defend their rules on appeal—can be staggering.<sup>358</sup> Indeed, scholars critical of the procedural hurdles courts have imposed upon agency rulemaking observe that these procedural requirements sometimes have driven agencies to forego the rulemaking process altogether and to pursue alternative avenues that entail *less*, rather than *more*, public input.<sup>359</sup>

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Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 827-28 (1990) (“In either the second step of *Chevron* or in arbitrary and capricious review, the court often asks itself whether the agency considered and weighed the factors Congress wished the agency to bring to bear on its decision.”); see also DAVIS & PIERCE, *supra*, § 7.4, at 316; Lawson, *Outcome, Procedure and Process*, *supra* note 350, at 332.

357. See Jaffe, *supra* note 325, at 1267-68 (noting the “crucial role” of courts—and not just the APA—in the development of administrative law).

358. Cf. Elliott, *supra* note 323, at 1492 (“What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review.”).

359. Cf. Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 410 (1997) (“The Supreme Court [has] abandoned its attempt to force agencies to choose rulemaking over adjudication through direct review of agency choice of decisionmaking procedures.”). Sometimes, agencies may resort to issuing “interpretive rules” or “opinion letters,” which offer guidance to lower-level agency staff and affected entities but do not carry the force of law. Although these informal agency pronouncements are not accompanied by the procedural protections associated with notice-and-comment rulemaking or formal adjudication (and an agency's willingness to resort to them seems at first glance to undermine the goal of participation by affected parties), the Supreme Court recently has reaffirmed that these devices do not ultimately bind anyone until they are tested through adjudication, at which point they are subject to judicial review. See *United States v. Mead Corp.*, 533 U.S. 218, 229-34 (2001) (holding that courts ordinarily do not owe *Chevron* deference to these sorts of informal pronouncements); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (same).

Judicial doctrines regarding substantive review of agency decisions also required sacrifice. *Chevron* and *State Farm* may have had the virtue of setting benchmarks for judicial review on substantive grounds, but many scholars question the wisdom of the particular benchmarks those decisions established. Whereas before *Chevron*, courts could strike down agency decisions that in their view violated legislative instructions, *Chevron* restricts courts to doing so only when the agency has violated *clear* legislative instructions or has adopted a patently *unreasonable* reading of those instructions, thereby weakening what historically had been an important check on administrative overreaching.<sup>360</sup> *State Farm*, in contrast, has been criticized for making judicial review of agency policy too intrusive. In the course of questioning whether agencies have engaged in reasoned decisionmaking, courts may sometimes substitute their own policy judgments for those of politically accountable, expert administrators, and in so doing may make it more difficult for those administrators to make sound policy.<sup>361</sup>

But if these procedural and substantive doctrines were costly, they reflected a judgment that the extra costs were worth the benefits of keeping judges within the limits of their institutional competence and constitutional authority. The lengths to which judges went to provide themselves with litigant input and legal criteria—and to structure their new responsibilities so as to resemble their traditional role—provide strong support for the notion that the traditional judicial role is worth saving, even at great expense.

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360. See, e.g., Duffy, *supra* note 141, at 146; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 484-85 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187 (1992); Molot, *Judicial Perspective*, *supra* note 143, at 73-75; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2090 (1990).

361. This problem has justified a retreat from “hard look” review in its most aggressive form. See, e.g., Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 457-58 (1999).

Then-Judge Breyer highlighted the tension between *Chevron* and *State Farm* in a law review article soon after they were handed down. He pointed out that in matters of interpretation, at least judges are well-equipped to second-guess administrators, whereas in matters of policy judges are relatively poorly equipped. See Breyer, *supra* note 343, at 382-97; see also Strauss, *supra* note 351, at 1130-31 (considering Breyer’s arguments and concluding that *State Farm* “hard look” review and *Chevron* deference can be reconciled when the Supreme Court’s desire to manage lower courts is taken into account); cf. Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 785-806 (1997).

