Changing Practices, Changing Rules : Judicial and Congressional Rule Making on Civil Juries, Civil Justice and Civil Judging

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I. THE CHANGING CONTOURS OF THE CIVIL LITIGATION SYSTEM

The topic for this symposium[1] is procedural change and the respective roles of Congress and of the judiciary in making the rules that govern civil justice. The immediate focus is the last decade of innovations, from the 1980's when a group sponsored by Senator Joseph Biden published a pamphlet *Justice for All : Reducing Costs and Delay in Civil Litigation*[2] through the enactment in 1990 of the *Civil Justice Reform Act* (CJRA), to its study by RAND over the past few years, to 1997 — the year in which Congress considers whether to renew the *Civil Justice Reform Act*.[3] The central questions are : What is the shape of the litigation system in the United States in the late 1990's? How, if at all, does it look different than it did before Congress enacted the *Civil Justice Reform Act* of 1990?

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1. Civil Justice Reform Act Implementation Conference (March 20-22, 1997) (program on file with the Alabama Law Review).

2. Task Force on Civil Justice Reform, *Justice for All : Reducing Costs and Delay in Civil Litigation* (Brookings, 1989) [hereinafter *Justice for All*].

3. As enacted in 1990, the CJRA had provisions for terminating certain programs and for evaluating and reporting on implementation. Pilot and demonstration programs were to run for a "4-year period". *CJRA of 1990*, Pub. L. No. 101-650, s. 105 (codified as amended at 29 U.S.C. s. 471-482 (1994)). Those deadlines were extended, first to 1996 and then to December of 1997. See *Judicial Amendments Act of 1994*, Pub. L. No. 103-420 s. 4; *Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317 s. 608(b). The Judicial Conference of the United States was required to report initially in 1995, and then the reporting time was extended, first until 1996 and then until June 30th of 1997. See *CJRA of 1990*, Pub. L. No. 101-650, s. 104; *Judicial Amendments Act of 1994*, Pub. L. No. 103-420, s. 4; *Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317, s. 608(a). In May of 1977, the Judicial Conference filed its final report on implementation of this Act. See the Judicial Conference of the United States, "The Civil Justice Reform Act of 1990 : Final Report Alternative Proposals for the Reduction of Cost and Delay, Assessment of Principles, Guidelines & Techniques" (May 1997) [hereinafter 1997 Judicial Conference CJRA Report] (submitted as required by the legislation as the third report to Congress).

My response requires an understanding not only of the last decade but also the last half century, the years since 1938 when the Federal Rules of Civil Procedure became effective.[4] My purposes are several : to map the respective roles of the federal judiciary and of Congress in governing civil processes; to understand the relationships between national and local rule regimes; to examine the changes over these decades in the practices of judging, and to learn more about the interactions of judges and lawyers during the course of civil litigation. Below I rely on two examples (changes related to the size of the civil jury and those related to the role of the judge during the pretrial process) from which to learn about how practices change, about the relationship between practices and rule regimes (be they local or national), and about the respective roles of the federal judiciary and Congress in altering both practice and rules.

As the discussion below details, the history of these past decades is one of growing judicial discretion over civil process, of judicial care to guard its own discretionary authority, of ongoing variation between national and local rules and between rules and practice, and of declining discussion by trial judges of their roles as adjudicators. Thus far, the judiciary has generally succeeded in convincing Congress that expansive judicial discretion over civil case processing is appropriate. Despite evident discord between Congress and the federal judiciary about the enactment of the CJRA, the congressionally-enacted CJRA and the judicially-promulgated Federal Rules of Civil Procedure closely resemble each other.

Thus, while a good deal of commentary has located civil justice reform as a contested arena, I disagree about the locus of tension, but not about the fact of conflict. Contemporary battles between the federal courts and Congress are less about civil process and more about the structure and authority of the judiciary itself. Over the past decades, the federal judiciary has shored up its dominion over case processing and its role as case managers and settlers, but neither through doctrine nor through commentary have judges articulated a robust commitment to federal adjudicatory authority nor have they developed a literature or a practice supporting their special license and expansive authority.

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4. See Order of December 20, 1937, 302 U.S. 783 (1937). The rules became effective on September 16, 1938, after their submission to Congress. See The Hon. Jack B. Weinstein, "After Fifty Years of the Federal Rules of Civil Procedure : Are the Barriers to Justice Being Raised?", (1989) 137 U. Pa. L. Rev. 1901 (discussing the rules in a symposium on their fiftieth anniversary).

II. A FIRST EXAMPLE : THE SIZE OF THE CIVIL JURY

My mandate for this symposium (to write about the role of the federal judiciary vis-a-vis Congress and how and when rules and practices change) was much on my mind when I participated in another conference, held in the winter of 1996 in New York City and co-sponsored by the New York University School of Law and the Federal Judicial Center. Assembled were about 45 federal judges from the Eastern seaboard; the topic was the jury system in the United States.[5] After my segment of the program was over, I listened as a federal appellate judge, Patrick Higginbotham, gave an impassioned defense of the twelve-person civil jury. Judge Higginbotham, who sits on the Fifth Circuit, had chaired the Advisory Committee on Civil Rules in the mid-1990's during its work that resulted in a proposed amendment (ultimately unsuccessful) of Federal Rule 48 to reinstate the requirement of a twelve-person civil jury.[6]

A. The Practice of a Six Person Jury, and Subsequently, a Revised Rule

To understand the exchange in 1996 among federal judges about the size of a civil jury, a bit of background is needed about how the size of the civil jury changed, from twelve to six. Insofar as I am aware, advocacy for a jury smaller than twelve began in the 1950's and became more insistent in the 1960's.[7] Advocates suggested that shrinking the

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5. See "Improving Jury Selection and Jury Comprehension, A Workshop Co-sponsored by the Federal Judicial Center and the Institute of Judicial Administration of New York University School of Law", (December 11-13, 1996) (materials on file with author) [hereinafter NYU/FJC Jury Conference].

6. As amended in 1991, Fed. R. Civ. P. 48 currently states that : "The court shall seat a jury of not fewer than six and not more than twelve members [...]." In 1995, the Advisory Committee on Civil Rules had proposed language to state : "The court shall seat a jury of twelve members [...]." " Proposed Amendments to the *Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence*", 163 F.R.D. 91 at 147 (transmitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for Notice and Comment, September 1995) [hereinafter Proposed Rules]. According to the memorandum from The Hon. Judge Higginbotham in support of that change, the Advisory Committee "unanimously recommend[ed] a return to 12-person juries [...]." *Ibid*. at 135. As he explained, the purpose was to ensure that a civil jury would commence "with 12 persons, in the absence of a stipulation by counsel of a lesser number, but could lose down to 6 as excused by the trial judge for illness, etc.". *Ibid*. at 136.

7. See e.g., Roy L. Herndon, "The Jury Trial in the Twentieth Century" (December 1956) 32 L.A.B. Bull. 35 [hereinafter Jury Trial]; "Six-Member Juries Tried in Massachusetts District Court" (1958) 42 J. Am. Judicature Society 136 [hereinafter Six Member Juries]; Edward A. Tamm, "The Five-Man Civil Jury : A Proposed Constitutional Amendment" (1962) 51 Geo. L.J. 120 [hereinafter Five-Man Civil Jury]; E.A. Tamm, "A Proposal for Five-Member Civil Juries in the Federal Courts" (February 1964) 50 A.B.A. J. 162 [hereinafter Proposal]. The first federal legislation that I have been able to locate that makes possible a smaller than twelve person jury was introduced on February 19, 1953, by Representative Abraham Multer,

number of jurors would "relieve congestion", encourage "prompt trials and lower costs", with no effects on outcome.[8] Some of the vocal proponents were federal and state trial judges, who asserted not only their own experiences[9] but also those of state systems that had used smaller juries in certain kinds of cases.[10] A fair inference from the advocacy in

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a Democrat from New York. See H.R. 3308, 83d Cong. (February 19, 1953) (to permit that "[i]n each civil action tried by a jury, other than those tried by a jury as a matter of right guaranteed by the seventh amendment of the Constitution, the number of jurors which constitute a jury and the number of jurors who must agree [for a valid verdict] shall be determined by the law of the State in which such civil action is tried"). No hearings appear to have been held nor have I found commentary on what sparked this proposal.

In 1958, an Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts reported to the New York State Governor and Legislature about proposed procedural revisions. Included was a provision that a "party demanding jury trial [...] shall specify in his demand whether he demands trial by a jury composed of six or of twelve persons. Where a party has not specified the number of jurors, he shall be deemed to have demanded a trial by a jury composed of six persons". Thereafter, opposing parties would also have had the option of demanding a jury of twelve. Title 41.4 at 223-224, 1958 Report of the Temporary Commission on the Courts, 13 [N.Y.] Legislative Document (February 15, 1958). According to the Notes, the Municipal Court of New York had that practice and it "worked well". Further, New York courts had had six person juries in New York "justice of the peace" courts since the state's inception in the eighteenth century. Appended was a list of the size of the juries in the then forty-eight states. *Ibid.* at 579-597 (reporting that "[m]ost departures from the twelve-man jury practice occur in courts of limited jurisdiction").

In 1972, the New York Legislature changed its statute to provide for a reduction in jurors from twelve to six. See NY CPLR s. 4104 (McKinneys, 1996) ("A jury shall be composed of six persons"). That change accorded with recommendations from Governor Nelson A. Rockefeller, arguing that "by speeding up the selection of juries", trials would also be "speeded up". Governor's Memorandum, N.Y. State Legis. Annual, ch. 185, 1972 Laws of N.Y. at 322.

8. Six-Member Juries, *supra* note 7 at 136.

9. For example, United States District Court Judge E.A. Tamm referred to his experience with the District of Columbia's code of five person juries in condemnation cases and argued that five provided the "perfect balance in affording the litigants all of the benefits of a jury trial, while eliminating unnecessary delay, expense and inefficiency". Five-Man Civil Jury, *supra* note 7 at 138.

10. See e.g. *ibid*. at 134-135 (citing a 1956 speech by a California judge that "at least 36 states have constitutional and statutory provisions for juries of less than 12 in one or another of their courts", albeit often in only certain kinds of cases).

For a description of state court experiences, see The Hon. Richard H. Phillips, "A Jury of Six in All Cases" (1956) 30 Conn. B.J. 354 (discussing lower court use of six person juries in courts other than the superior court); Philip M. Cronin, "Six-Member Juries in District Courts" (April 1958) 2 Boston B.J. at 27 (reporting on the "success" of the 1957 "experiment" of six person juries in Worcester Superior Court). According to Professor Hans Zeisel, while some of the states permitted smaller juries for cases involving small claims, at least Utah permitted eight person juries in noncapital cases in general jurisdiction courts. H. Zeisel, "And Then There Were None : The Diminution of the Federal Jury" (1971) 38 U. Chi. L. Rev. 710 [hereinafter And Then There Were None]. The Hon. Judge Edward J. Devitt reported that in

favor of making this change is that, although the Federal Rule permitted a jury of less than twelve upon stipulation, such stipulations were rare;[11] in the 1960's, the twelve person civil jury was the norm in federal court.[12] In 1970, the United States Supreme Court decided *Williams* v. *Florida*,[13] which held that Florida's six person criminal jury was constitutionally permissible. That case was decided on June 22, 1970.[14] At the time, Federal Rule of Civil Procedure 48 provided that juries of less than twelve could occur *only* by party stipulation.[15] Nevertheless, within four months, federal district courts began to change their local rules. By 1972, 54 local district court rules provided for six person

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addition to Utah, Florida and Virginia also provided for less than twelve person juries in courts of general jurisdiction. See E.J. Devitt, "The Six Man Jury in the Federal Court" 53 F.R.D. 273, 278 No.6 (Address at the Eighth Circuit Judicial Conference, June 30, 1971).

11. See Five-Man Civil Jury, *supra* note 7 at 140 (noting that no one had ever so stipulated in his experience as a judge).

12. I have found no direct empirical evidence on the number of jurors who sat, but the arguments for change all seem to be addressed to a uniform tradition of twelve jurors. For example, according to Judge E.A. Tamm, at least one state (Connecticut) that provided for the option of six had not then succeeded in installing six person juries except in courts of limited jurisdiction and that, to "change" the number of jurors, a constitutional and legislative mandate was needed. *Ibid.* (quoting R.H. Phillips, *supra* note 10 at 355-356). See also Gordon Bermant & Rob Coppock, "Outcomes of Six- and Twelve-Member Jury Trials : An Analysis of 128 Civil Cases in the State of Washington" (1973) 48 Wash. L. Rev. 593 (reporting on the "growing" support for a jury smaller than 12). Further, in 1956, when describing smaller juries, Judge Herndon commented that only the "increasing numbers of heretics have had the boldness to argue that the number twelve is *not* sacred [...]" (emphasis in the original). Jury Trial, *supra* note 7 at 47.

13. *Williams* v. *Florida*, 399 U.S. 78 at 86-103 (1970) (concluding that a criminal defendant's Sixth Amendment rights were not violated by a Florida rule permitting a six person jury).

14. *Ibid.*

15. As promulgated in the 1930's, Rule 48, entitled "Juries of Less than Twelve — Majority Verdict", provided that the "parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury". Rules of Civil Procedure for the District Courts of the United States, and Proceedings of the Institute on Federal Rules 102 (ABA, William W. Dawson, ed., 1938) [hereinafter *1938 Rules*].

juries.[16] During that time, the Judicial Conference of the United States passed a resolution in favor of a six person civil jury and asked Congress to enact such a rule.[17]

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16. According to Chief Judge Richard Arnold of the Eighth Circuit (who also supported the return in 1995 to a twelve person jury), within the first year after *Williams*, 29 federal district courts had, by local rule, "moved to six person juries". See The Hon. Richard S. Arnold, "Trial by Jury : The Constitutional Right to a Jury of Twelve in Civil Trials" (1993) 22 Hofstra L. Rev. 1 at 25 [hereinafter Jury of Twelve]. See also E.J. Devitt, *supra* note 10 at 277 ("The trend toward six-man juries in civil cases in the Federal Courts is growing rapidly"). For the details of which districts made the change, see H. Richmond Fisher, "The Seventh Amendment and the Common Law : No Magic in Numbers", 56 F.R.D. 507 at 535-542 ("List of U.S. District Courts that Have Adopted Rules Reducing the Size of Civil Juries", beginning in November of 1970 and ending in September of 1972).

    Chief Justice Warren Burger's enthusiasm for the smaller jury played a role, but the chronology of changes is somewhat difficult to reconstruct. According to Hans Zeisel, seventeen of these districts changed their rules under the sponsorship of the Chief Justice. See And Then There Were None, *supra* note 10 at 710. In contrast, the Chief Justice points to districts that had changed their rules as support for his position that such alterations were worth further investigation. See Chief Justice Warren E. Burger, "The State of the Federal Judiciary — 1971" (1971) 57 A.B.A. J. 855 at 858 (address given July 1971, and published September 1971). In that address, and despite the existence of Fed. R. Civ. P. 48 that then provided for deviations from twelve only upon party stipulation, the Chief Judge mentioned the state practice of smaller juries, that a "dozen federal districts have followed the examples of some of those states" and reduced the size of civil juries, and that he had "urged the recently appointed Committee on Rules of Civil Procedure to look closely at the experience of courts" using smaller juries. *Ibid*. Paul Carrington recalls the Chief Justice asked in a (perhaps unpublished) speech why juries should be twelve and that soon thereafter, the local rules began to appear. Telephone Conversation with Paul Carrington of Duke University (February 24, 1997).

    Support for smaller juries also came from a study, conducted under the auspices of the Institute for Judicial Administration of NYU, which gathered data by surveying lawyers, judges, and court clerks in New Jersey's state courts. See Institute for Judicial Administration, "A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts" (1972) (concluding that smaller juries saved money and that differences in outcomes "appear to be due to differences in the types of cases selected by lawyers to be tried to six- and twelve-member juries rather than to differences in the size of the jury").

17. Jury of Twelve, *supra* note 16 at 25. See "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C. March 15-16, 1971) at 5-6 (according to The Hon. Irving Kaufman, then Chair of the Committee on the Operation of the Jury System, by that time, five or six districts had adopted local rules changing the size). The Conference Resolution stated that it "approve[d] in principle a reduction in the size of juries in civil trials in the United States district courts", and that the means to "effectuate" the change was by rulemaking or by statute. *Ibid*. In October of the same year, the Conference reaffirmed its resolution. "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C. October 28-29, 1971) at 41.

In 1973, the Supreme Court reviewed one of those local federal district court rules that permitted a six person jury in civil cases.[18] The Supreme Court (5-4) held that neither the Seventh Amendment, the Rules Enabling Act, nor the Federal Rules of Civil Procedure required that twelve people sit on a federal civil jury; thus, the local variation was neither unconstitutional nor unlawful.[19] Note that, by the time the Supreme Court considered and upheld the federal six person civil jury, more than half the districts had rules providing for six person juries in at least some of their civil cases.[20]

Despite the federal judiciary's enthusiasm for six person juries, the Judicial Conference met with skepticism when it pressed Congress for legislation to change the size of civil juries.[21] After a series of unsuccessful efforts to obtain congressional

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18. The rule came from the federal district court of Montana. *Colgrove* v. *Battin*, 413 U.S. 149 (1973) (citing Local Rule, U.S. District Court, Montana 13(d)(1)).

19. *Colgrove*, 413 U.S. at 160, 162-163. Justice W. Brennan wrote for the five person majority; Justice W. Douglas, joined by Justice L. Powell, argued in dissent that the local rule was flatly inconsistent with the federal rules. *Ibid*. at 165. Justice Marshall, joined by Justice Stewart, dissented on constitutional grounds as well as on statutory and rule grounds. *Ibid*. at 166-188. The decision has been much criticized. See, e.g., P.D. Carrington, "The Seventh Amendment : Some Bicentennial Reflections", U. Chi. Legal F. 33 at 51 (noting that Geoffrey Hazard had called the decision "monumentally unconvincing" and adding that "[t]o some, it may not be even that persuasive") [hereinafter The Seventh Amendment].

20. As the Court so noted. *Colgrove*, *supra* note 18 at 150 n.1.

21. Representative Willliam Lloyd Scott, a Republican member of Congress, introduced H.R. 7800, 92d Cong. (1971), to provide that "[a] petit jury in civil and criminal cases in a district court of the United States shall consist of six jurors" except in capital cases. In 1973, after he had become a Senator, Scott introduced an identical bill in the Senate. See S. 288, 93d Cong. (1973).

    In 1972, Emanuel Celler, a Democrat from New York and then Chair of the Judiciary Committee of the House, introduced H.R. 13496, 92d Cong. (1972), to provide for six person juries in civil cases "unless the parties stipulate to a lesser number". In 1973, Peter Rodino, the new chair of the Judiciary Committee and a Democrat from New Jersey introduced H.R. 8285, 93d Cong. (1973), which was identical to the Celler bill of the year before. A companion Bill (S. 2057, which slightly varied from the House version) was before the Senate. In 1977, Representative Rodino introduced a bill again, identical in its effort to alter the jury size but also including requirements of unanimity absent stipulations by the parties.

    See H.R. 7813, 95th Cong. (1977).

    Testifying in 1973 on behalf of the legislation were federal judges, including The Hon. E.J. Devitt, The Hon. Arthur Stanley, Jr. in his capacity as Chair of the Judicial Conference on the Operation of the Jury System, and an official from the Justice Department. See *Three Judge Court and Six Person Civil Jury : Hearings* on S. 271 and H.R. 8285. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 93d Cong. [hereinafter Hearings on a Six Person Jury].

    Judges Devitt and Stanley argued for the reduction in size on the grounds of its utility, economy, and for the statute on the grounds of the need for "uniformity" of practice. *Ibid*. at

blessings, in 1978 the "Judicial Conference agreed to stop seeking legislation on the

17, 19, 30, 36. James McCafferty of the Administrative Office provided data on juror utilization and cost savings. *Ibid*. at 25-26. The Justice Department argued that the reduction in size would save money, increase speed, and diminish the burden of service on juries. *Ibid*. at 92-96. The ABA took no position at that point. *Ibid*. at 104 (statement of Edmund D. Campbell).

Opponents included the ACLU, the NAACP, and Professor Hans Zeisel. Arguments advanced against the change included that juries would have fewer members of minority communities (*ibid*. at 127, Testimony of Charles Morgan for the ACLU; *ibid*. at 142, Testimony of Nathaniel Jones for the NAACP; *ibid*. at 161, testimony of Hans Zeisel); that jury service is an important part of American life that should be encouraged and widely distributed (*ibid*.); that civil juries were vital parts of the justice system (*ibid*. at 133-34); and that the claims of size not affecting outcome were erroneous (*Ibid*. at 157-162).

The question of the size of the civil jury was debated thereafter by the ABA. In 1974, an ABA committee initially recommended "support[ing] the enactment of legislation which would revise the number of jurors in civil trials in federal courts to six persons", but when that proposal encountered opposition, withdrew that recommendation. See "Proceedings of the 1974 Midyear Meeting of the House of Delegates" and "Report No. 1 of the Special Committee on Coordination of Judicial Improvements", ABA Ann. Rep., vol. 99, at 182, 305 (1978).

In 1983, the ABA promulgated its first set of Standards Relating to Juror Use and Management; in that volume, ABA Standard 17(b) stated that civil juries should "consist of no fewer than six and no more than twelve". See "ABA Standards Relating to Juror Use and Management" (1983) at 150 [hereinafter ABA Standards]. See also "Standard 17(b)" (ABA, 1993) at 156 [hereinafter 1993 ABA Standards].

At the midyear meeting in 1990, the ABA House of Delegates approved by voice vote a resolution from the Section of Tort and Insurance Practice that the ABA supports "legislative efforts to restore the size of a federal civil jury to 12 persons and to enable 10 of the 12 to render a verdict in a civil trial". (Resolution on file with author). The ABA House of Delegates endorsed that resolution in 1991. 1993 ABA Standards, *supra* at 161.

subject".[22] By that time (1978), 85 of the districts had their own rules permitting fewer than twelve jurors.[23]

Not until more than a decade later, however, did the national rule reflect this change. Moving forward to the late 1980's, Professor Paul Carrington (then the Reporter for the Advisory Committee) proposed revisiting Rule 48 initially in the hopes of *returning* to the twelve person jury. But, upon finding little support in the Advisory Committee for that position, Professor Carrington thought it appropriate to revise the text to reflect the practice of empaneling smaller juries.[24] Thereafter, the Advisory Committee proposed a rule change to authorize judicial selection of a smaller civil jury; the comment explained that the older rule was rendered "obsolete",[25] an inventive euphemism to capture

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22. "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C., September 21-22, 1978) at 78 (Judge C. Clyde Atkins, then Chair of the Committee on the Operation of the Jury System, reported that, because local rules provided for juries of six in 85 of the federal districts, no further legislation should be sought). See also "Jury of Twelve", *supra* note 16 at 27. Between 1971 and 1978, the Conference considered the size of the jury several times. In 1972, it approved the then-pending H.R. 13496, "drafted" in furtherance of the Conference's resolution in support of a smaller jury. "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C., April 6-7, 1972) at 4-5. In 1973, 1974, and 1977, the Conference reiterated its support for smaller juries. See "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C., April 5-6, 1973) at 13; "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C., September 19-20, 1974) at 56; "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C., September 15-16, 1977) at 83-84.

    As among the different proposals, the Conference expressed its preference for one Bill (S. 2057) that provided for unanimity absent stipulation and for alterations in peremptory challenges over another Bill (H.R. 8285) that did not have those features; the Conference also stated its view that juries should be reduced in size in civil but not in criminal cases. "Report of the Proceedings of the Judicial Conference of the United States" (Washington, D.C., September 13-14, 1973) at 54-55.

23. See 1978 Report, *supra* note 22 and Jury of Twelve, *supra* note 16 at 27-28. By 1989, four more districts had enacted such local rules, so that eighty-eight districts authorized smaller juries. Telephone Conversation with David Williams, Administrative Office of the United States Courts (February 28, 1997).

    In terms of the size of juries in states, see J. Clark Kelso, "Final Report of the Blue Ribbon Commission on Jury System Improvement" (1996) 47 Hastings L.J. 1433 at 1490-1491 (describing eight states that have juries of less than twelve in certain kinds of felony cases and, in contrast, "fewer than fifteen" states that have civil juries of twelve "without exception"; also reporting a recommendation to reduce jury size in certain criminal cases in California).

24. Telephone Conversation with Paul Carrington of Duke Law School (February 24, 1997). See also, The Seventh Amendment, *supra* note 19 at 52-53 (because the then-text of Rule 48 "*is rendered meaningless* [...] *it is now necessary to revise the rule, lest it mislead parties and counsel in light of the reality established by the local rules")*.

25. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, "Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure" (1989) 127 F.R.D. 237 at 357, Fed R.

the point that the national rule was disobeyed at the local level. Hence, in 1991, about twenty years after the change in practice, the Supreme Court promulgated an amended Federal Rule 48 to state that a court "shall seat a jury of not fewer than six and not more than twelve".[26] Today, federal civil juries across the United States routinely consist of fewer than twelve persons.[27] I provide an overview of the evolution of this rule change in Chart 1.

From this background, move forward once again to December of 1996, and consider the exchange between Judge Higginbotham and the federal district court judges. With the skill of a well-practiced trial lawyer, Judge Higginbotham made an impassioned plea for the twelve person jury. For him, trial courts were the "heart" of the federal

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Civ. P. 48 advisory committee's notes.

26. Fed. R. Civ. P. 48; see "Amendments to Federal Rules of Civil Procedure" (1991) 134 F.R.D. 525 at 545.

27. Once again, statements in rules and the actual practice diverge. Many local rules speak of six person juries. Yet case law from litigants seeking reversals on the grounds that the wrong number of jurors deliberated demonstrates that, regardless of mandates of six or twelve, some district judges sent more than six jurors and fewer than twelve to deliberate. For example, the Fifth Circuit concluded in one case that, if a judge "convert[s]" alternate jurors to "regular voting jurors before" discharging the jury to deliberate, the acceptance of a verdict from the larger jury (there, a jury of eight) was not reversible error, absent a party's objections at the time. *Rideau* v. *Parkem Indus. Servs. Inc.* 917 F.2d 892 at 895 (5th Cir. 1990). The Fourth Circuit developed a rule that no more than six jurors could retire to deliberate (see *Kuykendall* v. *Southern Ry.*, 652 F.2d 391 at 392 (4th Cir. 1981), while the Sixth Circuit concluded that permitting a larger number to deliberate did not constitute reversible error. *Hanson* v. *Parkside Surgery Ctr.*, 872 F.2d 745 (6th Cir.), cert. denied *sub nom.*, *Hanson* v. *Arrowsmith*, 493 U.S. 944 (1989). See also *E.E.O.C.* v. *Delaware Dep't of Health & Social Servs.*, 865 F.2d 1408 at 1420-1421 (3d Cir. 1989) (noting that a seven person jury, comprised of six jurors plus one alternate deliberating, was not a "problem" when parties did not object); *UNR Industries, Inc.* v. *Continental Ins. Co.*, 682 F. Supp. 1434 at 1446-1447 (N.D. Ill. 1988) (rejecting a challenge to an eight person jury consisting of six jurors and two alternates).

