

UIC School of Law

## UIC Law Open Access Repository

---

UIC Law Open Access Faculty Scholarship

---

1-1-1995

### Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act, 28 U. Mich. J.L. Reform 305 (1995)

Matthew R. Kipp

Paul B. Lewis

*John Marshall Law School*, [plewis8@uic.edu](mailto:plewis8@uic.edu)

Follow this and additional works at: <https://repository.law.uic.edu/facpubs>



Part of the [Courts Commons](#), [Judges Commons](#), and the [Jurisprudence Commons](#)

---

#### Recommended Citation

Matthew R. Kipp & Paul B. Lewis, *Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act*, 28 U. Mich. J.L. Reform 305 (1995).

<https://repository.law.uic.edu/facpubs/210>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Open Access Faculty Scholarship by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# LEGISLATIVELY DIRECTED JUDICIAL ACTIVISM: SOME REFLECTIONS ON THE MEANING OF THE CIVIL JUSTICE REFORM ACT

---

Matthew R. Kipp\*  
Paul B. Lewis\*\*

*With the Civil Justice Reform Act (CJRA), Congress attempted to further a trend that the federal judiciary had undertaken largely on its own initiative. Sensing a critical need to address the mounting expense and delay of federal civil litigation, Congress, like the judiciary, sought to increase the degree of early and active involvement of judges in the adjudicatory process. The result of this mandate has been a further emphasis on the role of the judge as a case manager. As a necessary corollary, the liberty and self-determination of individual litigants—ideals that have historically been seen as philosophical cornerstones of the Anglo-American adjudicative process—have been correspondingly diminished. In this Article, the authors examine the departure from the philosophical moorings of the Anglo-American system of justice that implementation of the CJRA represents and consider whether the gains to be achieved by the Act, if successful, offset the potential costs to the litigants that the Act imposes.*

*A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.<sup>1</sup>*

*You can't be a rationalist in an irrational world. It isn't rational.<sup>2</sup>*

## INTRODUCTION

The Civil Justice Reform Act of 1990 (CJRA or Act)<sup>3</sup> arose from a reform movement that had been building for several

---

\* B.A. 1985, Yale University; J.D. 1989, Columbia University. Associate, Skadden, Arps, Slate, Meagher & Flom. Mr. Kipp was a member of the Civil Justice Reform Act Advisory Group for the United States District Court for the Northern District of Illinois.

\*\* B.A. 1986, Northwestern University; J.D. 1989, Yale University.

1. *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945) (L. Hand, J.).

2. JOE ORTON, *WHAT THE BUTLER SAW* 72, act 2 (Grove Press 1970) (1969).

3. The Civil Justice Reform Act of 1990 is Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. V 1993)).

years. Long before Senator Joseph Biden introduced a bill to reform the nation's civil justice system,<sup>4</sup> judges and commentators alike had noted the sharp increase in cases filed in the federal courts, the growing backlog of unresolved cases caused by this increase, and the corresponding escalation in cost and delay attendant with litigating a case in the federal system.<sup>5</sup> As a result of such trends, judges of their own accord increasingly had become involved in the management of pretrial litigation.<sup>6</sup>

The Civil Justice Reform Act was a legislative attempt to coordinate and encourage various judicial methods to streamline federal litigation. The Act was based on the proposition that the cost and delay of federal civil litigation had grown to the level where access to, and use of, the nation's courts was jeopardized for all but the wealthiest members of our society.<sup>7</sup> The central purpose of the Act was to assure continuing, meaningful access to the federal courts by reducing both the time and cost associated with litigating a case at the federal

---

4. See *infra* notes 149–51 and accompanying text.

5. See, e.g., *Anthony v. Abbott Lab.*, 106 F.R.D. 461, 465 (D.R.I. 1985) ("Our citizens' access to justice . . . is under serious siege. Obtaining justice in this modern era costs too much . . . . [If our courts] are to remain strong and viable, they cannot sit idly by in the face of attempts to loot the system."); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 443 (1986) ("Despite some evidence which shows that a dramatic reduction in case duration may offset increases in the filing rate, there is a general perception of judicial system overload.").

6. See, e.g., JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT 4 (1994) [hereinafter CJRA REPORT] ("Prior to the CJRA many courts had established, either by local rule or general order, various principles and techniques contained in the statute."); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981) (discussing the use of pretrial management procedures for effective handling of the increasing number of cases, especially complex and protracted cases); Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 600 (1989) (discussing a variety of judicial case management techniques); Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 138–45 (1978) (listing seven advantages of judicial responsibility for case control and discussing pragmatic ways to implement such procedures).

7. See S. REP. NO. 416, 101st Cong., 2d Sess. 6 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6809 ("For the middle class of this country . . . the courthouse door is rapidly being slammed shut. Access to the courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford.") (citation omitted).

level.<sup>8</sup> The Act proposed to do so largely through “improve[d] litigation management” by the judge assigned to the case.<sup>9</sup>

This mandate was far from nominal. Although many judges prior to the Act already had employed a variety of “managerial” techniques, this legislative directive represented a formal recognition that the more traditional, passive role of the judge—a role that was a primary value in the Anglo-American system of justice—was no longer viable under present-day conditions. Shortly after the Act’s passage, Chief Justice Rehnquist acknowledged this transformation of the role of the federal judge:

This traditional view of district judges has changed somewhat in recent years. Huge case loads have led to more emphasis on case management and judicial administration, and the recent Civil Justice Reform Act will accelerate this trend. District judges have lost some of their discretion to handle their own dockets and now must both view themselves as managers and experience some of the strong hand of management themselves.<sup>10</sup>

The CJRA is therefore significant for the philosophical transformation that it signifies. Passage of the Act illustrates the insight of Joe Orton’s aphorism:<sup>11</sup> the concept of the passive, reactive judge is no longer “rational” in the “irrational” world of burgeoning case loads, swelling backlogs, and extended pretrial procedures. Rather, Judge Learned Hand’s articulation of the judge as an active case manager, as opposed to an inert moderator,<sup>12</sup> appears now to be the only “rational” alternative.<sup>13</sup>

---

8. See *id.* at 1, reprinted in 1990 U.S.C.C.A.N. at 6804 (“The purpose of this legislation is to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in our Nation’s Federal courts.”).

9. See 28 U.S.C. § 471 (Supp. V 1993). The Act sought to achieve uniform systemic change in an odd manner: each of the ninety-four federal judicial districts was empowered to bring forth and experiment with its own individual expense and delay reduction plan. *Id.*

10. Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 8.

11. ORTON, *supra* note 2, at 72.

12. *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945) (L. Hand, J.).

13. See *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989) (“One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation.”).

At root, the Act marks a philosophical departure from the basic notions of individual autonomy and self-determination, notions upon which the government of the United States, and in particular, the federal judicial process, has historically been based.<sup>14</sup> The idea of a judiciary designed primarily to serve the needs of the individual, a judiciary that correspondingly placed the individual litigants at the core of the adjudicative process, has a firm basis in Anglo-American jurisprudence.<sup>15</sup> Historically, the belief in autonomy, dignity, and primacy of the individual has suggested that state or societal interests must necessarily be secondary to the interests of the individual in the adjudicative process. As such, and as will be discussed more fully below, individuals traditionally have preserved their autonomy when invoking the civil judicial apparatus, not only by determining when to access the judicial process provided by the state, but also by retaining control over all relevant aspects of this process leading up to the final adjudication of the dispute.<sup>16</sup>

While there has been a growing trend toward procedural judicial activism in this country for the past twenty to thirty years, perhaps made most apparent by the advent of the so-

---

14. This change in some sense mirrors Bruce Ackerman's concept of "Constitutional Moments," which occur when significant constitutional determinations that result in lasting changes to the fabric of constitutional interpretation are made, although, at the time these moments occurred, it was not self-evident that they would be of enduring significance. Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 YALE L.J. 453, 486 (1989) (discussing "political movements [that] have mobilized popular consent to new constitutional solutions"); cf. *United States v. Lopez*, 115 S. Ct. 1624, 1657 (1995) (Souter, J., dissenting) ("Not every epochal case has come in epochal trappings."). The CJRA signifies not so much a "constitutional moment" as it does an official legislative acceptance of a series of such judicially implemented moments, as well as a furtherance of the changes suggested by these moments.

15. Historically, the notion of adjudication in this country has been predicated on the idea that social and economic arrangements were based on the actions of autonomous individuals and were not actively imposed upon society by the government. The civil justice system in this country was designed with this approach in mind. See *infra* Part I.B.

16. As a practical matter, of course, this assertion cannot be wholly true. Certain procedural rules are imposed upon the parties to aid the judiciary in the administration of justice, and the parties are obliged to comply with these rules. These rules should be, and generally are, nonsubstantive and content-neutral under the Federal Rules of Civil Procedure. Thus, to enable the judiciary to hear cases and administer justice efficiently, the Federal Rules set parameters on party conduct, and the parties forfeit some of their individual autonomy when they opt to invoke the judicial process. Although such forfeiture results in an increase in actual individual autonomy by allowing the judicial apparatus to function, it creates the appearance of a net loss of some individual autonomy. See *infra* Part II.

called public law model of judicial administration,<sup>17</sup> the CJRA is a significant *legislative* acknowledgment that such activism is needed to address the increasingly complex problems of judicial management.<sup>18</sup> Through the Act's provisions, Congress not only placed its stamp of approval upon active court involvement in areas of adjudication that traditionally have been the exclusive realm of the parties, but also deemed such judicial intervention to be a necessary part of modern federal civil litigation.<sup>19</sup> By doing so, Congress implicitly recognized that a curtailment of individual procedural rights was necessary to effect a net increase in individual substantive liberty. That is, while the CJRA demands the reduction of certain adjudicatory values long considered primary elements of common law litigation, it does so based on the theory that such limitations are necessary to allow better access to a more meaningful system of justice.

The purpose of this Article is to discuss some significant implications of the CJRA. Part I puts the theoretical assumptions of the Act in context by considering two different models for the administration and resolution of civil disputes: (1) the passive judiciary model stemming from the political philosophy of, among others, Locke and Blackstone, and (2) the activist model, which is pervasive in continental Europe. Using these two models as opposing reference points, Part II examines the movement in America from one model of judicial involvement, the judge as umpire, toward another, the judge as case manager. Part III considers the role of the CJRA in this movement. After tracing the relevant background of the CJRA, Part III then outlines the implementation of the Act and delineates the principles of civil justice administration on which the Act rests. It discusses the contributions that the Act has made, and will likely make, in furthering the movement toward a

---

17. *Id.*

18. The legislature, of course, has approved amendments to the Federal Rules of Civil Procedure, but these amendments were drafted by the judiciary pursuant to the Rules Enabling Act, ch. 646, 62 Stat. 961 (1948) (current version at 28 U.S.C. § 2072 (1988 & Supp. V 1993)). The CJRA, on the other hand, was a legislative effort from start to finish. For a more detailed discussion of the relationship between the powers conferred by the Rules Enabling Act and the mandates of the Civil Justice Reform Act, see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

19. See, e.g., McGovern, *supra* note 5, at 442 ("Underlying trends in litigation management and alternative dispute resolution are radical shifts in theories of the relative functions of judges and attorneys. . . . The new model of the judge's role suggests that dispute resolution should not be left largely to attorneys and parties.").

more procedurally active judiciary. Finally, Part III examines the Act's expanded procedural limitations on litigants in advancing the role of the judge as case manager, and questions whether the Act will increase the real degree of autonomy and liberty for individuals by furthering the ability of individuals to avail themselves more fruitfully of the federal adjudicative process.

## I. TWO METHODS OF ADMINISTERING JUSTICE

The Civil Justice Reform Act is the foremost manifestation of a national movement toward more active judicial management of federal litigation. This movement signals a departure from the traditional concept of adjudication in the Anglo-American tradition. Historically, judges have been passive and neutral. Their role has been to provide a forum for individuals—who have long been the dominant players in the adjudicative process—to bring about an acceptable resolution to their disputes in a civil fashion. A well-established philosophical tradition supports this view of the judiciary.

