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“Inherent Power” and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?

DAVID A. RAMMELT*

Judges ought to remember that their office is *ius dicere*, and not *ius dare*; to interpret law, and not to make law, or give law.

Francis Bacon¹

Of those cases initially selected and set for the process, 44.3% have settled I attribute a good portion of this figure to those cases which require that extra “push” toward settlement

Judge Thomas D. Lambros²

INTRODUCTION

When a litigant files suit in a federal court, she enters a forum that offers important guarantees. Presumably, she enters a system that will treat her like all other litigants in similar situations.³ Her access to the forum should

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1. “Of Innovations,” *The Works of Francis Bacon*, v. XII, 1857-74 (M. Scott ed. 1908).

2. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 473 (1984).

3. Similar treatment, or national uniformity, is an important characteristic of the federal litigation system. Discussing the tension between federal and local rules of civil procedure, Judge Robert Keeton of the United States District Court for the District of Massachusetts, writes:

National uniformity serves important interests. Among those interests is the fundamental interest . . . in causing disputes to be resolved on the merits, according to law, and to be resolved in an evenhanded way so like cases are treated alike. Outcomes should not depend on the luck of the draw as to what judge decides the case, and for stronger reasons should not depend on judge shopping or forum shopping.

Uniformity of procedure helps lawyers and parties know what to expect and how to proceed. It reduces surprise. It promotes fairness—at least when the uniform rule is a good rule. It promotes efficiency in the use of lawyer time and other resources.

Also—and as a trial judge myself perhaps I will be forgiven for stating the point bluntly—nationally uniform rules protect (though of course not fully) against the tyranny of any unduly willful renegades among us trial judges.

Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 860 (1989).

be neither more nor less encumbered than that of all other litigants.⁴ She should pay neither more nor less than it costs to defend or pursue similar claims. She should face an unbiased judge or jury. She should be judged by the same laws, evenly applied, should abide by the same procedures and should have the same notice and knowledge of these laws and procedures as all other litigants.

The federal judicial system has generally aspired to protect this picture of a fair, accessible trial. The guarantees associated with a fair trial, however, have exacted a cost from the system.⁵ An explosion in the number of lawsuits and regulatory actions filed each year in federal court, coupled with a simultaneous increase in the length and complexity of trials, has resulted in what many perceive to be an unmanageable demand on the federal judiciary.⁶

4. According to Judge Jack Weinstein of the United States District Court for the Eastern District of New York, the Federal Rules of Civil Procedure, which govern the federal system, were intended to guarantee access to the federal courthouse:

Few disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors. . . . The drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly. Every claimant would get a meaningful day in court. In the golden age of federal civil procedure, the federal courthouse was the beacon to which those with serious substantive grievances could turn for direction toward justice.

Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

5. While a set of rules has been promulgated to steer the course of litigation through the federal system, and while few would dispute the need for these rules, the procedural rules themselves sometimes contribute to the problem. "Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part . . . from abuse of the discovery procedures available under the Rules." Order of April 29, 446 U.S. 995, 999 (1980) (Powell, J., dissenting).

6. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 65, 80 (1985) (excess litigation in the federal courts has placed an unmanageable strain on the federal judiciary); see Sherman, *Restructuring the Trial Process in the Age of Complex Litigation* (Book Review), 63 TEX. L. REV. 721, 722 (1984) ("Cases that take years to prepare, involve reams of documents and hundreds of hours of depositions, and require weeks or months to try have taxed the resources of our judicial system to the breaking point."). According to Professor Judith Resnik, a frequent critic of judicial activism, there are several possible explanations for the last decade's docket explosion, chief of which are: (1) a population increase, (2) a proliferation of congressionally-created statutory claims, (3) greater attorney accessibility due to an increase in the number of lawyers combined with a resulting decrease in fees and (4) an incentive to litigate, most often in the corporate context, induced by the potential recovery of attorney fees. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

Some observers, however, dispute the contention that the "explosion" is a recent development, or that the threat it presents is as dire as many would believe:

Concern over excess litigation in the federal courts is also typically exaggeration. . . .

. . . .

The truth about the "litigation explosion" is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access. . . .

The "explosion" idea is [however] wrong as a matter of fact

Weinstein, *supra* note 4, at 1907-09.

In 1984, Chief Justice Warren Burger devoted his entire Year-End Report on the Judiciary to the problem of court congestion. The Chief Justice noted that the number of trials lasting more than thirty days had increased an astounding 344% in the ten-year period ending with 1981.⁷ He warned that, unless a solution were created, the problem would be exacerbated by a trend of new filings and longer trials. Three years later, Chief Justice William Rehnquist lamented that, despite efforts to remedy the situation, the trend toward more litigation had continued and could be expected to worsen.⁸

A disturbing consequence of this crisis confronting the federal judiciary is that many district court judges, especially sensitive to the problem, feel compelled to implement ad hoc procedures to expedite, and in some cases circumvent, the formal process.⁹ Broadly termed "Alternative Dispute Resolution" (ADR), these ad hoc procedures have gained acceptance in the legal community as a practical solution to the docket-crisis confronting the federal judiciary.¹⁰

While there is a need to explore creative means to resolve the docket-crisis, a dilemma results when these alternative procedures are forcibly

7. Burger, Year-End Report on the Judiciary (1984) (available from the Public Information Office of the United States Supreme Court).

8. In 1987, Chief Justice Rehnquist warned that "despite the determined efforts of everyone associated with the federal judiciary, both new filings and pending cases continue at high and in some instances record levels. Unfortunately, there is a good likelihood that our workload will become heavier." Rehnquist, Year-End Report on the Judiciary 4 (1987) (available from the Public Information Office of the United States Supreme Court). Chief Justice Rehnquist's prophecy was fulfilled a year later when he reported that filings in the district courts rose from 279,087 to 283,000 criminal and civil cases, with 272,000 civil and criminal cases pending. Rehnquist, Year-End Report on the Judiciary 11 (1988) (available from the Public Information Office of the United States Supreme Court).

9. See Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). Professor Resnik reflects that "ADR (in the form of court-annexed arbitration, judicial settlement conferences, summary jury trials and mediation) offers not only an alternative to, but often a replacement for, adjudication." *Id.* at 536.

10. The crisis is due, in part, to a legal system that is reluctant to abandon established procedural tradition. See R. POSNER, *supra* note 6. Judge Richard Posner has depicted the traditional formal process as empty and formalistic, a facade of procedural regularity in an unfair world in which technicalities and ritualism are observed before justice. See also Resnik, *supra* note 9, at 544-45. Professor Resnik, a proponent of caution when addressing and instituting change in the current litigation system, recognizes that the condition of the present system demands attention:

I agree that the procedural format crafted fifty years ago no longer responds adequately to many issues that consume us today: the gross imbalance between litigants in certain kinds of disputes, the inabilities and misbehavior of lawyers and parties in categories of cases, the large number of disputes seeking attention, and the enormous difficulties, in some cases, in claiming that the outcomes achieved resemble "truth" or any approximation of it.

Id.

imposed.¹¹ If the litigant is forced to participate in ADR, procedural and substantive protections—most notably uniform treatment and access to trial—may be sacrificed for judicial economy.

This Note will address the nature and scope of those powers by which the federal judiciary may implement mandatory or compulsory ad hoc ADR. This Note focuses specifically on the "Summary Jury Trial" (SJT), and will suggest that the exercise of such procedures must be restrained where they restrict the litigant's access to the courts or disparage the federal promise of uniformity. Part I briefly describes those mandatory ADR methods commonly used by federal judges. Part II explores the litigant's right of access to the federal courts. Part III examines the perceived sources of power by which to implement ad hoc procedures that threaten access. Part IV examines limitations on judicial management in the settlement process and explores the relationship between settlement activism and ADR implementation by focusing on issues common to judicially negotiated settlement, mandatory arbitration and the SJT. Part V surveys the current federal case law. Finally, Part VI addresses the legal and practical limitations on mandatory ADR.

This Note concludes that, regardless of their docket problems, federal judges should not unilaterally impose mandatory, ad hoc procedures designed to discourage trial participation by coercing settlement. Absent explicit recognition by the Federal Rules of Civil Procedure, such procedures should be invoked only with the consent of the litigants.

I. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

A. Background

Dissatisfied with the pronounced, systemic inefficiencies of the formal litigation machine, the legal profession has, with increasing frequency,

11. One of the responsibilities of the federal judge, argues Judge Weinstein, is to safeguard the decision of the litigant to avail herself of the protection of the federal system:

The judge *qua* judge, however, has little impact on the choice between lawsuits and alternatives. . . . [C]ourts may not encourage [alternative] methods of resolving disputes by making it more difficult to commence or to prosecute and defend lawsuits. Once the parties choose to come to court, the judge should fulfill his or her responsibility to public office by hearing their dispute, and not sending them elsewhere.

Address by Judge Jack B. Weinstein, "Judges and Alternative Dispute Resolution," ABA Session on Judicial Power and ADR (Toronto, Canada, August 9, 1988).

discovered the utility of ADR.¹² Premised on flexibility, ADR has the capacity to adapt to the needs and resources of the individual litigant.¹³ Proponents argue that the remedy achieved is at least as satisfying to the litigant as that possible through traditional channels.¹⁴ Moreover, given the inevitable delays and expense that plague the formal legal machine,¹⁵ ADR may very well present the *only* effective means of resolving a dispute.¹⁶

12. See generally Alfini, *Alternative Dispute Resolution and the Courts: An Introduction*, 69 JUDICATURE 252 (1986); Barnett, *The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective*, 53 ANTITRUST L.J. 277 (1984); Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984); Henry, *Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s*, 1 OHIO ST. J. ON DISPUTE RESOLUTION 113 (1985); McMillan & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985); Nelson, *Alternative Dispute Resolution: A Supermarket for Law Reform*, 14 N.M.L. REV. 467 (1984). But see Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

The growing acceptance of ADR is evidenced by the fact that ADR, despite its immaturity, may have gained an institutional stronghold in the administrative operations of the federal government. It has been reported that Congress is considering legislation that would "create a 'gravitational pull' toward the use of ADR throughout the government" in civil cases that involve the United States as a party. LaVelle, *Congress Now Considering Dispute Resolution Measure*, NAT'L L.J., Feb. 5, 1990, at 1, col. 1.

13. Flexibility is one of the preeminent advantages of ADR, though the degree of flexibility varies with the technique. For example, in the arbitration context, the hearings are before a judge or arbitrator selected on the basis of knowledge and expertise; formal rules of evidence and trial procedure are avoided because attorneys need not be present. The atmosphere is informal and relaxed, remedies may be tailored to fit the circumstances, the scheduling and location of hearings may be arranged for the parties' convenience, and the proceedings may be conducted in private. See generally Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1987-88).

14. In addition to the obvious satisfaction associated with saving court costs and attorney fees, litigants may be spared the emotional strain attendant lengthy judicial proceedings. Goldstein, *Alternatives for Resolving Business Transaction Disputes*, 58 ST. JOHN'S L. REV. 69, 75 n.15 (1983); Stipanowich, *supra* note 13, at 428 n.6. Assessing the viability of arbitration, Professor Thomas Stipanowich muses, "Having gone to the time and trouble of bringing a case through interminable pretrial motion practice, attempting to educate the decision maker while observing the intricacies of trial procedure, and waiting out a lengthy appeal, even a 'victorious' litigant may well question whether justice has been served." *Id.* at 428.

15. See generally Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611 (1981); Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245 (1977); McMillan & Siegel, *supra* note 12. Documenting the pervasive attorney practice of procrastination and exhaustive preparation, McMillan and Siegel theorize:

[t]he ills of our present litigation system are attributable to the simple phenomenon that if a lawyer is given five years to do everything he can to win his case, he will think of five year's worth of activity to improve the chances. The fallacy in this approach is that the outcome probably would not change much if the same case were completed in three years or one year.

Id. at 439.

16. For example, delays increase the likelihood that witness testimony will be unavailable or less reliable at the time of trial, and the absence of such credible or reliable testimony significantly undermines the probability that the truth will be accurately determined and that justice will be served. See Nagel, *Predicting and Reducing Court-Case Time Through Simple Logic*, 60 N.C.L. REV. 103, 105 (1981).