Such anecdotal evidence can be supplemented only in part. According to John K. Rabiej of the Administrative Office of the United States Courts, when the Advisory Committee was considering the proposed change, it sought to obtain comprehensive data but learned that such information could not be collected nationwide from the current data base. Telephone Conversation with John K. Rabiej, Administrative Office of the United States Courts (February 17, 1997). Thereafter, David Williams of the Administrative Office did a survey for the Committee; he reviewed monthly juror utilization forms returned periodically from different districts. See "Monthly Petit Juror Usage" JS 11, Rev. 10/90 (on file with author). When filled out by the districts, some but not all of these forms distinguish between civil and criminal juries. Some note use of alternatives, but many do not. The form does not request information on the number of jurors sitting at the time of verdict. Within these constraints, Mr. Williams concluded that, in 1994, eight person civil juries were utilized most frequently in the federal courts, followed by seven, twelve, and nine person juries, and relatively infrequently, six person juries. Interview of Alys Brehio with David Williams, Administrative Office of United States Courts (February 28, 1997).

judiciary, and jury trials one of the most important activities of the trial court.[28] He argued that a return to twelve persons helped the quality of deliberations and the consistency of verdicts.[29] He pointed out that a twelve person jury also enhanced the opportunity for a diverse group of citizens to participate in and be educated by the jury — all of which, in his view, improved the fairness and the legitimacy of the jury and outweighed what he considered to be the negligible savings in cost and time achieved by a smaller jury.[30]

But despite my appreciation for the skills of the advocate, most of his audience of 45 district trial judges were unmoved.[31] Rather, these federal trial judges insisted on how *normal* a jury of six to nine people was; more were rarely needed. Many trial judges reported positive experiences with smaller juries and believed them to be "economical and expeditious".[32] Moreover, these district judges bridled at the prospect of a *mandatory* twelve person jury; they decidedly preferred the flexibility and discretion that inhered in the current rule. Judge Higginbotham did succeed in one respect. In conversation afterwards with a few relatively new trial judges, I learned that, prior to Judge Higginbotham's speech, they had not realized that they had the discretion to have a jury "as large as twelve"; some reported they might well "try" a jury of twelve.

Given the practice of varying numbers of jurors, the Advisory Committee argued that its proposal was less transformative than would be a leap from six to twelve jurors : "[t]hroughout the United States today the district courts are seating 8 and 10 person juries for any other than the most routine civil matters". Proposed Rules, *supra* note 6 at 136. At the NYU/FJC Jury Conference, *supra* note 5, many district judges also commented that they rarely used six person juries and that the debate was not fairly cast as six versus twelve but more accurately should be understood as nine versus twelve.

For a local rule detailing a district judge's options on the number of jurors, see the current rule in the United States District Court for the District of South Carolina, Local Civil Rule 48.01 (1997) (providing that civil cases may be submitted to either a jury of six or twelve, "at the discretion of the presiding Judge. However, if the parties agree to waive a six (6) person jury with one or more alternate jurors and proceed to trial with an eight (8) person jury with no alternate jurors, the Court may allow them to do so". Further, if any of the eight leave, the court may take a verdict as long as at least six remain).

28. The Hon. Patrick E. Higginbotham, Oral Presentation, at NYU/FJC Jury Conference, *supra* note 5 and accompanying text.

29. *Ibid.*

30. *Ibid.*; see also Memorandum from Patrick E. Higginbotham to Members of the Advisory Committee on Civil Rules, re Six-Person versus Twelve-Person Juries (October 12, 1994) (on file with author).

31. The Hon. John Keenan, of the United States District Court for the Southern District of New York, was assigned the task of presenting the arguments on behalf of a smaller jury and representing the district judges' views. NYU/FJC Jury Conference, *supra* note 5.

32. Rule 48, Prepublication Comments, materials provided to the NYU/FJC Jury Conference, *supra* note 5 at 21 (on file with author).

Thus, within twenty-five years, a rule and practice had changed so completely that a generation of "new" judges assumed it ordinary to have juries of less than twelve and thought it odd for someone to insist that twelve was a number not only to be preferred but to be mandated. The district judges' views were sufficiently powerful within the Judicial Conference[33] to cause that body to reject a proposal by the Standing Committee on Civil Rules to return to the twelve person jury.[34] The avalanche of protest from federal district judges — a kind of rebellion against *their own judicial* rulemakers — resulted in the refusal to transmit a proposed rule change.[35]

B. Initial Lessons

The civil jury practices provide a first occasion from which to look at the processes of rule change. Note the trajectory : First, the practice relating to the size of civil juries changed at the *local level*, initially coming from state court practice and then moving to federal district civil practice. Thereafter, the United States Supreme Court countenanced — indeed, endorsed — both the state and federal practices and found them permissible under federal constitutional and statutory law.[36]

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33. Bruce D. Brown, "Judges Kill Plan to Require 12 on Jury" (September 30, 1996) Legal Times at 12 (a spokesperson for the judiciary cited district court opposition to the proposal); Henry J. Reske, "The Verdict of Most States and the Judicial Conference is... Smaller Juries are More Efficient" (1996) 82 A.B.A. J. 24.

34. In June of 1996, the Standing Committee on the Rules of Practice and Procedure of the United States Judicial Conference voted, 9-2, in favor of the proposed amendment to Rule 48. "Report of the Proceedings of the Judicial Conference of the United States" (September 17, 1996) at 70.

35. See B.D. Brown, *supra* note 33 at 12 (describing comments about district court opposition). See also materials provided for the NYU/FJC Jury Conference, *supra* note 5 at Tab "Jury Size and Unanimity" including excerpt from Report of the Judicial Conference, Committee on Rules of Practice and Procedure, Agenda F-18, Rules September 1996 (including prepublication comments on proposed amendments to Rule 48, many of them negative and from district court judges and noting that the Judicial Conference Committee on Court Administration and Case Management opposed the amendment, in letters written on December 21, 1994, and March 20, 1996, and provided to the Judicial Conference).

36. As noted earlier, national signals of support were forthcoming from Chief Justice Burger and the Judicial Conference. See *supra* notes 16-17 and accompanying text. Further, the Court's case law also provided enthusiastic support for a smaller jury — explained in part by its effort to cushion the impact of the application of the Sixth Amendment to the states.

    For example, in *Williams*, *supra* note 13 at 103, the Court (per Justice White) argued against "codifying" a twelve-person jury as a constitutional requirement by claiming that it was a "feature so incidental" to the Sixth Amendment that only ascribing "a blind formalism to the Framers" could support its constitutional imposition. Justice White cited Justice Harlan's earlier dissent, in *Duncan* v. *Louisiana*, in which Harlan, arguing against incorporation of the obligation of a jury trial on the states, noted that the federal rule of twelve is not fundamental, but rather that the number was "wholly without significance 'except to mystics'". *Ibid.* at 102,

Second, local federal rule changes both *predated the national rule* and were *at variance with* the governing federal rule.[37] Third, the national rule — Rule 48 — followed *long after the practice* and codified what was already deeply in place. National rulemaking was *not* the beginning of change, but the announcement of a change that had already occurred. While at the formal level, the change was complete within about twenty years (measured from the time of introduction in the early 1970's to the enactment of the national federal rule in 1991), local practice had been revised more rapidly.

Fourth, and related to the roots of the change at the local level, the revision had great support from *trial judges*, who promoted the concept of a smaller jury, persuaded the bar, and then implemented the change. For example, when proponent Edward Devitt (then Chief Judge of the federal district court in Minnesota) described his local rule on six person juries, he explained how the change was negotiated by the bench with the bar. In his words, "[i]n the interest of securing the cooperation of the members of the Bar in accepting the Rule graciously and assisting in making its purposes effective", the change had initially a limited application.[38]

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quoting *Duncan* v. *Louisiana*, (1968) 391 U.S. 145 (J. Harlan, J., dissenting). Justice Harlan, in turn in *Williams*, protested that, because of the incorporation doctrine he had argued against in *Duncan*, the Court would permit "diluting constitutional protections within the federal system" including a twelve person criminal jury. *Williams*, *supra* note 13 at 117-119 (Harlan, J., concurring and dissenting).

37. Here the dissenters in *Colgrove* clearly have it right that the local rules and the national rule did not "mesh". *Colgrove*, *supra* not e18 at 165 (W. Douglas, J., dissenting). The national rule stated that parties could "stipulate" to juries of less than twelve whereas the local rule at issue mandated juries of six. In short, the local rules violated the national rule. Paul Carrington has observed that, given the ruling in *Colgrove*, the "sky seemed to be the limit" on local deviation from national rules. P.D. Carrington, "A New Confederacy? Disunionism in the Federal Courts" (1996) 45 Duke L.J., 929 at 951 [hereinafter Disunionism].

38. E.J. Devitt, *supra* note 10 at 274-275 ("the Rule was made applicable only to those cases where jurisdiction was also obtainable in the state courts. Hence it was limited to Diversity, FELA, and Jones Act cases with the thought that if the Rule in its limited form was effective and withstood challenge, if any, it later would be extended to federal jurisdiction cases as well"). According to Judge E.J. Devitt, the State of Minnesota adopted a rule providing for six person juries after *Williams* v. *Florida* was decided in 1970. See Hearings on a Six Person Jury, *supra* note 21 at 31; see Minn. Stat. Ann. s. 593.01 (June 8, 1971). The prior rule had defined a jury to be a "body of 12 men or women, or both" but was replaced with the definition of a "body of six persons". Historical Note to Minn. Stat. Ann. s. 593.01 (1988). In 1988, the Minnesota Constitution was amended; it now states that "[t]*he legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members*". Minn. Const. art. I, s. 4. Thereafter, the Minnesota statute was repealed by 1990 *Minn. Laws 1990*, ch. 553, s. 15 (Rule 48 of the Minnesota Rules of Civil Procedure continues to provide that "*parties may stipulate that the jury shall consist of any number less than twelve*[...]").

Fifth, the change enhanced the *discretion* of trial judges, who in this instance took authority away from litigants (or more accurately, their lawyers) to decide on the number of jurors.[39] As judges at the 1996 *NYU/FJC Jury Conference* explained, they have varied practices on the number of jurors routinely empaneled. Few reported selecting only six, and more said that they often picked eight or nine jurors. An obvious utility of using more than six is permitting attrition without a mistrial.[40] Trial judges liked this flexibility and objected strongly to a mandated number of jurors, and, more specifically, twelve. As Professors Stephen Subrin and Stephen Burbank have taught us,[41] a basic feature of the twentieth century rule reform in the United States has been the growth of judicial discretion; specifically, discretionary practices more commonly associated with equity

39. We lack definitive empiricism to tell us how that discretion is exercised in practice, how many juries of what kinds are populated by what number of jurors, both at the time of commencement of a trial and at its completion. See *supra* note 27 and accompanying text.

40. The system of empaneling alternate jurors on the civil side changed when judges gained the flexibility of determining the number of jurors. In 1989, when proposing to authorize smaller juries, the Advisory Committee proposed the elimination of the practice of empaneling alternative jurors. See "Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate and Federal Rules of Civil Procedure", *supra* note 25 at 355-357. At the time, Rule 47 had provided that judges could empanel no more than six additional jurors who would sit and then, prior to deliberations, be excused if not needed. *Ibid.* The Advisory Committee noted "dissatisfaction" with the "burden [...] on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation." *Ibid.* at 356. Further, if judges attempted to include the alternates, they risked reversal. Some circuits held that, absent parties' consent on the record, judges who permitted alternate jurors to deliberate commit reversal error. See, e.g., *Cabral* v. *Sullivan*, 961 F.2d 998 (1st Cir. 1992) (ordering a new trial when a district judge permitted four alternates to deliberate with six jurors). See also *supra* note 27.

    The 1995 proposals to return the jury to the larger size were not accompanied by a return to alternates; rather, proposed Rule 48 provided that the court seat twelve jurors, that all participate "unless excused", that absent party stipulation, verdicts be unanimous, and that no verdict be taken from fewer than six jurors. "Proposed Rules," *supra* note 6 at 147. The alternate juror system remains on the criminal side. See Fed. R. Crim. P. 24(c). Data remain unavailable nationwide on the number of jurors empaneled as contrasted with those sitting at verdict. Further, to my knowledge, no research has been done on whether the willingness to excuse jurors has been altered since the rule changes. See *supra* note 27 and accompanying text.

41. See Stephen N. Subrin, "How Equity Conquered Common Law : The Federal Rules of Civil Procedure in Historical Perspective" (1987) 135 U. Pa. L. Rev. 909 [hereinafter How Equity Conquered]; Stephen B. Burbank, "The Rules Enabling Act of 1934" (1982) 130 U. Pa. L. Rev. 1015; Stephen B. Burbank, "Ignorance and Procedural Law Reform : A Call for a Moratorium" (1993) 59 Brooklyn L. Rev. 841 [hereinafter Ignorance and Procedural Law Reform].

were imported by the federal rules into law and have become routine across the federal docket. Here we see an example of that increase in judicial discretion.[42]

The sixth point is about the *role of Congress*, which stayed away from making changes. Presumably, the popular base of juries[43] made it politically unpopular to press for legislation cutting their size. Some members of Congress evidently also thought it unwise.[44] This example of the size of the civil jury provides no evidence of Congress as adventurously championing efforts to alter civil practice in a dramatic fashion. Rather, Congress appears to have been a conservative spectator.[45]

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42. The rejection of a proposed lawyer voir dire of jurors is consistent with this aspect of the trajectory of judicial control rather than of lawyer/litigant control. See Proposed Rules, *supra* note 26 at 129, 145 (Advisory Committee recommendation that Rule 47, on the selection of jurors, be modified so that, after a judge-conducted voir dire, the "court shall also permit the parties to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion"). While an FJC study determined that, in practice, about sixty percent of the federal judiciary permits such lawyer involvement, judges opposed mandating that practice. See Marcia Coyle, "Rules Would Expand Voir Dire, Civil Jury Size" (March 11, 1996) 18 Nat'l L.J. at A12. The opposition resulted in the withdrawal of the proposed amendment and instead on educational efforts to encourage judges to permit attorney voir dire. See *Draft Minutes of the Civil Rules Committee*, April 18-19, 1996 at 5 (on file with author).

43. While criticism of the jury is longstanding, so is support for it. See for example, The American Jury System, "Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States" June 24-25 (Roscoe Pound Foundation, 1977); "Verdict : Assessing the Civil Jury System" (R.E. Litan ed., 1993).

44. The Hon. R.S. Arnold mentioned "congressional misgivings" in discussing the absence of legislation to decrease jury size. Jury of Twelve, *supra* note 16 at 27. Specifically, both Representatives Robert Kastenmeier and Robert Drinan expressed skepticism about the wisdom of the reduction. During the questioning, Representative Kastenmeier asked about opposition to the change stemming from litigants concerned about the "quality of justice", and about whether a change in the civil jury was a "foot in the door for the reduction in size of criminal juries". Hearings on a Six Person Jury, *supra* note 21 at 29, 32. Representative Drinan stated that, given the 5-4 decision in *Colgrove*, he did not believe that the matter was "settled". *Ibid*. at 30. Furthermore, in his view, federal judges had exceeded their authority by local rulemaking beyond the parameters of Rule 48 and the *Rules Enabling Act*. *Ibid*. at 36. Drinan also raised the possibility of some kind of "compromise" in which certain kinds of cases, such as those involving civil rights, would be exempt from the smaller jury provisions. *Ibid*. at 139.

45. When testifying in opposition to the then-pending legislation, Professor H. Zeisel called upon the committee to make "the 12-man jury obligatory in Federal courts". *Ibid.* at 163. Kastenmeier demurred, explaining that he had not received reports of injustice. In an exchange with Representative Robert Drinan, Professor Hans Zeisel discussed the politics, that in his view, the *Colgrove* case was one in which the defendant insurance company wanted the larger jury, and that, plaintiffs' lawyers "almost by a political decision" had not complained. Given his view that a smaller jury was a more erratic jury, he thought that plaintiffs' attorneys might well have a preference for it. *Ibid*. at 164.

    It is not clear whether views of the size of the jury during the 1970's corresponded to one's position in the bar as a "defense" or "plaintiff" attorney. According to the lower court opinion

Seventh, the grounds for change were *economy and efficiency : speed and ease*. More than two decades ago, proponents argued on behalf of a "six man" jury in words familiar today. As Judge Devitt put it, the change would "improve [...] efficiency at less cost without sacrifice of legal rights".[46] Hans Zeisel, a critic, put it more bluntly : that the two arguments in favor of a reduction in size were "save money and [...] save time".[47]

Eighth, once the change was made, the new approach became *hard to revise*, even when its underpinnings were questioned from several directions; for many, the change was a "terrible blunder".[48] One ground for objection to the central premise of the 1970's Supreme Court rulings is familiar. Made then and now is the argument that courts err when they conclude that twelve versus six jurors makes no difference in the outcome; social scientists instruct us that jury size matters.[49] A second argument is new and it is about the effect of size on the diversity of members within a jury. As Judge Higginbotham and others have explained, between 1970 and 1990, aspirations for participation on the jury changed. Juries shrunk in size as the jury pool was opened by Supreme Court doctrine[50] to include a wider range of individuals and as the Court revised its doctrine on

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in *Colgrove*, both plaintiff and defendant protested District Judge Battin's decision to empanel a six person jury; the plaintiff filed the mandamus action and was then joined by the defendant. *Colgrove* v. *Battin*, 456 F.2d 1379, 1380 (9th Cir. 1972).

46. E.J. Devitt, *supra* note 10 at 273 (speaking at the Eighth Circuit Judicial Conference in June of 1971). See also Five-Man Civil Jury, *supra* note 7 at 141 ("Modern conditions, i.e., ever increasing congestion and delay in the federal courts, mounting costs — monetary and social — of the jury system necessitate its serious reform in the interest of efficiency and economy if the jury system is to survive").

47. Hearings on a Six Person Jury, *supra* note 21 at 167. His response was that the "time argument is absolutely wrong and the money argument is quite clear". *Ibid.*

48. Conversation with John Frank, February 24, 1997. See generally, Jury of Twelve, *supra* note 16 at 32-35. See also the debates within the ABA Standards, *supra* note 21.

49. And Then There Were None, *supra* note 10 at 715-724, was one of the first to attempt to correct the Supreme Court's interpretation of social science data. See also Robert J. MacCoun, "Getting Inside the Black Box : Toward a Better Understanding of Civil Jury Behavior" (ICJ, December 1987); Michael J. Saks, "The Smaller the Jury, the Greater the Unpredictability" (1996) 79 Judicature 263.

    Professor Shari Diamond of the American Bar Foundation and the University of Illinois pointed out to me that the "frequency and magnitude of differences due to size are likely to be modest — although certainly important". Given the small number of cases that individual judges see tried to verdict, trial judges are unlikely to attribute surprising verdicts to size; "it is only be a systematic study of multiple cases (or a large scale simulation) that we can detect real and important, although not huge effects". Hence, judges may be comfortable accepting "the apparent efficiencies" (ranging from selection time to reduced interruptions due to personal needs of individual jurors) associated with smaller juries and not perceive them "as purchased at the price of less dependable jury verdicts". Letter of S. Diamond to J. Resnik (May 15, 1997) (on file with author).

50. See *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991); *J.E.B.* v. *Alabama*, 511 U.S. 127 (1994). See generally Nancy Marder, "Beyond Gender : Peremptory Challenges and the Roles

peremptory challenges to ban those based in race and gender.[51] Noting with poignancy this temporal sequence, Judge Higginbotham argued that, given contemporary concerns about inclusivity, whatever the accuracy of the 1970's cost/benefit analysis, it should be recalculated to reflect current views on the importance of diversity on the jury.[52] But these substantive, specific arguments against the six person jury were trumped by two general positions : that trial court *discretion* was the desirable means to achieve the desired goal of judicial *economy*.

III. A SECOND ILLUSTRATION : THE CIVIL JUSTICE REFORM ACT

Turn now from the change in the size of a civil jury, a change that is discrete, specific, and small in terms of the scope of its application[53] compared with that of the

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of the Jury" (1995) 73 Tex. L. Rev. 1041.

51. See also Proposed Rules, *supra* note 6.

52. *Ibid.* (arguing that a "12 person jury [...] works an exponential increase in its ability to reflect the interests of minorities [...]. Reducing the size from 12 to 6 plainly deals a heavier blow to the representativeness of the civil jury than any bigoted exercise of preemptory challenges"). Albert Alschuler and Andrew Deiss note that, "as the jury's composition became more democratic, its role in American civil life declined". A.W. Alschuler & A.G. Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 U. Chi. L. Rev. 867, 868.

53. The change in the number of jurors affects a small fraction of all federal litigation; over the past decades, civil jury trials in the federal courts represent under 10% of the annual dispositions. For example, in 1971, when the number of jurors was being reduced in federal courts by local rulemaking, a trial was commenced in 7,950 of the civil cases, of which 3,347 were jury trials and 4,603 were non-jury trials; in contrast, the federal courts disposed of 85,638 cases; thus 9.3 % of the civil caseload reached trial. *1971 Annual Report of the Director of the Administrative Office of the United States Courts*, Table C-4 at 280 [hereinafter *1971 Annual Report*].
In 1995, a trial was commenced in 7,443 of the civil cases (4,126 of which were jury trials and 3,317 were non-jury trials). The district courts disposed of a total of 229,325 cases; thus 3.2% reached trial. See *1995 Annual Report of the Director of the Administrative Office of the United States Courts*, Table C-4 at 162 [hereinafter *1995 Annual Report*].

Note that the actual number of civil trials over the time period remained fairly stable; given increases in the size of the judiciary, the number of trials per judge went down. Hence, each judge selects fewer juries and the number of such selections per year is small; the economies achieved by having to select fewer jurors at the front end thus become minimal.

A different argument about economies is not the time for selection, but the savings achieved from having fewer jurors with which to deal. While the absolute numbers of trials have emained roughly constant, their length has increased. Data are no longer available that distinguish the length of jury and non-jury trials. Interview with staff at the Administrative Office of the United States Courts (June 11, 1997). In 1971, of 10,093 trials completed, 8,860 (about 88%) were three days or under and 160 (under 2%) were longer than 10 days. Table C-8, *1971 Annual Report* at 311. In 1995, of the 10,395 trials commenced, the 7,706 trials (74%) were three days or under and 401 (almost 4%) were longer than 10 days. *1995 Annual*

CJRA,[54] legislation that some describe as aimed at "reform" of the entire civil justice process and its rulemaking procedures.[55] Congress has targeted cost and delay as problems to be solved, commissioned local Advisory Groups in each district to develop plans as the means of reform, offered guidance in the form of principles on differential case management, discovery control, and use of alternative dispute resolution (ADR),[56] and asked the Institute for Civil Justice (ICJ) of RAND to assess the impact of its efforts. RAND's ICJ considered a series of variables (time to disposition, litigation costs, attorney satisfaction and views of fairness)[57] and then measured those variables in twenty federal districts[58] by comparing data from cases terminated in 1991 and from cases filed in 1992-1993.[59] The researchers concluded that the "CJRA pilot program, as the package was

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Report at Table C-8, 177.

One other comment is appropriate about judicial perceptions of jury selection as a burden. Criminal trials remain, absent party stipulation, trials of twelve in the federal courts. Fed. R. Crim. P. 23(b). In terms of numbers and percentages, the volume of criminal trials is proportionally higher than civil trials. In 1971, of 44,615 criminal defendants, at least 6,416 (about 14%) were tried. *1971 Annual Report*, Table D-4 at 340. In 1995, of 54,980 criminal defendants, at least 4,765 (about 9%) were tried. *1995 Annual Report*, Table D-4 at 225.

54. 28 U.S.C. s. 471 et seq. (1990).

55. In 1988, Congress had made some adjustments in the rulemaking model of the *Rules Enabling Act* but the basic structure had remained intact. See 28 U.S.C. s. 2071-2077, and the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, 54 Fed. Reg. 13,752 et seq. (April 5, 1989).

56. 28 U.S.C. s. 472-473. For discussion of the initial efforts and empirical evaluation of Advisory Groups, see Lauren K. Robel, "Grass Roots Procedure : Local Advisory Groups and the Civil Justice Reform Act of 1990" (1993) 59 Brook. L. Rev. 879 [hereinafter Local Advisory Groups].

57. See James S. Kakalik, Terremce Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, "Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 5" (1996) [hereinafter *RAND's Evaluation of the CJRA*]. At the same time, RAND published three other volumes, all by the same authors, reporting its research : *An Evaluation of Judicial Case Management under the Civil Justice Reform Act* [hereinafter *RAND's Evaluation of Judicial Case Management*]; *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* [hereinafter *RAND's Evaluation of Mediation and ENE*] and *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts* [hereinafter *RAND's Implementation of the CJRA*]. For additional information in the research plan used, see Terrence Dunworth & James S. Kakalik, "Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990" (1994) 45 Stan. L. Rev. 1303.

58. For the list of districts, see *RAND's Evaluation of the CJRA*, *supra* note 57 at 3; the twenty represented about one third of federal caseload filings.

59. *Ibid.* at 8. For summaries of the CJRA plans, see David Rauma & Donna Stienstra, "The Civil Justice Reform Act Expense and Delay Reduction Plans : A Sourcebook" (1995).

implemented, had little effect" on any of the variables studied.[60] RAND's report tells us that "implementation often fell short";[61] "in practice, there was much less change in case management after CJRA than one might have expected from reading the plans".[62] RAND

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60. *RAND's Evaluation of the CJRA, supra* note 57 at 87. See also *RAND's Evaluation of Judicial Case Management, supra* note 57 at 15 (discussing the absence of empirical data prior to this study of the effects of such management). A study of the implementation of the CJRA in one district, that of the Northern District of Ohio, focused on the use of differential case management (DCM). See Lawrence A. Salibra II, Geri Smith, Christopher Malumphy, *A Study of the Differented Case Management Implemented Pursuant to the Civil Justice Reform Act of 1990 in the Federal District Court for the Northern District of Ohio* (February 1996) (conducted by the Advisory Committee of that district) [hereinafter *Northern District of Ohio DCM Study*] (on file with author). The study concluded that DCM was fully implemented and had some effects on the ways in which attorneys allocated their time and on the kinds of activities in which they engaged, but that the "DCM system, along with the ADR protocol, did not appear to be associated with faster case resolution" nor did these procedures have great impact on lawyer time. *Ibid*. at 20. The authors term their findings "consistent" with those of RAND and conclude that, in general, litigation is not unduly costly nor is discovery inappropriately conducted. *Ibid*. at 19, 21-22.