### *A. The Passive Versus the Active Administration of Justice*

At the extremes, there are two quite different models by which a state can administer justice. At one end of the continuum is a judiciary that is truly passive, which serves merely to provide a forum in which adversarial parties resolve conflict. In such a state, individual autonomy and self-realization are the primary values, and individual rights are held absolute. Law serves only as a suggested approach to arranging individual relationships, and it is easily displaced if the parties agree to be governed by other rules of conduct. The American system of adjudication historically has reflected this fundamental notion; in many ways, however, the provisions of the CJRA run contrary to this antecedent of our judicial system.<sup>20</sup>

---

20. See Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976). As will be discussed, there is a recent history

At the other end of the continuum is the activist state, where the judiciary itself, often due to its own interest in the proceeding, is an active player in the administration of justice. Such a structure of judicial administration is frequently called "inquisitorial," and under such a system political values tend to be imposed upon the judicial process.<sup>21</sup> The inquisitorial system evolved primarily in continental Europe, and some version of it now dominates the judicial systems in most parts of the world.<sup>22</sup>

## *B. The Philosophical Foundations of the American Judicial System*

*1. The Passive, Reactive State*—Dispute resolution in the United States traditionally has followed the model of the passive state. The role of the judge has been that of neutral, passive decision maker whose tribunal exists solely to allow autonomous individuals to vindicate their rights under law.<sup>23</sup>

---

of civil justice that comports with the philosophical tenor of the CJRA, and which perhaps served as a springboard to the codification of the Act. For example, revisions to Rule 16 of the Federal Rules of Civil Procedure over the past 20 years have increased the activist role of the judge. *See, e.g.*, Richey, *supra* note 6, at 603 (noting that "in Rule 16 the drafters endorsed—if not by mandating aggressive judicial involvement, then by at least expressly *permitting* such involvement—the managerial model of judging"). In addition, several scholars have considered the advent of "managerial judges" in the United States, particularly with reference to public law litigation, to be a step toward a more inquisitorial system. *See, e.g.*, Chayes, *supra*, at 1296–98 (discussing the heightened role of the judge in fact-finding in public law litigation); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376–80 (1982) (discussing the increased role that judges play in all stages of litigation). For a further discussion of this trend and other activist trends in the American administration of justice, see *infra* Part II.

21. *See* MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 82 (1986) ("Rather than emanating from civil society and mirroring its practice, activist law springs from the state and expresses its policies. The controlling image of law is that of the state decree, wholly divorced from contractarian notions.").

22. *See generally* ARTHUR ENGELMANN ET AL., *A HISTORY OF CONTINENTAL CIVIL PROCEDURE* (Robert W. Miller trans., 1927) (discussing the development of civil procedure in the individual countries of continental Europe).

23. *See* Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation*, 75 F.R.D. 89, 117, 121 (1976) ("Judges for centuries have thought that they were just supposed to be skilled referees who would step into the ring when the lawyer combatants said they were ready to fight. . . . When a case came to trial, how it was developed before trial, whether there had been adequate preparation for trial, whether the case had to be tried at all, none of these things were of concern to the judge."); Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 347 (1905) ("[T]he



Judges do not serve to implement policy; rather, they serve primarily to provide a mechanism for social self-management. Legal procedure is thus designed in a policy-neutral way.<sup>24</sup> Judges do not take a dominant role in the judicial process. Instead, the litigants have traditionally been left to control this process: litigants may initiate an action by filing a lawsuit,<sup>25</sup> join<sup>26</sup> or intervene<sup>27</sup> in lawsuits, and control the fact-finding process.<sup>28</sup> Procedural rules designed by the state to govern the dispute are generally waiveable on party consent.<sup>29</sup> If such a party-dominated system results in less than an optimal view of the truth, the truth must be subordinated to the necessity of protecting these individual rights.<sup>30</sup> With the

---

common-law theory of litigation is that of a fair fist fight, . . . with a court to see fair play and prevent interference. . . . We strive in every way to restrain the trial judge and to insure the individual litigants a fair fight, unhampered by mere considerations of justice.”); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) (“The adversary system is characterized . . . by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard.”). As Professor Judith Resnik has noted, even typical artistic renderings portray “justice” as even-handed and neutral. Resnik, *supra* note 20, at 382–83.

24. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074–87 (1989). This notion of substance-neutral procedure, however, has been much challenged in regard to the Federal Rules of Civil Procedure, which have often been criticized as incorporating value judgments into facially-neutral rules. See, e.g., Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246–47 (1989) (arguing that despite their facial neutrality, the Federal Rules have been used to facilitate “social justice litigation”); see also McGovern, *supra* note 5, at 450 (“[P]rocedures are rarely value-neutral, whether or not we believe that they should be. Any procedure—regardless of the nature of the underlying dispute or the method by which procedures are applied—will affect the outcome of a case.”). For an extensive critique of the impact of the Federal Rules of Civil Procedure, see Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988*, 137 U. PA. L. REV. 1873 (1989).

25. FED. R. CIV. P. 3 (a litigant invokes a civil action “by filing a complaint with the court”).

26. FED. R. CIV. P. 19.

27. FED. R. CIV. P. 24.

28. The trial judge historically had little or no power over either the fact-finding process or the organization of the adjudicative process. See, e.g., Chayes, *supra* note 20, at 1286; Marvin E. Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 468 (1976).

29. See, e.g., DAMAŠKA, *supra* note 21, at 99–100. In the American system of justice, however, the ability to waive a right is not always absolute. Cf., e.g., Singer v. United States, 380 U.S. 24, 34–35 (1965) (discussing a criminal defendant’s right to waive trial by jury, and holding that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right”).

30. Such a view is evident in the realm of criminal procedure. The “truth” often is placed second to maintaining certain individual rights, such as the right to avoid

passage of the CJRA, Congress has moved the adjudicative process in the United States away from this traditional model of party-dominated justice.<sup>31</sup>

2. *The Influence of Locke*—The passive model of adjudication dates back in Anglo-American thought at least as far as Locke and Blackstone. Indeed, the fundamental importance of Locke's natural law philosophy stems from his use of natural law concepts to validate individual rights as primary in civil society. Notably, in *The Second Treatise of Government*, Locke's earlier notions of natural law are transformed from a universalistic concept to one that emphasizes the natural rights of individuals in relation to the state.<sup>32</sup> That is, the right of individuals to secure life, liberty, and estate become primary in Locke's philosophy.<sup>33</sup>

The principal structure of Locke's argument in the *Second Treatise* runs roughly as follows: civil government begins with a contract, and this contract puts an end to the existing pre-political state known as the state of nature. For Locke,

[t]he state of nature has a law of nature to govern it which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker . . . and being furnished with like faculties, sharing all in one

---

unreasonable searches; therefore, evidence improperly obtained is excluded from trial. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("[T]he [rights to] freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions . . . [dictate] that no man is to be convicted on unconstitutional evidence.") (citations omitted); FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."); see also DAMASKA, *supra* note 21, at 105 ("[S]o seriously is autonomy taken in the reactive state that it is protected even in those instances where the parties' exercise of autonomy seriously strains the optimal functioning of legal process designed as a contest.").

31. The CJRA, while the most prominent, is not the first attempt to mandate increased judicial management of the adjudicative process. See *infra* Part II. Amendments to Rule 16 of the Federal Rules of Civil Procedure also have sought to encourage greater case management by the judge. See *infra* text accompanying notes 128–34.

32. See JOHN LOCKE, *The Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT 184 (Thomas I. Cook ed., 1947).

33. See EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 61 (1955) (discussing the impact of Locke's *Second Treatise* on natural law in American constitutional theory).

community of nature, there cannot be supposed any such subordination among us that may authorize us to destroy another, as if we were made for one another's uses as the inferior ranks of creatures are for ours.<sup>34</sup>

In the state of nature, all people were free and independent. The sole restraining force in such a state was one's own reason, and the use of reason assured that an individual's actions always conformed to nature.<sup>35</sup> Individuals entered into relationships with one another, and the state of nature insured the peace. Maintaining the peace, however, is dependent upon humans acting in accordance with the dictates of reason,<sup>36</sup> and people are not always rational. As a result, individuals wrong each other, thus creating the prospect of war in an otherwise peaceful state.<sup>37</sup> This prospect of war was one reason why people chose to leave the state of nature.<sup>38</sup>

A second distinct reason led individuals to choose to leave the state of nature. Even when one chooses to act rationally according to the laws of nature, one may not be wholly successful in doing so. This is because the state of nature lacks "an established, settled, known law, received and allowed by common consent to be the standard of right and wrong and the common measure to decide all controversies between them."<sup>39</sup> Since no moral law is implanted in us, the only way for one to come to know law in the state of nature is to study it, which not all do. A further complication stems from the fact that in the state of nature, "*every man hath a right to punish the offender and be executioner of the law of nature.*"<sup>40</sup> Thus, "[i]n the state of nature there wants a known and indifferent judge with authority to determine all differences according to the established law; for every one in that state being both judge and executioner . . . passion and revenge is very apt to carry them too far."<sup>41</sup>

For these reasons, individuals made a contract in which they agreed to make a new state by relinquishing the power each

---

34. LOCKE, *supra* note 32, at 123.

35. *Id.* at 123-24.

36. *Id.*

37. *Id.* at 130.

38. *Id.* at 131, 184.

39. *Id.* at 184.

40. *Id.* at 125.

41. *Id.* at 184.

held in the state of nature and by allowing the state apparatus to perform these functions instead.<sup>42</sup> After forming this social contract, Locke believed that individuals were better off than before. While the individual right to punish fellow citizens had been relinquished by leaving the state of nature, all other rights remained intact, including the naturally derived rights to life, liberty, and property. Indeed, the entire purpose of creating civil society was to safeguard these natural rights more effectively.<sup>43</sup>

In Locke's theory, it is significant that upon individuals' decision to enter civil society, their natural rights such as life, liberty, and property were increased because people were free to enjoy them, which they had not been free to do in the state of nature. While in the state of nature there may have been more theoretical liberty, in actuality, civil society increased the amount of net, practical liberty.<sup>44</sup>

Because civil society is designed to protect innate rights, the preservation of these rights becomes the criteria for judging all acts of government and all laws of the state. The fundamental rights of the individual that emanate from the state of nature determine the validity of the laws of the civil state; the laws of the civil state do not create fundamental rights.<sup>45</sup>

Ultimately for Locke, the civil state is the sum of the individuals who comprise it. Natural law is a backdrop both to describe the origin of individual rights and to assure that these rights are elevated to primary status when the civil state is organized. Indeed, the main purpose of the state is to

---

42. As Locke stated:

Whenever, therefore, any number of men are so united into one society as to quit every one his executive power of the law of nature and to resign it to the public, there and there only is a political or civil society. And this is done wherever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government . . . . And this puts men out of a state of nature into that of a commonwealth . . . .

*Id.* at 164.

43. See *id.* at 186.

44. See MAURICE CRANSTON, JOHN LOCKE 210 (1957). This point has important implications for the CJRA. The CJRA will bring about a decrease in procedural autonomy with the hope of bringing about a net gain in substantive liberties. See *infra* Part III.

45. See HEINRICH A. ROMMEN, THE NATURAL LAW 89 (Thomas R. Hanley trans., 1947) (explaining that according to Locke's philosophy an individual's rights exist prior to the creation of the State).

protect individual self-interests. The state exists for individual, not community, concerns.

