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Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power

Jay Tidmarsh*

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Introduction

The Federal Rules of Civil Procedure have revolutionized our thinking about procedure.¹ Prior to the Rules' enactment in 1938, the procedures adopted to resolve lawsuits were a function primarily of the relief sought, and secondarily of the forum selected to obtain that relief. The issue of relief was crucial because cases that sought "legal" relief and cases that sought "equitable" relief invoked remarkably different procedural systems.² Once a case was pigeonholed as legal or equitable, its form (or, to use the modern concept, its "cause of action"³) was also important, both because a

1. Numerous recent symposia discuss aspects of the Federal Rules' remarkable achievement. See Symposium, *A Duty-Oriented Procedure in a Rights-Oriented Society*, 63 NOTRE DAME L. REV. 597 (1988); Symposium, *The Fiftieth Anniversary of the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 399 (1988); Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988*, 137 U. PA. L. REV. 1873 (1989); Symposium, *The Future of Federal Litigation*, 50 U. PITT. L. REV. 701 (1989); Symposium, *Issues in Civil Procedure: Advancing the Dialogue*, 69 B.U. L. REV. 467 (1989); see also Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243 (1984) (discussing the civil litigation process); Symposium, *Modern Civil Procedure: Issues in Controversy*, 54 LAW & CONTEMP. PROBS. 1 (1991) (same).

2. In general terms, actions at law had a more rigid dance of pretrial pleadings, no pretrial discovery, limited joinder rights, trial of a single issue to a jury, relatively swift dispositions, and a heritage of procedural exactitude at the expense of the action's merits. Suits in equity had simpler pretrial pleadings, limited discovery and joinder provisions, trial (often bifurcated) of many issues to the court, a legendary slowness in the docket, and a somewhat stronger heritage of doing justice on the merits. For discussions of specific differences in pleading and practice in the two systems, see 9 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 262-411 (1926); ROBERT W. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 17-42 (1952); RONALD J. WALKER, *THE ENGLISH LEGAL SYSTEM* 20-31, 44-46 (6th ed. 1985); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914-21 (1987).

The theoretical difference between law and equity—that law operated only against property while equity operated against the conscience of the person—hardly justified the disparate procedures. Rather, the difference developed from common lawyers' slavish distrust of the jury. Their goal was to narrow a case to a single issue for either the judge or the jury to decide. Complicating factors, like multiple legal theories or numerous legal issues within a single theory, were consequently eliminated by the strictures of pleading rules. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 42-44 (2d ed. 1981). Unencumbered by a jury and better trained in Roman law, the medieval Chancellors who developed the system of equity felt no need for similar procedures for suits within their jurisdiction. See F.W. MAITLAND, *EQUITY* 6-8 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936).

3. In Anglo-American jurisprudence, the recognition that law is comprised of substantive theories of liability and a separate set of procedures that enforce those liabilities is a distinctly modern idea. Before the latter half of the seventeenth century, common lawyers and judges did not conceive of law in terms of substantive theory, but in terms of whether a particular plea fit the terms of a specific writ or whether a defensive matter needed to be specially pleaded or lay within the general issue. See, e.g., *Gibbons v. Pepper*, 1 LD. Raymond 38 (1695); *The Thorns Case*, Y.B. 6 Edw. 4, fo. 7, pl. 18 (1466). See generally MILSOM, *supra* note 2, at 37-48 (reviewing common law writs); THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 379-83 (5th ed. 1956) (same). Conversely, the Chancellor perceived that his task in equity was to "do justice"; not until *Cook v. Fountain*, 3 Swanston 585 (1676), did the Chancellor disclaim the accomplishment of individual justice in favor of adherence to general principles with the force,

plaintiff often could litigate only one form at a time and because each form came with its own finespun set of procedural rules and distinctions.⁴ Regardless of the exact procedures that these two choices dictated, the lawyers attended precisely to procedural niceties, for a single miscue almost invariably was fatal to an action at law and often so to a suit in equity.⁵

Today, only fifty-odd years after the Federal Rules were enacted, this procedural framework seems quaint, formalistic, and largely irrelevant.⁶ Gone are the separate procedural rules for suits in equity and actions at law.⁷ Gone is the belief that a single dispute with

predictability, and texture of "law." See MILSOM, *supra* note 2, at 94-96; PLUCKNETT, *supra*, at 702-03. By the latter half of the eighteenth century, English writers such as Blackstone were beginning to conceive of substantive theory as independent of either procedure or a sense of equity. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *279-*385, *432-*434; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 78, 87-88 (1975).

4. At common law, joinder of claims arising out of one transaction was nearly impossible, thus forcing a plaintiff to try one writ after another until a proper recovery was obtained. See Edson R. Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571, 573-82 (1920). The rule in equity was more generous, often overly so. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 67 (2d ed. 1947); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 9.2 (3d ed. 1985). The ability to join parties varied dramatically between law and equity, and also among the legal actions. See OLIVER L. BARBOUR, LAW OF PARTIES TO ACTIONS AT LAW AND SUITS IN EQUITY (1864); 1 JOSEPH CHITTY, A TREATISE ON PLEADING, AND PARTIES TO ACTIONS 1-93 (Henry Greening & J.C. Perkins eds., 15th Am. ed. 1874); CLARK, *supra*, §§ 56, 59. Finally, the pleadings in all actions and suits followed a similar format (a writ or bill serving as plaintiff's initial statement, a responsive pleading or demurrer from the defendant, and then a further response or demurrer by the plaintiff), but the precise requirements of the opening plea and the highly technical rules for further pleading varied so dramatically among the disparate legal writs and bills in equity that general similarities often were dwarfed by specific differences. For the classic multi-volume treatment of the rules of pleading various legal theories, see CHITTY, *supra*. For a treatment of pleading in equity cases, see PHILIP T. VAN ZILE, A TREATISE ON EQUITY PLEADING AND PRACTICE (1904). These complicated and theory-specific sets of pleading and joinder rules not only created lurking landmines over which the most experienced practitioners might trip, but also retarded the development of a general code of procedure that operated independently of specific substantive theories.

5. Although this rigidity of common law procedure has been somewhat overstated, it is generally accurate to say that "[e]xcept in the simplest cases, the plaintiff can never be quite sure that his demand will attain the stage of trial, the defendant that some inadvertence will not see him cast *in toto*." MILLAR, *supra* note 2, at 36; see PLUCKNETT, *supra* note 3, at 680. Likewise, as the Chancery began to develop regularized procedures, parties could no longer be certain that the Chancellor would ignore procedural missteps in order to "do justice." See Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 21 (1905).

6. The advent of British and American procedural reform during the nineteenth century had lessened considerably the rigors of the ancient procedures. See JAMES & HAZARD, *supra* note 4, § 1.6; Subrin, *supra* note 2, at 929-43. In this country, however, reforms were not universally adopted, and even the "code pleading" that was a centerpiece of the reform movement contained ample theory-specific traps in the areas of pleading and joinder. See CLARK, *supra* note 4, §§ 45-55, 57-58, 60-79. For a complete discussion of pleading and practice, see CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND (1897); WILLIAM A. SUTHERLAND, A TREATISE ON CODE PLEADING AND PRACTICE (1910).

7. See FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature . . ."); FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'"). In federal court one significant difference remains between actions at law and suits in equity: the Seventh Amendment's guarantee of a jury trial in "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII; see FED. R. CIV. P. 38, 39. That difference

elements of contract, tort, and environmental law must be resolved in three separate proceedings using different rules of formal procedure.⁸ Gone are the beliefs that mastery of the arcane twists of pleading "profert" and "oyer" is as important as mastery of the facts, and that legal procedure must rely on procrustean rules to protect a jury from hearing the rich factual intricacies of a dispute.⁹ Instead, we perceive procedure to be a body of "adjective law" independent of, and largely subservient to, the requested relief and the merits of the substantive claim.¹⁰

Even as we have intellectually divorced procedure from its traditional framework of remedy and doctrine, we have married procedure to new analytical constructs. One construct is obvious: Rules of procedure in federal court are distinct from those in state court.¹¹ A second construct is more subtle. Although the formal assumption of the Federal Rules is to the contrary, we intuitively understand that the car accident at the corner and the massive securities case do not require the same procedures.¹² The difference between the two

generally is not thought to mandate other procedural distinctions; pleading, joinder, discovery, and other requirements of the Federal Rules of Civil Procedure apply equally to legal and equitable claims.

