
ARTICLE

THE PRIVATIZATION OF PROCESS: REQUIEM FOR AND CELEBRATION OF THE FEDERAL RULES OF CIVIL PROCEDURE AT 75

JUDITH RESNIK[†]

The normative goals of the 1938 Federal Rules facilitated a reconceptualization of federal adjudication by welcoming into court a diverse array of persons who, as the century unfolded and equality mandates expanded, became rights-holders. As a consequence, courts came to serve as venues for democratic debates about rights and remedies. Seventy-five years later, that egalitarian project has contracted, and the Federal Rules have been refocused on management and judge-based settlement efforts.

That privatizing of process inside courts, as well as the devolution to agencies and outsourcing to private providers, is promoted by official voices within the federal judiciary. These new procedural forms close off public access by siting dispute resolution outside the public sphere. Not only are potential claimants losing knowledge of alleged injuries and the modes of redress, but these privatizing procedures undermine rationales for public and private investments in the lower federal courts. In 1995, the federal judiciary's Long Range Plan worried about the nightmare of ever-expanding filings and vanishing trials. By 2014, data on filings and investments showed flattening rates of filing, reductions in courthouse space, and tightening budgets. While the Long Range Plan's aspirations to control growth may be coming to fruition, the planners' hopes of preserving the federal courts as

[†] Arthur Liman Professor of Law, Yale Law School. © Judith Resnik. Thanks to my coauthors Robert Cover and Owen Fiss with whom I wrote *Procedure* (1986) and its subsequent edition *Adjudication and its Alternatives* (2003) and from whom I learned so much; to my coauthor Dennis Curtis with whom I wrote *Representing Justice* (2011); to the Symposium conveners Catherine Struve, Tobias Wolff, and Stephen Burbank; to my commentator, the Honorable William Young, and the other participants; and to Jason Bertoldi, Julia Brower, Allison Gorsuch, Andrew Hammond, Mark Kelley, Devon Porter, Andrew Sternlight, Megan Wachspress, and Mary Yanik for thoughtful, energetic, and generous research assistance.

lively venues, hospitable to diverse claimants trying cases, are not being fulfilled. Absent changes in rules, doctrines, and practices, the federal courts—like the 1938 Federal Rules—are moving into a decline and, with them, opportunities for public debates about the contours of legal norms.

I. EQUAL JUSTICE, CIRCA 1938, AND THEN, THEREAFTER	1794
II. INVESTING IN FEDERAL JUDICIAL POWER	1798
III. RECONCEPTUALIZING THE “JUDICIAL,” REWRITING THE RULES, AND RE-SITING ADJUDICATION: THE NEW PRIVATE PROCESS ...	1802
A. <i>The Settling, Managing, Multi-Tasking Judge</i>	1803
B. <i>Devolution</i>	1806
C. <i>Outsourcing</i>	1809
IV. ENDANGERED SPECIES: TRIAL JUDGES AND PUBLIC PROCESSES	1814
V. NIGHTMARISH SCENARIOS: LONG RANGE, STRATEGIC PLANNING, AND PROJECTED CASE FILINGS	1822
VI. BACK TO THE FUTURE: FLATTENED FILINGS AS A NORMATIVELY RISKY GOAL FOR THE FEDERAL COURTS	1825
VII. FORWARD TO THE FUTURE: THE DECLINE OF DEMOCRATIC OPPORTUNITIES FOR DEBATING NORMS	1835

I. EQUAL JUSTICE, CIRCA 1938, AND THEN, THEREAFTER

*“Drink to our Rules—they know of no flaw:
‘Equal Justice Under the Law!’”*

—George Wharton Pepper, circa 1938¹

In 1938, George Wharton Pepper, a former U.S. senator and member of the committee that drafted the Federal Rules, provided these closing lines in one of his “toasts” to the new Federal Rules of Civil Procedure.² Reading his words in 2014, it is possible to miss that the idea of “equal justice under law” was then innovative. In 1938, those words did not (as they do now) appear in scores of state and federal opinions.

Rather, the phrase “Equal Justice Under Law” had been newly minted in 1935 to grace the top of the front façade of the Supreme Court’s new

¹ *A Toast to the Federal Rules (Circa 1938)*, Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988*, 137 U. PA. L. REV. 1877, 1877 (1989).

² See Order, 297 U.S. 731 (1936). Pepper also served as the Committee’s vice-chair. See Charles E. Clark, *Philadelphia Lawyer: An Autobiography*, 54 YALE L.J. 172, 173 (1944) (book review).

courthouse.³ The architects suggested the words to fit the space allotted above the pillars in the Court's first building of its own. Etched on the other side are the words "Justice the Guardian of Liberty,"⁴ which captured the constitutional jurisprudence of the era, as "liberty"—of contract and from regulation—was its leitmotif. Indeed, at the 1932 ceremony laying the cornerstone, Chief Justice Charles Evans Hughes called the new building "a testimonial to an imperishable ideal of liberty under law" and made no mention of equality.⁵

Yet today "Equal Justice Under Law" is the "tag line" for the U.S. Supreme Court, which uses it on the cover of brochures.⁶ The linkages between the Supreme Court's iconic marble temple and equality under law were forged in the decades that followed, through *Brown v. Board of Education* in 1954 and *Reed v. Reed* in 1971, intersecting with landmark federal laws protecting equal rights in accommodations, credit, housing, salaries, and employment, supplying lawyers by way of the Legal Services Corporation, mandating fee-shifting for victorious civil rights claimants, and thereby equipping individuals with resources to pursue rights in courts.

The toast by Pepper in 1938 predates these renovations of American law. Yet the normative goals that infused the 1938 Federal Rules facilitated this reconceptualization of federal adjudication by welcoming into court a diverse array of persons, who became rights-holders as the century unfolded. Many scholars have chronicled the underpinnings of the 1938 Rules—with their functionalist, anti-formalist commitments to easing barriers to entry through trans-substantive, uniform, national provisions that expanded opportunities for information exchange, vested discretion in trial judges, and aimed for efficient decisionmaking focused on the merits of claims.⁷

The equality goals of the 1930s rested in part on the trans-substantivity of the Rules, cutting across an eclectic expanse of civil proceedings and

³ See Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: The New and Iconic Supreme Court*, 38 J. SUPREME CT. HIST. 207, 232-33 (2013) [hereinafter Resnik & Curtis, *Inventing Democratic Courts*].

⁴ See *id.* at 233.

⁵ Charles Evans Hughes, *Corner Stone of New Home of Supreme Court of the United States Is Laid*, 18 A.B.A. J. 723, 729 (1932).

⁶ See Resnik & Curtis, *Inventing Democratic Courts*, *supra* note 3, at 233 and at 250 n.135.

⁷ See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1127-65 (1982); Arthur R. Miller, *Simplified Pleading. Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494-98, 502-15 (1986); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972-77 (1989); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

assuming the fungibility of litigants. All kinds of cases were subject to the same regime. Further, to the extent that any rule worked to the advantage of a “plaintiff” or a “defendant,” that advantage would be neutralized over time as, in some cases, a given person or entity would be a plaintiff and in other cases, a defendant—shaping a sense of a new neutral system, resulting in “equal justice under law.”

For several decades, the 1938 Rules rested on their laurels. In 1963, Charles Clark, who had been the 1938 reporter, celebrated his project as he sought to deflect efforts to remove the Supreme Court from its role in rulemaking; Clark argued the system had worked. The Rules, “professionally conceived and professionally executed,” had permeated “the daily professional life of all lawyers” and garnered no “criticism of major character.”⁸

But criticisms have emerged as the progressive aspirations for simplicity, uniformity, and predictability met the challenges generated by new technologies, transformations in the legal profession, the constitutional and statutory innovations sketched above, and conflicts over norms that the Rules both represent and have engendered. The 1938 Federal Rules came into being not only in the era of segregation but also of mimeographing. Decades away were processes such as photocopying, computing, electronic data storage, and 3D printing, along with employment discrimination class actions, mass tort aggregation, same-sex marriage litigation, and thousand-person law firms.

Yet Clark and his colleagues reshaped ideas about what federal courts and judges do, how state courts organize their procedures, the ways in which the law is taught and lawyers practice, and who can be litigants. Federal judges gained their shared identity as a national cohort with the same daily practices.

For litigants, the 1938 Rules were redistributive, providing diverse sets of claimants with access to courts. Clark wrote his hortatory praise when a committee, chartered by Chief Justice Earl Warren, was reviewing the Rules. Benjamin Kaplan, a Harvard Law School professor, was its reporter, assisted by Arthur Miller.⁹ Their committee is known for its focus on multi-party litigation and for its signature accomplishment, the revision of Rule 23, governing class actions. The revised Rules paved the way for groups—tenants, consumers, employees, recipients of benefits, school children, and prisoners—to come to federal court.

⁸ Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC'Y 250, 254 (1963).

⁹ See Announcement of the Chief Justice of the United States, Committees on Rules Practice and Procedure of the Judicial Conference of the United States (April 4, 1960), reprinted in 28 U.S.C.A. at xvii (West 1960); Arthur R. Miller, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1354, 1356 (2011).

The now-national shorthand of the (b)(2) class worked in tandem with the civil rights revolution, for it was expressly designed to enable enforcement of school desegregation decrees.¹⁰ The (b)(3) class brought—as Kaplan explained—new remedies for consumers, bundling small-value claims.¹¹ The class action rule, intersecting with the judge-promoted multidistrict litigation statute and mass tort defendants entering bankruptcy, shifted expectations, as various forms of aggregation became the norm for diverse kinds of claimants.¹²

By redistributing access to courts, the Rules undermined the earlier premises of fungible litigants and produced the current understanding that, in a substantial number of cases, governments and corporations would be defendants, charged by individuals or groups with imposing harms. “Plaintiff” and “defendant” became identity-based categories that meant that not all would benefit or suffer equally from the impact of civil rules—a point that repeat players came to understand well.¹³

What the 1938 Federal Rules also gave litigants and the public was access to information. The asbestos litigation is a “poster case” of discovery’s powers and of the impact of public disclosure on debates about liability for harms and the shape of remedies.¹⁴ Thus, at the fiftieth anniversary of the Federal Rules in 1988, Benjamin Kaplan concluded that the Rules

have worked to considerable (if not universal) satisfaction to support revolutions of the substantive law. The much criticized discovery function and class action remain together the scourge of corporate and governmental malefactors.¹⁵

¹⁰ See David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702-08 (2011); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991) [hereinafter Resnik, *From “Cases” to “Litigation”*].

¹¹ Benjamin Kaplan, *A Prefatory Note, The Class Action—A Symposium*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

¹² Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 656-61 (2011); Resnik, *From “Cases” to “Litigation,”* *supra* note 10, at 21-24.

¹³ See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

¹⁴ For example, through discovery, lawyers uncovered the “Sumner Simpson papers,” demonstrating that asbestos manufacturing companies were aware in the 1930s through 1950s of the dangers of asbestos but did not inform workers of its dangers to health. See, e.g., *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1372-74 (3d Cir. 1991).

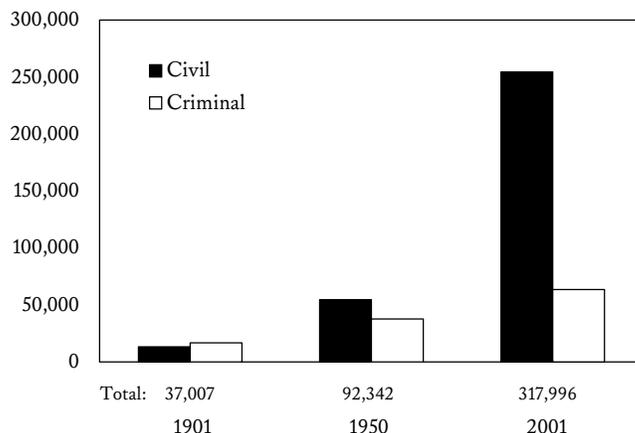
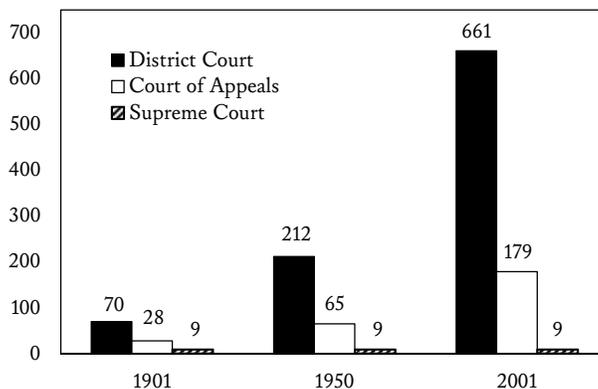
¹⁵ Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1881 (1989). He added that “fundamental faults of litigation procedure—for example, the handicapping of the weak, despite statutory

II. INVESTING IN FEDERAL JUDICIAL POWER

Congress not only delegated rulemaking power to the judiciary but also endowed federal judges with an array of enforcement powers. Between the 1960s and the 1990s, Congress created hundreds of new federal causes of action, thereby inviting investment of private resources—both funded and pro bono—for enforcement of or to defend against these new rights. Congress added public resources by expanding the Justice Department and other federal agencies, chartering more life-tenured judgeships, inventing (at the behest of federal judges) the position of magistrate judge, adding bankruptcy judges, expanding the numbers of law clerks and other court staff, and authorizing the construction of hundreds of new courthouses.