3. *The Influence of Blackstone*—William Blackstone's *Commentaries on the Laws of England* followed the Lockean philosophy that government exists to protect the individual.<sup>46</sup> Blackstone's extension of Locke's natural law philosophy greatly influenced the formative era of the American constitution.<sup>47</sup> For Blackstone, as for Locke, protection of individual liberty is the animating force for civil government:

This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth . . . . Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.<sup>48</sup>

Yet Blackstone differed from Locke in significant and influential ways. Blackstone rejected the notion that human beings had once lived in a state of nature, maintaining instead that individuals have always been social beings.<sup>49</sup> In addition, although he recognized that natural liberty is a right inherent at birth, he asserted that upon entering civil society, one is required to relinquish it, at least in part, "as the price of so valuable a purchase."<sup>50</sup> From this principle, Blackstone arrived at an image of the state that differed vastly from Locke's. The major differences in Blackstone's theory include: (1) that every state must have a supreme, uncontrolled authority; (2) that this authority is the "natural inherent right that belongs to the sovereignty of a state"; and (3) that all other powers in society must conform to the law-making powers of the state.<sup>51</sup>

---

46. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 124–25 (2d ed., 1766). But cf. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 41 (Charles W. Everett ed., 1928) ("In consequence of which . . . [Blackstone] has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the *fitness and unfitness of things* . . . but has graciously reduced the rule of obedience to this one paternal precept, 'that man should pursue his own happiness'.")

47. See CORWIN, *supra* note 33, at 84–88.

48. BLACKSTONE, *supra* note 46, at 125.

49. *Id.* at 44.

50. *Id.* at 125.

51. *Id.* at 47–51.

For Blackstone, the civil state, in contradistinction to Locke's theory, is the final source of the law:

It hath sovereign and uncontrollable authority in making, confirming . . . and expounding of laws . . . this being the place where that absolute, despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances . . . are within the reach of this extraordinary tribunal. . . . It can, in short, do every thing that is not naturally impossible. . . . True it is, that what the parliament doth, no authority upon earth can undo.<sup>52</sup>

4. *The Declaration of Independence*—The natural law theory of individual rights that followed from the philosophies of Locke and Blackstone was a dominant intellectual theme during the formative era of the American constitution.<sup>53</sup> This is perhaps best illustrated by the *Declaration of Independence*, in which Thomas Jefferson attempted to speak for the prevailing mind-set of the time. A believer in the Lockean tradition, Jefferson wrote that the rights of the people are “derived from the laws of nature, and [are] not the gift of their Chief Magistrate.”<sup>54</sup> Hence, “[i]t is not only vain, but wicked, in a legislator to frame laws in opposition to the laws of nature.”<sup>55</sup>

Unlike the final version, Jefferson's draft of the *Declaration of Independence* spoke expressly of the inherent nature of individual rights. The draft reads:

We hold these truths to be self evident: that all men are created equal; that they are endowed by their creator with [certain inherent and inalienable] rights; that among these are life, liberty, & the pursuit of happiness: that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, & to institute new government, laying it's foundation on such principles, & organising it's

---

52. *Id.* at 160–61.

53. *See* CORWIN, *supra* note 33, at 61 (Locke); *id.* at 84–85 (Blackstone).

54. THOMAS JEFFERSON, *THE JEFFERSONIAN CYCLOPEDIA* 691 (John P. Foley ed., 1900).

55. *Id.* at 486.

powers in such form, as to them shall seem most likely to effect their safety & happiness.<sup>56</sup>

This paragraph is Lockean in the purest sense. Nature provides individuals with inherent rights; to better assure themselves of these natural rights—and for no other reason—people form civil governments. It follows that governments exist not only to benefit the governed, but exist solely by the decree and consent of the governed. The people retain ultimate authority to insure the vitality of their individual rights. If the government oversteps its bounds in this regard, the people can dissolve it. It is upon such a theory that the American adjudicative system was based.<sup>57</sup>

### C. Two Models of Dispute Resolution

1. *The Adversarial Model and the Passive State*—Dispute resolution in the United States traditionally has adhered to a belief in the primacy of individual autonomy and self-realization as espoused by Locke. In accordance with these ideals, the state's apparatus for the administration of justice has been designed to provide a framework by which individuals can resolve their disputes in a civil manner, without going to war, as they would in the state of nature. This allows individuals to maintain the maximum autonomy possible in their pursuit of self-determination.<sup>58</sup> Theoretically, no state values come to the fore

---

56. Thomas Jefferson, *Draft of The Declaration of Independence*, reprinted in GARY WILLS, *INVENTING AMERICA* 374 (1978).

57. The Supreme Court has at times enunciated a very pure form of the Lockean conception of civil justice. For example, a classic Lockean pronouncement appears in *Canada S. Ry. v. Gebhard*, 109 U.S. 527, 536 (1883):

Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property.

*Id.*

58. See Chayes, *supra* note 20, at 1285 ("The traditional conception of adjudication . . . assumed that the major social and economic arrangements would result from the activities of autonomous individuals. In such a setting, the courts' . . . primary function was the resolution of disputes about the fair implications of individual interactions.").

in such a system.<sup>59</sup> Rather, those state values required to form the mechanism needed to administer justice are only “surrogate values” they espouse only the interests upon which individuals would agree were they so able to contract.<sup>60</sup> Under such a view, the only legitimate goal of a system of justice is to establish a format by which individual members of civil society may autonomously regulate their own behavior.

As an outgrowth of this notion, the civil justice system in the United States has traditionally made the litigants—not the state or its embodiment, the judge—the dominant figures in the legal process.<sup>61</sup> For example, individuals determine when to invoke the judicial process; they control fact-finding; they are involved in setting the pace of the process; and they are generally free to waive state-designed protective rules.<sup>62</sup> Such a system best preserves individual autonomy in a number of important aspects.<sup>63</sup> Perhaps most importantly, it allows the litigants to make their own case

---

59. In reality, certain “content-neutral” values, such as the promotion of efficient judicial administration, are incorporated into the fabric of the civil justice system in the United States. There has been much debate over whether such values, as incorporated into the Federal Rules of Civil Procedure, are in fact content-neutral. *See supra* note 24.

60. *See DAMAŠKA, supra* note 21, at 76 (“Where the state embraces no independent value system or policies . . . [t]he only legitimate route the lawgiver can take is to try to determine how citizens would have agreed to resolve a matter had they anticipated it; social expectations must be captured and defined.”).

61. This has been the case throughout the history of Anglo-American civil litigation. From as early as the twelfth century, parties have assumed primary responsibility for initiating legal proceedings and for defining the issues in their pleadings. *See* 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 604–05 (1911).

62. The party-dominated system of adjudication, which is in reality a lawyer-dominated system, has been subject to criticism. The most common critiques have been that a system controlled by the parties provides incentives to distort evidence and includes overly complex forms of discovery and trial presentation. *See, e.g.,* J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80–85 (1950) (contrasting the adversarial process with the search for truth in adjudication); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (arguing that the adversary system makes finding the truth too low a priority). As a result, truth may be sacrificed to preserve other ends. These ends, as have been discussed, are precisely those values of autonomy and self-determination that we as a society profess to hold dear. The CJRA is designed in part to address some of these criticisms of party-dominated adjudication.

63. In the enormously complex and time-consuming realm of civil litigation in the United States, individuals often cede to their attorneys significant amounts of control over their dispute. Some may question whether under such a system individual dignity and autonomy are in fact preserved. *See, e.g.,* Sward, *supra* note 23, at 317–18.



in court to the fullest extent that they deem appropriate, rather than at the direction of the judge.<sup>64</sup>

2. *The Inquisitorial Model and the Activist State*—The activist state is identified most frequently with an inquisitorial system of justice. In contrast to the adversarial system, the inquisitorial system of justice is notable for two significant and related characteristics. First, a hearing judge is the dominant actor in gathering evidence and questioning witnesses.<sup>65</sup> Second, a judge is the central player in the adjudicatory process.<sup>66</sup>

Some form of civil law justice is used throughout most of continental Europe.<sup>67</sup> A typical civil law proceeding is divided into three distinct stages, with a judicial officer dominating the latter two stages.<sup>68</sup> In a civil law jurisdiction, just as under the common law, the parties control the initial stage of an

64. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 44–45 (1984) (“Ultimately, the whole procedure yields results tailored to the litigants’ needs and in this way reinforces individual rights.”); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–83 (1978). Fuller presents an argument that adversary presentation, as opposed to the European inquisitorial model, is fundamental to an appropriate adjudicative process. *Id.* He contends that the integrity of this process demands the presence at trial of an advocate rather than solely an arbiter. *Id.* at 382. An arbiter would sacrifice her neutrality by the necessity of creating and presenting the case for each litigant. *Id.* Such a process could hardly allow an arbiter to regain neutrality. *Id.* at 382–83. As Fuller noted, “[I]f it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.” *Id.* at 383.

65. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 111 (1985). Fact-finding may proceed over a period of time, as the judge gathers as much information, but no more, than he feels is necessary to reach a decision. Parties act in the fact-finding process by suggesting witnesses and avenues to explore; however, they neither interrogate witnesses, nor, frequently, meet with witnesses in advance. *Id.* at 115–17; Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088–89 (1975); Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1234–35 (1958).

66. See MERRYMAN, *supra* note 65, at 36 (describing the civil law judge as “operator of a machine designed and built by legislators”). Some commentators argue that such a dominant judicial presence is necessary to provide a level playing field for parties of inherently unequal strength. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). For example, Professor Fiss notes that an activist judge “can employ a number of measures to lessen the impact of distributional inequalities. He can, for example, supplement the parties’ presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici.” *Id.* at 1077.

67. See Sward, *supra* note 23, at 301 (“The majority of the world . . . uses some version of the inquisitorial system that evolved primarily in continental Europe.”). See generally ENGELMANN ET AL., *supra* note 22 (discussing the development of civil procedure in continental Europe).

68. MERRYMAN, *supra* note 65, at 111.

action by invoking the judicial process when they file pleadings.<sup>69</sup> At the second stage a hearing judge views the evidence and prepares a written record of the findings.<sup>70</sup> Noticeably absent from this evidentiary stage in civil law proceedings is a broad-based, party-controlled discovery process. American-style discovery is virtually unknown in civil law jurisdictions.<sup>71</sup> In the third stage, the record prepared by the hearing judge is transmitted to the judicial decision makers who make a final decision based on the written record prepared by the hearing judge, counsels' briefs, and oral arguments from counsel.<sup>72</sup>

Civil law procedure thus does not recognize a clear delineation between the preparatory stages of an action and the actual trial.<sup>73</sup> Furthermore, civil law procedure differs from common law procedure in that it speaks of "instruction" and "modes of proof" rather than of evidence.<sup>74</sup> This civil law terminology reflects the notion that the judicial decision makers should merely be informed of the pertinent facts, rather than be persuaded by the presentation of evidence, as is the case in common law jurisdictions.<sup>75</sup>

Professor John Langbein has argued for the comparative advantage of the civil law system of civil procedure, using the German legal system for illustration.<sup>76</sup> Langbein's central thesis is that by allowing judges rather than lawyers to

---

69. *Id.*

70. *Id.*

71. *See, e.g.,* PETER HERZOG, *CIVIL PROCEDURE IN FRANCE* 233 (1967) (noting that in France, discovery of documents by the adverse party is possible only in very limited instances). Some critics have argued that placing major constraints on discovery is a rational method of dealing with the pretrial discovery explosion in the United States. *See, e.g.,* Loren Kieve, *Discovery Reform*, A.B.A. J., Dec. 1991, at 79-81 (arguing that the appropriate solution to the discovery "nightmare" in the United States is to follow the lead of civil law countries and abandon discovery).

72. MERRYMAN, *supra* note 65, at 111-12.

73. J. A. Jolowicz, *The Active Role of the Court in Civil Litigation*, in *PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION* 246 (Mauro Cappelletti ed., 1975).

74. *Id.* at 247.

75. *Id.* at 247-48.

76. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (arguing that, in comparison to German law, American civil procedure produces a system of litigation that is slow, expensive, and unpredictable). *But cf.* Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988) (arguing that Langbein's comparison of the American and German systems is too vague and speculative to be persuasive); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987) (arguing that the inefficiency built into the American system provides certain structural and substantive advantages).

investigate facts and question witnesses, many of the most troublesome aspects of American civil procedure may be avoided.<sup>77</sup> In a German civil case, the judge to whom a case is assigned is the coordinator of the adjudication.<sup>78</sup> After the initial pleadings have been filed, the judge initiates all subsequent activity of consequence.<sup>79</sup> The judge familiarizes himself with the case and then summons the lawyers to a pretrial conference in an effort to resolve the dispute.<sup>80</sup> If a resolution is not reached, the judge may call witnesses, and the witnesses are questioned primarily by the judge.<sup>81</sup>

The primary objective of such a hearing is to reach expediently a socially desirable goal, not necessarily to further or protect the interests of the particular litigants.<sup>82</sup> Accordingly, the interests of the parties in a civil suit—whose interests, after all, were the impetus for the filing of the complaint—are subordinated to greater societal interests. Such a view is diametrically opposed to the Lockean view upon which the American judicial system was founded, namely that the purpose of the state—in this case the judiciary—is to provide a mechanism to vindicate individual rights, and any other interests necessarily must be secondary.<sup>83</sup>

---

77. Langbein, *supra* note 76, at 824. Langbein notes, however, that aside from fact-finding, the German system does not differ significantly from the American model. *Id.* at 841–42. In both systems, lawyers remain strong advocates for their clients' positions by suggesting legal theories and proposing lines of factual inquiry. *Id.* at 829; cf. Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) (noting operational similarities among three continental systems and the American system). *But cf.* John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990) (arguing that judicially dominated fact-finding, the central characteristic of German procedure, could not be adopted in the United States without fundamental changes to the essence of American civil procedure).

78. Langbein, *supra* note 76, at 827–29.

79. *Id.* at 827–29, 837, 839.

80. *Id.* at 828.

81. *Id.* at 827–28. *But cf.* MERRYMAN, *supra* note 65, at 114–15 (noting that while German judges are more active, in most civil law jurisdictions, parties have much more control over what issues are deemed relevant, what evidence is introduced, and what questions are posed to witnesses).

82. See Langbein, *supra* note 76, at 828. "Socially desirable" in this context may be seen as bringing about those values considered desirable to society at large, rather than solely advancing the interests of the litigants, who, of course, invoked the judicial process so that their needs, rather than society's, would be protected. See, e.g., DAMAŠKA, *supra* note 21, at 81–82.

83. See *supra* notes 32–45 and accompanying text.

As discussed more fully below, the American model of justice has departed from its Lockean moorings. This new model, though still in transition, has begun to adopt certain quasi-inquisitorial features. The most prominent of these characteristics is the notion of the judge as a case manager, who enters the litigation at its inception and oversees the matter through its disposition.<sup>84</sup> In this regard, the CJRA has furthered the American movement toward a more inquisitorial process. Under the Act, judges are expressly encouraged to meet early and often with the parties,<sup>85</sup> to explore with the parties the possibilities of settlement,<sup>86</sup> to coordinate discovery schedules and motion practice with the parties,<sup>87</sup> and to set early and firm trial dates.<sup>88</sup>

## II. PROCEDURAL ACTIVISM PRIOR TO THE CIVIL JUSTICE REFORM ACT OF 1990

The passive model of adjudication, which embodies the laissez-faire principles of Locke and Blackstone, has been largely abandoned in America.<sup>89</sup> It would be misleading to claim, however, that the CJRA is responsible for this departure. Indeed, by the time the Act was signed into law in 1990, the concept of case management had been widely accepted both as an ad hoc method for meeting the exigencies of particular cases<sup>90</sup> and as a formal component of the pretrial process, as reflected in Rule 16 of the Federal Rules of Civil Procedure.<sup>91</sup>

---

84. For a survey of modern American techniques in pretrial case management, see FEDERAL JUDICIAL CENTER, *MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION* 5-37 (1993).

85. 28 U.S.C. § 473(a)(2) (Supp. V 1993).

86. § 473(a)(3)(A), (b)(5).

87. § 473(a)(2).

88. *Id.*

89. See, e.g., Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 266 (1985) ("[T]he cause of justice can no longer be served by a laissez-faire judicial model. Our controlled inaction is an affirmative choice, an abdication of our responsibility to use our power to assist in restoring the health of the system.")

90. See sources cited *supra* note 6.

91. Rule 16 establishes procedures for the pretrial management of the litigation. See also Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 526 (1992) ("Rule 16 contains enormous potential as a device for developing creative case management strategies. I believe that Rule 16 is the most

As one commentator blithely stated in 1986, "[T]he managerial horse is out of the judicial barn."<sup>92</sup>

The Act is therefore part of a larger movement toward a more procedurally active judiciary. This subsidiary role, however, does not detract from the Act's significance. Rather, the importance of the Act derives from the fact that the *legislature* saw the need to mandate procedural reforms in the context of a judicial movement that was already implementing many of these same methods.<sup>93</sup> Thus, in addition to the national reforms it seeks to achieve, the Act is significant, not in spite of the pre-existence of the judicial activist movement, but because of it.

### A. *The Rise of Case Management*

As discussed in Part I, the adjudicatory system that was an outgrowth of Lockean and Blackstonian philosophy existed solely for the resolution of private disputes between private individuals regarding the allocation of private rights.<sup>94</sup> Many developments in twentieth-century America led to the breakdown of this private law model.<sup>95</sup> This transformation occurred primarily in the latter half of the twentieth century.<sup>96</sup> The most

---

important rule of civil procedure for a trial judge, because, along with our inherent power, it is the specific repository of the authority of a federal trial judge to manage the judicial calendar.").

92. McGovern, *supra* note 5, at 440; see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322 (1986) ("Managerial judging has spread rapidly from one judge to another because many trial judges share a sense of frustration at the amorphous sprawl of litigation under the Federal Rules and are anxious to try new ways of bringing cases to issue.").

93. Indeed, it is arguable that all of the managerial techniques necessary for managing the litigation process were available to judges before the enactment of the CJRA. See, e.g., Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1397 (1992) ("The 1983 revisions of the Federal Rules and the 1985 issuance of the *Manual for Complex Litigation Second* effectively codified virtually all of the managerial judging techniques that courts had created.").

94. See *supra* Part I.C.1.

95. See, e.g., Peckham, *supra* note 6, at 770 ("[T]oday's massive volume of litigation and the skyrocketing costs of attorney's fees and other litigation expenses have, by necessity, cast the trial judge in a new role, that of pretrial manager.").

96. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 512 (1986) ("The nineteen-thirties were . . . the era before implied private causes of action, before the rise of civil rights litigation, before much federal court hospitality towards rights seekers, before intensive litigation against federal agencies, before the reformulation of the class action rule, before the 'due process' revolution.").

notable aspect of this transformation was the rise of public law disputes, which often involved actions seeking prospective institutional reform, such as desegregation or the improvement of state facilities, and which required ongoing, post-trial oversight by the judge assigned to the case.<sup>97</sup>

The public law model of litigation revolutionized much of the accepted structure of legal adjudication. It expanded many of the limiting assumptions of traditional civil litigation, including the propositions that the courts were to serve only to vindicate the private rights of private parties, that lawsuits be bipolar, that legal actions retrospectively address acts that have been completed in their entirety, that the right violated and the remedy requested necessarily be interdependent, and that the suit be both party-instituted and party-controlled.<sup>98</sup>

The public law model grew out of the creation or expansion of federal rights, both statutory and constitutional, which sought to effect systemic social change.<sup>99</sup> Many judges determined that the federal courts bore the responsibility to ensure that these changes were properly implemented once a violation of those rights had been established.<sup>100</sup> This responsibility entailed active judicial management of the litigation both before and after trial. The judge had to become sufficiently familiar with the institution in question to determine whether a federal violation had occurred, and if there was a violation, the judge had to preside over any post-trial proceedings brought to enforce compliance with the injunctive remedy imposed.<sup>101</sup>

---

97. See Resnik, *supra* note 20, at 393 ("Post-trial judicial management is also a creature, in part, of a shift . . . in the use of lawsuits by diverse groups to assert novel legal rights."). While the discussion here addresses the case management role as being wholly judicial, judges are also empowered to designate others, such as a special master, to serve in this role. *E.g.*, FED. R. CIV. P. 53(a), (c) (permitting the court to appoint special masters with broad discovery powers). The policy arguments remain largely unchanged when a judicial designee assumes the judicial management function.

98. See Chayes, *supra* note 20, at 1282–84 (comparing traditional concepts of litigation with modern features of public law litigation).

99. See, *e.g.*, *Langton v. Johnston*, 928 F.2d 1206, 1221 (1st Cir. 1991) ("At least since the time of *Brown v. Board of Education*, district courts have exercised broad powers and enjoyed great latitude in regulating the operations of state institutions, ranging from school districts, to hospitals, to prisons, as may be necessary to enforce federally assured rights.") (citation omitted).

100. See, *e.g.*, *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 296–97 & nn. 1, 5 (1990) (discussing the use of the public law consent decree).

101. See, *e.g.*, *Langton*, 928 F.2d at 1210–11 (tracing the implementation and enforcement of a consent decree as applied to conditions at a state prison facility).

Professor Abram Chayes, in his seminal article, *The Role of the Judge in Public Law Litigation*, recognized the rise in public law litigation and its transformative effects on the function of the judiciary.<sup>102</sup> Chayes called this model “public law litigation,” and noted that the defining characteristics of private civil litigation had become inapplicable in an age when civil litigation was aimed increasingly at the vindication of public, federal rights.<sup>103</sup> In the public law model, the nature of the adjudicative process was fundamentally inverted from the traditional framework, and nowhere so much as in the role of the neutral, passive decision maker.<sup>104</sup> Not only had the nature of the litigants gone from fixed and stable to widespread and amorphous, but the judge had become the single dominant player in organizing and directing the case, as well as in fashioning nontraditional and creative remedies.<sup>105</sup>

At the center of these remedies was the consent decree: a judicial order prescribing a course of future conduct for the institution or system named in the suit.<sup>106</sup> The formulation of this decree, as well as the oversight needed to ensure compliance with it, required the assigned judge to become both a procedural and substantive case manager.<sup>107</sup> In Professor Chayes’s view, such active involvement in the affairs of public institutions transformed the federal judge from a passive arbiter into a governmental policymaker:

[A] judicial decree establishing an ongoing affirmative regime of conduct is *pro tanto* a legislative act. . . . [I]n actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.<sup>108</sup>

---

102. See Chayes, *supra* note 20; see also Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647 (1988) (discussing the impact of the Chayes article).

103. Chayes, *supra* note 20, at 1284.

104. *Id.* at 1298.

105. *Id.*

106. *Id.* at 1284.

107. *Id.* at 1284, 1300.

108. *Id.* at 1302; see also *Langton v. Johnston*, 928 F.2d 1206, 1221 (1st Cir. 1991) (“In public law litigation, courts typically play a proactive role—a role which can have nearly endless permutations. . . . The relief requested often involves the restructuring of a state or city program, requiring the court to fashion equitable remedies—sometimes unique and often complicated—in order to secure ‘complex legal goals.’”) (citations omitted).

In addition to the public law movement, other forces also caused federal judges to become more active participants in the suits brought before them. The introduction of liberal discovery rules in the 1938 Federal Rules of Civil Procedure was one such force.<sup>109</sup> By allowing for broad discovery in an otherwise adversarial environment, the Federal Rules sowed the seeds for active pretrial case management. Discovery disputes ultimately became a source of frequent pretrial litigation, as parties sought judicial involvement to counter perceived abuses by their opponents.<sup>110</sup> This judicial participation in pretrial disputes made courts more amenable to involvement with other pretrial matters. According to one commentator, "supervision of discovery became a conduit for judicial control over all phases of litigation and thus infused lawsuits with the continual presence of the judge-overseer."<sup>111</sup>

This need for pretrial judicial oversight was heightened by the significant growth in case filings beginning in the late 1950s. In the three decades from 1960 to 1990, the number of lawsuits filed each year almost tripled, from 90,000 in 1960 to more than 250,000 in 1990.<sup>112</sup> Moreover, the legal profession in America grew apace. From 1977 to 1989, the legal industry grew 382 percent.<sup>113</sup> Furthermore, during the 1970s, Congress increased the opportunities for indigent plaintiffs to bring suit. In 1974, Congress created the Legal Services Corporation to provide legal assistance to indigent people;<sup>114</sup> two years later, Congress enacted the Civil Rights Attorneys' Fee Act,<sup>115</sup> which

---

109. See Peckham, *supra* note 89, at 256 (discussing the introduction of discovery rules and their effect on the pretrial process); Resnik, *supra* note 20, at 391-92 (explaining that the creation of new discovery rights allowed litigants to enlist the court's help in obtaining requested materials).