ADR includes any number of informal techniques or processes designed to reduce the complexity and formality of litigation. Examples of recognized ADR techniques include the following: arbitration, mediation, conciliation, mini-trials, summary jury trials, private hearings or trials before retired judges, private dispute resolution centers, increased magistrate control¹⁷ and review panels. Participation in ADR,¹⁸ it is hoped, will avoid the formal system by fostering settlements prior to trial.

Ordinary settlement differs from ADR in two important respects. First, settlement—sitting down and hammering out a satisfactory resolution through negotiation—is commonly considered a vestige of the adversary process with all of its attendant maladies.¹⁹ Conversely, ADR generally provides an arena that stresses trust and cooperation.²⁰ Second, ordinary settlement is devoid of a hearing process.²¹ ADR may seek settlement, but it typically involves some process *beyond* ordinary negotiations. ADR involves judicial intervention.

A typical first step in ADR involves the judge actively bringing the parties together for a negotiated settlement. The issues arising from this increased judicial activism concern both ADR and the institutional role of the court.²²

17. The increased use of judicial adjuncts—magistrates and masters—is one solution to combat the perceived ills of the federal litigation system. The primary debate over such procedures concerns the scope of article III, and is therefore beyond the scope of this Note. For a recent discussion of the problems and advantages involved in the use of magistrates and masters, see Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

18. In most ADR, the parties to a dispute voluntarily agree to participate. Voluntary cooperation often results in an extraordinarily high degree of litigant satisfaction due to the tremendous potential cost savings. Thus, courts will sometimes propose alternatives to the litigants. See generally *King v. E.F. Hutton Co.*, 117 F.R.D. 2 (D.D.C. 1987) (court proposing omnibus settlement conference).

19. "The adversary process—the engine of the adjudicatory system—operates on a theory of fundamental distrust: Never put faith in the adversary. Litigation thus becomes formal, tricky, divisive, time-consuming, and distorting." Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 (1986). Because settlement is often a ritualistic prelude to the zero-sum game of litigation between opposing counsel, distrust and manipulation are inevitably present. "In contrast, the creation of trust is central to the design of many ADR processes." *Id.* ADR proponents, therefore, proclaim that the results of ADR are not only superior to litigation, but are also "clearly superior to conventional settlements." *Id.* at 429.

20. *Id.*

21. The ADR method is acutely aware of the litigant's or disputant's psychological need for the combative elements of the adversarial process and the ensuing therapeutic benefits that such an encounter produces. Consequently, the vast majority of ADR methods provide some type of contested hearing wherein the disputants may air their sentiments.

22. "The extent of judicial participation in settlement efforts varies. Generally, the judge is permitted to participate in negotiation as long as he or she acts as a catalyst, encouraging settlement but not taking sides." J. TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 88 (1983).

Assessing the propriety of ADR, therefore, requires a clear understanding of permissible judicial entanglement with the settlement process.²³

The parameters of permissible settlement intervention are only broadly sketched in the Federal Rules of Civil Procedure.²⁴ Despite the dependence of the federal judiciary on settlement as a means of winnowing dockets,²⁵ the Rules have only recently begun to regulate judicial supervision and participation in the settlement process. The 1983 amendments to the Rules formally recognized, for the first time, the district court judge's authority to assist in pretrial settlement discussions.²⁶ Rule 16 explicitly contemplates "the possibility of settlement or the use of extrajudicial powers to resolve the dispute."²⁷ The language of the rule, however, is silent regarding what, if any, limitations exist on the use of "extrajudicial powers."

In addition to their ambiguous statutory power, some federal district court judges have invoked the doctrine of "inherent powers,"²⁸ either alone or in conjunction with Rule 16, as authority for implementing ad hoc ADR procedures designed to induce settlement. The doctrine of inherent power, however, is as vague as Rule 16, and can result in a style of docket control commonly, and appropriately, referred to as "managerial judging."²⁹ The

23. Commentators are divided over the extent to which a federal judge should actively become involved with or encourage settlement. Compare Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1983-84) (advocating increased activism) and Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1983) (judicial activism necessary) with Resnik, *supra* note 6 (potential for abuse acute with ad hoc judicial activism).

24. See *infra* notes 87-116 and accompanying text.

25. "It is no secret that the overwhelming majority of legal disputes are settled without trial." J. TANFORD, *supra* note 22, at 87. Judge S. Arthur Spiegel of the United States District Court for the Southern District of Ohio estimates that over 95% of all civil cases are disposed of before a trial on the merits. Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 832 (1986). Similar estimates, though dated, find that only 6.5% of civil cases reach a trial on the merits. See ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. table C4, 388-90 (1980).

26. A number of commentators have argued that prior to the 1983 amendments, settlement negotiations fell outside the ambit of the original Federal Rules governing pretrial procedure. See Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L.F. 7 (1982). Oesterle argues that the original drafters of Rule 16 believed that settlement discussions were not a desirable facet of the pretrial conference, that the pretrial conference was intended to refine the issues for trial, and that settlement, while perhaps a byproduct of the conference, was not the goal of the conference. *Id.* at 7; see also Note, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 176 (1985) ("In the years immediately following the adoption of the Federal Rules of Civil Procedure, most authorities believed that parties should not discuss the topic of settlement in the presence of the trial judge.").

27. FED. R. CIV. P. 16(c).

28. See *infra* notes 117-36 and accompanying text.

29. See, e.g., Constantino, *Judges as Case Managers*, 17 TRIAL 56 (1981); Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Resnik, *supra* notes 6 & 9; see also Note, *supra* note 26, at 183. Some commentators advocate a shift in the role of pretrial procedure from a mere trial

managerial judge "believe[s] that the system does not work; that *something* must be done to make it work; and that the only plausible solution to the problem is *ad hoc* procedural activism by judges."³⁰

One potential danger of this ad hoc activism is that a judge may effectively coerce, rather than induce, settlement by forcing a litigant to forego his right to trial. Worse yet, a judge may become so involved in the settlement process that, should the matter proceed to trial, an unbiased factual and legal determination becomes impossible.³¹ In addition, a mandatory settlement process may cause delay and expense that the litigant would not have encountered during preparation for the traditional trial.

B. Compulsory ADR Procedures

Realizing the obvious advantages offered by ADR, the federal judiciary has begun to experiment with and implement these mechanisms as an alternative to the formal process.³² Such innovations are innocuous, if not commendable, when agreed upon by the parties. As noted above, however, the judicial practice of *mandatorily* imposing these procedures on an ad hoc basis is more dangerous.

Principally, there are two compulsory ADR processes designed to circumvent effectively the traditional trial: court-annexed arbitration³³ and the summary jury trial.³⁴ Both endeavor to achieve a fair, expedient result by promoting settlement or relief without the necessity of a trial.

1. Court-annexed Arbitration

Court-annexed arbitration is most often the product of local district court rule.³⁵ Recently, however, Congress has enacted a national arbitration program.³⁶ In arbitration, a certain class of cases—most commonly determined

prerequisite to the dominant phase of dispute resolution. Arguing that the benefits to the substantive litigation process from managerial judging outweigh the procedural unfairness inherent in ad hoc implementation, Professor E. Donald Elliott concludes, "we will have to stop thinking of the 'pretrial' process as a prelude to trial, and start thinking of it as the 'main event.'" Elliott, *supra*, at 335. *But see* Resnik, *supra* notes 6 & 9.

30. See Elliott, *supra* note 29, at 309 (emphasis in original).

31. For a discussion of the potential bias problems that may occur when a judge adopts an activist role, see Oesterle, *supra* note 26, at 10.

32. See generally *infra* notes 35-59 and accompanying text.

33. See Elliott, *supra* notes 35-46 and accompanying text. In this Note, "arbitration" should be understood to encompass that which is court ordered, either by judicial initiative or local federal rule, as opposed to arbitration that is mandated under specific contractual arrangements between consenting parties (e.g., a collective bargaining agreement to arbitrate labor disputes).

34. See *infra* notes 47-59 and accompanying text.

35. As of 1985, 16 states and ten federal district courts had authorized court-ordered arbitration programs. See Edwards, *supra* note 12, at 668.

36. Court Reform and Access to Justice Act of 1988, 28 U.S.C.S. §§ 651-658 (Law. Co-op. Supp. 1989). See *infra* notes 42-46 and accompanying text.

by the dollar amount of damages³⁷—are referred to one or more arbitrators who may “tailor relief to fit the circumstances, unbound generally by legal or equitable principles save their own sense of justice and fairness.”³⁸ The court enters the arbitration award as a final judgment of the court, unless one of the parties rejects the award by filing a demand for a trial *de novo*.³⁹ If a party objects to the award and demands a trial, she may incur sanctions—arbitrator fees, court costs and/or attorney’s fees—if she subsequently loses a formal trial on the merits, or if the final judgment is less favorable than the arbitration award.⁴⁰ Arbitration purportedly does not jeopardize a party’s right to trial by jury or the position of the case on the court calendar.⁴¹

In October, 1988, Congress passed the Court Reform and Access to Justice Act of 1988.⁴² The Act authorizes ten federal district courts, which operated experimental arbitration programs, to enact local rules providing for the use of voluntary and mandatory arbitration.⁴³ The Act extends

37. Under the Act, for example, a district court may “require the referral to arbitration of any civil action pending before it if the relief sought consists only of money damages not in excess of \$100,000 or such lesser amount as the district court may set, exclusive of interest and costs.” 28 U.S.C.S. § 652(a)(1)(B).

38. Stipanowich, *supra* note 13, at 434.

39. See *New Developments: Court Adjunct ADR*, 2 Alternative Dispute Resolution Rep. (BNA) No. 22, at 372 (Oct. 27, 1988) (discussing operation of experimental, court-annexed arbitration program subsequently expanded by the Act) [hereinafter REPORT].

40. *Id.*

41. *Id.*

42. 28 U.S.C.S. §§ 651-658 (Law. Co-op. Supp. 1989) [hereinafter Act].

43. *Id.* Those sections of the Act that expressly authorize district courts to refer cases to mandatory arbitration provide:

§ 651. Authorization of Arbitration

(a) Authority of Certain District Courts. Each United States district court . . . may authorize by local rule the use of arbitration in any civil action, including an adversary proceeding in bankruptcy. . . .

§ 652. Jurisdiction

(a) Actions That May be Referred to Arbitration.

(1) . . . a district court that authorizes arbitration under section 651 may—

(A) allow the referral to arbitration of any civil action . . . pending before it if the parties consent to arbitration, and (B) require the referral to arbitration of any civil action pending before it if the relief sought consists only of money damages not in excess of \$100,000 or such lesser amount as the district court may set, exclusive of interest and costs.

. . . .

(b) Actions That May Not Be Referred Without Consent of Parties. Referral to arbitration under subsection (a)(1)(B) may not be made— (1) of an action based on an alleged violation of a right secured by the Constitution of the United States, or

(2) if jurisdiction is based in whole or in part on section 1343 of this title.

(c) Exceptions From Arbitration. Each district court shall establish by local rule procedures for exempting, *sua sponte* or on motion of a party, any case from

programs currently in effect, and calls for the United States Judicial Conference to name ten other districts that will later be authorized to establish voluntary arbitration programs.⁴⁴

While the Act reflects continuing congressional experimentation with *national* ADR,⁴⁵ it also recognizes the possibility of *local* innovation since "each participating district court is authorized to establish its own unique arbitration program, reflecting its particular goals and resources."⁴⁶ Uniform court-annexed arbitration, therefore, has not yet arrived. Despite federal legislation, arbitration generally remains subject to local variation, if it is ordered at all. The summary jury trial, similar in some respects to court-annexed arbitration, is the second form of mandatory ADR.

2. The Summary Jury Trial

A revolutionary, and heralded,⁴⁷ technique of alternative dispute resolution is the summary jury trial.⁴⁸ The creation of Judge Thomas Lambros, the

arbitration in which the objectives of arbitration would not be realized—

- (1) because the case involves complex or novel legal issues,
 - (2) because legal issues predominate over factual issues, or
 - (3) for other good cause.
- (d) Safeguards in Consent Cases. In any civil action in which arbitration by consent is allowed under subsection (a)(1)(A), the district court shall by local rule establish procedures to ensure that—
- (1) consent to arbitration is freely and knowingly obtained, and
 - (2) no party or attorney is prejudiced for refusing to participate in arbitration.