8. See FED. R. CIV. P. 1, 2.

9. See PLUCKNETT, *supra* note 3, at 379-83 (arguing that the ability to conceive of cases in terms of the factual occurrences rather than procedural rules signals the transition to a mature legal system); S.F.C. Milsom, *Law and Fact in Legal Development*, 17 U. TORONTO L.J. 1 (1967) (same), reprinted in S.F.C. MILSOM, *STUDIES OF THE HISTORY OF THE COMMON LAW* 171 (1985). The device of profert (offer) and oyer (hearing) enabled one party to learn the contents of some documents in the possession of another party. For a treatment of its many technicalities, see CHITTY, *supra* note 4, at 378-79, 446-53.

10. See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 1 (A.H. Chaytor & W.J. Whittaker eds., 1936); Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 389 (1910).

11. The Rules Enabling Act of 1934, see Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1988 & Supp. 1990)), which empowered the Supreme Court to adopt rules of procedure for the United States district courts, replaced the Conformity Act of 1872, see Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (repealed 1934), which had required the district courts to adopt the procedures then in force in the states in which they sat. Although many states have incorporated aspects of the Federal Rules of Civil Procedure, the majority of Americans live in states with systems of procedure that differ in significant regards from the Federal Rules. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1369 (1986); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2026-31 (1989). The decidedly pro-Federal Rules bias of law school curricula has not yet removed these disparities.

12. Formally, the Federal Rules are designed to be "trans-substantive," which means that the same set of rules applies in all civil cases. The trans-substantive assumption has come under increasing attack in recent years. See, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 718-19 (1988); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-33 (1975); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547-48 (1986); Rosenberg, *supra* note 1, at 243-44; Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2175-78 (1989); Subrin, *supra* note 2, at 985. For defenses

cases does not seem to hinge upon the substantive theory of the case (the "cause of action"); two tort cases—one a car accident at the corner and the other a products liability action involving thousands of plaintiffs—also might require different procedural rules. Just as equitable suits were once thought to require different procedural rules than legal actions, we now perceive that "big" cases might well demand different rules than "routine" ones.¹³

The perception is widely shared. For more than forty years, courts and scholars have documented the course of the "big" case and decried its excesses.¹⁴ Proposals to change the rules of the game for "big" cases abound, with reformers suggesting everything from minor procedural tune-ups,¹⁵ to major overhauls of existing

of trans-substantive procedure, see Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

13. See generally MANUAL FOR COMPLEX LITIGATION SECOND (1985) [hereinafter MANUAL] (recommending ways in which to proceed with complex litigation).

14. See, e.g., AMERICAN BAR ASS'N, REVISED FINAL REPORT AND RECOMMENDATIONS OF THE COMMISSION ON MASS TORTS (1989) [hereinafter COMMISSION ON MASS TORTS]; AMERICAN COLLEGE OF TRIAL LAWYERS, RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION (1981), reprinted in 90 F.R.D. 207 (1981) [hereinafter RECOMMENDATIONS ON COMPLEX LITIGATION]; AMERICAN LAW INST., COMPLEX LITIGATION PROJECT (Tent. Draft No. 1) (1989) [hereinafter COMPLEX LITIGATION PROJECT Draft No. 1]; ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY (1984); RONALD J. BACIGAL, THE LIMITS OF LITIGATION (1990); WAYNE D. BRAZIL ET AL., MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS (1983); JAMES KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION (1983); MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (1970) [hereinafter MCML]; MANUAL, *supra* note 13; REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991) [hereinafter REPORT ON ASBESTOS LITIGATION]; REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1951), reprinted in 13 F.R.D. 62 (1952) [hereinafter PRETTYMAN REPORT]; REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979), reprinted in 80 F.R.D. 509 (1979) [hereinafter REPORT ON ANTITRUST LAWS AND PROCEDURES]; PETER H. SCHUCK, AGENT ORANGE ON TRIAL (1986); THOMAS E. WILLING, TRENDS IN ASBESTOS LITIGATION (1987); *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960) [hereinafter *Handbook*]; Leonard S. Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A. J. 848 (1980); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976) [hereinafter Kirkham, *Good Intentions*]; Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497 (1980) [hereinafter Kirkham, *Complex Civil Litigation*]; Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950); *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F.R.D. 395 (1958); *Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319 (1959) [hereinafter *Seminar*]; Joseph Sanders, *The Benedictin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992); Leon R. Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41 (1952).

15. See, e.g., Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541 (1989); Janofsky, *supra* note 14; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Sam C. Pointer, Jr., *Complex Litigation: Demonstration of Pretrial Conference*, 6 REV. LITIG. 285 (1987).

constitutional, jurisdictional, and procedural doctrines,¹⁶ to replacing "big" case litigation with alternate methods of resolution.¹⁷ Recently, Congress has added its voice. Without mandating any specific procedural changes, the Civil Justice Reform Act of 1990 requires courts to consider the development of special procedures to handle complex cases.¹⁸

The failure of prior efforts to differentiate procedural rules on the basis of remedy and doctrinal theory raises the question of whether procedural differentiation on the basis of "bigness" will be viewed through the lens of history as another quaint, formalistic, and wrong-headed distinction. In this Article, I begin to answer the question by examining whether it is possible to define complex litigation in a way that meaningfully distinguishes "big" cases from "routine" ones.

The development of this definition is crucial for several reasons.

16. Because there has been no significant sentiment to amend Article III, section 2 of the United States Constitution to permit federal jurisdiction in complex cases, the primary constitutional issue under discussion has been the ability and need to circumvent the Seventh Amendment's guarantee of jury trial in complex federal cases. See, e.g., Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); *infra* notes 84-94 and accompanying text. Proposals to reform diversity jurisdiction, removal and multidistrict provisions, party joinder rules, and res judicata principles recently have proliferated. See, e.g., AMERICAN LAW INST., COMPLEX LITIGATION PROJECT (Tent. Draft No. 2) §§ 5.01-.05 (1990) [hereinafter COMPLEX LITIGATION PROJECT Draft No. 2] (advocating changes in removal and claim preclusion rules); COMMISSION ON MASS TORTS, *supra* note 14, at 4-9, 80-87; COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, §§ 3.02-.09 (advocating greater powers to consolidate cases within the federal system); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44-48, 93-95, 97, 99-100 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE]; Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141 (1984); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master*, 69 B.U. L. REV. 695 (1989); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986). For an overview and critique of legislative proposals to amend jurisdictional provisions, see Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990) [hereinafter Mullenix, *Complex Litigation*]. Although it does not specifically address the problem of complex litigation, Congress' recent enactment of supplemental jurisdiction often will make the consolidation of a large case in a federal forum an easier matter. See 28 U.S.C.A. § 1367 (West Supp. 1991).

17. See REPORT ON ASBESTOS LITIGATION, *supra* note 14, at 27-35; Eugene R. Anderson et al., *The Asbestos Health Hazards Compensation Act: A Legislative Solution to a Litigation Crisis*, 10 J. LEGIS. 25, 27 (1983); Kenneth R. Feinberg, *Do Mass Torts Belong in the Courtroom?*, 74 JUDICATURE 237, 237 (1991); Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 32-36 (1986); cf. Stephen C. Yeazell, *The Salience of Salience: A Comment on Professor Hazard's Authority in the Dock*, 69 B.U. L. REV. 481, 485 (1989) (noting that in other countries, many types of nonroutine litigation are handled through the legislative or executive process rather than the judicial process).

18. 28 U.S.C.A. § 473(a)(1), (a)(3) (West Supp. 1991).

Should it turn out that a definition of complex litigation cannot be developed, the invitation of the Civil Justice Reform Act and the reformers to separate complex cases from routine ones must be rejected. On the other hand, should it turn out that a definition does exist, a correct understanding of complex litigation might prevent well-intentioned reform from paving the path to a procedural hell. Without a proper definition, it is impossible to decide whether separate procedural rules are necessary to cope with the reality, rather than the myth, of complex litigation; to determine the content of those rules; or accurately to assign the right set of rules to the right set of cases.¹⁹ Indeed, even a cursory reading of the literature on complex litigation demonstrates that different commentators appear to have very different conceptions of, and consequently very different solutions for, the disease that everyone calls "complex litigation." A definition can provide clues about the nature of the "disease," and thus assist in deducing appropriate treatments.²⁰

A proper definition also can help to avoid placebos and poisons. Without some understanding of what complex litigation is, it is impossible to evaluate whether a proposed "cure" will have side effects that far outweigh its benefits. A formal definition of "complex litigation" might well suggest fundamental limitations on the range of proper solutions.