### E. *Lessons for Class Action Litigation*

Judges called upon today to review settlements in mass tort suits—and to approve settlement-only class actions in particular—face a problem analogous to that which judges confronted, and largely overcame, in reviewing agency regulations. In both contexts, judges have been asked to evaluate an agent's actions on behalf of a principal—rather than to resolve traditional disputes between adversaries—and have found themselves proceeding without the litigant input or legal criteria they enjoy in a traditional adversarial setting. In administrative law, judges responded to this problem by promoting participation by affected parties and establishing procedural and substantive criteria for judicial review. They encouraged someone to intervene on behalf of absent principals and supplied those intervenors with procedural and substantive grounds upon which to challenge agency action. In this manner, judges structured their review of administrative decisions to resemble their traditional adjudicative role, albeit at significant expense.

Similar responses are available in contemporary class action practice, some of which have been explored by scholars and some of which have not. Given the strong parallels between the problems that judges face when reviewing agency decisions and class settlements, we should seriously consider the parallel avenues available to address these problems and bring contemporary judicial behavior back into line with the judiciary's traditional adjudicative role.

When it comes to ensuring that parties, rather than judges, frame the issues in disputes, the administrative law analogy serves to reinforce proposals that already have been advanced by civil procedure scholars.<sup>362</sup> As noted in Part I, scholars have proposed a variety of reforms to improve representation for absent class members. Some would change fee structures so as to align attorney and client interests more closely,<sup>363</sup> some would rely on guardians ad litem or rival plaintiffs' attorneys to second-guess class attorneys and challenge settlements on behalf of absent class members,<sup>364</sup> and some would assign multiple class attorneys to represent different subclasses of plaintiffs with conflicting interests.<sup>365</sup> Other scholars have

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362. It is worth observing that even Abram Chayes saw the benefits of ensuring that "the party structure is sufficiently representative of the interests at stake" so that "a considerable range of relevant information will be forthcoming." Chayes, *supra* note 2, at 1308.

363. See *supra* note 108 and accompanying text.

364. See Koniak, *supra* note 97, at 1092; Macey & Miller, *supra* note 76, at 4, 6; Miller, *supra* note 96, at 638; see also *supra* notes 109, 116 and accompanying text.

365. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999); Amchem Prods. v. Windsor, 521 U.S. 591, 627 (1997); Coffee, *Class Action Accountability*, *supra* note 7, at 393-94; Coffee, *Class Wars*, *supra* note 76, at 1445-56; Issacharoff, *supra* note 110; see also *supra* note 110 and accompanying text.

explored a variety of ways to empower class members to protect themselves. These proposals would give class members additional powers to object to proposed settlements, to opt out of those settlements, and even to take splinter groups of plaintiffs with them.<sup>366</sup> Although, as Part I explored, each of these proposals would be costly, the administrative law analogy supports implementing them nonetheless. Given the lengths to which we have gone to give affected parties both the ability and incentive to challenge administrative action in court, it is hard to see why we should not also encourage dissident class members and attorneys to challenge class settlements in court.<sup>367</sup>

When it comes to giving judges the substantive criteria they need to review class settlements, the administrative law example not only provides support for reform, but also provides concrete guidance on how that reform

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366. See Coffee, *Class Action Accountability*, *supra* note 7, at 420, 423, 432-33; Coffee, *Class Wars*, *supra* note 76, at 1354, 1446-53; Issacharoff, *supra* note 76, at 833 (noting the importance of "a meaningful right to opt out of class actions"); Issacharoff, *supra* note 115, at 1061; Monaghan, *supra* note 76, at 1174; Woolley, *supra* note 159, at 629; *see also supra* notes 111-116 and accompanying text.

367. As noted earlier, scholars critical of the procedural hurdles courts have imposed upon agency rulemaking observe that these procedural requirements sometimes have driven agencies to forego the rulemaking process altogether and to pursue alternative avenues which entail *less*, rather than *more*, public input. *See supra* note 359 and accompanying text. These scholars might fear that just as burdensome procedural requirements have led agencies to forego notice-and-comment rulemaking in favor of case-by-case adjudication or informal policy statements, comparably burdensome requirements in class action practice may lead plaintiffs' attorneys to forego the class action mechanism.

