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EXODUS FROM AND TRANSFORMATION OF AMERICAN CIVIL LITIGATION

*Richard D. Freer**

ABSTRACT

The story of American federal civil litigation over the past half century is one of exodus and of transformation—exodus from and transformation of the traditional model of “court litigation.” The exodus has taken various paths, especially contractual arbitration. The Supreme Court has extended the Federal Arbitration Act to contracts of adhesion and to the adjudication of federal statutory rights. Thus arbitration has become mandatory for claims by consumers and employees. In approving this expansion, the Court increasingly makes clear that it sees nothing special about court litigation—that it and arbitration are mechanisms of equal dignity.

But, at least as envisioned historically, court litigation plays a far broader role than arbitration. It is a transparent public process, governed by the rule of law. It generates the common law that governs most aspects of our daily lives. It is pivotal in social ordering. Arbitration, in contrast, goes on behind closed doors, is not cabined by the rule of law, and does not result in reasoned opinions. Arbitration resolves the dispute at hand and does little else. Accordingly, some have argued that the view that arbitration and court litigation are equivalents cheapens the values embodied in court litigation.

That argument is strong, but would be stronger if today’s version of court litigation resembled the historical model. It does not. Courts today are less often fora for public adjudication and law generation than monuments to mediation. Litigants not cajoled into settlement are hustled through a front-loaded process focused increasingly on adjudication without trial. Indeed, some judges conclude that going to trial reflects a systemic “failure.”

The driving force of both the exodus from court litigation and its transformation is the perception of excessive caseload. There are not enough

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Article III judges to do the job in accord with the historical model. Thus, the Court and drafters of the Federal Rules have pursued two safety valves: getting disputes out of the courts and streamlining litigation to foster pretrial resolution. They have pursued exodus and transformation.

INTRODUCTION

The story of American federal civil litigation over the past half century is one of exodus and of transformation—exodus from and transformation of the traditional model of public dispute resolution. The exodus from what we will call “court litigation” has taken various paths. Innumerable claims are channeled out of Article III courts to legislative tribunals, and judges frequently require litigants to submit to court-annexed alternative dispute resolution (ADR).

The most notable path of exodus in recent years, however, has been to arbitration pursuant to contract between the parties. The Supreme Court has extended the Federal Arbitration Act,¹ which was passed in 1925 to facilitate enforcement of commercial arbitration clauses, to contracts of adhesion and to the adjudication of federal statutory rights. Thus arbitration has moved from the business-to-business realm to govern resolution of potential claims by consumers and employees. In approving this expansion, the Court increasingly makes clear that it sees nothing special about court litigation—that it and arbitration are mechanisms of equal dignity.

This conclusion is possible if we consider the role of court litigation merely to be the resolution of disputes. Historically, though, court litigation has reflected broader goals and values. Court litigation is a public, transparent process, governed by the rule of law. It generates the common law that governs most aspects of our daily lives. Court litigation is intended to play a significant role in social ordering. Arbitration is not. Arbitration goes on behind closed doors, unseen by the public and unreported by the media; it is not cabined by the rule of law, and does not result in written opinions to guide society. Arbitration resolves the dispute at hand and does little else. The view that arbitration and court litigation are equivalents cheapens the values embodied in court litigation. Some argue that it threatens the law-giving function of the judiciary.

¹ 9 U.S.C. § 2 (2012).

This argument is strong, but would be stronger if today's version of court litigation resembled the historical model. It does not. Courts today are less often fora for public adjudication and law generation than monuments to mediation. The current judicial bureaucracy cajoles parties into settling their disputes. Cases not settled are hustled through a front-loaded process focused increasingly on adjudication without trial. Indeed, some judges conclude that going to trial reflects a systemic "failure."² Thus, court litigation has transformed from dispute resolution and law generation to a forced march through progressively smaller windows of opportunities for public adjudication.

Both the exodus and the transformation are fueled by the perception of excessive caseload.³ There are not enough Article III judges to do the job in accord with the historical model. Yet Congress has not appreciably increased the number of Article III judges. Thus, the courts (led by the Court and drafters of the Federal Rules) have pursued two safety valves: getting disputes out of the courts and streamlining litigation to foster pretrial resolution. They have pursued exodus and transformation.

Part I of this Article discusses the traditional model of court litigation, and the values it embodies, and describes the strains put upon that model by increased docket pressure in the last quarter of the twentieth century. Part II discusses the exodus from that system, particularly as facilitated by the Court's expansive embrace of privatized arbitration. Part III outlines the transformation of court litigation, with a front-loaded process focused on settlement or adjudication without trial, and characterized increasingly by contract procedure. Finally, Part IV suggests that a broad theme underlying both the exodus and the transformation is the supremacy of contract. This theme is consistent with a general (though not universal) political embrace of deregulation and freedom of contract. The Court has erred, however, in applying principles of freedom of contract to non-negotiated, form arbitration agreements. By permitting the imposition of arbitration clauses with bans on aggregate litigation, the Court imperils access to dispute resolution of any type, at least in cases involving large numbers of negative-value claims.

² See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

³ See, e.g., Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921.

I. THE MODEL AND THE STRAIN ON IT

Obviously, court litigation resolves disputes. But it does much more. As Lon Fuller explained, court litigation is “a form of social ordering,” of governing and regulating the relations among people.⁴ If mere dispute resolution (and, for that matter, efficiency) were the only goal, we could decide cases by coin toss. We do not do that, however, because court litigation is supported by normative values⁵ that are reflected in various characteristics of the process.

American court litigation is public. Courthouses are public buildings, with open access to most records and proceedings.⁶ Litigation thus informs people about events that may affect their lives, such as alleged problems with widely used products or fraudulent misrepresentations to investors or consumers.⁷ More broadly, it can “supply narratives to be shared and debated by a heterogeneous citizenry.”⁸ Public access allows the citizenry (including the media) to assess the performance of the judges and lawyers, and to monitor the political legitimacy of the judicial system.⁹

Court litigation is adversarial and participatory, with each side, through counsel, presenting its positions and reasoning concerning the relevant law. The system relies on this adversarial crucible, with testimony under oath, to sharpen the legal issues to be decided by the judge.¹⁰ On questions of fact, the traditional centerpiece is trial, at which each party is permitted to tell its story

⁴ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978). Professor Fuller noted that “[e]ven if there is no statement by the tribunal of the reasons for its decision, some reason will be perceived or guessed at, and the parties will tend to govern their conduct accordingly.” *Id.* Professor Fuller spoke of “adjudication” rather than the term I use, “court litigation.”

⁵ Professor Redish has gleaned six “foundational goals” in court litigation: accuracy, efficiency, political legitimacy, maintenance of the proper substantive–procedural balance, predictability, and fundamental fairness. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 593–94 (2001).

⁶ See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2820–36 (2015) (discussing public access to courts).

⁷ Litigation thus “forces information into the public eye. . . . [and] is a particularly powerful means of information forcing, and even the threat of civil discovery can result in disclosure.” Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3199 (2013).

⁸ Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1103 (2006).

⁹ “[T]hrough access, the public is educated, the judges and litigants and lawyers are supervised, and knowledge of legal requirements is disseminated.” Resnik, *supra* note 8, at 1114; see also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657 (2016). Litigation produces “narratives that help litigants and the public understand events.” Lahav, *supra*, at 1679.

¹⁰ See Fuller, *supra* note 4, at 368. Adjudication “gives formal and institutional expression to the influence of reasoned argument in human affairs.” *Id.*

to the fact-finder. In some cases, that fact-finder is the jury, which reflects the wisdom of the common person and engages public self-governance.¹¹ Trial in open court is understood to be “constitutive of American democracy.”¹²

The process is overseen by a neutral, generalist trial judge, who is charged with the responsibility of applying the rule of law. The adjudicated case ends with entry of the court’s judgment, a public document announcing the outcome. The trial judge’s decisions on matters of law are subject to plenary review by the court of appeals, further ensuring fidelity to the rule of law. The court’s reasoning often is set forth in a written, publicly available opinion, explaining the decision in accordance with established law (or justifying a change in the law).¹³

The reasoned application of fact to law does more than resolve the dispute at hand. It limns and develops the law itself. Most of our general law of contract, tort, and property is common law, the product of the judicial branch. The authoritative interpretation of our governing documents comes from case law. And though judicial decisions are retrospective in that they make judgments about past events, they play a prospective role in guiding citizens

¹¹ “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” *Blakely v. Washington*, 542 U.S. 296, 306 (2004); see also Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 183 (2005) (“My own view is not only that the civil jury trial is well worth preserving, but that it *must* be preserved to assure public participation in civil dispute resolution, the continued development of the common law, and a bar well-trained in advocacy.”). The jury, comprised of ordinary citizens, can act as a counterweight to aggregate power of other actors, including the parties, the government, or even the bench itself as judges are subject to their own prejudices. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 402 (2011).

¹² See Burbank & Subrin, *supra* note 11, at 401; see also William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 76–77 (2013) (“Open court proceedings . . . carry important symbolic value: at their best, they are emblematic of fair, swift, and transparent justice. The strengths and weaknesses of a party’s case, the credibility of evidence, the skill of attorneys, and the demeanor of the judge are all on display in the open courtroom.”).

¹³ I do not suggest that the majority of cases result in published opinions. And of those that do, very few appellate pronouncements, and even fewer trial court decisions, “make law.” Trial judges routinely rule on motions without detailed opinion. On the other hand, the process features the application of the rule of law to the specific case. The parties argue their positions based upon the law; and the judge, even the judge ruling from the bench in an oral order, responds to those reasoned arguments. And though general jury verdicts do not demonstrate the group’s reasoning, bench trials result in written findings of fact and conclusions of law. See FED. R. CIV. P. 52(a)(1). As Professor Lahav notes, the failure to provide written opinions is cause for criticism of the judiciary. Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 519 (2015).

about appropriate behavior.¹⁴ Moreover, the transparent public nature of the process and decisions allows the legislature to react and abrogate various holdings, which is an integral part of checks and balances.¹⁵

Like any model, this paradigm has never been fully realized.¹⁶ Excessive caseload creates pressure that may lead to change. Caseload “crises” have commanded significant attention at various times in our history. In 1956, for example, Attorney General Brownell convened a national conference on court congestion and delay.¹⁷ The focus of this Article, though, is on the dramatic increase in federal caseloads from the 1970s to the 1990s.¹⁸ In common narrative, there was a “litigation explosion”¹⁹ during that time, the causes of which are familiar. In the 1960s, the Court invigorated civil rights.²⁰ Congress

¹⁴ By deciding cases through this process, courts engage in social ordering as much as legislatures do. Fuller, *supra* note 4, at 363–65; *see also* James R. Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement, or Decisions According to Law?*, 30 GA. ST. L. REV. 983, 1015 (2014) (“The essential goal of every modern system of civil justice is the application of law to facts to determine rights and resolve disputes according to law and justice. In this way, legal systems not only do right in individual cases, they make social life possible. They validate a nation’s laws and facilitate its peoples’ compliance with law.”). In a recent example of the court’s prospective role, the U.S. Supreme Court recently denied certiorari review of a Second Circuit decision which altered the contours of the insider-trading statutes in a very tangible way, narrowing the outer boundaries of what may be considered insider trading for purposes of criminal prosecution. *See United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015); Matthew Goldstein & Adam Liptak, *Supreme Court Denies Request to Hear Insider Trading Case*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/business/dealbook/supreme-court-denies-request-to-hear-insider-trading-case.html>.

¹⁵ For example, in response to the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007), Congress passed the Lilly Ledbetter Fair Pay Act of 2009, codifying the law with respect to the timeliness of pay-compensation claims prior to the Court’s decision and making the new law retroactive to otherwise abrogate and supersede the Supreme Court’s decision. Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5(e)(3) (2012)).

¹⁶ *See* Fuller, *supra* note 4, at 357 (discussing adjudication “as it might be if the ideals that support it were fully realized”).

¹⁷ Maxeiner, *supra* note 14, at 1003.

¹⁸ *See, e.g.*, Galanter, *supra* note 3, at 923–24 (noting an 89% increase in federal civil case filings from 1978 to 1984); *see also* Lahav, *supra* note 9, at 1699. After relatively little litigation in federal courts from the 1930s to the 1960s, development precipitated a significant rise in the number of suits filed in federal courts. *Id.* The rate of filing new cases in district courts has leveled off in recent years. *See* Resnik, *supra* note 6, at 2933 (review of filing trends over 110 years “suggests that if the current trend line remains stable, both the rate of filings and the number of civil and criminal cases may decline”).