61. *RAND's Evaluation of the CJRA, supra* note 57 at 10.

62. *Ibid*. at 15. Another report on the CJRA comes from the Federal Judicial Center, which considered the work of five "demonstration districts" (Northern District of California, Western District of Michigan, Western District of Missouri, Northern District of Ohio, and Northern District of West Virginia), designated specifically by the Act. See Donna Stienstra, Molly Johnson, & Patricia Lombard, *Report of the Judicial Conference Committee on Court Administration and Case Management : A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (FJC, January 27, 1997) (on file with author) [hereinafter *FJC Demonstration Programs Report*]. These districts were designated because of particular judges' interest in and support of ADR, and they were thus "willing participants" in using differential case tracking and ADR. *Ibid*. at ii-iii. The FJC's data are based on interviews with court personnel and advisory group members and from questionnaires answered by attorneys and some who conducted the ADR; no litigant surveys were undertaken nor were there independent measures of costs other than attorneys' perceptions of the effects of procedural changes on costs.

    This FJC report echoes, in some respects, RAND's findings. One focus was on differential case tracking and management. The FJC reports that management efforts sometimes reduce the time to disposition. FJC Demonstration Programs Report at 7 (reporting that in only one of three case management districts studied did statistics "show a clear lowering of disposition time during the demonstration period"). Further, the cause of such decrease may be attributed to a variety of factors, including the reporting obligations in the CJRA itself. *Ibid*. More than half the attorneys surveyed in three districts reported that case management regimes had no effects on costs (*Ibid*. at 9, Table 3), and about two-thirds reported that they [the attorneys] were "satisfied with the cost of litigation" in their case. *Ibid*. at 8. Like RAND, the FJC reports intangible benefits, such as a change in "climate" and like RAND, the FJC report describes attorney appreciation for contact with the bench. *Ibid*. at 9-10.

    The other focus of FJC's Demonstration Programs Report was on ADR. In one of the districts studied, the Western District of Missouri, attorneys reported that ADR decreased their litigation costs. *FJC Demonstration Programs Report* at 18. The FJC made estimates of costs savings, but stated that its conclusions could only be tentative pending measurement of actual

argues that one reason for a lack of change was Congress' top-down effort to impose rules on a group of people — federal judges — who are themselves specially tied to their self-perception as independent actors.[63]

I do not disagree with the idea that federal judges are particularly invested in their own independence. I do think, however, that the reports on the CJRA need to be recast and therefore the results reinterpreted. The problem is not with RAND's able and thoughtful work.[64] The problems are with RAND's mandate and its metric; the researchers were charged with looking for the effects of the 1990 legislation, and to do so, they understandably relied on assessing the differences in case processing before and after 1990.[65] But the CJRA is not the *beginning* of a change. Its enactment marks the fact of changes long underway in the civil process. Searching for footprints of those changes in a short time-frame results in conclusions of little implementation or of unsuccessful attempts to bring about procedural change. When the inquiry shifts from an immediate to a somewhat longer time span, however, one finds significant alterations.

A. Rules Codify Practice : Practice Persists After Rules Change

The CJRA (like the enactment of a national rule in 1991 on the size of civil juries) represents a national codification of practices that have already become embedded in culture and that have garnered substantial (albeit not universal) support from bench and bar. Because the changes predate 1990, it is not surprising to find few effects of a reform of this magnitude in an interval as short as four years.

I am not making the argument that Congress and the judiciary were easy co-venturers in 1990, happily working together to ratify changes already in place. Members

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costs and comparison data. *Ibid.* Similarly, many attorneys reported that ADR was the cause of settlement. *Ibid.* at 19.

Because some ADR proponents and providers have been distressed with RAND's finding of no direct data to support ADR's utility in saving cost and time (*see* discussion *infra*, at notes 185, 199-201 and accompanying text), some of them have invoked the FJC report and stressed its findings. See, for example Elizabeth Plapinger, "Twilight of CJR Means Unsure Future for ADR", Nat'l L.J. September 22, 1997, at B25.

63. *RAND's Evaluation of the CJRA, supra* note 57 at 7.

64. My thanks to James Kakalik, Terrence Dunworth and their colleagues, their work enables this commentary and others.

65. *RAND's Evaluation of Judicial Case Management, supra* note 57 at 7-8. The methodology involved relying on comparisons between ten pilot and ten comparison districts, and separately analyzing quantitative data from cases terminated in 1991 and those filed in 1992-93 after "the implementation of the pilot program plans".

of the judiciary objected vehemently to the then-proposed legislation;[66] some commentators argued that the so-called "Biden Bill" infringed on Article III prerogatives of federal judges.[67] But step back from the description of the fray and consider the proposals found within the CJRA; virtually all that is within the CJRA can also be found in either the national or local federal rules, as they were amended in the 1980's and again, after the CJRA, in the 1990's. These practices themselves evolved over several decades.

Hence, a first conclusion. National rulemaking — be it proposed by Congress or the federal judiciary — frequently represents codification of practice and reflection of change rather than the commencement of newly-minted regimes.[68] The footnote here is that I am not claiming a meta-rule that insists national rulemaking can never be the source of innovation.[69] Rather, my point is to underscore a strong tendency in contemporary rulemaking to codify practice rather than to invent.

Moreover, I am also not arguing that national codification represents an underlying unity — a single nation-wide set of processes in place and then expressed by a national rule. Recall that RAND found that most judges described little difference in

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66. See, for example "The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990", Hearings Before the Committee on the Judiciary, U.S. Senate, 101st Cong., 2d Sess. on S. 2027 and S. 2648 [hereinafter CJRA Hearings], including the testimony and statement of the Hon. Aubrey E. Robinson, Jr., Chief Judge of the U.S. District Court for the District of Columbia at 208-209, 218-222; of the Honorable Robert F. Peckham at 320-332; and of the Hon. Diana E. Murphy, then president of the Federal Judges Organization at 360-377, all objecting to the legislation as then drafted.

67. See Linda S. Mullenix, "The Counter-Reformation in Procedural Justice" (1992) 77 Minn. L. Rev. 375, 379, 407-423 (discussing "turf battles" between Congress and the federal judiciary, and arguing that Congress had overstepped its authority). See Disunionism, *supra* note 37 at 961-962 (describing judicial objections that the legislation would undermine their independence); Marcia Coyle, "Senate Sets its Sights on Delays in Civil Trials" (1990) Nat'l L.J. July 23, 1990, at 5 (describing ABA and Judicial Conference opposition to the "mandatory nature" of the bill's proposals).

68. See Stephen N. Subrin, "Federal Rules, Local Rules, State Rules : Uniformity, Divergence, and Emerging Procedural Patterns" (1989) 137 U. Pa. L. Rev. 1999, 2045 (describing the "cross-pollination between state and federal procedure") [hereinafter Local Rules]. J. Langbein observed that his experience with the Uniform Law Conference is parallel : most projects begin with examples from earlier practices, and the tendency to borrow rather than innovate is endemic in legal systems throughout the world. Letter of Professor John H. Langbein of Yale Law School to Judith Resnik (April 11, 1997) (on file with author).

69. See, for example, the 1966 revision of the class action rule, Fed. R. Civ. P. 23 and the 1938 rules themselves. See also Mark Tushnet & Larry Yackle, "Symbolic Statutes and Real Laws : The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act" 47 Duke L.J. (forthcoming 1997) (manuscript on file with author) (discussing legislative and judicial lawmaking, its interaction, and offering categories of statutes as instrumental, expressive, and symbolic). What Tushnet and Yackle term instrumental overlaps with my category of "innovation", and my discussion of codifying practice relates to their use of the term "symbolic". We all agree that, whether instrument, innovative, symbolic or codifying practice, national rulemaking does have consequences that modify some behavior.

their practices, before and after the CJRA.[70] (Those who managed continued to do so, and those who did not, did not change.) Codifying "national practice" thus provides a statement of trends, as described and inscribed by judicial leaders including those supported by institutions like the Federal Judicial Center and the Judicial Conference, but the corollary points are that practice persists after rules change and proponents of change cannot always compel compliance. Below I sketch forty years of work of judges and lawyers that is reflected in the CJRA.

70. *RAND's Evaluation of Judicial Case Management, supra* note 57 at 84-85.

1. The Sources of Judicial Management

Congress described the CJRA as framed by "principles" whose implementation was at the center of RAND's inquiry. According to the Act, Congress hoped for use of six techniques : "differential case management"; "early judicial management"; "monitoring and control of complex cases"; "encouragement of cost-effective discovery through voluntary exchanges and cooperative discovery devices"; "good-faith efforts to resolve discovery disputes before filing motions"; and "referral of appropriate cases to alternative dispute resolution programs".[71]

Those "principles" are not inventions of the 1990 Congress. Each of them can be found in revisions in the 1980s to federal and local rules, and then in subsequent revisions of those rules after 1990.[72] Further, the six principles (fairly reducible to three — judicial management, discovery reform, and promotion of alternative dispute resolution) have their sources in the work of federal judges and of lawyers over the decades from the 1930's through the 1980's.

Where do the ideas of judicial control, alternative processes, burdensome discovery, and reliance on judges to process cases come from? A first source is the *structure* of the 1938 rules themselves. As is well explained by Professor Stephen Yeazell, the 1938 rules created a pretrial phase of litigation in which judges and lawyers had new opportunities for exchange.[73] That exchange was influenced by what Professor Stephen Subrin has described as the 1938 rules' adoption of equity's orientation, licensing discretionary behavior of judges.[74]

While the 1938 rules both created a space in which management could occur and authorized judges to exercise discretion to do so, the original rules did not articulate a strong vision of judges as case managers. Rereading the original Rule 16, one finds a description of the pretrial process both completely *discretionary* and focused on the preparation of cases for trial.[75] Neither the word "discovery" nor "settlement" are

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71. *RAND's Evaluation of the CJRA*, *supra* note 57 at 3; see also 28 U.S.C. s. 473.

72. See Fed. R. Civ. P. 16 (1993), 146 F.R.D. 427, 431 (1993); Fed. R. Civ. P. 26 (1993), 146 F.R.D. 431 (1993).

73. Stephen Yeazell, "The Misunderstood Consequences of Modern Civil Process" (1994) 1994 Wis. L. Rev. 631 at 647-649 [hereinafter Misunderstood Circumstances].

74. How Equity Conquered, *supra* note 41.

75. The 1938 text read : "Rule 16. Pre-Trial Procedure; Formulating Issues".
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
4. The limitation of the number of expert witnesses;

mentioned in the 1938 version of Rule 16.[76] For the origins of today's judicial case management with its reorientation of judicial role, one must go outside the *text* of then-governing Rule 16, to practices of judges and lawyers beginning in the 1930's in both state and federal courts.

a) State Practices : The Uses of the Pre-Trial

Like the downsizing of the civil jury, the development of federal pre-trial processes has roots in state practices,[77] admired by the federal rule drafters. The 1938 version of Rule 16 cites state and municipal court use of the "pre-trial",[78] and some federal

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5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by a jury;
6. Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

1938 Rules, *supra* note 15 at 37-38. See also David L. Shapiro, "Federal Rule 16 : A Look at the Theory and Practice of Rulemaking" (1969) 137 U. Pa. L. Rev. 1969, 1977-1981 [hereinafter Federal Rule 16] (describing the drafting).

76. See *infra* note 80 and accompanying text for drafter Charles Clark's view of the deliberate exclusion of the discussion of settlement from the 1938 version of Rule 16.

77. A Detroit judge, Ira W. Jayne, is credited with first initiating pre-trials in 1926. See The Hon. Ira W. Jayne, "Foreword, Symposium on Pre-Trial Procedures" (1956) 17 Ohio St. L.J. 160-162; Harry D. Nims, Pre-Trial 16-17 (1950) [hereinafter Nims, Pre-Trial]; The Hon. Irving R. Kaufman, "The Philosophy of Effective Judicial Supervision over Litigation, in Seminar on Procedures For Effective Judicial Administration" (1961) 29 F.R.D. 191, 207, 213 [hereinafter Effective Judicial Supervision].

New Jersey's use of pretrials was also a point of reference. See for example, Remarks of Justice William J. Brennan, Jr., "Introduction to the Problem of the Protracted Case, in Seminar on Protracted Cases", 23 F.R.D. at 376-377 (discussing need for the pre-trials to be mandatory and to be held in advance of trial). Pre-trials were also used in North Dakota, Tennessee, and Kansas. See H.D. Nims, Pre-Trial, *supra* note 77 at 8.

78. The Advisory Committee's notes refer to similar rules in the cities of Boston, Cleveland, Detroit, Los Angeles, and New York. *1938 Rules*, *supra* note 15 at 38-39. Reference was also made to the practice in England of "directions" and to the use of pre-trial conferences for "discussion and identification of the actual points in dispute" to facilitate presentations at trial. *Ibid.* at 297. In 1936, a Royal Commission had published "The Dispatch of Business at Common Law", discussing the pre-trial hearing and its utility; that report is quoted in "Pre-Trial Clinic, Demonstrations", a Conference co-sponsored by the Committee for the Improvement of the Administration of Justice of the Judicial Conference of Senior Judges and

judges drew from that practice when incorporating the pre-trial in their routine soon after the 1938 rules were promulgated.[79]

Of course, when focused on the "practice", a question exists about what that practice was. What happened at a "pre-trial" and how does it comport with what occurs today? Equating the 1939 and the 1997 "pre-trial/pretrial" is unwise; indeed, the word itself has changed, with the hyphen between "pre" and "trial" dropping out. The earlier,

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by the Section of Judicial Administration of the American Bar Association (1944) 4 F.R.D. 35, 80-81 [hereinafter Judicial Conference/ABA "Pre-Trial Clinic"].

In the 1990's, the English judiciary is reconsidering its practices; a recent report endorses a form of case management. See *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July, 1996) (also known as "Lord Woolf's Report", after the chair, Lord Harry Woolf, now Master of the Rolls and presiding judge in the Court of Appeal, Civil Division). Description and criticism of that approach can be found in *Reform of Civil Procedure* (A.A.S. Zuckerman & Ross Cranston eds., 1995) and in Michael Zander, "Judicial Case Management in England" (distributed to participants in the CJRA Implementation Conference). For discussion of managerial approaches and civil justice reform in Australia, see the Hon. G.L. Davies, "Managing the Work of the Courts" (paper delivered at the Australian Institute for Judicial Administration Asia-Pacific Courts Conference, August 22-24, 1997) (on file with the author).

79. Following the promulgation of the Federal Rules, the Hon. Judge George C. Sweeney (of the federal district court in Boston) and the Hon. Judge Bolitha J. Laws (of the federal district court in the District of Columbia) were the first federal courts to set up a pre-trial calendar and to bring the pre-trial conference to its full use. *Report by the Committee on Pre-Trial Procedure to the Judicial Administration Section of the American Bar Association* 1 (1952) [hereinafter *1952 ABA Pre-Trial Committee Report*]. See also Ross W. Shumaker, "An Appraisal of Pre-Trial in Ohio" (1956) 17 Ohio St. L.J. 192, 196 [hereinafter Appraisal] (detailing pre-trial use by a federal district judge as soon as the 1938 rules became effective); Hon. James Alger Fee, "Pre-Trial Conferences and Other Procedures Prior to Trial in the Ordinary Civil Action, in Pre-Trial Procedure in Ordinary Civil Actions, in Proceedings of the Seminar on Protracted Cases" (1958) 23 F.R.D. 319, 328 (describing the District of Oregon as using that practice since the inception of the Federal Rules and arguing that it was "the most efficient device as yet discovered for finding out what is the essential controversy in a case before trial"); Herbert W. Clark, "What Remedies for Refusal of a Pre-Trial Conference?" (mandatory use in the districts of Oregon and Massachusetts). *Ibid*. at 334, 335. By 1944, one report states that a majority of federal district courts used pre-trial procedure. Will Shafroth, "Pre-Trial Techniques of Federal Judges" (1944) 4 F.R.D. 183, 184.

In terms of numbers of such conferences, in 1948, 3,716 pretrials were reported; by 1951, the number was 8,202. *1952 ABA Pre-Trial Committee Report*, *supra* at 11. These numbers require at a minimum the context of the number of civil cases then pending and those concluded by trial. At the end of 1948, 49,215 civil cases were pending; of the 37,769 cases terminated that year, 11.6% were disposed of by trial. See *1948 Annual Report of the Director of the Administrative Office of the United States Courts* at 47, 93 (Chart 8). Using the number of cases pending in 1948, we know that, in about 7.6%, courts held pre-trials. Turning to 1951, at the end of that year, 55,084 civil cases were pending. Of the 52,119 civil cases terminated, trials were begun in 6,962, or a bit more than 13%. *1951 Annual Report of the Director of the Administrative Office of the United Courts* at 52, 95, 148 (Table C7). Thus, in 1951, courts held pre-trials in about 14.9% of the cases.

hyphenated form reflected a focus on trial preparation and clarification.[80] As one judicial proponent pointed out : "pre-trial, perhaps is a misnomer; it is rather a part of the actual trial".[81] Others spoke of cases having been "pre-tried", and some advocated that no case should be permitted to be tried without that step.[82] In contrast, today the unhyphenated "pretrial" is a stage unto itself, no longer fixed on trial but rather assumed to be the predicate to a conclusion *without trial.*

Yet the concept of a pre-trial conference having ends other than the trial itself was not outlandish from Rule 16's inception. In 1944, the Pre-Trial Committee of the Judicial Conference recommended that "orders with reference to both discovery and summary judgment may be entered at the pre-trial conference in appropriate cases".[83] In the "demonstrations" held during the same year, a mock pre-trial conference resulted in agreement for a plaintiff to submit to a physical examination.[84] By 1958, one lawyer argued that Rule 16's pre-trial conference was a "discovery device itself", to be used like a subpoena or a request for documents, to gain information and expedite the process.[85]

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80. In 1938, the ABA Committee on Pre-Trial Procedure described the pre-trial as a "preview", during which the court should narrow the issues, to shorten and speed the trial hearings, and avoid trial in cases where it is not useful. *Report of the Committee on Pre-Trial Procedure*, 63 *Annual Report of the American Bar Association* (1938) 534 [hereinafter *1938 ABA Pre-Trial Committee Report*]. Later, one of the original drafters, Charles E. Clark, sought to confine the rule to that use. He argued that Rule 16, "in its inception and in its wording, makes it clear that pre-trial is not intended as a substitute for trial; its whole tenor is that of proper preparation for trial". Hon. C.E. Clark, "To an Understanding Use of Pre-Trial, in Proceedings of the Seminar on Procedures for Effective Judicial Administration" (1961) 29 F.R.D. 191, 455 [hereinafter Understanding Use of Pre-Trial].

81. Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78 at 56 (The Hon. Bolitha J. Laws describing the practice in the District of Columbia).

82. Understanding Use of Pre-Trial, *supra* note 80 at 341. Clark described the role of the judge at the pre-trial as that of the "primary architect in preparing the case for adjudication" and therefore, that the judge who was to preside at the trial should preside at the pre-trial and the two events should not be temporally far from each other. Charles E. Clark, "Objectives of Pre-Trial Procedure" (1956) 17 Ohio St. L.J. 163, 165.

83. "Pre-Trial Procedure", Committee Report, (1944) 4 F.R.D. 83, 97 (appended to Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78. The Pre-Trial Committee's recommendations included that, absent special circumstances, every civil case "should be pre-tried before it is assigned for trial". *Ibid.* at 98.

84. Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78 at 61.

85. Manley B. Strayer, "Discovery in Pretrial Conference Procedure in Proceedings on the Seminar in Protracted Litigation" (1958) 23 F.R.D. 347, 349 (describing practice in the District of Oregon, including the practice that pretrials be held "soon after a case is filed", and stating that parties sometimes attend). See also *Effective Judicial Supervision, supra* note 77 at 214 ("[i]n the ordinary case [the pre-trial conference] is the apex of the discovery process, providing a final opportunity to narrow the issues [...] and, generally streamline the case"); I.W. Jayne, *supra* note 77 at 162 (describing pre-trial in state courts in 1930's as providing a "preview" of each case).

    See Rule 11(A) of the Rules of the United States District Court for the District of Delaware, 4 Fed. R. Serv. 2d 1112, 1115 (1961) ("So far as practicable all discovery should be

In addition to the use of a pre-trial for discovery, many also saw the pre-trial conference as the occasion for exploration of settlement.[86] Again the 1944 demonstrations (held to teach lawyers and judges about this "most successful of the new procedures")[87] are illustrative. The mock pre-trials included judges who raised the question of settlement.[88] Other proponents relied on state court examples in which pre-trials were scheduled before trial dates were set and settlement was discussed.[89]

Judicial promotion of settlement at pre-trials was a particularly controversial aspect of the procedure.[90] We know this in part from discussion about what place

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completed prior to pretrial. Pretrial should not be deemed a substitute for discovery procedures provided by the Federal Rules of Civil Procedure").

86. One of the pre-trial's major proponents, Advisory Committee member and Michigan law professor Edson Sunderland, described pre-trial hearings as typically occurring about two weeks before trial, and that sometimes the case was settled, or alternatively, the dispute was reduced in scope. He cited data from Detroit that cases were dropped from the trial list. *1938 Rules*, *supra* note 15 at 298-299. See also *1938 ABA Pre-Trial Committee Report*, *supra* note 80 at 537-539 (discussing the use of pre-trials to avoid unnecessary trials by facilitating settlements); The Hon. Bolitha J. Laws, "Pre-Trial Procedure "(1940) 1 F.R.D. 397 at 401-403 (speaking at an ABA conference and explaining his settlement efforts, including reassuring counsel that his views should not deter them from seeking their day in court).

87. These are the words of Judge Parker, who chaired the Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78 at 36.

88. Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78 at 54 ("The Court : Have you gentlemen considered the possibility of a settlement or adjustment of this matter?"); *Ibid*. at 69 ("The Court : [...] Gentlemen, is there anything I can do to aid you in the settlement of this case? Have you talked it over?" followed by a discussion of a demand of $5,000, an offer of $3,000, and a judge asking : "Would you consider giving an additional $1,000?" and, after additional exchanges, the judicial statement : "The trial judge will probably bring up this matter of settlement again before the actual trial starts [...]. [A]s I often have told counsel at pre-trial, I have no desire to bring any pressure on you to settle", followed by a direction to the clerk to note that "the estimated time of trial is five days, and [...] the prospects of settlement are good").

89. See Harry D. Nims, "Some By-Products of Pre-Trial" (1956) 17 Ohio St. L.J. 185 at 187 (discussing a 1955 report of the New York Temporary Commission on the Courts, describing a settlement rate of 95% of the cases in the State Supreme Court and arguing for earlier settlements, before cases were listed for trial; also describing a 1954 Judicial Survey Commission of Massachusetts which urged settlement and that "a vigorous effort" should be made to help pre-trial do its "proper work") [hereinafter By-Products of Pre-Trial]. See also *1952 ABA Pre-Trial Committee Report*, *supra* note 79 at 5 (discussing accidents involving the Long Island Railroad, the pre-trial of 200 cases within 11 days, and 92 settlements).

90. But not its exclusive source of controversy. See, for example, comments of Detroit Judge J.A. Moynihan, discussing the early opposition to pre-trial; that he was "threatened with constitutional actions and told [he] had no authority and [he] was invading the rights of lawyers and litigants, and [he] was depriving people of trials by jury, and many other things". Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78 at 47.

settlement had in pre-trial proceedings.[91] Proponents such as Justice Brennan approvingly described the link between pretrial conferences and settlement in New Jersey courts[92] and opponents, such as Judge Clark, inveighed against a focus on settlement during pre-trials. Some federal judges were plainly enthusiasts of the view that pre-trials, in federal court, like some state courts, was "to enlarge justice by consent and to reduce the need for judgment by command".[93] Charles Clark, among others, firmly disagreed. Relying on his authority as an original drafter of the Federal Rules, he opined : "It is no mere chance that no provision is made [in Rule 16] for settlement negotiations; those are no part of a proper pre-trial".[94] Charles Clark also weighed in that the judge who pre-tried a case should try

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91. See, for example, "Appraisal", *supra* note 79 at 205 (quoting a recommendation of the 1944 Pre-Trial Committee of the Judicial Conference that "the committee considers that settlement is a by-product of good pre-trial procedure, rather than a primary objective to be actively pursued by the judge"); The Hon. Alfred P. Murrah, "Pre-Trial Procedure : A Statement of Its Essentials" (1953) 14 F.R.D. 417, 420 ("settlement of cases is not a primary objective of pre-trial conferences, but, when properly presented, it is an important by-product and often the logical result of pre-trial"); Effective Judicial Supervision, *supra* note 77 at 215 (settlement as a "legitimate and important by-product of pretrial", reducing the disruption caused by settlements on the eve of trial); The Hon. William F. Smith, "Pretrial Conference — A Study of Methods, in Seminar on Procedures", 29 F.R.D. 348, 352 ("while settlement should not be regarded as a primary objective of the pretrial conference, the discussion of the prospects of settlement should not be avoided by the trial judge"); O.W. Whitney, Jr., "Adaptability of Pre-Trial to the Less Populated Counties" (1956) 17 Ohio St. L.J. 171, 173 (discussing the personal relations among bar members as facilitating settlement but that settlement is not the "sole or prime purpose" of pre-trial).

92. W.J. Brennan, *supra* note 77 at 378 ("We have learned that 'cards face up on the table' before we go to trial will lead, as we have found in New Jersey definitely that it does, to settlements").

93. Appraisal, *supra* note 79 at 200-201 (quoting Mahoning County, Ohio's rule, which also provided that in cases not terminated prior to trial, parties could request reassignment to another judge for trial).