Id. (emphasis added).

44. See REPORT, *supra* note 39, at 371.

45. *Id.*

46. *Id.*

47. The SJT has generally been viewed as an innovative and effective alternative to traditional litigation, and was endorsed by the 1984 Judicial Conference. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPTEMBER 19-20 at 88 (1984); see also Lambros, *supra* note 2, at 465 (quoting Chief Justice Burger praising the SJT as an effective alternative). Often, however, analysis of the SJT contemplates that the device will be used with the consent of the parties. When mandatory, the device has its critics. See Maatman, *The Future of Summary Jury Trials in Federal Court*: Strandell v. Jackson County, 21 J. MARSHALL L. REV. 455 (1988); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

48. See generally Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980). For a detailed presentation of the infant summary jury trial by Judge Lambros to The Judicial Conference of the United States Committee on the Operating of the Jury System, see Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 467 (1984). For later comments and analyses by Judge Lambros, in addition to rebuttals to criticisms, see Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789 (1989); Lambros, *Summary Jury Trial*, 37 FED'N INS. & COUNS. CORP. Q. 139 (Winter 1987); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Lambros, *The Summary Jury Trial*, 13 LITIGATION 52 (1986); see also Spiegel, *supra* note 25. But see Maatman, *supra* note 47; Posner, *supra* note 47, at 366.

SJT device "is a simple, flexible, and inexpensive settlement alternative."⁴⁹ As its creator states: "The process is intended to aid and assist the parties in gaining a realistic perspective of the fair settlement value of their case."⁵⁰ Having gained this perspective, the parties are more likely to reassess their negotiation positions, thus dramatically increasing the possibility of settlement. Even if the goal of settlement is not attained, the technique can "aid in streamlining jury trials so that the trial process undergoes a more efficient use of time."⁵¹ For these reasons, "durable or hard core cases that are not settled through conventional pretrial negotiations"⁵² are encouraged, sometimes forced, to engage in the SJT—a sort of pretrial "trial."

The SJT can be especially effective in those cases where certain settlement barriers are present: (1) where the litigant merely desires to present her case before some impartial body, (2) where the litigant believes her only chance of success lies in getting a weak case before a jury, or (3) where the litigant is incapable of an objective assessment of the strengths and weaknesses of her position.⁵³

While the backbone of the SJT is flexibility, there are certain constants that characterize the procedure. The SJT is most beneficial when invoked while the case is substantially in a posture for trial.⁵⁴ When discovery and motion procedure has been completed, the parties commence the process by submitting a brief containing the relevant legal issues and any proposed jury instructions. A summary voir dire process results in a petit jury composed of six members. Judge Lambros states that "[a]lthough the jurors are not mislead to believe that the proceeding is equivalent to a binding jury trial, the non-binding character of the proceeding is not emphasized."⁵⁵

The "trial" consists of the litigants' counsel presenting a narrative summation, including fact and argument, of their respective cases. No sworn witness testimony is taken, though it may be incorporated into the presentation, and the use of exhibits and other trial aids is kept to a minimum. Objections are discouraged, but in the event counsel oversteps the "bounds of propriety" during the presentation, the judge is empowered to admonish accordingly.⁵⁶ At the conclusion of the presentations, the jury, after restricted deliberation, issues either a consensus verdict, or separate, individual verdicts

49. Lambros, *Summary Jury Trial*, 37 FED'N INS. & CORP. COUNS. Q. 139, 139 (Winter 1987).

50. *Id.*

51. Lambros, *supra* note 2, at 468.

52. Lambros, *supra* note 49, at 139.

53. See *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603, 604 (D.C. Minn. 1988) (listing examples of situations where settlement obstacles make a particular case a viable candidate for the SJT); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (1986).

54. Lambros, *supra* note 2, at 470.

55. Lambros, *supra* note 53, at 289.

56. Lambros, *supra* note 2, at 470.

that reflect each juror's opinion.⁵⁷ The final stage, a dialogue component unique to the SJT, provides counsel with ample access to the jurors to analyze and question their reactions to the issues and counsels' presentations. The SJT assumes that, after digesting the results, counsel will return to the settlement negotiating table equipped with a better understanding of the case.

Judge Lambros reports that of the 49 SJTs held in his courtroom during the period ending with 1986, 92% resulted in settlement.⁵⁸ This figure, according to Lambros, translates into both litigant savings—i.e., expenses saved by avoiding trial—and an average juror-cost savings of “roughly” \$1,504 per case.⁵⁹ While the SJT may present an attractive success rate—assuming “success” is measured by increased settlements and reduced juror costs—compelled compliance requires an inquiry into the competing rights and powers involved. Part II will briefly examine the litigant's right of access to the federal courts. Part III will then consider the sources of power by which the federal judiciary might implement ADR procedures.

II. THE LITIGANT'S RIGHT OF ACCESS TO FEDERAL COURT

There are two basic theories under which a litigant might assert a right of access to the federal courts. The first is that one or more provisions of the Constitution confer, explicitly or implicitly, a right of access upon the litigant.⁶⁰ A second and somewhat related theory is that district courts, having been created pursuant to Congress' article III power to establish inferior courts,⁶¹ cannot refuse to exercise jurisdiction over legitimate federal claims.⁶²

57. *Id.* The parties, however, may elect to have a binding summary jury trial verdict. *See Negin v. City of Mentor*, 601 F. Supp. 1502 (N.D. Ohio 1985).

58. Lambros, *supra* note 2, at 473.

59. *Id.* *But see* Posner, *supra* note 47. Judge Posner questions whether there is empirical evidence sufficient to support the proposition that the SJT and similar forms of ADR increase judicial efficiency (i.e., by superior, or more frequent, settlements, and a resulting reduction in the number of jury trials). *Id.* at 382. Moreover, because the SJT uses jurors who must be paid at the same rate as regular federal jurors, the government may, in effect, be put in the position of subsidizing the device. This leads Judge Posner to ask: “Can a public subsidy of the settlement process be justified?” *Id.* at 372.

60. *See infra* notes 63-71 and accompanying text.

61. Article III provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States

U.S. CONST. art. III, § 1, 2.

62. *See infra* notes 72-75 and accompanying text.

In *Ryland v. Shapiro*,⁶³ the Fifth Circuit observed that “[t]he right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.”⁶⁴ While it is broadly assumed that the Constitution guarantees access to *some* court,⁶⁵ it is not clear whether the right identified by the *Ryland* court is the right of access to the *federal court*.⁶⁶

Where a litigant’s claim, assuming it meets the basic jurisdictional requirements,⁶⁷ involves fundamental constitutional or federal questions, a federal court should properly be considered the appropriate forum.⁶⁸ The litigant’s right of access would appear to be protected under the Constitution by virtue of a catalogue of rights embodied in the first amendment, and the equal protection and due process clauses of the fourteenth amendment.⁶⁹

63. 708 F.2d 967 (5th Cir. 1983).

64. *Id.* at 971.

65. G. GUNTHER, CONSTITUTIONAL LAW 51 n.6 (11th ed. 1985).

66. In *Ryland*, plaintiffs alleged that a state cover-up in the death of their daughter deprived them of a wrongful death action. Plaintiffs argued that the alleged cover-up denied them access to the state courts to litigate their tort claim, and this denial of access violated their civil rights under § 1983 of the United States Code. The district court disagreed and dismissed plaintiffs’ claim, reasoning that depriving the plaintiffs of access to state court “did not invade a private substantive or procedural legally protected interest guaranteed by statutes and constitution of the United States.” *Ryland*, 708 F.2d at 970. The Fifth Circuit reversed, holding that such a deprivation was both a substantive and procedural violation of rights embodied in the privileges and immunities clause of article IV, the right to petition under the first amendment, and the due process and equal protection clauses of the fourteenth amendment.

While the Fifth Circuit did not expressly limit the “right of access” to state courts—the plain language of the opinion refers only to “courts” generally—a contextual reading of the opinion suggests that the court was referring to state courts. Much of the court’s reasoning, however, would apply to a litigant’s claim of access to the federal courts. Specifically, the court’s due process analysis would seem to apply to claims that arise only by virtue of federal statute because “it is widely assumed that under some circumstances due process does require access to a court.” G. GUNTHER, *supra* note 65, at 51 n.6. For example, if a litigant has a property interest in a claim, as the *Ryland* court suggests, and that claim is created under federal (but not state) law, then to deny that litigant access to federal court (a court that is presumably familiar with federal statutes, and experienced in interpreting them) would be a due process violation. Similarly, the *Ryland* court’s equal protection and first amendment analysis would apply where the asserted claim is one created by federal statute, and where federal courts previously have recognized federal jurisdiction in cases involving other litigants asserting a similar claim.

67. This assumes that the litigant’s claim is colorable and involves a case or controversy sufficient to satisfy the basic ripeness and mootness requirements of article III.

68. *See infra* note 69.

69. Courts generally find a right of access to the federal courts where the claim asserted implicates a fundamental constitutional right, or where the Congress has expressly created a federal right. *See Shaw v. Neece*, 727 F.2d 947, 949 (10th Cir.) (“Clearly, access to the courts of the United States is a guaranteed constitutional right.” (citation omitted)), *cert. denied*, 466 U.S. 976 (1984). The federal courts, however, are reluctant to declare that there is an unconditional right to litigate in federal court. *See Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983), where the Court recognized a first amendment right of access to the federal courts to petition the government for redress of grievances, but concluded that

In addition, the seventh amendment,⁷⁰ while not absolute, guarantees the right to a jury trial in all actions to enforce rights and remedies traditionally enforced at common law.⁷¹ Together, these constitutional provisions appear to safeguard the right of access to a federal court, at least where the litigant asserts a valid federal or constitutional claim.

In addition, a litigant's right of access to the federal courts can also be traced to article III of the Constitution. This analysis involves an interpretation of the extent to which a district court may decline jurisdiction validly conferred by Congress pursuant to article III. The question of whether Congress may restrict or eliminate lower court access has been the subject of ongoing debate.⁷² Professor Lawrence Sager argues that the guarantees

there is no such right to bring frivolous lawsuits: "The First Amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, the public airing of disputed facts—are not advanced when the litigation is based on . . . knowingly frivolous claims." (footnote and citations omitted); see also *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980), where the Court questioned authority for the proposition "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." (no right to relitigate in federal court an issue already decided in state court). Instead, courts will look to the nature of the claim asserted to find the constitutional source of the right. See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (due process clause construed as providing prisoners with meaningful access to the courts); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (first amendment, which guarantees right to petition government, includes right of access to courts); *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981) ("The scope of such a right [to access the district court] depends in part on the nature of the suit.").

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that a litigant has a right of access to the federal courts in a civil rights action under § 1983 of the United States Code. "The right of access to the courts, upon which [*Johnson v. Avery*, 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579 (legal assistance to prisoners prosecuting civil rights claims).

70. The seventh amendment to the Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

71. See *Ross v. Bernhard*, 396 U.S. 531 (1970) (seventh amendment guarantee, which preserves the litigant's right to a jury trial in suits at common law, depends on the nature of the issue to be tried and includes the right to a jury trial in a shareholder's derivative action); *Pernell v. Southall Realty Co.*, 416 U.S. 363 (1974). The seventh amendment, however, is generally inapplicable in administrative proceedings where the factfinder possesses a particular expertise that makes jury determination inappropriate. *Curtis v. Loether*, 415 U.S. 189 (1974); see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

72. Compare Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 532-33 (1974) (arguing that the district court, or some form of lower federal court, "is constitutionally required" both to enforce the mandates of the Supreme Court, especially in progressive areas such as civil rights, and to ensure the correct interpretation of the Constitution given the impossibility of Supreme Court review of all state decisions involving federal issues) and Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 61-75 (1981) (article III requires that some federal forum must be available for the enforcement of federal

of judicial independence and competence found in article III evidence an "inherent" requirement that a federal forum be available for the enforcement of federal constitutional rights,⁷³ and that Congress cannot eliminate lower federal courts if the effect is to deny litigants access to defend such rights.⁷⁴ If Congress is limited in its ability to restrict lower federal court jurisdiction, as Professor Sager suggests, then a similar limitation should apply to the district courts. In other words, if article III limits the ability of Congress to restrict access to the district courts which it created, then the district courts can have no greater restrictive power to limit their own jurisdiction. Once Congress has conferred federal jurisdiction through the creation of a federal cause of action, a federal court must recognize its duty to hear the case.⁷⁵

III. SOURCES OF JUDICIAL POWER TO COMPEL ADR

Judicial power to compel compliance with innovative ADR procedures does not flow directly from the Constitution. Rather, the power to implement such procedures stems from three possible sources: (1) local district

constitutional rights) with Gunther, *Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 912 (1984) ("difficult to argue that lower federal courts *must* be available to adjudicate federal claims") and Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982) (disagreeing with Professor Sager's interpretation of article III finding a limitation on the power of Congress to curtail lower court jurisdiction).