This formal analysis, which seeks both solutions and their limitations in an examination of complex litigation's essential attributes, can be both criticized and defended.²¹ Thus far, however, such a

19. See *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1127 n.3 (Fed. Cir. 1985) (noting that no one has "yet spelled out definitive, reliable criteria on which to determine clear boundaries for 'simple,' 'complex but not too complex,' and 'too complex'"); Burbank, *supra* note 12, at 717 (calling for the development of a system to identify complex litigation).

20. I derive the analogy to a cure from Francis McGovern, who has advocated a "Problem-Diagnosis-Prescription-Evaluation" methodology for resolving complex litigation. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660 (1989); McGovern, *supra* note 15, at 449-56.

21. Not everyone believes that the game of finding a definition is worth the candle. See *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) ("In answering the Seventh Amendment question, we believe that any test which is dependent upon the complexity characterization of a case would be too speculative to be susceptible of any type of practical application."); MARK A. PETERSON & MOLLY SELVIN, *RESOLUTION OF MASS TORTS* at vi (1988) ("We do not attempt a precise definition of *mass litigation* Rather than attempt to set out and defend the importance of various issues as being necessary to define litigation as mass, the research explores the significance of those issues for litigation involving multiple claims."); STANDARDS OF JUDICIAL ADMINISTRATION RECOMMENDED BY THE JUDICIAL COUNCIL § 19(c) [hereinafter *JUDICIAL ADMINISTRATION STANDARDS*] ("Complex litigation is not capable of precise definition"), reprinted in CALIFORNIA RULES OF COURT 872 (West 1992) [hereinafter *CALIFORNIA RULES*]; Peter W. Sperlich, *The Case for Preserving Trial by Jury in Complex Civil Litigation*, 65 JUDICATURE 394, 397, 408 (1982) (contending that complexity "is largely in the eye of the beholder" and that "there is no agreed upon definition of complexity"). On the other hand, other commentators have recognized that, if special rules are to be created for complex litigation, the problem of formal definition cannot be avoided. See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1463 (1987) ("Not even those charged with responsibility to devise procedures for complex cases in the federal courts have essayed a definition worthy of the name. . . . [P]roviding definition to an area of law represents perhaps the highest form of that enterprise as scholarship." (footnote

formal analysis has never been attempted. The burden of this Article, therefore, is to demonstrate that an inquiry into the form of complex litigation provides a useful perspective on the hydra-headed problem of complex litigation.

Part I begins the inquiry by describing the practical and theoretical factors that have led various courts and commentators to label particular types of litigation "complex." Although all the definitions provide important data about the nature of complex litigation, none capture its full breadth. Thus, the task of the Article's next two Parts is to develop a formal and inclusive definition. Part II builds the theoretical framework for the definition by describing the form of adjudication and the positive assumptions of modern civil litigation.

Next, Part III demonstrates that complex litigation arises from the friction between the real-world problems outlined in Part I and the theoretical framework developed in Part II. Part III argues that all complex cases initially involve at least one of four different modes of complexity: the attorneys have difficulty in amassing, formulating, or presenting relevant information to the decisionmaker; the factfinder has difficulty in arriving at an acceptably rational decision; the remedy is difficult to implement; or there exist procedural and ethical impediments to joinder. The unifying attribute of these four modes is that the dispute can be resolved rationally only through the accretion to the federal judiciary of powers traditionally assumed by the other "actors" (parties, lawyers, jurors, and state courts) in the litigation enterprise. This attribute alone, however,

omitted)); Subrin, *supra* note 2, at 985 (noting that the development of "different procedural rules for different types of cases" requires us to "confront[] the demons of technicality, line-drawing, and definition"); cf. Robert A. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 905 ("What are the goals of the civil justice system? . . . Without some agreement about the answers to such first order questions it is difficult to formulate policy for or evaluate civil justice reform, because it is not even clear whether any need for reform exists.").

The debate over the legitimacy and utility of a definition of complex litigation is simply a specific manifestation of the much larger debate, begun by the legal realists, over the validity of formal legal analysis. For the modern terms of that debate, see *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); *Symposium, The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 570-71 (1983); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). I do not intend to enter that broader debate here; my limited goal in this Article is to determine whether formal analysis, whatever its merits, can provide a useful perspective on the issues of whether particular procedural rules are necessary for complex cases, and if so, what are the boundaries of those rules. My goal also is minimal in another respect. I do not purport to create a definition of complex litigation that can be useful for all contexts in which the term might be used. See Walter W. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 340-41 (1933) (arguing that no term has an immutable meaning). Rather, my search for a definition of "complex litigation" is limited to the context of procedural reform: What meaning should we give to "complex litigation" if we are going to create special rules to handle it?

constitutes an overbroad definition of complex litigation; such cases, although "complicated," are not truly complex. Complex litigation also contains a second fundamental attribute: The increase in judicial power needed to deal with these complications threatens to overrun the deep-seated assumption of modern civil litigation that similarly situated claims, parties, and legal theories should be treated in procedurally similar ways.

Thus understood, the form of complex litigation adumbrates some valid judicial solutions for the "big" case, and also suggests certain limitations on the scope of judicial power. At one level, this definition identifies certain "polycentric" cases that lie beyond the scope of legitimate adjudication. At a different level, this form isolates the key factors that must be considered in developing procedures for resolving complex cases. At still another level, the analysis suggests that the violence done to the egalitarian aspiration of modern procedure constitutes a powerful, and generally ignored, factor in the exercise of judicial power in the "big" case.

Part IV applies the insights gained from Part III to the future of civil procedure. Complex litigation stands in the crossroads of the thorniest issues in modern civil procedure: case management; trans-substantivism; adversarialism; the wisdom of equitably based procedural codes; the relationship between procedure and the law and economics movement; and the involvement of courts in politically charged controversies. Part IV demonstrates that these issues, and consequently the direction of procedural reform, can be understood only against the backdrop of the four categories of cases (routine, complicated, complex, and polycentric) developed from the definition of complex litigation.

I. *A Cacophony of Definitions*

Other than the rich diversity of the proposals, the most striking feature of the commentary on complex litigation is the lack of agreement about a definition for the subject. Cases have been described as "complex" when they are costly to litigate,²² when they involve many issues,²³ when they involve many parties,²⁴ when they involve

22. See, e.g., Brazil, *supra* note 15, at 398 (describing "complex, resource-threatening cases"); Irving R. Kaufman, *Report on the Study of the Protracted Case*, 21 F.R.D. 55, 63 (1957) (stating that the discovery phase in a complex case is "so costly, so time-consuming, and so exasperating"); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 338 n.7 (1986) (noting that complex cases can be "very costly and time-consuming").

23. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 858 (1985); Schuck, *supra* note 22, at 338 n.7.

24. See, e.g., RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* at 1 (2d ed. 1992); Dennis A. Kendig, *Procedures for Management of Non-Routine Cases*, 3 HOFSTRA L. REV. 701, 705-06 (1975); Resnik, *supra* note 12, at 511 (discussing "complex, multi-party action (the 'Big Case')"); Rowe & Sibley, *supra* note 16, at 23 (regarding a "number of parties" as a characteristic of complex litigation); Schuck, *supra* note 22, at 338 n.7.

parties located in many forums,²⁵ when they involve legally thorny issues,²⁶ when they are protracted,²⁷ when they develop voluminous evidence,²⁸ or when the outcome of the case might have nationwide consequences.²⁹ To a person worried about the Seventh Amendment implications of complex litigation, the nub of complexity is the extreme difficulty a jury faces in resolving a dispute rationally.³⁰ When a case generates a large fund with many claimants, complexity means the establishment of administrative structures to speed recovery to the recipients.³¹ It seems that there is no such thing as "complex litigation," only "complex litigations."

In order to discover whether a common theme unites the various claims of complexity, the first step is simply to articulate the ways, both practical and theoretical, in which courts and commentators have defined "complex litigation." In general terms, those courts

25. See, e.g., COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 11 ("multiparty, multiforum litigation"); Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 108-09; Rowe & Sibley, *supra* note 16, at 15, 30.

26. See, e.g., Kirkham, *Problems of Complex Civil Litigation*, *supra* note 14, at 498 (including cases with "specially complicated legal and factual issues" as complex cases); Lempert, *supra* note 16, at 84 (noting with trepidation that either "voluminous evidence or esoteric [legal] issues might be enough" to designate a case as complex); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 623 n.99 (1989) (stating that "[a] case might be legally complex but factually simple").