94. *Understanding Use of Pre-trial*, *supra* note 80 at 455-456, in *Proceedings of the Seminar on Procedures for Effective Judicial Administration*, July 1961 (also invoking New Jersey's famous Chief Judge Arthur Vanderbilt, as not tolerating "maneuvering" as a part of pre-trials and allowing "settlement negotiations only quite apart from the hearing and only at the side bar of the court"). Clark argued that "the function [of the pre-trial] is to see that the parties and the court are fully acquainted with the case, leaving no room for the tactic of surprise attack or defense, and to uncover and record the points of agreement between the parties — all to the end of shortening and simplifying the eventual trial". *Ibid.* at 456. See also Charles E. Clark, "Pre-Trial Orders and Pre-Trial as a Part of Trial", in "Seminar on Protracted Cases" (1958) 23 F.R.D. 319 at 506, 509-510 (describing "pre-trial at its best is just a part of the trial itself" and criticizing the conception of pre-trials as a "failure unless the parties are dragooned into a settlement"). See also Appraisal, *supra* note 79 at 201, 204 (describing one Ohio County's rule, different from the others, that "if settlement is to be had there is no reason to have a pre-trial conference. Pre-Trial should not be primarily for settlement", and describing the use of pre-trial for settlement as the "most controversial" aspect of the practice).

See also a 1960 local rule from the Eastern District of North Carolina that "the primary objective of pre-trial should be to facilitate trial and a just judgment", and that "compromise settlement shall be regarded as a by-product of such procedure rather than the end sought", and another from the Western District of North Carolina, which provided that "any party has

it. Because the judge at the pre-trial was the "primary architect in preparing the case for adjudication", that judge should preside at a trial, close in time to the pre-trial.[95] But not all courts adopted that view; in several jurisdictions, one judge did the pre-trial and another presided at trial.[96]

To summarize, in the early years under Rule 16, its use and function was debated as state and federal judges argued on behalf of its utility — either as a means of detailing the contours of a trial or as a means of avoiding that trial. Adjudication served as a dominant end-point. But while seen as a principal, if not exclusive, focus of the judicial process, trials were not described as desirable events. Rather, even as fierce a proponent of cabining pre-trial procedures as Charles Clark considered that during pre-trials, as parties made final selections of facts in dispute, they might also learn of the views they shared, and "go the small remaining distance to reach a settlement without the agony of trial".[97] Further, Clark promoted the concept of the trial judge as skillful at pre-trials, perhaps "more effective [...] than one who may be able to turn out well-rounded opinions".[98] "Pre-trial is not a matter for errand boys or clerks. Rather it is the high function on the part of both judge and counsel".[99]

b) Protracted Cases : Calling for Control

For some, it was state court practices in ordinary litigation that anchored their views on the utility of a "pre-trial"; for other judges, it was their experiences with larger, "protracted" cases that committed them to the vision of judge as useful overseer of the pretrial arena. When the problems of "protracted cases" became the focus, aspects of state court pre-trial practice were modified. State courts relied on different judges during the phases of a case, but, as detailed below, promoters of pre-trial in the "big case" argued that a single judge should control such cases from filing to disposition.

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the right to decline to discuss settlement and insist on an immediate trial". Both are quoted in "Comment : The Local Rules of Civil Procedure in the Federal District Courts — A Survey," (1966) Duke L.J. 1011, 1054 [hereinafter Local Rules Survey].

95. C.E. Clark, *supra* note 82 at 165.

96. H.D. Nims, Pre-Trial, *supra* note 77 at 20, 29, 31, 38, 54 (describing such practices in New York, Massachusetts, D.C., Delaware, and Texas); see also *1938 ABA Pre-Trial Committee Report*, *supra* note 80 at 538 (emphasizing how freely the parties could feel to discuss their chances for prevailing at trial, since the pretrial judge "will not (ordinarily) be the one who hears the case").

97. C.E. Clark, *supra* note 82 at 164.

98. *Ibid.* at 165.

99. *Ibid.* at 166. Clark stated that he hoped the symposium on pre-trial would "promote the conviction that the judge's finest accomplishment is adjudication on the basis of a case properly developed by astute counsel, with his own pronouncements largely muted, rather than the ex-cathedra pronouncement of the formal opinion". *Ibid.* at 170.

In the early 1950's, in the wake of anti-trust litigation that had been filed in several federal districts, the federal judiciary turned its concerns to what were then called "protracted" cases.[100] A first judicial committee, chaired by Judge Barrett Prettyman, produced a report on the problem,[101] and a second committee, chaired by Judge Alfred Murrah, wrote a *Handbook of Recommended Procedures for the Trial of Protracted Cases* to teach judges to respond to these cases.[102] The response advocated was that :

> [t]*he judge assigned should at the earlier moment take actual control of the case and rigorously exercise such control throughout the proceedings in such case*.[103]

Specifically, that judge ("iron-hearted" in demeanor)[104] was supposed to hold conferences to get "acquainted" with both counsel and the case,[105] define issues beyond what was set forth in the pleadings and authorize discovery only within "the bounds" of the issues so delineated,[106] require counsel to confer prior to bringing discovery disputes to the judge,[107] employ masters to supervise discovery if needed,[108] establish a "tentative timetable" for the phases of the litigation, including scheduling motions and forecasting the time to trial,[109] "promote" stipulations of fact among parties,[110] consider bifurcation of

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100. See Committee to Study Procedure in Anti-Trust and other Protracted Cases (also called the "Prettyman Committee", after its chair, the Hon. E. Barrett Prettyman), "Procedure in Anti-Trust and Other Protracted Cases" (1953) 13 F.R.D. 62 (discussing such cases as posing an "acute major problem in the current administration of justice" and suggesting that trial judges should provide firm oversight in the preparation for trial to avoid undue expense and waste); The Hon. Alfred P. Murrah, *Background of the Seminar, in Seminar on Protracted Cases for United States Judges* (1958) 319 at 386 [hereinafter Background of the Seminar] ("[T]he judicial process was literally breaking down under the weight of these cases").

101. 3 F.R.D. 62 (1953).

102. The Hon. Alfred Murrah, wrote a *Handbook of Recommended Procedures for the Trial of Protracted Cases* 25 F.R.D. 351 (1960) [hereinafter *Handbook for Protracted Cases*]. See also Alfred Murrah, "Foreword, in Seminar on Protracted Cases" (1958) 21 F.R.D. 395 [hereinafter Foreword].

103. *Ibid.* 23 F.R.D. at 614-615.

104. *Ibid.* 25 F.R.D. at 384 (attributing the phrase to a 1951 speech by Judge Prettyman).

105. *Ibid.* at 385 (IV.A. "The First Pre-Trial Conference : Timing; Order Setting Conference; Scope").

106. *Ibid.* at 387.

107. *Ibid.* at 396.

108. *Ibid.* at 392-393.

109. 25 F.R.D. 395 ("Early designation of an unalterable time for trial has many benefits").

110. *Ibid.* at 397.

issues for trial,[111] organize and limit the presentation of proof at trial,[112] and control the use of experts on and proof of "complicated scientific, technical and economic facts".[113]

As the details of these directives demonstrate, the activities identified as important in 1953 for the protracted case are in 1997 considered appropriate for the ordinary case. That application was less obvious three decades ago. In many respects, the protracted case was conceptualized as different from the rest of the docket and because of that difference, in need of a distinct kind of process. As the Preface to the *Handbook for Protected Cases* explained :

> *Let it be emphasized this is not the ordinary litigation; our subject is rare in number, the truly complicated, a few hundred amid the tens of thousands of cases on federal court calendars.*[114]

Because these cases were "rare", the judge dispatched to control these cases was instructed to act in a special capacity.[115] Unlike ordinary litigation, in which under the master calendar system then in use, different judges worked on phases of the same lawsuit,[116] in protracted litigation, a single judge would be assigned "for all purposes" and would need relief from other duties.[117] Hence, procedures crafted for the "big" case might have been understood as appropriately applied only to litigation fitting that criterion.[118]

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111. *Ibid.* at 403.

112. *Ibid.* at 405-407.

113. *Ibid.* at 415-431.

114. *Handbook for Protracted Cases*, *supra* note 102 at 359.

115. *Ibid.* at 383 ("Control of a case during the trial thereof is familiar to all trial judges. But here we speak of control of the case in its procedural aspects prior to trial as well as during the trial itself").

116. See *Calendaring Systems*, in Understanding Use of Pre-Trial, *supra* note 80 at 227-279 (Hon. James M. Carter, Hon. Albert A. Ridge, Hon. Edwin M. Stanley, Hon. George L. Hart, Jr., Prof. Maurice Rosenberg, all discussing pros and cons of individual and master calendar systems).

117. See *Handbook for Protracted Cases, supra* note 102 at 373, 377, 384 (recommending that assignment be made "to one judge for all purposes" to enable "his prompt assumption of control" and that "necessary adjustments should be made in the normal case load of the assigned judge").

118. See, for example, the Hon. Judge E. Barrett Prettyman, *The Importance of the Problem*, in "Seminar in Protracted Cases" (1957) 21 F.R.D. 395, 405 (questioning whether the "American judicial system [could] devise procedures for such controversies no matter how big or complicated").

But early on, some judges insisted on the similarity between the "ordinary" and the "big" case.[119] As one judge explained to his colleagues : "[a]s far as techniques are concerned, you are driving at the same end and obviously enough you go through the same motions".[120] Thus the summary of recommendations from the first *Seminar on Protracted Cases* proposed : "The techniques suggested herein will likewise save time, lighten calendars and further justice in most cases".[121]

2. The Means of Change : Local Rulemaking, Judicial Education, and Constituencies for Judge-Lawyer Contact

I have sketched the sources from which the principles of the 1990's CJRA evolved. A distinct issue is how individual judges' experiences and preferences made their way into widespread use and then into rules and statutes. Three other parts of twentieth century federal procedural history thus become relevant : the growth of local rules, changes in the size and composition of both the judicial and legal professions, and the advent of the federal judiciary as an organized bureaucracy and training center for federal judges. This is not the occasion upon which to provide a full history of any, but a brief foray into all three topics is necessary.

a) Local Rules Communicating Techniques

Local rules provide a vehicle for judicial communication of changes afoot in operating practices. As is familiar, the 1938 Rules provided that district courts could make additional rules not inconsistent with the national regime.[122] As many commentators have

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119. J.A. Fee, *supra* note 79 at 381.

120. *Ibid.* at 382. The seminar had devoted a day to the use of pre-trial procedure "in the ordinary civil action" at the suggestion of Judge Fee, who had also done such a program for the Ninth Circuit Judicial Conference. *Background of the Seminar*, *supra* note 100 at 319.

121. *Seminar on Protracted Cases*, *supra* note 102 at 521. Further, judges recommended a parallel procedure for "'big' criminal cases", albeit with accommodations in light of criminal defendants' constitutional rights. See *Handbook for Protracted Cases*, *supra* note 102 at 399-403; William B. West, III, "Criminal Pre-Trials — Useful Techniques, in Seminar on Procedures" (1961) 29 F.R.D. 436, 436-441.

122. Fed. R. Civ. P. 83 (1938) ("Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules [...]. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules"). See generally S.N. Subrin, "Local Rules," *supra* note 68 at 2011-2016 (discussing the history of local rulemaking and the assumption that some such rulemaking would be needed under the then nascent federal rules, and the drafting of Rule 83).

documented over the decades, local rules have expanded in scope and number.[123] In terms of the national rule of particular interest here — Rule 16 — some of the local rules echoed a pre-trial of which Charles Clark would have approved. Such rules either left the matter to the discretion of the district judge[124] or used the pre-trial to organize the case for trial, including provisions for introduction of exhibits and the like.[125] In contrast, other local rules expanded the domain of the pre-trial, such as requiring that lawyers meet in advance of the pre-trial conference to make agreements and write documents detailing their positions, authorizing the discussion of settlement (but not its inclusion in a pre-trial order), and threatening the imposition of sanctions.[126] That such requirements exceeded the national rules is yet another illustration of disuniformity, discussed earlier in the context of downsizing the civil jury.[127] Several local rules on case management display a parallel disloyalty to the national regime.

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123. *Ibid.* at 2018-2021. Professor Robel notes that the 1988 amendments to the Rules Enabling Act attempted to address the divergence by requiring notice and review of local rulemaking. Local Advisory Groups, *supra* note 56 at 881 No.12. See also Fed. R. Civ. P. 83, as amended in 1995.

124. See for example, Rule 12 of the Rules for the United States District Court for the Northern District of Indiana (1960) 4 Fed. Rules Serv. 2d 1137, 1140 ("The court may hold pre-trial conferences in any civil case upon notice to counsel for all parties").

125. See for example, Rule 11 of the Rules of the United States District Court for the District of Delaware, 4 Fed. R. Serv. 2d 1112, 1115 (1961).

126. See for example, Calendar Rules of the United States District Court for the Southern District of New York, Rules 13-16, 4 Fed. R. Serv. 2d 1157, 1158-1163 (1961); for criticism of this packet as beyond the scope of Rule 16 and providing inappropriate penalties for non-compliance, see Understanding Use of Pre-Trial, *supra* note 80 at 458-460. Judge Clark's comments often linked the expansion of pre-trial beyond what he claimed was intended with his concerns about erosion of general pleadings rules, particularly in large cases. See the Hon. Charles E. Clark, "Comment on Judge Dawson's Paper on the Place of the Pleadings in a Proper Definition of the Issues in the 'Big Case', in Seminar on Protracted Cases" (1958) 23 F.R.D. 319, 435; see also his opinion for the *Second Circuit in Nagler* v. *Admiral Corp.*, 248 F.2d 319 at 326 (2d Cir. 1957).

    Other examples of local rules expanding the Rule 16 practice include Rule 3 (*Informal Conference — Pre-Trial Statements*); Rule 4 (*Contents and Form of Pre-Trial Statements*); Rule 6 (*Pre-Trial*), of the *Rules of the United States District Court for the Northern District of California*, 6 Fed. R. Serv. 2d 1263, 1264-1267 (1962); and Rule 7 (*Pre-Trial*) of the *Rules of the United States District Court for the Eastern District of North Carolina*, 5 Fed. R. Serv. 2d 1148, 1158-1160 (1962). Some local rules expressly authorized discussion of settlement at pre-trial conferences. See, for example, Rule 15(c) of the *Rules of the United States District Court for the District of Maryland*, 5 Fed. R. Serv. 2d 1109, 1113 (1961); *Rule 7(L)(4) of the North Carolina Rules*, *supra* at 1159.

    See also D.L. Shapiro, Federal Rule 16, *supra* note 75 at 1982-1983 (discussing the practice of expanding requirements in pre-trial conferences).

127. See *supra* notes 7-27 and accompanying text. See also discussion *infra*, Section III D.

b) Judges as Teachers and Proselytizers

While local rules provide a medium for individual judges within a district to express their shared commitments,[128] a critical element in the transformation of the role of the federal judge was communication across the United States judiciary. Others have chronicled the growth of the federal judiciary as a self-conscious bureaucracy;[129] my focus here is on the federal judiciary *as a teaching institution*, aimed at educating judges about a particular set of attitudes to take toward their work. That interest requires a brief explication of the evolution of the federal judiciary as a self-administering, staffed, data-collecting entity that set about (in connection with other organizations) to train judges and lawyers under the 1938 rule regime.

Through the work of judges, administrative staff, lawyers, and law teachers as they met at judicial conferences, at bar-hosted events, and at law schools, different modes of case processing were described and inscribed. Committees and institutions were created because of the felt need for change and as a means of reiterating particular visions of the shape such change should take. The discussion that follows therefore returns to many of the materials described above to consider the sources of the commentaries and the modes of their dissemination.

A first development of relevance is the formal investiture of a group of judges with administrative responsibility for the federal judiciary, which in turn relates to the growth in the number of federal judges. In 1922, Congress created twenty-five new federal judgeships and an administrative body, the Conference of Senior Circuit Judges. Congress authorized the conference to meet annually; its judges were "to advise as to the needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved".[130] In 1948, a renamed conference, now

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128. "Local", "local" rules or standing orders, issued by an individual judge and stating that judge's own rule regime, express that judge's variation from or a refusal to abide by a district's local rules.

129. See for example, Wolf Heydebrand & Carroll Seron, "Rationalizing Justice : The Political Economy of Federal District Courts" (1990).

130. Act of September 19, 1922, ch. 306, s. 2, 42, Stat. 837, 838. Congress authorized a "$10 per day" travel reimbursement. *Ibid.* at 839. See also Henry P. Chandler, "Some Major Advances in the Federal Judicial System" (1922-1947) 31 F.R.D. 307, 318 (1963) [hereinafter Major Advances]. As Chandler tells the history, a major impetus to administrative reform in the nineteenth century was the erratic quality of clerks of court. *Ibid.* at 313-317. The creation in the early twentieth century of the conference was in response to growing dockets and interest in judicial reform, including ABA activities that also produced the *Rules Enabling Act* and the 1938 Federal Rules. When William H. Taft became Chief Justice in 1921, he took to Congress ideas he had advanced in the 1910's at the ABA about the creation of an administrative body. While loath to adopt his request for "judges at large" (for example, not sitting in a designated district but free to be assigned on an "as needed" basis), Congress did authorize the conference. *Ibid.* at 318-330. One objector, Representative Clarence Lea of California, both argued that the such a committee would perform legislative functions and "become the propaganda organization for legislation for the benefit of the Federal judiciary". *Ibid.* at 328.

called the "Judicial Conference of the United States", continued the work of its predecessor.[131]

The work of these judges was enabled by the creation of staff offices to support them. Congress has formed two such entities : the Administrative Office ("AO") of the United States Courts, established in 1939, to "examin[e] the state of the dockets" and "transmit [...] statistical data" on the courts,[132] and the Federal Judicial Center ("FJC"), created in 1967 to "further the development and adoption of improved judicial administration" by undertaking research, staffing judicial committees, and conducting "programs of continuing education and training for personnel of the judicial branch".[133]

Moving back to the 1940's, the judiciary's Conference chartered committees, including a "Pre-Trial Committee".[134] In the 1950's, that committee expressed its concern about the lack of implementation of the 1951 *Report on Procedure in Antitrust and Other Protracted Cases*;[135] the Chief Justice responded in 1956 by appointing federal district judges from each circuit "to study the pre-trial problems peculiar to protracted civil and

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131. Judicial Code and Judiciary, ch. 646, s. 331 62 Stat. 902 (1948) (codified and then amended at 28 U.S.C. s. 331-335 (1994)). The 1948 codification repeats much of the 1922 statute; added was a requirement that the Chief Justice report annually to Congress on the work of the Judicial Conference. The work of the Judicial Conference has been altered over the past few decades by amendments that changed the composition of the Conference. See, for example, Act of August 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (providing for the inclusion of district judges); modified the work on rulemaking (Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356, and *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702, 102 Stat. 4642 (1988)); provided for the Conference's authority in judicial disability proceedings (*Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, Pub. L. No. 96-458, 94 Stat. 2035 1980); and most recently, revised selection procedures and terms of members of the Conference. (*Federal Courts Improvement Act of 1996*, Pub. L. 104-317, 110 Stat. 3847). For an illustrated history, see *Judicial Conference of the United States Celebrates its 75th Anniversary*, 29 The Third Branch 1-20 (September 1997) (counting the creation of the Conference of Senior Judges as the founding).

132. Act of August 7, 1939, ch. 501, s. 304(2), 53 Stat. 1223 (codified as amended at 28 U.S.C. s. 601-612 (1944)).

133. Pub. L. No. 90-219, s. 620, 81 Stat. 664 [codified as amended at 28 U.S.C. s. 620-629 (1967)]. See also Russell R. Wheeler, "Empirical Research and the Politics of Judicial Administration : Creating the Federal Judicial Center" (1988) 51 Law & Contemp. Probs. 31 [hereinafter Empirical Research]. Once again, the creation of both institutions comes after the existence of some of the work that each entity assumed; prior to the creation of the Administrative Office, the Department of Justice had been collecting data on the docket and, as detailed below, prior to the 1968 creation of the FJC, the federal judiciary had begun its educational efforts.

134. See Major Advances, *supra* note 130; Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78; Nims, Pre-Trial, *supra* note 77 at 191. The committee was first chaired by the Hon. Chief Judge John Parker of the Fourth Circuit. The committee issued its report in 1944 and concluded its term. It was reactivated in 1947 and was chaired by the Hon. Judge Alfred P. Murrah, who would lead the committee and also the Federal Judicial Center.

135. Background of the Seminar, *supra* note 100 (discussing the committee's work in the 1950's).

criminal litigation".[136] A few years earlier, New York University's Institute for Judicial Administration[137] had begun a series of seminars for judges; in 1957, the federal judges' committee joined with NYU for the first "Seminar on Protracted Cases for United States Circuit and District Judges", and others followed at law schools around the United States.[138]

Shortly thereafter, in 1960, the Judicial Conference expanded the focus by authorizing seminars for judges and lawyers "for the purpose of exploring the most effective techniques for the utilization of the pretrial and trial procedures contemplated by the Federal Rules of Civil Procedure".[139] In addition to the seminars on "protracted" cases, federal judicial leaders did a series of programs for newly-appointed judges. As Judge Murrah, who served as a Director of the Federal Judicial Center described them, "the seminars and conferences have been by and for judges [...] planned and largely executed by a group of seasoned judges".[140]

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136. Foreword, *supra* note 102 at 401.

137. Established in 1952, 21 F.R.D. at 404. Arthur Vanderbilt, former dean of NYU, former President of the American Bar Association, and then Chief Justice of the New Jersey Supreme Court, was pivotal in its founding. During the 1930's and 1940's, Vanderbilt worked on the creation of "Minimum Standards for Judicial Administration", and then pressed for law schools to become more involved in judicial reform and for law teachers to be more cognizant of social science data. In its early years, the Institute for Judicial Administration (IJA) served as a clearinghouse on judicial administration and published reports on the organization of courts and caseloads. In 1956, the IJA began an appellate judges seminar, which continues in the 1990's in two sessions, one for new judges and one for judges with more years of service on appellate courts. See Fannie J. Klein, *Changing the System : The Twenty-Five Year Crusade of the Institute for Judicial Administration for Equal Justice in American Courts, An Historical Perspective* (1977).

138. 21 F.R.D. at 395-396. A second followed in California at Stanford in 1958 ("Proceedings of the Seminar on Protracted Cases for United States Judges" (1958) 23 F.R.D. 319), and a third occcurred in 1959 at the University of Colorado. See *Handbook for Protracted Cases*, *supra* note 102 at 355, 360 and nn.1-2. The first seminar ended with resolutions, including that the Prettyman Report was the "foundation and Bible for handling such [protracted] cases" and that single judge assignments and judicial control were central responses. J. John W. Murphy, "Summary and Resolutions, in Seminar for Protracted Cases" (1957) 21 F.R.D. 395, 519-520. A related seminar, "On Procedures for Effective Judicial Administration", was held at Southern Methodist University in 1961 and documented at 29 F.R.D. 191.

139. "Resolution of the Judicial Conference of the United States", (1962) 29 F.R.D. 192 (authorizing the Committee on Pretrial Procedure, "in cooperation with the Committee on Court Administration" to conduct such meetings or seminars and to conduct a "special study for the purpose of developing a statement of the essentials of pretrial and trial practice for presentation to the Judicial Conference for its consideration and adoption").

140. The Hon. Judge Alfred P. Murrah, "Foreword to Reports of the Conference for District Court Judges" (1973) 59 F.R.D. 205 (also thanking West Publishing Company for publishing the proceedings) [hereinafter 1973 Foreword].

One of the agendas of this educational effort was to teach judges about "effective judicial supervision of litigation 'from cradle to grave'",[141] and another was to educate lawyers about new procedures.[142] The proponents were self-described "proselytizers".[143] As the New York Times described the effort, "The Federal judicial hierarchy is pushing a campaign to make its trial judges abandon their traditional role as passive umpires between opposing lawyers and to become more masterful in controlling trials".[144] The emphasis on management in the 1960's reflected a general interest in "systems management", in vogue in business at the time,[145] and a view of the need for the federal judiciary to modernize.[146] The agenda was not, however, simply a question of caseload rationalization but rather one of altering the modes of process, to create "speedier and more effective procedures".[147]

At many of these "new judges" conferences in the 1960's, discussions of judges as managers and settlers were often accompanied by the comment that the role was controversial. But (at least in the materials I have located thus far), the judicial lecturers at such conferences were not those *opposed* to such roles for judges. Rather, the proponents mentioned opposition, as they rebutted charges that such a role was inappropriate or unwise.[148] Over time, the discussion of case management became more

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141. Effective Judicial Supervision, *supra* note 77 at 207 (quoting Chief Judge Murrah).

142. Nims, Pre-Trial, *supra* note 77 at 191-195 (describing "demonstrations" of pre-trials held around the country during 1948-1950 and attended by hundreds of attorneys). The text of some of the simulations can be found in at the appendix. *Ibid.* at 206-249.

143. *Ibid*. ("we plead guilty to utilizing the next few days to proselytize [... but] most of the techniques will also prove helpful to all judges regardless of whether they are converted to our belief in early judicial intervention").

144. *More U.S. Judges Go to School*, New York Times, June 23, 1965.

145. See W. Heydebrand & C. Seron, "Rationalizing Justice : The Political Economy of Federal District Courts" (1990), *supra* note 129 at 13-14 (discussing the dimensions of a "[t]echnocratic [r]ationalization of [j]ustice" to include a respect for a "business orientation" and a legitimation of administrative modes); *ibid*. at 38-39 (quoting congressional support for the creation of the Federal Judicial Center because it will help bring "[m]anagement experts, systems analysts, data interpreters, personnel experts" together with judges).

146. In the 1960's, the judiciary commissioned a study of its own processes; the North American Rockwell Information Systems Company prepared a report, *A Management and Systems Survey of the U.S. Courts* (1969) (excerpts on file with author). Proponents of judicial management argued it is essential for courts to keep pace with social change. Effective Judicial Supervision, *supra* note 77 at 210. State court management institutions began in the 1970's. See W. Heydebrand & C. Seron, *supra* note 129 at 41.

147. Effective Judicial Supervision, *supra* note 77 at 212. See also a "state of the judiciary" address of the Hon. Chief Justice Warren Burger, who in 1970 raised his concern that, aside from the federal rules, the "judicial processes for resolving cases and controversies have remained essentially static for 200 years". The Hon. Chief Justice Warren Burger, "State of the Judiciary — 1970" (1970) 56 A.B.A. J. 929, 933.