But simply observing that class action reform may lead to unintended negative consequences does not alone answer whether these consequences are sufficiently costly as to counsel against reform. It is important to keep in mind that my focus is on large-claim class actions, where class members have claims large enough to be brought individually. If, in some instances, reform efforts inadvertently would deprive plaintiffs of class representation and require them to sue on their own, rather than as a class, this no doubt would deprive injured individuals of some benefit. *See Hay & Rosenberg, supra* note 4, at 1379-80; Rosenberg, *supra* note 122, at 394-96. But it would be a mistake to assume that the individual lawsuit is the only alternative available for plaintiffs who do not become members of a plaintiff class. *See Hensler, supra* note 93, at 1913 (noting that "individual treatment of asbestos cases" is "largely a myth"). Most mass tort actions arise only after plaintiffs' attorneys have pursued a great number of individual cases and have amassed an "inventory" of cases involving similar claims. If efforts to protect absent class members from collusion between class attorneys and defendants may sometimes lead those attorneys to refrain from filing class actions, this does not mean that attorneys will cease to take on great numbers of individual cases. In these instances, clients will get some of the benefits of aggregation that Professors Hay and Rosenberg highlight and may very well have at least as much control over the litigation and settlement of their claims as they would have in a class action suit. *But cf. Erichson, supra* note 89, at 385-86 (noting problems with informal aggregation); Nagareda, *supra* note 4, at 752, 771 (noting similarities and differences between class settlements and aggregate settlements). While such an unintended consequence may not be as desirable as the result that reformers intend—a class action suit in which plaintiffs enjoy loyal representation and elaborate participation rights—it is by no means a terrible result when one considers that reforms would also sometimes achieve their intended results and lead to more rigorous judicial review of class settlements. *Cf. Hensler, supra* note 81, at 192 (noting that "a pro forma review and approval of a class action settlement may afford little more protection against agency problems than is accorded by an informal aggregation process that does not require judicial scrutiny of a party-negotiated settlement").

should be structured.<sup>368</sup> Our best hope of making the judicial role in class settlements resemble the judiciary's traditional adjudicative role is by modeling judicial review of class settlements after the substantive record review judges undertake in administrative law.<sup>369</sup> Judges should ask not simply whether settlements are "fair, adequate, and reasonable"—the rather vague standard they currently apply<sup>370</sup>—but also whether proposed settlements (1) reasonably implement the applicable substantive law regime (à la *Chevron*) and (2) have reasonable evidentiary support in the record (à la *State Farm*).<sup>371</sup> In order to secure judicial approval, a settlement's proponents would have to show that the settlement appropriately protects the plaintiffs' substantive law rights, and would have to construct a record of evidence to support their conclusion. Dissident class members and attorneys would be able to defeat a proposed settlement on either ground, and, as in the administrative process, would have an opportunity to contribute to the evidentiary record. Indeed, to facilitate the construction of the record, dissidents would have to be given access to any pre-settlement discovery conducted by the parties and allowed some opportunity to conduct additional discovery themselves.<sup>372</sup>

In proposing that judges model their review of class settlements after their review of administrative action, I am really suggesting that they follow the administrative example and ultimately model their conduct after their review of verdicts in conventional civil litigation.<sup>373</sup> After all, the two prongs of review I derive from the administrative realm—one "legal" and the other "evidentiary"—find their roots not just in judicial review of agency decisions, but ultimately in the record review judges undertake in deciding whether to grant or deny a judgment as a matter of law in traditional civil lawsuits. When a judge grants a judgment as a matter of law—whether a JNOV, a directed verdict, or summary judgment—the

368. This guidance is much needed, given the difficulty scholars have identified in defining substantive standards for judicial review. See, e.g., Silver & Baker, *supra* note 89, at 1530-35 (noting the difficulties of crafting a substantive rule to govern allocations of settlement amounts among plaintiffs).

369. See Nagareda, *supra* note 7, at 902 (arguing that "courts usefully may draw upon familiar doctrines of judicial review in administrative law to form a conceptual framework for their analysis of mass tort settlements under Rule 23(e)"); cf. Nagareda, *supra* note 100, at 186 (drawing parallels between fairness hearings in class settlements and notice-and-comment procedures in administrative rulemaking).