During much of the twentieth century, the federal courts were a booming industry. Two charts and a photograph provide a quick summary. Figure 1 tracks the growth in filings, from approximately 30,000 cases brought yearly in 1901 to more than 300,000 filed in 2001. Figure 2 maps the rise in life-tenured judgeships, from around 100 authorized judgeships in 1901 to more than 850 life-tenured positions in 2001.

help for them here and there—should be attributed not to the Rules, but rather to the state of the nation . . . ” *Id.*

Figure 1: Federal District Court Filings: 1901, 1950, 2001¹⁶Figure 2: Federal Court Article III Judgeships: 1901, 1950, 2001¹⁷

¹⁶ This figure is derived from multiple sources. Data for 2001 are from ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL CASELOAD STATISTICS: MARCH 31, 2001 tbls.C & D (2001). Data for 1950 are from David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 126 tbl.14 (1981) (citing ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1950)). Data for 1901 are from *id.* at 103 tbl.6 (citing 1 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934); 2 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 111 (1934)) and are estimated. Numbers do not include bankruptcy filings.

¹⁷ Data are derived from ADMIN. OFFICE OF THE U.S. COURTS, JUDGES AND JUDGESHIPS: AUTHORIZED JUDGESHIPS (2012), available at <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/all-judgeships.pdf>; see also ADMIN. OFFICE OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. DISTRICT COURTS, available at <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/history-district-judgeships.pdf>.

Another way to see the changes is through understanding the history of courthouse construction and by looking at courthouse buildings. In the mid-1930s, the first federal skyscraper courthouse (designed, as was the Supreme Court, by Cass Gilbert) opened in New York City.¹⁸ The verticality of the twentieth-century charts, tracking filings and judgeships, is matched by the Thomas F. Eagleton United States Courthouse in St. Louis, Missouri (shown in Figure 3) which, when it opened in 2000, was the largest federal courthouse in the country.¹⁹

Figure 3: Thomas F. Eagleton United States Courthouse,
St. Louis, Missouri²⁰



Photographer: The Honorable David D. Noce

¹⁸ See Resnik & Curtis, *Inventing Democratic Courts*, *supra* note 3, at 231-35.

¹⁹ U.S. GEN. SERVS. ADMIN., THOMAS F. EAGLETON UNITED STATES COURTHOUSE, ST. LOUIS, MISSOURI 12 (2001).

²⁰ Architects: Hellmuth, Obata + Kassabaum, Inc., 2000. Photograph courtesy of and reproduced with the permission of the photographer, the Honorable David D. Noce, U.S. Magistrate Judge, Eastern District of Missouri.

The federal judiciary's administrative girth likewise expanded. In 1939, Congress ended the Department of Justice's role in providing administrative assistance to the federal judiciary and substituted a new entity, the Administrative Office of the U.S. Courts (AO), operating inside the judicial branch.²¹ While the AO once camped in the Supreme Court's basement, the construction of the Thurgood Marshall Federal Building in Washington, D.C. in 1992 provided dedicated space.²² The facility is shared by the Federal Judicial Center (FJC), chartered in 1968 to train judges through socializing them to the mores of the Rules and through research, including on the Rules' impact.²³ By 2006, some 30,000 people worked for the federal judiciary.²⁴

While the jurisprudence of William Rehnquist is not associated with an expansive view of federal court jurisdiction, the expansion of the federal judiciary's footprint took place during his tenure as Chief Justice; Congress invested more than eight billion dollars in courthouse buildings.²⁵ In the mid-twentieth century, the policymakers of the courts—the U.S. Judicial Conference—had sought more “court quarters”; by century's end, many federal judges sat in new courthouses, including some in buildings designed by architects such as Henry Cobb, Thom Mayne, Richard Meier, and Moshe Safdie.²⁶ The more than 500 segregated, purpose-built facilities that exist today make it hard to remember that, in 1850, no federal building had the name “U.S. Courthouse” on its front door.²⁷

²¹ Pub. L. No. 76-299, 53 Stat. 1223, 1223 (codified as amended at 28 U.S.C. § 601 (2012)).

²² See generally *Thurgood Marshall Federal Judiciary Building*, ARCHITECT OF THE CAPITOL, <http://www.aoc.gov/capitol-buildings/thurgood-marshall-federal-judiciary-building> (last visited May 12, 2014).

²³ See, e.g., FED. JUDICIAL CTR., *THE BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* (6th ed. 2013), [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf).

²⁴ See *New Director of the Administrative Office Named*, THIRD BRANCH NEWS (May 2006), http://www.uscourts.gov/news/TheThirdBranch/06-05-01/New_Director_of_the_Administrative_Office_Named.aspx.

²⁵ See Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 895 (2012) [hereinafter Resnik, *Building the Federal Judiciary*].

²⁶ See JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 147, 168, 175 fig.118 (2011).

²⁷ See Resnik, *Building the Federal Judiciary*, *supra* note 25, at 861, n.127; RESNIK & CURTIS, *REPRESENTING JUSTICE*, *supra* note 26, at 140-42.

III. RECONCEPTUALIZING THE “JUDICIAL,” REWRITING THE RULES, AND RE-SITING ADJUDICATION: THE NEW PRIVATE PROCESS

But those grand buildings may soon be obsolete. The norms for judges have changed, as have the hopes for what happens in courts. Through an amendment process now dominated *by* federal judges, the Federal Rules have come to insist on a charter *for* judges different than what the 1938 Rules had provided. Today’s Rules instruct judges to promote alternative dispute resolution (ADR). Some of these procedures are court-based yet private. Other forms of ADR are the devolution of adjudication to administrative agencies and the outsourcing of decisions to private ADR providers. These three changes constitute what should be understood as a “New Private Process,” displacing the model proffered in the 1938 Federal Rules.

These practices are often justified as enhancing “access” for rights-holders by improving opportunities to bring claims less expensively and more expeditiously. One issue, not explored here, is the empirical question of whether either ADR methods or court-based lawsuits succeed in enhancing claimants’ access to remedies. My focus in this Article is on how these practices affect another form of “access”—the public’s opportunities to have firsthand knowledge of the claims brought, the interactions among disputants, and the decisions made.

“All courts shall be open” are words regularly found in state constitutions.²⁸ The federal Constitution protects rights to “public” trials for criminal defendants,²⁹ as well as for treason,³⁰ and public access to civil litigation derives from a mix of common law traditions, jury trial rights, the First Amendment, and the Due Process Clause. Yet as detailed below, the rise of judge-based settlement efforts, of devolution to agencies, and of outsourcing to private providers—wholeheartedly promoted by official voices of the federal judiciary—closes off public access by siting dispute resolution outside the public sphere. Not only are potential claimants losing knowledge of alleged injuries and the modes of redress, but these new forms of dispute resolution undermine rationales for public and private investments in the lower federal courts.

²⁸ See Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 app. 1 at 999-1003 (2012) [hereinafter Resnik, *Constitutional Entitlements*].

²⁹ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

³⁰ See U.S. CONST. art. III, § 3, cl. 1 (“No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

A. *The Settling, Managing, Multitasking Judge*

The 1938 Rules shaped what Rule 16 called “Pre-Trial Procedure; Formulating Issues,”³¹ vesting discretion in judges to confer with lawyers on trial preparation, that is, amending pleadings, the “possibility of obtaining admissions . . . [to] avoid unnecessary proof,” limiting expert witnesses, and such “other matters as may aid in the disposition of the action.”³² Fifty-five years later, the “pretrial” lost its hyphen and shifted its focus.³³ The discretionary possibility of a conference has become increasingly obligatory, as judges are extolled to use their managerial authority.³⁴ Today, Rule 16 is the centerpiece of judicial management of both lawyers and of cases, and the aim is avowedly to promote settlement without trial.

The concept of settlement was not foreign in the 1930s. Yet the 1938 Rules neither used the term “settlement” nor tasked judges with its promotion. Federal Rule 68 did provide for an “offer of judgment”³⁵ and the Rules prohibited class actions from being “dismissed or compromised without the approval of the court.”³⁶ In contrast, the current version of the Federal Rules uses the word “settlement” in the texts of Rules 11,³⁷ 16, 23,³⁸ and 26.³⁹

The evolution of Rule 16 both reflected and produced changing norms about the judicial role. In the middle of the twentieth century, a group of judges sought to school newly-appointed judges to be “early convert[s] to

³¹ FED. R. CIV. P. 16 (1938). The 1938 Federal Rules can be found at 308 U.S. 645 et seq. (1938).

³² FED. R. CIV. P. 16 (1938).

³³ See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 936 (2000) [hereinafter Resnik, *Trial as Error*].

³⁴ See FED. R. CIV. P. 16(b) (amended 1993); see, e.g., Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 850-51 (2013); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 399-402 (1982).

³⁵ See FED. R. CIV. P. 68 (1938).

³⁶ FED. R. CIV. P. 23(c) (1938).

³⁷ The current Rule 11 provides that monetary sanctions may not be awarded on the court’s initiative unless the court “issued [its] show-cause order . . . before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.” FED. R. CIV. P. 11(c)(5)(B). Cf. FED. R. CIV. P. 11 (1938).

³⁸ The 1938 version, “Class Actions,” prohibited dismissal or compromise without court approval. FED. R. CIV. P. 23(c) (1938). The 2003 Rule added a new subsection, “Settlement, Voluntary Dismissal, or Compromise,” detailing the courts’ role. FED. R. CIV. P. 23(e).

³⁹ In 1970, the word “settlement” was used to explain that parties could obtain discovery of insurance policies. FED. R. CIV. P. 26(b)(2) advisory committee’s note to the 1970 amendments. The 1993 amendments require parties before scheduling conferences to “disclose, without awaiting formal discovery requests, certain basic information that is needed to . . . make an informed decision about settlement.” FED. R. CIV. P. 26(a) advisory committee’s note to the 1993 amendments.

pre-trial" management.⁴⁰ Initially responding to "protracted" cases,⁴¹ judges crafted special procedures for control, which migrated from the "big case" to a broader spectrum of the docket.⁴² Yet judges debated the propriety of raising the question of settlement, as some argued that settlement could be a "by-product" of pretrial conferences but ought not to be an objective of judges convening those conferences.⁴³

By the 1980s, the Rules had enlisted judges in the pursuit of settlement. The 1983 amendments committed judges to the managerial model; the revisers argued that it had "become commonplace to discuss settlement at pretrial conferences."⁴⁴ A Rule 16 conference was no longer "focused solely on the trial"; instead, Rule 16 made "case management an express goal of pretrial procedure,"⁴⁵ and one purpose was that "settlement should be facilitated at as early a stage of the litigation as possible."⁴⁶ At "any conference under this rule . . . [participants were to] consider . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute"; "extrajudicial procedures to resolve the dispute"⁴⁷ were explained to be "adjudicatory techniques outside the courthouse."⁴⁸

A decade later, those "extrajudicial procedures" officially moved *inside* the courthouse. The 1993 amendments detailed more of the work and power of the managerial judge, authorized to direct "a party or its representative" to "be present or reasonably available by telephone in order to consider possible settlement of the dispute."⁴⁹ No activities were described as "extrajudicial"; instead "special procedures"⁵⁰ were those which aimed to "assist in resolving the dispute."⁵¹

Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary

⁴⁰ See Resnik, *Trial as Error*, *supra* note 33, at 945, n.72.

⁴¹ *Id.* at 938-43.

⁴² *Id.*

⁴³ See *id.* at 947-48.

⁴⁴ FED. R. CIV. P. 16(c)(7) advisory committee's note to the 1983 amendments.

⁴⁵ FED. R. CIV. P. 16(a) advisory committee's note to the 1983 amendments.

⁴⁶ FED. R. CIV. P. 16(a) (1983).

⁴⁷ FED. R. CIV. P. 16(c)(7) (1983).

⁴⁸ FED. R. CIV. P. 16(c)(7) advisory committee's note to the 1983 amendments. In 1988, Kaplan raised concerns that revisions were "engaging [judges] . . . in pursuit of settlement and other shortcuts . . . [and] encourag[ing] the modification of judges' sanctified patterns of behavior and thought, with consequences hard to foresee or appreciate." Kaplan, *A Toast*, *supra* note 15, at 1880-81; see also Resnik, *Managerial Judges*, *supra* note 34, at 377-78.