27. See, e.g., *Handbook*, *supra* note 14; Peckham, *supra* note 15, at 257 ("complex and protracted cases").

28. See, e.g., Kirkham, *Problems of Complex Civil Litigation*, *supra* note 14, at 498.

29. See, e.g., REPORT ON ANTITRUST LAWS AND PROCEDURE, *supra* note 14, at 522 (discussing the "sweeping nature of potential relief" as a component of complex antitrust cases); Geoffrey C. Hazard, Jr. & Paul R. Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, (describing the stakes involved in the AT&T antitrust litigation) in *BRAZIL ET AL.*, *supra* note 14, at 80, 86; Kendig, *supra* note 24, at 706 (stating that the "presence of large stakes" is one possible factor in complex litigation); Rowe & Sibley, *supra* note 16, at 23 (identifying the "amounts at stake" as one characteristic of complex litigation); Alvin B. Rubin, *Complex Limitation: The Courts' View*, 53 TUL. L. REV. 1395, 1396-97 (1979) [hereinafter, Rubin, *Complex Limitation*] (noting that cases that "involve[] large amounts of money" can be complex); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 429 (1986) (finding a similarity among mass tort cases to be that "their total human and economic costs affect all of society"); cf. Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 653 (1989) (discussing the recent rise of "high-value litigation, often national in scope").

30. See, e.g., Devlin, *supra* note 16; Lempert, *supra* note 16; Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979); *infra* note 85 and accompanying text.

31. See, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1016-18 (2d Cir. 1973) (rejecting fluid recovery concept in a class action), *vacated on other grounds*, 417 U.S. 156 (1974); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *subsequent proceedings*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in part and rev'd in part*, 818 F.2d 179 (2d Cir. 1987); *In re A.H. Robins Co.*, 88 B.R. 742, *modified*, 1988 U.S. Dist. LEXIS 8697 (E.D. Va. July 29, 1988), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); Schuck, *supra* note 22, at 338 n.7 (stating that "[i]n a complex case, any judgment or settlement reached, even one for money damages, is likely to be difficult to implement").

and commentators that have defined complexity have done so by claiming either that complex litigation is a function of a certain substantive theory; that complex litigation is a function of certain pre-trial, trial, or post-trial procedural features; that complex litigation possesses a certain conglomerate of attributes that must all be satisfied; or that complex litigation violates some fundamental norm of traditional adjudication. Before turning to these four ways of articulating the definition of complex litigation, however, another phenomenon of complex litigation should be noted: the refusal of many of the important sources to define the subject at all.

A. The "Non-Definers": Definition by Default

There are two fundamental methods to finding a solution to a problem that presently has no answer. The first is to seek a definition of the problem and its causes, and then deduce solutions that, in theory, should solve the problem. The second is to experiment with various alternatives and then develop a solution from the observed data.³² Most of the methods proffered by present literature on complex litigation fall into the latter, inductive camp.³³ Rather than seeking a definition of complex litigation and then reasoning from first principles, the literature forgoes the attempt at definition and proceeds to advocate experimental solutions to cure the ills of some disease vaguely understood to be "complex litigation."

This failure to reason to a solution from the definition of complex litigation infects even the most significant sources. For instance, the *Manual for Complex Litigation (Second)* (hereinafter *Manual*)³⁴—the leading reference work on the subject—does not attempt a definition, but does spend more than 450 pages detailing potential remedies for its symptoms. The *Manual's* failure to define could hardly be an oversight; its immediate predecessor, the *Manual for Complex and Multidistrict Litigation*, included a definition within its first few pages.³⁵ The techniques suggested by the *Manual* to remedy complexity nonetheless hint at a definition. Among the *Manual's* recommendations for complex cases are frequent pretrial conferences;³⁶ appointment of lead or liaison counsel;³⁷ judicial involvement in the early formulation of issues³⁸ and development of discovery plans;³⁹ referrals to masters and magistrates;⁴⁰ bifurcation of pretrial and trial proceedings;⁴¹ the

32. For a more thorough description of these methods, see JAMES D. CARNEY & RICHARD K. SCHEER, *FUNDAMENTALS OF LOGIC* 157-58, 317-66 (2d ed. 1974); cf. Burbank, *supra* note 21, at 1463 (suggesting that it may still be premature to impose any deductive intellectual framework on complex litigation).

33. See *infra* note 50 and accompanying text.

34. *MANUAL*, *supra* note 13.

35. See MCML, *supra* note 14, §§ 0.1, 0.22. For a more detailed discussion of the MCML's definition, see *infra* notes 137-42 and accompanying text.

36. *MANUAL*, *supra* note 13, §§ 20.13, 21.2.

37. *Id.* § 20.22.

38. *Id.* § 21.3.

39. *Id.* § 21.4.

40. *Id.* §§ 20.14, 21.5.

41. *Id.* §§ 21.33, 21.632.

use of settlement techniques such as mediation, arbitration, summary jury trial, and mini-trial;⁴² the adoption of narratives, document summaries, and interim arguments and instructions during trial;⁴³ and the joinder of related cases through devices such as class-action and multidistrict litigation.⁴⁴ The second half of the *Manual* then applies these principles to six areas of substantive litigation: antitrust cases, "mass and other complex torts," securities litigation, takeover litigation, employment discrimination litigation, and patent cases.⁴⁵ In short, although it does not define complex litigation, the *Manual* seems to imply that "complex" cases are those that can benefit from certain case management principles or those that involve certain substantive theories.

The same unwillingness to define also infected the original edition of the subject's leading casebook, *Complex Litigation*.⁴⁶ The book opened by observing that "the precise characteristics of complex cases are uncertain" and that "nobody has devised a litmus test by which one may decide whether a given case properly is labelled complex."⁴⁷ It noted that "[a]rguably [complex litigation] is not significantly different from other litigation, only larger," and that "many of the problems of complex cases are symptomatic of all litigation."⁴⁸ Nonetheless, the authors believed that complex litigation was somehow distinct from its routine brethren, apparently because the procedural problems of complex litigation "take on new dimensions that change the complexion of litigation and, to a significant extent, the role of the courts and lawyers in society."⁴⁹

42. *Id.* § 23.12.

43. *Id.* §§ 22.32 to .34, 22.43.

44. *Id.* §§ 30.1 to .4, 31.12.

45. *See id.* §§ 33.1 to .6.

46. RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* (1985). Other textbooks with limited treatments of complex litigation also attempt no definition. *See* RICHARD H. FIELD ET AL., *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 1331-48 (6th ed. 1990); MAURICE ROSENBERG ET AL., *ELEMENTS OF CIVIL PROCEDURE* 779 (5th ed. 1990).

Curiously, another textbook authored by Professors Marcus and Sherman briefly defines complex litigation. *See* RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE* 401 (1989). For a discussion of that definition, see *infra* notes 73, 135 and accompanying text. Another textbook that defines complex litigation hastily is DAVID W. LOUISELL ET AL., *CASES AND MATERIALS ON PLEADING AND PROCEDURE* 1223 (6th ed. 1989). For further discussion of that definition, see *infra* notes 70, 100, 116, 162 and accompanying text.

In the new edition of *COMPLEX LITIGATION*, the authors attempt briefly to define complex litigation as possessing one of three or more characteristics: "difficult legal or factual issues," "the sheer number of parties," and "the amount of money involved." MARCUS & SHERMAN, *supra* note 24, at 1-2. Those characteristics are considered *infra* notes 73, 95, 114 and accompanying text. Although their definition ultimately proves to be inadequate, it is interesting to note the second edition's change of heart, and its recognition that a definition of the subject has some utility.

47. MARCUS & SHERMAN, *supra* note 46, at 2.

48. *Id.*

49. *Id.* According to the authors, the root causes of complexity were the injection of

In their decisions not to attempt a definition of complex civil litigation, these two sources are hardly alone. A preponderance of the cases and literature discussing complex litigation never pauses to consider what complex litigation is.⁵⁰ Unlike the *Manual* and the original edition of *Complex Litigation*, however, these proposals focus

courts into "inherently difficult and socially important" issues, "the amount of money involved in litigation," and "the sheer number of parties involved." *Id.* at 5-7.