73. See Sager, *supra* note 72, at 61-68.

74. See *id.*

75. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In *Cohens*, Chief Justice Marshall stated that the federal judiciary could not decline jurisdiction once it is validly conferred by Congress:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. at 404; see also *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), where the Court held that a litigant who properly invokes federal statutory jurisdiction cannot be compelled to submit to state court jurisdiction:

Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that. . . "it is [the federal court's] *duty* to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

Id. at 415 (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) (emphasis added)).

Professor Erwin Chemerinsky argues that "it is essential to have federal courts available to hear constitutional claims and that litigants raising constitutional claims should be able to choose whether to proceed in federal or state court." Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 369 (1988).

court rules;⁷⁶ (2) the Federal Rules of Civil Procedure;⁷⁷ or (3) the trial judge's "inherent" powers to manage and control the docket.⁷⁸

Critics argue that the latter two source theories condone sporadic judicial activism in settlement negotiations, a practice heretofore prohibited.⁷⁹ Moreover, critics argue that, irrespective of the source, such power is necessarily subservient to the Constitution and the Rules Enabling Act, both of which limit the capacity of the federal courts to alter existing substantive legal rights through procedure.⁸⁰ This Note will argue that mandatory, ad hoc ADR procedures cannot be justified under either the Federal Rules or the vague "inherent powers" doctrine. The next section will review the basic constitutional restraints on procedural innovation. It is followed by a section discussing the scope of the Federal Rules and a section examining the status of the inherent powers doctrine.

A. Constitutional Limitations

Article III of the Constitution explicitly grants Congress the power to regulate the review of controversies.⁸¹ In turn, Congress, by enacting section 2072 of the Rules Enabling Act,⁸² has delegated this power by authorizing

76. Under the Federal Rules, local district courts may enact procedural rules not inconsistent with the Federal Rules or article III of the Constitution. FED. R. CIV. P. 83.

77. See *infra* notes 87-95 and accompanying text. Proponents of the utilization of such ad hoc ADR procedures argue that the authority to require compliance is implicit in the Federal Rules. Most commonly, this power is found to emanate from an aggregation of Rules 1, 16 and 83. The ambiguous power to facilitate settlement under Rule 16 is frequently cited as the basis for this argument. See *infra* notes 87-116 and accompanying text. Specifically, proponents urge that the language of FED. R. CIV. P. 16(c)(7) ("may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute") invites discretionary implementation.

78. See *infra* notes 117-36 and accompanying text. The "inherent" power of the district court to control its docket was explicitly recognized by the Supreme Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962).

79. See Oesterle, *supra* note 26, at 7; see also Resnik, *supra* notes 6 & 9.

80. See Maatman, *supra* note 47, at 473-74.

81. U.S. CONST. art. III, § 2. This section provides, in relevant part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States. . . .

[In all such cases], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

82. 28 U.S.C. § 2072 (1982). The Rules Enabling Act states:

The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure

the Supreme Court to prescribe rules of practice and procedure for the federal courts. The Act states, however, that the Court may not promulgate rules that "abridge, enlarge or modify any substantive right" ⁸³

The Court, by virtue of the authority vested in it by the Act, has developed the Federal Rules of Civil Procedure to ensure that the litigant's constitutional rights under article III and the seventh amendment are protected. The Federal Rules, however, "cannot avoid the congressional limit on affecting substantive rights."⁸⁴ While the line distinguishing substance from procedure may be unclear,⁸⁵ the Federal Rules must not encroach upon the careful balance between judicial efficiency and litigant rights: "the rights of litigants cannot be altered or compromised in the guise of regulating procedure."⁸⁶

B. *The Federal Rules as Judicial Justification for ADR*

When a federal judge offers the Rules as warrant for his intervention, he is likely to merge several rules, the combination of which justifies his conduct. Specifically, Rule 1,⁸⁷ Rule 16(c)⁸⁸ and Rule

in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Id.

83. *Id.*

84. Maatman, *supra* note 47, at 474.

85. "The distinction between substance and procedure is often unclear. Rules that may be classified as procedural may also bear directly on the substantive rights of litigants." *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460 (1965)). The difficulty in distinguishing substantive from procedural rights arises because the two become blurred when a "procedural" rule affects substance. What are thought to be fundamental rights—access to the federal courts, uniform treatment, and the even, unbiased application of the laws of the United States—are, in a sense, both procedural and substantive because procedural restrictions may limit these rights. "Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely 'neutral' in the sense that it does not affect substance." Elliott, *supra* note 29, at 325.

86. Maatman, *supra* note 47, at 474.

87. Rule 1 decrees that federal judges shall apply the Federal Rules "to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

88. The declared objective of Rule 16 is to foster efficient settlement through the use of pretrial discovery and planning. Rule 16(c) provides, in relevant part:

The participants at any conference under this rule may consider and take action with respect to . . .

.....

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

.....

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

FED. R. CIV. P. 16(c).

39⁸⁹ are said to expressly provide the district court judge with the power to manage the court docket at the pretrial stage.⁹⁰ The linchpin of this combined power is Rule 16. Invoking Rule 16 as justification for the SJT assumes that the desire to avoid trial is a legitimate goal of pretrial procedure. Here, the judge acts as a case manager,⁹¹ employing the "extrajudicial powers" contemplated by Rule 16⁹² to encourage settlement. Danger lies, however, where encouragement gives way to coercion.⁹³

Few would argue that the federal judge must have the necessary tools to control his docket. The Federal Rules, which are the "product of a careful process of study and reflection . . . where the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant,"⁹⁴ attempt to provide such a docket-control tool in Rule 16.⁹⁵ This rule, however, is limited in its ability to authorize mandatory procedures not contemplated by the Rules.

In *Lockhart v. Patel*,⁹⁶ the court addressed its authority to order parties and their insurers to attend a settlement conference. The court, interpreting the propriety of such an action under Rule 16, stated that the drafters of the Rule "knew of the docket pressures to which our courts are subject, and knew that to process 400 cases you have to settle at least 350. That is why they encouraged 'forceful judicial management,' which is the only means of settling a high percentage of cases."⁹⁷ The court concluded that

89. Applied by analogy, this Rule states that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury." FED. R. Crv. P. 39(c).

90. Although analyzed as independent justification for ADR implementation, the Rules are frequently combined with the inherent power (or "supervisory power") doctrine. See generally *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

91. See Peckham, *supra* note 29, at 770. Judge Peckham, the Chief District Court Judge for the Northern District of California, observed that "until very recently most appellate courts held the view that district courts had virtually unfettered discretion to enact and enforce pretrial rules, regulations, and procedures, and considered that this discretion was supported by broad sanctioning powers." *Id.* at 790. While Judge Peckham's article pre-dates the 1983 amendments to the Federal Rules, his observation is worth note because it aptly illustrates judicial recognition of the competing tensions a judge encounters when openly advocating settlement.

92. See *supra* note 88.

93. It is clear that federal judges may not coerce settlement. See *infra* text accompanying note 114; *infra* notes 137-40 and accompanying text. The line between encouragement and coercion, however, is blurred, and there may be a temptation to encourage settlement too zealously. "Judges are human and humans tend to abuse power when they have it; Rule 16 is surely no exception." Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995 (1989).

94. *Strandell v. Jackson County*, 838 F.2d 884, 886-87 (7th Cir. 1987).

95. When combined with the speed and efficiency mandate of Rule 1, Rule 16 logically invests in the trial judge the ability to participate in pretrial to whatever degree the judge feels necessary to speed the lawsuit to its conclusion.

96. 115 F.R.D. 44 (E.D. Ky. 1987).

97. *Id.* at 47.

a trial judge may order the attendance of party representatives with the ability to settle because without such attendance the settlement conference would be a wasted exercise.⁹⁸ Implicit in the court's reasoning was the absence of undue burdens on the parties. The travel cost incurred in attending the conference was offset by the potential savings available if a satisfactory settlement was realized. Of course, the court stated, an actual settlement could not be ordered, but a trial judge could require a party "to make reasonable efforts, including attending a settlement conference with an open mind."⁹⁹

Recently, an en banc panel of the Court of Appeals for the Seventh Circuit issued a similar ruling in *G. Heileman Brewing Co. v. Joseph Oat Corp.*¹⁰⁰ In a six to five majority opinion (with five separate dissenting opinions), the *G. Heileman* court reversed an earlier panel that had restricted the power of a district court to require the appearance of a represented party (as opposed to a represented party's attorney) at a settlement conference. In deciding that a district court may compel such attendance, the *G. Heileman* court held that "Rule 16 does not limit, but rather is enhanced by, the inherent authority of federal courts to order litigants . . . to attend pretrial conferences."¹⁰¹

The *G. Heileman* court, in interpreting Rule 16(a)(5),¹⁰² addressed three issues. First, the court considered whether the Rule's explicit language (which includes only a "represented party's attorney or an unrepresented party") foreclosed the forced attendance of a party represented by counsel. Noting that a judge may not coerce settlement, the court read the language of Rule 16 to be silent with respect to represented litigants. This silence did not indicate an exclusion of power.¹⁰³

Second, the court considered whether such attendance could be mandated, notwithstanding the textual silence of the Rule, under the inherent power of the court to relieve docket pressures. The court held that the inherent power of the trial court to manage litigation conferred upon the court power to require the represented party's attendance at settlement conferences.¹⁰⁴

Third, the court considered whether such a broad interpretation of inherent judicial authority would invest in the trial court a power that

98. *Id.*; see *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974) (similar conclusion reached, though decision pre-dates 1983 Federal Rules amendments).

99. *Lockhart*, 115 F.R.D. at 47; see *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985).

100. 107 F.R.D. 275 (W.D. Wis. 1985), *rev'd*, 848 F.2d 1415 (7th Cir. 1988), *rev'd*, 871 F.2d 648 (7th Cir. 1989) (en banc).

101. 871 F.2d at 656.

102. Rule 16(a) states: "(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference. . . ." FED. R. CIV. P. 16(a).

103. *G. Heileman*, 871 F.2d at 651-52.

104. *Id.* at 652.

contravened the Federal Rule's careful balance of interests, resulting in the encouragement of what the dissent termed "judicial high-handedness."¹⁰⁵ Conceding that "inherent powers are shielded from direct democratic controls, [and] must be exercised with restraint and discretion,"¹⁰⁶ the court nonetheless concluded that ordering a represented party's attendance at a settlement conference was "in harmony" with Rule 16, and, therefore, represented only an effort to "preserve the efficiency, and more importantly the integrity, of the judicial process."¹⁰⁷

A reading of the five dissenting opinions reveals the dilemma that divided the *G. Heileman* court.¹⁰⁸ The dissenting judges¹⁰⁹ focused on the express language of Rule 16. More importantly, they focused on the consequences of a broad interpretation that finds power where none explicitly exists.¹¹⁰ Because the litigant has no duty to "negotiate [for settlement] 'in good faith,'"¹¹¹ forced party attendance at a settlement conference would be useless.¹¹² Moreover, to ascribe such a power would violate the Rules Enabling Act,¹¹³ and would significantly undermine a primary purpose of the Federal Rules:

We may express in grandiose terms all sorts of theory and postulation about being careful not to influence, intimidate and/or coerce a settlement, but under the pressure that our trial judges experience today from their ever-burgeoning caseloads, we would be foolhardy not to anticipate [t]he appearance of partiality and impropriety [that] must be

105. *Id.* at 657 (Posner, J., dissenting).

106. *Id.* at 654 (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)).