⁴⁹ FED. R. CIV. P. 16(c) (1993).

⁵⁰ FED. R. CIV. P. 16(c)(9) (1993).

⁵¹ See FED. R. CIV. P. 16(c)(9) advisory committee's note to the 1993 amendments.

jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to the consensual resolution of the dispute without a full trial on the merits.⁵²

Further, instead of the 1983 notes cautioning judges against imposing “settlement negotiations on unwilling litigants,”⁵³ the 1993 Rule 16 gave judges power to compel participation.⁵⁴ Congress also supported this shift in judicial role through enactment in 1990 of the Civil Justice Reform Act, prompting in part the 1993 amendments.⁵⁵

Rule 16 has not produced an extensive body of law, but several of the reported cases come from litigants protesting judicial insistence on ADR or the sanctions judges imposed on litigants reluctant to use ADR.⁵⁶ Judicial engagement with settlement has spawned other norm shifts, including a revised approach to *ex parte* contact. The Code of Judicial Conduct for United States Judges now permits judges to “confer separately with the parties and their counsel in an effort to mediate or settle pending matters,” while warning that judges “should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.”⁵⁷

The denouement of this thirty-year transition can be seen on the federal judiciary’s website, reproduced in part in Figure 4; the homepage welcomes visitors to “Understanding the Federal Courts” by explaining “How the

⁵² *Id.*

⁵³ FED. R. CIV. P. 16(c)(7) advisory committee’s note to the 1983 amendments.

⁵⁴ *See* FED. R. CIV. P. 16(b) advisory committee’s note to the 1993 amendments. Research questions the efficacy of judicial case management, in terms of time and money. *See generally* JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

⁵⁵ *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–482 until it was to sunset on Dec. 1, 1997). That act instructed each district court chief judge to appoint advisory committees, charged with developing methods of promoting efficient dispute resolution. *See also* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–58 (2012)).

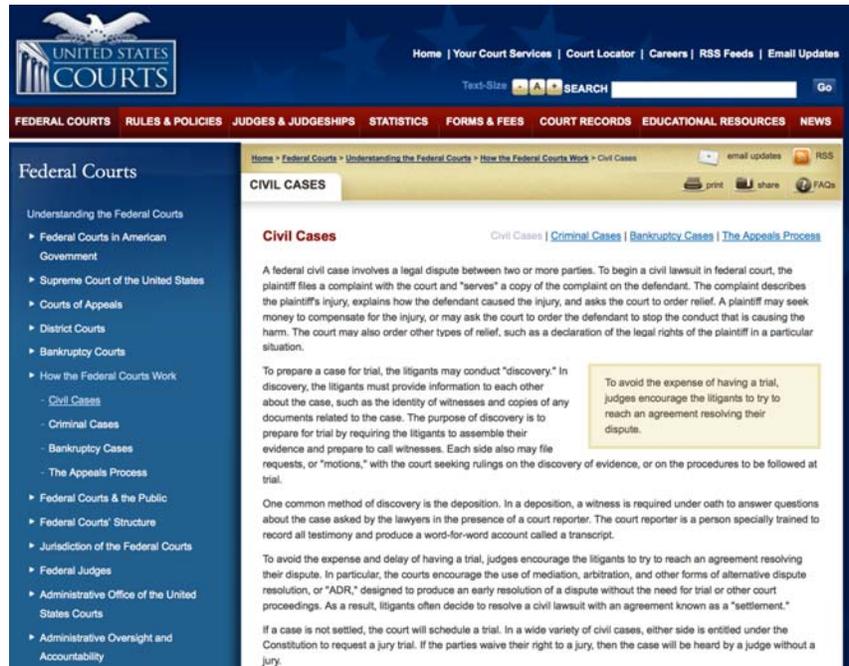
⁵⁶ *See, e.g.,* United States v. U.S. Dist. Court for N. Mar. I., 694 F.3d 1051, 1061-62 (9th Cir. 2012) (holding that the government can be ordered to participate in mandatory settlement conferences but that requiring a government official with authority to settle to appear at a first settlement conference was an abuse of discretion); *Pinero v. Corp. Courts at Miami Lakes, Inc.*, 389 F. App’x 886, 888-89 (11th Cir. 2010) (affirming, based on an abuse of discretion review, a \$2500 fine against a plaintiff’s attorney for failing to bring her client to a settlement conference).

⁵⁷ *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(d), cmt. 3A(4) (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Volo2A-Cho2.pdf>.

Federal Courts Work.” One part of the text, set off in a box for emphasis, reads:

To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.⁵⁸

Figure 4: Homepage of the United States Federal Courts⁵⁹



B. Devolution

The Federal Rules are the centerpiece of this Symposium, but the norms they reflect and produce are part of a larger context, revising adjudication's reach. Below I sketch those links through a brief discussion of the delegation of adjudicatory functions to administrative agencies and the outsourcing to private entities through the Supreme Court's expansive reading of the 1925

⁵⁸ *Civil Cases*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CivilCases.aspx> (last visited May 12, 2014).

⁵⁹ *Id.*

Federal Arbitration Act (FAA). A few graphics and a brief review of case law provide insights into both.

Figure 5 captures the congressional investments in administrative adjudication. As of 2001, about 850⁶⁰ life-tenured judgeship lines were authorized; another 324⁶¹ slots went to bankruptcy judges and some 471⁶² to magistrate judges, while about 4700⁶³ judges served in federal administrative agencies. That same year, some 85,000 evidentiary proceedings—defined to include a proceeding in which a person testified but not necessarily at a trial—took place in federal courthouses before magistrate and bankruptcy judges as well as Article III judges. As Figure 6 details, some 570,000 evidentiary proceedings took place in four high-volume federal agencies, dealing with social security, veteran, immigration, and employment claimants.⁶⁴ The Article III judiciary has both promoted such delegation⁶⁵ and by and large found it constitutional, as many efforts to limit the jurisdiction of administrative law judges and magistrate judges have been rebuffed.⁶⁶ The Court has, however, limited delegation to bankruptcy court judges.⁶⁷

⁶⁰ ADMIN. OFFICE OF THE U.S. COURTS, JUDGES AND JUDGESHIPS: AUTHORIZED JUDGESHIPS, *supra* note 17.

⁶¹ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2005 tbl.1.1 (2005), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2005/Table101.pdf>.

⁶² *Id.*

⁶³ RAYMOND LIMON, OFFICE OF ADMIN. LAW JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY: THEN AND NOW: A DECADE OF CHANGE 1992-2002 app. C, at 7 (2002).

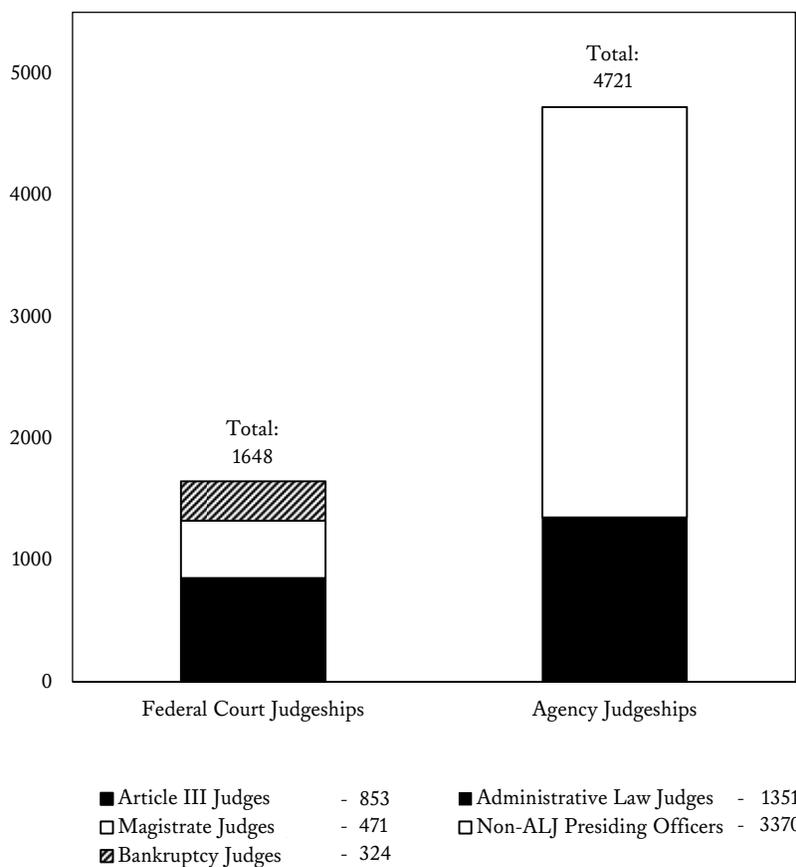
⁶⁴ Cf. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 500 (2004).

⁶⁵ See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 33-34 (1995), available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf> [hereinafter LONG RANGE PLAN].

⁶⁶ See, e.g., CFTC v. Schor, 478 U.S. 833 (1986); United States v. Raddatz, 447 U.S. 667 (1980); Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 626-47 (2002).

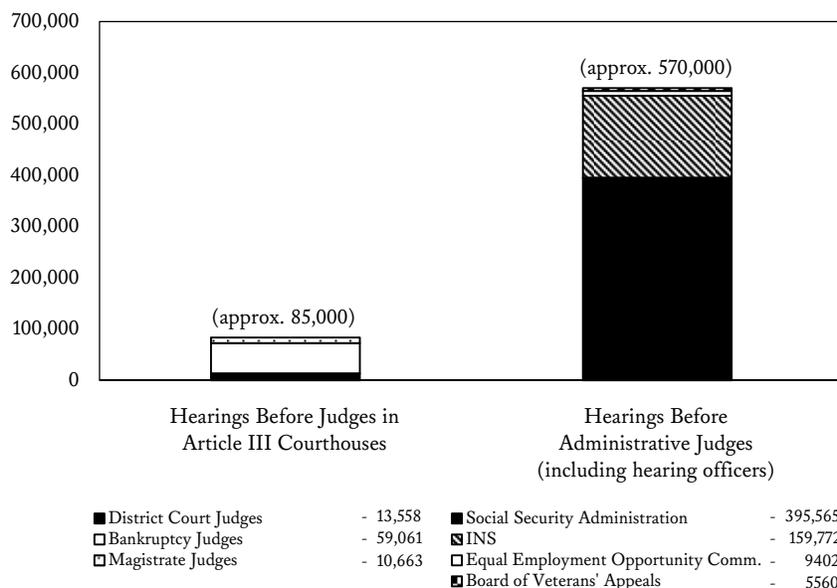
⁶⁷ See Stern v. Marshall, 131 S. Ct. 2594 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The implications of these decisions are the subject of *Executive Benefits Insurance Agency v. Arkison*, 702 F.3d 553 (9th Cir. 2012), cert. granted, 133 S. Ct. 2880 (2013).

Figure 5: Authorized Judgeships in Federal Courts and in Federal Agencies: 2001⁶⁸



⁶⁸ Data regarding agency judgeships are derived from LIMON, *supra* note 63, app. C at 7; see also Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1008 (2004). Information presented regarding Article III, magistrate, and bankruptcy judgeships comes from ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 61. Versions of Figures 5-7 appeared originally in Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1129-35 (2006).

Figure 6: Estimate of Evidentiary Proceedings in Article III Courthouses and in Four Federal Agencies: 2001⁶⁹



C. Outsourcing

A third mechanism of privatization comes from the enforcement of contracts mandating arbitration in lieu of adjudication. My own 2002 cell phone service document, reproduced in Figure 7, provides an example. By activating the service, I waived rights to court and became obligated to “arbitrate disputes arising out of or related to this or prior agreements.” In purported symmetry, this document also states that both the provider and the consumer were precluded from pursuing any “class actions or class arbitrations.” Once, such provisions would not have been enforced, but today consumers are subject to their strictures. Like revisions of the Federal Rules, the law on mandatory arbitration has been built on changing views about the role of courts and the value of litigation.

⁶⁹ Data are derived from ADMIN. OFFICE OF THE U.S. COURTS, 2001 JUDICIAL BUSINESS 24-25, 30 (2001). Classifying and quantifying the volume of administrative proceedings is complex; the methods are detailed in Memorandum from Natalie Ram & Bertrall Ross to author (June 6, 2006) (on file with author).

Figure 7: Example of Cellular Phone Document: 2002



YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). . . . YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE . . .

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

In 1925, the FAA mandated that a “written provision in any maritime transaction or a contract evidencing a transaction involving commerce” (unless it was in “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”) was “valid, irrevocable, and enforceable”⁷⁰ subject to “such grounds as exist at law or in equity for the revocation of any contract.”⁷¹ As those familiar with Commerce Clause jurisprudence of that era know, the exclusion was directed at the very workers that the federal legislature had the authority to regulate.

The Supreme Court once read the FAA as neither precluding other federal regulatory goals nor applying when parties had significantly different bargaining power. As the Court explained in 1953 in *Wilko v. Swan*,⁷² even if some buyers and sellers “deal[t] at arm’s length on equal terms,” the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor.”⁷³ Further, arbitrators’ awards could “be made without explanation of their reasons and without a complete record of their proceedings,” and hence, one could not examine “arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact.’”⁷⁴

In the 1980s, the Supreme Court revised its views. Rejecting the *Wilko* Court’s concern that arbitration was a “method of weakening the protections afforded in the substantive law to would-be complainants,”⁷⁵ the Court reread congressional statutes to require that persons having made the agreement to arbitrate were obliged to those agreements.⁷⁶ Further, in 1984, in *Southland Corp. v. Keating*,⁷⁷ the Court extended the FAA’s application to state courts despite the California Franchise Investment Law’s requirement of “judicial consideration of claims.”⁷⁸ Dissenters (including Justice O’Connor and Justice Rehnquist) objected that the Court had turned the FAA, a federal procedural right irrelevant in state courts, into a “newly discovered federal right.”⁷⁹ In 2001 and thereafter, a five-person majority expanded the FAA again by applying it to employees, even though employees had alleged

⁷⁰ 9 U.S.C. §§ 1–2 (2012).

⁷¹ *Id.* § 2 (2012).

⁷² 346 U.S. 427 (1953).

⁷³ *Id.* at 435–38.

⁷⁴ *Id.* at 436.

⁷⁵ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

⁷⁶ *Id.* at 480.

⁷⁷ 465 U.S. 1 (1984).

⁷⁸ *Id.* at 10.

⁷⁹ *Id.* at 22–23 (O’Connor, J., dissenting).

they had rights under state antidiscrimination laws and even when waivers appeared on job applications.⁸⁰

The many decisions, often 5–4, regularly rely on the Court’s view that arbitration is to be preferred to adjudication. In 2011, in *AT&T Mobility LLC v. Concepcion*,⁸¹ the Court enforced waivers of class actions in either arbitration or the courts through provisions like that accompanying my cell phone. The majority, per Justice Scalia, relied on its prior readings of the FAA (“our cases”) to support the idea that the FAA not only mandated “bilateral” arbitration but also did so to avoid the “costliness and delays of litigation.”⁸² Further, the 2012 decision in *CompuCredit Corp. v. Greenwood*,⁸³ describing the “federal policy favoring arbitration agreements,”⁸⁴ coupled with the 2013 ruling in *American Express Co. v. Italian Colors Restaurant*,⁸⁵ has narrowed the doctrine’s openness to reading other federal statutes to require adjudication and to assessing whether alternatives impose prohibitive expense or are otherwise inadequate to vindicate federal statutory rights.⁸⁶

The Court’s recent interpretation of the FAA shares features central to the Court’s new approach to the Federal Rules. First, like *Bell Atlantic Corp. v. Twombly*⁸⁷ and *Ashcroft v. Iqbal*,⁸⁸ the FAA rulings are laced with discussion of the burdens of adjudication. Second, just as limits on class actions such as *Wal-Mart Stores, Inc. v. Dukes*⁸⁹ undercut Rule 23’s capacity to augment resources for claimants, the FAA case law ignores resource disparities between parties.⁹⁰ Third, the flexibility of arbitration that was seen in

⁸⁰ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The EEOC can, under certain circumstances, pursue claims that the employee cannot. See *EEOC v. Waffle House, Inc.*, 534 U.S. at 297–98.

⁸¹ 131 S. Ct. 1740 (2011).

⁸² *Id.* at 1749–50 (internal quotation marks omitted).

⁸³ 132 S. Ct. 665 (2012).

⁸⁴ *Id.* at 669.

⁸⁵ 133 S. Ct. 2304 (2013).

⁸⁶ A few state courts have held some obligations to arbitrate unenforceable. See, e.g., *Gandee v. LDL Freedom Enter., Inc.*, 293 P.3d 1197, 1200–03 (Wash. 2013) (holding a four-sentence arbitration agreement unconscionable in three ways).

⁸⁷ 550 U.S. 544 (2007).

⁸⁸ 556 U.S. 662 (2009).

⁸⁹ 131 S. Ct. 2541 (2011).

⁹⁰ Rule 16 managerial judges may be responsive to the lack of parity of resources, as the Rule provides a platform for judges committed to engagement and dialogue. See Gensler & Rosenthal, *supra* note 34; William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT’L & COMP. L. REV. 305 (2009). But the Rule neither insists on nor builds in mechanisms for oversight, and the 1983 advisory notes recommended exemptions from case management for cases likely to involve unrepresented or other needy litigants, such as social security claimants and habeas petitioners. FED. R. CIV. P. 16(b) advisory committee’s note to the 1983 amendments.

the 1950s as a flaw has since become a virtue. Indeed, arbitration and adjudication are now posited as variations on the same dispute resolution theme—aimed (per the reconfiguration of Rule 16) as a mechanism to settle disputes rather than to enforce legal rights.⁹¹

IV. ENDANGERED SPECIES: TRIAL JUDGES AND PUBLIC PROCESSES

In 2007, the Honorable Brock Hornby argued that the time had come to depict differently what judges did. “Reality TV” ought not show judges on the bench but rather

[i]n an office . . . using a computer . . . to monitor the . . . caseload . . . conferring with lawyers (often by telephone or videoconference) . . . researching the law . . . and writing For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.⁹²

While this “multitasking” judge is gaining appeal in other legal systems as well,⁹³ Judge Hornby’s description captures why television—and court civic programs—focus on trials. Not much can be gleaned from watching judges looking at computers or talking on phones. The new judicial posture is a factor contributing in the United States to the now-familiar “vanishing trial.”⁹⁴ In 2012, of one hundred civil cases filed in federal district court, 1.2 began trial.⁹⁵ By contrast, cases in which some “court action” takes place have increased. Four decades ago, about forty percent of the docket closed without “court action”;⁹⁶ in 2012, about twenty percent of the filings did so.⁹⁷

⁹¹ See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

⁹² D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 462 (2007).

⁹³ See THE MULTI-TASKING JUDGE: COMPARATIVE DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski eds., 2013).

⁹⁴ See generally Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004).

⁹⁵ ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2012 tbl.C-4 (2012) [hereinafter 2012 ANNUAL REPORT], available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/Co5Mar12.pdf>.

⁹⁶ See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1972); see also BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 185 tbl.309 (1977).

⁹⁷ See 2012 ANNUAL REPORT, *supra* note 95, at tbl.C-4.

How might one evaluate this shift? John Langbein has argued that the vanishing trial is an appropriate denouement of the 1938 procedural innovations, enabling litigants and judges to learn enough that they no longer need trials.⁹⁸ But whether by trial or through other procedures, what *is* needed for democratic governance is public information about disputes, the processes that produce their resolutions, and the power (public and private) that shapes the mechanisms and outcomes.⁹⁹ Along with trial judges, public knowledge about conflicts, procedures, and resolutions is also endangered. The diminution in private and public investments in “law” is one problem. Another is the absence of opportunities for direct observation to gain the experience necessary to debate what procedure ought to look like and what norms ought to govern rights and obligations.

To glimpse what is at risk of being lost through the New Private Process requires understanding what aspects of courts are and could remain accessible to the public. Given that most “court action” occurs during the pretrial phase, and that agencies and ADR are the sites for many disputes, below I sketch the contours of the law on access to non-trial processes in courts, in the hearings and in the records of agencies, and in private dispute resolution centers.

The backdrop is the history in England and the United States of open courts—traditions that are intertwined with jury trials and with European practices of public performances of the power of the state.¹⁰⁰ The Fundamental Laws of West New Jersey of 1676 provided that “justice may not be done in a corner nor in any covert manner.”¹⁰¹ A century later, state constitutions turned these customs into rights. An early example comes from the 1792 Delaware Constitution, proclaiming “All courts shall be open,” a phrase appearing in several other constitutions as well.¹⁰²

⁹⁸ John Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 551 (2012).

⁹⁹ Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

¹⁰⁰ See generally RESNIK & CURTIS, *supra* note 26, at 288-305.

¹⁰¹ CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY, AGREED UPON, ch. XXIII (1676), reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2551 (Francis Newton Thorpe ed., 1909), available at http://avalon.law.yale.edu/17th_century/nj05.asp.

¹⁰² DEL. CONST. of 1792, art. I, § 9, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 278, 279 (Ben: Perley Poore ed., 1877). For citations of other state constitutions with such terms, see Resnik, *Constitutional Entitlements*, *supra* note 28, at app. 1.

The federal Constitution guarantees “public” trials for criminal defendants but offers fewer directions for civil proceedings.¹⁰³ Nonetheless, an amalgam of the First Amendment’s Free Speech and Petition Clauses, due process, jury trial guarantees, and the common law protects access to civil as well as criminal trials. Yet, when what happens in courts changes, questions emerge about how presumptions of access apply. In the criminal context, the issues are about whether ancillary proceedings—voir dire, pretrial suppression hearings, and postconviction proceedings—should, like the “public trials” referenced in the Sixth Amendment, be open, as well as about which participants can enforce rights to openness. For example, the Supreme Court has overturned the exclusion of a sole observer from a voir dire¹⁰⁴ and has recognized access rights of both criminal defendants and the public to court-based hearings—as cases with names such as *Richmond Newspapers, Inc. v. Virginia*¹⁰⁵ reflect.¹⁰⁶

The Court’s analysis is often framed in two parts: “whether the place and process have historically been open to the press and general public,” and “whether public access plays a significant positive role in the functioning of the particular process in question.”¹⁰⁷ This “experience and logic” test, if met, requires the state to justify closures based on a showing of a compelling state interest.¹⁰⁸ Because this test is contingent rather than rights-based, “experience” can change the “logic” of what needs to be open. As the Federal Rules and ADR reshape “experiences,” they alter the “logic” of what courts are about and when openness is therefore protected.

In terms of documents, in 1978, when ruling that the public could not have the actual tapes made by President Nixon, the Supreme Court described a “general right to inspect and copy public records and documents, including judicial records and documents.”¹⁰⁹ What becomes a “judicial record or document” garnering the presumption? Court-generated docket sheets are covered,¹¹⁰ and parties’ filings (electronic or paper) may be, but

¹⁰³ U.S. CONST. amend. VI.

¹⁰⁴ *Presley v. Georgia*, 558 U.S. 209, 215-16 (2010) (per curiam).

¹⁰⁵ 448 U.S. 555 (1980).

¹⁰⁶ See, e.g., *id.*; Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

¹⁰⁷ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986).

¹⁰⁸ *Id.* at 9; see also *United States v. Simone*, 14 F.3d 833, 841-42 (3d Cir. 1994).

¹⁰⁹ *Nixon v. Warner Commc’ns., Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted); see also 11 U.S.C. § 107 (2012) (presuming access for bankruptcy records).

¹¹⁰ See *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93-94 (2d Cir. 2004).

some courts also test for materials' relevance to "the performance of the judicial function and usefulness in the judicial process."¹¹¹

When the Federal Rules required that discovery materials be filed unless a court ordered otherwise,¹¹² that information could make its way into the public domain, subject to any protective orders imposed. In 1984, the Supreme Court held that a state court's protective order did not run afoul of First Amendment injunctions against prior restraints, as long as the order was supported by good cause and did not preclude dissemination of underlying information through other routes.¹¹³ Further, the Court commented that "pretrial depositions and interrogatories are not public components of a civil trial."¹¹⁴ Thus, to the extent discovery was filed in court, it was subject to "the control of the trial court" because no First Amendment right existed "to information made available only for purposes of trying [a person's law]suit."¹¹⁵

Rule changes reduced discovery's potential openness. In 2000, Federal Rule amendments reversed the prior filing provisions, which were replaced by the rule that "discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing."¹¹⁶ The change was explained as a ministerial response to volume—that papers (in the pre-digital age of the 1990s) could not be stored. But even if documents are filed, judges may decide to limit access unless the materials are annexed to complaints, substantive motions, or otherwise deemed a "judicial document."¹¹⁷

In addition, parties are permitted to bargain to hide materials unearthed. Confidentiality clauses may be a predicate to the initial disclosures—making nondisclosure the baseline from which to negotiate before

¹¹¹ See *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (granting access to reports related to consent decree implementation). Redactions of certain filings are possible. See *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 (8th Cir. 2013).