110. See, e.g., Peckham, *supra* note 89, at 256 ("The pressures and incentives of the litigative process overwhelmed the spirit of the new rules, and discovery abuse became widespread, particularly in the large cases.").

111. Resnik, *supra* note 20, at 379.

112. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1 (1991)[hereinafter PRESIDENT'S COUNCIL ON COMPETITIVENESS]. Since 1990, case filings in federal court have continued to grow. According to the Administrative Office of the United States Courts, case filings in 1990 totalled 264,409, whereas filings in 1994 reached 281,740. COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 11, tbl. 3 (Nov. 1994) (citing statistics furnished by the Administrative Office of the United States Courts).

113. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 112, at 2. During the same period, by contrast, the food industry grew 90.9% while the automotive industry grew 40.0%. *Id.*

114. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 2, 88 Stat. 378, 378-88 (codified as amended at 42 U.S.C. § 2996 (1988)).

115. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. § 1988 (1988)).



provides for one-way fee shifting in favor of successful plaintiffs who sue under the federal reconstruction-era statutes.

Additionally, the complexity of many federal cases increased during the 1960 to 1990 period, reflecting the prolific expansion of federal administrative and statutory rights, both inside and outside of the public law model.<sup>116</sup> Many of these cases asserted the rights of wide-ranging classes, which were themselves made possible by the liberalized procedures of the Federal Rule governing class actions.<sup>117</sup>

Furthermore, amendments to the Federal Rules gave the judge greater authority to facilitate settlement among the parties.<sup>118</sup> Such a grant of authority further transformed the judge's role from a manager of the litigation to a facilitator of the case's resolution. Modifications made in 1983 to Rule 16 recognized this fact, noting that "it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible."<sup>119</sup>

### *B. Implementing the Case Management Procedures*

Prior to the enactment of the CJRA, the judiciary was predominantly responsible for implementing procedures to streamline the growing volume of federal cases. In 1969, the judiciary took one of the first steps toward a more efficient system when most of the district courts in metropolitan areas

---

116. See, e.g., CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, FINAL REPORT 17 (1993) ("In 1962, much of the legislation and litigation in the areas of civil rights, Title VII employment discrimination, pensions, and prisoner litigation did not exist. Thirty years later, these are among the most frequently filed cases in this district. They are often among the most time-consuming cases . . .").

117. FED. R. CIV. P. 23; see also Resnik, *supra* note 96, at 522 ("The revision of the class action rule has enabled diverse sets of individuals to present themselves as groups to the federal courts and has prompted extensive consideration of when representative litigation is permissible.").

118. FED. R. CIV. P. 16(a)(5) (permitting the courts in their discretion to order pretrial conferences for purposes which include "facilitating the settlement of the case").

119. FED. R. CIV. P. 16 advisory committee's note (1983); see also Elliott, *supra* note 92, at 308 ("[M]anagerial judging has recently become a set of techniques for inducing settlements.").

moved from a master calendar system to an individual assignment program.<sup>120</sup> Under the master calendar approach, a motion judge or judges would hear pretrial motions in a case until it was ready for trial; a different judge would then be assigned to conduct the trial.<sup>121</sup> Under the new system, a judge was assigned a case from its inception and remained with that case until its disposition.<sup>122</sup> The transfer to an individual assignment system had two efficiency rationales. First, by handling their cases at all stages, judges would become more familiar with the cases before them, and would therefore handle both pretrial and trial matters more expeditiously.<sup>123</sup> Second, judges would become motivated to move their cases more promptly because they would be responsible for their own caseloads.<sup>124</sup>

Judges also began to recognize the importance of establishing regular case management procedures. Writing in 1976, Judge Alvin Rubin emphasized the need for judges to take firm control of the cases assigned to them.

[P]urely on the basis of twenty-odd years before the bar, and eleven years on the trial bench, and without being able to cite data and chart or chapter and verse, I suggest that there *are* advantages to judicial assumption of responsibility for case control . . . . Better results are achieved by judges who actively engage in case management than by those judges who prefer not to meddle with the lawyers.<sup>125</sup>

Many judges began to adopt case management procedures as a result of programs held by the Federal Judicial Center, an organization created by Congress in 1967 at the recommendation of the Judicial Conference of the United States.<sup>126</sup> The Federal Judicial Center provided continuing education to existing judges, and it also ran seminars for newly appointed judges in which the instructors taught the benefits of active case management.<sup>127</sup>

---

120. Peckham, *supra* note 89, at 257.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Rubin, *supra* note 6, at 138.

126. See Act of Dec. 20, 1967, Pub. L. No. 90-219, § 101, 81 Stat. 664, 664-68 (codified as amended at 28 U.S.C. §§ 620-629 (1988 & Supp. V 1993)).

127. See Peckham, *supra* note 89, at 257-58 (explaining the functions of the Federal Judicial Center); Will, *supra* note 23, at 117 (extolling the benefits of active case management at a Federal Judicial Center seminar for newly appointed federal trial judges).

The most significant of these case management procedures was the pretrial status conference. Authorized by Rule 16 of the Federal Rules of Civil Procedure, these conferences allow the judge to meet with the attorneys for all sides to discuss matters relating to trial.<sup>128</sup> Although, prior to its amendment in 1983, Rule 16 focused solely on trial issues, courts began to use these conferences to address pretrial matters, such as discovery and motions.<sup>129</sup> Indeed, in 1981, Judge Robert Peckham noted "the increasingly widespread use of the early status conference" and described it as "a device which enables a judge to intervene soon after the filing of a case to schedule all the activity that will occur before trial."<sup>130</sup>

In 1983, the Supreme Court greatly expanded the scope of the pretrial conference under Rule 16. According to the Advisory Committee on the Rules, the amendments sought to make "scheduling and case management an express goal of pretrial procedure."<sup>131</sup> This was done by expanding the range of topics to be discussed at such conferences to cover all aspects of the pretrial phase, including the prospect of settlement.<sup>132</sup> The amendments emphasized the need for early and firm judicial management because studies had shown that cases are resolved more efficiently "when a trial judge intervenes personally at an early stage to assume judicial control over a case."<sup>133</sup>

Like the CJRA, the 1983 amendments to Rule 16 both reflected and confirmed the growing movement away from the passive model of adjudication. Under the revised Rule 16, judges had express license to work with the parties to coordinate the extent and pace of pretrial activities. According to Judge Charles Richey, the new Rule 16 signalled a fundamental departure from the traditional model of adjudication:

---

128. FED. R. CIV. P. 16.

129. Peckham, *supra* note 6, at 771.

130. *Id.*

131. FED. R. CIV. P. 16 advisory committee's note (1983).

132. *See id.* ("This subdivision [FED. R. CIV. P. 16(c)] expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases.").

133. *Id.*; *see also* Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 823 (1988) ("Rule 16 was amended in 1983 to make specific what had probably been intended from the beginning—that the trial judge was indeed the ruler, not only of the pretrial conference, but of the entire pretrial process.").

In terms of theory, the Rule effectively lays to rest the historical model of the passive judge—the judge who acts only when compelled, and who refuses to sully himself with the *administration* of a lawsuit—and replaces it with a model that is more active, and which is involved with every aspect of a lawsuit from start to finish. In my view, this change marks a fundamental alteration in what it means to be a federal judge.<sup>134</sup>

Other commentators voiced similar assessments of Rule 16's wide grant of authority.<sup>135</sup> Nevertheless, seven years after these amendments, Congress passed the Civil Justice Reform Act, which requires all district courts to examine their pretrial procedures to determine whether these methods can be made more effective through improved judicial case management.<sup>136</sup> Absent from the Act is any statement explaining why Rule 16 is not adequate to achieve the reduction of cost and delay that the Act seeks. The import of the Act, however, is clear enough: in the eyes of Congress, the ad hoc procedures in place throughout the country are insufficient to redress the problems of cost and delay besetting the nation's civil justice system as a whole.<sup>137</sup>

The emergence of these case management principles, as embodied in Rule 16, has not met with universal approval.<sup>138</sup> Some argue that such direct, pretrial negotiations undermine the traditional notion of judicial accountability. They contend that pretrial meetings and settlement conferences can be held

---

134. Richey, *supra* note 6, at 600.

135. See, e.g., Peckham, *supra* note 89, at 258 ("The present centerpiece of federal judicial case management is a 1983 amendment to the Federal Rules of Civil Procedure. Rule 16 was amended to codify and encourage the use of case management techniques.") (footnotes omitted); Tobias, *supra* note 93, at 1397 (noting broad powers conferred by 1983 amendments to Rule 16).

136. Pub. L. No. 101-650, § 103(a), 104 Stat. 5090 (1990) (codified as amended at 28 U.S.C. §§ 471–473 (Supp. V 1993)).

137. Cf. Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1291–92 (1994) (noting that despite the significant reforms proposed by groups such as the American Bar Association, "the rule changes recommended to Congress by the Judicial Conference remained largely ineffectual"); Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 845–46 (1994) (discussing the attempted promulgation by the Judicial Conference of a "14 Point Program").

138. See, e.g., Resnik, *supra* note 20, at 424 ("In sum, I am skeptical of claims that management increases judicial productivity at reduced costs. . . . Moreover, managerial proponents have not even considered the effects of judicial management on the nature of adjudication.").

off the record, out of public view, and that judges have no obligation to explain such actions in reasoned, written opinions.<sup>139</sup> Moreover, such extensive meetings with the parties may lead to biases against particular litigants.<sup>140</sup> Thus, these critics argue, although judges have seized increasingly greater authority, managerial judging has not included a parallel increase of the procedural safeguards necessary to combat potential abuses of such authority.<sup>141</sup>

While an evaluation of the merits or demerits of the case management approach is beyond the scope of this Article, it is important to note here that this activist approach, though criticized, is now well established in the American civil justice system. Part III assesses the CJRA's contribution to the solidification of case management as an essential part of the federal judicial function.

### III. THE CIVIL JUSTICE REFORM ACT OF 1990 AND THE FURTHERANCE OF PROCEDURAL ACTIVISM

The legislative history of the Civil Justice Reform Act makes clear Congress's intent to bring systemic, procedural reform to the nation's civil justice system.<sup>142</sup> At the heart of this objective is the belief that the reforms that preceded the Act—from amendments to the Federal Rules of Civil Procedure to the use of ad hoc management techniques—were not comprehensive enough to effect sufficient change throughout the entire system. Indeed, the Act was based on the proposition that funda-

---

139. See, e.g., *id.* at 378. But see Peckham, *supra* note 89, at 263 ("Unreported or ex parte communications do indeed provide a temptation for abuse and, more importantly, may create the appearance or suspicion of coerciveness. To alleviate this potential abuse, . . . all status and pretrial conferences should be on the record with all counsel present.")

140. But see *Bilello v. Abbott Lab.*, 825 F. Supp. 475, 481 (E.D.N.Y. 1993). In *Bilello*, the defense counsel argued that Judge Weinstein had a biased view of the case stemming from his communications with the litigants during settlement negotiations in a prior state action. *Id.* at 477. Judge Weinstein summarily dismissed this argument, holding: "Without the participation of the judge in the settlement process, civil litigants would be adversely affected. Federal and state judges have an obligation to cooperate in clearing the dockets of both courts." *Id.* at 481.