50. See N.D. ILL. R. 2.30(g); Freytag v. Commissioner, 111 S. Ct. 2631, 2635 (1991) (describing tax litigation as "complex"); Kansas v. Utilicorp United, 110 S. Ct. 2807, 2815 (1990) (denying standing to indirect purchasers in antitrust action, in part because the "case was already quite complicated" and the "expansion of the case would risk the confusion, costs, and possibility of error inherent in complex litigation"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 633, 640 (1985) (rejecting "potential complexity" as a reason to deny enforcement of an arbitration clause); Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1162 (7th Cir.) (en banc) (noting "the evolving concept of the district judge's managerial responsibility in complex litigation"), *rev'd on other grounds*, 470 U.S. 373 (1985); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); BROOKINGS INST., JUSTICE FOR ALL (1989) [hereinafter JUSTICE FOR ALL]; FEDERAL COURTS STUDY COMMITTEE, *supra* note 16; REPORT ON ASBESTOS LITIGATION, *supra* note 14; Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Maxwell M. Blecher & Howard F. Daniels, *In Defense of Juries in Complex Antitrust Litigation*, 1 REV. LITIG. 47 (1980); Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in BRAZIL ET AL., *supra* note 14; Burbank, *supra* note 21, at 1463 (acknowledging that "[c]omplex litigation" means different things to different people; the term captures a multitude of sins"); James M. Carter, *Judicial Control of the Case and Limitation of Discovery*, 23 F.R.D. 406, 406-07 (1959); Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45 (1958); Hazard & Rice, *supra* note 29; The Honorable Mr. Justice Kerr, *International Arbitration v. Litigation*, 10 J. BUS. L. 164, 180 (1980); Lempert, *supra* note 16; William V. Luneburg & Mark A. Nordenberg, *Specialty Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981); Roy W. McDonald, *Identification of "Big Case" and Assignment to a Single Judge*, 23 F.R.D. 587 (1959); McGovern, *supra* note 20; McGovern, *supra* note 15; Pointer, *supra* note 15; Sperlich, *supra* note 21; Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595 (1987); Jack B. Weinstein, *Procedural and Substantive Problems Arising from Disasters*, 5 TOURO L. REV. 1 (1988); James R. Withrow & Richard P. Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 4 (1976) (noting that "[t]he definition of complexity has itself become more complex," but attempting no definition); Douglas King, Note, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984); Timothy G. Little, Note, *Court-Appointed Special Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission*, 8 HARV. ENVTL. L. REV. 435 (1984). Similarly, the Civil Justice Reform Act requires district courts to consider the creation of special rules for complex cases, but fails to define complexity. 28 U.S.C.A. § 473(a)(1), (a)(3) (West Supp. 1991); cf. CAL. GOV'T. CODE § 68607(c) (West Supp. 1992) (requiring establishment of procedures for early identification of cases that might be "protracted," but giving no definition of the term).

Among writers who "define" complexity, extracting a definition is often a task akin to pulling teeth. Many of these writers use one-phrase "throw-away" descriptions that are so vacuous or circuitous as to amount to a virtual nondefinition. See, e.g., Kirkham, *Good Intentions*, *supra* note 14, at 208 ("protracted and complicated suit"); Peckham, *supra* note 15, at 257, 271 ("complex and protracted cases" and "large-scale cases"); Resnik, *supra* note 12, at 511, 521 ("complex, multi-party action" and "multi-party, multi-issue disputes"); Constance S. Huttner, Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511, 511, 530 (1979) ("massiveness of the cases" and "factual complexity"). Other writers have sought to define only one particular type of complex litigation, eschewing a more encompassing description. See, e.g., COMMISSION ON MASS TORTS, *supra* note 14, at 5-11; PETERSON & SELVIN, *supra* note 21, at vi-vii; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 853 (1984); Georigene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for*

myopically on only one manifestation of complexity. No "big picture" solutions are attempted; in fact, there is no sense of any "big picture" at all. Nor is there a sense of a dividing line between "complex" cases and "routine" cases, as many of the proposed solutions are equally valid in cases of all sizes. Although the breadth of the problems posed by complex litigation emerges from the array of articles, the combined message of these inductive "nondefiners" appears to be that the difference between complex and noncomplex cases is only one of degree: In complex cases, the advocated technique is crucial especially to the resolution of the case; whereas in routine cases, the technique is more of a luxury item.⁵¹

This failure to define is at the same time understandable and perplexing. It is understandable because the number of potential issues that arise in complex cases would seem to require a definition so amorphous as to render the exercise of definition meaningless. At a deeper level, however, the lack of definition is profoundly perplexing. If complex litigation is so nebulous that no definition is possible, then we should stop deceiving ourselves that there is such a thing as "complex litigation." Rather, the various manifestations of complexity identified by the commentators should be viewed as independent conditions. The choice of appropriate procedural tools in a "complex" case should be guided by the same principles of justice, speed, and efficiency that guide all litigation.⁵²

This conclusion conflicts with the deep-rooted belief, even among the nondefiners, in a phenomenon called "complex litigation."⁵³ The issue remains, however, whether that belief is correct. The inductive approach of the "nondefiners" has provided considerable useful data with which to begin the process of inquiry. Procedural features such as class actions, multidistrict litigation, and difficulty of party joinder seem to be associated with complexity, as do

Federal Common Law?, 54 *FORDHAM L. REV.* 167, 167-71 (1985). If these brief descriptions are added to the list of the nondefinitions, only a handful of truly descriptive efforts survive for deeper consideration.

51. See *MANUAL*, *supra* note 13, § 10 ("The Manual is intended primarily for use in complex civil litigation in federal courts. However, the principles of management and many of the techniques it describes may be useful in criminal cases, in state courts, and in routine federal civil litigation."); James A. Fee, *Similarity of Techniques in Ordinary Civil Cases and in Protracted Cases*, 23 *F.R.D.* 380 (1959); Rubin, *Complex Limitation*, *supra* note 29, at 1409; *Seminar*, *supra* note 14, at 615 ("Pretrial, useful in every case, is indispensable in protracted cases."); *supra* note 48 and accompanying text.

52. Compare *MANUAL*, *supra* note 13, § 10 (setting forth "the basic principles that characterize the fair and efficient resolution of complex litigation") with *FED. R. CRV. P.* 1 (stating that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

53. For instance, Professors Marcus and Sherman, who are unable to define precisely complex litigation, nonetheless believe that it exists. *MARCUS & SHERMAN*, *supra* note 46, at 2; *MARCUS & SHERMAN*, *supra* note 24, at 1-2.

problems of voluminous discovery and jury comprehension. Certain substantive theories are associated frequently with complex litigation, as are certain case-management techniques. The nature of the Federal Rules, the recent surge in the exercise of judicial power, and the failings of the adversarial system also might have a role in a proper definition.

The difficulty lies in finding a common theme that, on the one hand, unites these disparate concepts, and, on the other hand, divides "complex" cases from "routine" ones. Unless that theme exists, the energy devoted to the study of the subject called complex litigation has been misspent.

B. Definition by Substantive Theory

Not all writers have despaired of a definition for complex litigation. The earliest attempts described complexity in terms of those causes of action that generated peculiar management problems. Because the problem of complexity first was noted in antitrust cases, antitrust cases and complex litigation quickly became synonymous.⁵⁴ Subsequent writers expanded the list to include other legal theories that, even today, are the grist of complexity's mill: securities and takeover litigation,⁵⁵ commercial disputes,⁵⁶ institutional reform suits,⁵⁷ claims of mass employment discrimination,⁵⁸ products liability and mass torts,⁵⁹ and patent litigation.⁶⁰

Designation by substantive theory has two distinct advantages.

54. See AMERICAN BAR ASS'N SECTION OF ANTITRUST LAW, MONOGRAPH NO. 3, EXPEDITING PRETRIALS AND TRIALS OF ANTITRUST CASES (1979) [hereinafter EXPEDITING ANTITRUST CASES]; BRAZIL ET AL., *supra* note 14; MCML, *supra* note 14, § 0.22; RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 211; PRETTYMAN REPORT, *supra* note 14, at 65 (noting that antitrust cases fit the mold of protracted litigation); REPORT ON ANTITRUST LAWS AND PROCEDURES, *supra* note 14; WILLIAM W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION (1982); *Handbook*, *supra* note 14, at 375, 434; McAllister, *supra* note 14; *Seminar*, *supra* note 14, at 584-613; William E. Steckler, *Preliminary Draft of Check List of Procedural Devices for Handling the Big Case (Civil)*, 21 F.R.D. 523, 524 (1957) (identifying "[a]ll antitrust cases" as worthy of big case procedures); Leon R. Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165 (1950); Yankwich, *supra* note 14, at 42. The local rules of at least two courts also have identified antitrust cases as meriting the special treatment given in those districts to complex litigation. See W.D. Ky. R. 19(a)(1) (superseded July 1, 1987) (copy on file with author); N.D. OHIO RULE FOR COMPLEX LITIGATION 2.01(f).