107. *Id.* at 652.

108. In *G. Heileman*, the Seventh Circuit clearly recognized the tension between the need for judicial efficiency and the potential erosion of the litigant's substantive rights precipitated by an expansive interpretation of the Federal Rules. An analysis of the dissenting opinions is necessary for two reasons. First, the *G. Heileman* decision offers a thorough analysis of the relationship between the Federal Rules and the inherent powers doctrine, and an understanding of the dissenters' position clarifies this relationship. Second, the en banc decision was narrowly decided (six to five) in favor of a broader interpretation of judicial power. This fact illustrates the controversy surrounding such interpretations of power.

109. The five dissenting judges were: Posner, Coffey, Easterbrook, Ripple and Manion, Circuit Judges.

110. *G. Heileman*, 871 F.2d at 657 (Posner, J., dissenting); *id.* at 658-60 (Coffey, J., dissenting); *id.* at 666-67 (Manion, J., dissenting). Support for the dissenting judges' position can be found in *Wyeth Laboratories v. United States Dist. Court for the Dist. of Kan.*, 57 U.S.L.W. 2047 (10th Cir. 1988). In *Wyeth*, the Tenth Circuit held that a federal district court lacked the power to establish a "litigation library" for the collection of pleadings, discovery material, trial exhibits and other material used in litigation. The court stated: "If an act can be performed by a district court, it is because it was permitted and not because it was not prohibited by Congress. Federal courts operate only in the presence rather than in the absence of statutory authority." *Id.* at 2047.

111. *G. Heileman*, 871 F.2d at 664 (Posner, J., dissenting) (citing Advisory Committee Comment to FED. R. CIV. P. 16(c)).

112. *Id.*

113. *Id.* at 665 (Ripple, J., dissenting).

avoided at all lengths if our nation is to continue to show respect for its judicial judgments.¹¹⁴

The *G. Heileman* decision illustrates the judicial discord and tension that result when facets of the settlement stage become compulsory.¹¹⁵ Because the dimensions of the pretrial Rule are ambiguous, district court judges are left to create and define their own limitations. Discerning the precise point when self-imposed limits exceed the scope of the Rules is difficult. The only pattern is that Rule 16 authority is apparently usurped when a pretrial procedure clearly conflicts with the careful balance of the Rules, or attempts to coerce settlement.¹¹⁶

The *G. Heileman* majority touched only briefly on the doctrine of inherent powers, and then only as support for an expansive interpretation of Rule 16. As the next section will discuss, however, the inherent power of the court is often offered as an independent source of authority for mandating ADR.

C. *The Inherent Power of the Court*

The second justification commonly offered for ad hoc settlement procedures is the inherent power of the court to manage various aspects of the litigation process. The Supreme Court recognized inherent power in *Link v. Wabash Railroad Co.*,¹¹⁷ when it held that the Federal Rules did not restrict the inherent power of a district court to dismiss dormant lawsuits. The Court stated that:

[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.¹¹⁸

Seizing on this language in *Link*, courts have recognized inherent powers beyond *sua sponte* dismissal for want of prosecution.¹¹⁹ Since *Link*, a number of courts have assumed that the trial court's inherent power extends to a vast array of pretrial procedures, including compliance with mandatory

114. *Id.* at 662 (Coffey, J., dissenting).

115. See also *Identiseal Corp. v. Positive Identification Sys.*, 560 F.2d 298, 302 (7th Cir. 1977) (court cannot force a party to engage in discovery); *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir. 1976) (per curiam) (court cannot compel parties to stipulate to facts).

116. See *Strandell*, 838 F.2d at 887; *Kothe*, 771 F.2d at 669; *Lockhart*, 115 F.R.D. at 47. 117. 370 U.S. 626 (1962).

118. *Id.* at 630-31.

119. Judge Robert Peckham argues that *Link* "initially set the tone for the extremely deferential attitude of the appellate courts toward the district courts' authority to use pretrial procedures." Peckham, *supra* note 29, at 790.

settlement procedures. Lower courts have decided that the district court has the inherent authority to require attendance at settlement conferences,¹²⁰ to assess pretrial sanctions,¹²¹ to adopt novel means of controlling cases during pretrial¹²² and to regulate the litigation before it.¹²³ Lower courts have disagreed, however, over the extent to which inherent power authorizes the imposition of *mandatory* settlement-inducing procedures such as the summary jury trial,¹²⁴ mediation,¹²⁵ and arbitration.¹²⁶

Some lower courts have recognized limits to the inherent powers doctrine. While a district court's power to control its docket is generally respected, the court may not act in a manner that interferes with protected constitutional rights,¹²⁷ it may not undercut the potency of discovery rules¹²⁸ nor

120. See *G. Heileman*, 848 F.2d at 1415; *In re LaMarre*, 494 F.2d at 753; *Lockhart*, 115 F.R.D. at 44.

121. See *Matter of Sanction of Baker*, 744 F.2d 1438 (10th Cir. 1984) (pretrial sanctions have always been within the inherent power of the courts to manage their affairs as an independent branch of government); *J. M. Clemminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D.C. Conn. 1981) (federal trial court possesses inherent power to control disposition of cases before it, including the authority to levy sanctions in response to abusive litigation practices). *But see Harris v. Callwood*, 844 F.2d 1254 (6th Cir. 1988) (dismissal of plaintiff's suit for failure to appear at pretrial conference excessive); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985) (imposition of monetary sanction on attorney for misconduct without affording attorney prior notice and opportunity to be heard violates due process).

122. See *Lockhart*, 115 F.R.D. at 47 (discretion of court to manage docket must be protected by according the court the ability to adopt novel and imaginative means of control). *But see Strandell*, 838 F.2d at 884.

123. See, e.g., *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943 (9th Cir. 1976) (district court has broad and inherent power to regulate litigation before it); *Turner v. American Bar Ass'n*, 407 F. Supp. 451 (N.D. Tex. 1975), *aff'd*, 542 F.2d 625 (federal judge has inherent power to govern and control litigation before him); see also *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (court has inherent power to establish standards of litigation conduct).

124. See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1989), appeal *sub nom.* pending (courts have the power to conduct SJT under either Rule 16, or as a matter of the court's inherent power to manage its cases); *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988) (inherent power allows imposition of mandatory SJT); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988) (inherent power allows imposition of mandatory SJT); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988) (inherent power allows imposition of mandatory SJT). *But see Strandell*, 838 F.2d at 884.

125. See *Tiedel v. Beech Aircraft Corp.*, 118 F.R.D. 54 (W.D. Mich. 1987), *rev'd*, 865 F.2d 88 (6th Cir. 1988) (district court lacks the power to promote settlement by requiring a party who rejects a mediator's proposal to pay the prevailing side's attorney's fees).

126. See generally *supra* notes 35-46 and accompanying text.

127. See *Vietnamese Fishermen's Ass'n v. Knights, Etc.*, 543 F. Supp. 198 (S.D. Tex. 1982) (district court power to fashion remedy is broad, but cannot interfere with constitutional rights).

128. See *Strandell*, 838 F.2d at 884; *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129 (5th Cir. 1987) (district court power cannot undercut discovery control measures, including a rule mandating the holding of a discovery conference upon the motion of one of the parties).

may it impinge upon the Federal Rules.¹²⁹

In *Eash v. Riggins Trucking Inc.*,¹³⁰ the Court of Appeals for the Fourth Circuit surveyed the history of the inherent powers doctrine, and described the concept as “nebulous, and its bounds as ‘shadowy.’ . . . definitional problems regarding inherent power [] have bedeviled commentators for years”¹³¹ The Fourth Circuit found three primary justifications for invoking inherent power,¹³² but concluded that regardless of which justification a court adopts, the court may not act to the derogation of a party’s due process rights.¹³³ Similarly, in *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*,¹³⁴ the Court of Appeals for the Seventh Circuit, declining to define the doctrine’s precise contours, flatly stated: “inherent authority . . . may not be exercised in a manner inconsistent with the Federal Rules of Civil Procedure.”¹³⁵

Somewhere within a court’s inherent power there exist limitations. These limitations, though vague, would appear to involve situations where such authority would conflict with the Federal Rules.¹³⁶ This Note will next discuss the practical problems resulting from the lack of coherent limits on judicial power.

IV. UNRESTRAINED JUDICIAL INVOLVEMENT: JUDGES OR MANAGERS?

A. *Judicial Activism in the Settlement Process*

The purpose of each ADR technique is to promote settlement. When voluntary, such procedures represent a meaningful and effective alternative to the high cost of traditional litigation.¹³⁷ These ADR procedures, however,

129. See *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) (local rule that was inconsistent with Federal Rule 16 held invalid).

130. 757 F.2d 557, 558 (3d Cir. 1985).

131. *Id.* at 561.

132. The court stated that the doctrine is employed under three general pretenses: (1) judicial powers pursuant to article III; (2) the nature of the court; and (3) necessity in the sense of being practical or useful. *Id.* at 562-63.

133. *Id.* at 570-71.

134. 867 F.2d 996 (7th Cir. 1989).

135. *Id.* at 1002. See *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988) (inherent supervisory power does not permit district court to dismiss criminal indictment for error in grand jury proceedings where such action would contravene “harmless error” rule of Federal Rule of Criminal Procedure 52(a)).

136. *Cf. G. Heileman*, 871 F.2d at 648.

137. See *supra* notes 12-30 and accompanying text. The rules relating to discovery are an obvious source of potential abuse. Much of the discovery process may be a needless exercise designed to engage the opposition in a flood of “paper wars.” Another example is the exhaustive appeals process. While purporting to correct trial errors, the process may actually negate the usefulness of a trial when judgments are reversed on technical, quasi-harmless, or ancillary grounds irrelevant to the central issues of the dispute. Moreover, the appellate process may undercut the finality of judgment when a losing party pursues a borderline-frivolous claim to ultimate exhaustion—i.e., the finality of a jury verdict is lost when the loser is able to postpone paying damages pending the outcome of an appeal.

should not completely supplant trials. When ADR procedures are mandatory, litigants may be deprived of those guarantees that underpin the judicial system. Discovery protections, the ability to proceed to trial, and the resulting fairness of that trial may all be destroyed. Mandatory ADR may force litigants to endure a costly procedure implemented on an ad hoc basis with minimal benefit.

Courts and commentators have struggled to articulate the extent to which a trial judge may intervene in the settlement process.¹³⁸ It is clear that a judge may not "club" the parties into an involuntary compromise of the litigation.¹³⁹ Judicial power, whether inherent or rooted in Rule 16, is limited in its capacity to force settlement upon unwilling litigants.¹⁴⁰ As one court defined the limitation: "[T]he horses may be led to water. Whether they drink is up to them."¹⁴¹ Yet aside from this obvious restriction on extreme activism, there are no coherent restraints on judicial attempts to "lead" the litigants to settlement.

Professor Marc Galanter asserts that the "[a]ctive promotion of settlements is now unmistakably the 'established' position in the federal judiciary."¹⁴² Echoing this observation, Judge Robert Peckham of the United States District Court for the Northern District of California, reacting to the impact of the increased caseload on judicial management, writes: "While few judges wish to force unwilling parties to settle, many judges believe that the promotion of informed and fair settlements is one of the most important aims of pretrial management."¹⁴³ Judge Peckham's view, however, begs the question—what is a "fair" settlement? More importantly, who decides, the judge or the litigant? This Note will argue that a judge who zealously pursues settlement to relieve his docket becomes more "case manager" than judge. In this role, the judge who actively advocates what

138. See Resnik, *supra* note 9 at 496 ("At a more theoretical level, the Rules fail to address what role, if any, judges should play in shaping settlements and how judges should assess the adequacy of the compromises reached."). Compare Peckham, *supra* note 23, at 253 (advocating the need for judicial participation) with Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

139. See *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985) (holding that Federal Rule 16 was not designed as a means for clubbing the parties, or one of them, into an involuntary compromise of the litigation).

140. See generally *Evans v. Jeff D.*, 475 U.S. 717 (1986) (trial judge lacks the authority to "require the parties to accept a settlement to which they had not agreed"); *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974) (due process constraints of the Constitution upon the inherent powers of the trial judge restrict his power to compel settlement of which one party does not approve); *Abney v. Patten*, 696 F. Supp. 567, 568 (W.D. Okla. 1987) ("Obviously the Rule [16] does not permit compelled settlements, nor even the imposition of settlement negotiations on unwilling litigants.").