141. See, e.g., Resnik, *supra* note 20, at 380.

142. See, e.g., S. REP. NO. 416, *supra* note 7, at 2, reprinted in 1990 U.S.C.A.N. at 6804 (explaining how expense and delay reduction plans will create a "national framework for attacking the cost and delay problem, while implementing that strategy through a policy of decentralization").

mental alterations in the administration of civil justice remained necessary in spite of the increased use of managerial techniques by judges, given the continuing escalation of cost and delay involved in federal litigation.<sup>143</sup>

According to the Act, systemic solutions to the national problems of cost and delay are sought, not through rigid, national mandates, but through individual and unique plans written by each district court.<sup>144</sup> Moreover, most district courts are not required to adopt specific procedures; rather, they are only obligated to consider a number of procedures set forth in the statute.<sup>145</sup> As discussed more fully below, the purpose of this arrangement is to allow each district court to adopt and experiment with a set of procedures that works well under the court's particular conditions.<sup>146</sup>

Initially, at least, there is no uniformity among the ninety-four federal judicial districts. One irony of the Act, therefore, is that it seeks to bring about systemic, national change through nonuniform, local experimentation with a host of pretrial techniques.<sup>147</sup> The one consistent mandate of the Act, however, is that each district court seek a more efficient system through the judges' increased use of case management techniques. As the Biden task force stated: "Both lawyers and

---

143. Such was the conclusion of a special task force convened at the behest of Senator Biden to develop a set of recommendations to alleviate the problems of excessive litigation cost and delay:

To a significant degree . . . the reform efforts of years past have been stopgaps designed to address narrow problems rather than to effect fundamental changes that would dramatically improve the system. The rising costs and delays involved in litigation demand now a more far-reaching approach. . . .

Although well intentioned, past changes in the [federal] rules failed to alleviate the dual problems of litigation costs and delays. Accordingly, we have concluded that reform efforts must look beyond "tinkering changes," . . . and must instead search for more systemic solutions.

TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 8-9 (1989)(citation omitted) [hereinafter JUSTICE FOR ALL], reprinted in *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 421 app. at 434-35 (1990) [hereinafter *Senate Hearings*].

144. See 28 U.S.C. §§ 471-472 (Supp. V 1993).

145. 28 U.S.C. § 473 (Supp. V 1993).

146. See *infra* Part III.A.2.

147. See 28 U.S.C. § 473. *But see* Biden, *supra* note 137, at 1294 (noting that after the courts' period of experimentation ends in 1997, the CJRA requires the Judicial Conference to recommend either that *all* courts adopt the six principles of litigation management set forth in 28 U.S.C. § 473(a) or that *all* adopt an alternative set of guidelines specified by the Judicial Conference).

judges overwhelmingly favor increasing the role of federal judges as active case managers . . . .<sup>148</sup>

### A. Background

On January 25, 1990, Senator Joseph Biden introduced Senate Bill 2027, known as the *Civil Justice Reform Act of 1990*.<sup>149</sup> The bill sought to reduce the costs and delay associated with federal civil litigation by mandating that every federal district court develop and implement an “expense and delay reduction plan.”<sup>150</sup> These plans were to incorporate certain broad principles of litigation management delineated in the bill. The central feature of the bill, as well as of the Act that followed, was Congress’s recognition that the desired reductions in cost and delay could only be achieved through the active management by federal judges of the cases assigned to them.<sup>151</sup>

---

148. JUSTICE FOR ALL, *supra* note 143, at 7, reprinted in *Senate Hearings* at 433.

149. See S. REP. NO. 416, *supra* note 7, at 3, reprinted in 1990 U.S.C.C.A.N. at 6805.

150. *Id.* at 2, reprinted in 1990 U.S.C.C.A.N. at 6804. The Senate Report stated:

Title I, the Civil Justice Reform Act of 1990, requires that every Federal district court develop and implement a civil justice expense and delay reduction plan. Each plan, which will be based on the recommendations and assessment of a local advisory group convened in each district, will apply certain well-accepted principles and guidelines of litigation management. In this way, title I promulgates a national strategy and national framework for attacking the cost and delay problem, while implementing that strategy through a policy of decentralization.

*Id.*

151. Senator Biden explained that “[e]ach of the principles set forth in the Act rests on a common premise: intelligent case management puts limited judicial resources to their best use and reduces delay and excessive cost in civil litigation.” Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL’Y 1, 5–6 (1992). The President’s Council on Competitiveness reached the same conclusion in its report on civil justice reform. See PRESIDENT’S COUNCIL ON COMPETITIVENESS, *supra* note 112, at 20.

These conclusions were incorporated into a presidential executive order. Exec. Order No. 12,778, 3 C.F.R. § 359 (1991), reprinted in 28 U.S.C. § 519 (Supp. V 1993). This order requires all federal agencies involved in civil litigation to adopt a number of reform techniques, including prefiling the notice of a complaint to the disputants in an effort to achieve settlement, producing core information prior to formal discovery, and using alternative dispute resolution resources where appropriate. *Id.* For a more extensive discussion of this executive order, see Richey, *supra* note 91, at 534–35.

1. *The Louis Harris Study on Procedural Reform of the Civil Justice System and the Brookings Report*—The bill's emphasis on the need for active judicial management was based on two studies that examined the state of civil justice in America. The first was a survey conducted by Louis Harris and Associates (the Harris Survey).<sup>152</sup> This study involved extensive telephone interviews with over 1000 attorneys and judges involved in the federal justice system.<sup>153</sup> The majority of the survey participants identified discovery abuse as a "major cause" of undue cost and delay in federal litigation.<sup>154</sup> Such abuses included the tendency by some to over-discover and the related strategy of using discovery as an adversarial tool to impose additional financial burdens on one's opponent.<sup>155</sup> A significant majority of the interviewees agreed that to achieve reform of the civil justice system, the role of the judge as an active case manager would have to be increased.<sup>156</sup>

---

152. LOUIS HARRIS & ASSOC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM (1989), reprinted in *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 91–184 (1990) [hereinafter HARRIS SURVEY].

153. *Id.* at 92. The survey involved interviews with 250 private plaintiffs' lawyers, 250 private defense lawyers, 100 public interest lawyers, 300 corporate general counsel of companies selected from the 5000 largest corporations in America, and 147 federal district court judges. *Id.*

154. Sixty-two percent of plaintiff and defense counsel, 63% of the public interest lawyers, 80% of the corporate counsel, and 71% of the judges expressed this opinion. *Id.* at 128.

The identification of discovery abuse as a chief cause of undue cost and delay in federal litigation was not a novel conclusion. In 1980, Justice Powell, in dissenting from the adoption of certain amendments to the Federal Rules of Civil Procedure, recognized the devastating effects that discovery abuse was levying upon the system:

[A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting) (footnote omitted).

155. HARRIS SURVEY, *supra* note 152, at 132.

156. *Id.* at 161. This reform proposal was favored by 83% of the plaintiff lawyers, 80% of the defense lawyers, 89% of the public interest lawyers, 92% of the corporate counsel, and 84% of the federal trial judges. *Id.* For a critique of the methodology of the Harris Survey, see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1410–15 (1994). In particular, Professor Mullenix takes issue with the Harris Survey's declaration of procedural deficiencies in the federal system based on nothing more than answers to an opinion poll. *Id.* at 1413.



The Brookings Institute and the Foundation for Change formed a task force to conduct the second study (Brookings Report).<sup>157</sup> This task force had been assembled at Senator Biden's request to recommend ways the civil justice system could be reformed.<sup>158</sup> The members of this group met six times between September 1988 and June 1989 to formulate a report.<sup>159</sup> The final report, entitled *Justice for All: Reducing Costs and Delay in Civil Litigation*, provided the basis for the Civil Justice Reform bill<sup>160</sup> that Senator Biden introduced on January 25, 1990.<sup>161</sup>

The thesis of the report reiterated the findings of the Harris Survey that those involved with the civil justice system in America are widely dissatisfied with the high cost and slow pace of federal litigation:

The American system of civil justice is under attack: from clients who believe that their cases take too long to get to trial and cost far too much; from federal and state legislators who hear these complaints from their constituents; from judges who must manage the system; and from many attorneys themselves who participate in it.<sup>162</sup>

The report offered solutions in the form of twelve broad procedural recommendations,<sup>163</sup> four recommendations for expanding

157. JUSTICE FOR ALL, *supra* note 143, at vii, reprinted in *Senate Hearings* at 423. The Harris Survey was conducted in connection with the activities of the task force and its results were incorporated into the task force's report. *Id.* at 6. Professor Mullenix, however, questions the report's validity because "[t]he analysis and recommendation set out in the . . . report were supported solely by the Harris survey; the report acknowledged no studies or evidence contrary to the task force conclusions." Mullenix, *supra* note 156, at 1417.

158. JUSTICE FOR ALL, *supra* note 143, at vii, reprinted in *Senate Hearings* at 423. The task force included "leading litigators from the plaintiffs' and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges and law professors." *Id.*

159. *Id.*

160. S. 2027, 101st Cong., 2d Sess. (1990).

161. S. REP. NO. 416, *supra* note 7, at 13, reprinted in 1990 U.S.C.C.A.N. at 6816.

162. JUSTICE FOR ALL, *supra* note 143, at vii, reprinted in *Senate Hearings* at 423.

163. *Id.* at 12-29, reprinted in *Senate Hearings* at 438-55. These recommendations consist largely of management techniques that are set forth in the CJRA. Compare *id.* at 12, reprinted in *Senate Hearings* at 438 (recommending that courts be statutorily directed to develop and implement a "Civil Justice Reform Plan") with 28 U.S.C. § 471 (Supp. V 1993) (requiring that United States district courts implement a "civil justice expense and delay reduction plan"); compare JUSTICE FOR ALL, *supra* note 143, at 14, reprinted in *Senate Hearings* at 440 (recommending that each district court include in its Civil Justice Reform Plan a system of case tracking or differentiated case

judicial resources,<sup>164</sup> and a series of recommendations for attorneys and their clients.<sup>165</sup> Like the Harris Survey that preceded it, the Brookings Report based many of its recommendations on the need for district judges to become more active in the litigation process: “[I]t is essential that the courts intervene at the earliest possible stage to structure the litigation with a view toward minimizing costs and delays.”<sup>166</sup>

2. *The “Cornerstone” Principles of Civil Justice Reform*—According to the legislative history of the Act, the bill introduced by Senator Biden rested on six “cornerstone” principles of civil justice reform, five of which directly assumed increased judicial case management.<sup>167</sup> These principles called for:

- (1) building reform from the “bottom up”; (2) promulgating a national, statutory policy in support of judicial case management; (3) imposing greater controls on the discovery process; (4) establishing differentiated case management systems; (5) improving motions practice and reducing undue delays associated with decisions on motions; and (6) expanding and enhancing the use of alternative dispute resolution.<sup>168</sup>

In adopting these principles, Congress articulated a number of policy determinations. Most notably, Congress echoed the conclusions of both the Harris Survey and the Brookings Report that reform of the present system depended on the active case administration of district court judges: “As the number of cases has increased and the cases themselves have become increasingly complex, judges, court administrators, and other civil justice system experts have recognized the importance of courts exercising early, active, and continuous control over case progress.”<sup>169</sup>

---

management) with 28 U.S.C. § 473(a)(1) (Supp. V 1993) (requiring that each district court consider including in its plan a “systematic, differential treatment of civil cases that tailors the level of individualized and case specific management”).

164. JUSTICE FOR ALL, *supra* note 143, at 30–33, *reprinted in Senate Hearings* at 456–59.

165. *Id.* at 34–39, *reprinted in Senate Hearings* at 460–65.

166. *Id.* at 24, *reprinted in Senate Hearings* at 450. The Brookings Report continues: “We believe the best mechanism for accomplishing this objective is to require each district court’s [expense and delay reduction] plan to provide for a *mandatory* scheduling conference—presided over by judges and not magistrates—at the outset of all but the simplest and most routine of cases . . .” *Id.*

167. S. REP. NO. 416, *supra* note 7, at 14, *reprinted in 1990 U.S.C.C.A.N.* at 6817.

168. *Id.*

169. *Id.* at 16, *reprinted in 1990 U.S.C.C.A.N.* at 6819.