¹⁹ In his heralded studies, Professor Galanter demonstrated that though more cases were filed from the 1960s through the 1980s, the rate of growth was largely consistent with the growth of population and growth of the economy and largely could be attributed to certain substantive areas. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1266–68 (2005); Galanter, *supra* note 3, at 937–42. Without doubt, though, the number of filings in the federal courts increased steadily throughout the period.

²⁰ This fact is reflected by the exponential growth in cases filed under 42 U.S.C. § 1983, asserting violation of federal rights under color of state law. 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE

created other rights.²¹ Innovative tort theories such as strict product liability began to take hold.²² Centralization of the economy made it possible for a single defective product or fraudulent statement to injure hundreds or thousands of people. Congress has been reluctant to increase meaningfully the amount in controversy requirement for diversity of citizenship cases. More recently, the Class Action Fairness Act funneled increasing numbers of class actions (a particularly labor-intensive type of case) into federal court. The “war on drugs” and the trend toward increased criminalization added docket burdens from the criminal side.²³

At the same time, Congress committed to the use of private civil litigation to enforce the law.²⁴ It enacted fee-shifting statutes to promote enforcement of a variety of rights.²⁵ The promulgation of the modern class action provision in 1966 created a powerful new tool for the aggregate enforcement of rights, notwithstanding that it could create litigation that otherwise would never have been filed.²⁶ Taboos on lawyer advertising dropped away²⁷ as the Court

AND PROCEDURE § 3573 (3d ed. 2008) (“Despite the high purpose for which the statutes were enacted, for many years they were rarely used. This changed dramatically, starting in the 1960s. In 1960 approximately 300 actions were filed under the general heading of civil rights. In fiscal 1982 more than 17,000 actions of this kind were filed. In fiscal 2006, 29,814 private civil rights cases were commenced in the district courts.” (footnotes omitted)).

²¹ See Resnik, *supra* note 8, at 1109 (“[B]y the Warren era, constitutional interpretation looked favorably upon court-based processes to enable racial equality and to enhance human dignity. Congress not only supported, but also expanded, this project by authorizing government officials and private parties to bring lawsuits to enforce federal laws regulating an array of issues related to the economy, personal safety, workplace relations, the environment, and interpersonal obligations of fair treatment.”).

²² See Galanter, *supra* note 3, at 937.

²³ See David L. Cook et. al., *Criminal Caseload in U.S. District Courts: More than Meets the Eye*, 44 AM. U. L. REV. 1579, 1586 (1995); Patricia W. Hatamy Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1181.

²⁴ This was a recognition that the administrative state was not able to enforce the laws fully, and therefore it enlisted private enforcement. By doing this, the administrative state used private rights to vindicate the public law. A more direct example of civil litigation as law enforcement is the *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729–3733 (2012), in which the plaintiff need not be harmed by the practices on which she blows the whistle. The original False Claims Act was passed in 1863. See An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863).

²⁵ See, e.g., 42 U.S.C. § 1988(b) (the prevailing party may recover from the losing party attorney’s fees in civil rights and RFRA cases, among others); 20 U.S.C. § 1415 (fee-shifting for prevailing parents of a child with disability in IDEA [Individuals with Disabilities Education Act] suit); 42 U.S.C. § 3613(c)(2) (Fair Housing Amendments Act fee-shifting provision); 42 U.S.C. § 12205 (Americans with Disabilities Act fee-shifting provision).

²⁶ Professor Benjamin Kaplan, who was Reporter for the 1966 amendments, conceded this point. See generally Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967).

recognized in the late 1970s that bringing suit was akin to political activity.²⁸ Advertising also allowed broader use of contingent fee arrangements, which permitted lawyers to invest in cases and share the risk with plaintiffs.²⁹

Increases in the number of Article III judgeships³⁰ did not keep pace with the increased caseload at the end of the twentieth century.³¹ Case queues and backlogs increased, which led Congress in 1990 to require federal judges to account for their caseloads and the timeliness of resolution every six months.³² One way to cope would be to channel cases out of the federal courts.

II. THE EXODUS

The exodus from court litigation started long before the modern concern about docket glut. Early in the twentieth century, Congress began outsourcing enormous numbers of disputes from Article III courts to other tribunals in the federal government. It created Article I courts, such as the tax court,³³ which feature adversarial presentation and application of the rule of law, but which are not overseen by judicial officers enjoying Article III protections. Time after time, the Court approved legislative delegation of judicial business to

²⁷ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (holding that a ban on attorney advertising in newspapers violated the First Amendment). *See generally* William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255 (2005).

²⁸ *See* Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1765–66 (2013) (noting that the Court “recognized that collective activity to obtain meaningful access to the courts is protected under the First Amendment”).

²⁹ *See* Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457 (1998) (highlighting some of the modern trends in the bar and contingency fee arrangements); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998) (tracing the historical evolution of contingency fee contracts in the United States).

³⁰ Instead, the number of adjunct personnel hired to assist Article III judges has increased, which, in turn, has led to increased delegation and oversight issues. *See infra* note 47 and accompanying text.

³¹ Incumbent Article III judges generally may have opposed expansions of their ranks. *See* William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 47 (1999) (discussing “judicial reluctance to expansion” due to losing current status). This desire to protect their prestigious turf may resonate with Congress.

³² 28 U.S.C. § 476 (2012), part of the Civil Justice Reform Act of 1990, requires the Director of the Administrative Office of the U.S. Courts to collect and publish semiannual reports disclosing for each district and magistrate judge “the number of motions that have been pending for more than six months,” the “number of bench trials that have been submitted for more than six months,” and “the number . . . of cases that have not been terminated within three years after filing.”

³³ *See generally* 13 WRIGHT ET AL., *supra* note 20, § 3528.

non-Article III bodies.³⁴ The purpose of this enormous exodus was not expressly to relieve docket pressure in federal courts. Rather, it reflected an embrace of the administrative state, with relatively informal dispute resolution by experts in their respective fields.³⁵

Congress has also delegated fact-finding to manifold administrative officers and judges in agencies, subject to judicial review in Article III courts.³⁶ The Court has applauded this delegation for “reliev[ing] the [Article III] courts of a most serious burden.”³⁷ Today there are two and a half times as many federal administrative law judges as there are district court judges.³⁸

In addition, Congress has provided adjunct personnel inside the federal courthouse. In 1968, it created the post of federal magistrate, to whom district judges may delegate substantial numbers of dispositive and non-dispositive pretrial matters.³⁹ Indeed, magistrate judges may preside over civil trials (jury or non-jury) if the parties consent.⁴⁰ It was more than symbolic when, in 1991, Congress amended the names of these officers to “magistrate judges.”⁴¹ The new appellation reflected the increased scope of authority. The Court has consistently facilitated delegation to magistrate judges with broad

³⁴ However, non-Article III tribunals may not issue final determinations on cases involving private rights. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69–70 (1982) (bankruptcy court cannot determine private rights disputes); *Crowell v. Benson*, 285 U.S. 22, 56–57 (1932) (non-Article III tribunals cannot make final determinations of constitutional facts).

³⁵ The New Deal largely eschewed litigation as a tool of economic and social policy. Yeazell, *supra* note 28, at 1778. The turn from litigation to regulation came in large part “in response to judicial decisions that thwarted a number of early efforts at social reform. Litigation was the tool of those who opposed the administrative regulations of the Progressive Era and the New Deal.” *Id.* at 1778. The perception was that the administrative state was a “rational and efficient alternative to the sloppy and politically retrograde inconsistency of litigation.” *Id.*

³⁶ Judicial review need not be de novo, but may be based upon the record created by the non-Article III body. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936).

³⁷ *Crowell*, 285 U.S. at 54.

³⁸ There are presently 677 authorized district court judgeships, *Status of Article III Judgeships—Judicial Business 2015*, U.S. CTS., <http://www.uscourts.gov/status-of-article-iii-judgeships-judicial-business-2015>, while “[a]s of December 2014, there were 1,698 ALJs serving in 26 federal departments, agencies, boards, or commissions.” *Mission, Constitution, and Bylaws*, FED. ADMIN. L. JUDGES CONF., <http://www.faljc.org/mission-constitution-bylaws/> (last visited Mar. 23, 2016).

³⁹ See generally *Federal Magistrates Act*, 28 U.S.C. §§ 631–639 (2012); 18 U.S.C. §§ 3401, 3060; *Landmark Judicial Legislation: The Federal Magistrates Act*, FED. JUD. CTR. http://www.fjc.gov/history/home.nsf/page/landmark_19.html (last visited Feb. 19, 2016).

⁴⁰ 28 U.S.C. § 636(c)(1).

⁴¹ Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 482, 104 Stat. 5096 (1990) (codified at 28 U.S.C. § 471).

interpretations of magistrate judges' authority⁴² and lenient interpretation of district court review.⁴³

District courts routinely outsource various aspects of litigation to bankruptcy judges who, like magistrate judges, are not Article III officers.⁴⁴ Most recently, in *Wellness International Network, Ltd. v. Sharif*,⁴⁵ the Court upheld the authority of bankruptcy judges to hear (with the consent of the parties) matters falling within the judicial power of Article III. The Court relied upon the reality that “without the distinguished service of [non-Article III] judicial colleagues, the work of the federal court system would grind nearly to a halt.”⁴⁶ Though Congress has refused to increase the number of Article III judges, it has readily expanded the number of these adjunct personnel.⁴⁷ In the aggregate, there are more magistrate and bankruptcy judges than district judges.⁴⁸

Behind the scenes in the courthouse, the number of law clerks at all levels of the federal judiciary has increased steadily. Entire banks of research attorneys serve as staff law clerks to the district and appellate bench.⁴⁹ So in these ways Congress has expanded the federal judiciary. But it has done so in a

⁴² See, e.g., *Roell v. Withrow*, 538 U.S. 580, 584 & n.1, 588 (2003) (noting that though a magistrate judge may preside at trial only with parties' consent, such consent may be inferred from conduct and need not be express). See generally *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993).

⁴³ See, e.g., *United States v. Raddatz*, 447 U.S. 667, 673–74 (1980) (statute requiring de novo review by district judge does not require de novo hearing, but permits review on the record to determine (in a hearing to suppress evidence in a criminal case) which testimony was more believable).

⁴⁴ The Court has occasionally pushed back against some congressional efforts to vest jurisdiction in the bankruptcy courts. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 68, 87 (1982) (declaring bankruptcy law unconstitutional for vesting “inherently judicial” Article III power in an Article I court).

⁴⁵ 135 S. Ct. 1932, 1944–45 (2015).

⁴⁶ *Id.* at 1938–39; see also Jonathan R. Nash, *Article Three Protectionism*, HILL (June 2, 2015, 6:30 AM), <http://thehill.com/blogs/pundits-blog/the-judiciary/243696-article-three-protectionism>.

⁴⁷ Professor Lahav has noted that while an increase in the number of judicial personnel may alleviate problems of process scarcity for litigants, it would not likely solve the problem of lack of litigant participation so characteristic of a litigation system focused on settlement. Lahav, *supra* note 13, at 513 n.3.

⁴⁸ *Wellness Int'l Networks*, 135 S. Ct. at 1938 n.1 (Congress has authorized 179 court of appeals and 677 district judgeships, while there are 534 full-time magistrate judges and 349 bankruptcy judges); see Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 972 (2007) (“The non-Article III magistrate and bankruptcy judges, whose numbers come close to those of the Article III judiciary, now perform a large amount of adjudicatory work in federal district courts, in civil and criminal cases (though their decisions are in theory subject to review by Article III judges).”).

⁴⁹ Chad Oldfather & Todd C. Peppers, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1 (2014).

way that changed the character of litigation by balkanizing the process through delegation of discrete judicial functions subject to district court oversight.⁵⁰

The more profound route of exodus recently, however, is to privatized dispute resolution.⁵¹ Here, parties to a contract provide that their disputes will be resolved outside the court system, by a third party of their choosing. Increasingly in the 1980s, dissatisfaction with the delay and expense of litigation led many to extoll the virtue of less formalized process.⁵² Adherents of the ADR movement argued that alternatives are more flexible than court litigation, that the parties could hire experts as decision-makers, and that confidentiality would foster better resolutions.⁵³ ADR was thought to be cheaper and less cumbersome than court litigation. The march to ADR became a cottage industry, and new providers of resolution services sprang up.⁵⁴ Law school curricula made way for courses on arbitration, mediation, and negotiation.⁵⁵ ADR is so common today that the adjective “alternative” probably should be dropped.⁵⁶

The Court facilitated the ADR boom, starting in the 1980s, by embracing arbitration with great zeal.⁵⁷ Historically, courts had refused to enforce arbitration agreements. They decried the secrecy of arbitration hearings and the

⁵⁰ This fact has contributed to the rise of the “managerial judge,” which is a characteristic of the transformation of court litigation, discussed in the following section of this Article. *See infra* note 165 and accompanying text.