¹¹² In 1938, Rule 5(d) had provided that discovery materials were to be filed "within a reasonable time." See *FED. R. CIV. P. 5(d)* (1938). In 1980, the Rules continued to require filing, but only for discovery materials used in the proceedings or requested by a court order. See *FED. R. CIV. P. 5(d) & 30(f)(1)* (1979); *FED. R. CIV. P. 5(d)* advisory committee's note to the 1980 amendments. The Advisory Committee noted that, while cumbersome to store, such materials could be of interest to others, such as similarly situated litigants and the public. *FED. R. CIV. P. 5(d)* 1980 advisory committee's note.

¹¹³ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984).

¹¹⁴ *Id.* at 33; see also *id.* at 33-34 & n.19.

¹¹⁵ *Id.* at 33 & n.19; *id.* at 32.

¹¹⁶ See *FED. R. CIV. P. 5(d)* (2000).

¹¹⁷ See, e.g., *FTC v. AbbVie Products LLC*, 713 F.3d 54 (11th Cir. 2013); *United States v. Wecht*, 484 F.3d 194, 207-08 (3d Cir. 2007).

information can be revealed, including to similarly situated litigants. Further, using court-based ADR may also be a method by which materials become private. Both state¹¹⁸ and federal¹¹⁹ law recognize privileges for information obtained through various forms of ADR.¹²⁰ This potential for sheltering documents has prompted protests, resulting in case law providing standards for compelling disclosure.¹²¹

Settlements, if filed in court, are generally accessible.¹²² Yet some courts permit sealing—upheld, for example, in Holocaust art recovery and in 9/11-related litigation.¹²³ Moreover, stipulations of dismissal need not include underlying agreements. A headline-grabbing example of closure came from a sex discrimination case filed by the Equal Employment Opportunity Commission (EEOC). The press had heralded an expected trial: “The Women of Wall Street Get Their Day in Court.”¹²⁴ Instead, as *The Wall Street Journal* explained, “[a]lthough the EEOC had planned to introduce statistics about women’s pay and promotion at trial, details on the alleged disparities . . . were never made public As part of the settlement, the parties agreed to honor a pre-existing confidentiality order, designed to keep many . . . documents . . . under wraps.”¹²⁵

Class actions, and a few other statutory provisions, have information-forcing mechanisms because they require courts to approve settlements and permit or require information about proposed settlements to be disseminated. Yet in practice, researchers have found that information on distributions to

¹¹⁸ See generally Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 565-667 (2005).

¹¹⁹ See 28 U.S.C. § 652(d) (2006) (requiring local rulemaking for confidentiality in court-based ADR). Administrative ADR requires confidentiality absent agreement, prior disclosure, or threat to public safety. See 5 U.S.C. § 574(a) (2012).

¹²⁰ See Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 495-97 (2006).

¹²¹ See e.g., *In re Teligent, Inc.*, 640 F.3d 53, 58-59 (2d Cir. 2011).

¹²² In the Eleventh Circuit, even if “the sealing of the record is an integral part of a negotiated settlement . . . the court file must remain accessible to the public.” *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992); see also *Jessup v. Luther*, 277 F.3d 926, 930 (7th Cir. 2002); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986).

¹²³ See, e.g., *In re September 11 Litigation (World Trade Center Properties Litigation)*, 723 F. Supp. 2d 526, 533 (S.D.N.Y. 2010); *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673, 676 (S.D.N.Y. 2009).

¹²⁴ See Patrick McGeehan, *The Women of Wall Street Get Their Day in Court*, N.Y. TIMES, July 11, 2004 (Sunday Business), at 5.

¹²⁵ Kate Kelly & Colleen DeBaise, *Morgan Stanley Settles Bias Suit for \$54 Million*, WALL ST. J., July 13, 2004, at A1.

individuals has been sparse.¹²⁶ Moreover, even as an FJC study found that most settlements filed in court were not sealed, some of those which were sealed had been brought under the Fair Labor Standards Act,¹²⁷ which has a statutory obligation of openness—at least as to some settlements.¹²⁸

This system of closure is not inevitable; settlement contracts made under the tutelage of courts could—like plea bargains—be subject to regulation. The rationales for court intervention include third-party interests, the need to supervise lawyer–client relations (akin to Rule 11 guilty pleas), and avoiding subsequent disputes because of a lack of understanding or specificity of settlements.¹²⁹ A few local rules, based on such concerns, provide models,¹³⁰ as do some state provisions calling for settlements in open court as a predicate to enforcement.¹³¹ Some states also require Internet postings of settlements over a certain amount, such as in medical malpractice cases.¹³² Yet, despite the many words added to the revised Rule 16, the Rule does not speak to the public dimensions, if any, of case management and ADR, nor does the Rule give guidance on whether and how to record whatever settlements it aims to help produce.

Turning to agency-based adjudication, other provisions address access to the documents, proceedings, and outcomes. The parameters are set by a mix of statutes and regulations and, episodically, court-generated doctrines. In federal administrative proceedings, some adjudicatory proceedings are

¹²⁶ See Nicolas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes?* (RAND Inst. for Civil Justice, Working Paper No. WR-599-ICJ, 2008).

¹²⁷ TIM REAGAN & GEORGE CORT, FED. JUDICIAL CTR., SEALED CASES IN FEDERAL COURTS 15 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Sealed-Cases.pdf>; ROBERT TIMOTHY REAGAN, SHANNON R. WHEATMAN, MARIE LEARY, NATACHA BLAIN, STEVEN S. GENSLER, GEORGE CORT & DEAN MILETICH, FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 5 (2004).

¹²⁸ See generally Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013).

¹²⁹ See generally Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?* (UCLA Sch. of Law, Law & Econ. Research Paper Series, Research Paper No. 08-15, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161343.

¹³⁰ See, e.g., Joseph F. Anderson, Jr., *Secrecy in Litigation: The Healthy Debate Continues*, 81 CHI.-KENT L. REV. 301, 302 n.3 (2006).

¹³¹ See, e.g., N.Y. C.P.L.R. 2104 (McKinney 2012); *Gordon v. Shafiq*, 968 N.Y.S.2d 352, 354-55 (Sup. Ct. 2013).

¹³² See, e.g., CONN. GEN. STAT. § 19a-17a (2013) (requiring that “[u]pon entry of any medical malpractice award or upon entering a settlement of a malpractice claim,” the entity making payment must notify the Department of Public Health of the terms of the award); NEB. REV. STAT. 84-713(1) (2010) (requiring a public agency to “maintain a public written or electronic record of all settled claims”).

presumptively open and others closed to outsiders.¹³³ The justifications for the closing of files and hearings rely on either individual interests in privacy (of health matters and other life circumstances) or—as famously in the context of immigration deportation proceedings after 9/11—national security.¹³⁴

Yet even if one could read files or attend hearings, practical impediments make doing so difficult. Most agencies are located in office buildings that often do not have open doors. When records in administrative agencies are available, they may be on tape or in file cabinets, rather than in digital form. Administrative law judges' decisions are likewise not always provided to the public through web portals.¹³⁵

The increasing prevalence of closed processes can be seen from a few challenges to proceedings that blur the line between “court” and the alternatives. In 2011, the Second Circuit considered the limits imposed on access to processing by the New York City Transit Authority (NYCTA), which had become a low-level criminal court. NYCTA issued about 125,000 notices of violation in a year; some 20,000 citations were contested at in-person hearings in which Transit Authority officials presided.¹³⁶ To attend, observers needed permission from respondent-defendants. The Second Circuit concluded, under the “experience and logic” test, that a “qualified First Amendment right of access”¹³⁷ existed because the Transit Authority’s “quasi-judicial’ administrative proceedings” were so similar to a “criminal trial.”¹³⁸

The NYCTA adjudicated high-volume, low-level infractions. Closed procedures in the Delaware Chancery Court, however, had a different purpose. In 2009, the Delaware legislature, worried about maintaining the state’s “preeminence” in high-end corporate dispute resolution, created a program to attract users.¹³⁹ The legislature offered what it called “arbitration,” run by its Chancery Court’s judges and held in the state’s courthouses, to disputants if at least one party was incorporated in Delaware, the stakes were at least a

¹³³ Social security hearings are presumptively open, 20 C.F.R. § 498.215(d) (2013), as are some immigration hearings, see 8 C.F.R. § 1003.27 (2013). Access to veteran proceedings and records is limited. See 5 U.S.C. § 552a (2012); 38 U.S.C. § 5701 (2012); 38 U.S.C. § 7332 (2012).

¹³⁴ Compare *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

¹³⁵ Some decisions can be found on the Internet. See, e.g., *Civil Remedies ALJ Decisions by Year*, U.S. DEP’T HEALTH & HUM. SERVICES, <http://www.hhs.gov/dab/decisions/civildecisions/index.html> (last visited May 12, 2014).

¹³⁶ See *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 290-91 (2d Cir. 2011).

¹³⁷ *Id.* at 304; see also *id.* at 298 n.9.

¹³⁸ *Id.* at 299; *id.* at 299-303.

¹³⁹ DEL. CODE ANN. tit. x, §§ 347, 349 (West 2010 Supp.); DEL. CH. R. 96-98 (2014).

million dollars, and the disputants were willing to pay \$12,000 in filing fees and \$6000 per day thereafter.¹⁴⁰

Those sums purchased what the district court called “in essence a closed civil trial”; filings were not on the public docketing system, and the public was barred from attending. The decisions were enforceable as judgments and subject to review by the Delaware Supreme Court. A group called the “Delaware Coalition for Open Government” argued that the state’s legislation violated the First Amendment; after a federal district judge agreed, Delaware’s Chancery Court judges appealed and lost again. The Third Circuit, in a divided ruling, concluded that “Delaware’s government-sponsored arbitration” could not be held in a courthouse, be decided by state judges, produce an enforceable judgment, and yet be closed to the public.¹⁴¹

But public access is not required when consumers and employees are pressed into arbitration under the FAA. Thus, the circuit court rulings analyzing why access needs to be accorded by the New York City Transit Authority and Delaware’s Chancery Court make all the more salient the Supreme Court’s enforcement of mandatory arbitration, which has thus far walled off the public more than administrative adjudication and court-based activities. As the dissenting circuit judge argued in the Delaware litigation, the promise of confidentiality is a linchpin of ADR’s appeal,¹⁴² and the rules of the leading purveyors of ADR require it.¹⁴³

The pages of this Symposium document the losses imposed by closure. Information developed in the shadow of constitutional obligations of open courts spans disclosures of judges’ salaries, court budgets, filings, trends, case proceedings, and outcomes. Thus far, law has not imposed parallel regulations on the alternatives it has promoted.¹⁴⁴ Private dispute resolvers are left to produce information as they wish, subject only to constraints such as state-mandated disclosures of malpractice verdicts or other publication

¹⁴⁰ See *supra* note 139.

¹⁴¹ Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 514 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

¹⁴² *Id.* at 523 (Roth, J., dissenting).

¹⁴³ See, e.g., *Principle 12, Consumer Due Process Protocol*, NAT’L CONSUMER DISPUTES ADVISORY COMM., http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased (last visited May 12, 2014); *Rule 31, Rules of Conditionally Binding Arbitration*, BETTER BUSINESS BUREAU, <http://www.bbb.org/council/programs-services/dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/#31> (last visited May 12, 2014). *But see* Pokorny v. Quiztar, Inc., 601 F.3d 987, 996-1002 (9th Cir. 2010) (finding unenforceable ADR provisions including confidentiality that created one-sided advantages).

¹⁴⁴ See Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963 (2005).

requirements.¹⁴⁵ Aside from this patchwork of regulations, corporate disclosure statements, academic case studies, and thousands of anecdotes, the public face of private dispute resolution depends on what providers decide to put on it.¹⁴⁶

V. NIGHTMARISH SCENARIOS: LONG RANGE, STRATEGIC PLANNING, AND PROJECTED CASE FILINGS

“If the federal courts’ civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish. . . . [I]n twenty-five years the number of civil cases commenced annually could reach 1 million . . . , while the criminal filings could reach nearly 84,000 [A]ppeals could approach 335,000”

—Long Range Plan for the Federal Courts, 1995¹⁴⁷

When discussing the twentieth century developments, I provided Figures 1 and 2, as well as the photograph of the federal courthouse in St. Louis, to capture some of the exuberance represented by investments in the federal courts; the upward lines suggested a never-ending surge of cases, resulting in demands for more judges and bigger courts.¹⁴⁸ Rather than embrace this picture of growth in a Weberian fashion, leaders of the federal courts saw “increasing caseloads” as a problem to be solved.¹⁴⁹ The quote about “nightmarish” scenarios comes from the report of a special committee chartered by the Judicial Conference to write a *Long Range Plan* during the wave of millennium projects of the 1990s. The ninety-three recommendations, accompanied by two hundred pages of explanation and appendices, were adopted by the Judicial Conference in 1995.