Congress determined, however, that such managerial control by the judiciary should not be mandated generally, but rather should be tailored to address the specific circumstances of each of the ninety-four district courts in the federal system.<sup>170</sup> Accordingly, while Congress hoped eventually to see uniformity in the implementation of the Act's mandates, it initially incorporated the recommendation of the Brookings task force that every district court should be required to implement its own expense and delay reduction plan after considering the recommendations of a local advisory group.<sup>171</sup> This approach, characterized as implementing reform from the "bottom up," had the dual benefits of drawing on the experience of those who actually practiced before the court in question and of "stimulat[ing] a much-needed dialogue between the bench, the bar, and client communities about methods for streamlining litigation practice."<sup>172</sup>

As one of the central aspects of litigation reform, Congress attempted to streamline discovery. Emphasizing the conclusions of the Harris Survey and the Brookings Report, Congress identified discovery abuse as a chief cause of needless cost and delay in the federal courts.<sup>173</sup> Congress listed discovery control by the judiciary as a necessary goal of civil justice reform in its cornerstone principles.<sup>174</sup> These principles, in turn, became a national directive on December 1, 1990, when President Bush signed the Civil Justice Reform Act of 1990.<sup>175</sup>

---

170. See *id.* at 2, 14–16, reprinted in 1990 U.S.C.C.A.N. at 6804, 6817–19.

171. See *id.* at 14, reprinted in 1990 U.S.C.C.A.N. at 6817.

172. JUSTICE FOR ALL, *supra* note 143, at 12, reprinted in *Senate Hearings* at 438.

173. S. REP. NO. 416, *supra* note 7, at 20, reprinted in 1990 U.S.C.C.A.N. at 6823. ("Discovery abuse is a principal cause of high litigation transaction costs. Indeed, in far too many cases, economics—and not the merits—govern discovery decisions."); see also *id.* at 22, reprinted in 1990 U.S.C.C.A.N. at 6825 ("The day is fast approaching—if it is not already here—when litigators will not try cases; they will just discover each other to death.") (quoting *Discovery*, LITIG., Fall 1988, at 7).

174. See *supra* notes 167–68 and accompanying text.

175. The bill, as signed into law on December 1, 1990, differed in some material respects from the bill as introduced by Senator Biden on January 25, 1990, although these differences are not relevant for purposes of this Article. For discussions of the bill's legislative evolution, see Mullenix, *supra* note 18, at 407–24. For a discussion on the merit of a legislative solution of litigation management abuse and delays over a judicially imposed solution, see Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 105, 109–17.

*B. Implementation of the Civil Justice Reform Act*

1. *Provisions*—The Act begins by setting forth a number of “findings,” which are closer to statements on policy than they are to factual assertions.<sup>176</sup> However amorphous, these findings share a common premise and, not surprisingly, they come to the same conclusion advanced by the Harris Survey, the Brookings Report, and Senator Biden’s task force: For civil justice reform to occur, district court judges must employ “effective litigation management” techniques in the administration of their dockets.<sup>177</sup>

The Act requires that each district court develop and implement a “civil justice expense and delay reduction plan.”<sup>178</sup> As stated by the Act, “[t]he purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”<sup>179</sup> Each court is instructed to develop a plan after receiving the recommendations of an advisory group.<sup>180</sup> The advisory groups are required to submit a report to their respective courts after examining a number of the court’s features, including the condition of the criminal and civil dockets, the trends in case filings, the principal causes of cost and delay in civil litigation, and the ways in which cost and delay can be reduced.<sup>181</sup> Both the advisory group report and the subsequent district court plan are then reviewed by the chief judges of each district court in the circuit and the chief judge of the court of appeals for that circuit, as well as by the Judicial Conference of the United States.<sup>182</sup>

The “principles and guidelines of litigation management and cost and delay reduction” set forth in the Act<sup>183</sup> focus primarily on increased judicial involvement in the administration of

---

176. See, e.g., Civil Justice Reform Act, Pub. L. No. 101-650, § 102(3), 104 Stat. 5089 (1990) (“The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants’ attorneys, and by the Congress and the executive branch.”).

177. § 102(5), 104 Stat. at 5089.

178. 28 U.S.C. § 471 (Supp. V 1993).

179. *Id.*

180. 28 U.S.C. § 478.

181. 28 U.S.C. § 472.

182. 28 U.S.C. §§ 472(d), 474(b).

183. 28 U.S.C. § 473(a).

pretrial procedure, from tracking cases according to their complexity, to "early and ongoing control of the pretrial process," to encouraging cost-effective discovery, and to the referral of appropriate cases to alternative dispute resolution programs.<sup>184</sup> Perhaps the most comprehensive of these case management principles is section 473(a)(3), which combines case development, discovery control, and settlement consideration in the context of complex or "other appropriate" cases.<sup>185</sup>

2. *Operation*—The Act does not *require* the use of any procedure listed in section 473(a)(1)–(6) for eighty-four of the ninety-four federal district courts. Rather, each district court (except for a designated group of ten),<sup>186</sup> in consultation with its appointed advisory group, need only consider whether to incorporate these principles into its own expense and delay reduction plan.<sup>187</sup> This discretionary approach does not apply,

---

184. § 473(a)(1)–(6); see also Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 169 (1992) ("[T]he almost exclusive emphasis of the Act is on tighter managerial control over pretrial proceedings, curbing discovery abuse, and recourse to alternative dispute resolution.").

185. § 473(a)(3). This section provides as a "principle[] and guideline":

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

- (A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;
- (B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil procedure;
- (C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—
  - (i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and
  - (ii) phase discovery into two or more stages; and
- (D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition.

*Id.*

186. See *infra* text accompanying notes 188–89.

187. See 28 U.S.C. § 473(a). Under § 473(b), each advisory group and district court must consider a number of procedural techniques, including requirements that (1) the parties submit a joint discovery plan, (2) all requests for extensions of deadlines for completion of discovery be signed by the attorney and client, and (3) a representative of the parties with authority to bind them be made available by telephone during settlement conferences. 28 U.S.C. § 473(b).

however, to those ten courts chosen as "Pilot Districts."<sup>188</sup> The Act instructed the Judicial Conference to select by December 31, 1991, ten district courts to participate in a pilot program in which the case management principles specified in the Act had to be included in each court's expense and delay reduction plan.<sup>189</sup>

Each pilot district had to complete its cost and delay reduction plan by December 31, 1991.<sup>190</sup> The pilot districts' plans must remain in effect for a minimum of three years.<sup>191</sup> At the end of this three-year period, "an independent organization with expertise in the area of Federal court management" will compare the cost and delay reduction in pilot districts with that of similar districts for which adoption of the Act's management principles was discretionary.<sup>192</sup> The Judicial Conference shall include this study in a report it must submit by December 31, 1996 to the Committees on the Judiciary for the House of Representatives and for the Senate.<sup>193</sup> In this report, the Judicial Conference must recommend either the expansion of the number of districts for which the Act's management guidelines are mandatory, or the implementation of alternative cost reduction programs.<sup>194</sup>

---

188. Civil Justice Reform Act, Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5097-98 (1990), reprinted in 28 U.S.C. § 471 app. (Supp. V 1993).

189. § 105(b), 104 Stat. at 5097. At least five of the pilot districts had to encompass metropolitan areas. *Id.* The Judicial Conference selected the following courts as pilot districts: Southern District of California, District of Delaware, Northern District of Georgia, Western District of Tennessee, Southern District of New York, Eastern District of Pennsylvania, Western District of Oklahoma, Southern District of Texas, District of Utah, and Eastern District of Wisconsin. CJRA REPORT, *supra* note 6, at 1-2.

190. § 105(b), 104 Stat. at 5097. Reports on the cost and delay reduction plans were due by December 31, 1993. § 105(c), 104 Stat. at 5098.

191. § 105(b)(3), 104 Stat. at 5097.

192. § 105(c), 104 Stat. at 5098. In May 1992, the Administrative Office of the United States Courts contracted with the RAND Corporation to conduct this study. See CJRA REPORT, *supra* note 6, at 25.

193. CJRA REPORT, *supra* note 6, at 25. The Act originally required the Judicial Conference to submit its report on December 31, 1995, but this deadline was extended by one year to allow for a more comprehensive report. *Id.*

194. § 105(c)(2), 104 Stat. at 5098. Also on December 31, 1995, the Judicial Conference must report on the Act's "Demonstration Program." § 104(d), 104 Stat. at 5097. This program designates five district courts to experiment with various case management techniques. The Western District of Michigan and the Northern District of Ohio are required to "experiment with systems of differentiated case management," and the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri are required to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution." § 104(a), (b), 104 Stat. at 5097.

This reporting requirement is part of the Act's long-term goal of bringing greater uniformity to the various case management principles that the district courts formulate in their plans. The recommendations of the Judicial Conference's report—whether to adopt across-the-board adoption of the Act's principles or to impose these or other procedures on some or all district courts—will ultimately form the basis of a wider plan regarding the reduction of cost and delay in the federal courts.<sup>195</sup> According to Senator Biden, this broader program will be implemented whether or not the principles delineated in the Act prove effective: "Regardless of the Judicial Conference's determination, proceedings will be initiated under the Rules Enabling Act to make permanent a national plan for assuring the speedy and inexpensive resolution of civil disputes."<sup>196</sup> The eventual standardization of these procedures will eliminate, at least in theory, the inefficiencies stemming from the present requirement that litigants familiarize themselves with different CJRA procedures in each of the ninety-four federal district courts.

3. *The Judge as Case Manager*—As of December 1, 1993, all ninety-four of the district courts had implemented their expense and delay reduction plans.<sup>197</sup> Of these ninety-four plans, eighty-six explicitly require "Early Involvement of [a] Judicial Officer."<sup>198</sup> The most prominent devices for the assertion of this judicial control are the setting of an early and firm trial date,<sup>199</sup> the holding of a case management conference, and

---

195. § 105(c)(2)(C), 104 Stat. at 5098.

196. Biden, *supra* note 151, at 16.

197. CJRA REPORT, *supra* note 6, at 2.

198. *See id.* app. I (showing which of the six principles of cost and delay reduction embodied in the Act have been adopted by each district court). The CJRA Report indicates that 96% of the courts have adopted the principle of controlling the extent and time for completion of discovery, 91% adopted the principle of early and ongoing judicial control of pretrial proceedings, and 87% instituted the principle of requiring the voluntary exchange of information as part of the discovery process. *Id.* at 4.

199. Several plans require that a firm trial date be set at the case management conference. Many jurisdictions establish an 18-month limit from the filing of the complaint until the date of trial. *See, e.g.*, U.S. DISTRICT COURT FOR THE DISTRICT OF IDAHO, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Mar. 1, 1992) (setting a goal that 95% of cases should be tried within 18 month period); U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 31, 1991) (suggesting that judge should set trial date within 18 months); U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 1991) (requiring trial no more than 18 months after filing of complaint); U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 18, 1991) (setting trial date within 12 to 18 months of complaint, depending on the type of case).

the establishment of a case management plan. Most important is the case management conference, at which such issues as case tracking, discovery schedules, motion practice, and a trial date are discussed.<sup>200</sup>

In the District of Massachusetts, for example, unless ordered otherwise, the parties are required to file a joint statement no later than five business days prior to the management conference. The statement must include (1) a joint discovery plan scheduling the time and length of all discovery events, (2) a schedule for the filing of motions, and (3) certifications signed by each party and its counsel that the party and counsel have conferred about establishing a budget for the progress of the litigation through trial.<sup>201</sup> Irrespective of whether the various district plans require the parties to submit a written report before the management conference, most of the plans instruct the court, after the conference, to set the pace of the litigation through the issuance of a management order addressing such matters as discovery limits, motion deadlines, the time and methods for the identification of experts, and the date of the next, or final, pretrial conference.<sup>202</sup>

The discovery parameters set forth in such management orders are often dictated by the track to which the court assigns the particular case.<sup>203</sup> The "tracking" of cases results from the Act's identification of differential case management

---

Other plans require that a firm trial date be set at the earliest possible point in the litigation. *See, e.g.*, U.S. DISTRICT COURT FOR THE DISTRICT OF DELAWARE, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 23, 1991); U.S. DISTRICT COURT FOR THE EASTERN AND WESTERN DISTRICT OF ARKANSAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 30, 1991).