55. See, e.g., MANUAL, *supra* note 13, §§ 33.3-.4; RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 211; Charles B. Arendall, Jr., *Securities Cases Complex Litigation*, in PRACTICING LAW INST., NEW DEVELOPMENTS IN COMPLEX AND MULTIDISTRICT LITIGATION (1973) [hereinafter NEW DEVELOPMENTS].

56. See, e.g., W.D. Ky. R. 19(a)(3) (superseded July 1, 1987) ("derivative suits") (copy on file with author); MCML, *supra* note 14, § 0.22 ("individual stockholders' stockholders' derivative, and stockholders' representative actions"); Brazil, *supra* note 15, at 398 ("massive commercial litigation"); Milton Kunen, *Other Protracted Cases*, 21 F.R.D. 483, 483 (1957) (noting "long and complicated cases in derivative stockholders' actions, [and] . . . in a substantial number of commercial cases").

57. See, e.g., MCML, *supra* note 14, § 0.22 (defining "cases involving requests for injunctive relief affecting the operations of a large business entity" as complex); see also *infra* notes 100-01.

58. See, e.g., MANUAL, *supra* note 13, § 33.5.

59. See, e.g., OHIO C.P. SUPP. R. 8.01(B)(3) (designating product liability cases as potentially complex); COMMISSION ON MASS TORTS, *supra* note 14, at vii; MCML, *supra* note 14, § 0.22; MANUAL, *supra* note 13, § 33.2; William F. Georghan, Jr., *Multistate Torts*,

To the extent that different litigation tracks or different procedural rules apply to complex cases, a substance-based definition greatly simplifies the taxonomic task that clerks, judges, and lawyers must perform.⁶¹ A substantive definition also allows the techniques necessary to resolve a complex case to be applied with a sensitivity to the substantive aims of the relevant body of law.

In spite of these advantages, a substance-based definition encounters three fatal criticisms. The first is the problem of underinclusion. Breach of contract claims, bankruptcy, and a host of other substantive theories usually left off the list of complex theories can generate cases as complicated as any case involving a "complex theory."⁶² The converse problem is overinclusiveness. Not all cases asserting a particular theory are complex. The obvious example is tort law, where only a fraction of tort cases generally are viewed as "complex." The same is true of other theories more closely aligned with complex litigation.⁶³ The dual problems of underinclusion and overinclusion mean that designation by substantive theory runs a

in NEW DEVELOPMENTS, *supra* note 55; James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534-42 (1973); Juenger, *supra* note 25, at 108-09; Weinstein, *supra* note 17, at 3.

60. See, e.g., MCML, *supra* note 14, § 0.22 ("patent, copyright, and trademark cases"); MANUAL, *supra* note 13, § 33.6 ("Patent Litigation"); PRETTYMAN REPORT, *supra* note 14, at 62 ("patent cases"); Handbook, *supra* note 14, at 375, 434 (identifying as complex a "patent case involving an unusual multiplicity or complexity of issues"); Frank A. Picard, *Special Problems in Criminal Cases and Patent Suits*, 21 F.R.D. 462 (1957); Seminar, *supra* note 14, at 519-51.

61. If no consequences flow from the designation of a case as complex, there is little reason to worry about the definition of complex litigation. Judges and commentators who write about complex litigation, however, invariably are faced with or advocate substantive or procedural proposals differentiating complex from routine cases. Because substantive or procedural consequences might depend on the designation, there has long been a concern with assuring that the classification can be performed both speedily and accurately. See MCML, *supra* note 14, §§ 0.2-.23 (stating that prompt identification of a complex case is the first problem); Handbook, *supra* note 14, at 375-77 (advocating the use of an initial checklist by the clerk and an immediate pretrial conference to determine if the case actually is complex); Kendig, *supra* note 24, at 708-12 (promoting early identification of complex cases); Steckler, *supra* note 54, at 523-24.

62. See, e.g., Resnik, *supra* note 12, at 521 (suggesting that Chapter 11 bankruptcies are complex); Rubin, *Complex Limitation*, *supra* note 29, at 1395-97 (designating admiralty-limitations actions as complex); Setear, *supra* note 26, at 632 (opining that Chapter 11 bankruptcies are complex); cf. Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 12 (contending that "complicated labor cases" should be considered "protracted cases" within the meaning of the Handbook, *supra* note 14). Obviously, if the list is expanded to encompass all theories that might in some cases result in complex litigation, the list of complex theories probably would be far larger than the list of routine theories, and therefore would lose its utility as a predictor of complexity.

63. One example of overinclusion is a securities claim asserted on behalf of several million persons who failed to buy a stock after the publication of a materially misleading prospectus. As the complaint would not survive a motion to dismiss, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), this securities class action actually would be less difficult to litigate than a car accident with a two-day trial. Cf. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992) (finding no proximate cause

tremendous risk of causing inappropriate consequences in significant numbers of cases.

Third, a substance-based definition cannot be justified simply because it is more sensitive to substantive theory. Although some awareness of, and sensitivity to, the goals of the relevant substantive law arguably might be desirable in the application of procedural rules,⁶⁴ the formal development of separate procedural rules in certain classes of cases risks the reintroduction of the repudiated writ system.⁶⁵ That possibility does not necessarily require rejection of a substance-based definition of complexity, but the reestablishment of procedural divisions based upon substantive theory a mere fifty years after their abolition should give us reason to pause.⁶⁶ Fundamentally, a definition by substantive theory smacks of arbitrariness. Without some external criteria for judging complexity, any argument that securities cases are complex and car accidents at the corner are not is ipse dixit.

In fact, the "complex" substantive theories appear to share two common characteristics. The first is malleability of doctrine. Concepts such as "fraud" in a securities case, "discrimination" in a desegregation case, "negligence" or "defect" in a tort case, and "market share" and "conspiracy" in an antitrust case frequently are incapable of "bright-line" definition, and usually require an intricate examination of the surrounding facts. Because a car accident at the corner relies on the same concept of "negligence" as an environmental tort, however, malleability of doctrine cannot be the only relevant characteristic. "Complex" cases also demonstrate a second essential ingredient: The information needed to answer the amorphous question of "fraud" or "conspiracy" is massive in quantity or

in RICO case brought by non-purchasers of stock attempting to recover for misrepresentations).

The danger of overinclusion has long been recognized. See McDonald, *supra* note 50, at 588 (observing that an American Bar Association report "rejects the theory that every antitrust case necessarily is protracted or complicated"); Comment, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303, 306 n.21 (1969) (noting that "both trademark and products liability actions frequently are small and should be handled under the usual civil procedures"); Letter from Stuart A. White to Walther E. Wyss (June 11, 1968) ("Automatically to invoke the cumbersome procedure set forth in the [MCML] in relatively simple patent cases would be like using a sledge hammer to drive a thumb tack."), quoted in Comment, *supra* at 306 n.22. The typical remedy suggested for the problem has been an early pretrial conference and decision by the court about whether a prima facie complex case is actually complex. See *Handbook*, *supra* note 14, at 376-77; McDonald, *supra* note 50, at 588. Under this arrangement, however, the initial substantive definition begs the question; "the judge must develop criteria for deciding which of the many cases in these categories are complex." Comment, *supra*, at 307.

64. See Cover, *supra* note 12, at 732-40.

65. See Subrin, *supra* note 2, at 985. See generally *supra* notes 2-10 and accompanying text (discussing the writ system).

66. For instance, designation by substantive theory may lead to pleading artifices designed to manipulate the rules for complex cases. Plaintiffs who wish to take advantage of the rules for complex cases will find a way to plead "complex" substantive theories, while parties who want to avoid the rules will shun a valid "complex" allegation. The intricate dance of pleading and pretrial dismissal that our jurisdictional statutes already impose will be replicated, with equally time-consuming and merit-frustrating results.

highly technical in nature.⁶⁷

Taken together, these two characteristics locate the definition for complex litigation in process, not substance. Substance remains relevant, but only because amorphous doctrine makes it difficult to digest information before trial or comprehend it during trial. Thus, definition by substantive theory acts only as a crude surrogate for a definition that—if it exists at all—appears to be procedural in nature.