148. See for example, the Hon. Edward S. Northrop, *The Role of the Judge in the Settlement Process*, 1970-71; Peter Fay, *Settlement Approaches*; The Hon. Noel P. Fox, *Settlement : Helping the Lawyers to Fulfill their Responsibility, in Seminars for Newly Appointed United*

assured, with the judge envisioned as appropriately engaged in settlement.[149] By 1973, some participants described a "trend [...] from settlement as part of a pretrial conference (to get the parties talking) to the beginning of a separately identifiable process of mediation and conciliation".[150] In other words, what the 1990 CJRA terms "alternative dispute resolution" had begun to emerge.[151]

States District Judges at 235 (1970-1971) (all on file with author). A published version of this talk is discussed *infra*, note 154. In the 1976 proceedings for the *Seminar for Newly Appointed United States District Judges*, the Hon. Judges Hubert L. Will, Robert R. Merhige, Jr., and Alvin B. Rubin gave a lecture with the same title, celebrating settlement and judicial assistance of settlement; included are examples of how to mediate cases and evaluate their worth as well as an outline of suggestions on the "judge's role in stimulating settlement negotiations", with headings such as "The Beginning Moves", "The Atmosphere", and "Tactics". Hubert L. Will, Robert Mehige, Jr. & Alvin Rubin, "The Role in the Settlement Process, in Seminar for Newly Appointed District Judges" (1976) 75 F.R.D. 89, 203, 227-232.

149. See for example, the Hon. Walter E. Craig & Dean Gordon A. Christenson, *The Settlement Process, Report of Seminar F in Reports of the Conference for District Judges*, *supra* note 140 at 252, 253-254 (describing discussion of the "richness and variety of judge's skills in the settlement role" and the "creative ingenuity to generate new techniques rapidly" including ex parte meetings with counsel and sealed estimates on recommendations of sums, and noting that the judge was moving from the role in a "traditional pretrial conference" toward a process "of mediation"); see also Hubert L. Will, Robert R. Merhige, & Alvin B. Rubin, *supra* note 148 (expressing enthusiasm about the judicial settlement role).

150. 1973 Foreword, *supra* note 140.

151. The relationship between alternative dispute resolution and courts changed over the decades. One illustration comes from commentary in 1971, at the District of Columbia Circuit's Judicial Conference, about the need for what the conferees termed "non-judicial means" of dispute resolution. See "Excerpts from Proceedings of the Thirty-Second Annual Judicial Conference of the District of Columbia Circuit", (1971) 54 F.R.D. 107, 142 ("Panel and Discussion — Non-Judicial Means of Resolving Legal Disputes"). The term "non-judicial means" enables us to understand that, in the 1970's, arbitration, administrative resolutions, and "alternative grievance" procedures were all understood as activities occurring outside those of the judiciary. Changes in the language of Rule 16 provide similar insight. In the 1983 amendments to the rule, reference is made to "extrajudicial" procedures. See Fed. R. Civ. P. 16(c)(7) (1983).

    By the 1990's, however, the judiciary had reformatted its processes to include ADR. The 1993 amendments to Rule 16 thus speak of "special procedures to assist in resolving the dispute". Today we understand these procedures as "judicial" means of resolving disputes. See Fed. R. Civ. P. 16(c)(9) (1993). As the 1993 Advisory Note explains, the revision "more accurately" describes the procedures that, aside from "traditional settlement conferences [...] may be helpful in settling litigation". Fed. R. Civ. P. 16, advisory committee's note (1993). See generally J. Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. on Disp. Resol. 211, also reprinted by RAND (1995).

By 1968, when Congress created the Federal Judicial Center, judges had been lecturing to and educating each other for several years.[152] Like the transformation of practice into rules, many of the activities of judicial education pre-dated the institution (the FJC) that became their sponsor.[153] According to the programs from those sessions,[154] as of 1971, new judges were instructed about the "concept of judicial responsibility for the disposition of litigation" during an initial orientation session conducted by Judge Murrah; other sessions included "management of civil case flow from filing to trial", and "the role of the judge in the settlement process".[155] By 1976, Judge Hubert L. Will was instructing that, "most cases [...] are better disposed of, in terms of highest quality of justice, by a negotiated — freely negotiated — settlement, than by the most beautiful trial that you can preside over".[156] By 1990, when the Hon. William Schwarzer assumed the directorship of the FJC, civil management training became a day-long session.[157]

One other comment on the role of judicial education institutions in promoting case management is in order. These institutions are self-conscious actors, in need of support (including funding) and attentive to risks of alienating their audience or sponsors. As explained by Gordon Bermant and Russell R. Wheeler, the FJC institution sought to

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152. See also *1948 Annual Report of the Director of the Administrative Office of the United States Courts*, *supra* note 79 at 51 (discussing "demonstrations of the practice [of pre-trials] in actual cases before meetings of members of the bar and judges", a Judicial Conference Committee attempted to "show how [pre-trial] can be most effectively employed"). In addition to judicial education on the federal side, the states launched parallel efforts, and in 1964, the National College for the State Judiciary was established in Reno, Nevada. See F.J. Klein, *supra* note 137 at 40.

153. With the establishment of such an organization, the judiciary obtained a means to exercise some control over its own management as well as a vehicle for disseminating norms on judging. See Empirical Research, *supra* note 133 at 44-51 (arguing that the Judicial Conference lacked effective means to implement its proposals and that the structure of the FJC enabled judges to control research and education more than some legislators desired).

154. With the help of Rob Jones and librarians Roger Karr and Matt Sarago, and the staff at the Federal Judicial Center, I have located programs, beginning in 1971 from seminars for newly-appointed United States District Judges. Some of the programs, including those that pre-date the FJC, resulted in publications by West Publishing, in free-standing paperback books, the earliest of which appears to have been in 1962. Excerpts from proceedings appear in some of the Federal Rules Decisions. See for example, the Hon. Noel P. Fox, "Settlement : Helping the Lawyers to Fulfill their Responsibility" (1972) 53 F.R.D. 129 n.1 (describing his talk as "public property [...] prepared for a public purpose as part of the seminar program for newly appointed district judges"), and "Proceedings of Seminar for Newly Appointed United States District Judges", (1976) 75 F.R.D 89.

155. 1971 Program (on file with author). In 1987, a session (conducted by Prof. Francis McGovern) was devoted to ADR. Program for Seminar for Newly Appointed Judges at 3 (November 16-20, 1987) (on file with author).

156. Hubert L. Will, "Judicial Responsibility for the Disposition of Litigation, in Proceedings of Seminar for Newly Appointed United States District Judges" (1976) 75 F.R.D. 117, 123.

157. Program for Seminar for Newly Appointed Judges at 2-5 (June 17-22, 1990) (on file with author). Several years earlier, additional special programs were developed devoted to case management. See for example, Programs for District Court Case Management Workshop, Atlanta, Georgia (March 21-23, 1983) and periodically thereafter (on file with author).

develop curricula that avoided "contaminating the stream of adjudication" and was "free from biases and special pleading".[158] A focus on case management and the pre-trial processes appears to meet that need; judicial economy, improved administration, reducing costs, and accelerating dispositions are all topics that appear "merely" procedural and offer a superficially safe haven from partisanship.

In addition to activities within institutions of the judiciary, the other organizations of relevance to the promotion and dissemination of pretrial management are the American Bar Association and law schools. The ABA has long been a key participant in the rule regime; the ABA was central to the enactment of the *Rules Enabling Act* in 1935 that authorized the formulation of a nationwide set of federal rules,[159] and the ABA has also played an important role in popularizing those rules by teaching lawyers and judges about the meaning and use of those rules and in working with judges to popularize them.[160] The ABA's Pre-Trial Committee, formed in the late 1930's, predated the one created by the federal judiciary.[161] The ABA co-sponsored some of the "clinics" and conferences,[162] many of which occurred at law schools, which served both as venues for conferences and as publishers of the results.[163] Another important means of dissemination was the West Publishing Company, which as a "courtesy" to judges, provided free publication of proceedings of many of the conferences.[164]

In sum, as one reads the materials about the promotion of case management, a group of "repeat players" emerge, serving on ABA committees, federal judicial committees, and lecturing, going to and hosting conferences at which they reiterate their

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158. Gordon Bermant & Russell R. Wheeler, "From Within the System : Educational and Research Programs at the Federal Judicial Center" 114-115 (initially in Reforming the Law, G. Melton, (ed.), 1987 and also provided as a monograph from the FJC).

159. See How Equity Conquered, *supra* note 41 at 943-961.

160. *1938 Rules*, *supra* note 15 at 299 (excerpts from the proceedings of the Institute on Federal Rules of the American Bar Association, held with cooperation from the School of Law of Western Reserve University in Cleveland, Ohio).

161. That committee, formed in 1937, was chaired by Joseph A. Moynihan and issued an enthusiastic report on the future of pre-trial procedure in 1938. *1938 ABA Pre-Trial Committee Report*, *supra* note 80 at 534-550.

162. See for example, Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78. In 1955, the ABA committee (then chaired by the Hon. Judge Clarence L. Kincaid) published and distributed *A Judge's Handbook of Pre-Trial Procedure* which included suggestions on the conduct of pre-trial conferences, forms for pre-trial orders, and transcripts of pre-trial conferences. "A Judge's Handbook of Pre-Trial Procedure" (1955) 17 F.R.D. 437.

163. For example, the symposium in which this essay sits illustrates the shared roles of the ABA and of law schools. Here, the University of Alabama serves as host, co-convener, and publisher of the results.

164. The relationship between West Publishing Company and the federal judiciary has become a source of controversy. See Sharon Schmickle & Tom Hamburger, "Who Owns the Law?" (March 5, 1995) *Minn. Star Trib.* 1A (reporting that judges took trips at West's expense). West Publishing has also provided funds for NYU's Institute for Judicial Administration's appellate judges seminars. See F.J. Klein, *supra* note 137 at 89.

commitments to judicial control over the pretrial phase and to a managerial mode. The judges who were the speakers are the same ones who served as leaders of new judicial institutions such as the FJC and as members of committees of the Judicial Conference and the ABA. In their work, these judges urged their colleagues to change their understandings of the practice of judging. Through these series of "clinics", "institutes", meetings, "demonstrations", seminars and symposia, the messages of a new gospel on judging were reiterated and spread.

The effectiveness of the mixture of local practices, rulemaking, and judicial education is underscored by Benjamin Kaplan, who in one of the early (1961) seminars (on "*Procedures for Effective Judicial Administration*")[165] understood the significance of the changes underway. Attending in his capacity as the newly-appointed reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, Kaplan summarized the proceedings by noting that :

> *there is unanimity of feeling that the pretrial conference is a vital and necessary part of the pretrial proceedings in civil causes* [...]. *It is definitely on the move. It is becoming a most important feature of the proceedings prior to trial, and in certain judicial districts it has already established itself as a dominating element in those proceedings.*[166]

He accurately forecast that some would urge the rulemakers to make the Rule "mandatory in all or most cases [...and to] prescribe detail" as well as "sanctions".[167]

c) Management as a Moment of Contact Between Attorneys and Judges

Judicial leaders' affection for pretrial management is one source of the transformation of process; lawyers' interest in it is another. Several researchers have reported that lawyers "like" pretrial management; my interest is in understanding why.

A 1944 description of pre-trial conferences, offered by the Detroit judge (Joseph A. Moynihan) who also chaired the ABA Committee on Pre-trial, spoke of the informality; at pre-trials, judges and lawyers "talked about the ball game and the weather" while smoking cigarettes and cigars.[168] In 1950, Harry Nims called pre-trials "simple

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165. Remarks of Professor Benjamin Kaplan, in "Proceedings of the Seminar on Procedures for Effective Judicial Administration" (1961) 29 F.R.D. 191, 462.

166. *Ibid.* at 462.

167. *Ibid.* at 463, counseling at least hesitation and invoking the comments of Professor Maurice Rosenberg about misuse of judicial time, of the Hon. Judge C.E. Clark about the use of Rule 16 to reintroduce special pleading rules, and of the Hon. Judge William Smith about the need for cooperation.

168. Judicial Conference/ABA "Pre-Trial Clinic", *supra* note 78 at 48.

straightforward discussion between lawyers and the judge".[169] In the late 1950's, lawyers at a conference about the pre-trial process argued that an "intangible benefit" of pre-trials was that the practice "opened up a new relationship between the trial lawyer and the trial court".[170]

More recent reports and data echo the theme of pre-trial conferences and judicial management as enabling contact between lawyers and judges. In 1980, when reporting data on lawyers' opinion of civil discovery, Wayne Brazil (then a researcher for the American Bar Foundation and now a magistrate judge) described attorneys' frustration with judicial inactivity around discovery.[171] Thereafter, Magistrate Judge Brazil argued for "firm judicial control [...over] the pretrial development of big cases".[172] In 1983, Brazil surveyed lawyers within his district and learned that ninety percent "prefer[red] a settlement judge who actively offers suggestions and observations [to] one who simply facilitates communication".[173] In short, the claim is that lawyers like judges who manage and who attempt to bring about settlement.[174] Those findings are reiterated in the 1996

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169. Nims, Pre-Trial, *supra* note 77 at 199.

170. Roy F. Shields, "Advantages to a Trial Lawyer of a Pre-trial Conference" (1958) 23 F.R.D. 342, 347.

171. Wayne D. Brazil, "Views from the Front Lines : Observations by Chicago Lawyers About the System of Civil Discovery" (1980) Am. B. Found. Res. J. 217, 245-251 [hereinafter Views from the Front Lines]. Brazil noted that lawyers cited judges' negative attitudes, limited resources, and reluctance to impose sanctions as three critical causes of judicial ineffectiveness. *Ibid.* at 248. In response to the survey question "Do you feel that you get adequate and efficient help from the courts in resolving discovery disputes and problems", 69% of respondents answered negatively. That figure rose to 93% among those he described as big case litigators. *Ibid.* at 247.

172. Wayne D. Brazil, "Improving Judicial Controls over the Pretrial Development of Civil Actions : Model Rules for Case Management and Sanctions" (1981) Am. B. Found. Res. J. 873, 890. Brazil describes the increase in support for the proposition that "firm judicial control is an absolutely essential element of any serious effort to improve the efficiency and fairness of the pretrial development of big cases". *Ibid.* at 890.

173. Wayne D. Brazil, "A Close Look at Three Court-Sponsored ADR Programs : Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values" (1990) U. Chi. Legal F. 303, 309 (emphasis omitted). These data come from a larger study, involving four districts, in which Brazil found some regional variations, as well as differences between plaintiff and defense lawyers. See Wayne D. Brazil, "Settling Civil Suits : Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges" (1985) at 137-143, and Wayne D. Brazil, "Effective Approaches to Settlement : A Handbook for Lawyers and Judges" (1988) at 435-445 [hereinafter Settling Civil Suits]. For example, lawyers from California (the state in which Brazil presides as a magistrate judge) were more enthusiastic about judicial engagement in settlement conferences than those from Florida. *Ibid.* at 436. Plaintiffs' attorneys distinguished themselves from defense attorneys, particularly on the issue of judicial intervention to preclude a party from accepting a settlement that the judge believed to be insufficient. *Ibid.* at 438.

174. See Michael E. Tigar, "Pretrial Case Management under the Amended Rules : Too Many Words for a Good Idea" (1994) 14 Rev. Litig. 137, 157 (praising management but criticizing the increasing "particularism" of the rule).

RAND report on the CJRA, which reported that "a higher degree of case management is associated with higher lawyer satisfaction"[175] and in discussions of the report by the Judicial Conference itself.[176]

Why do lawyers like case management? It is one of the few arenas in which attorneys have an opportunity to meet with judges — an activity enjoyed *by* some lawyers in and of itself, and surely an activity that is useful *for* lawyers in their relationship[s] with their clients. In the current litigation regime, in which fewer than four percent of the civil docket conclude by commencement of trials[177] and many of the adjudicated motions are determined "on the papers", lawyers described as "litigators" (to be distinguished from lawyers who are "trial lawyers") still want to "go to court". Judicial management provides one route.[178] Further, in a world in which "incivility" is described as a central quality of

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175. *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at xxxii, 55. Both RAND and the Judicial Conference also concluded that the CJRA's creation of local advisory groups has engendered additional contact between judges and attorneys and that such contact is beneficial. See *RAND's Implementation of the CJRA*, *supra* note 57 at xvi, 24, 26. See also Local Advisory Groups, *supra* note 56 at 897-899 (discussing tensions when judges did not implement Advisory Group recommendations).

176. See *1997 Judicial Conference CJRA Report*, *supra* note 3 at 30 (discussing the FJC's report in which many attorneys approved of case management practices as "helpful in moving their cases along"); *ibid.* at 19, 21 (discussing the utility of advisory groups as a means of education and contact between bench and bar).

177. Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary 36 tbl. C-4 (December 31, 1995) (reporting that 3.2% of civil cases reached trial). The relationship between judicial settlement efforts and the declining rate of trial is the subject of debate; given the many variables that affect decisions to settle, it is difficult to determine what role judicial activism plays in the declining trial rate. From current data, we know that a large percentage of dispositions occur "without any court action" or before issue is joined. See *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at 142-143 tbl. C.8 (Civil Case Point of Disposition) (57.5% disposed of in these ways). It is more difficult to ascertain what role, if any, judges took before the 1938 rules. According to the American Law Institute, *A Study of the Business of the Federal Courts : Part II, Civil Cases* (1934), which studied dispositions in 13 districts (of the then 84), about 30% of the federal docket "at law" concluded by a court decision. *Ibid.* at 265. Settlement rates varied widely among the districts. "Voluntary dismissals, discontinuance, withdrawal or nonsuit" represented on average about 43% of the dispositions at law, with a high of 64% in the Northern District of Ohio and a low of 7.3% in the District of Massachusetts. *Ibid.* at 129, tbl. 17. In those districts, however, disposition might also occur under a category described as "judgment by stipulation, consent, confession or compromise," and while the overall average was 9%, the districts with the higher "voluntary settlement" rates have lower "judgments by stipulation," suggesting the possibility that procedural requirements sorted cases among the two categories. *Ibid.* at 65, 129. If those categories fairly represent the "settlement" activity, then settlements constituted more than fifty percent of the docket. See also Charles E. Clark & James W. Moore, "A New Federal Civil Procedure, II. Pleadings and Parties" (1935) 44 Yale L.J. 1291, 1294 (describing the ALI data as evidence that "the great majority of the cases are terminated before trial is reached").

178. "[I]ncreased magistrate judge activity on civil cases is a strong and statistically significant predictor of greater attorney satisfaction [...]. [O]ne reason [...] is that [attorneys] find [magistrate judges] more accessible than district judges". *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at xxviii. RAND also recommended increased reliance on magistrate judges. *Ibid.* at xxviii.

litigation, lawyers want judges to hear their claims of inappropriate adversarial behavior and hopefully to chill if not sanction those excesses.[179]

Lawyers not only want help when dealing with opponents but also want guidance for their own lawyering and assistance in their interactions with clients. Again, according to research by Magistrate Judge Wayne Brazil, many attorneys want judges to raise the topic of settlement[180] and then to give advice, "to express an opinion, to comment specifically on the strengths or weaknesses of evidence or arguments, or to evaluate a case".[181] Brazil argues further that the judicial contribution to the merits of settlement discussions stems from judges' work as judges; "[j]udges [...] are paid to make decisions", and he proposes, are valued for their "skill in judging".[182] Thus, judicial case management may assuage attorneys' own anxieties about how to prepare cases and what advice to provide clients. We also know that attorneys use judges in their dealings with their own clients. Researchers report lawyers frequently invoke (albeit not always accurately)[183] judicial opinions on the value of a case. Attorneys report that judicial views on the reasonableness of a settlement have significant effects on "balking client[s]".[184]

Finally, lawyers use judicial case management as one place in which to advocate to judges. They want to persuade judges of the validity of their positions, and case management is a strategic occasion upon which to advance a client's cause.

Judges, in turn, like aspects of the pre-trial management process. In contrast to attorneys who may see it as an advocate's avenue, judges see it as a moment in which lawyers can be constrained. The rule revisions of the 1980's were explicit in their interest in constraining attorneys. As Arthur Miller explained in an FJC publication about the 1983 amendments, a major theme was "somehow to try and engineer improved or increased lawyer responsibility, to moderate lawyer behavior in litigation so that there is less of the

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179. See Thomas E. Willging, John Shapard, Dona Stienstra, & Dean Miletich, "Discovery and Disclosure Practice, Problems, and Proposals for Change : A Case-Based National Survey of Counsel in Closed Federal Civil Cases" 41-45 (FJC, 1997) [hereinafter FJC Discovery and Disclosure Practice Survey] (reporting that 54% of the attorneys surveyed thought that judicial involvement in discovery disputes would be useful to reduce expenses, and 47% believed that judicial case management would reduce discovery problems) (on file with author; my thanks to Prof. Tom Rowe for his assistance in obtaining these materials).

180. A good deal of literature suggests that proposing the possibility of a settlement is a sign of weakness. See for example, Settling Civil Suits, *supra* note 173 at 45.

181. Wayne D. Brazil, "What Do Lawyers Expect from Judges?" (September 1985) 21 Trial 69, 69 (summarizing his research reported in the book "Settling Civil Suits").

182. Settling Civil Suits, *supra* note 173 at 45.

183. See for example, William L. F. Felstiner & A. Sarat, "Enactments of Power : Negotiating Reality and Responsibility in Lawyer-Client Interactions" (1992) 77 Cornell L. Rev. 1447 at 1463 (describing attorneys who offer clients "a form of cynical realism through which the legal system and its actors are trashed [...] frequently in an exaggerated fashion").

184. Settling Civil Suits, *supra* note 173 at 101-102. See also W.L.F. Felstiner & A. Sarat, *supra* note 183 at 1462-1465 (describing a series of techniques lawyers use to persuade their clients, including attorneys' knowledge of legal rules and their estimates of what judges will do).

aimless, less of the pavlovian, less of the drifting".[185] Judicial management is the means,[186] and many judges believe that they are good at it, reaping results both in terms of cheaper process and of quicker dispositions.[187]

Of course, that attorneys and judges respond positively to access to judges during the pretrial phase is insufficient to validate it as an appropriate process; issues remain about the propriety or fairness of case management as well as its utility. A few commentators have suggested that limitations on the interactions are appropriate; for example, Professor David Shapiro proposed a presumption that, "in the absence of informed consent by the parties, a judge who has become significantly involved in settlement discussions should not ordinarily preside over the adjudication of issues on the merits [...]".[188] Empirical reports also inform us of litigant distress at attorney-judge settlement conferences in which the parties are absent.[189]

Another question is about the efficacy of case management. RAND reports that early "judicial case management" may save time, but only at the price of "significantly increased lawyer work hours".[190] RAND further concludes that to maximize efficacy, management must be coupled with enforcement of deadlines, including shortening

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185. Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure : Promoting Effective Case Management and Lawyer Responsibility* 10 (FJC, 1984) (based on remarks made at an FJC workshop).

186. As Professor A. Miller put it, "what has been done to Rule 16 [...] is that it has been transformed. The old Rule 16 is gone and what you now have in Rule 16 is a blueprint for management". *Ibid.* at 20.

187. Hence, one finds both surprise and hesitancy in embracing RAND's findings. See for example, Rex Bossert, "Case Management Gets Judicial Nod; *RAND ADR* Study Fails to Deter Judges, Who Say More Experiment Is Warranted" (June 9, 1996) Nat'l L.J. at A11; Darryl Van Duch & Marcia Coyle, "Start Over on Case Management Reform?," (February 10, 1997, Nat'l L.J. at A6.

188. Federal Rule 16, *supra* note 75 at 1996 (arguing against a flat prohibition); see also J. Resnik, "Managerial Judges" (1982) 96 Harv. L. Rev. 376 at 426-432 (discussing the risk of premature judgment). The assumption, according to one ABA committee, in state court practice in the 1930's was that the judge who did the pre-trial would not conduct the trial. *1938 ABA Pre-Trial Committee Report*, *supra* note 80 at 538.

189. E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *The Perception of Justice : Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* 44-79 (RAND, 1989).

190. *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at xxiii 55. In her comments at the University of Alabama CJRA Implementation Conference and then at a FJC training seminar for district judges, Professor Lauren Robel suggested that judges should think of case management as imposing costs on clients and then determine how much management is appropriate to do.

discovery periods and insisting on trial dates,[191] which might be understood as proposing less judicial management and more court-based cut-offs. Judges might respond (indeed have, in a fashion, via the Judicial Conference report on the CJRA and RAND's findings[192]) that the "close-up view"[193] has use because judges provide needed guidance for inept lawyers, focus for overspending lawyers, and control of misbehaving lawyers.

These points about the fairness and utility of case management are relevant to the ongoing use of managerial processes, and I will return to them below; the point here is to underscore that judicial promotion of pretrial management finds a receptive ear in lawyers, eager to have a chance to "go to court".

3. The Results of Four Decades of Changes

By individual practices (carried over from state courts and appearing particularly useful in large-scale litigation), through articulation (by local rules, in committee reports, and repeated under the aegis of judicial education), and through support from attorneys (in search of an open court house door), the "pre-trial" moved from a predicate to trial to a stage unto itself, an activity focused on disposition without trial. Some of the terms have changed; we no longer hear about "iron-hearted judges" or "protracted cases" but rather about "managerial judges" and "complex cases". Some new terms, such as "differential case management" (DCM or tracking) and "alternative dispute resolution" (ADR), have been added, but the framework (once detailed for the rare "protracted" case) has become accepted as appropriate in the ordinary case.[194]

The second chart provides a snapshot of the distance traveled. I have there marked the late 1950's and early 1960's as a useful stop along the way. One way to appreciate the change in the gestalt is to consider an essay written in 1958 by Professors Benjamin Kaplan and Arthur Mehren of the Harvard Law School, joined by Judge Rudolf Schaefer of the Hamburg *Amtsgericht.*[195] They had just returned from a trip to Germany, and they wrote about what they learned for their United States audience, comprised of judges and lawyers.

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191. RAND's Evaluation of Judicial Case Management, *supra* note 57 at xxxiii.

192. See 1997 Judicial Conference CJRA Report, *supra* note 3 at 29-32 (discussing a list of recommendations involving judicial management including setting limits on discovery, the filing of motions, and time limits to trial).

193. R.F. Sheilds, *supra* note 170 at 347.

194. See *supra* note 100 and accompanying text.

195. Benjamin Kaplan, Arthur Von Vehren & Rudolf Schaefer, *Phases of German Civil Procedure* (1958) 71 Harv. L. Rev. 1193 at pts. 1 & 2.