370. See Hazard, *supra* note 89, at 1259-68; see also cases cited *supra* note 102. As noted earlier, see *supra* note 117, proposed amendments to Federal Rule of Civil Procedure 23(e) would codify the "fair, reasonable, and adequate" standard that is found in the case law.

371. See Nagareda, *supra* note 7, at 902. For a discussion of how ethics rules might also be revised to provide criteria for evaluating class settlements, see generally Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 79, at 1161-62, 1213-19.

372. See Kahan & Silberman, *supra* note 100, at 244 (noting the need for objectors to conduct discovery).

373. Cf. *supra* Section IV.C (describing how judges modeled their review of administrative decisions after appellate review of trial court decisions in traditional civil cases).

judge does so because a decision in favor of the non-moving party is either (1) prohibited by law or (2) unsupported by the evidence. Judges reviewing class action settlements should follow the example of judges reviewing agency action and use these elements of the traditional judicial role to structure their new responsibilities. Judges should treat class settlements as they would jury verdicts and apply to proposed class settlements virtually the same legal and evidentiary standards they have long applied to verdicts in civil cases.

One might object to this proposal on the ground that it conflates verdicts with settlements and overlooks that settlement is supposed to be an efficient alternative to litigation, not a cumbersome equivalent. To impose additional procedural and substantive hurdles on class settlements—and to require that settlements comport with law and are supported by evidence in the same way as adjudicated outcomes—risks ignoring that settlements typically are a product not just of the legal and factual positions of the parties, but also of the expenses they would incur in continuing litigation and the risks associated with going to trial.<sup>374</sup> Even if it is appropriate to model *litigation* in class action lawsuits after administrative *litigation*, someone skeptical of my proposal might question why we should impose such significant procedural and substantive hurdles on the *settlement* process.<sup>375</sup> To impose additional procedural and substantive hurdles on class settlements is to make settlements look more like litigation itself, rather than an efficient alternative.

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374. See Bone & Evans, *supra* note 75, at 1297 (noting the importance of “risk-bearing costs, litigation costs, and reputation costs”); Hazard, *supra* note 89, at 1266-67. Given all of the factors that affect settlement values, one might object that it is inappropriate to use a substantive law standard—such as state tort law—as the benchmark to decide whether class attorneys are adequately representing their clients. This stands in contrast to administrative law, where the statutes that define the boundaries of agency power are indeed the instructions of the agency’s principal, Congress.

375. The skeptic might say that the better analogy for class settlements is negotiated rulemaking, or “reg-neg,” which does not entail the same procedural and substantive hurdles as full-blown rulemaking subject to judicial review. But even if we were to compare judicial review of negotiated regulations with judicial review of class settlements, we still would find judicial review in the mass tort context to be lacking. Despite some controversy over the scope and intensity of judicial review in the reg-neg context, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 92 (1997); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 102 (1982); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 22-25, 59-66 (1985) [hereinafter Wald, *New Role*], judges reviewing negotiated rulemakings generally undertake a record review under *Chevron* and *State Farm* that is roughly comparable to that which they undertake when facing challenges to regulations promulgated after conventional notice-and-comment rulemaking. See 5 U.S.C. § 570 (2000); *USA Group Loan Servs. v. Riley*, 82 F.3d 708, 714-15 (7th Cir. 1996) (Posner, C.J.); Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1466-68 (1997); Wald, *New Role*, *supra*, at 22-25; cf. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1286-1309 (1997) (noting comparable rates of court challenges to EPA rules issued after negotiated rulemaking and notice-and-comment rulemaking).