⁵¹ I do not suggest that the number of cases removed from court litigation by contractual arbitration approaches the number of disputes heard by Article I courts and administrative law judges. Rather, the contractual exodus is more profound because it permits exodus dictated not by congressional policy but by one party to a contract of adhesion. *See infra* note 199 and accompanying text.

⁵² *See* Edward F. Sherman, *Mediation Training: Career Opportunities and Skill Formation for Other Occupations*, in AM. ARBITRATION ASS’N, *ADR AND THE LAW* 69, 69 (20th ed. 2006).

⁵³ *See supra* note 35 and accompanying text; *infra* note 171 and accompanying text.

⁵⁴ *See* Sherman, *supra* note 52, at 69–70 (“[T]he ADR movement has made it possible for more people to earn a living as mediators . . .”).

⁵⁵ *See, e.g.,* Deborah R. Hensler, *Our Court, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 165–66 (2003) (discussing the high interest in alternative dispute resolution).

⁵⁶ “An increasingly common parlance (crisscrossing the globe) replaces the phrase ‘alternative dispute resolution (ADR)’ with DR, so as to put courts . . . on a continuum of mechanisms responding to conflicts.” Resnik, *supra* note 6, at 2806–07; *see* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 339–40 (2005) (“ADR has expanded to become somewhat of a court of general civil jurisdiction. No longer a niche product for certain commercial and labor law cases, ADR now commands attention in all sectors of the economy and in virtually every segment of society.” (footnotes omitted)).

⁵⁷ *See infra* notes 72–99 and accompanying text.

fact that arbitration decisions were not tethered to the rule of law.⁵⁸ Regarding federal claims, courts were nervous that a private arbitrator would not be familiar with congressional policy, which could undermine enforcement of rights. Some courts concluded that arbitration clauses improperly usurped a legislative function by “ousting” proper tribunals of jurisdiction.⁵⁹ Against this hostile background Congress passed the Federal Arbitration Act (FAA),⁶⁰ which required courts to enforce valid arbitration provisions, and permitted them to stay litigation, compel arbitration, and enforce arbitration awards.

Congress did this in 1925.⁶¹ At the time, contractual arbitration provisions were found in commercial agreements, and applied to disputes between businesses.⁶² Form contracts of adhesion and mass marketing of products were unknown. In the words of one observer, “the FAA was originally envisioned by Congress as a relatively limited legislation that would govern disputes between commercial parties in federal court.”⁶³ Presumably, the businesses engaged in arbitration were of at least roughly equal bargaining power and routinely had ongoing relationships.

For over half a century, contractual arbitration remained largely limited to the business-to-business scenario. Starting in the 1980s, however, the Court changed the arbitration world and paved the way for a broader exodus from court litigation. Underlying these decisions is the notion that the contract is supreme, and that parties should be required to abide by a provision opting out of the public dispute-resolution apparatus. The Court has not lamented this

⁵⁸ See Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 865–70 (2004) (discussing early courts’ attitude towards arbitration and reasons behind passage of the FAA).

⁵⁹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974) (discussing American courts’ adoption of the “ousting” jurisprudence). There was, of course, similar antipathy to the enforcement of forum selection clauses. See Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT’L L. 663, 666 (1997) (stating that federal courts generally refused to enforce forum selection clauses until the mid-twentieth century).

⁶⁰ 9 U.S.C. §§ 1–14 (2012). The legislation was originally known as the “United States Arbitration Act,” but was changed to the FAA in 1947. See Resnik, *supra* note 6, at 2860–62.

⁶¹ See United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14).

⁶² On the other hand, arbitration has long been common to resolve disputes among members of affinity groups, such as religious groups. See generally Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111 (2015).

⁶³ 31 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 907.01 (3d ed. 2015). Among other things, the FAA permits a party to an arbitration agreement to petition a court to order the parties to arbitrate, to seek judicial recognition of an arbitration award, and to set aside an arbitration award on very limited grounds. 9 U.S.C. §§ 4, 9 & 10. See generally 13D WRIGHT ET AL., *supra* note 20, § 3569 (3d ed. 2008).

move, in part because it has come to consider arbitration as fungible with, if not superior to, court litigation.

Over the past three decades, the Court has extended the command of the FAA to contracts of adhesion—contracts entered without negotiation, on a “take it or leave it” basis.⁶⁴ This was a remarkable change of course. In *Wilko v. Swan*, decided in 1953, the Court had rejected arbitration of federal securities claims by consumer-investors, in part because of the perceived congressional purpose of protecting investors, who, no matter how sophisticated, were at an informational disadvantage vis-à-vis the issuer of securities.⁶⁵

Extending the FAA to contracts involving individual consumers changed the dynamic of arbitration itself. In the historical commercial context at which the FAA was aimed, arbitration is between repeat players. Expansion to contracts of adhesion ensures that arbitration will frequently be between the business that imposes the clause (and will have experience in arbitration) and the individual (who will not be a repeat player). In addition to imposing arbitration, the business will also choose the forum and the arbitrator.⁶⁶

The Court also did not seem to appreciate the fact that arbitration imposes a significant cost on its participants: they must pay the arbitrator’s fee, which can, per hour, exceed that of lawyers. In many consumer cases, the business agrees to pay the arbitrator’s fees.⁶⁷ This, in turn, raises a significant problem

⁶⁴ 31 MOORE ET AL., *supra* note 63, § 907.01 n.2. Congress has cut back on the availability of arbitration in form contracts between automobile manufacturers and dealerships. See 15 U.S.C. § 1226. Legislative history expressed concern that dealers were “virtual economic captives” of the manufacturers, who offered only “take it or leave it” contracts. S. REP. NO. 107-266, at 2–3 (2002). Automobile dealers surely are not the only “virtual economic captives.”

⁶⁵ 346 U.S. 427, 435 (1953) (“Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by the [Securities] Act on a different basis from other purchasers.”), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989).

⁶⁶ The powerful party will be a repeat player with that provider of dispute resolution, which may give rise to concerns about fairness for the other party. Moreover, choice of provider will affect costs of the proceeding. The burden is on the party challenging a clause to demonstrate that the costs imposed by the chosen procedure would prevent her from vindicating her rights. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

⁶⁷ This is not universally true, but a wise business will note that imposing costs of arbitration on the consumer may result in a court holding that the clause is unconscionable. See, e.g., *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1282–83 (11th Cir. 2012) (provision that arbitration expenses be borne by customer regardless of outcome is unconscionable as a matter of general contract law; clause was severable from arbitration provision, however, so arbitration was ordered); *Palmer v. Infosys Techs., Ltd.*, 832 F. Supp.

of industry capture. Put bluntly, providers of arbitration services might not get repeat business if they rule too often for the party opposing the one who is picking up the tab.⁶⁸ In contrast, of course, the taxpayers pay the decision-maker in court litigation, which obviates the problem of capture.⁶⁹

It is worth noting that during the same period the Court also validated forum selection clauses contained in adhesion contracts.⁷⁰ Indeed, it analogized the two, thereby ignoring an obvious difference between these types of clauses. A forum selection clause imposed in a contract of adhesion permits one party to shift litigation from one court to another court. An arbitration provision imposed in a contract of adhesion, however, permits one party to eliminate a judicial forum altogether.⁷¹

The Court also reversed course on permitting arbitration of federal statutory claims. In rejecting arbitration of securities claims in *Wilko*, the Court recognized the importance of a federal *judicial* forum for the effective vindication of investors' rights.⁷² Arbitration would require someone "without judicial instruction on the law" to enter an award, which would be made "without explanation of reasons and without a complete record of proceedings."⁷³ In light of *Wilko* and similar cases, courts were reluctant to

2d 1341, 1346–47 (M.D. Ala. 2011) (holding that the arbitration agreement unconscionable as a matter of general contract law; "[w]hile the *Concepcion* Court expressed concern about arbitration morphing into a set of formalized, class-based procedures, this arbitration agreement is unconscionable at an antecedent step").

⁶⁸ See generally Resnik, *supra* note 6; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

⁶⁹ This is not to say that there are not efforts to capture judicial officers. An obvious example is financial contributions to campaigns of elected state court judges. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (noting that due process requires recusal of judge to whose campaign a litigant made a substantial donation). Forum shopping is also a method of attempting to ensure a favorable decision-maker.

⁷⁰ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–97 (1991).

⁷¹ If the ouster doctrine—which rejects clauses that attempt to oust a court of jurisdiction, see *supra* note 59—were to have teeth, it would seem appropriate in the arbitration context (as opposed to the forum-selection-clause context). Though a forum selection clause effectively upsets the original court's venue prerogative, it does not oust the judiciary of power over a case within its jurisdiction. Of course, in the arbitration context (and not the forum-selection-clause context), there is federal legislation, which preempts state law under the Supremacy Clause. U.S. CONST. art. VI, cl. 2. Because arbitration robs courts of jurisdiction to adjudicate, however, one might expect narrow interpretation of that legislation. Obviously, the Court does not agree. See, e.g., *Shute*, 499 U.S. at 593–97.

⁷² 346 U.S. 427, 435–36 (1953) (noting that the "effectiveness in application [of Securities Act provisions advantageous to an investor] is lessened in arbitration as compared to judicial proceedings").

⁷³ *Id.* at 436. The lack of record meant that the "arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care,' or 'material fact' cannot be examined." *Id.*

enforce arbitration clauses in employment contracts.⁷⁴ By the 1980s, though, the Court's attitude had changed. The Court overruled *Wilko* in 1989⁷⁵ and in 1991 permitted arbitration of employees' claims under the Age Discrimination in Employment Act.⁷⁶ Thus, the fact that Congress made one's federal statutory right non-waivable does not mean that it provided a right to a federal judicial forum.⁷⁷

Over time, "the FAA became a federal substantive right, preempting state laws found by the Court to undermine its own broadening of the 'liberal federal policy favoring arbitration.'"⁷⁸ Contract trumped the policies of court access and protection of individuals that had characterized earlier decisions. Though the Court left open a safety valve—that arbitration may be denied when the process would not permit "effective vindication" of rights—the Court has yet to find such a case.⁷⁹ It has upheld arbitration of a wide variety of federal- and state-law claims,⁸⁰ including claims under consumer-protection laws⁸¹ and even for wrongful death from the allegedly negligent operation of a nursing home.⁸²

⁷⁴ See G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 514–15, 565–72 (1990) (discussing the lower courts' struggle with the applicability of the FAA to federal employment claims).

⁷⁵ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989).

⁷⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28, 35 (1991).

⁷⁷ In light of this attitude, it is not surprising that the Court has permitted state-court judgments to be preclusive of federal securities claims. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

⁷⁸ Resnik, *supra* note 6, at 2839 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011)).

⁷⁹ Lower courts occasionally do. See, e.g., *McMullen v. Meijer, Inc.*, 355 F.3d 485, 490–91 (6th Cir. 2004) (provision for selection of arbitrator did not provide effective substitute for judicial forum for plaintiff's Title VII claims; case remanded to determine whether arbitrator-selection provision could be severed and the remainder of the arbitration clause enforced).

⁸⁰ See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (antitrust); *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401, 404–70 (2003) (Racketeer Influenced and Corrupt Organizations Act); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26, 28 (Age Discrimination in Employment Act); *Rodriguez de Quijas*, 490 U.S. at 486 (Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (Securities Exchange Act 1934); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 640 (1985) (antitrust); see also *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 490–95 (3d Cir. 2014) (holding as a matter of first impression that whistleblower retaliation claims under the Dodd-Frank Act are not exempt from pre-dispute arbitration agreements). As a general rule, when Congress creates a claim, courts presume that federal and state courts have subject matter jurisdiction. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (concluding that federal jurisdiction exclusive only if Congress so provides expressly or by fair implication). Thus, there is no presumption of a federal forum for federal claims.