141. *Abney*, 696 F. Supp. at 568.

142. Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986). Professor Galanter notes, "Judges who are activists on this matter are invited to give seminars to new judges; their views are broadcast by publication in *Federal Rules Decisions* and disseminated in booklets by the Federal Judicial Center." *Id.* at 261.

143. Peckham, *supra* note 29, at 773.

he thinks is a fair settlement threatens the independent prerogative of the litigant to decide on what terms she will accept compromise, if at all.

B. Coerced Settlement: The Effect on Procedural and Substantive Rights

Professor Judith Resnik has adamantly warned of the potential for abuse when trial judges assume too much control over the settlement process.¹⁴⁴ Terming these jurists "managerial judges,"¹⁴⁵ Resnik argues that they "have begun to perceive themselves as being in the business of settlement as much as (sometimes more than) in the business of adjudication."¹⁴⁶ While proponents of managerial judging are confident that "informal exercises of power can be used wisely as well as effectively,"¹⁴⁷ Resnik perceptively argues that court discretion may threaten substantive and procedural guarantees.¹⁴⁸

Managerial judging principally threatens access to justice. Burdensome settlement procedures inevitably obstruct, or even eliminate, the litigant's ability to proceed to trial.¹⁴⁹ Settlement is not a prerequisite to trial.¹⁵⁰ If the litigant must engage in settlement negotiations,¹⁵¹ then she is detoured from her normal litigation course. Even if de jure access is unmolested (e.g., when the ADR purports to be nonbinding), de facto access may be limited if the litigant's substantive and procedural rights become illusory.

First, the transformation from judge to manager may significantly hamper judicial objectivity.¹⁵² As the judge becomes increasingly involved in the

144. See Resnik, *supra* notes 6 & 9.

145. Resnik, *supra* note 9, at 497.

146. *Id.* at 528.

147. *Id.* at 544.

148. See *supra* note 85 and accompanying text.

149. "Are judges who require settlement negotiations implementing a societal decision that we no longer offer trial-as-of-right to any litigant who so desires and who has the resources and stamina to insist upon one?" Resnik, *supra* note 9, at 550.

150. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657-58 (7th Cir. 1989) (Posner, J., dissenting).

151. In light of *G. Heileman*, 871 F.2d at 648, the litigant may be compelled to attend a pre-trial settlement conference to discuss the possibility of settlement. This is not to say, however, that the litigant must engage in settlement negotiations. See *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987).

152. See Resnik, *supra* note 6, at 427; see also Oesterle, *supra* note 26, at 11 (questioning whether activist judges can cleanse their minds of inadmissible information learned during pretrial, and noting the possible impact on trial in light of the judge's considerable influence over juries); Note, *supra* note 26, at 182 ("judge who coerces parties into a settlement injects into trial a consideration outside the merits of the case"). But see Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1971) (threat of impartiality of the managerial judge more theoretical than real).

case, he may later find it difficult to ignore impressions or biases.¹⁵³ For example, the judge may develop feelings of friendship or loyalty that may later bias his judgment.¹⁵⁴ This danger of bias differs from that posed during normal motion practice because pre-trial litigation rarely involves a presentation of *all* the facts in the case (thus, a judge is unlikely to make an early determination of the merits), nor does it require sustained contact with the parties.¹⁵⁵ Similarly, some impressions that the judge forms may be based on a lawyer's inaccurate, incomplete, or misleading statements.¹⁵⁶

Second, appellate review of legal determinations infected by inappropriate judicial settlement conduct becomes virtually impossible because the trial record will not reflect evidence improperly received and considered during the settlement stages.¹⁵⁷ Nor will any abuse of discretion at the settlement stage be discernible because much of the negotiation takes place off the record. Thus, it becomes difficult to supervise and constrain the trial judge's unfettered use of power.¹⁵⁸

Third, given the inclination of some judges to influence their colleagues by developing managerial innovations, the judge may subconsciously invest an unhealthy interest in the outcome, or aggregate outcomes, of a particular settlement procedure.¹⁵⁹ It is possible that a particular judge might influence the result of a procedure to improve the success of his invention.

153. The inevitable counter-argument is that this dilemma can be avoided by appointing a different judge for settlement and trial; a practice utilized in many state courts (e.g., California). This solution, however, undercuts the efficacy of judicial management because two judges are now required to handle each case instead of one.

154. Professor Resnik argues that the frequent contact between judge and lawyer that necessarily occurs during settlement negotiations "may become occasions for the development of intense feelings—admiration, friendship, or antipathy. Therefore, management becomes a fertile field for the growth of personal bias." Resnik, *supra* note 6, at 427.

155. These elements of sustained contact leading to personal bias, *supra* note 152, and early determinations of liability without a thorough factual presentation, *supra* note 154, raise the issue of whether the judge should be involved in the settlement process at all. Professor David Shapiro notes that the question of whether the judge should be significantly involved in the settlement process is not settled:

[T]here has been a continuing debate about whether a judge who is involved in settlement discussions should preside at the trial, or at any adjudication of an issue on the merits . . . Is there perhaps a sufficient consensus by now to state some sort of principle—say that in the absence of informed consent by the parties, a judge who has become significantly involved in settlement discussions should not ordinarily preside over the adjudication of issues on the merits?

Shapiro, *supra* note 93, at 1996.

156. See Resnik, *supra* note 6, at 425 (noting the absence of institutional factors at the pretrial settlement stage that act to check the judge's pretrial management—factors such as a review of the record for the veracity of assertions on which the judge makes determinations).

157. Professor Resnik notes that the conduct of the managerial judge results in "[u]nreviewable power." Resnik, *supra* note 6, at 430.

158. See generally Resnik, *supra* note 6.

159. Judicial innovations to combat the ills of the system are encouraged, and indeed often serve as the catalyst for procedural reform or amendment. See *supra* notes 12-16 and

Fourth, litigants run a substantial risk of being treated in a disparate manner when they encounter a particular judge that is especially settlement-prone.¹⁶⁰ A litigant appearing before a managerial judge who is especially creative with his interpretation of permissible judicial intervention may be forced to endure procedures not required of similar litigants. This may result in additional costs or possible party admissions not incurred by litigants appearing before judges with lighter docket pressures, or judges who abdicate a managerial role.¹⁶¹

Finally, successful ADR that results in settlement fails to produce a written opinion. Future litigants, therefore, are deprived of any precedent on which to guide their behavior or expectations.

This is not to say that settlement is best relegated to its former covert status. Settlement is clearly a legitimate goal of the pretrial process, and judges should indeed encourage and facilitate voluntary discussions and compromise.¹⁶² It is, however, crucial that the judge not descend from his position as an impartial administrator of justice; that he not actively coerce the litigant into avoiding the judge's official courtroom jurisdiction. The adversarial process should serve the litigant, and if the litigant desires to avail herself of the process, she should be able to do so without undue restraints.¹⁶³ The next Part will examine the courts' incoherent attempts to address such restraints.

V. MANDATORY ADR: THE CASELAW

Conceptually, mandatory arbitration and mandatory summary jury trials are very similar. Both are informal hearings before an impartial body that renders a non-binding determination of liability prior to a "trial on the

accompanying text; *see also* Galanter, *supra* note 142 and accompanying text. Given the natural desire to receive the accolades of one's peers, the activist judge must be careful not to become too self-interested in the results of his innovation. More than one scientist has been known to conform the experiment to fit the hypothesis.

160. "More troublesome than these surprising calculations of judicial productivity, however, is the prospect that settling courts dispense a brand of justice that is inferior to that dispensed by courts adhering to the conservative tradition." Oesterle, *supra* note 26, at 10.

161. This potential for disparate treatment is especially troublesome because there is no compelling reason for the disparity. There is little empirical evidence to suggest that active promotion of settlements produces more settlements, produces superior settlements, or even makes courts more productive. Galanter, *The Federal Rules and the Quality of Settlements: A Comment on Rosenberg's, The Federal Rules of Civil Procedure in Action*, 137 U. PA. L. REV. 2231, 2233-34 (1989).

162. The legitimacy of settlement, however, should not be predicated solely on its purported ability to lighten the judicial docket. One commentator notes that the empirical data from 1977-1981 indicate that courts exerting more pressure to settle do not necessarily dispose of more cases per judge than those courts expending less effort on settlement. *See* Oesterle, *supra* note 26, at 9 ("data suggest that extensive court involvement in civil case settlement does not help clear crowded dockets").

163. *See* Resnik, *supra* note 6, at 431.

merits." Both have as their express purpose the desire to encourage settlement and thereby avoid litigation. Finally, both purport to leave unrestricted the litigant's ability to proceed to a full trial "on the merits" should the advisory opinion prove unsatisfactory and settlement be not reached. There are, however, several procedural and substantive factors that distinguish mandatory arbitration from ad hoc ADR procedures such as the SJT, and these significant differences make mandatory arbitration a far more palatable alternative.

A. *Mandatory Arbitration Distinguished*

The distinction between substantive and procedural rights is often obscure.¹⁶⁴ In *Kimrough v. Holiday Inn*,¹⁶⁵ the United States District Court for the Eastern District of Pennsylvania held that "[a] change in the right to jury trial is substantive where there is a substantial likelihood that the outcome of the trial would be influenced by the change and where no significant advantage accrues to the government by virtue of the innovation."¹⁶⁶ The *Kimrough* court, however, concluded that compulsory, non-binding arbitration as a condition precedent to trial did not violate a litigant's substantive right to a jury trial.¹⁶⁷

Dismissing the contention that a local arbitration rule violated the Federal Rules, the fourteenth amendment or the seventh amendment to the Constitution, the court emphasized that arbitration is the product of local rules clearly authorized under the Federal Rules.¹⁶⁸ Further, "arbitration . . . greatly aids the efficiency of the trial system yet does not influence the outcome of the final verdict for any individual."¹⁶⁹ Underpinning the court's reasoning were several factors, including the litigant's ability to demand a trial de novo, the substantial savings of discovery resources, the ability of the panel to render a fair result, the limited nature of the procedure, and the fact that the "[l]itigants [had] the opportunity to test the validity of their claims very shortly after [filing]."¹⁷⁰ In sum, the benefits of providing an efficient alternative for dispute resolution outweighed any incidental burdens to the litigant. A number of federal courts have followed this declaration of mandatory arbitration's constitutionality.¹⁷¹

164. See Elliott, *supra* note 29, at 325-26; see also *supra* note 85.

165. 478 F. Supp. 566 (E.D. Pa. 1979).

166. *Id.* at 569 (interpreting the Supreme Court's directive in *Ballew v. Georgia*, 435 U.S. 223 (1978)).

167. *Id.* at 571.

168. *Id.* at 572.

169. *Id.* at 569.

170. *Id.* at 571.

171. See, e.g., *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712 (E.D. Pa. 1983).

Given the legitimacy of mandatory arbitration, it would appear that other mandatory settlement-inducing procedures should survive constitutional muster. There are important concerns with other procedures,¹⁷² however, that simply do not apply to mandatory arbitration.¹⁷³

Perhaps the most important distinguishing factor is that mandatory court-annexed arbitration provides notice to the litigants that the procedure will apply to an entire class of disputes.¹⁷⁴ Because there is no ad hoc implementation—an unavoidable characteristic of the flexibility-driven summary jury trial¹⁷⁵—the parties are on notice, from the moment they file suit, that they will be subject to arbitration. This allows the litigant to plan her discovery and case preparation accordingly. There is no risk that the litigant will conduct exhaustive discovery and motion procedure—a process that may take several years and exact great costs in terms of money and effort—only to be informed just prior to trial that she must undergo an unexpected preliminary procedure.¹⁷⁶ Court-annexed arbitration avoids such pretrial waste by advising the litigant that she need only conduct that preparation necessary for the arbitration hearing. If arbitration proves unsatisfactory, then the party can engage in the necessary pretrial procedures. In contrast, the SJT may appear without warning, and the litigant may lack the ability to tailor preparation to the informality and expertise of the hearing panel.¹⁷⁷

Second, mandatory arbitration routinely refers all of a certain class of disputes to the process.¹⁷⁸ This eliminates the potential for disparate treat-

172. See *infra* notes 173-82 and accompanying text.

173. The Supreme Court, in *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), suggests that a possible distinguishing factor is the possibility of public law being decided by private parties. In *Thomas*, the Court determined that article III of the Constitution did not prohibit Congress from selecting binding arbitration as the mechanism for resolving compensation disputes among participants in the Federal Insecticide, Fungicide, and Rodenticide Act's registration scheme. *Id.* at 583. The Court emphasized that such a procedure did not present the danger that private parties would decide issues of public law, and that the Act, which would be subject to arbitration, applied to a narrow arena of disputes. *Id.* at 585-91; see also Edwards, *supra* note 12, at 671.