In 2010, the Judicial Conference issued a new *Strategic Plan*, a slimmed-down, eighteen-page document officially superseding the *Long Range Plan* without being “an across-the-board rescission of the individual policies articulated in the recommendations and implementation strategies” of the

¹⁴⁵ See, e.g., CAL. CIV. PROC. CODE § 1281.96 (2014); MD. CODE ANN., COM. LAW § 14-3903 (LexisNexis 2013).

¹⁴⁶ See Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, DISP. RESOL. J., Aug.–Oct. 2009, at 6, 6-7; Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008).

¹⁴⁷ LONG RANGE PLAN, *supra* note 65, at 18.

¹⁴⁸ See *supra* note 20 and Figures 1, 2 & 3.

¹⁴⁹ LONG RANGE PLAN, *supra* note 65, at 8.

1995 *Long Range Plan*.¹⁵⁰ The differences in the two plans, produced fifteen years apart, reflect both the success of efforts to circumscribe access to the federal courts and the worries that such a contraction produces.

In 1995, the “nightmarish” scenario for 2020 had assumed a growth rate calculated “over the past 53 years” that produced a “bleak” picture of civil filings growing from 239,000; by 2020, civil cases “could reach 1 million.”¹⁵¹ This rising tide would, the planners thought, undermine federal court governance and the coherence of law. Moreover, resources would become scarcer, causing “delay, congestion, cost, and inefficiency.”¹⁵²

Under this scenario, the *Long Range Plan* predicted that “civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers.”¹⁵³ Further, district court judges were already spending “fewer of their working hours in civil trials than ever before,” and “the future may make the civil jury trial—and perhaps the civil bench trial as well—a creature of the past.”¹⁵⁴ The projected denouement was that the “federal district courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice.”¹⁵⁵ In this future, the “federal courts have by and large become criminal courts and forums for those who cannot afford private justice.”¹⁵⁶

As explained in the Foreword to the 1995 *Long Range Plan*, the goals were to avoid those predictions and to conserve the “judicial branch’s core values of the rule of law, equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability,” while dealing with the challenges presented by the “limited financial resources of the federal government.”¹⁵⁷ The *Long Range Plan* cited the Framers’ preference for keeping the federal judiciary small (a notion “at the heart of judicial

¹⁵⁰ See JUDICIAL CONFERENCE OF THE UNITED STATES, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 18 (Sept. 2010), available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf> [hereinafter 2010 STRATEGIC PLAN].

¹⁵¹ LONG RANGE PLAN, *supra* note 65, at 18.

¹⁵² *Id.* at 19.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 19–20.

¹⁵⁵ *Id.* at 20.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at vii.

federalism”)¹⁵⁸ and advocated that the federal judicial workload needed to be limited while making courts “more accessible.”¹⁵⁹

Proposed solutions included increasing reliance on administrative agency adjudication when constitutionally permissible,¹⁶⁰ more judicial case management,¹⁶¹ and increased use of alternative dispute resolution methods.¹⁶² Further, the Judicial Conference urged Congress “to exercise restraint”¹⁶³ by not creating new federal statutory rights or crimes unless advancing “clearly defined and justified national interests”¹⁶⁴ and “where federal interests are paramount.”¹⁶⁵ The point was to impose “sensible limitations on federal criminal and civil jurisdiction.”¹⁶⁶ The *Long Range Plan* also encouraged Congress to help states as part of “judicial federalism.”¹⁶⁷ The Federal Rules of Civil Procedure played a small role, discussed in the context of expanding judicial case management.¹⁶⁸

The 2010 *Strategic Plan* had no growth charts or “recommendations” but rather goals, issues, and responses—termed “strategies.” In addition to the rule of law, equal justice, judicial independence, accountability, and excellence, the judiciary’s goals discussed another value: “service.”¹⁶⁹ The 2010 *Strategic Plan* began with a discussion of “providing justice,” and the first

¹⁵⁸ *Id.* at 8 (noting that “[f]ederal courts were intended to complement state court systems, not supplant them” and “were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not”).

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.* at 33-34 (“Congress and the agencies concerned should be encouraged to take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.”).

¹⁶¹ *Id.* at 70 (“The district courts should enhance efforts to manage cases effectively.”).

¹⁶² *Id.* at 70-71 (“District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.”).

¹⁶³ *Id.* at 28.

¹⁶⁴ *Id.* at 23.

¹⁶⁵ *Id.* at 24.

¹⁶⁶ *Id.* at 22; *see also id.* at 24 (Recommendation 2); *id.* at 28 (Recommendation 6).

¹⁶⁷ *Id.* at 21-23 (asking Congress to consider providing significant resources to state court systems to enhance their capacity to take on greater caseloads).

¹⁶⁸ *See id.* at 58 (“Rules of practice, procedure, and evidence . . . should be adopted and, as needed, revised to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation.”); *id.* at 70-71 (encouraging “continued experimentation in the district courts with innovative case management techniques” and “a variety of alternative dispute resolution techniques that involve members of the bar and other court adjuncts”).

¹⁶⁹ *See* 2010 STRATEGIC PLAN, *supra* note 150, at 2. The Plan defined service as “commitment to the faithful discharge of official duties; allegiance to the Constitution and the laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner.” *Id.*

answer to enhancing that effort was “[e]ffective case management” to reduce cost and delay.¹⁷⁰ Other concerns included improving courthouse safety;¹⁷¹ implementing new technology;¹⁷² increasing staff and compensation;¹⁷³ expanding the numbers of judgeships;¹⁷⁴ attracting applicants;¹⁷⁵ raising judicial salaries;¹⁷⁶ improving relationships with other branches of government;¹⁷⁷ enhancing public trust, understanding, and confidence;¹⁷⁸ and managing resources—a phrase that reflected ongoing pressures to downsize staff and facilities.¹⁷⁹

Concerns about capacity and resources continue to be recorded when the judiciary goes to Congress for judgeships and its budget. In September 2013, for example, the Chair of the Judicial Conference’s Judicial Resources Committee testified in support of more judgeships; he spoke of a thirty-nine percent increase from 1991 to 2012 in district court filings, resulting in some 520 filings per judgeship, each year.¹⁸⁰ By 2013’s end, the annual report by Chief Justice Roberts was devoted to “the single most important issue facing the courts”: the budget.¹⁸¹

VI. BACK TO THE FUTURE: FLATTENED FILINGS AS A NORMATIVELY RISKY GOAL FOR THE FEDERAL COURTS

Some—but not all—of what the *Long Range Plan* envisioned has come to pass. Figure 8 provides one summary of caseload predictions for 2010 and of the numbers of cases actually filed. With the advantage of hindsight, we know that, rather than the 610,000 filings that had been anticipated in 1995 for the year 2010, only 360,000 cases were begun—a number close to the 322,000 cases filed in 2000. Figure 9 maps case filings over more than a

¹⁷⁰ *Id.* at 4-5.

¹⁷¹ *Id.* at 6-7.

¹⁷² *Id.* at 11-12.

¹⁷³ *Id.* at 9-10.

¹⁷⁴ *Id.* at 7.

¹⁷⁵ *Id.* at 10.

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.* at 14-16.

¹⁷⁸ *Id.* at 16-17.

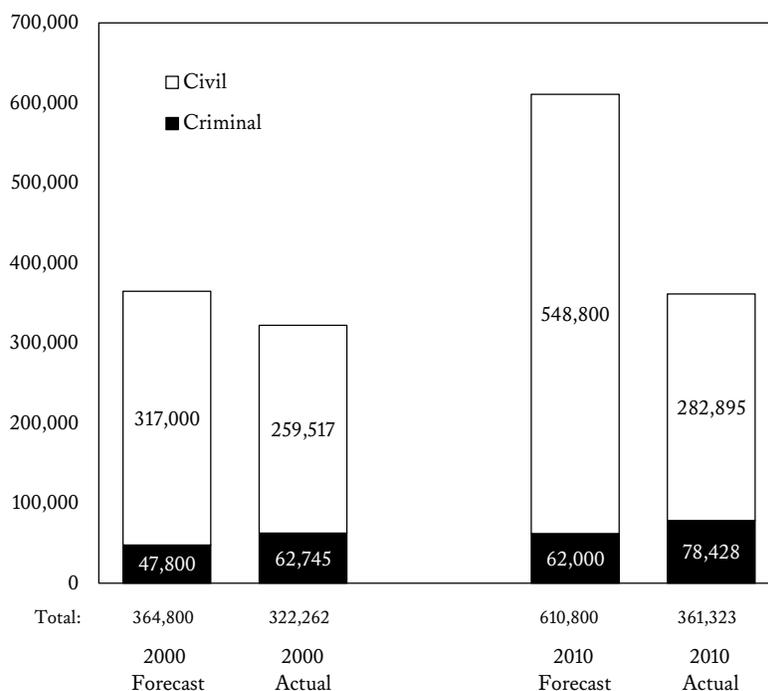
¹⁷⁹ *Id.* at 8.

¹⁸⁰ *Statement of Hon. Timothy M. Tymkovich, Chair, Comm. on Judicial Res. of the Judicial Conf. of the U.S., Before the Subcomm. on Bankr. and the Courts of the S. Comm. on the Judiciary, 113th Cong.* (Sept. 10, 2013), available at <http://news.uscourts.gov/sites/default/files/judge-tymkovich-testimony.pdf>.

¹⁸¹ JOHN ROBERTS, 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (Dec. 31, 2013), available at <http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>.

century, from 1905 to 2013, explaining the source of an impression of unabated growth. The bars on the graph rise over the century. But when the focus shifts to the last two decades, 1995–2013, as shown in Figure 10, the bars flatten, and filings look relatively stable.¹⁸²

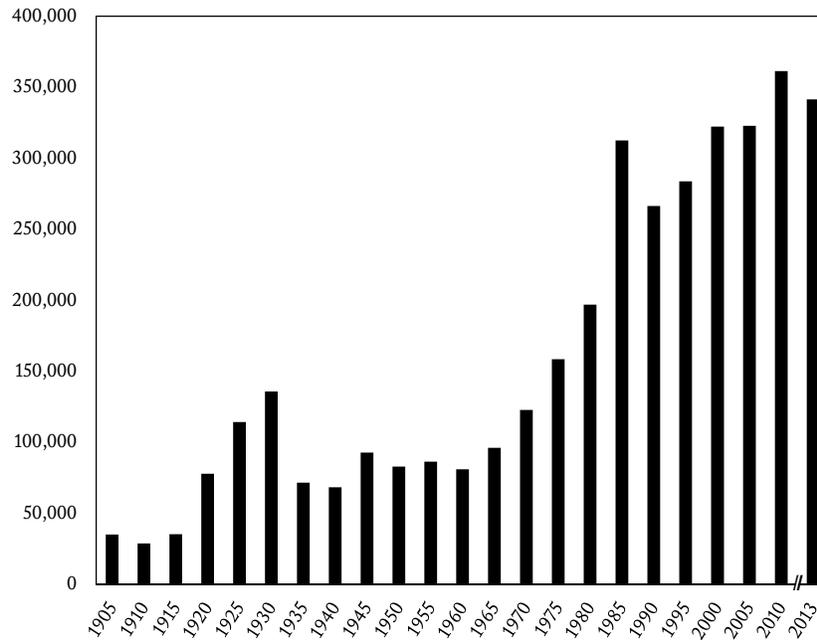
Figure 8: Projected Versus Actual Federal District Court Filings: 2000 and 2010 (Forecasts Made in 1995)¹⁸³



¹⁸² Another recent analysis, using a somewhat different method of counting cases, also concluded that civil filings had been stable since 1986, and argued that rather than describe civil caseloads exploding, the term should be “stagnation.” See Patricia Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416864.

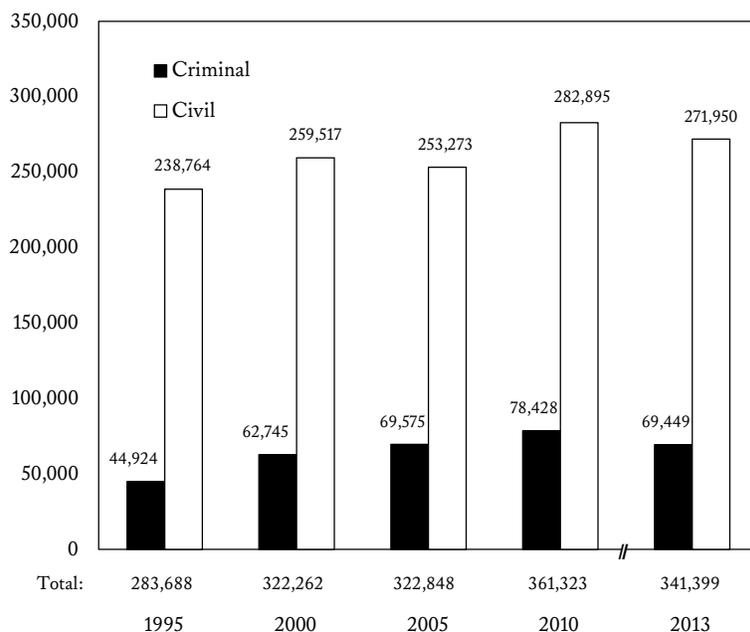
¹⁸³ This chart is derived from multiple sources. See ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS: STATUS REPORT, at I-18 (2008) (reviewing forecasts made in 1995 against filing figures in 2000); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 138 tbl.C, 204 tbl.D (2011), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx> (reporting filings in 2010); LONG RANGE PLAN, *supra* note 65, at app. A, tbl.1 (“Caseload and Judgeship Projections”) (showing forecasts for civil and criminal filings in district court for 2000, 2005, 2010, 2015, and 2020).