⁸¹ See, e.g., *Concepcion*, 131 S. Ct. at 1744.

⁸² *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

The Court has also limited the types of questions that a court may decide in ruling on a motion to compel arbitration. The judge may decide the “gateway” question of whether the agreement submits the case to arbitration. This gateway issue “has a . . . limited scope.”⁸³ The Court may not decide matters such as whether a claim is otherwise barred,⁸⁴ or whether an agreement’s limit on punitive damages precludes a statutory claim for treble damages,⁸⁵ or whether a clause forbids class arbitration.⁸⁶ Another example is the Court’s severability doctrine, which requires that an attack on the validity of the underlying contract itself (say, for fraudulent inducement) must be ruled upon by the arbitrator and not by a judge.⁸⁷ A judge may decide only a claim that the arbitration clause itself (and not the contract as a whole) is invalid.⁸⁸

The FAA provides for very limited judicial review⁸⁹ of arbitration decisions,⁹⁰ and the Court has held that neither the parties nor a judge may expand the scope of that review.⁹¹ Under the FAA, a court may not set aside a ruling of an arbitrator simply because the arbitrator made an error—“even a serious error.”⁹² So, like Las Vegas, what happens in arbitration pretty much stays in arbitration; a court rarely will call the meaningful shots.

⁸³ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

⁸⁴ *Id.* (whether arbitration barred by NASD rules).

⁸⁵ *PacifiCare Health Sys., Inc.*, 538 U.S. at 407 n.2 (“Given our presumption in favor of arbitration, we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability.” (citation omitted)).

⁸⁶ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066, 2071 (2013) (holding that though the agreement was silent on the issue, the arbitrator’s order of class arbitration could not be set aside under limited appellate review of arbitration matters).

⁸⁷ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). The Court applied *Prima Paint* to a case filed in state court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006). In *Preston v. Ferrer*, 552 U.S. 346, 359 (2008), the Court concluded that the FAA superseded state law that would have vested jurisdiction of the dispute in an administrative agency. Thus, the state court was required to order arbitration, and the arbitrator would determine the validity of the contract. *Id.*

⁸⁸ See, e.g., *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 430 (5th Cir. 2004).

⁸⁹ As the court succinctly observed in *First State Insurance Co. v. National Casualty Co.*,

A party that implores a court to vacate an arbitration award normally faces a steep uphill climb: the scope of judicial review of arbitration awards is “among the narrowest known in the law.” And where, as here, the arbitration clause contains an “honorable engagement” provision, judicial review is encumbered by yet a further level of circumscription. Surveying this arid landscape, the court below refused to vacate the challenged arbitration award and instead confirmed it. Discerning no error, we affirm.

781 F.3d 7, 9 (1st Cir. 2015) (citation omitted).

⁹⁰ 9 U.S.C. §§ 10, 11 (2012).

⁹¹ *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁹² *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671 (2010).

Further, the scope of issues to be submitted to arbitration is a matter of contract. In a form contract, the terms will typically be quite broad. For example, a provision that the parties arbitrate any matter “arising out of or relating to” the parties’ agreement may compel arbitration of tort claims.⁹³ Again, the contract is supreme; the fact that one party to the agreement unilaterally imposed those terms is irrelevant.⁹⁴ Implicit is the assumption that the other party could simply have refused to enter the agreement. Though this is certainly true regarding leisure or luxury items like cruises, in contemporary society it is less clear that people can readily go without things like cellphones or that they can refuse to put a loved one in a nursing home in order to avoid an arbitration clause.

Part of the current FAA jurisprudence is the Court’s attitude that arbitration is an apt substitute for court litigation. Indeed, the Court has come to justify its holdings on the notion that “arbitration [is] a better process than adjudication and [does] just as well as an enforcement mechanism for public rights.”⁹⁵ The two are fungible, though, only if one values nothing more than the dispute resolution function of court litigation.⁹⁶ No component of arbitration is public. The hearings are private; there is no access for public or press.⁹⁷ There is no jury. The secrecy of the proceedings precludes public knowledge of potentially dangerous products or practices. Privatized resolution does not result in reasoned public explication of the law. The lack of transparency precludes

⁹³ See, e.g., *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 383 (11th Cir. 1996); *Troshak v. Terminix Int’l. Co.*, No. Civ. A. 98-1727, 1998 WL 401693 (E.D. Pa. July 2, 1998); see *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

⁹⁴ There is a parallel in cases involving forum selection clauses. In *Carnival Cruise Lines, Inc. v. Shute*, the Court upheld such a provision in a consumer adhesion contract. 499 U.S. 585, 587, 596 (1991). The result was that a plaintiff residing in Washington and injured on a cruise in California had to sue the cruise ship company in Florida. The Court was willing to assume that absence of the forum selection clause would have resulted in more expensive fares. *Id.* at 594. It thus presumed a level of bargaining power for the plaintiff.

⁹⁵ Resnik, *supra* note 6, at 2840. Thus, the Court opines, litigation is costly and slow, while arbitration produces streamline proceedings that adequately protect rights. *Id.*

⁹⁶ Though arbitration historically has been hailed as less expensive and time-consuming than court litigation, recent experience, at least in high-stakes cases, belies the point. One common complaint today is that aspects of court litigation, notably discovery, imported into arbitration, make it “look” and “feel” (and cost) more like court litigation.

⁹⁷ Provisions in the arbitration rules of various providers, such as the American Arbitration Association, routinely require the arbitrator to ensure privacy of hearings. AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 42 (2013), https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_004103. Third parties generally may to attend only if no party objects. *Id.*

interaction between judicial and legislative branches. Arbitration does not even affirm the rule of law, because, as seen above, arbitrators' decisions are not reviewed for adherence to the law.

Accordingly, commentators argue that a massive exodus to private dispute resolution robs the judiciary of its law-giving function and stymies development of the common law.⁹⁸ It impoverishes the democratic values underlying the historic court litigation model.⁹⁹ The argument is strong. But to a degree it is based upon a false comparison because court litigation today is not what the traditional model contemplated.

III. THE TRANSFORMATION

A. *Meanwhile, Back at the Courthouse . . .*

What were the plaintiffs leaving behind when their cases were shuttled into arbitration? They were leaving a system focused on, if not obsessed with, efficiency.¹⁰⁰ A driving force came in the early 1990s, when Congress required the Administrative Office to impose requirements that judges report about cases pending and disposition times.¹⁰¹ Judges being human (and being lawyers, who are competitive), these requirements imposed at least implicit pressure to shore up one's docket.¹⁰² The pressure to shore up the docket is reflected in a front-loaded system of litigation focused on pretrial resolution and compromise.

⁹⁸ See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 678–79 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015); Kim Karelis, *Private Justice: How Civil Litigation is Becoming a Private Institution—The Rise of Private Dispute Centers*, 23 SW. U. L. REV. 621, 622 (1994).

⁹⁹ Fiss, *supra* note 98, at 1085–86.

¹⁰⁰ See 28 U.S.C. § 476 (2012).

¹⁰¹ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 476 (2012)).

¹⁰² Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1108 (2015) (“The [Administrative Office] publishes the number of cases pending more than three years for each individual judge by name. As a result, judges have some incentive to reduce their case disposition times.” (footnote omitted)). Anecdotally, many law clerks to federal judges can tell stories of increased activity in chambers near the deadlines for reporting to the Administrative Office. It is worth noting that in the 1950s the federal district courts moved from a master calendaring system, in which different judges might have presided over various stages of a case, to a single-assignment system. Thus, each judge is personally responsible for the progress of cases assigned to her.

A judicial “settlement culture” has become pervasive in the federal courts.¹⁰³ The original Federal Rules of Civil Procedure did not contain a single reference to any form of the word “settle.”¹⁰⁴ For years, courts were reluctant to require parties to discuss settlement. District judges felt that settlement, if it happened, should be a by-product of conferences and not an express objective for the court.¹⁰⁵ That compunction is now a thing of the past.¹⁰⁶ Rule 26 requires the parties to discuss settlement and permits the judge to promote it.¹⁰⁷ Nor is the effort focused solely at the trial-court level. Case management and ADR are features of appellate practice as well.¹⁰⁸

¹⁰³ Materials for a seminar for newly appointed district judges in 1976 said, “Most cases . . . are better disposed of, in terms of highest quality of justice, by a freely negotiated settlement than by the most beautiful trial that you can preside over.” Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation, in Seminar for Newly Appointed U.S. District Judges*, 75 F.R.D. 89, 123 (1976). Judges often praise settlement. See, e.g., *Hispanics United v. Vill. of Addison*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997) (“[A] bad settlement is almost always better than a good trial.”). The settlement culture of the federal courts is widely noted. See, e.g., James J. Alfani, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 256 (1999); Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 680 (2013); Fiss, *supra* note 98, at 1075 (“Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”); Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994); Harold Hongju Koh, “*The Just, Speedy, and Inexpensive Determination of Every Action?*,” 162 U. PA. L. REV. 1525, 1526–27 (2014); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 405 (1982); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 80–81 (2006).

¹⁰⁴ See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802 (2014).

¹⁰⁵ AM. BAR ASS’N, *THE IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE* 78 (5th ed. 1971) (reporting that a majority of district judges concluded that pretrial conference “is not properly a device” for urging parties to settle).

¹⁰⁶ See, e.g., *Switzer v. Much, Shelist, Freed, Denenberg, Ament, Bell & Rubenstein, P.C.*, 214 F.R.D. 682, 688 (W.D. Okla. 2003) (“This Court has neither the authority nor the desire to force the parties to settle this case. . . . However, in the interest of managing its resources and minimizing cost and delay to the parties, the Court does have both the specific and inherent authority to require attendance at, and good faith participation in, a settlement conference.”).

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.”

Resnik, *supra* note 104, at 1805.

¹⁰⁷ FED. R. CIV. P. 16(c)(2) (listing matters that may be discussed at a scheduling conference, including “settling the case”); FED. R. CIV. P. 26(f)(2) (requiring parties to meet and consider various items, including “the possibilities for promptly settling or resolving the case”).

¹⁰⁸ See generally 16AA WRIGHT ET AL., *supra* note 20, § 3979 (4th ed. 2008) (“Responding to docket pressures, the courts of appeals have developed appellate mediation programs that, when appropriate, may help to streamline the substantive and procedural issues in an appeal and may also facilitate settlement.”); Mori Irvine, *Better Late than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341, 341–45 (1999).

Congress has imposed the ethos of ADR on the courts. Every district is required to offer some form of court-annexed ADR.¹⁰⁹ The goal of court-imposed ADR is to provide benchmarks, with the hope that these will spur the parties to compromise their differences. In Delaware, the state attempted to get in on the growth industry by allowing parties to hire sitting chancery judges (at a filing fee of \$12,000 and charges of \$6,000 per day) to arbitrate their cases—and to keep the proceedings and the results private.¹¹⁰ The Third Circuit rejected this effort to use public resources to render privatized justice as unconstitutional.¹¹¹

The Federal Rules reflect an embarrassing minimization of traditional judicial functions by providing that district judges are not meant to “adjudicate” or even “resolve” cases, but that they are merely to “assist in the resolution” of cases.¹¹² Though the majority of cases filed have always settled,¹¹³ the centerpiece of our traditional model is the trial.¹¹⁴ The original version of Federal Rule 16 envisioned the pretrial-conference order as establishing the issues to be resolved at trial; that conference came at the *end* of the pretrial-litigation phase, to sharpen the evidentiary presentation in the courtroom.¹¹⁵

Now, the Federal Rules envision multiple conferences to oversee the pretrial phase and promote settlement, rather than to focus the trial.¹¹⁶ Today, pretrial “is a stage unto itself, no longer a prelude to trial but rather assumed to be the way to end a case *without trial*.”¹¹⁷ Not surprisingly, in a system bent on

¹⁰⁹ See Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 290 n.9 (2003) (discussing The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658, 652(a), which requires each district court to provide at least one ADR process to litigants). More than forty state judicial systems mandate ADR in at least some cases.

¹¹⁰ Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 521 (3d Cir. 2013).

¹¹¹ *Id.*

¹¹² FED. R. CIV. P. 16(c)(2)(I).

¹¹³ See Burbank & Subrin, *supra* note 11, at 401.