174. See *supra* notes 35-46 and accompanying text.

175. See *supra* notes 47-59 and accompanying text. There is virtually no way the litigants can be advised early on of the possibility of mandatory SJT participation because the case must develop sufficiently to allow both sides to intelligently negotiate for settlement. By the time the parties have amassed enough information to assess the merits of their respective cases, they may be very close to the actual trial date.

176. Because the SJT presentation is a narrative summation, the litigant's counsel may have to prepare in a manner ill-suited for trial. In addition, assuming the ADR technique is successful in achieving its goal of settlement, years of discovery and preparation may be wasted.

177. In contrast to the jury, which lacks both education in the law and an understanding of the necessary technical background of the dispute, the arbitration hearing panel is often composed of expert(s) in one or both. Stipanowich, *supra* note 13, at 430. This allows the litigant to refrain from amassing the extensive background facts necessary to present the litigant's case to the jury.

178. Most commonly the litigant's monetary demand is the deciding factor. For example,

ment of similar cases since all of the litigant class will endure the process as a prerequisite to trial. While treatment may vary from district to district—depending on whether the district employs mandatory arbitration—the level of offense is greatly reduced because all litigants in a particular district are on notice that cases in their locale will be similarly treated.¹⁷⁹

Third, mandatory arbitration does not involve the judge who will eventually preside over the trial should one of the parties elect to disregard the arbitration decision. A separate panel renders the decision, and the judge becomes involved only through the normal course of litigation.¹⁸⁰ Concerns over judicial prejudice, therefore, are reduced.

Finally, mandatory arbitration, unlike the SJT, is not the product of ad hoc judicial fiat. Rather, it represents either congressional initiative or district unity. The entire district, on either its own motion or direction from Congress, institutes a set of procedural guidelines to be followed in each case. These procedures are subject to comment, criticism, and review¹⁸¹ regarding their propensity to violate the limitations to judicial power embodied in the Rules Enabling Act.¹⁸² The “[c]ongressional concern for

the Court Reform and Access to Justice Act, 28 U.S.C.S. §§ 651-658 (Law. Co-op. 1988 & Supp. 1989), provides that any of the 10 district courts which already have established arbitration programs may require the parties to arbitrate any case in which the relief sought consists of less than \$100,000 in damages (although individual courts may set an amount of less than \$100,000 as the mandatory cut-off). *Id.* § 652(a)(1)(B). In addition, certain types of disputes (i.e., labor or certain industry disputes) are referred first to arbitration by virtue of contractual arrangement.

179. While the possibility of disparate treatment by districts is offensive to the concept of uniform national treatment of cases, this is tolerable in light of the probable future of the Access to Justice Act. The Act is an experimental program. Congress apparently intends that, once the kinks have been worked out of the system, the program will be implemented on a national scale. Practicality demands that some variance be endured during this transition and experimentation stage. See *Kimbrough*, 478 F. Supp. at 575. In holding that compulsory arbitration does not violate a litigant's equal protection or due process guarantees, the *Kimbrough* court stated, “The local arbitration rule is a first step to develop a fast, efficient, and inexpensive system of dispute-resolution on a national scale Unfortunately, the price of planned progress may be temporary disparity.” *Id.* Moreover, the very existence of local rules does not destroy national uniformity. See Keeton, *supra* note 3, at 859. The problem arises when a local rule would subvert the Federal Rules, or would invest in the trial judge the power to implement procedures on an ad hoc basis—problems that are not present in the Act.

180. See *supra* notes 37-40 and accompanying text.

181. Rule 83 requires that copies of the proposed rule be furnished to the judicial council, the Administration Office of the United States Courts and the public. The 1985 amendment to the Rule attempts to “enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them.” Notes of Advisory Committee on Rule 83. For criticism that the amendment does not go far enough in requiring review by the local bar and other appropriate commentators, see 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3152, at 217 (1973).

182. For a discussion of the restraints on judicial power found in the Rules Enabling Act, see *supra* notes 81-86 and accompanying text. In *McCargo v. Hedrick*, 545 F.2d 393, 402 (4th Cir. 1976), the court warned that “local rules are not a source of power but are instead a

uniformity of practice in the federal courts"¹⁸³ is thus satisfied while allowing the judicial experimentation envisioned by the Act. Mandatory arbitration, therefore, will not be invoked by any particular judge on a case-by-case basis according to a desire to alleviate his workload.

Thus, notice to the litigants, equal treatment and procedural uniformity distinguish court-annexed arbitration from the summary jury trial. The next section will discuss the current state of the law regarding mandatory summary jury trials, and will argue that no coherent position emerges. This will be followed by Part VI, which will suggest that the lack of fundamental requirements discussed above make a mandatory SJT intolerable under current procedural principles.

B. *The Summary Jury Trial*

While mandatory arbitration, uniformly implemented, can be reconciled with the rights and protections afforded under the Rules, ad hoc implementation of the SJT cannot. A number of lower courts have approved of the procedure, though primarily as a *non-mandatory* device.¹⁸⁴ A survey of

manifestation of it." (court invalidated local rule requiring the parties to submit a pretrial written statement of the controlling matters and issues or be subject to sanction, including default). Assuming, however, that a district court does not exceed the scope of local rule-making authority, the power to implement local rules is found in Rule 83. Rule 83 provides, in pertinent part:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

183. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 665-66 (7th Cir. 1989) (Ripple, J., dissenting).

184. Summary jury trials have been held in an estimated sixty-five districts. See Maatman, *supra* note 47, at 455 (1988). See generally *Compressed Gas Corp. v. U.S. Steel Corp.*, 857 F.2d 346 (6th Cir. 1988) (SJT held with approval); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1987) (SJT properly held under either inherent power or Rule 16); *Mui v. Wing*, 822 F.2d 1089 (6th Cir. 1987) (SJT held in child support action with jury finding insufficient evidence to establish that plaintiff and defendant were ever married); *Erskine v. Consolidated Rail Corp.*, 814 F.2d 266 (6th Cir. 1987) (SJT held with approval with jury returning verdict for plaintiff, directed verdict for defendant at actual trial); *Kem-Solv, Inc. v. Deep Run Design*, No. 85-6794 (E.D. Pa. Aug. 25, 1988) (LEXIS, Genfed library, Dist file) (SJT properly held on RICO claims as settlement device); *Homeowner's Funding Corp. v. Century Bank*, 695 F. Supp. 1343 (D. Mass. 1988) (available array of alternative dispute resolution choices includes SJT); *Smart v. Simonson*, No. 80 C 3169 (N.D. Ill. Nov. 30, 1987) (LEXIS, Genfed library, Dist file) (court held one day SJT resulting in verdict for defendants, defendants motion for summary judgment later granted), *aff'd*, 867 F.2d 429 (7th Cir. 1989); *AMP, Inc. v. Zacharias*, No. 87 C 3244 (N.D. Ill. June 12, 1987) (LEXIS, Genfed library, Dist file) (SJT held with approval); *Seck v. Hamrang*, 657 F. Supp. 1074 (S.D.N.Y. 1987) (ADR procedures available to court include SJT); *Fraleigh v. Lake Winnepesaukee*, 631

the available case law fails to provide a coherent position on the propriety of a *mandatory* SJT. The Seventh Circuit, combining analyses of both the court's inherent power and Rule 16, has held that a mandatory SJT exceeds the scope of judicial power.¹⁸⁵ District courts in Kentucky,¹⁸⁶ Minnesota¹⁸⁷ and Florida,¹⁸⁸ however, have disagreed with the Seventh Circuit and permit a mandatory summary jury trial.

In *McKay v. Ashland Oil, Inc.*,¹⁸⁹ the United States District Court for the Eastern District of Kentucky upheld the use of a mandatory SJT as consistent with both Rule 16 and the court's inherent powers. The court viewed the device as "effect[ing] substantial savings of time,"¹⁹⁰ though the court conceded that "to date we have only unscientific anecdotal evidence of the effectiveness of summary jury trials."¹⁹¹ Similarly, in both *Arabian American Oil Co. v. Scarfone*¹⁹² and *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*,¹⁹³ district court judges upheld compulsory SJT participation as an effective means of forcing the parties to prepare for trial without abridging the litigants' substantive rights.¹⁹⁴

In stark contrast to these decisions stands *Strandell v. Jackson County*,¹⁹⁵ a decision in which the highest ranking court to address the issue rejected the SJT precisely because of its potential to violate substantive rights. In *Strandell*, the Court of Appeals for the Seventh Circuit determined that neither Rule 16 nor the inherent powers doctrine permitted a district court to "require that an unwilling litigant be sidetracked from the normal course of litigation."¹⁹⁶ Rejecting the reasoning of the district court, the Seventh Circuit held that the potential for violating a litigant's substantive rights

F. Supp. 160 (N.D. Ga. 1986) (if parties are interested in settling the case, the court has the power to suggest SJT); *Hall v. Ashland Oil Co.*, 625 F. Supp. 1515 (D. Conn. 1986) (court felt SJT would serve as effective settlement facilitating device); *Carter v. National R.R. Passenger Corp.*, No. 83-6234, slip op. (E.D. Pa. March 7, 1986) (parties agreed to recommendation of SJT); *Negin v. City of Mentor*, 601 F. Supp. 1502 (N.D. Ohio 1985) (SJT used solely on issue of damages, litigants encouraged to use binding SJT); *Audlee v. New England Tank Indus. of N.H., Inc.*, No. 83-3568, slip op. (D. Mass. Dec. 23, 1985) (SJT demonstrated that despite complicated case, fact-finding group could judge issue of liability); *Rocco Wine Dist., Inc. v. Pleasant Valley Wine Co.*, 596 F. Supp. 617 (N.D. Ohio 1984) (cause set to be submitted to SJT after joint settlement status conference).

185. *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987).

186. *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988).

187. *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988).

188. *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988).

189. 120 F.R.D. at 43.

190. *Id.* at 51.

191. *Id.* at 49. The court recognized Judge Posner's concerns about the proven efficacy of the device, Posner, *supra* note 47, but cautioned against "smother[ing] a promising infant in the cradle." *Id.* at 50.

192. 119 F.R.D. at 448.

193. 123 F.R.D. at 603.

194. *Scarfone*, 119 F.R.D. at 444-49; *Carey-Canada*, 123 F.R.D. at 604-05.

195. 115 F.R.D. 333 (S.D. Ill. 1987), *rev'd*, 830 F.2d 195 (7th Cir. 1987), *aff'd*, 838 F.2d 884 (7th Cir. 1988).