While there is something to this argument—and the doctrines governing judicial review of verdicts would inevitably have to be adjusted before being used for judicial review of settlements<sup>376</sup>—I strongly disagree with the claim that verdicts and settlements are so inherently different as to preclude judges from borrowing one set of doctrines for use in the other arena. Although settlement may appropriately be distinguished from adjudication in other contexts, there are two reasons for rejecting this distinction in class action litigation, or at least in the mass tort cases that occupy scholars and are the focus of this Article.<sup>377</sup> For one thing, adjudication is not a viable option in many mass tort cases. In part because the stakes are so high, and in part because the logistics are so complicated, settlement is not a *substitute* for the judicial process, but instead is an inevitable *precursor* to the judicial review.<sup>378</sup> Given that judicial review of class settlements often is the *only* judicial process realistically available to protect the rights of absent class members, there are very strong reasons to model the class action settlement process after the administrative process, and the traditional adjudicative process more generally.<sup>379</sup> If we want the adjudicative process to protect the rights of affected parties and to reflect the rule of law, then we should require parties to bargain in the limelight of the law, based on an open evidentiary record, rather than in its murky shadows.<sup>380</sup>

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376. See *infra* notes 386-388 and accompanying text.

377. See *supra* notes 88-122 and accompanying text.

378. Nagareda, *supra* note 100, at 151 (“Settlements, not judgments after trial, stand overwhelmingly as the end result of actions certified to proceed on a classwide basis.”); cf. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 548-50 (1991) (noting inevitability of settlement in some small-claim class actions with large stakes for defendants); Hensler, *supra* note 93, at 1900 (noting that “some courts had given up on trying to process their asbestos cases, believing that only legislative action could deal with the masses of claims that were concentrated in their courts”); Rubenstein, *supra* note 5, at 413 (noting that the “primary judicial activity” in “large, complex class actions” is often “the fairness hearing that blesses the outcome”); Willging et al., *supra* note 96, at 143-44 (noting the prevalence of settlements in class actions not disposed of by motion).

379. Indeed, if we were to admit that trial is not a viable option in many mass tort cases—particularly those certified as settlement-only class actions—and were to treat judicial review of settlements as a distinct process from certification for trial, which should be presided over by distinct judicial officers, this not only would subject class settlements to broader participation and more meaningful substantive scrutiny, but also might have important collateral effects on judicial competence. If a judge rejecting a settlement proposal after record review could simply refer the matter back to the parties for further negotiation and discovery, or to another judge in the rare event that the parties should proceed to trial, this would alleviate the strong incentives judges have today to approve settlements so as to avoid presiding over a trial. See *supra* notes 104, 106 and accompanying text. Judges would likely be willing to scrutinize settlements more carefully if they knew they could reverse and remand matters to someone else—as judges do in the administrative context and in conventional appeals—rather than resolve disputes themselves.

380. See Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 79, at 1218-19 (arguing that “courts . . . must also take responsibility for assuring that the settlements which occur not only ‘in the shadow of the court,’ but often inside of it, are fair and justify dismissal of the underlying individual lawsuits”). Although we conventionally think of civil litigation as more principled, and less political, than law administration, this assumption becomes quite vulnerable when we



Moreover, the agency problems between class attorneys and class members, and the risk of collusion between class attorneys and defendants,<sup>381</sup> provide additional reasons for treating settlements like adjudicated outcomes in the mass tort context even if it would be inappropriate to do so elsewhere. In other contexts, a judge can safely assume that a proposed settlement benefits all affected parties, by reducing their litigation expense, their litigation risk, or both. Otherwise the parties would not agree to the settlement.<sup>382</sup> In most cases, the judge also can leave it to the parties to allocate any bargaining surplus among themselves.<sup>383</sup> In the class action context, however, agency problems and opportunities for collusion create a risk not just that class attorneys and defendants will reap more than their fair share of the bargaining surplus, but that they may actually take more than the total bargaining surplus and leave the absent class members worse off than they would be in the absence of a settlement.<sup>384</sup> The problem is not necessarily that class attorneys and defendants would consciously embark on such a project, or would knowingly agree to a settlement that is patently unfair to class members. Rather, it is that even the most well-meaning participants in the class settlement process, whether defendants, class attorneys, or even judges, are bound to evaluate a proposed settlement through a lens that is influenced by their own self-interest.<sup>385</sup> The least judges can do to protect class members against disadvantageous settlements is to make sure that the settlement is superior to a verdict that the judge would strike down as unreasonable at trial. (Indeed, one might go even further and require a judge not just to pass on the *parties'* factual and legal positions, but to issue his or her *own* findings of fact and conclusions of law. Such a requirement that the judge find facts, as opposed to reviewing the parties' factual allegations, would counter the judge's strong incentive to approve a proposed settlement and