¹¹⁴ See Lahav, *supra* note 9, at 1680 (“[T]raditionally the trial was the focus of narrative creation in litigation.”); Resnik, *supra* note 2, at 927 (“Trials are thought to be the centerpiece of this judicial process . . .”).

¹¹⁵ Indeed, the pretrial conference was inserted into the original Federal Rules as an “afterthought,” having been championed by Attorney General William Mitchell because of some states’ provision for the conference. *Id.* at 935–37. The original provision for pretrial conference “reflected that the meeting was to talk about the shape of the coming trial.” *Id.* at 936.

¹¹⁶ FED. R. CIV. P. 16(a) (“[T]he court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences . . .”).

¹¹⁷ Resnik, *supra* note 2, at 937.

pushing settlement, few cases go to trial: in federal court, fewer than 2%.¹¹⁸ The judge is in chambers,¹¹⁹ more often than not managing the case toward a non-merits-based conclusion.¹²⁰ Two decades ago, one judge famously said, “Members of the bench should keep in mind that the word ‘judge’ is a verb as well as a noun.”¹²¹ The focus on conciliation and consensus is so dominant that, stunningly, going to trial is seen as pathological—as a “failure” of the system.¹²²

The settlement culture is especially prevalent in mass tort litigation, which today is dominated by consolidation under the multidistrict (MDL) litigation procedure.¹²³ A startling percentage of all civil cases in district courts are coordinated for MDL treatment.¹²⁴ And a stunning 96% of those cases pending in MDL proceedings are mass-tort cases.¹²⁵ Thus, very few federal-court mass-tort plaintiffs have their claims to themselves; they must share the stage with suits filed by other plaintiffs. Lawyers lose control, as the aggregated mass starts to look like a class action, with the MDL judge appointing lead counsel and overseeing the management of the aggregate proceedings. Increasingly, the prevalent goal of these consolidated proceedings is to buy “global peace” for the defendants.¹²⁶ MDL judges have invented the

¹¹⁸ There is a robust literature on the “vanishing trial.” See, e.g., Burbank & Subrin, *supra* note 11, at 401; Galanter, *supra* note 19; Marc Galanter, *The Vanishing Trial*, DISP. RESOL. MAG., Summer 2004, at 3, 6 (“[I]n the absence of trials, the decision-making process of adjudication may get swallowed up by the surrounding bargaining process.”); 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, 944 (2004).

¹¹⁹ Studies indicate that judges spend little time actually on the bench. See, e.g., Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243, 259 (2013) (noting data suggest bench presence is less than two hours per day in the federal courts).

¹²⁰ See Galanter, *supra* note 118, at 6 (“With fewer benchmarks and little prospect of a determinative trial, our system of bargaining in the shadow of law may well become one of adjudication in the shadow of bargaining.”); see also Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1769, 1785 (2014) (“[The] federal judiciary . . . has very little experience evaluating the merits of claims. Trials have decreased and cases have been shunted away from federal court by arbitration doctrine.”).

¹²¹ Harp v. City, 161 F.R.D. 398, 402 (E.D. Ark. 1995).

¹²² See Resnik, *supra* note 2, at 926; Yeazell, *supra* note 118, at 947–48.

¹²³ 28 U.S.C. § 1407 (2012) creates the Judicial Panel on Multidistrict Litigation and empowers it to order cases transferred to a single district and judge for coordinated pretrial proceedings. See generally 15 WRIGHT ET AL., *supra* note 20, §§ 3861–3868 (4th ed. 2013).

¹²⁴ Thomas Metzloff, *The MDL Vortex Revisited*, JUDICATURE, Autumn 2015, at 37, 38–41, 43 (2015).

¹²⁵ See *id.* at 41.

¹²⁶ Indeed, defendants often are the driving force behind the motion to consolidate in MDL. See Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 240 (“As is well known, what defendants seek most from class action litigation is closure, or ‘global peace.’”).

“quasi-class action” to justify a great many practices, including the ability to foster (some would say coerce) settlement.¹²⁷

Part and parcel of the vanishing trial is a focus on pretrial practice.¹²⁸ One characteristic of today’s litigation is “front-loading,” or forcing increased activity into earlier phases of a case. Perhaps the purest example of front-loading is found in Rules 16 and 26, which require a substantial investment of time and effort in the first months of a case. Under Rule 26(f)(2), the parties must meet and confer to discuss a broad array of topics.¹²⁹ Within fourteen days after that meeting, the parties must produce their initial disclosures under Rule 26(a)(1) and develop a detailed discovery plan, including their views on matters such as what discovery may be needed, when it should be completed, and potential problems with discovery of electronically stored information.¹³⁰ In 1993, when required disclosures were added to the Rules, these activities were to be completed in time to allow the court to issue its scheduling order no more than 120 days after service of process on the defendant.¹³¹ Effective December 1, 2015, that time is cut by 25%, as the court must issue the scheduling order no later than ninety days after service of process.¹³²

What is the purpose of imposing this flurry? It is not clear. But the “hurry up” mentality is so well ingrained that the Advisory Committee felt no need to explain (let alone justify) this 25% reduction in time.¹³³ One possibility is that the increased activity forces litigants to incur substantial expense early in the case, which might increase the incentive to compromise.¹³⁴

¹²⁷ Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 405 (2011).

¹²⁸ See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003) (“[T]he core of American civil procedure and the quest for ‘reform’ are now centered on the period anterior to trial.”).

¹²⁹ FED. R. CIV. P. 26(f)(2) (listing issues the “parties must consider,” including “the possibilities for promptly settling or resolving the case”).

¹³⁰ FED. R. CIV. P. 26(a)(1)(C), (f)(2)–(3). These proposals will guide the court in creating the scheduling order under Rule 16(b).

¹³¹ FED. R. CIV. P. 26(a)(1)(C), 26(f) advisory committee’s note to 1993 amendment.

¹³² FED. R. CIV. P. 16(b), 26(a)(1)(C), 26(f); see FED. R. CIV. P. 16(b) advisory committee’s note to 2015 amendment.

¹³³ Concomitantly, amendment of Rule 4(m) reduces the time in which to serve process on the defendant from 120 to 90 days. There had been no outcry for this reduction. See Moore, *supra* note 102, at 1106.

¹³⁴ Rules 16 and 26 are party-neutral. One might expect the incursion of expense early in a case would incline a plaintiff more readily than a defendant to consider settlement. This is because many plaintiffs’ lawyers work on contingent fee, and thus subsidize the litigation. Requiring them to do more work in the early stages forces them to invest more in the case before reaching adjudication, which might increase the incentive

In the 1990s, England and Wales adopted the Woolf Reforms, which, among other things, embraced front-loading for precisely this reason.¹³⁵ The reforms were intended to force parties and lawyers to engage in early-case and even pre-filing activity in an effort to spur settlement.¹³⁶ The move toward compromise was part of the United Kingdom's rejection of the adversary system. The Woolf Report lamented that litigation had become "too adversarial," and proposed that case management, increased numbers of conferences and, at least implicitly, the need to pay lawyers from the very beginning of the case would incline litigants to iron out their differences and make the dispute go away.¹³⁷ American litigation has done much the same thing, with managerial judging, increased conferences and face time between the opponents, and strict time requirements. We have done this, though, without national debate and without consensus on the need to abandon the adversary system.

But does front-loading foster settlement? In 1993, the Advisory Committee expressed its hope that its then-new required disclosures would lead to increased settlement by putting more information before the parties without the need to request it.¹³⁸ In fact, however, there is a sense that settlement rates may not have declined as a result of the mandatory disclosure regime.¹³⁹ As a general rule, then, it may be that parties who have invested in a case may dig in their heels rather than look for a settlement.

The motivation behind the enforced alacrity in Rules 16 and 26 is probably banal. Over time, judges have come to dominate the rule-making process.¹⁴⁰ Judges, as we have seen, are under pressure from the Administrative Office to

to settle. But the same can be said of the defendant who is getting billed by the hour and may be tempted to write a check to be done with the whole matter. Note, however, where the incentives lie. While the defendant herself is incurring cost and thus may want to get out through settlement, it is the plaintiff's lawyer (not the plaintiff) who may feel the pressure imposed by increased pretrial activity. Obviously, the ability of each party to incur expense and bear risk varies with each case.

¹³⁵ See Steven Flanders, *Transforming the Role of English Judges*, 81 JUDICATURE 244, 245 (1998).

¹³⁶ *Id.* at 249.

¹³⁷ *Id.* at 248–49.

¹³⁸ FED. R. CIV. P. 26(a) advisory committee's note to 1993 amendment; see George B. Shepherd, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465, 474 (2016).

¹³⁹ See Shepherd, *supra* note 138, at 474 (noting that increased discovery does not increase settlement rates); Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 760 (1995) (predicting that mandatory disclosure would result in decline of settlement rates).

¹⁴⁰ Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 460 (2013).

account for timely disposition of their cases. One need not be a cynic to conclude that the reduction is intended simply to keep cases moving through the system more quickly.¹⁴¹

Some front-loading has hurt the legal system as a whole in unanticipated ways. An example concerns the liberalization of discovery, such as the 1970 amendment to Federal Rule 34, to permit requests for production without a court order. Discovery, of course, is an integral part of pretrial practice and a focal point in debates about whether our litigation system “works.”¹⁴² Despite rhetoric about out-of-control discovery costs, it appears that the vast number of cases present no significant problems; discovery expense is proportional to the dispute at hand.¹⁴³ Still, there is evidence that the liberalization of discovery was an important factor in causing the legal profession to move to hourly billing,¹⁴⁴ which, some conclude, is chiefly responsible for the increased cost of legal services and for increased lawyer wealth in the last part of the twentieth century.¹⁴⁵ Though the negative public perception of lawyers in the United States stems from many sources, this unintended consequence—a public perception that attorneys are getting rich by running the meter—is damaging to the judicial system as a whole. It also plays into an ongoing narrative that litigation is too expensive and time-consuming.

Most front-loading in contemporary litigation results not from the Federal Rules but from Supreme Court decisions.¹⁴⁶ Some of these decisions have hurt

¹⁴¹ See, e.g., Moore, *supra* note 102, at 1108 (public hearings on Rule amendments elicited “suspicion” that temporal limitations were imposed “to shorten [judges’] case disposition times”). The time pressure from front-loading might help plaintiffs. It keeps the case moving and forces certain decision points, which makes it difficult for defendants to run out the clock. Perhaps this merely means, though, that if there is to be a war of attrition of resources, it may simply come earlier rather than later.

¹⁴² See generally Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

¹⁴³ See generally Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

¹⁴⁴ See generally George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91; see also Maxeiner, *supra* note 14, at 1008 (“It is no coincidence that hourly billing became the norm when discovery became routine.”).

¹⁴⁵ See Maxeiner, *supra* note 14, at 1008 (discovery “turned contests into wars of attrition”); Shepherd & Cloud, *supra* note 144, at 97.

¹⁴⁶ Others have written about the Court raising barriers to plaintiffs’ access to justice. The most consistent voice is that of Professor Miller. See, e.g., 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); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014); Miller, *supra* note 128. My emphasis is on how these cases increase front-loading. So even if the changes effected by them did not raise hurdles for the plaintiff, they would increase litigation cost, usually disproportionately for the plaintiff.

plaintiffs by changing the rules to make access to court more difficult. For example, the Court's recent decisions on specific¹⁴⁷ and general¹⁴⁸ personal jurisdiction restrict access to courts, as many have noted.¹⁴⁹ These rulings also mean that more plaintiffs will be put to the burden of overcoming Rule 12(b)(2) motions. For example, many companies that would never have challenged general personal jurisdiction (because of continuous and systematic activities in the forum) will now have an incentive to move to dismiss or even to set aside judgments already entered in cases filed before the Court changed the law.¹⁵⁰

A plaintiff's path may be made more difficult even if the Court's decisions do not actually impose a higher substantive hurdle. An example may be the "plausibility pleading" standard established by the Court in 2007 and 2009.¹⁵¹ Arguably, the Court has tempered its stance on pleading in subsequent cases,¹⁵² and there is a debate about whether "plausibility pleading" imposed an improperly high hurdle on plaintiffs.¹⁵³ Even if the standard did not increase dismissal rates (an issue on which commentators may disagree),¹⁵⁴ there seems to be no doubt that the cases have increased the number of Rule 12(b)(6)

¹⁴⁷ *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (specific personal jurisdiction proper only over defendant that "purposefully avail[s] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

¹⁴⁸ *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

¹⁴⁹ See generally Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For*: Goodyear, Daimler, and the Evisceration of General Jurisdiction, 64 EMORY L.J. ONLINE 2001 (2014); Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012).