200. *See, e.g.*, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 30, 1993); U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 18, 1991); U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 18, 1991).

201. U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, Rule 1.02(d) (Nov. 18, 1991).

202. *See, e.g.*, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 12, 1991) ("The Court should adopt guidelines for deposition practice, interrogatories, requests for documents and discovery of experts.").

203. *See, e.g.*, U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Aug. 19, 1993) (dividing the caseload into "fast track," "expedited track," "standard track," and "complex track" litigation); *see also* CJRA REPORT, *supra* note 6, at 11 ("[Thirty-two] district court plans establish limits, or suggest that judicial officers place limits, on interrogatories, depositions, or both. Typically, these limits . . . vary by track and length of discovery; more complex cases are given more time for discovery, and litigants are allowed a greater number of interrogatories and depositions.").



as a principle of cost and delay reduction.<sup>204</sup> Through categorizing the cases on its docket, the court becomes involved in the litigation at an early stage.<sup>205</sup> Thus, for example, under the Eastern District of Texas's plan, the judge must place a case on one of six tracks, ranging from least complex to most complex, shortly after the case is filed.<sup>206</sup> The first four tracks contain specific limitations on the kinds and amount of discovery that can be taken.<sup>207</sup> These limitations are not permissive; the parties cannot agree to alter these restrictions.<sup>208</sup> Rather, they must seek modification at the management conference with the judge.<sup>209</sup> Tracks five and six, however, do not have specific discovery limits because the cases assigned to them are too complex to be subjected to predetermined schedules.<sup>210</sup> For these types of cases, the judge must take an even more active role in shaping discovery, and the judge is instructed by the plan to tailor a discovery schedule that fits the particular management needs of the case.<sup>211</sup>

The active and central role of the judge in the management of the litigation is certainly the common theme in all of the district plans. This feature manifests itself in many ways. In the District of South Carolina, for example, the court itself sends interrogatories to the parties to gather information on the law and facts of the case, the witnesses involved, and the discovery anticipated by the parties.<sup>212</sup> In the Northern District of Indiana, the judge can order the parties to participate in a settlement conference when the judge deems such a conference appropriate.<sup>213</sup> In the Eastern District of Virginia, the court makes explicit in its plan what is otherwise an implicit

---

204. See 28 U.S.C. § 473(a)(1) (Supp. V 1993).

205. See CJRA REPORT, *supra* note 6, at 8 (“[Differential case management] brings together two trends in case management into one cohesive system: 1) the monitoring of case events; and 2) the supervision of time periods between case events through case processing ‘tracks,’ keyed to serve broad case types.”).

206. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, Art. I (Dec. 31, 1991).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 29, 1993).

213. U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 31, 1991).

tenet of the entire CJRA—that the court is to control the litigation, not the lawyers:

[T]he hallmark of this particular court is that its judges control and manage the litigation process. From the preliminary involvement in setting a discovery schedule . . . to the absolute control over deadlines and the trial date[,] the court makes it clear to attorneys and litigants alike that the court, and not the lawyers control the docket.<sup>214</sup>

By allowing the judicial officer to control the litigation process, rather than simply the trial itself, the Act incorporates values more typically associated with the civil law procedural tradition, as opposed to the common law tradition.<sup>215</sup> In the face of this early and ongoing judicial supervision of the litigation, the delineation between trial, traditionally controlled by the judge, and pretrial, historically controlled by the parties, begins to break down. Professor Judith Resnik has argued that this early and active involvement in the litigation can affect the judge's impartiality: "[A]s pretrial case managers, judges operate in the freewheeling arena of informal dispute resolution. Having supervised case preparation and pressed for settlement, judges can hardly be considered untainted if they are ultimately asked to find the facts and adjudicate the merits of a dispute."<sup>216</sup>

Unlike the civil law tradition, the judicial officer in charge of pretrial matters in the federal courts is also the officer before whom the trial takes place.<sup>217</sup> A central assumption of the Act, therefore, is that judges must be trusted to remain impartial, despite their more active role in the processing of the litigation.<sup>218</sup> The question remains whether the Act—with its emphasis on case management and de-

---

214. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 31, 1991).

215. See *supra* notes 65–75 and accompanying text.

216. Resnik, *supra* note 20, at 429–30 (footnotes omitted).

217. In the civil law procedural tradition, however, the judicial officer who handles the pretrial discovery stages of the case does not preside over the dispute at trial. See MERRYMAN, *supra* note 65, at 11–12; Jolowicz, *supra* note 73, at 247.

218. Chief Judge Robert F. Peckham stated, in response to Professor Resnik's concerns: "Impartiality is a capacity of mind—a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotional from one's rational faculties. Only because we trust judges to be able to satisfy these obligations do we permit them to exercise such power and oversight." Peckham, *supra* note 89, at 262.

emphasis of litigant autonomy—will effectuate a better system of justice than the one it seeks to reform.

*C. The Civil Justice Reform Act and the  
Lockean Tradition*

There are numerous criteria by which a legislative act may be evaluated. Its success may be determined, for example, based on whether the act achieved its goals, whether it did so in a cost-effective manner, and whether the act sacrificed any important values in achieving those goals. As this Article has shown, the CJRA represents a further stage in a significant movement away from the values that formed the historical and philosophical basis of Anglo-American law. Whether the Act ultimately achieves its goals remains to be seen. However, the changes necessary to achieve the Act's goals, attainable or not, are already emerging.

At this early stage of the Act's implementation, the single most discernible consequence of the Act is the transformation of the judge's pretrial role, from that of an overseer to that of a case manager. The judge has become the animating force in the civil litigation process. This transformation of the judge's role was deemed necessary by Congress in light of the growing demands placed on the system.<sup>219</sup> As Chief Justice Rehnquist observed:

[T]ime and again the nation has looked to the federal courts to handle a larger and larger proportion of society's problems. One can certainly doubt the wisdom of this trend, and particularly of some of its specific examples, but that is not the point. The point is that as a result of people

---

219. Cf. WILLIAM W. SCHWARZER & ALAN HIRSCH, *THE ELEMENTS OF CASE MANAGEMENT* 1 (1991). Schwarzer and Hirsch posit:

Rule 1 of the Federal Rules of Civil Procedure describes the goal of the judicial system: 'to secure the just, speedy, and inexpensive determination of every action.' If judges are to achieve this goal in the face of scarce judicial resources and the rising cost of litigation, they must manage the litigation process.

*Id.*

looking to the federal courts those courts have become overburdened and the system has become clogged.<sup>220</sup>

The CJRA was a congressional attempt to reform the civil justice system, not by enlarging it or by reducing the work that it had to do, but by making it more efficient. This efficiency is achieved through a transformation of the federal judge: what once was a passive, reactive umpire must now become an assertive, proactive manager. In the eyes of Congress, this transformation represented the best chance of keeping the federal courts accessible to all who sought their use.

The success of the CJRA must ultimately be judged, however, not merely on whether it increases the efficiency of the federal adjudicative process, but also on whether by doing so it increases the net freedom, autonomy, and liberty of individual litigants. One way to make this determination is to ascertain whether individuals would agree to the costs that the Act exacts in order to reap the anticipated benefits to the adjudicatory system. The CJRA, much like the move away from the state of nature in Locke's philosophy,<sup>221</sup> represents a significant philosophical compromise undertaken to achieve an otherwise seemingly elusive goal. For Locke, it was a wholly rational, though difficult, decision for humanity to leave the state of nature, for while the prospect of unlimited freedom existed in the state of nature, logistical difficulties resulted in a tremendous diminution of these freedoms.<sup>222</sup> By forfeiting some theoretical liberty and autonomy in order to enter civil society, individuals were able to *capture* a larger share of *actual* autonomy than was possible in the state of nature; that is, while the absolute freedoms available to individuals diminished in civil society, there was a net gain of freedoms actually enjoyed.<sup>223</sup>

Although Congress perhaps never so intended, the CJRA marks a similar transition. By increasingly empowering the judge at the expense of the litigants, the Act represents a clear diminution in the absolute autonomy of individuals who invoke the civil justice system, an autonomy that we as a society have long cherished. Underlying this transformation, however, is the notion that because of the expense and delay claimed to

---

220. Rehnquist, *supra* note 10, at 3.

221. See *supra* Part I.B.2.

222. See *supra* notes 34–44 and accompanying text.

223. See *supra* notes 42–44 and accompanying text.

beset the federal adjudicatory system, individuals have not been able to capture the sort of gains in autonomy and liberty that the system was designed to safeguard. The Act presupposes that, much like the decision to leave the state of nature, it is rational for a litigant to forfeit, up-front, some individual autonomy to reap a net gain in substantive liberty, namely access to a more meaningful federal civil adjudicative process.

The direct costs of the CJRA, in addition to the philosophical compromises, are real. For example, the Act adds a level of complexity to the practice of federal civil litigation by requiring each district court to implement its own cost and delay reduction plan. The lack of uniformity among the districts' plans places an additional burden upon the litigant or, more accurately, its counsel, who must learn the district's local rules, the applicable standing orders of the assigned judge, and also the particularities of the local expense and delay reduction plan.<sup>224</sup> For the CJRA to be justifiable, individuals would have had to agree to these costs in the hope of reaping greater benefit from the adjudicatory system. Whether this would occur is dependent upon, among other factors, how successful the Act proves to be in bringing about meaningful gains in the process of federal civil adjudication.

It is premature, at this stage, to evaluate the success of the Act. How effectively it brings about a net gain of fundamental freedoms remains to be seen. Nevertheless, the Act represents a bold move by Congress—surely far bolder than it realized—away from certain, primary concepts of the role of the judge in the Anglo-American system of justice. The Civil

---

224. One commentator argues that the requirements imposed on litigants and courts by the Act *reduces* the quality of justice that the courts are able to provide. See Tobias, *supra* note 93, at 1426–27. Tobias notes:

Growing balkanization adversely affects the civil justice system. For example, the earlier procedural developments, such as managerial judging, as elaborated by the CJRA's implementation, require that attorneys and parties prepare, file, and sign a greater number of papers and attend more conferences, multiply the steps in lawsuits, and enhance the emphasis on ADR. Most importantly, these considerations make it more difficult to ascertain the truth and to reach the merits of disputes, diminishing the quality of justice secured.

*Id.* at 1426.

Not surprisingly, the Judicial Conference's December 1994 report suggests that the Act is achieving more favorable results. See CJRA REPORT, *supra* note 6, at 27 ("Although empirical findings are not yet available, anecdotal reports, as well as a number of the advisory group reports and court plans, indicate that the Act has had a beneficial impact on the federal courts.").

Justice Reform Act stands as more than just an alteration to the mechanism of adjudication in the United States. It is a statement by Congress that it is necessary to deviate from certain time-honored values in order for civil litigants to have more meaningful access to the federal adjudicatory system in the future.

### CONCLUSION

The Civil Justice Reform Act has pushed the state's role in the administration of civil justice in this country increasingly toward an activist position. This has resulted in the further distancing of our judicial process from the Lockean and Blackstonian conception that individual rights and individual autonomy lead to, and are a justification for, the formation of the state, and has suggested a move toward the opposite view that the state empowers individuals with these rights. Such a move, while deemed necessary by both the legislature and the judiciary, further attenuates our system of government from that envisioned by the Founders during our nation's formative era. Whether such a step is necessary in order to achieve a more efficient, responsive, and effective judiciary should become clearer in the years to come.