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compare the weak judicial review available for mass tort settlements with the intense record review to which administrative decisions are subject. *Cf. id.* at 1165 (noting that the law tends "to treat most negotiations as matters of private ordering with little public scrutiny"). In some respects I am suggesting the converse of those who believe that "adversarial processes may need to take a page out of the learning of ADR processes." Menkel-Meadow, *supra* note 95, at 528-29. I am urging that alternatives to adjudication should sometimes be modeled to look more like adjudication. *See supra* note 281 and accompanying text.

381. *See supra* notes 88-101 and accompanying text.

382. *See supra* notes 77-78, 289 and accompanying text.

383. *See supra* notes 77-78, 289 and accompanying text. *But cf.* Galanter, *supra* note 33, at 108-09 (noting that repeat players do better in adjudication than one-time participants); Menkel-Meadow, *supra* note 99, at 38-57 (noting the same phenomenon in alternative dispute resolution); *supra* note 291 and accompanying text.

384. *See supra* notes 88-105 and accompanying text. *But cf. supra* note 75 and accompanying text.

385. *See supra* notes 88-106 and accompanying text.

be rid of the case, but it also would make settlement all that much more difficult.)<sup>386</sup>

In arguing that judges should treat class settlements more like class adjudications, I do not mean to claim that the doctrines governing one realm can be imported wholesale into the other without any adjustment. Just as judges in the administrative state have had to adjust their traditional role to fit new circumstances—and the *Chevron* and *State Farm* standards differ significantly from the legal and evidentiary standards judges apply in conventional civil lawsuits—so too would judges have to adjust traditional standards of review for the settlement context. We might hope that the legal and evidentiary components of judicial review of agency decisions and jury verdicts might help judges flesh out the “fair, adequate, and reasonable” class settlement standard, but in some circumstances the standards are likely to be in tension. Consider, for example, the settlement of a suit that would almost certainly result in a finding of liability if it were tried, but which might yield jury verdicts of widely varying amounts.<sup>387</sup> In such a case, if the parties were to propose a settlement for an amount at the low end of the range of potential jury verdicts, the settlement would satisfy the traditional standards governing review of verdicts—i.e., it would be consistent with the law and supported by the evidence—but it might not be “fair, adequate, and reasonable.” Indeed, the settlement might be rejected as *unfair* because it would allow the plaintiff class almost none of the bargaining surplus captured by the settlement. Conversely, in a case where the jury might reasonably return a verdict *either* for the plaintiffs *or* for the defendant, it would seem eminently “fair, adequate, and reasonable” for the parties to settle for an amount well below the plaintiffs’ full measure of damages, even if the very same compromise could, at least in theory, be deemed unreasonable—i.e., inconsistent with law or unsupported by evidence—if it were reached by a jury.<sup>388</sup> As these examples demonstrate,

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386. Cf. *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. Unit A 1982) (“In determining the adequacy and reasonableness of the proposed settlement, the court does not adjudicate the dispute . . . . The very purpose of the compromise is to avoid the delay and expense of such a trial.” (internal quotation marks and citation omitted)).

387. In such a suit, a judge might be inclined to grant partial summary judgment on the issue of liability and then leave it to the parties to proceed to trial, or propose a settlement, on the issue of damages.

388. Then again, it is far from clear that a judge would overturn such a compromise verdict. It might seem unreasonable for a jury to find the defendant liable and then award damages well below the injury actually suffered by the plaintiffs, but such compromise verdicts are by no means uncommon. To the extent that we are concerned with damage amounts, rather than liability, then the new trial standard (and the closely related concepts of additur and remittitur) may offer a closer analogy than the standard for judgment as a matter of law. Cf. *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935) (holding that judges may order a new trial where the jury returns a verdict with inadequate damages, but that the Seventh Amendment prohibits the judge from adding to those damages).

the standards governing jury verdicts would have to be adjusted to take into account the role of litigation risk in the settlement process.