¹⁵⁰ See, e.g., *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237 (D.D.C. 2015); *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, No. CIV-11-1284-D, 2014 WL 8187951 (W.D. Okla. Dec. 12, 2014); *Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451 (S.D.N.Y. 2008).

¹⁵¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁵² In *Erickson v. Pardus*, 551 U.S. 89 (2007), the Court upheld a complaint filed by a prisoner alleging deliberate indifference to medical needs, and said, "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 93 (ellipsis in original) (quoting *Twombly*, 550 U.S. at 555). In *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014), the Court upheld a complaint alleging violation of federal civil rights despite the plaintiff's failure to cite the statute under which he sued. *Id.* at 346. *Twombly* and *Iqbal* did not apply because they addressed factual, and not legal, sufficiency. *Id.* ("[The Rules] do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").

¹⁵³ See Adam McDonnell Moline, Comment, *Nineteenth-Century-Principles for Twenty-First-Century Pleading*, 60 EMORY L.J. 159 (2010).

¹⁵⁴ See Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 194 (2014) (discussing and disagreeing with empirical studies that claim to show that plausibility pleading had "negligible real-world effects").

motions to dismiss.¹⁵⁵ So regardless of the pleading standard,¹⁵⁶ more plaintiffs are put to the burden of overcoming a motion.¹⁵⁷ Making a motion to dismiss under Rule 12(b)(2) or 12(b)(6) is easy and inexpensive for defendants. Defending and defeating the motions, however, require the plaintiff to fight for her litigation life.

A plaintiff overcoming the personal jurisdiction and pleading hurdles may next face more front-loading with a motion for summary judgment. A generation ago, in a widely noted “trilogy” of cases,¹⁵⁸ the Court invigorated the practice of adjudication without trial.¹⁵⁹ Professor Miller concluded that the Court’s message was “an instruction to the lower courts to increase the disposition of cases under Rule 56 either to protect defendants or to achieve systemic efficiency.”¹⁶⁰ Some critics¹⁶¹ have said the same thing about the

¹⁵⁵ See Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012).

¹⁵⁶ It is worth noting that the Court imposed plausibility pleading through opinion and not by proposing an amendment to Federal Rule of Civil Procedure 8(a)(2), which ostensibly prescribes the requirements for stating a claim. *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544. Going through the process outlined by the Rules Enabling Act would have taken a long time and might not have been successful. See 28 U.S.C. §§ 2072–2074 (2012).

¹⁵⁷ Even in matters governed by Federal Rule, when an amendment does not alter the actual standard at the ground level, the change invites litigation and imposes costs on litigants. Effective December 1, 2015, the requirement that discovery requests be “proportional to the needs of the case” is moved from being a filter on the discovery of relevant non-privileged information to being part of the definition of discoverability itself. Arguably, the new definition limits the scope of discovery. Moore, *supra* note 102, at 1112–17. Regardless, it will clearly increase the number of motions contesting discovery.

The hyperactivity of the Rules Advisory Committee over the past generation can be criticized on various fronts, one of which is the imposition of expense to litigate the meaning of new rules. See Freer, *supra* note 140, at 468. Congress has also imposed such costs with its imprecise drafting of such jurisdictional provisions as the Class Action Fairness Act and the supplemental jurisdiction statute. See Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1367, 1453, 1711–1715.

¹⁵⁸ To the extent the Court has loosened the reins on granting summary judgment, it has done so by decision and not by rulemaking.

¹⁵⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (permitting defendant to move for summary judgment by demonstrating lack of record evidence supporting an element of plaintiff’s claim); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986) (rejecting the “scintilla” test, which had allowed denial of summary judgment if the opposing party produced a mere scintilla of evidence indicating a dispute of material fact); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (permitting court to grant summary judgment in favor of defendant when it concludes that plaintiff’s theory is implausible).

¹⁶⁰ Miller, *supra* note 128, at 1133 (speaking specifically of the *Celotex* decision). The trilogy “transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation.” *Id.* at 984.

¹⁶¹ See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837 (2009).

more recent decision of *Scott v. Harris*,¹⁶² which permits judges to grant summary judgment based upon video evidence that, in the judges' view, contradicts evidence proffered by the other party.¹⁶³

B. A New Set of Guiding Principles

The transformation of litigation away from a trial-centered process—the obsession with efficiency, the settlement culture, the front-loading, and adjudication without trial—is marked by a fundamental change in the role of the trial judge. Historically, judges were neutral umpires who were largely reactive; they ruled on matters brought to them by the parties. The new court litigation model required a more activist oversight role.¹⁶⁴ It is now universally understood that the courts are staffed with what Professor Resnik has famously called “managerial judges.”¹⁶⁵ They sit atop a huge bureaucracy: today, of the over 30,000 people employed by the federal judicial branch, fewer than 1,000

¹⁶² 550 U.S. 372, 380 (2007) (“no reasonable juror” could believe plaintiff’s version in light of video evidence); see Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 205 (2012) (discussing the consideration of “harmproof evidence,” such as a videotape, where it is properly admitted evidence that is powerful enough to overcome other evidence (whether properly admitted or not, one must presume) that might suggest another conclusion).

¹⁶³ The holding is not limited to video evidence. See, e.g., *White v. Georgia*, 380 F. App’x 796, 797 (11th Cir. 2010). The court refused to credit plaintiff’s sworn statement that she was shot because medical records indicated that injuries were not caused by gunshot. *Id.*

¹⁶⁴ In part, the new regime evolved from a spate of “mega cases” in the 1960s and 1970s. Some of these involved overwhelming numbers of parties, and the trial judge was required to oversee organization of counsel for effective litigation. Institutional litigation put courts in charge of desegregating schools and clean up of environmental disasters. Judges relied increasingly on delegation to adjuncts like magistrate judges and masters. Class actions put judges in an unaccustomed fiduciary position of having to protect the interests of class members. This, in turn, could jeopardize a judge’s impartiality, because she was called upon to broker terms of settlement of class actions. FED. R. CIV. P. 23(e) (requiring judge to hold hearing and assess fairness and reasonableness of settlement of a certified class action). The oversight role was not limited to large cases, but found its way into quotidian judicial life. See Resnik, *supra* note 2, at 942 (“[L]eaders of the federal judiciary took the mission of judicial control of the protracted case and expanded it from the large case to the smaller one.”).

¹⁶⁵ Resnik, *supra* note 103, at 386–91. Professor Miller has chronicled a shift in the 1970s in the Advisory Committee’s focus from reactive judging to managerial judging and from trial to pretrial. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 55 (2010). As Steven Gensler has observed,

[F]ederal judges now take control of their cases from the start. The process of taking control typically begins with the judge issuing a case-management order that sets a detailed schedule based on the particular needs of the case. As the case goes forward, the federal judge can continue to exercise control by, among other things, closely managing the scope, timing, and sequence of discovery and dispositive motions.

Steven S. Gensler, *Judicial Case Managements: Caught in the Crossfire*, 60 DUKE L.J. 669, 670–71 (2010).

are Article III judges.¹⁶⁶ These shifting roles have had an impact on judges' behavior, moving from reactive to inquisitorial as they seek, rather than receive, information in furtherance of efficiency and resolution.¹⁶⁷ This transformation also reflects that, as a practical matter, the notion of judge as stakeholder in court litigation has taken on an entirely different meaning.

Another aspect of contemporary court litigation is the emergence of "contract procedure."¹⁶⁸ Parties now attempt, with remarkable success, to tailor court litigation by choosing options differing from the usual litigation rules.¹⁶⁹ As noted, courts long ago agreed to permit litigants to supplant rules of personal jurisdiction, venue, and choice of law through forum selection clauses and law selection clauses.¹⁷⁰ More recently, courts have upheld agreements overriding the public nature of court judgments by permitting parties to stipulate to private consent judgments and confidential settlements.¹⁷¹ They

¹⁶⁶ *Data, Analysis & Documentation: Federal Employment Reports*, U.S. OFF. PERSONNEL MGMT. (Sept. 2013), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2013/september/table-1/>; *How the Federal Courts Are Organized: Federal Judges and How They Get Appointed*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183> (last visited Mar. 27, 2016).

¹⁶⁷ The use of the inquisitorial model is not without precedent in the United States, although it is generally understood that such a model is prevalent in European, not American, legal systems. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

¹⁶⁸ See, e.g., Charles W. Tyler, Note, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560 (2013).

¹⁶⁹ There are limits, of course. Parties cannot stipulate around limitations on subject matter jurisdiction because that is a structural limitation having nothing to do with individual interests. Within the non-judicial realm, however, scholars assert that there are some procedural rules that implicate interests beyond those of the litigants and, therefore, should not be subject to stipulation. See, e.g., David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008). In Part IV, I will suggest that the procedures permitting aggregate vindication of claims might be such procedural rules.

¹⁷⁰ See 14D WRIGHT ET AL., *supra* note 20, § 3803.1 (4th ed. 2013).

¹⁷¹ See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (consent decree permissible under Title VII and permitted to provide relief beyond that provided by statute as long as it was fair and reasonable); *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) (reversing denial of consent decree in case where monies paid by polluter were to be paid to private organizations and not to the U.S. Treasury); *State v. Nat'l Arbitration Forum, Inc.*, No. 27-CV-0918550, 2009 WL 5424036 (Minn. Dist. Ct. July 17, 2009) (consent judgment entered against credit card arbitration service firm after case brought on behalf of consumers subject to mandatory arbitration agreements).

Not every court permits this practice. In a line of cases, Judge Jed S. Rakoff has openly challenged the granting of consent decrees, at least in the securities litigation context. See *SEC v. Citigroup Global Markets Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011); *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304 (S.D.N.Y. 2011); *SEC v. Bank of Am. Corp.* (Bank of America Opinion I), 653 F. Supp. 2d 507 (S.D.N.Y. 2009). See generally Michael C. Macchiarola, "Hallowed by History, but Not by Reason": Judge Rakoff's

have permitted waiver of the rules permitting aggregate joinder, including class litigation.¹⁷² They have undermined the finality of judgments by enforcing agreements to vacate judgments.¹⁷³ And, of course, they have permitted the deprivation of access to a judicial forum by arbitration clauses in form contracts.

The transformation of court litigation is so profound that many individual claimants may prefer arbitration to what they get in the courts. One commentator concludes,

[O]nly the mythology of outdated belief systems could sustain the view that coerced participation of employees and consumers in arbitration invariably constitutes a denial of justice. In point of fact, the weaker party should rationally seek to avail itself of a more user-friendly dispute resolution process that provides for acceptable final results.¹⁷⁴

The transformation robs more than the disputants. Because so few cases go to trial, public engagement through access to courtrooms and jury service today is relegated to the realm of folklore and mythology. The role of appellate courts as law givers is diminished. For decades, the federal courts of appeals have screened large numbers of appeals as unworthy of oral argument and disposed of them by cursory per curiam opinions containing little if any legal reasoning. Today, over 70% of opinions from the U.S. Courts of Appeals are “unpublished.”¹⁷⁵ Even though these opinions are widely available on the

Critique of the Securities and Exchange Commission's Consent Judgment Practice, 16 CUNY L. REV. 51, 96 (2012).

¹⁷² See *infra* Part IV.

¹⁷³ See, e.g., *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119, 121 (Cal. 1992) (“[P]arties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances that warrant an exception to this general rule.”). See generally Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991) (arguing that settlement through vacatur distorts settlement and perverts the judicial process); Steven R. Harmon, Comment, *Unsettling Settlements: Should Stipulated Reversals Be Allowed to Trump Judgments' Collateral Estoppel Effects Under Neary?*, 85 CALIF. L. REV. 479, 480 (1997); Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233 (1989) (supporting the practice).

¹⁷⁴ Thomas E. Carbonneau, “Arbitracide”: *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARBITRATION 233, 253 (2007).

¹⁷⁵ Table 2.5—U.S. Courts of Appeals Judicial Facts and Figures, U.S. CTS. (Sept. 30, 2013), <http://www.uscourts.gov/statistics/table/25/judicial-facts-and-figures/2013/09/30> (listing percentage of unpublished opinions, reflecting unpublished opinion rate of 82% in 2013); see Robert Timothy Reagan, *A Snapshot of Briefs, Opinions, and Citations in Federal Appeals*, 8 J. APP. PRAC. & PROCESS 321, 324 (2006). Reagan explained that in the sample of cases included in a study conducted by the Federal Judicial Center in the mid-2000-oughts:

Internet¹⁷⁶ and may be cited as persuasive authority,¹⁷⁷ it is remarkable that the very courts issuing them do not consider them to provide binding precedent.