Basically, Kaplan et al. reported on the news from abroad : that is, they described behavior of German judges that looked quite foreign from the perspective of the United States. As they put it, the German judge was :

> [...] *constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and advisor,* [and] *as insistent promoter of settlements*.[196]

While at the time these foreign judges were just that, "foreign" in their behavior as compared to what was expected of United States judges,[197] today the words that Kaplan used to describe German judges capture the role of the United States managerial judge, who is also an "insistent promoter of settlement".[198] Since the 1960's and 1980's, federal judges have been taught — taught by each other in conferences before the creation of the FJC and then by the FJC as it trains new judges, by local rules and practice, by state court practices, by colleagues, by seminars at law schools, by their own prior experiences as lawyers in the federal courts, and then by a national rule regime — taught by all these sources to exercise their discretion to manage cases, to try to control attorneys, to try to get control over discovery, to urge ADR, to bring up the question of settlement and to function as "settlement judges".[199]

In sum, there has been a change, significant and substantial, in the federal civil docket in terms of the relationship between judges and lawyers, in terms of the daily processes of litigation, in terms of what federal district judges take to be their job, and in terms of the goals of the process.[200] The 1938 Rules provided a vague category called the

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196. *Ibid.* pt. 1 at 1472.

197. See J. Resnik, *supra* note 188 at 382-386 (describing expectations in the United States in the 1930's to 1960's that judges not engage in settlement promotion); see also By-Products of Pre-Trial, *supra* note 89 at 188 (describing "bitter criticism from lawyers and judges in New York and elsewhere" when in 1949, judges in Brooklyn and New York called conferences specifically "[to] help [...] the parties to end" cases without trial, and the then-more recent "spreading" of judicial settlement efforts).

198. The point is not to equate German judges and United States judges but rather that descriptions of a particular posture, seen as unique then, are no longer understood as outside the conception of what United States judges might be about. See for example, John Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chi. L. Rev. 823 at 858-866.

199. This term appears in the Eastern District of New York's CJRA plan. See *United States District Court for the Eastern District of New York, Civil Justice Expense and Delay Reduction Plan*, 1991 WL 525112, at 12; Janet Cooper Alexander, "Judges' Self-Interest and Procedural Rules : Comment on Macey" (1994) 23 J. Legal Stud. 647; Marc Galanter & Mia Cahill, "Most Cases Settle : Judicial Promotion and Regulation of Settlements" (1994) 46 Stan. L. Rev. 1339.

200. For an argument that judges have also changed in their stance toward legislation and have, in the past few decades, become much more involved in lawmaking, see Charles Gardner Geyh, "Paradise Lost, Paradigm Found : Redefining the Judiciary's Imperiled Role in Congress" (1996) 71 N.Y.U. L. Rev. 1165. For discussion of changes in appellate practices, see the Hon. Mary M. Schroeder, "Appellate Justice Today : Fairness or Formulas, The Fairchild Lecture" (1994) Wis. L. Rev. 9.

pre-trial and left it utterly to the discretion of the district judge as to whether it would be filled and if so, how. The 1990's find the mandate that judicial involvement with lawyers begin soon after the filing of lawsuits and continue through conclusion. The change is not, however, a change that occurred between 1990 and 1994 but one that has been underway since the 1950's and which is still in process today.

Thus it is not surprising that RAND found little difference over a four year time span in costs, time to disposition, the views of lawyers and judges,[201] in the amount of time "judicial officers" invested per case,[202] or in judicial perceptions of their role in managing cases.[203] Both the CJRA and recent revisions by the judiciary of Rule 16 are instances in which statutes and rules codify practices rather than invent them. This is not to say that after the codification represented by the CJRA, no change occurred but rather that codification is a marker rather than the point of departure.[204] Hence, one would expect, as RAND found, some evidence of new programs or greater use of programs already extant, specifically an increase in the fraction of cases managed.[205]

B. Migratory Procedure : From Case Management to Lawyer Management

Given this first conclusion (that national rulemaking — be it from Congress or from the federal judiciary — frequently represents codification of practice), a second, related point (again, reflected in RAND's findings) is about the basis for rulemaking. Rulemakers write with cases in mind, with paradigms of the problems or events to which rulemaking is addressed.[206] Be they judicial or congressional, rulemakers generalize from

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201. *RAND's Evaluation of the CJRA*, *supra* note 57 at 22 (suggesting that the finding of little effect from the enactment of the CJRA can be explained by several reasons, including that some districts did not alter their practices after the legislation, that those districts that did make alterations applied those rules to only a small number of cases, that those changes that were more widely implemented had relatively little effect on time, cost, and perceptions of fairness, and that variation among individual judges limited implementation efforts).

202. *RAND's Evaluation of the CJRA*, *supra* note 57 at 24; *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at 249-250. The study included time spent by magistrate and district judges per case but not special masters, mediators, arbitrators. *Ibid*. at 244.

203. *RAND's Evaluation of the CJRA*, *supra* note 57 at 24 (85-92% of the judges responded "no difference"); *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at 84-85. According to the *FJC Demonstration Program Report*, *supra* note 62 at 38, one judge said "[w]e've only renamed what we've been doing". Similarly, in the Northern District of Ohio, advisory group members reported that a differential case management program predated the CJRA. *Ibid.* at 87. Not all agreed, however, that the CJRA worked no change; for example, in the Western District of Michigan, the majority of judges reported substantial changes stemming from the CJRA. *Ibid.* at 51.

204. See *RAND's Evaluation of the CJRA*, *supra* note 57 at 17.

205. *Ibid.* at 10.

206. See Judith Resnik, "Failing Faith : Adjudicatory Procedure in Decline" (1986) 53 U. Chi. L. Rev. 494 at 508-515.

their experiences. In recent years, those experiences are disproportionately in "big" cases. Below, I detail why and how these cases are so dominant and then some of the consequences when rulemaking, based on the "big" case, migrates and is applied to other kinds of cases. My purposes here are (again) to understand what RAND found about the CJRA and at what else RAND might have looked.

From a host of social science work, we know that small cases are typically resolved without judicial involvement.[207] In their daily work, judges see only a fraction of the caseload, those pulled to their attention by means of pre-trial discovery disputes, requests for adjudication such as motions to dismiss or for summary judgment, and trials. (Judges also used to see a disproportionate amount of prisoner litigation, in part because those cases are lawyer-less and hence without gatekeepers or advocates).[208] Given a declining rate of trials in civil litigation in federal court,[209] discovery and motion practice become important means by which cases come before the judiciary (including both district court and magistrate judges).

While discovery had been a practice celebrated from its inception in the 1930's through the 1960's,[210] claims of difficulty with discovery emerged early on in the "big

207. David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, & Joel B. Grossman, "The Costs of Ordinary Litigation" (1983) 31 UCLA L. Rev. 72 at 83-84 (based on empirical research, the Civil Justice Litigation Project found, "[t]he typical case is procedurally simple and will be settled voluntarily without a verdict or judgment on the merits").

208. Judges see fewer of these cases because of practices of delegation of them to magistrate judges (see Carroll Seron, *The Role of Magistrates : Nine Case Studies (1985)*) and of federal legislation limiting prisoner access. See the *Prison Litigation Reform Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, s. 803 (requiring exhaustion of administrative remedies); *Prison Litigation Reform Act* s. 804, amending 28 U.S.C. s. 1915 (requiring that prisoners, attempting to file in forma pauperis, pay funds from trust accounts, if any, and precluding filings in excess of three under certain conditions).

209. Misunderstood Circumstances, *supra* note 73 at 633-639 (describing the decline over a fifty year period, from 15.4 percent in 1940 to 4.3 percent in 1990).

210. See for example, Maurice Rosenberg, "Columbia Project for Effective Justice", Field Survey of Federal Pretrial Discovery; *Report to the Advisory Committee on Rules of Civil Procedure* at 3 (Discussion draft, February 1965) (at the request of the Advisory Committee, research on discovery found that "there are not any widespread or profound failings in the present scope or availability of discovery"); Maurice Rosenberg, "Changes Ahead in Federal Pretrial Discovery", (1968) 45 F.R.D. 479 at 488 (describing findings as demonstrating that while discovery works well, it does "not appear to save substantial court time" and should not be understood as an "efficiency-promoting device"). See also the 1951 Annual Report of the Director of the Administrative Office, *supra* note 78 at 104-105 (discussing which forms of discovery were "popular").

case".[211] More generalized cries of "discovery abuse" come to the fore in the late 1970's, again many of them in reference to the "big case".[212] Basically, data on discovery — then and now — are that the majority of cases do not involve discovery disputes;[213] large-scale litigation does.[214] Similarly, problems associated with large-scale litigation have become one basis for arguments in favor of alternative dispute resolution.[215]

It is not only judges who "know" about pre-trial litigation in civil cases by means of the big case; the same is true of the lawyers who serve on the rule and bar committees involved in rulemaking. Lawyers who work on large-scale litigation have the economic wherewithal (and sometimes self-interest) to sustain involvement in the rulemaking

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211. See for example, Richard W. McLaren, "Procedure in Private Antitrust Cases", in *Seminar on Protracted Cases*, (1957) 21 F.R.D. 395 at 440, 445-448 (discovery problems in anti-trust litigation); the Hon. John W. Murphy, "Summary and Resolutions", (1957) 21 F.R.D. 395 at 519-520 ("Control of discovery is desirable and may properly be exercised by the judge"). See also J.P. Frank, L.G. Rockwell, M.S. McDougal & G.C.K. Leighter, "Tactical Use and Abuse of Depositions Under the Federal Rules" (1949) 59 Yale L.J. 117 at 125-126 (relying on interviews with judges, lawyers, and stenographic reporters and concluding that, while in the "majority of cases" no abuse occurs, those involving "complex litigation" do entail abuse because the "resources of time, money and counsel make it practicable as a litigation tactic").

212. See Maurice Rosenberg & Warren R. King, "Curbing Discovery Abuse in Civil Litigation : Enough is Enough" (1981) BYU L. Rev. 579 (describing the criticism and arguing that two premises of the rules, unlimited access and the assumption of judicial involvement as exceptional, should be revised).

213. See Paul R. Connolly, Edith A. Holleman, & Michael J. Kuhlman, "Judicial Controls and the Civil Litigative Process" (1978) Discovery 28 (in 52 percent of the cases studied, no discovery requests existed on file; in those with requests for discovery, the median number of requests was three). More recent data comes from work by the FJC, who at the request of the Advisory Committee on Civil Rules, sent questionnaires to 2,016 attorneys in 1,000 cases and, based on a response rate of 59 percent, reported that 94 percent engaged in what they termed "formal discovery", and that 48 percent reported some discovery problems; "FJC Discovery and Disclosure Practice Survey", *supra* note 179 at 10-21. See also Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery* (paper prepared through the FJC for the 1997 Advisory Committee meetings) (summarizing the literature on discovery and analyzing its limitations) (on file with author); *Northern District of Ohio DCM Study*, *supra* note 60 at 21-23 (problems of unduly expensive litigation, including discovery abuse, are likely related with a subset of the docket).

214. See Views from the Front Lines, *supra* note 171 at 222-235 (dividing civil discovery into two "subworlds", one of large cases and the other of small cases); FJC Discovery and Disclosure Practice Survey, *supra* note 179 at 2, 19-21 (reporting that attorneys attributed four percent of the total litigation attorney expenses per client to "unnecessary discovery expenses" and concluding that the problems with discovery stem not from the forms of discovery but the type of case; that "complex", "contentious", "high-stakes", and "high-volume cases" present problems).

215. See Deborah R. Hensler, "A Glass Half Full, A Glass Half Empty : The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 Tex. L. Rev. 1587 at 1590-1591.

process.[216] These lawyers and judges have common reference points, share experiences and, over the past decades, share perceptions of the waste and expense of practices that they are in a position to see. In short, the "big case" forms the basis of a good deal of the experiences and understanding of the set of lawyers and judges who make rules about civil litigation.

What do such judges and lawyers "know" when they contemplate large litigation? They know of problems, of the need for judicial control, of attorney misbehavior. Over the years, judges and lawyers generalized that the rules they were developing in what I will call "context A" (such as securities and anti-trust) would benefit "context B" (the general civil docket). Over time, the discretionary approach of the 1938 Rule 16 (in essence, providing that whatever pretrial process occurred was within the unfettered discretion of the district court) was replaced first informally by judges urging their colleagues to shift toward a managerial, discovery-controlling, settlement-oriented regime,[217] and then formally by a rule that mandated judicial involvement.[218]

The concept of judicial control, argued as essential for the big case and in discovery disputes, was then generalized as useful in ordinary litigation. I detailed earlier what the 1950's *Handbook on Protracted Litigation* included[219] to demonstrate how that which was specially crafted in the 1950's to apply to the unusual lawsuit has become familiar in the 1990's to judges and lawyers as steps to be taken in most cases. Further, while state use of a pre-trial had relied on different judges for that phase than for trial,[220] the *Handbook* argued the need for a single judge to control the case throughout its life, and that has become the current federal practice. Procedures crafted with one kind of case in mind have *migrated* to almost the whole docket.[221]

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216. The classic essay is that by Marc Galanter, "Why the 'Haves' Come Out Ahead : Speculations on the Limits of Legal Change" (1974) 9 L. & Soc'y Rev. 95.

217. See for example, Robert Peckham, "The Federal Judge as a Case Manager : The New Role in Guiding a Case from Filing to Disposition" (1981) 69 Cal. L. Rev. 770; William Schwarzer, "Managing Civil Litigation : The Trial Judge's Role" (1978) 61 Judicature 400.

218. The 1983 amendments to Rule 16 state this mandate. See Fed. R. Civ. P. 16, as amended in 1983 and then in 1993.

219. See *supra* notes 114-117 and accompanying text.

220. See 1938 ABA Pre-Trial Committee Report, *supra* note 80 at 538.

221. In another paper, I noted this spillover effect. See Judith Resnik, "Procedural Innovations, Sloshing Over : A Comment on Deborah Hensler, A Glass Half Full, A Glass Half Empty : The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 Tex. L. Rev. 1627 [hereinafter Procedural Innovations]. See also Mark C. Weber, "The Federal Civil Rules Amendments of 1993 and Complex Litigation : A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases" (1994) 14 Rev. Litig. 113 (arguing that the federal rules are well designed for more complex cases but that other rules should be developed for "small cases" and pointing to "[s]pecial small claims rules" as a "near-universal feature of state civil practice"). *Ibid.* at 131.

What flows from the use of experience with large cases to make rules for most cases? The problem, of course, is that assumptions fairly-based in experiences with one set of cases may not be apt in other kinds of civil litigation. One might make the wrong rules for cases that are not the basis from which the initial rule regime is built and find oneself faced with unexpected and unintended consequences.

The image of transferring rules that are plausible in one set of cases to another set helps explain what RAND found about how management can increase costs. In large-scale litigation, lawyers spend lots of time with and before judges. Judges in turn have focused on reining in those lawyers, already present and consuming court and client resources. What we call "case management" is really an effort to manage *lawyers*, not cases.

Further support for the translation of "case management" into "lawyer management" comes from the specific decision to leave unregulated a group of cases that RAND called "minimal management cases", described as lawsuits involving prisoners, social security, bankruptcy appeals, foreclosure, forfeiture and penalties, and debt recovery.[222] The absence of judicial management for such sets of cases is not novel with the CJRA; the practice is continuous with that under Rule 16, as revised in 1983.[223] That these cases are not managed underscores that the goal of management is superintendence of attorneys, not cases. If case management were at the central concern, provisions for litigants in need of assistance might be prominent, but the innovations of the last decades have not been to equip these litigants — to use the offices of the court to bring assistance to them — but rather for judges to work on cases in which litigants have lawyers. (Some might respond that many of these "minimal management cases" are not worth judicial assistance because they are either of very little economic value and/or pose few legal questions and should not be before the Article III judiciary at all.)[224]

The exclusion of certain cases from the management regime makes plain the focus on lawyers. Yet experiences with lawyers in big cases do not provide great insight into lawyer behavior in ordinary cases, in which judges and lawyers had not been so entangled. Judicial management is an effort to insist on attorney investment in litigation, and specifically, that attorneys spend time with each other and with judges in the pretrial

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222. See *RAND's Evaluation of the CJRA*, *supra* note 57 at 7 n. 3, 11-12 (finding that these cases remain untouched by the management regime of the CJRA).

223. Social security and prisoner litigation are cases offered in the Advisory Notes to the 1983 Rule as examples of ones that might be exempt from the mandatory pretrial process. See Fed. R. Civ. P. 16(b) advisory committee's note (1983). Note that Professor Robel also found that under the exemption category were an array of cases broader than those listed here, and further argued that any such exemptions should not be left to district court discretion but should be uniform nationally. See Lauren K. Robel, "Mandatory Disclosure and Local Abrogation : In Search of a Theory for Optional Rules" (1994) 14 Rev. Litig. 49 at 52-55.

224. See for example, *The Federal Courts Study Committee*, *Report of the Federal Courts Study Committee* (April 2, 1990) at 55-60, 48-50 (proposals to move social security cases to an administrative system and to increase dispute resolution mechanisms other than the federal courts for prisoner litigation).

process. Unlike the large-scale cases, in which lawyers were already front and center, in the middling range of cases, lawyers might not — but for judicial management — undertake certain kinds of activities, such as taking depositions before a discovery cut-off or preparing for conferences.[225] When transposed to other cases, judicial management (that potentially economizes in the large-scale context) requires greater investment of lawyer hours.[226] When managing lawyers, judges sit as "super senior partners" attempting to oversee attorneys' products. What RAND's work nicely reminds us is that lawyers (at least those paid on an hourly basis) have the ability to pass on the costs of management to their clients.[227] As a result, the very "reforms" advanced on the grounds that they would save money end up costing money.[228]

Hence, the CJRA should serve as a caution against the practice of generic rulemaking based on a narrow band of information and experience. RAND's report is thus supportive of commentators who call for more and better empiricism to inform the rulemaking process in general.[229] But the empiricism provided there also needs revisiting. If the data were disaggregated by kind of case, would the results be the same? Would cost savings be found in the subset of cases for which these rules were initially designed?

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225. See *RAND's Evaluation of the CJRA*, *supra* note 57 at 14 (management and discovery cutoffs push lawyers to do work that might not occur without those provisions and thus both increase costs).

226. While management compelled more attorney work (see *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at xxiii-xxiv), judges reported to RAND that it did not, however, take them more time. *Ibid*. at 84. That finding fits with reports that, before and after the act, judicial time investment remained relatively stable. *Ibid*. at 24.

227. See J. Resnik, *supra* note 188 at 422-423 (managerial judging, if imposed across all kinds of cases, requires attorneys to invest time, including in some cases that would have been disposed of without that work).

228. When RAND's findings are coupled with the recent experiences of revisions of Rule 11, a possible conclusion is that judges are clumsy actors when asked to oversee attorneys and that the structural position in which judges sit makes it unlikely that they can do much other than give attorneys excuses to "keep the meter running". The initial expansion of Rule 11 in 1983 was borne of an impulse parallel to that found in the CJRA and in Rule 16 : judicial superintendence of attorneys, and specifically, their misbehavior. However laudatory the goal, the means — judges watching over lawyers — proved cumbersome, time consumptive, and imprecise. The task spawned (in the Rule 11 context) "satellite litigation", and in relatively short order, Rule 11 was revised again in an effort to pull back from what came to be understood as needless and/or ineffective efforts by judges to control attorneys. See the 1993 amendments to Rule 11, Fed. R. Civ. P. 11 (amended 1993) (1993) 146 F.R.D. 401, 419; John Frank, "Bench-Bar Proposal to Revise Civil Procedure Rule 11" (1991) 137 F.R.D. 159. Note that Congress modified the Rule 11 process in the *1995 securities legislation*, 15 U.S.C. s. 77 (z-1)(c) (Supp. 1995), to impose greater oversight of attorneys in that category of cases.

229. See for example, Laurens Walker, "A Comprehensive Reform for Civil Rulemaking" (1993) 61 Geo. Wash. L. Rev. 455 (urging empirical testing of proposed rules); Laurens Walker, "Avoiding Surprise from Federal Civil Rule Making : The Role of Economic Analysis" (1994) 23 J. Legal Stud. 569; *Cf*. Robert G. Bone, "The Empirical Turn in Procedural Rule Making : Comment on Walker" (1994) 23 J. Legal Stud. 595 (offering a cautionary note); "Ignorance and Procedural Law Reform," *supra* note 41 (urging a reduction in rule revision in general).

C. The Durability of Discretion

One reading of RAND's report is that, at least in the time frame studied and without disaggregation of the data, judicial discretionary control of the pre-trial docket and the various management techniques do not, in and of themselves, achieve the congressional goals of cost savings. (RAND's recommendation is that, to save money, judges need to modify their practices and set discovery and trial deadlines.)[230] Further, RAND's evaluation of six alternative dispute programs provides little support for their use as means to reduce time to disposition or costs to litigants.[231] In other words, just like the change from the twelve to the six person jury, the new rule regime is subject to question about at least its claims of economy, if not its wisdom. One might then assume that RAND's findings would lead to some calls for revision of these rules.

Thus far, little evidence of that response exists. The Judicial Conference's formal response, issued in May of 1997 as required by Congress, continues to express commitment to judicial discretionary control; most of its recommendations relate to techniques to control attorney behavior, and few address limitations on judicial behavior.[232] Further, at the Alabama conference for which this essay was written and in other materials, providers of alternative dispute resolution questioned RAND's data, invoked aspects of the FJC's Report as supportive of their work, and affirmed the utility of ADR and of case management.[233]

In that discussion, the rationale for the CJRA shifts; no longer are cost and delay the central justifications but rather the processes themselves are claimed to be useful, offering intrinsic utility because they provide for more dialogue, for better and more just (if not less expensive) decisionmaking.[234] The argument is that Congress and the federal

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230. *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at xxxiii. RAND explains, "the combined effects of early management, setting the trial schedule early, and reducing time to discovery cut-off tend to offset their respective effects on lawyer work hours". *Ibid.* at 90.

231. *RAND's Evaluation of Mediation and ENE*, *supra* note 57 at xxx-xxxv.

232. *1997 Judicial Conference CJRA Report*, *supra* note 3 at 2-3, 5-7. In a summary of its recommendations, the Conference included a few mandates, such as consideration of whether Fed. R. Civ. P. 16 should be amended to "require a judicial officer to set the date of trial to occur within a certain time". *Ibid.* at 3. Otherwise, the Conference called for continued use of case management and a good deal of local decisions, including that "individual districts continue to determine on a local basis whether the nature of their caseload calls for the track model or the judicial discretion model for their differentiated case management (DCM) systems". *Ibid.* at 5.

233. See News Release, CPR Institute for Dispute Resolution, *ADR Group Cautions Against Developing Policy Based on RAND Institute's ADR Study* (March 14, 1997) [hereinafter *ADR Group Press Release*]; *Judges, Scholars Oppose Rand Findings*, Metropolitan Corporate Counsel, May, 1997 at 24.

234. See for example, *ADR Group Press Release*, *supra* note 233 at 4 (arguing that well-designed and implemented ADR programs offer "better quality solutions [...] and may increase public confidence and satisfaction with our courts. Mixed cost and delay data should not overshadow these important justice values".); 1997 Judicial Conference CJRA Report, *supra* note 3 at 37

judiciary properly installed a regime of judicial management of lawyers, and that RAND's limited congressional charter did not reveal how the additional investment of lawyer time was useful. The argument runs further that, rather than focus on cost and money, RAND should have considered either litigant satisfaction or the better, more generative remedies produced by case management and ADR.

Assessing these claims is difficult. Given the problems RAND encountered in obtaining data from litigants,[235] we do not know whether judicial oversight helped lawyers provide better services to clients or become more responsive or knowledgeable. Because other RAND reports tell us that litigants value process,[236] we might have grounds for celebrating the procedural changes of the last decades if we had information on achievements other than those specified by Congress, which were primarily time to disposition and litigation costs.[237]

The post-RAND rationales for the CJRA demonstrate the ability to shift rationales for procedural innovations. The impulse to remain committed to a rule regime even if it does not appear to have accomplished the purposes for which it was first articulated permits another conclusion about the rules of the last decades — their durability. Further, what appears to be particularly durable is discretion; *procedural changes that augment trial court discretion in the service of ease and economy are hard to undo.*

("Despite the failure to find positive cost and delay reducing impacts, the Conference does believe that the positive attributes often associated with ADR (and reflected in the FJC demonstration data and findings), such as increased lawyer and litigant satisfaction, argue for continued experimentation"). See also Rex Bossert, "Case Management Gets Judicial Nod; RAND ADR Study Fails to Deter Judges Who Say More Experiment Is Warranted," (June 9, 1997) Nat'l L.J. at A11 (quoting the chair of one Judicial Conference Committee as expressing disappointment that the study did not "affirm our belief that ADR reduces cost and delay"). For responses, see Janet Conley, "Is ADR Living Up to Its Promise?," (September 24, 1997) Am. Lawyer (including comments by Dr. Deborah Hensler, director of RAND's ICJ).

235. RAND attempted to obtain litigant data, but the response rates were too low for use and much of the satisfaction and perception of fairness data come from lawyers. See *RAND's Evaluation of the CJRA*, *supra* note 57 at 6 (responses from one eighth of the litigants surveyed); see also *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at 117-119) (discussing the difficulties of sampling litigants, including the absence of addresses and nonresponses).

236. E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom Tyler, "In the Eye of the Beholder : Tort Litigants' Evaluations of Their Experiences in the Civil Justice System" (1990) 24 L. & Soc'y Rev. 953; Robert J. MacCoun, E. Allan Lind & Tom R. Tyler, "Alternative Dispute Resolution in Trial and Appellate Courts", in *Handbook of Psychology and Law* 107-110 (1992); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, "Individuals within the Aggregate : Relationships, Representation, and Fees" (1996) 71 N.Y.U. L. Rev. 296 at 355-372.

237. See *RAND's Evaluation of the CJRA*, *supra* note 57 at 5.

Embedded in the pattern of change ongoing from 1938 forward is a deep commitment *by* the federal judiciary to the discretionary authority *of* the district court judge over pretrial processes.[238] Here, recall the rebellion of the federal judges against their *own* rulemakers when faced with a proposed mandate of a twelve person jury.[239] Not only did district judges insist that they knew how to tailor, individually, the number of jurors needed for a particular case, but they clung to that discretion as if it had been part of an "hoary and time honored"[240] tradition, rather than the newly-minted option (younger than 25 years) that it was.