C. Definition by Procedural Feature

Courts and commentators who define complexity in nonsubstantive terms isolate one of four procedural features as the benchmark of complexity: intractable pretrial proceedings; difficulties of proof and comprehension at trial; complications in the implementation or administration of a remedy; or the number of parties. Frequently, writers list two or more of these features and claim that complexity exists whenever any of the listed features are found. They do not, however, look beneath the surface to see if a single theme unites all of these procedural manifestations of complexity.

1. Complexity in Pretrial Proceedings

The most popular procedural description of complex litigation concerns the difficulty of defining issues and discovering facts in the pretrial process. The precise formulation of this description varies. Most writers find the key to "pretrial complexity" lies in the type of discovery that complex cases engender—discovery that has been described alternately as "voluminous,"⁶⁸ "massive [and] complicated,"⁶⁹ "broad-ranging,"⁷⁰ "extensive,"⁷¹ or requiring "[the] production of voluminous documents[,] . . . more than five (5) pretrial depositions[,] . . . or more than twenty-five (25) interrogatories."⁷² A different description focuses on the underlying reason for

67. Even complex cases involve a certain amount of routine work. See *Bernardi v. Yeutter*, 942 F.2d 562, 565 (9th Cir. 1991) (holding that, although "civil rights cases may be characterized as complex," certain motions filed in the case "did not involve complex work" sufficient to justify higher attorneys' fees award).

68. Kirkham, *Problems of Complex Civil Litigation*, *supra* note 14, at 498.

69. Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 525 (1991) ("Complex civil litigation involving multiple parties and multiple claims gives rise to massive, complicated discovery.").

70. LOUISELL ET AL., *supra* note 46, at 1223 ("Complex cases can be identified by the fact that they involve large stakes, broad-ranging discovery, and sometimes multiple parties.").

71. See Kendig, *supra* note 24, at 704 ("extensive pretrial preparation by the litigants"); Resnik, *supra* note 12, at 521 ("extensive and burdensome").

72. Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 *FORDHAM L. REV.* 907, 916, 997 (1980). A somewhat different quantitative definition of a complex case, proposed by Judge Rubin, is "one that, in the view of counsel for any

large-scale discovery: the “unusual multiplicity or complexity of factual issues.”⁷³ Finally, some of the commentary speaks in terms of the consequences of large scale discovery: the “protraction” of complex cases in relation to routine ones.⁷⁴

Obviously, there is a great deal of overlap among these definitions, and some cases will generate pretrial complexity of such proportions that they satisfy each of these descriptions. The lack of agreement about the precise nature of pretrial complexity, however, creates significant difficulties. Different perceptions of the problem suggest different solutions. For instance, protraction suggests that procedures that accelerate discovery are appropriate,⁷⁵ whereas voluminousness points in the direction of bifurcation, a process that often slows the proceedings.⁷⁶

Finally, all of the definitions suffer from either excessive rigor or undue pliability. Procrustean quantitative requirements, such as twenty-five interrogatories or 2,000,000 pages of documents, risk the miscategorization of large numbers of cases. Qualitative definitions such as “voluminousness” or “protraction” lack specificity—and consequently utility—without some benchmark against which they can be measured. If the benchmark is determined by the cost of discovery in proportion to the stakes of the litigation, then even the massive and lengthy discovery in antitrust cases like the *AT&T*⁷⁷ or *IBM*⁷⁸ litigations was hardly complex. If the benchmark is an absolute number—such as discovery which will exceed six months—then the problem of procrustean misclassification surfaces again.

It is important, therefore, to search for a common, unifying thread among these competing descriptions of pretrial complexity. Two points stand out. First, cases that are legally complicated are

party, will involve more than two or three days of discovery.” Rubin, *Complex Limitation*, *supra* note 29, at 1396.

73. Kirkham, *Problems of Complex Litigation*, *supra* note 14, at 498; see MARCUS & SHERMAN, *supra* note 24, at 1 (noting that one characteristic of complex litigation is “difficult legal and factual issues”); MARCUS ET AL., *supra* note 46, at 401 (listing various manifestations of complex cases, including “intricate legal and factual issues”).

74. See, e.g., N.D. OHIO RULES FOR COMPLEX LITIGATION 2.01-.04; *Handbook*, *supra* note 14; Peckham, *supra* note 15, at 257; *Seminar*, *supra* note 14.

75. Compare MANUAL, *supra* note 13, § 21.422 (identifying informal discovery and automatic disclosure as ways to save time and expense) and 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 Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 87-106 (1991) (proposing early mandatory disclosure of basic documentary and factual information in all civil cases) [hereinafter *Preliminary Draft*] and William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989) (same) with Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (questioning the appropriateness of early mandatory disclosure).

76. See 28 U.S.C.A. § 473(a)(3)(B), (a)(3)(C)(ii) (West Supp. 1992) (requiring courts to consider the possibility of bifurcating trial or ordering staged discovery in complex cases); MANUAL, *supra* note 13, § 21.632 (noting possible “increased cost and inconvenience” with bifurcation); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2388 (1971) (describing risks and benefits of bifurcation); *Preliminary Draft*, *supra* note 75, at 85, 87 (requiring courts to consider bifurcation and separate trial at preliminary pretrial conference).

77. See *United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978).

78. See *United States v. IBM*, 76 F.R.D. 97 (S.D.N.Y. 1977).

not truly "complex" unless they also involve an intricate factual fabric. Even the simplest factual situations can generate wonderfully difficult legal issues.⁷⁹ Although the resolution of these cases is not an easy matter, the type of rational analysis in which lawyers are trained ultimately yields an acceptable conclusion. There is no impediment like "voluminous" or "protracted" discovery that precludes the lawyers from performing their adversarial task—the crafting of persuasive and comprehensive arguments.⁸⁰

Second, the existence of a factually intricate dispute does not, on its own, create problems of pretrial complexity. If broad and judicially unmanaged discovery results in simple, clearly defined issues for trial, there is little reason to call the case complex; instead, the discovery system is simply doing the job for which it was designed. The real problem of pretrial complexity is that messy pretrial proceedings beget messy trials—at least without significant intervention by the judge. Left to their own devices, the parties appear unable to shape a case for resolution: The issues in the case cannot be defined until the facts have been discovered, but the discovery will be free-wheeling and chaotic until the issues have been defined.⁸¹ A strong

79. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

80. A few commentators have suggested that difficult legal issues are sufficient to make a case complex. See *supra* note 26 and accompanying text. Court rules that set up special procedures for complex cases also occasionally designate legally complex cases as complex. See NAPA CTY. R. 202 ("stating that [p]rotracted cases" can involve "difficult legal questions"), reprinted in CALIFORNIA RULES, *supra* note 21, at 901; SAN DIEGO CTY. COMPLEX LITIGATION RULES (introduction) (same), reprinted in CALIFORNIA RULES, *supra* note 21, at 956; SAN JOAQUIN CTY. R. 6-107a (same), reprinted in CALIFORNIA RULES, *supra* note 21, at 984; OHIO COMMON PLEAS SUPP. R. 8.01(B)(4) (defining "related cases involving unusual multiplicity or complexity of factual or legal issues" as complex); JUDICIAL ADMINISTRATION STANDARDS, *supra* note 21, § 19(c) (noting that complex litigation can involve "difficult or novel issues"). At present, it is important to note only that these commentators and rules seem to have an erroneous impression of the factors that make a case complex; in subsequent sections of the Article, I demonstrate that complex litigation does not include cases in which the only type of complexity is legal complexity.

I do not mean to suggest, however, that legally difficult cases can never be complex litigation. Complex cases frequently involve new and complicated legal issues. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980) (finding no federal question jurisdiction), cert. denied, 454 U.S. 1128 (1982); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1650 (E.D.N.Y. 1988) (establishing criteria for claiming against settlement fund); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (discussing choice-of-law principles to be applied in mass tort); *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982) (developing criteria for nascent "government contractor" defense). When a voluminous factual record is joined with uncertainties over the state of the law, the uncertain relevance of the facts can fuel problems of pretrial complexity by creating an even greater demand for discovery of all material and an even greater counter-tendency to resist disclosure. See Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 722-23 (1983).

81. For discussions of the insoluble "chicken-and-egg" dilemma posed by the simultaneous need to define legal issues before discovering the facts and to know all the facts before defining the legal issues, see *Tcherepnin v. Franz*, 461 F.2d 544, 548 (7th Cir.)

dose of “iron-hearted”⁸² judicial control during pretrial proceedings is necessary to avoid—or at least ameliorate—the paralysis caused by the unholy matrimony of the adversarial process and our liberal pleading and discovery rules.