One would think that shifting away from the historical model of court litigation—shifting from adjudicating to processing—would have required debate, in which “lawmakers and the public are presented with a choice between competing visions” of the litigation system.¹⁷⁸ But that did not happen. As Professors Subrin and Main demonstrate, the federal courts have entered a new era of practice essentially by accretion—with changes here and there that, overall, have brought us where we are.¹⁷⁹

[N]inety-nine percent were resolved during the study period. Of these, fourteen percent were resolved by published opinions, thirty-one percent were resolved by unpublished opinions, and fifty-five percent were resolved without opinions. If we take into account the number of cases filed in each circuit, this implies that among all cases an estimated ten percent were resolved by published opinions, approximately thirty-one percent were resolved by unpublished opinions, and about fifty-nine percent were resolved without opinions.

Id.

¹⁷⁶ See Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 171 (2012); *id.* at 155 (citing 44 U.S.C. § 3501 note § 205(a)(5) (2004) (requiring court websites to provide “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format”). Additionally, the long-established sources, Lexis and Westlaw, are augmented by other subscription services and innumerable blogs, making “unpublished” opinions widely available. West Publishing Company has for over a decade published hard copies of the “Federal Appendix,” which consists entirely of “unpublished” opinions. *Federal Appendix (National Reporter System)*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/Reporters/Federal-Appendix-National-Reporter-System/p/100000796> (last updated Mar. 27, 2016).

¹⁷⁷ FED. R. APP. P. 32.1.

¹⁷⁸ Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1856 (2014). Earlier, Professor Bone noted that changes in procedural regimes in the nineteenth and twentieth centuries were normatively grounded. Robert G. Bone, *Making Effective Rules: The Need for Procedural Theory*, 61 OKLA. L. REV. 319, 321 (2008). That is, there were reasons for the changes made. Contemporary procedural law has developed, however, without such grounding. *Id.*

¹⁷⁹ Subrin & Main, *supra* note 178, at 1857 (“[T]here was no specific moment when [the new regime] was passed, no legislative history revealing its purpose, and no anointed leaders personifying it.”).

As seen, some of the changes were imposed by changes to the Federal Rules, while most resulted from Court decisions. At some level, it is proper to lay the Rules amendments at the feet of the Court, since it is the titular head of the rulemaking process. But the Court has generally been disengaged from that process. Indeed, it has effected some procedural change by decision rather than inviting the Advisory Committee to address the issue. One example is the standard for pleading a claim under Rule 8(a)(2), discussed in *supra* text accompanying notes 151–56. Another is its de facto augmentation of Rule 11 in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48–51 (1991). For an example of the Court’s inviting rulemakers to act, see *Schiavone v. Fortune*, 477 U.S. 21, 30–31 (1986) (addressing relation back of amended pleadings under Rule 15(c)). On the other hand, members of the Advisory Committees are appointed by the Chief Justice, who may appoint like-minded people to run the rulemaking process. See generally Moore, *supra* note 102, at 1087–88 (noting the “pro-defendant composition” of the advisory committees).

Fears that privatization—the exodus to alternatives—would impoverish our civil justice system may be overblown precisely because the civil justice system itself is impoverished. Litigants remaining in court do not find the robust adversary system of our model, but a huge bureaucracy bent on pushing cases to pretrial resolution, particularly by compromise.

IV. EXODUS AND TRANSFORMATION CONVERGE: HEGEMONY OF CONTRACT TO TRUMP AGGREGATION

Both the exodus and the transformation have been driven (or justified) by docket pressure that makes it impossible for courts to do what our historical model calls for them to do.¹⁸⁰ Because of case overload, we have farmed cases out of the system and we have also altered the system.

The tenor is not hospitable to plaintiffs. Are the exodus and particularly the transformation part of a “war” on plaintiffs? Many think so. In fairness, though, many could have seen developments in the 1960s and 1970s as a “war” on defendants. For example, the trilogy of summary judgment cases in 1986 may be seen as a reaction to some trial judges’ refusal to grant summary judgment in almost any context, to the disadvantage of defendants. The Court may be seen as reminding district judges that they should not write Rule 56 out of the rulebook. The Court’s repeal of the “equitable clean up” doctrine in the mid-twentieth century vastly expanded the right to jury trial, mostly to the benefit of plaintiffs.¹⁸¹ Tort theories permitting recovery without negligence and the withering of contributory negligence encouraged plaintiffs and fueled the rise of the plaintiff’s bar as a political and economic force.¹⁸²

¹⁸⁰ “The problem to be solved is insufficient capacity, as judges cannot respond to all in need of their attention.” Resnik, *supra* note 2, at 2847; see Miller, *supra* note 128, at 985–96 (discussing rhetoric of litigation explosion and need for reform). Professor Miller observed that public outcry was

unprecedented in its decibel level and sense of urgency, bringing together a coalition of politicians, lawmakers, business people, and scholars that often bridge[d] traditional lines between conservative and liberal ideologies. It . . . engaged the attention of all three branches of the federal government as well as many state legislatures.

Id. at 986 (footnote omitted); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (discussing the rhetoric of litigation explosion). See generally Subrin & Main, *supra* note 178.

¹⁸¹ Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

¹⁸² Yeazell, *supra* note 28, at 1771–72.

There was a conscious political decision in the 1960s to expand rights and provide for enforcement through litigation, rather than enforcement through the administrative state. Hence Congress created claims carrying multiple damages and passed statutes permitting shifting of attorney's fees. Defendants may see the fee-shifting provisions in some federal statutes as skewed in favor of plaintiffs.¹⁸³ And, of course, the 1966 promulgation of the modern class action as a private enforcement mechanism was controversial. Depending on one's viewpoint, it was hailed as allowing aggregate enforcement or decried as "turn[ing] a \$1.28 overcharge of a million customers into a potential multimillion-dollar liability."¹⁸⁴

To a degree, we expect things to change. We expect a pendulum to swing. And it has, from pro-plaintiff to pro-defendant. For example, the message of the "trilogy" cases has been heard not simply to keep Rule 56 on the books but to justify summary judgment at unprecedented levels. One study of Title VII cases showed that summary judgment has essentially supplanted trial as the mode of adjudication.¹⁸⁵ Is that swing motivated by an anti-plaintiff agenda? Maybe. But it seems likely that some aspects of the transformation, such as managerial judging and case oversight, had bipartisan support—they were embraced not as a matter of ideology, but as a way for judges to cope with docket overload.¹⁸⁶

Some of the transformation is undoubtedly ideological. That is neither new nor unexpected. Just as today's Advisory Committee might be "activist" in limiting discovery, so the Advisory Committee of the 1960s was "activist" in promoting litigation by creating the modern class action.¹⁸⁷ The Court changes over time, sometimes more liberal and sometimes more conservative, not only on the substance of the law but on procedural matters as well. There is

¹⁸³ For example, under the Civil Rights Act, prevailing plaintiffs should routinely recover attorney's fees, while defendants may do so only if they show that the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 421 (1978).

¹⁸⁴ Yeazell, *supra* note 28, at 1771.

¹⁸⁵ Amanda Farahany & Tanya McAdams, *Analysis of Employment Discrimination Claims for Cases in Which an Order Was Issued on Defendant's Motion for Summary Judgment in 2011 and 2012 in the U.S. District Court for the Northern District of Georgia*, in BARRETT & FARAHANY, LLP, JUSTICE AT WORK (2013), <http://ssrn.com/abstract=2326697>.

¹⁸⁶ See generally Subrin & Main, *supra* note 178, at 1859–77 (noting that while the reaction began as a bipartisan push to cope with burgeoning dockets, it became more politicized with time as it shifted from a simple question of management to perceptions of pro-plaintiff or pro-defendant procedures).

¹⁸⁷ See also Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1881 (1989) ("[The Federal Rules] have worked to considerable (if not universal) satisfaction to support revolutions of the substantive law.").

something benign about the image of a pendulum; we have faith that it will swing back away from the extremes.

But it is possible for a pendulum to come off its mount, and once broken it cannot correct itself. To me, we are at such a point, and I trace it to a philosophy that underlies both the exodus and the transformation: the primacy of contract. Contract enables parties to opt out of court litigation and go to arbitration. And contract enables the parties to transform the rules of their engagement—for example, by agreeing to forgo aggregate resolution.

The emphasis on contract can be located in broader societal and political trends favoring free markets and deregulation. Those theories have been in ascendancy, and they have made their mark on substantive and procedural law. All of that might be well and good except for the Court's applying freedom of contract to form agreements—agreements in which, by definition, there is no freedom to negotiate terms. The Court's embrace of contract *uber alles* threatens, at least in one area, to take the pendulum off its mount. The area is large-scale, negative-value disputes.

Before discussing this particular threat, we detour to note that the Court has been extremely active regarding class actions in recent years. And though some of the decisions bode well for plaintiff class actions,¹⁸⁸ the overall thrust is clearly negative. *Wal-Mart Stores, Inc. v. Dukes*¹⁸⁹ made it more difficult to satisfy the commonality requirement of Rule 23(a)(2) and limited remedies in Rule 23(b)(2) classes; many have commented on these changes.¹⁹⁰ Much of the newer difficulty in class practice, though, comes from the Court's substantial front-loading of the certification process. Thus, certification is based upon evidence, not pleadings, so the plaintiff must "be prepared to prove that . . . in

¹⁸⁸ For example, the Court saved the class action under diversity of citizenship jurisdiction from ready visceration by state law in *Shady Grove Orthopedics Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); see Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448 (2011). And, in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), the Court retained the fraud-on-the-market presumption of reliance in Rule 10b-5 cases.

¹⁸⁹ 131 S. Ct. 2541 (2011). Indeed, there was more good news for securities plaintiffs.

¹⁹⁰ See, e.g., Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153, 154 (2015); Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes*, 62 DEPAUL L. REV. 659, 672 (2013); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013).

fact” the requirements of Rule 23 are satisfied.¹⁹¹ The factual inquiry at certification can overlap with facts underlying the merits of the dispute.¹⁹² As a result of *Wal-Mart*, certification motions require evidentiary development, often dealing with facts relevant to the underlying dispute. The Court hinted¹⁹³ that expert testimony offered for certification must qualify for admissibility under Federal Rule of Evidence 702 and for reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁹⁴ Additionally, in *Comcast Corp. v. Behrend*,¹⁹⁵ the Court established that the class representative in a damages class action must be able to demonstrate a model that will permit the court to assess damages for each class member.¹⁹⁶

These episodes of front-loading reinforce a general sense that class action litigation is more difficult in federal court than in many state courts. Indeed, that sentiment underlay passage of the Class Action Fairness Act,¹⁹⁷ which federalizes many class actions and thus requires them to run the often-stricter gauntlet of federal practice.¹⁹⁸

¹⁹¹ *Wal-Mart*, 131 S. Ct. at 2551 (emphasis omitted). Thus, there must be “rigorous analysis,” “[s]ignificant proof,” and “[a]ctual, not presumed, conformance with Rule 23.” *Id.* at 2551, 2553 (first alteration in original) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

¹⁹² Courts were nervous because of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), which forbade district courts to apportion the costs of giving notice to class members based upon an assessment of who would prevail on the merits. The Court made clear in *Wal-Mart* that any implication in *Eisen* that a district court ruling on class certification may not consider evidence implicating the merits was the “purest dictum.” 131 S. Ct. at 2552 n.6.

¹⁹³ In *Wal-Mart*, the Ninth Circuit concluded that expert testimony of a sociologist could be considered without full-blown qualification of that testimony for admissibility and reliability. The Supreme Court did not make an express holding, but “doubt[ed] that [this was] so.” 131 S. Ct. at 2554.

¹⁹⁴ 509 U.S. 579 (1993). Lower courts seem to have taken the hint. *See, e.g., Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 812 (7th Cir. 2012) (“If a district court has doubts about whether an expert’s opinions may be critical for a class certification decision, the court should make an explicit *Daubert* ruling.”).

¹⁹⁵ 133 S. Ct. 1426 (2013).