Figure 9: All Cases Commenced in Federal District Courts: 1905–2013¹⁸⁴



¹⁸⁴ The information presented in Figures 9, 10, 11, and 12 is based on multiple sources. Data for 1905–1998 are from William F. Shughart & Gökhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904–2002 (ICPSR 3987)*, INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987> (last updated Mar. 30, 2006). For data for years 1999–2012, see FED. JUDICIAL CTR., HISTORICAL CASELOADS IN THE FEDERAL COURTS, http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page (last visited May 12, 2014). Data for 2013 are taken from ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2013 tbls.C & D (2013), available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx>. The data do not include bankruptcy filings.

Figure 10: Civil and Criminal Cases Commenced in Federal District Courts: 1995–2013¹⁸⁵



These recent numbers raise questions about the *rate* at which filings increased, and Figure 11 captures the rate and fluctuations of federal filings for the century. Figure 12, the growth rate from 1975 to 2013, shows that if the trend line that appears for these years continues, it is likely that both the rate of filings and the number of civil and criminal cases may decline.¹⁸⁶ Figure 13 separately charts bankruptcy petitions, which account for the largest volume of filings.

¹⁸⁵ See *id.*

¹⁸⁶ Here, I do not disaggregate civil and criminal cases. Cf. Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation* (Nov. 14, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354386. Further, I do not disaggregate by type of civil case. Cf. Moore, *supra* note 182.

Figure 11: Growth Rate and Fluctuation of Total Federal District Court Filings: 1905–2013¹⁸⁷

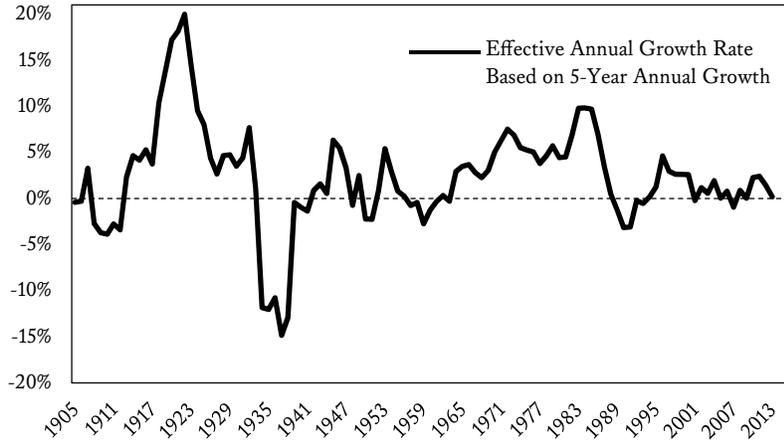
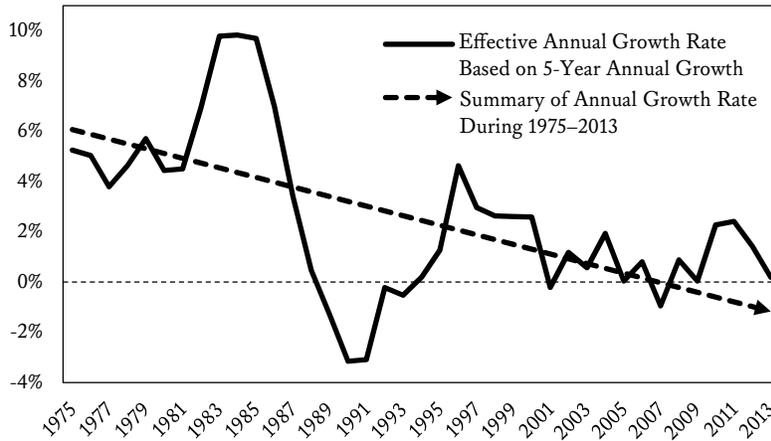
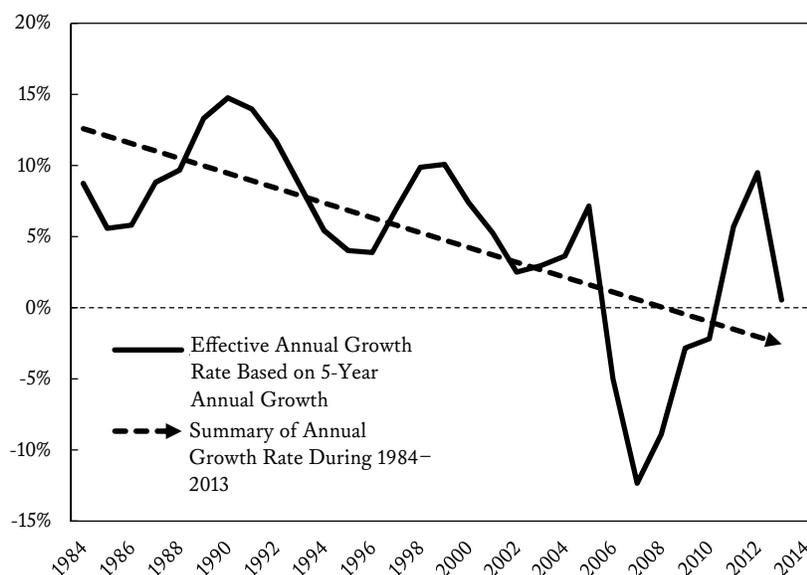


Figure 12: Growth Rate of Federal District Court Filings: 1975–2013¹⁸⁸



¹⁸⁷ See *supra* note 184. The effective annual growth rate described in Figures 11, 12, and 13 reflects the annual rate of growth that would have occurred if filings had increased at a constant rate during the prior five years. This growth rate, based on actual growth in each of the five years, has been smoothed out to avoid the distraction of the volatility in year-to-year growth rates. Five-year growth rates for 1905–1908 are based in part upon estimated filings during 1900–1903, projected backwards using years with reported numbers of filings and cases pending. Data do not include bankruptcy filings.

¹⁸⁸ See *id.* Data do not include bankruptcy filings. In Figures 12, 13, 14, and 17, the summary line is a simple linear regression, also known as an ordinary least squares regression, that best fits the growth rates during the years charted.

Figure 13: Growth Rate of Bankruptcy Filings: 1984–2013¹⁸⁹

Thus, the aspirations of the 1995 Judicial Conference to slow filing rates are coming to fruition. Yet the slowdown has not achieved the planners' other goals. As Figure 14 documents, while federal courts continue to garner significant investments from Congress, the rate of growth in funding is declining. Indeed, the federal judiciary has committed itself to shrinking its own footprint. In a 2013 press release, the courts announced that "space reduction is priority Number One for the Space and Facilities Committee,"¹⁹⁰ and the Chief Justice reported that staffing, in 2013, was at the lowest level since 1997.¹⁹¹

¹⁸⁹ Data for 1979–2012 are reported by FED. JUDICIAL CTR., HISTORICAL CASELOADS IN THE FEDERAL COURTS, http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page (last visited May 12, 2014). Data for 2013 are taken from ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY STATISTICS 2013 tbl.F (2013), available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f.pdf.

¹⁹⁰ *31 Court Facilities to be Downsized in First Year of Cost-Cutting Project*, ADMIN. OFFICE OF THE U.S. COURTS (Oct. 15, 2013) (quoting Hon. D. Brooks Smith, Chair, Jud. Conf. Space & Facilities Comm.), <http://news.uscourts.gov/31-court-facilities-be-downsized-first-year-cost-cutting-project> (last visited May 12, 2014).

¹⁹¹ ROBERTS, *supra* note 181, at 5.

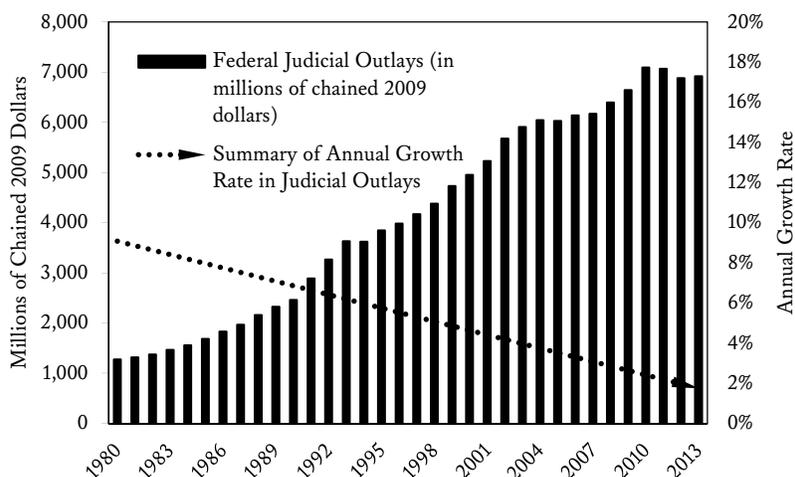
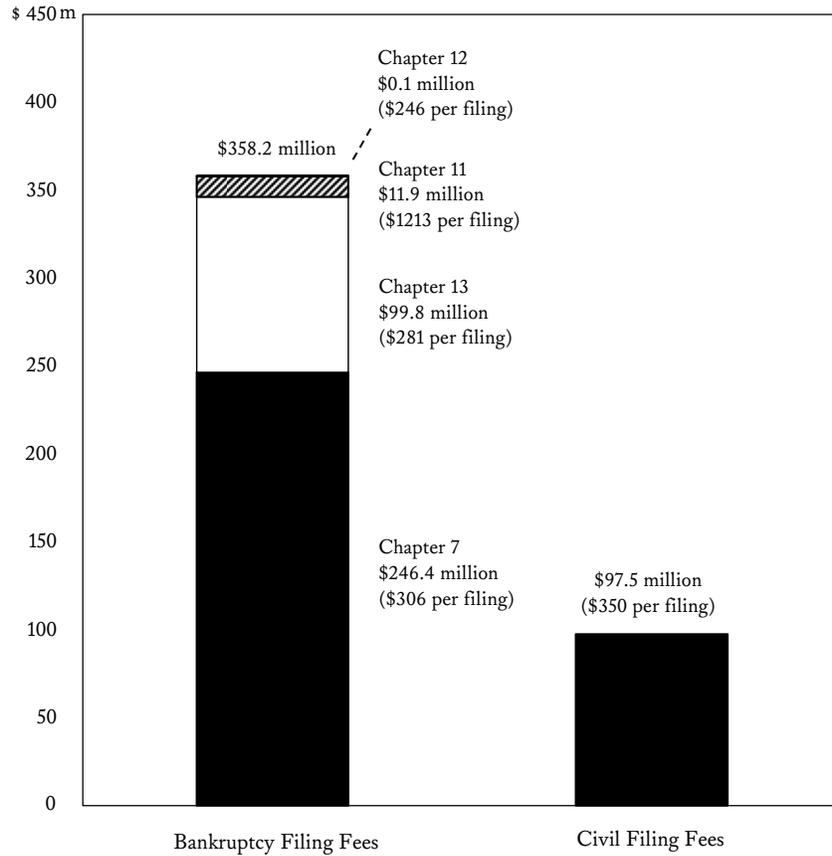
Figure 14: Government Expenditures for the Federal Judiciary: 1980–2013¹⁹²

Figure 15 details estimated revenues from filing fees in 2012. The estimates show that Chapter 7 bankruptcy petitioners provided some \$250 million in revenue, while civil filing fees accounted for about \$100 million. This chart echoes another concern of the 1995 Judicial Conference: that the federal courts would become places for poor people and criminal defendants, rather than attract a mix of investments from a diverse set of litigants. The 1995 *Long Range Plan* urged reliance on state courts, which, as shown in Figure 16, continue to receive the vast bulk of cases. Even as juvenile, domestic, and traffic filings are excluded, forty million cases were filed in state courts in 2010.¹⁹³ Figure 17 completes the graphic discussion by showing that the rate of filings in state courts is more stable than that in the federal courts.