Recall also how, when earlier drafts of the CJRA included mandatory language,[241] the federal judiciary launched an energetic lobbying effort,[242] resulting in the current, and deliberately "vague"[243] language of the CJRA that vests discretion for CJRA implementation with federal judges. The judiciary was able to persuade Congress of its need for "maximum flexibility on the part of each judge to manage his or her own

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238. See How Equity Conquered, *supra* note 41 at 942-948 (discussing discretion as a key feature of equity practice that was transferred to the rest of the docket in the 1930's rule revisions).

239. See *supra* notes 5-52 and accompanying text.

240. The phrase is used in *People* v. *Venters*, 311 N.Y.S.2d 283 at 283 (App. Div. 1st Dep't 1987) (finding that New York's practice of closing the courtroom during delivery of the jury charge deprived a defendant of constitutional rights).

241. The task force, assembled by Senator Joseph Biden and meeting at the Brookings Institute, had recommended that "[b]*y statute, [Congress should] direct all federal district courts to develop and implement within twelve months a 'Civil Justice Reform Plan*'" (*Justice for All, supra* note 2 at 12) and that such plan should include "case tracking" (*ibid*. at 14) the setting of firm discovery deadlines and trial dates, and deviation permitted only under limited circumstances (*ibid*. at 16-21). See also the draft of s. 2027, introduced January 25, 1990, s. 471(b), that provided that "[e]*ach civil justice expense and delay reduction plan shall include* [... a] *system of differentiated case management* [...]" and other mandates).

242. See for example, CJRA Hearings, *supra* note 66 at 208-209, 218-222 (testimony and statement of the Hon. Judge A.E. Robinson, Jr. urging Congress to permit additional opportunities for judicial input and hear from the Hon. Chief Judge Robert Peckham, who chaired a special task force of the Judicial Conference on the then-proposed CJRA; stating that the federal judiciary agreed with the principles of the CJRA but disagreed with the "specific means" of achieving the "common goal" (*ibid*. at 220), that the bill's mandates could have negative effects and would be "extraordinarily intrusive into the internal workings of the Judicial Branch" (*ibid*. at 221)); see also *ibid*. at 320-332 (statement by the Hon. Robert F. Peckham, arguing that the judiciary's changes to Rules 11, 16, and 26 addressed parallel concerns, that the Judicial Conference created a committee on "Court Administration and Management" to respond, that the proposed legislation was spawned without assistance from judges who have attempted to respond but felt pressured, and that a key point of disagreement was the effort "to insist on mandating conformity with procedural principles"); and *ibid*. at 360 (statement of the Hon. Diana E. Murphy, then President of the Federal Judges Organization, objecting that the legislation responded as if the civil docket was not affected by other aspects of the district court docket and was ill-advised, especially in its absence of flexibility).

243. This term is the ICJ's. See *RAND's Evaluation of the CJRA*, *supra* note 57 at 30 ("the vague wording of the act itself").

caseload".[244] Thus, the 1938 Federal Rules' ideological commitment to judicial discretion became codified in the text of the CJRA of 1990.[245]

Evidence of the depth of judicial commitment to discretion is illustrated by one of RAND's findings, that in practice, federal judges have generally not used the congressionally-recommended system of what some call "differential case management" and others term "tracking", by which cases are sorted according to specified criteria and given differing pretrial procedures. Instead, RAND found that judges prefer individual "tailoring",[246] a practice consistent with the preference for discretion that drives both the implementation of the CJRA and the language of the act itself. Rather than work together to create uniform pre-trial practices that create tracks describing different kinds of process for different kinds of cases, most federal judges continue to prefer what Charles Clark described forty years ago as the "individualization of the case".[247]

Perhaps Judge Clark's phrase needs to be altered; the commitment is to "individualization" of the judge. I began this essay by describing a conference, held in 1996, at NYU about civil juries. Reports of another conference, held in July of 1938, in Cleveland, illuminate judges' attachment to their own individual authority. In July of 1938, the ABA, working with another law school (Western Reserve) held an "Institute" to discuss the then brand-new Federal Rules of Civil Procedure. Members of the Civil Rules Committee explained their project to the bar, and Professor Edson Sunderland, a major proponent of Rule 16,[248] was charged with leading the discussion. After he explained the rule, the following exchange took place :

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244. Statement of Judge A.E. Robinson, Jr., CJRA Hearings, *supra* note 66 at 224. Of course, congressional pressure also resulted in increased judicial attention to these issues, including its drafting of a "14 [p]oint [p]rogram", as was noted by Judge R.F. Peckham. *Ibid.* at 397.

245. My view is not, however, that all of the ideological commitments within the 1938 rules are still shared. See Stephen N. Subrin, "Teaching Civil Procedure While You Watch It Disintegrate" (1994) 59 Brooklyn L. Rev. 1155 at 1158 (discussing the "sea change" that has undermined "liberality of pleading, wide-open discovery and attorney latitude") [hereinafter Teaching Civil Procedure].

246. *RAND's Evaluation of the CJRA*, *supra* note 57 at 12-13 (very little evidence that judges use differential case management but rather that judges tailor "management to the needs of the case"); *RAND's Implementation of the CJRA*, *supra* note 57 at 28-32, 45-46, 49. Judicial objections to tracking can be found in CJRA Hearings, *supra* note 66 at 289 (questions answered by Judge A.E. Robinson, Jr., include the view that to "assign cases mechanically to rigid tracks would have a detrimental effect" on management efforts).

247. C.E. Clark, *supra* note 82 at 164.

248. See Edson R. Sunderland, "The Theory and Practice of Pre-Trial Procedure" (1937) 36 Mich. L. Rev. 215 (arguing that civil procedure lacked a means to test pleadings comparable to that of the preliminary hearing on the criminal side, describing the "remarkable effort" in Wayne County courts in having a compulsory informal hearing in which attorneys appeared before judges, with the result that some cases were disposed of and others were tried better).

> Mr. Herbert M. Bingham, (Washington, D.C.) : *As I read Rule 16, it is solely discretionary and the court acts on its own volition. In other words, neither party can file a motion for a pre-trial hearing.*

Mr. Sunderland : *It is entirely discretionary with each district judge. He can handle it as he sees fit.*

Mr. Bingham : *As a matter of curiosity, why was it made discretionary?*

Mr. Sunderland : *Because if the district judges didn't like it, it wouldn't work anyway.* (Laughter)

Mr. Bingham : *Why could it not have been mandatory?*

Mr. Sunderland : *There is no use in making it mandatory because nothing will be accomplished without the sympathetic interest of the judge, and you can't force him to be sympathetic.* (Laughter).[249]

D. Discretion at the Expense of Uniformity

The observation that trial judges are deeply committed to their own discretion helps to explain the proliferation of local rulemaking, both before and after the CJRA. Uniformity is, inevitably, in tension with the exercise of individualized discretion, and thus, built into the federal rules of 1938 is a feature that works against the aspiration of uniformity.[250]

Many commentators have decried what they term the "balkanization" of civil procedure,[251] and charged Congress with abetting disuniformity with the enactment of the CJRA.[252] But as Dean Daniel Coquillette, Stephen Subrin, and Mary Squires documented in the Local Rules Project they undertook in the late 1980's, local rule proliferation predates the CJRA. By the late 1980's, more than 5,000 local rules existed, many of which

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249. *1938 Rules*, *supra* note 15 at 299.

250. For discussions of different kinds of uniformity, see Stephen N. Subrin, "Uniformity in Procedural Rules and the Attributes of a Sound Procedural System : The Case for Presumptive Limits" (1997) 49 Ala. L. Rev. 79 [hereinafter Uniformity in Procedural Rules].

251. See for example, Gregory C. Sisk, "The Balkanization of Appellate Justice : The Proliferation of Local Rules in the Federal Circuits" (1997) 68 U. Colo. L. Rev. 1.

252. Charles A. Wright argued in the 1960's that local rules were the "'soft underbelly' of federal procedure". See Local Rules Survey, *supra* note 94 at 1012 No.6 (quoting a letter from Prof. Wright to the law review) and recently reiterated that comment in C.A. Wright, Foreword : The Malaise of Federal Rulemaking (1994) 14 Rev. Litig. 1 at 10. For him, the CJRA "dashed" all hopes of progress toward limiting local rules; "[p]rocedural anarchy is now the order of the day". *Ibid.* at 11. See also Teaching Civil Procedure, *supra* note 245 at 1159-1160 (the CJRA as a "blow to uniformity").

were at wide variance from the national rules.[253] Professor Subrin takes us back further, to the report of disuniformity in the early 1940's[254] and to authorization for local rule variation by "at least 39 provisions" of federal statutes.[255] A 1966 empirical project documented the extent at that time, not only providing examples of variation but also of an ongoing tradition of disloyalty to national rules,[256] including the example with which I began this essay.[257] Further, variation is also substantial at the appellate level, to which the CJRA does not apply.[258]

The Federal Rules of the 1930's are founded upon judicial discretion, and now that 645 Article III district judges[259] have lived under that regime, one should not be surprised to find their exercise of discretion typified by the creation of local variations, as well as the creation of what some districts call "local, local rules" or "standing orders" — individual directives from individual judges about how they like cases to be processed before them. Further, the lack of enthusiasm that RAND found for differential case management (DCM) is also explained by the individualization permitted to judges under the Federal Rules. DCM is a form of very specific local rulemaking about case management; for that practice to go into effect in a district, judges must concur on the allocation of kinds of process to kinds of cases. Interestingly, the FJC's 1996 report on demonstration districts discussed the desirability of DCM because it is a source of uniformity.[260] Judicial hesitation in using DCM stems from a fear of a loss of discretion. In one district, with a small number of judges, those judges reported that creation of a

253. Daniel R. Coquillette & Mary P. Squiers, *Report of the Local Rules Project* (1988). See also Local Rules, *supra* note 68 at 137; P.D. Carrington,"Learning from the Rule 26 Brouhaha : Our Courts Need Real Friends" (1994) 156 F.R.D. 295 at 299. See also Anne M. Burr, "Building Reform from the Bottom Up : Formulating Local Rules for Bankruptcy Court-Annexed Mediation" (1997) 12 Ohio St. J. on Disp. Resol. 311; Local Rules Survey, *supra* note 94 at 1012 (in which the authors report that, in the 1960's, a "cursory examination of the currently effective local district court rules reveals a maze of decentralized directives, encumbered by trivia and often devoid of explanation"). That 1966 survey (relying on questionnaires and receiving a fifty percent return) found many variations; for example, "[d]espite the admonition that a district court afford a modicum of latitude when determining a temporal allotment for discovery, many districts have imposed rigid timetables"). *Ibid*. at 1044.

254. Local Rules, *supra* note 68 at 2016-2018.

255. *Ibid*. at 2019.

256. Local Rules Survey, *supra* note 94 at 1011.

257. Recall that, in 1973, 54 district courts had local rules in contravention of the national rule on the size of the civil jury. See *supra* note 16 and accompanying text. The Local Rules Survey also reports that, as of the 1960's, several areas of local rulemaking departed from the national regime, including that despite Rule 16's then discretionary pretrial process, several local rules required it in all civil cases. *Supra* note 94 at 1055.

258. G.C. Sisk, *supra* note 251 at 7-24 (detailing the differences among circuit rules).

259. Congressional Quarterly Judiciary Directory 1996, Status of Federal Judgeships (as of October 4, 1996) at 669 (645 authorized federal district court judgeships).

260. FJC Demonstration Programs Report, *supra* note 62 at 15.

DCM regime enabled them to share in a joint process of articulating which cases fit which rule regimes.[261]

While the CJRA is yet further *ratification* of local variation,[262] it is not the *creation* of such variation, which is itself deeply interwoven with the system of discretion.[263] And if one doesn't like local variation, one will have to sort out not only how to pull back from the CJRA but also from the assumptions that undergird the current rules.[264] To the extent rule drafters have hoped to channel discretion by leaving certain arenas plainly open to variation (such as the original version of Rule 16 and the current version of Rule 26), the report from RAND reminds us that discretion, once authorized, is difficult to cabin.

IV. DISCRETIONARY PROCESSES, CONSTRAINED ADJUDICATION : AGREEMENTS AND CONFLICTS BETWEEN THE FIRST AND THIRD BRANCHES

A. Shared Agendas : Procedural Discretion, Its Amplification, and Its Delegation to Judicial Officers

RAND's interpretation of its finding of relatively little change stemming from the enactment of the CJRA rests in part on what it terms the "*less than precise wording* of most of the act"[265] and its "vague" language.[266] The "vague" language is not happenstance but rather an illuminating facet of the statute. Here we see agreement between Congress and the judiciary, sharing a joint project that vests power in judges to make decisions about the shape of litigation. While Congress has, from time to time,

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261. *Ibid.* at 56 (discussing work within the Western District of Michigan).

262. Contrast this reading with that of Lauren Robel, in "Fractured Procedure : The Civil Justice Reform Act of 1990" (1994) 46 Stan. L. Rev. 1447, who argued that the CJRA should not be read as a broad warrant to depart from national, uniform rules and that local rulemaking should be constrained.

263. See also Federal Rule 16, *supra* note 75 at 1977-1978 (discussing the tension between "flexibility and discretion" and uniformity).

264. Echoes of this view can be found in the judiciary's own evaluation of its rulemaking process; while recommending inquiry into the use of "opt out" procedures from national rules and noting that "uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth". "A Self-Study of Federal Judicial Rulemaking — A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States" (1995) 168 F.R.D. 679 at 701.

265. *RAND's Evaluation of the CJRA*, *supra* note 57 at 33.

266. *Ibid.* at 31.

intervened in civil rulemaking,[267] in the CJRA of 1990, Congress and the federal judiciary were not genuinely at odds about *how* to process civil cases; Congress and the judiciary were really only disputing *who* should be announcing that the mode of civil processing has changed and who might get credit for a new national rule regime trumpeted as a "reform".[268] In this instance, unlike that of the shrinking size of the civil jury, Congress did not hesitate to claim itself the reformer of the civil justice process (the subject of popular criticism debated in presidential and congressional politics about "tort reform").[269] The CJRA and the federal rules together weave a national commitment to trial court discretion.[270]

Other recent ventures by Congress into rulemaking, specifically those altering civil practice rules in securities and prisoner litigation, are also not exemplary of radical variation between congressional and judicial instincts.[271] Members of the federal judiciary have been in the forefront of questioning the utility of both forms of litigation. Federal judges have long crafted doctrines and procedures to limit prisoner filings.[272] Further, even

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267. See for example, *Act of Jan. 12*, 1983, Pub. L. No. 97-462, 96 Stat. 2527 (reducing the role of U.S.marshals in the service of process in Fed. R. Civ. P. 4); *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, Title VII, Subtitle B, s. 7047, 102 Stat. 4181, 4401 (providing that examinations ordered by the court for discovery under Fed. R. Civ. P. 35 include not only physicians but also psychologists); *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (altering Fed. R. Evid. 412 to limit admissibility of prior sexual conduct of alleged victims). See Charler A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* s. 5381.1 (Supp. 1997). Further, other efforts to have Congress alter discovery and discovery rules have been attempted but not succeeded. See Disunionism, *supra* note 37 at 994-995. For discussion of congressional rulemaking on securities and prison litigation, see *infra* notes 271-273.

268. Note that I am also not arguing that all federal judges embrace the modes of the CJRA but that the segment supportive of the direction of the CJRA has been more vocal than the objectors. For such objections, see the Hon. G. Thomas Eisele, "Differing Visions — Differing Values : A Comment on Judge Parker's Reformation Model for Federal District Courts" (1993) 46 SMU L. Rev. 1935 [hereinafter Differing Visions].

269. See generally Karen O'Connor, "Civil Justice Reform and Prospects for Change" (1993) 59 Brooklyn L. Rev. 917 at 919 (discussing the "rhetoric of crisis" surrounding the courts in the late 1980's and 1990's).

270. Again, this claim is not absolute. Congress did, for example, include the mandate in the CJRA that public disclosure be given of judges who have cases pending more than three years. RAND found that, since the disclosure requirement has been in place, the percentage of cases pending over that time period declined. *RAND's Evaluation of the CJRA*, *supra* note 57 at 24-25. (That finding, like others, raises questions of causation; other variables, such as the composition of that case load and the activities that occur during the three year period, would have to be assessed to discern the effect of the disclosure requirement).

271. See *Prison Litigation Reform Act of 1996* (PLRA), Pub. L. No. 104-134, 110 Stat. 1321, 66-77 (to be codified at various Titles); *Private Securities Litigation Reform Act of 1995*, Pub. L. No. 104-167, 109 Stat. 737, 15 U.S.C. s. 77 et seq.

272. See M. Tushnet & L. Yackle, *supra* note 69; see also *Women Prisoners of the District of Columbia Dep't of Corrections* v. *District of Columbia*, 93 F.3d 910 at 919 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997) (reversing a district court's order on prison conditions for women prisoners, "emphasiz[ing] that federal courts must move with caution when called

Congress' current nibbles at the principle of transsubstantive civil rules can find precedents crafted by federal judges, who promulgated special procedures for multi-district litigation,[273] for "complex cases",[274] and for prisoners.[275]

Another set of agreements between the judiciary and the Congress is on the need for more judges but the unwillingness to create more life-tenured judges. While many federal judges bespeak their commitment to a very small federal judiciary and argue against adding life-tenured judges,[276] federal judges have in practice been supportive of a three decade expansion program that largely depends on the creation of whole other sets of judges who, while not having all the authority of life-tenured judges, have a lot of their job.

While one might have anticipated that life-tenured judges would have been fierce guardians of their distinctive mandates, the pressures of the docket and the desire to alter aspects of their work has resulted in a series of opinions upholding the authority of an array of judges. Both the Supreme Court and the Judicial Conference have sanctioned a

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upon to deal with even serious violations of the law by local prison officials"[,] and remanding for review of whether the *Prison Litigation Reform Act* limits the other claims raised by the prisoners).

273. See Patricia D. Howard, "Clerk of Judicial Panel on Multidistrict Litigation, A Guide to Multidistrict Litigation" (1977) 75 F.R.D. 577, as revised, (1989) 124 F.R.D. 479 (rules governing procedings under 28 U.S.C. s. 1407).

274. *Manual For Complex Litigation*, Third (1995).

275. Special Rules for Proceedings under 28 U.S.C. s. 2254, s. 2255 (1994) (first promulgated in 1977); Federal Judicial Conference, Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts (1980) (committee, chaired by the Hon. Ruggero J. Aldisert, proposed processes for handling "conditions of confinement" litigation). Thus, congressional efforts to limit prisoner access in the *Prison Litigation Reform Act of 1996*, codified at 28 U.S.C. s. 1915, are congruent with some barriers imposed by courts. See for example, Marie Cordisco, "Pre-PLRA Survey Reflects Courts' Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases" (1996) 9 Directions 26 at 26 (noting that the general aims of such programs were congruent with those of Congress in the PLRA, to "discourage frivolous cases by requiring plaintiffs to consider the costs of their suits"); *Hampton* v. *Hobbs*, 106 F.3d 1281 at 1285 (6th Cir. 1997) (upholding the limitations on prisoner *in forma pauperis* filings and noting its past approval of "assessments of costs against indigent prisoners" and of a district court order requiring partial filing fees). But see *Lyon* v. *Vande Krol*, 940 F. Supp. 1433 (S.D. Iowa. 1996) (finding unconstitutional aspects of the PLRA that preclude repetitive filings after three previous dismissals on specified grounds). For consideration of the relationship between judicial and legislative lawmaking and revision specifically in the context of the PLRA, see M. Tushnet & L. Yackle, *supra* note 69.

276. See for example, Jon O. Newman, "1,000 Judges-The Limit for an Effective Federal Judiciary" (1993) 76 Judicature 187; see also Gerald B. Tjoflat, "More Judges, Less Justice" (July 1993) A.B.A. J., at 70. But see Stephen Reinhardt, "Too Few Judges, Too Many Cases" (January 1993) A.B.A. J., at 52.

good deal of delegation of tasks from life-tenured judges to non-Article III judges,[277] some of whom are full-time employees within the judicial branch (magistrate and bankruptcy judges), others (administrative law judges and hearing officers) in agencies, and yet others are privately employed but work within courts as "early neutral evaluators", "mediators", and "arbitrators".[278] Evidence of the expansion of judges comes from a change in nomenclature; no longer are judges described in many rules and statutes as "district judges" but rather as "judicial officers",[279] a phrase that spans a group of similarly-situated government employees authorized to control the pretrial process and to issue dispositions.[280]

What do these judicial officers do? Their primary job is to move cases rapidly and inexpensively through a system. Through national and local rulemaking, through

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277. See for example, *Commodities Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986); *Thomas* v. *Union Carbide Agric. Prod. Co.*, 473 U.S. 568 (1985). Only occasionally has the Court rejected such delegation, and then in opinions that do not etch sharp limits. See for example, *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Granfinanciera S.A.* v. *Nordberg*, 492 U.S. 33 (1989). Judicial Conference appreciation of magistrate judges' work comes in many documents, including its report on the CJRA. See for example, 1997 Judicial Conference CJRA Report, *supra* note 3 at 20 (in which magistrate judges are recognized as "indispensable resources [...] readily available to supplement the work of life tenured district judges in meeting workload demands"). See also Judicial Conference of the United States, "Long Range Plan for the Federal Courts Recommendation" 65 (1996), approved by the Judicial Conference and calling for use of magistrate judges.

278. The Court has also embraced private arbitration, not only because it provides an alternative to adjudication but also because it is described as being much like adjudication. See Judith Resnik, *supra* note 151; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 116 S. Ct. 1652 (1996) (finding a Montana statute requiring special notice of arbitration clauses to be preempted); *Painewebber, Inc.* v. *Bybyk*, 81 F.3d 1193 (2d Cir. 1996) (finding the question of arbitrability appropriately determined by the arbitrator). Cf. *Prudential Sec., Inc.* v. *Mills*, 944 F. Supp. 625 (W.D. Tenn. 1996) (describing the rule in the Sixth Circuit as requiring a judicial determination of arbitrability); Paul D. Carrington & Paul H. Haagen, "Contract and Jurisdiction" (1997) 1996 Sup. Ct. Rev. 331.

279. The CJRA defines "judicial officer" as "a United States district court judge or a United States magistrate". *Civil Justice Reform Act of 1990*, Pub. L. No. 101-650, ch. 23, stat. 482, codified at 28 U.S.C.A. s. 471 note (West Supp. 1997). While earlier drafts had provided for pretrial management by district judges, the Senate's legislative history explained that, by using the term "judicial officer", Congress authorized a "full role" for magistrate judges in the pre-trial process. See S. Rep. No. 101-416, at 63, 1990, reprinted in 1990 U.S.C.C.A.N. 6802, 6852. See also 1997 Judicial Conference CJRA Report, *supra* note 3 which throughout uses the phrase "judicial officer" ("The Committee on Court Administration and Case Management should consider case management procedures that would encourage *judicial officers* to set early trial dates"). *Ibid.* at 31 (emphasis added).

    The term "judicial officer" appears in the United States Constitution three times, all in discussions of executive and judicial officers. See U.S. Const. art. VI, cl. 3 (discussing oaths to be taken by members of legislatures and "all executive and judicial Officers"); U.S. Const. amend. XIV (twice referring to voting for executive and judicial officers). In addition, there are more than 150 references in federal statutes to that phrase.

280. See *RAND's Evaluation of Judicial Case Management*, *supra* note 57 at 244.

educational programs, through joint ventures with the bar and Congress, federal judges have fashioned a position for themselves as "litigation managers", as power brokers, as what Frances McGovern and I have both argued[281] could be termed "players" at the table among competing negotiators.[282]

In addition to successful insulation of discretion in case processing and in delegating duties, federal judges are also seeking to expand their authority; they may soon return to Congress with requests for other discretionary charters. For example, the Honorable Judge Jon O. Newman of the Second Circuit believes that district judges should have some power to select the cases they process by means of a discretionary docket; he proposes that federal judges be authorized to decline cases within certain categories and send them to state court.[283] Also afloat over the past decade have been several proposals for the end of appeal as of right.[284] The most recent were contemplated by the Long Range Plan of the United States Judicial Conference, but rejected.[285]

While appellate oversight remains at a formal level, commentators have begun to document its erosion in practice. Given that some federal circuits have a system of appeals that decide many cases without oral argument and without publication of opinions, Professor Lauren Robel argues that a kind of discretionary appellate system may well have begun.[286] Professors William M. Richman and William L. Reynolds add that such discretion has resulted in a tracking system, in which "important cases" receive more

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281. Francis E. McGovern, "An Analysis of Mass Torts for Judges" (1995) 73 Tex. L. Rev. 1821, 1839; Procedural Innovations, *supra* note 221 at 1628-1631.

282. As Paul D. Carrington puts it : "*The conscious mission of many district judges is less to make decisions applying law to the facts, and more to preside over the manufacture of dispositions*". Describing an increase in judicial discretion, Carrington's descriptor is that the "*district judge is each year less a judge of a law court and more a local chancellor or lord of the manor, more to be feared and less to be respected*". Disunionism, *supra* note 37 at 943 [footnotes omitted].

283. Jon O. Newman, "Determining the Proper Allocation of Cases Between Federal and State Courts" (1995) 79 Judicature 6 (describing which federal judges could "exercise discretion as to whether a particular case within federal jurisdiction ought to be litigated in federal or state court").

284. Martha A. Dragich, "Once a Century : Time for a Structural Overhaul of the Federal Courts" (1996) Wis. L. Rev. 11 at 45 (outlining some of the proposals); Judith Resnik, "Precluding Appeals" (1985) 70 Cornell L. Rev. 603 at 605-624 (discussing Chief Justice Rehnquist's suggestion that the time may have come to consider abolishing appeal as of right in the federal system).

285. Judicial Conference of the United States, "Long Range Plan for the Federal Courts" (December 1995) 43-44 ("[t]o ensure the continued fairness and quality of federal justice, the principle of allowing litigants at least one appeal as of right to an Article III forum should be upheld").

286. Lauren Robel, "Private Justice and the Federal Bench" (1993) 68 Ind. L.J. 891 at 898-906 (discussing how arguments and publication of opinions are optional with the appellate court and that, in the subset of cases that are neither argued or published, "judges' involvement [...] is marginal"). See also M.A. Dragich, *supra* note 284 at 12-14.

attention.[287] Within a bit more than a century, we may be about to come full circle, from a system before the Evarts Act of 1891 that did not provide appeal as of right in every case to such a system once again.[288] Here may be another example of practice that predates formal revisions; in practice, judges have installed a system of discretionary review, and its statutory ratification may not be too far in the distance.