¹⁹⁶ Add to this the front-loading caused by the promulgation of Rule 23(f) in 1998. It permits interlocutory appellate review of class certification rulings, in the discretion of the court of appeals. FED. R. CIV. P. 23(f). This front-loads appellate review and often requires the class representative to survive two rounds in the certification battle: one to have the district court certify the class, and the other to avoid reversal by the court of appeals. Limited data on the point suggests that courts of appeals have used Rule 23(f) to reverse or vacate certification of classes more frequently than to reverse or vacate the denial of class certification. Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13 (2007).

¹⁹⁷ Class Action Fairness Act, 28 U.S.C. § 1332(d) (2012) (permitting federal jurisdiction based upon minimal diversity and aggregate amount in controversy in excess of \$5,000,000, subject to exceptions for localized classes).

¹⁹⁸ *See* Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 REV. LITIG. 591, 603 (2013).

These developments might simply be an example of the pendulum. We are in an era in which it is tougher to satisfy the class action requirements. But the Court has countenanced a further step that, at least in some cases, elevates the notion of agreement not to make class litigation more difficult, but to make it go away altogether. The further step, of course, is the combination of an arbitration clause with a class action “waiver.”¹⁹⁹ In *AT&T Mobility LLC v. Concepcion*²⁰⁰ and *American Express Co. v. Italian Colors Restaurant*,²⁰¹ consumers asserted “negative value” claims, meaning that the cost of litigation made them unviable if pursued individually. And, in each case, the contracts containing the arbitration clause also forbade aggregate proceedings.

In *Concepcion*, state law provided that aggregate procedure was indispensable to the private enforcement of the claim; thus, class action bans were unenforceable when included in contracts of adhesion involving negative-value consumer fraud-type claims.²⁰² Nonetheless, the Court applied the FAA and held that both the arbitration provision and the class ban were enforceable.²⁰³ Of course, under the Supremacy Clause, the FAA, as federal law, trumps contrary state law. That does not mean, though, that the Court was required to conclude that the FAA applied. Indeed, the federalism issue—presented by the fact that state law considered the procedural device as integral to the right it created—should have counseled a narrow footprint for the FAA.

In upholding preemption of state law, the Court had some comments about class practice. One purpose of the FAA, the Court reasoned, is to ensure enforcement of arbitration clauses according to their terms.²⁰⁴ Another is to foster the efficient and speedy resolution of the dispute.²⁰⁵ State law, by permitting class arbitration, violated the latter tenet by generating a complicated proceeding that placed the arbitrator in the atypical position of having to protect absentees’ interests.

In other words, arbitration is an ill-suited forum for class litigation. If that is the case, though, why would the Court permit such ready exit from the

¹⁹⁹ This combination of clauses is increasingly common in consumer contracts of adhesion, as discussed in the text below. See *infra* notes 222–25 and accompanying text. In this context, the word “waiver” seems euphemistic. It is a ban.

²⁰⁰ 131 S. Ct. 1740 (2011).

²⁰¹ 133 S. Ct. 2304 (2013).

²⁰² 131 S. Ct. 1740; see *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

²⁰³ *Concepcion*, 131 S. Ct. at 1753.

²⁰⁴ *Id.* at 1745–46.

²⁰⁵ *Id.* at 1749.

judicial forum—from the one forum in which class practice is workable? The fact that a significant tool of law enforcement does not work in arbitration should have counseled a refusal to enforce non-bargained arbitration provisions.

There are arguments against class treatment of large-scale negative-value cases like *Concepcion* in any forum. One of the historic justifications of the class action is efficiency—it will substitute one case (albeit complex) for thousands of small ones. But negative-value claims such as those in *Concepcion* will not be asserted individually; as Judge Posner has said, only a lunatic or a fanatic sues for \$30.²⁰⁶ Because the thousands of small claims would never be filed, aggregation will create litigation that would never have been filed. Creating litigation traditionally was thought to be a bad thing because it further burdened the legal system and may have raised the specter of champerty. Additionally, promoting proceedings in these cases seems inconsistent with the maxim *de minimis non curat lex*, which counsels that we occasionally have to take our lumps for \$30. Moreover, as a general matter, negative-value class actions have proved “quite poor” as vehicles for distributing money to victims.²⁰⁷

Of course, there are arguments the other way. Litigation and arbitration are means of private enforcement of the law. If no one will file a claim, and if the state does not act, the law will not be enforced. If it is not enforced, it may have no deterrent effect. In this way, forcing plaintiffs into arbitration and forbidding aggregation can exculpate defendants, at least as to negative-value claims that de facto will not be enforced individually. The negative-value class action thus poses a profound fundamental question. If the goal is compensation, it doesn’t work. If the goal is law enforcement and deterrence, it may be indispensable (at least in an era of weak public enforcement).

The Court addressed this fundamental issue tangentially. It kept open a safety valve in *Concepcion* by suggesting that class arbitration bans will not be upheld (as arbitration clauses themselves will not be upheld) if the prescribed procedure will not allow “effective vindication” of the plaintiffs’ rights.²⁰⁸ On the facts, the majority in *Concepcion* concluded that claims could and would be vindicated in individual arbitration. The agreement in the case was seen as

²⁰⁶ *Carnegie v. Household Int’l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

²⁰⁷ Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1550 (2016).

²⁰⁸ *Concepcion*, 131 S. Ct. at 1753.

consumer-friendly. It required arbitration in the customer's home county, required the defendant to pay all costs, and, if the arbitration award was higher than the defendant's offer, the customer would recover \$7,500 and double attorney's fees. Thus, the Court did not see the provision as preventing vindication of the consumers' claims.

The Court faced a different situation in *Italian Colors*.²⁰⁹ There, a class of restaurant owners sued American Express, alleging that the credit-card company violated federal antitrust laws by using monopoly power to force them to accept credit cards at higher interest rates than those charged by competitors.²¹⁰ The agreements required arbitration and forbade aggregation.²¹¹ Though the claims were not *de minimis*, they were negative-value because the cost of retaining expert witnesses on the complex economic issues in such cases would be prohibitive.²¹² Only if the plaintiffs could litigate en masse would it be feasible to retain experts and prove the case. The Second Circuit distinguished *Concepcion* because the plaintiffs had shown that pursuit of individual claims was not feasible.²¹³ In other words, "effective vindication" of the antitrust laws required invalidation of the ban on class litigation.²¹⁴

²⁰⁹ For one thing, *Italian Colors* involved a claim under federal law, while *Concepcion* was a state-law claim.

²¹⁰ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

²¹¹ *Id.*

²¹² *Id.*

²¹³ In its original decision, the Second Circuit found that plaintiffs' rights could not be effectively vindicated. *In re Am. Exp. Merchs.' Litig.*, 554 F.3d 300, 304 (2d Cir. 2009), *rev'd sub nom. Italian Colors*, 133 S. Ct. at 2304. Then, in its decision after the Supreme Court decided *Concepcion*, the Second Circuit distinguished that case as well. As Judge Pooler explained,

The Supreme Court granted Amex's petition for a writ for certiorari, then vacated and remanded for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* Finding our original analysis unaffected by *Stolt-Nielsen*, we again reversed the district court's decision and remanded for further proceedings. On April 11, 2011, we placed a hold on the mandate in *Amex II* in order for Amex to file a petition seeking a writ of certiorari. While the mandate was on hold, the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*. The *Concepcion* Court held that the Federal Arbitration Act preempted a California law barring the enforcement of class action waivers in consumer contracts. The parties submitted supplemental briefing discussing the impact, if any, of *Concepcion* on our previous decisions, and we find oral argument unnecessary. As discussed below, *Concepcion* does not alter our analysis, and we again reverse the district court's decision and remand for further proceedings.

In re Am. Exp. Merchs.' Litig., 667 F.3d 204, 206 (2d Cir. 2012) (citations omitted), *rev'd sub nom. Italian Colors*, 133 S. Ct. at 2304. The Second Circuit found *Concepcion* instructive but not controlling on the issue of whether a mandatory non-aggregation arbitration agreement is per se enforceable. *In re Am. Exp. Merchs.' Litigation*, 667 F.3d at 214.

²¹⁴ *Italian Colors*, 133 S. Ct. at 2310.

The Court reversed. The majority was willing to accept that individual litigation would be infeasible economically.²¹⁵ Still, *Concepcion* governed.²¹⁶ The majority explained that nothing in the FAA, the antitrust laws, or Rule 23 evinces an intention to prohibit parties from forgoing their right to assert class claims.²¹⁷ Addressing the “effective vindication” argument embraced by the Second Circuit, the majority recognized that “public policy” can invalidate agreements that operate “as a prospective waiver of a party’s right to pursue statutory remedies.”²¹⁸

But, it concluded, nothing in the present agreement impeded the plaintiffs’ ability to pursue statutory remedies.²¹⁹ The substantive damages claim asserted under the Sherman Act was created forty-eight years before promulgation of the original Rule 23 made it possible to aggregate such claims. By inference, then, the Congress that created the right to sue could not have intended that it be enforced through the class device.²²⁰ The fact that it is not worth the expense of proving the claim “does not constitute the elimination of the right to pursue that remedy.”²²¹ In short, “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”²²²

The message of these cases is clear: astute businesses will impose arbitration clauses coupled with class “waivers,” sweetened by some “consumer-friendly” provisions that arguably make the ADR effective (though whether it is in fact effective may not matter much). The result, in many cases, will be that the defendant will never be held to account in any forum. One abiding question in the debate over ADR is whether arbitration truly is cheaper than court litigation. One thing is for sure: arbitration is cheaper if it does not occur.²²³

²¹⁵ *Id.* at 2310–11.

²¹⁶ *Id.* at 2312.

²¹⁷ *Id.* at 2309–11.

²¹⁸ *Id.* at 2310 (emphasis omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

²¹⁹ *Id.* at 2311.

²²⁰ *Id.* at 2309, 2311.

²²¹ *Id.* at 2311.

²²² *Id.* at 2309. Indeed, the Court went on to say that the antitrust laws (at issue in *American Express*) “do not guarantee an affordable procedural path to the vindication of every claim.” *Id.*

²²³ There is increasing support for the conclusion that vast numbers of claims eligible for arbitral enforcement are never pursued. Resnik, *supra* note 6.

This result is accomplished by melding a common theme underlying both exodus and transformation—that the terms of an agreement are supreme. First, contract enables the parties to opt for arbitration. Second, the parties may contract out of the normal rules of aggregating claims.

The problem, of course, is that in adhesion contracts “the parties” are not doing these things. The powerful party is. Enforcing agreements is an important societal norm. But contracts and contracts of adhesion are not the same thing. And perhaps some procedural tools, like Rule 23, should be deemed too important to waive, at least in an adhesion contract, especially if the law creating the claim considers aggregation important to enforcing the law. The Court’s blithe failure to consider such issues may go beyond the swinging of a pendulum. It is not a matter of making the use of Rule 23 more or less difficult. It is, at least in some cases, whether Rule 23 can effectively be written out of the rulebook.

Commentators have noted that the contemporary “anti-plaintiff” trend is largely hidden from public view because it is rooted in procedural law.²²⁴ Procedure is the domain of lawyers and judges, not consumers and employees. The public is not likely to be galvanized over changes in pleading standards, or the scope of class certification litigation or front-loading, or limitations on personal jurisdiction. But Americans have an underlying sense of fairness and a sense that the courts should be there when they need them.²²⁵ Though they may not notice things that go on inside the courthouse, they may well notice when, with increasing frequency, the courthouse door has been closed.

CONCLUSION

American civil procedure features a model of trial-based public dispute resolution supported by important foundational goals that go far beyond simply deciding the case at hand. The Court has facilitated an exodus from that model while at the same time contributing to a transformation of the system to one that does not reflect those foundational goals. Both the exodus and the

²²⁴ See, e.g., Lahav, *supra* note 9, at 1700 (“[T]he lines of battle are around procedures that block substantive rights even more than about the rights themselves, and these procedural limitations have been successful in part because many people either do not realize their significance, or have adopted the view that litigation is bad and should be reduced without understanding its benefits.”).

²²⁵ In the iconic words of Chief Justice John Marshall, “[The] very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws, whenever he receives an injury. . . . One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

transformation are driven by a perceived inability to cope with docket overloads, and are accompanied by a disheartening loss of faith in litigation itself. And they are rooted in an unwavering fidelity to enforcing contracts as written, even when the result is to deny access to any forum at all.