¹⁹² The information presented in Figure 14 comes from OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2015 HISTORICAL TABLES tbl.4.1 (2014), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/hist.pdf>; BUREAU OF ECON. ANALYSIS, 2009 GDP CHAINED PRICE DEFLATOR, available at <http://www.bea.gov/national/xls/gdplev.xls>.

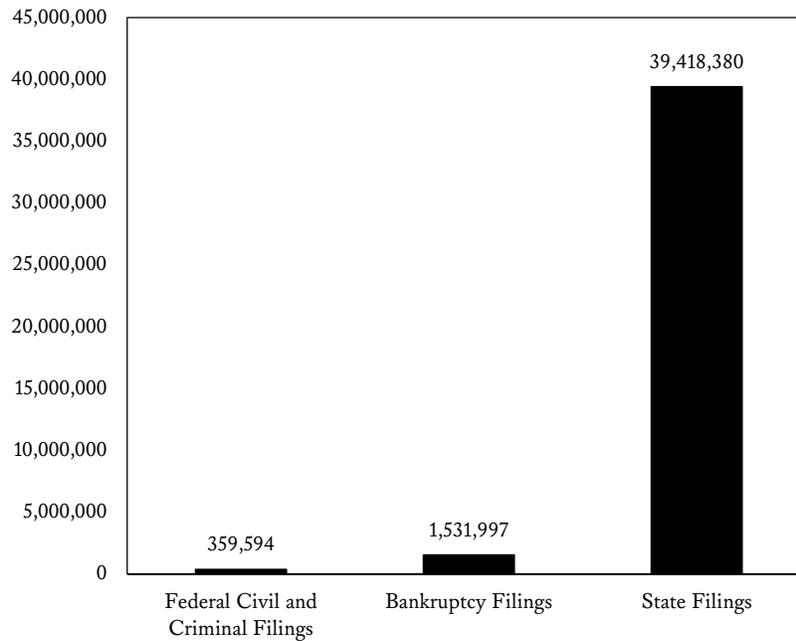
¹⁹³ See ROBERT C. LAFONTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAND, SARAH A. GIBSON & ASHLEY N. MASON, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011).

Figure 15: Estimated Filing-Fee Income from Civil and Bankruptcy Cases in 2012¹⁹⁴

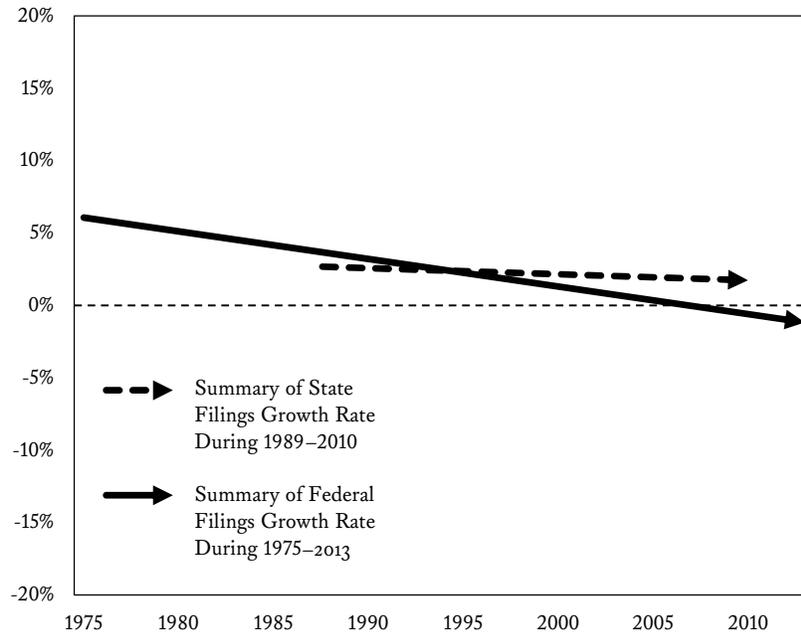


¹⁹⁴ The information in Figure 15 comes from ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY STATISTICS: MARCH 31, 2013 tbl.F-2 (2013), available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0313_f2.pdf; JOHN ROBERTS, 2012 FEDERAL YEAR-END REPORT ON THE FEDERAL JUDICIARY (2012), available at <http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf>. The fiscal year for bankruptcy filings ends March 20, 2013. The fiscal year for civil filings ends September 30, 2012. Sums for both forms of filing assume that each filer paid the filing fee and that no fee waivers were granted.

**Figure 16: Comparing the Volume of Filings
in State and Federal Courts: 2010¹⁹⁵**



¹⁹⁵ Federal criminal, civil, and bankruptcy filing data come from ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010 tbls.C-1, D-1 & F (2010), available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>. Data on state filings come from the Court Statistics Project, Nat'l Ctr. for State Courts, *State Court Caseload Statistics: Civil and Criminal—National Caseloads 2010*, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> (last visited May 12, 2014). The number of state filings is an estimate, as states do not uniformly report data on all categories; further, this number does not include juvenile, domestic, or traffic cases that are in the state court filing data.

Figure 17: Growth Rate of State and Federal Court Filings: 1975–2013¹⁹⁶

To summarize, efforts to slow the rate of filings through the *Long Range Plan*'s recommendations, rule revisions, the Court's construction of the FAA, and much else have sent many litigants away from the federal courts. But slowing filing rates have not been accompanied by a growth in trial rates nor significant new budgetary investments by Congress in the courts. Further, while the *Long Range Plan* discussed preserving the federal courts as "forums where the weak and the few have recognized rights that the strong and the many must regard,"¹⁹⁷ more consumers, employees, and their opponents are being sent (through the FAA doctrine and other developments)

¹⁹⁶ The information presented regarding federal filings comes from multiple sources. Data for 1975–1998 are from Shughart and Karahan, *supra* note 184. Data for 1999–2010 are from Annual Reports of the Director of the Administrative Office of the U.S. Courts. See FED. JUDICIAL CTR., HISTORICAL CASELOADS, *supra* note 184. Federal caseload numbers do not include bankruptcy filings. State filing data for the years 1988–2010 were provided by the National Center for State Courts in two spreadsheets (on file with author). As explained in note 195, *supra*, not all states report data in all categories, and the state figures detailed here do not include juvenile, domestic, or traffic cases. Growth rates in state filings during 1975–1988 are not included because comparable data are not available for that period. State filing data after 2010 were not available.

¹⁹⁷ LONG RANGE PLAN, *supra* note 65, at 20.

to the private sector for resolution of disputes. The federal courts are increasingly venues for the bankrupt, who join a stream of criminal defendants.

Stephen Yeazell entitled an article “Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got.”¹⁹⁸ Some will “like” what “we” are getting, but below, I explain why “we,” the public, ought to object to what is being lost.

VII. FORWARD TO THE FUTURE: THE DECLINE OF DEMOCRATIC OPPORTUNITIES FOR DEBATING NORMS

The thoughtful trial judge who identified himself as part of an “endangered species”¹⁹⁹ argued that, while the practices had changed, the judicial “mission” had not; judges continued “to interpret and clarify laws, adjudicate and protect rights, maintain fair processes, and punish” even as “the method” of doing so had been altered.²⁰⁰ But even if judges do so, the public dimensions of their work are diminishing. Public adjudicatory procedures make important contributions to functioning democracies, as the past seventy-five years of interactions between equality norms and the 1938 Federal Rules exemplify. In closing, I outline some of what is lost as processes are privatized.

To do so, I draw on Jeremy Bentham who, writing in 1812, explained the value of what he termed “publicity,”²⁰¹ a practice he wholly admired. “Without publicity, all other checks are insufficient: in comparison with publicity, all other checks are of small account.”²⁰² Bentham’s claims are echoed regularly in case law on rights of access to courts. Calling courts a “theatre of justice,”²⁰³ Bentham believed that courts sparked communication between citizen and the state; it would be “natural” for judges to adopt “the habit of giving reasons from the bench.”²⁰⁴ The court was also therefore a “school,” teaching the public about the rules of law.²⁰⁵

Further, Bentham saw public processes as the means by which the public could critique both judges and the law. Bentham urged that ordinary

¹⁹⁸ Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943 (2004).

¹⁹⁹ Hornby, *supra* note 92, at 462.

²⁰⁰ *Id.* at 467-68.

²⁰¹ See JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), reprinted in 6 THE WORKS OF JEREMY BENTHAM 1, 351 (John Bowring ed., 1843).

²⁰² *Id.* at 355.

²⁰³ *Id.* at 354.

²⁰⁴ *Id.* at 357.

²⁰⁵ *Id.* at 355.

spectators, or “auditors,”²⁰⁶ be permitted to take notes that could be distributed widely. These minutes could serve as insurance for the good judge and as a corrective against misrepresentations made by “an unrighteous judge”: “Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial.”²⁰⁷

Bentham’s critique is in many respects remarkably modern, as he argued for simplified procedures and holistic treatment of problems. Further, Bentham worried about costs, and he wanted fast, oral proceedings, with judges available around the clock. Moreover, Bentham opposed filing fees as “a tax upon distress,”²⁰⁸ and he proposed subsidies for litigation through an “Equal Justice Fund” that would pay the transportation and lodging costs for litigants.²⁰⁹

In addition to Bentham’s focus on publicity as enhancing accuracy, education, and discipline, today’s courts serve another function—as a site of democratic practices. Courts model the democratic precepts of equal treatment, demonstrate that the state itself is subject to democratic constraints, and facilitate democratic revisions of governing norms. Adjudication is an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Courts are the great leveler, as the goals of participatory parity and reciprocal respect require that all participants, including the government, act as their opponents’ equals.

Litigation forces dialogue upon the unwilling and temporarily alters configurations of authority. The public facets either make good on egalitarian promises or prompt inquiries (such as the gender, race, and ethnic bias task forces of the 1980s and 1990s)²¹⁰ into the failures to live up to them. Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. The public and the immediate participants see that law varies by contexts, decisionmakers, litigants, and

²⁰⁶ *Id.* at 356.

²⁰⁷ JEREMY BENTHAM, BENTHAM’S DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, WITH A COMMENTARY ON THE SAME n.d. [not dated], reprinted in 4 THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., 1843).

²⁰⁸ JEREMY BENTHAM, A PROTEST AGAINST LAW-TAXES, SHOWING THE PECULIAR MISCHIEVOUSNESS OF ALL SUCH IMPOSITIONS AS ADD TO THE EXPENSE OF APPEAL TO JUSTICE (1793), reprinted in 2 THE WORKS OF JEREMY BENTHAM 573, 582 (John Bowring ed., 1843).

²⁰⁹ See FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE 153-54 (1983).

²¹⁰ See, e.g., Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS: J. WOMEN CULTURE & SOC’Y 952 (1996).

facts. Through democratic iterations—the backs-and-forths of courts, legislatures, and the public—norms can be reconfigured.

As in other democratic processes, such as majoritarian voting, the outputs are widely varied. Public awareness can generate new rights, such as freedom from domestic violence, and new limitations, such as caps on monetary damages for malpractice. Thus, unlike Bentham, I do not presume that the public debate will necessarily produce just (in utilitarian terms or otherwise) results or “an improvement in the quality of opinions held by the people.”²¹¹

Yet court-based publicity does enable debate about norms, and the ascent of participatory rights in public judicial processes prompted significant investments in the courts. The shift towards ADR represents the decline of adjudication, and, with it, the role of the federal courts. Bentham’s reforms to curb what he saw as the problems generated by “Judge & Co.” were to require simpler, more public, and better-funded procedures. The current solutions privatize procedures, and those put at risk are not only litigants or members of the potential audience but the judges themselves.

Adjudication has a special purchase on the public fisc because of its distinctive character as a specific kind of social ordering. In contrast, through case management, judicial efforts at settlement, and mandatory ADR in or through courts; through devolution to administrative agencies; and through enforcement of waivers of rights to court, the framework of “due process procedure,” with its independent judges and open courts, is replaced by what can fairly be called “contract procedure.”²¹² As judges press to alter juridical modes and reconfigure courts as but one of many places for dispute resolution, as judges embrace management and settlement, and as judges stop working before the public eye, judges lose the argument for their independence and for expansive public subsidies.

In 1988, on the fiftieth anniversary of the Federal Rules, John Frank explained that “[d]ispute settling is a social function of government . . . of a piece with delivering the mail, controlling traffic, or providing school lunches.”²¹³ There are “old and new government social services. Dispute

²¹¹ See PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 267 (2009).

²¹² See generally Resnik, *Procedure as Contract*, *supra* note 129.

²¹³ See John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1883 (1989).

settling is very nearly the oldest²¹⁴ But *democratic* dispute resolution is novel, and as detailed here, fragile.

²¹⁴ *Id.*