But if traditional standards of review would have to be adjusted at the settlement stage to take into account the risks associated with a range of possible outcomes at trial, it is not at all clear that those standards should be adjusted for litigation expenses, which also loom large in the settlement process. If a judge were to take into account saved litigation expenses in deciding what is “fair, adequate, and reasonable,” the judge might approve a settlement that is lower than what a reasonable jury could award so long as the difference between the expected verdict and the low settlement amount is no greater than the additional litigation expenses the plaintiffs would incur if they were to proceed to trial. There are two considerations that counsel against such an adjustment for litigation expenses. First, unlike a client who pays his or her attorney an hourly fee, class members may not ultimately save all that much by avoiding a trial. Whether there would be any significant cost-savings for the class members would depend upon whether the class attorneys would be awarded a greater share of a recovery after trial than after a settlement and on how much of the attorneys’ additional out-of-pocket costs would come out of the class members’ share of the recovery.<sup>389</sup> Second, even if a settlement would save the class members something in litigation expenses, a judge who is willing to adjust his or her definition of “fair” for this reason would ignore that defendants also stand to save litigation expenses. Any settlement that reflects only the plaintiffs’ saved expenses and not the defendants’—and thereby allocates the bulk of the bargaining surplus to defendants—is just as likely to be the product of agency problems or collusion as to reflect the best interests of the class members. If judges were instead to treat settlements as verdicts—and refuse to take into account saved litigation expenses on either side—this would tend to require that the bargaining surplus to be gained from a settlement is shared by plaintiff class members as well as defendants.

In short, I propose that judges adjust traditional legal and evidentiary standards for application to class settlements, but that judges not vary them so much as to defeat the purpose of reform. In mid-twentieth century administrative law it took judges several decades to overcome their preference for open-ended, contextual standards of review and to subject their review of agency decisions to a more concrete body of law.<sup>390</sup> It may

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389. Cf. Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 *IND. L.J.* 59, 88-92 (1997) (exploring conflicts of interest between clients and attorneys where fees are structured so that attorneys bear virtually all of the expense of going to trial).

390. Compare *supra* notes 339-351 and accompanying text (describing the evolution of a multi-factored, contextual approach to deference in administrative law), with *supra* note 102 (noting the various factors judges consider in deciding whether to approve class settlements). Indeed, Justice Scalia recently has accused the Court of backsliding in this endeavor. See *United*

likewise take some time for courts to settle on a doctrine of judicial review for class settlements. But if the project will require time and effort, history suggests that the end result will be worth it.

### CONCLUSION

When Lon Fuller's classic article *The Forms and Limits of Adjudication* appeared in the *Harvard Law Review*, many scholars already considered it to be outdated. If it was not outdated then, most scholars consider it outdated today. But if Fuller has been largely discredited for taking the losing side in a battle between old and new models of litigation, scholars have mistakenly overlooked the continuing relevance of his work. Judges may preside over a different litigation landscape today, but this does not mean that Fuller's classic account of adjudication should be ignored. Fuller's description of the traditional judicial role remains important because it provides a sorely needed conceptual framework with which to analyze contemporary procedural problems. When we view contemporary litigation using Fuller's framework, we see that some of the most important controversies in civil procedure today arise where judges stray from their traditional role and cease to rely on affected parties to frame disputes or to look to an identifiable body of law in resolving those disputes.

Moreover, when we compare contemporary judicial practice to the judiciary's traditional adjudicative role we can make progress not only in understanding current doctrinal problems, but also in resolving them. Changes in litigation no doubt have placed the traditional judicial role under considerable strain. But there are powerful reasons to structure judicial conduct so as to retain the essential attributes of that traditional role. The judiciary's traditional adjudicative role reflects its core institutional competence, its role in the constitutional structure, and the considered judgment of two centuries of judges who confronted comparable challenges in the past. The institutional, constitutional, and historical underpinnings of the traditional judicial role provide much-needed ammunition for contemporary scholars who seek to reform contemporary judicial practice and restore the essential attributes of traditional judicial conduct.

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States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test.").