B. The Purposes of Discretionary Processing and the Powers of Judicial Officers

What do we know about the results of the transformation of the role of judge? RAND's work powerfully questions the utility of the general trajectory over the decades of reform of the civil process. The report tells us that some rules and practices of management aimed at cost reduction are not well designed for the purpose, that they do not in fact reduce costs.[289] RAND teaches us that, to go after cost and time, judges would have to limit (not manage) discovery and shorten the interval to trial. The disturbing core of RAND's conclusion is that, if the goals of the civil process are speed and cost reduction, the way to achieve them is to :

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287. William M. Richman & William L. Reynolds, "Elitism, Expediency, and the New Certiorari : Requiem for the Learned Hand Tradition" (1996) 81 Cornell L. Rev. 273 at 275, 293 (terming the appellate courts "the new certiorari courts", and arguing that "important" is often defined by "monetary value" and that "powerful litigants" receive more attention whereas smaller value cases, such as social security appeals, are often handled primarily by staff and receive little judicial time). See also Carl Tobias, "The New Certiorari and a National Study of the Appeals Courts" (1996) 81 Cornell L. Rev. 1264 (agreeing with much of the description but disagreeing about the role played by federal judges in framing the revised appellate system and questioning the proposed responses); William L. Reynolds & William M. Richman, "Studying Deck Chairs on the Titanic" (1996) 81 Cornell L. Rev. 1290 (responding that federal judges who lobby against expansion of the judiciary and who make policies about oral argument and delegation of decisionmaking have played a key role in framing a new appellate tiered process and that the expansion of the appellate courts is needed to restore judicial review in all cases).

288. See J. Resnik, "Tiers" (1984) 57 S. Cal. L. Rev. 837 at 1028-1030 (discussing the evolution of Supreme Court doctrine reducing appellate oversight in a variety of contexts); Disunionism, *supra* note 37 at 934-935 (discussing the *Evarts Act of 1891* and its goal of curbing what federal legislators then termed the "kingly power" of unsupervised federal judges).

289. Given these findings, one might then search for other justifications for the case management regime. For example, one might try to justify case management as an effort to require attorney investment of time and resources to make for better dispositions, and then seek research to learn about whether dispositions are affected by such techniques and try to figure out what measures of quality are possible.

1. monitor cases to ensure that deadlines for service and answer are met;

2. wait a short period after the joinder date before beginning judicial case management to see if a case will terminate;

3. set a firm trial date early; and

4. set a reasonably short discovery cutoff time.[290]

In short, were "judicial officers" to adopt the posture of calendar clerks, imposing and enforcing time limits on disputants, the goals of speedy, inexpensive dispositions might be achieved.

These developments are, in my view, significant; instead of being distracted by debates focused on disagreements between the judiciary and Congress over civil processes, our interest should be centered on federal judges' commitment to their own discretion over civil processes, the melange and trajectory of jobs now termed "judicial", and the relationship of that work to the role of judges as adjudicators.

One set of concerns implicates the general issue of rules and standards, and in this specific context, revolves around longstanding questions of visibility, accountability, and supervision.[291] As Stephen Subrin,[292] Stephen Yeazell,[293] Paul Carrington,[294] and I[295] have elsewhere observed, these past decades have witnessed the expansion of federal trial court discretion — of which RAND's report provides important further proof. From a variety of intertwined sources (expansion of equity practice, promulgation of the 1938 rules, and celebration of managerial judges) comes the same bottom line : relatively little superintendence of the trial court by appellate judges.

In addition to the age-old question of how to oversee the exercise of discretion, another concern, yet more fundamental, should engage us : at issue are the purposes to which that discretion is attached. Federal trial judges have, over this century, achieved a roving commission, but to do what? Federal district judges believe in, are protective of, and have been successful on the civil side in persuading others, and specifically Congress, to let them keep a vast amount of discretion in the handling and processing of the civil case load : including discretion to pick the numbers of jurors to listen to a civil case;

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290. This summary comes from the 1997 Judicial Conference's CJRA Report, *supra* note 3 at 16. The Judicial Conference then stated its endorsement of "shortened discovery cutoffs and a fixed trial date" as a part of its interpretation of the report as supporting judicial management as long as it is coupled with time limits. *Ibid.*

291. See J. Resnik, *supra* note 288 at 990-994.

292. S.N. Subrin, *supra* note 41.

293. Misunderstood Consequences, *supra* note 73.

294. Disunionism, *supra* note 37.

295. J. Resnik, *supra* note 188.

discretionary procedures to process "protracted" cases; discretionary procedures to manage ordinary civil cases; discretion to try to manage lawyers; discretionary affiliations with national rule regimes; and now, proposed discretionary appellate review and proposed discretion to determine which cases to admit to federal courts.[296] Federal judges have also agreed to become part of a cadre of judicial officers, and further, have conferred some of their discretionary authority on others both in and outside of the judicial branch.

While the breadth of powers of a federal district court judge over the civil docket is thus exposed, with support for it coming from both the judiciary and Congress, the purposes for which the exercise of these discretionary powers are put is much harder to "sight" (as in see) and to "cite" (as in quote from authoritative sources). While the district judge is a looming figure in contemporary processes, judicial attributes — other than powerful discretion — remain sketchy. Where is the vision for the judge? the sense of purpose? the ends served by the discretionary powers conferred? If the dominant agenda of the life-tenured trial judiciary is to manage, settle, and dispose of litigation and further, if its work is readily transferrable to other, non-tenured members of the judicial workforce, and in addition done as well by private providers (whom some litigants seem to prefer to the judiciary), it is difficult to argue about the distinctive import of the federal courts, let alone for special funding and prerogatives of this purportedly unique national resource.[297]

Of course, the response to such concerns is insistently to note that only federal judges can adjudicate, and moreover, that some of that adjudication demands the participation of an Article III judge.[298] But, while academics have made arguments in recent years about the necessity of Article III judges at some point in the federal adjudicatory process,[299] the literature by trial judges on their work as adjudicators is notably thin.[300] Federal judges have told us no story over these last decades to sustain the

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296. Of course, it would be a disservice to describe the actual rulemaking — both judicial and statutory — as singular in focus and only expanding judicial authority. Amendments to rules such as Rule 16 have not only increased discretion but have also included mandates, obliging judges to engage in certain forms of pretrial superintendence. But my point is about judicial views of the desirability of broad discretion, not its invariable actualization.

297. See William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 The Third Branch 1 (1992) (discussing the need to reserve federal judicial resources for issues "where important national interests predominate").

298. See Richard H. Fallon, Jr., "Of Legislative Courts, Administrative Agencies, and Article III" (1988) 101 Harv. L. Rev. 915 at 950-974.

299. Comments from a group of law professors (of whom I am one) have raised concerns that judges decreasingly share what Paul D. Carrington calls a "collective sense that the enforcement of legal rights and duties is their primary business". Disunionism, *supra* note 37 at 938. See also "Uniformity in Procedural Rules," *supra* note 250; S.B. Burbank, "Implementing Procedural Change : Who, How, Why, and When" (1997) 49 Ala. L. Rev. 221; Owen M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073; J. Resnik, *supra* note 188 at 423-432.

300. One brief essay comes from the Hon. William R. Wilson, Jr., of the Eastern District of Arkansas, who wrote in, "Where Has All the Civility Gone?", 1990 Arkansas Trial Lawyer Magazine, Summer, at 5, in which he notes that "The word judge is a verb as well as a noun

peculiar and particular form of decisionmaking, public adjudication, that is their domain exclusively.[301] Instead, judicial leaders have transformed the practices of judging and shifted the center to the pretrial phase, during which they offer advice and make informal decisions.[302]

Having just read three lengthy volumes about civil processes in the United States federal courts in the 1990's, and having read much of the literature about the need for and changes in civil processes, I can report almost no discussion of adjudication. The lengthy descriptions of RAND's intense study of the last four years of civil processes provide little insight into the judiciary as a unique and precious institution to preserve. Moreover, not only is little attention paid to the work of deciding disputed issues, but also missing from the conversation are words we might have aspired to include, when judges and civil procedure are the focus : judgment, wisdom, fairness, the difficult, angst-ridden problem of rendering judgment, the distinctive role of the deliberative judge.

In the early 1980's, Judge Patrick Higginbotham noted the trend toward proliferation of judges and worried about the "conversion of hearing examiners to judges, commissioners to magistrates, and referees in bankruptcy to judges".[303] Today's worry may well be the reverse : the conversion of judges into referees. For example, the Court of Appeals for the District of Columbia recently explained that a court-appointed mediator enjoyed judicial immunity from suit because there was nothing different between what the mediator did and what a "judge might [...] have" done.[304] While one can marvel at the

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and adjective". See also Differing Visions, *supra* note 268 (protesting proposals for increased use of tracking and ADR and commenting that, were those suggestions successful, "the federal judicial power in most civil cases would be delegated out, or sub-contracted, to non-judges and in some cases to non-lawyers").

301. See generally J. Resnik, "Failing Faith : Adjudicatory Procedure in Decline" (1986) 53 U. Chi. L. Rev. 494. P.D. Carrington makes a parallel point, describing the changes as a decline in "judicial professionalism" and includes as one of the factors that contribute to it the "growing preoccupation of district judges with administration, as distinct from enforcement, or, in other words, with moving cases rather than deciding them". Disunionism, *supra* note 37 at 940-944.

While a few judges have vocally protested, see for example, Differing Visions, *supra* note 268, as noted above, the judges who run institutions such as the Federal Judicial Center have been some of the most prominent promoters of a managerial/settlement regime.

302. Recall that Wayne Brazil reports that lawyers like judicial involvement in settlement when judges make decisions, assessing the value of cases. See *supra* note 173.

303. Patrick E. Higginbotham, "Bureaucracy — The Carcinoma of the Federal Judiciary" (1980) 31 Ala. L. Rev. 261, 264 (arguing that while all these groups were doing a good job in their assigned roles, it was unwise to delegate the judicial task). He accurately predicted that this group would "grow not just in number, but in function and power". *Ibid.* at 269.

304. *Wagshal* v. *Foster*, 28 F.3d 1249 at 1252-1253 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995). See also *Austern* v. *Chicago Bd. Options Exch.*, 898 F.2d 882 at 886 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990) (commercial organizations sponsoring contractual arbitration are immune from civil liability); *Corey* v. *New York Stock Exch.*, 691 F.2d 1205 at 1209-1211 (6th Cir. 1982) (holding that, because of the "functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners"[,]

creation of all these "judicial officers" and the delegation of work to them as an innovative response to the longstanding need for more judges and the political limitations on enlargement of the life-tenured judiciary, the transition of the entire workforce of judges into "judicial officers" makes it difficult to explain why some of them should continue to have either life-tenure or awesome authority, much of it discretionary.

C. Real Conflicts : The Power to Adjudicate

Why worry about diminished rationales for special powers to reside in a life-tenured judiciary? Because despite the agreements on civil processing, Congress and the judiciary are not easy co-venturers on fundamental questions of judicial authority to adjudicate. The troubling conflicts between the federal judiciary and Congress are not about how the judiciary *moves* the civil docket but about how the judiciary decides cases and how it functions as a branch of government. At issue is the exercise of power over outcomes (such as the judiciary's authority to judge cases involving the environment,[305] securities regulation,[306] habeas corpus,[307] and prisons[308]) and its authority to govern itself. Over the last few years, these conflicts have become vivid. For example, many proposals described as "court stripping" (depriving the federal courts of jurisdiction over particular kinds of cases, such as those involving abortion rights or school prayer) have been advanced over the past several decades but, until recently, they have not passed.[309] But, given recent legislation, the once "academic" exercise that federal courts teachers engaged in, of exploring whether such legislation could be constitutional, is now no longer hypothetical.

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the New York Stock Exchange, when acting through its arbitrators, has quasi-judicial immunity also shared by its arbitrators).

305. *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992) (finding that legislation directing the "management of areas [...] in Oregon and Washington" and stating that agreements about the spotted owls were "adequate [...] for the purpose of meeting the statutory requirements that are the basis for" then pending litigation, specified by name in the statute, had not impermissibly ordered an outcome in lawsuits but rather had changed the law involving logging and preservation of animal habitats). *Ibid.* at 434-435.

306. *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) (congressional requirements that courts reopen cases dismissed as time-barred).

307. See for example, *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996) (determining that the *Antiterrorism and Effective Death Penalty Act* does not repeal the Supreme Court's original jurisdiction over habeas corpus and that the restrictions do not constitute a 'suspension' of the writ"). *Ibid.* at 2340.

308. See the *Prison Litigation Reform Act*, discussed *supra* note 267 and *infra* notes 310-315.

309. See generally Larry G. Sager, "The Supreme Court, 1980 Term — Foreword : Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts" (1981) 95 Harv. L. Rev. 17. *Cf.* John Harrison, "The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III" (1997) 64 U. Chi. L. Rev. 203.

Some of the statutes limit judicial review, while others create rules for remedies and alter remedies and decisions already in place. For example, in 1996, Congress restricted judicial review of deportation orders and of asylum denials.[310] In addition, Congress has mandated sentences for certain kinds of offenses and, more generally, ordered judges to rely on sentencing guidelines created by a congressionally-charted commission.[311] With the enactment of the *Prison Litigation Reform Act* (PLRA), Congress comes close to dictating how to decide certain categories of claims; litigation about that act centers around the constitutionality of provisions of the PLRA about termination of consent decrees[312] and automatic stays of injunctions.[313] Pending are yet other efforts to

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310. See *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, 110 Stat. 1214, 1276-1279, s. 440 (1996), (codified at 8 U.S.C.A. s. 1252 (West Supp. 1997)); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-128, 110 Stat. 3009-546, 607-612 s. 306, (codified at 8 U.S.C. s. 1231 (1996)) ("no court may enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien [...]" or certify class actions in litigation except via limited habeas proceedings, also circumscribed), 699 (s. 604(b)(2)(D), amending 8 U.S.C. 1158 (West Supp. 1997)). Thus far, several courts have upheld various of these provisions, in part by noting that other avenues of judicial review may be open. See for example, *Mansour* v. *INS*, 123 F.3d 423 at 426 (6th Cir. 1997) (dismissing for lack of jurisdiction an effort to obtain review of the final order of deportation and concluding that the constitutional issue — of "whether the Constitution requires independent judicial review of a deportation order where a question of law is raised" — can be avoided because of the availability of review through habeas jurisdiction); *Turkhan* v. *INS*, 123 F.3d 487 at 490 (7th Cir. 1997) (concluding that § 440(a)'s language is "not so broad as to preclude judicial review of claims brought pursuant to other statutes"). See also *Auguste* v. *Attorney Gen.*, 118 F.3d 723 (7th Cir. 1997) ("because the Constitution does not give aliens the right to judicial review of deportation orders", s. 1252 is constitutional).

311. Symposium, "Federal Sentencing" (1992) 66 S. Cal. L. Rev. 1; Dennis E. Curtis, "Mistretta and Metaphor" (1992) 66 S. Cal. L. Rev. 607.

312. See for example, *Taylor* v. *Arizona*, 972 F. Supp. 1239 (D. Ariz. 1997) (holding unconstitutional as a violation of separations of powers the PLRA provisions requiring termination of consent decrees entered before the statute's enactment). A similar holding from a district court in Iowa (*Gavin* v. *Ray*, 1996 WL 622556 (S.D. Iowa. 1996)) was reversed by the Eighth Circuit in *Gavin* v. *Branstad*, 122 F.3d 1081 at 1086 (8th Cir. 1997) (concluding that Congress may alter remedial powers of federal courts and prevent them from enforcing "equitable relief previously awarded in pending cases" and that the immediate termination provisions of the PLRA "do not amount to an attempt by Congress to reopen final judgments of Article III courts"); *Benjamin* v. *Jacobson*, No. 928, Docket 96-7957, 1997 WL 523896 (2d Cir. 1997) (reversing a district court for vacating a consent decree under PLRA; noting that plaintiffs may seek enforcement of non-federal aspects of consent decrees in state courts based on an interpretation that the PRLA's requirement of "termination of prospective relief" means that the federal courts lack jurisdiction to enforce such decrees but not that the decrees themselves are invalid); *Plyler* v. *Moore*, 100 F.3d 365 at 369-370, 374 (4th Cir. 1996) (upholding the termination provisions, as construed to avoid constitutional questions, and noting Congress' "legitimate interest in [...] protecting states from overzealous supervision by the federal courts in the area of prison [...] litigation"), *cert. denied*, 117 S. Ct. 2460 (1997).

313. See 18 U.S.C. s 3626 (e)(2) and *Hadix* v. *Johnson*, 933 F. Supp. 1362 at 1366 (W.D. Mich. 1996) (finding automatic stay provisions unconstitutional because they are akin to making decisions in cases without individual determinations and factfinding). Further, the PLRA instructs judges about the requisite findings to be made and limits their otherwise expansive

limit judicial authority to approve consent decrees that involve the expenditure of public funds.[314] Congress also intervened directly in a particular case involving criminal proceedings against defendants charged with bombing a federal building in Oklahoma. Congress overruled the district judge's decision on televised proceedings and on the attendance of witnesses.[315]

Yet other illustrations of conflicts between Congress and the judiciary come from ongoing battles about the configuration of courts, the salaries of judges, and the confirmation of nominees. In the last several months, members of Congress have attempted, over the objections of most of the judges of the court and its lawyers, to split the Ninth Circuit.[316] In 1995, members of Congress sought to halt ongoing studies sponsored by several of the circuits on gender, racial, and ethnic fairness.[317] Another arena of conflict is congressional processing of judicial appointments[318] and congressional

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settlement authority and powers to appoint special masters. See 18 U.S.C. s. 3626 (a)(c) (providing that no consent decrees may be entered without findings that the relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right"); *Ibid*. at s. 3626 (f) (specifying procedures for special master appointments, interlocutory appeals of such appointments, and limiting the authority of masters and their compensation).

314. See the *Judicial Reform Act of 1997*, H.R. 1252, 105th Cong. s. 1369, "Limitations on Federal Court Remedies" (1997) (requiring that no district court enter orders or approve settlements requiring states or their political subdivisions to "impose, increase, levy, or assess any tax for the purpose of enforcing any Federal or State [...] right or law" without findings, based on "clear and convincing evidence" of many factors, including no alternatives, no loss of property values; authorizing intervention by any "aggrieved corporation, or unincorporated association" or others in such proceedings; and requiring automatic termination provisions).

315. See *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, s. 235 (requiring courts to order closed circuit televised proceedings to enable persons to view proceedings that become distant because of a change in venue); *Victim Rights Clarification Act of 1997*, Pub. L. No. 105-106 (prohibiting a district judge from ordering a victim of an offense excluded from the trial because of a possible subsequent need to testify at sentencing); see also Jeffrey Toobin, *Victim Power*, The New Yorker 40, 42 (March 24, 1997) (describing the victims of the bombing as "going over the judge's head and getting [an] act of Congress").

316. *Senate Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Bill of 1998, Ninth Circuit Court of Appeals Reorganization Act of 1997*, S. 1022, 105th Cong., s. 305 (1997). See generally Carl Tobias, "Why Congress Should Not Split the Ninth Circuit" (1997) 50 SMU L. Rev. 583.

317. 141 Cong. Rec. S14 at 691-692 (daily ed. September 29, 1995) (three Republican senators criticizing the efforts and urging federal funds be withdrawn). A rebuttal can be found at 141 Cong. Rec. S18 at 127-05 (daily ed. December 7, 1995) (nine Democratic senators voiced support for the efforts).

318. According to the Lawyers' Committee for Civil Rights Under Law, as of September 1st, 1997, "103 vacancies, or 12% of the 837 positions among the federal appellate and trial courts, and 52 nominations are awaiting Senate action". Statement of the Lawyers' Committee for Civil Rights Under Law on Vacancies in the Federal Judiciary (Sept. 1997) (on file with author). In 1994, the University of Virginia established the Miller Center Commission on the Selection of Federal Judges; its work was prompted by concern about delays in filling judgeships. See

control over judicial pay.[319] In addition, federal judges have objected to what some term "micro-management" of the federal judiciary, including the receipt of a questionnaire, from the chair of a Senate subcommittee, about how federal judges use their time and what they do in their extra-judicial activities.[320] Commentators report on an increased acrimony in the interactions between judges and attorneys; as Professor Charles Geyh puts it : "As the judiciary's profile in the legislative process has risen, so too have attacks on the judiciary's credibility".[321]

Most recently, individual federal and state judges have found themselves the brunt of sustained personal attacks, launched either in an attempt to have them removed from office or intimated in the discharge of their duties while in office.[322] In 1996, the ABA created a special "Commission on the Separation of Powers and Judicial Independence" to respond to attacks on the judiciary;[323] its report, issued in July of 1997, concluded that a "new cycle of intense judicial scrutiny and criticism is now upon us"[324] and objected to what it termed "demagogic attacks".[325] While noting that United States' history has had other such cycles and that the judiciary has itself not always been

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Statement of Daniel J. Meador before the Senate Committee on the Judiciary on behalf of the ABA Standing Committee on Federal Judiciary, Fed. News Serv. (May 21, 1996).

319. See Linda Greenhouse, "Rehnquist Criticizes Congress on Raises", N.Y. Times (January 1, 1997) at A14 (reporting on his annual state of the judiciary address as warning that the "morale and quality of the federal judiciary" was at stake). The speech, "1996 Year-End Report on the Federal Judiciary", is reprinted at 29 The Third Branch 1 (Jan. 1997). According to a recent ABA report, An Independent Judiciary : Report of the ABA Commission on Separation of Powers and Judicial Independence [hereinafter *An Independent Judiciary*] 28-29 (ABA, 1997), Congress has neither raised judicial salaries since 1993 nor provided cost-of-living increases.

320. An Independent Judiciary, *supra* note 319 at 31-32.

321. G. Geyh, *supra* note 200 at 1207.

322. Some of these incidents are catalogued in An Independent Judiciary, *supra* note 319 at 15-19. See also Stephen B. Bright, "Political Attacks on the Judiciary : Can Justice Be Done Amid Efforts to Intimate and Remove Judges from Office for Unpopular Decisions?" (1997) 72 N.Y.U. L. Rev. 309; "Judicial Independence" (1997) 80 Judicature 155-183 (discussing attacks on individual judges, including those on Penny White, who lost a retention election for her seat on the Supreme Court of Tennessee and on Rosemary Barkett, formerly of the Florida Supreme Court and now sitting on the Eleventh Circuit); Katharine Q. Seelye, "House G.O.P. Begins Listing a Few Judges to Impeach," *N.Y. Times* (March 14, 1997) at A24; David Barton, *Impeachment! Restraining an Overactive Judiciary* (on file with author) (a memorandum circulated in Washington, D.C. in the spring of 1997 and offering arguments from the "founders" on why impeachment is appropriate; further, arguing that "[e]ven if it seems that an impeachment conviction against a certain official is unlikely, impeachment should nevertheless be pursued. Why? Because just the process of impeachment serves as a deterrent"). *Ibid.* at 53.

323. Henry J. Reske, "Where to Draw the Line : ABA Commission Defines Areas of Judicial Independence" (1996) 82 A.B.A. J. 99.

324. An Independent Judiciary, *supra* note 319 at i.

325. *Ibid.* at 46.

restrained in its responses, the ABA described new aspects to the debate, including congressional interest "in the internal management and operational efficiencies of the judiciary" and the "unfortunate shrillness" that has marked the "tenor of inter-branch discussions".[326] The Commission reported on "mounting evidence not only of a loss of confidence and respect but also a diminished understanding of the role of judges and an independent judiciary in protecting and enforcing the rights of the people".[327] The American Judicature Society has launched a special project on judicial independence; its goal is to "promote and safeguard the principle of judicial independence".[328]

Consider this series of incursions on the legitimacy and authority of judges against the background of the federal judiciary's success in rewording the CJRA to confirm its discretionary powers over civil case processing. That juxtaposition provides reason to wonder about the wisdom of the transformation of judicial practices. Decades of judges as managers, negotiators, super-senior partners, and settlement mediators do not equip them well for such conflict. While powerfully imbued with discretion over how to process cases, federal judges seem all too vulnerable to oversight in the exercise of their judgment. It is not that the judiciary's adoption of a managerial stance towards its work has caused these battles but rather that, by turning the role of the judge into that of a bureaucratic manager, by explaining that the judge's job is just like that of a mediator,[329] by permitting ever-increasing delegation of the judicial task,[330] by becoming individual case tailors, the federal judiciary has not provided much argument for its special charter or why its constitutional role is worth cherishing. When the federal judiciary shifts its focus from adjudication and its consequential remedial authority, it loses a key identifying element of what constitutes a judge, and hence it loses reasons for protesting against congressional intervention.

Moreover, the charter of discretionary powers over civil pretrial processing rests on the special role of the judge, the unique vantage point, not only of disinterest but also of knowledge and experience of what adjudication offers in contrast to other forms of disposition.[331] If judges have altered the practice of judging and made it a kind of manager-facilitator job that many officials of courts and private parties can do, why give them either substantial discretion in pretrial processing or in adjudication? At issue is the role of the judge, the practice of judging, and the reason for celebrating or limiting the work of the Third Branch.

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326. *Ibid.* at ii.

327. *Ibid.* at vii.

328. Interview with Sandra Ratcliff Daffron, *Independent Judiciary is Key Issue for AJS*, 29 Third Branch 10-11 (August 1997).

329. *Wagshal* v. *Foster*, 28 F.3d at 1249.

330. See generally, Judith Resnik, "The Mythic Meaning of Article III Courts" (1985) 56 U. Colo. L. Rev. 581.

331. See Settling Civil Disputes, *supra* note 173, arguing that it is judges' training at decisionmaking that makes them effective at bringing about settlements.

Hence, I close with a comment made in 1956 by Harry Nims, a lawyer-proponent of pre-trial processes :

> *Pre-trial may have changed our concept of the function of our judges. Perhaps they are to be no longer regarded only as impartial moderators or umpires in courtroom duels; but in addition, as wise, understanding friends of those who seek relief in courts, ready to help with their common sense, wisdom and their knowledge of the law and of human nature, to adjust differences quickly and with just as little expenditure in time and money as is possible*.[332]

He concluded his comments by stating : "Surely this is an end greatly to be desired".[333]

That enthusiasm is what I cannot share.

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332. H.D. Nims, *supra* note 89 at 191. H.D. Nims also authored a book, *Pre-Trial, supra* note 77, published under the co-sponsorship of the Committee on Pre-Trial Procedure of the Judicial Conference of the United States and the Council of the Section on Judicial Administration of the ABA.

333. H.D. Nims, *supra* note 89 at 191.