196. *Strandell*, 838 F.2d at 887.

was simply too great to allow a judge to force the SJT procedure on a resisting litigant who is determined to avail herself of a trial on the merits.¹⁹⁷

The district court judge in *Strandell* held the plaintiffs' lawyer in contempt when he refused to participate in a summary jury trial.¹⁹⁸ The lawyer had refused to participate in the procedure, which was suggested by the judge on the eve of trial, because settlement appeared unlikely, the plaintiffs had exhaustively prepared for a full trial pursuant to the court's own pre-trial schedule, such a procedure would be unnecessarily costly, the procedure would give the defendants evidence that the court had previously ruled was no longer discoverable, and the district court did not have the power to force plaintiffs to participate in a procedure to which they adamantly objected. Agreeing with the plaintiffs, the Seventh Circuit reversed the contempt order, bluntly stating that a mandatory SJT is plainly inconsistent with the Federal Rules of Civil Procedure.¹⁹⁹

The Seventh Circuit based its *Strandell* decision on the lack of judicial authority to order mandatory settlement procedures, finding that such powers were outside the purview of both Rule 16 and inherent power.²⁰⁰ The court was worried that the device might allow the defendants access to information that was not otherwise discoverable (i.e., the court-ordered discovery deadline had passed, and the defendants had chosen not to avail themselves of evidence that would subsequently be previewed at the SJT). Yet the court's discomfort was fueled by more than a possible discovery violation. The *Strandell* court recognized the potentially disastrous effect that a mandatory SJT could have on a fair application of the Federal Rules. The court stated that not only was there a total lack of explicit authority for forcing litigants to endure the device, but that such an imposition would result in a "radical surgery" of the Rules by upsetting the "equal balance" between litigants.²⁰¹ The court warned that a "crowded docket does not permit the [district] court to avoid the adjudication of cases properly within its congressionally-mandated jurisdiction."²⁰² While innovative procedures might be admirable, observed the *Strandell* court, those with the SJT's potential impact were better left to the Supreme Court and the Congress.²⁰³

VI. PROBLEMS WITH THE SUMMARY JURY TRIAL

The summary jury trial's most glaring problem is that there is no consensus over the operation of the procedure. Three district courts²⁰⁴ have

197. *See id.* at 886-88.

198. *Strandell*, 115 F.R.D. at 336.

199. *Strandell*, 838 F.2d at 888.

200. *See id.* at 887-88.

201. *See id.* at 888.

202. *Id.*

203. *See id.*

204. *See supra* notes 185-88 and accompanying text (discussion of those federal courts that have subsequently challenged the Seventh Circuit's holding that mandatory SJTs are prohibited).

opposed the Seventh Circuit's proscription on mandatory summary jury trials.²⁰⁵ This conflict is particularly acute because it underscores the systemic problems with ad hoc implementation of the device. The propriety of a mandatory SJT necessarily hinges on an interpretation of nebulous concepts such as inherent authority²⁰⁶ and the spirit of the Federal Rules.²⁰⁷ Yet, the SJT is objectionable precisely because it must derive its source of authority from these shadowy bounds.²⁰⁸ Because the express power to compel the procedure cannot be found in the Federal Rules,²⁰⁹ its use violates fundamental procedural principles—namely lack of notice and uniformity.

A litigant filing suit in federal court now faces the following problem. If she files suit in the Seventh Circuit, she cannot be forced to participate in a SJT. But what if she files the exact same suit in Kentucky (where one court has held that she can be forced to participate)?²¹⁰ Will the district court judge follow his local colleague and order her to participate in a SJT, or will he follow the Seventh Circuit (the only circuit court to address the issue), thus leaving an intra-district split? If the judge does follow his colleague, will other courts in the circuit follow him, or will they agree with the Seventh Circuit, thus leaving an intra-circuit split? In any event, until the outstanding cases are reconciled, there is an inter-circuit split.

A clear articulation of the limits to ad hoc ADR is necessary to eliminate discretionary restrictions on court access, procedural irregularities and disparate treatment of litigants. Such an articulation is necessary because there are a number of situations, as the *Strandell* court identified, where ad hoc devices such as the SJT are inappropriate.

The potential for abuse of discovery rules (i.e., using the SJT as a fishing expedition) is one important consideration. One might question the necessity for pretrial discovery orders if counsel can simply ignore deadlines and wait for a preview of the opponent's case.²¹¹

The integrity of the SJT verdict is another important concern. While the elaborate rules and procedures that accompany trial may be complex, they have presumably developed with the purpose of gleaning truth from muddled and disputed facts. To be effective, ad hoc procedures must necessarily short-cut these rules. Yet, shortcutting invariably reduces, to some degree,

205. *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987).

206. See *supra* notes 117-36 and accompanying text.

207. See, e.g., *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 448 (concluding that Rule 16 sanctions the use of the SJT because "[t]he obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition.>").

208. Cf. *Strandell*, 838 F.2d at 888.

209. *Id.*

210. *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988).

211. Cf. *Maatman*, *supra* note 47, at 475.

the integrity and credibility of the truth-finding process in the eyes of the litigants who must accept the short-cuts.

As most trial lawyers will attest, the credibility of a witness can seriously impact interpretations or determinations of fact. For instance, in a complicated breach of contract or fraud case between competing corporations, the testimony of key management personnel or customers may establish or refute intent, motive or bad faith. The mandatory SJT, however, necessarily restricts or eliminates such valuable testimony to save time. If the success of a case depends on the credibility of witnesses, the SJT will be a waste of time, save for the additional discovery opportunity for the opponent, because the adversely affected party will demand a full trial to present these facts.²¹²

In addition, some cases, especially those involving intricate financial transactions, are excruciatingly complex. In these cases, an understanding of voluminous factual details may be crucial to a just resolution of the underlying dispute.²¹³ For example, to determine whether a corporation has violated the antitrust laws, the fact-finder might be expected to acquire a working understanding of the prevailing business practices and basic macroeconomic principles.²¹⁴ While this understanding might take a significant amount of time, it is necessary to reach a just conclusion in light of the huge monetary damages involved. In such a case, the fact-finder cannot possibly gain the requisite knowledge after a short presentation of the facts by the party's counsel. Assuming the litigant desires total vindication and does not want to settle,²¹⁵ a summary jury trial would force the litigant to suffer through a procedure that, in all probability, would lack serious benefit.²¹⁶ Moreover, if this is the litigant's position, the potential for

212. Judge Lambros suggests that if credibility will be a determinative factor, the SJT should be modified to permit witness testimony. See Lambros, *supra* note 53, at 690. The problem with this approach is that it is difficult for the judge to predict the credibility of a witness before he testifies, or to assess the strength of the testimony during pretrial. If the litigant and judge disagree as to the weight of a given piece of credibility evidence, the judge prevails in denying the testimony if the SJT is mandatory, and this undermines the litigant's confidence in the outcome. Moreover, even if the judge does permit limited witness testimony, time constraints may prevent adequate exploration of the witness' credibility.

213. Maatman, *supra* note 47, at 483.

214. See, e.g., R. POSNER & F. EASTERBROOK, ANTITRUST 347-54 (2d ed. 1981) (discussing the elaborate economic principles necessary to discover and prove the existence of "market power," an element that may be necessary to establish monopolization).

215. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) ("We do not view 'authority to settle' as a requirement that corporate representatives must come to court willing to settle on someone else's terms . . ." and "a district court cannot coerce settlement."); *Hess v. New Jersey Transit Rail Operations*, 846 F.2d 114 (2d Cir. 1988) (a defendant convinced it did no wrong may insist on total vindication and may resist settlement negotiations).

216. Any resulting determination by the abbreviated jury would lack the reasonable credibility necessary to induce serious settlement negotiations because both parties would perceive that

“sham” participation arises.²¹⁷

Litigants should not be required to preview their strategy, tactics and level of expertise to their opponent. While it is clear that “[t]rial by ambush is no longer an acceptable method of practice,”²¹⁸ it is equally clear that not all attorneys exhibit the same degree of competence, nor do all litigants pay the same attorney fees. The current judicial system is still adversarial, and a litigant is “entitled to the strategic advantage of information to which the other side has not sought access.”²¹⁹ A mandatory SJT not only requires a litigant to summarize her case for her opponents later use at trial, but it may result in the litigant making some type of admission, which would not otherwise have been discoverable, and which damages the case at trial.²²⁰

As a matter of public policy, there are certain cases that are simply inappropriate for disposition at the summary jury trial. Cases that have social implications beyond the individual dispute—civil rights cases for example—would be stripped of their precedential value because of the nonbinding, procedurally relaxed atmosphere of the SJT. Certain disputes, though initiated by private litigants, transcend private interest, and forcing suits with a strong public interest component to bypass public trial is not advantageous to society. The SJT can force such bypassing because the procedure may effect the outcome of a trial (e.g., through the discovery abuses, opportunities for admissions, or judicial bias, etc. discussed above), thereby effectively coercing settlement. Moreover, since the goal of the SJT is to promote settlement, incentives to litigate causes for society’s benefit (i.e., treble or punitive damages, attorneys fees, and publicity) would cease to have effect if cases were routinely settled because litigants were unwilling

the verdict was based on a factual presentation wholly different than that which could be expected at a full trial. In this sense, the process is flawed because fact determinations are simply too superficial. See Fiss, *Second-Hand Justice?*, Connecticut Law Tribune, Mar. 17, 1986, at 10, col. 1.

The third-party methods of ADR that eventuate in a judgment include the presentation of the facts and the law—a trial—but that trial is markedly less thorough and far-reaching than a judicial one. In some cases, it is also less structured or formal. This is obviously so with minitrials or summary jury trials, as the labels imply, but is also true of more standard third-party ADR methods such as arbitration; that is a principal source of their attractiveness. And although something is gained from the informality and brevity (namely, money), something is also lost: the normative power that is generated by a process that is deliberate and meticulous. . . .

Id.

217. See Maatman, *supra* note 47, at 475.

218. Federal Reserve Bank v. Carey-Canada, Inc. 123 F.R.D. 603, 606 (D. Minn. 1988).

219. Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 456 (7th Cir. 1987); see also United States v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980); Maatman, *supra* note 47, at 476-77.

220. Cf. G. Heileman, 871 F.2d at 662 (Coffey, J., dissenting).

to endure both an ad hoc procedure and a full trial.²²¹ This danger is especially great where the probability of success at trial may well be compromised by participation in the preliminary procedure.²²²

Finally, there are some disputes in which the litigants' primary motivation for filing suit does not involve monetary compensation or redress, but rather involves an overwhelming element of personal vindication.²²³ The litigant may desire a published opinion, on the record, that absolves her of any complicity in an alleged practice or that publicly clears her reputation. The media may notice such formal opinions, thus providing the only remedy possible when a dispute involves harm to reputation or integrity. In these situations, litigants are unlikely to settle, despite a judicial perception to the contrary, and, for them, the SJT is a futile exercise.

CONCLUSION

Something must be done to lessen the demand on the federal judiciary. The Supreme Court and the Congress may decide that society as a whole is better served by relaxing or eliminating certain procedures, and such a solution would perhaps be proper if implemented through the democratic process. But the use of mandatory ad hoc procedures, independently imposed by the judiciary for the sake of judicial economy, is a dangerous solution. As Judge Jack Weinstein argues:

[I]f cases are growing in the federal courts, so be it! That is what judges and courts are there to do: to hear cases. We are public servants pledged to do justice, not exalted elites who bless the masses with such bites of judicial time as we deign to dole out. If some judges are truly overburdened, then the first resort should be to add judges or to add support staff, not to shut the courthouse door.²²⁴

Solutions to the federal docket crunch must adhere to the most fundamental of procedural principles: They must provide litigants with notice and

221. This is possible because the preparation required for a summary jury trial and a traditional trial are very different. See Maatman, *supra* note 47, at 482. The extra cost involved in the added preparation may dissuade a lawyer from taking a difficult case.

222. A litigant who refuses to participate in a summary jury trial urged by a judge anxious to clear a crowded court docket may hurt her case at trial. In *Strandell*, when the plaintiffs refused to participate in the SJT, a trial date that was set for early 1987 was delayed, on motion of the judge, three times; a period that amounted to almost two years. See *G. Heileman*, 871 F.2d at 657 (Posner, J., dissenting) ("[i]t is the rare attorney who will invite a district judge's displeasure by defying a request to [accede to a judge's pre-trial request]").

223. Whether a court of law is the appropriate forum for such a dispute is irrelevant in light of the traditional role of the tribunal as a place for equitable remedies (whatever the nature of that remedy). It is certainly true that some relief, such as in a slander or libel action, may only be available through a public proceeding. The SJT, by contrast, is a closed affair. See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 902-05 (6th Cir. 1988) (summary jury trial not open to the public and press).

224. Weinstein, *supra* note 4, at 1909-10.

information, and they must treat litigants equally and uniformly. The appeal of expedited process is certainly attractive, but it is important that it not become the consuming motivation of the system.²²⁵ Regardless of the judiciary's workload, courts must permit a litigant to proceed to trial without suffering through ill-defined and under-regulated pretrial procedures.

225. "If judicial reform benefits only judges, then it isn't worth pursuing. If it holds out only progress for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America." Higgenbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 138 (1976).