These two common themes suggest a necessary role for case management in complex litigation. Because nothing in the themes suggests that case management is associated exclusively with complex cases, however, the existing writing on pretrial complexity fails to provide a comprehensive yet exclusive definition of complex litigation.

2. Complexity During Trial

The failure of pretrial complexity to capture the full scope of complex litigation is underscored by those commentators who have found complexity to inhere in the trial process as well. One aspect of this “trial complexity” is the management of large amounts of evidence in a constrained, pressure-filled situation. This problem—which focuses on the difficulties faced by lawyers in accomplishing their adversarial task of presenting evidence to the factfinder and by the judge in maintaining general custody and control over the evidence—is largely a technological one. The typically discussed remedy is the “courtroom of the future,” in which the availability of computers will allow attorneys either to communicate information such as objections to the judge or to retrieve rapidly trial testimony, exhibits, and other relevant information.⁸³

A distinct description of trial complexity concerns the inability of lay decisionmakers—usually juries—to comprehend voluminous or highly technical evidence.⁸⁴ The literature ascribes various causes to these comprehension problems: the issues might be beyond the technical comprehension or beyond the life experiences of the jury;

(upholding the resolution of critical legal issues in advance of discovery against a challenge that the method violated the Due Process Clause), *cert. denied*, 409 U.S. 1038 (1972); *EXPEDITING ANTITRUST CASES*, *supra* note 54, at 62 (noting that “legal issues are [often] so interrelated with the facts relevant on the ultimate issue of liability, that they cannot be segregated and decided in advance of trial”); *MANUAL*, *supra* note 13, §§ 21.31, 21.41; Withrow & Larm, *supra* note 50, at 26-36.

82. Withrow & Larm, *supra* note 50, at 5.

83. See *MANUAL*, *supra* note 13, §§ 22.12-14; Jessica Copen, *Courts of the Future*, 77 A.B.A. J. 74 (June 1991); Diane Knox, *Phoenix's Courtroom of the Future*, in *AM. LAW.* at 4 (Technology Supp. 1991).

84. Some commentators have stated that a lengthy trial is, in and of itself, an indicia of complex litigation. See *JUDICIAL ADMINISTRATION STANDARDS*, *supra* note 21, § 19(c) (noting that complex litigation may involve “extended trial times”); Resnik, *supra* note 12, at 511 (stating that the “Big Case” holds “the prospect of a lengthy trial” in addition to months of discovery); Rubin, *Complex Limitation*, *supra* note 29, at 1396 (regarding any trial exceeding five days as complex). Far more prevalent, however, are commentators who do not find a long trial to be complex per se, but instead to be a harbinger of jury comprehension problems. As trials become extended, jurors’ memories can fade, and well-educated, employed persons are less willing to serve on the jury. See *infra* note 85 and accompanying text.

It is interesting to note once again how these different perceptions of complexity lead to different solutions. Extensive use of issue-narrowing and bifurcation techniques adequately addresses the problem of length, whereas interim instructions and argument often are sufficient to address the problem of fading memory.

the length of trial might cause highly competent jurors to be unwilling to participate or might dim the memory of early, important testimony; the law (and consequently the instructions) might be inaccessible to lay people; or the vast array of evidence on the claims and crossclaims might defy the decisionmaker's ability to organize and consider issues logically.⁸⁵ Whatever the precise cause, the definition of trial complexity that emerges is "any set of circumstances which singly or in combination render [sic] a jury unable to decide in [a] rational manner."⁸⁶ Adjudication instead becomes "an arbitrary process based on speculation."⁸⁷ A wide array of proposals designed to close the gap between the evidence and its rational comprehension have been advocated, including allowing jurors to take notes,⁸⁸ permitting interim instructions and argument to the jury,⁸⁹ limiting trial to discrete issues or parties,⁹⁰ using court-appointed experts or masters,⁹¹ trying the case before a blue-ribbon

85. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1073-75 (3d Cir. 1980); *In re Corrugated Container Antitrust Litig.*, 1981-1 Trade Cas. (CCH) ¶ 64,114, at ¶ 76,702 (S.D. Tex.), *aff'd*, 659 F.2d 1337 (5th Cir. 1981); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976); AUSTIN, *supra* note 14, at 6-7, 80-104; Warren Burger, *Thinking the Unthinkable*, 31 Loy. L. Rev. 205, 210-11 (1985); Kirkham, *Good Intentions*, *supra* note 14, at 208; Luneburg & Nordenburg, *supra* note 50, at 942-50; Montgomery Kersten, Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99 (1979); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155, 1157-58 (1980); Note, *supra* note 30, at 906-11. For a more general discussion of juries' inability to understand instructions, see Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988).

86. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1079.

87. See Note, *supra* note 30, at 910. Speculative and irrational resolution can occur in one of two forms. First, the jury simply might be unable to remember or understand the evidence, and thus need to resort to guessing to resolve the case. Second, massive information and lay decisionmaking might dictate a trial strategy that forces parties to sacrifice meritorious but confusing claims. Just as serious political debate cannot occur in thirty-second sound bites, the intricacies of a case often cannot be packaged in a manner easily digestible by six persons. Although this problem inheres in all trial advocacy, complex cases risk a far greater factual myopia—far more dissonance between actual reality and courtroom re-enactment. This second aspect of irrational resolution creates a result as unrelated to the merits of a case as a verdict based on a guess.

88. AUSTIN, *supra* note 14, at 103; MANUAL, *supra* note 13, § 22.42; SCHWARZER, *supra* note 54, § 7-2(B)(7); Kersten, *supra* note 85, at 117-18.

89. See EXPEDITING ANTITRUST CASES, *supra* note 54, at 136-37; MANUAL, *supra* note 13, §§ 22.34, 22.431-432; SCHWARZER, *supra* note 54, § 7-2(c).

90. E.g., EXPEDITING ANTITRUST CASES, *supra* note 54, at 137; MANUAL, *supra* note 13, § 21.33; SCHWARZER, *supra* note 54, § 2-3(B)(4); Mullenix, *supra* note 69. Subject only to arguable constitutional restraints, see *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989), the Federal Rules of Civil Procedure allow for the separate trial of issues, FED. R. CIV. P. 42(b). Of course, when separate trials will not result in a more sensible resolution, the court is under no obligation to separate issues or parties. *United States v. IBM*, 60 F.R.D. 654 (S.D.N.Y. 1973); *Myers v. Celotex Corp.*, 594 A.2d 1248 (Md. Ct. Spec. App. 1991), *cert. denied*, 600 A.2d 418 (Md. 1992).

91. Courts have the power to appoint experts under Rule 706 of the Federal Rules of Evidence and comparable state provisions. FED. R. EVID. 706; see, e.g., *Az. R. EVID.* 706; *In re Swine Flu Immunization Prods. Liab. Litig.*, 495 F. Supp. 1185 (W.D. Okla. 1980) (appointing experts in non-jury case); COMMISSION ON MASS TORTS, *supra* note 14,

jury,⁹² or—most drastically—eliminating the jury.⁹³

Like pretrial complexity—which concerns the difficulties lawyers have in garnering, organizing, and appreciating the legal significance of information—the first aspect of trial complexity is quintessential lawyer's work. The other aspect of trial complexity, however, shifts the focus from the difficulties of the lawyer to those of the factfinder, who cannot comprehend the evidence, arguments, and instructions. In this latter aspect of trial complexity, the judge and jury become key players, and ultimately inject a new concern into the problem of complexity: difficulty in achieving a principled resolution of a case through the application of facts to existing law.⁹⁴

at 62-63; MANUAL, *supra* note 13, § 21.51; E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 501-05 (1989); Mullenix, *supra* note 69, at 545-50; Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991); cf. Kaufman v. Edelstein, 539 F.2d 811 (2d Cir. 1976) (discussing propriety of bench subpoenas issued against expert unwilling to testify for either party).

The power to appoint masters derives from Rule 53 of the Federal Rules of Civil Procedure and comparable state provisions. FED. R. CIV. P. 53; see, e.g., AZ. R. CIV. P. 53. For commentary generally favorable to the use of masters in complex cases, see RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 224-26; BRAZIL ET AL., *supra* note 14; MANUAL, *supra* note 13, § 21.52; Brazil, *supra* note 15; Kersten, *supra* note 85, at 116-17; McGovern, *supra* note 20; McGovern, *supra* note 15; Mullenix, *supra* note 69, at 540-45; Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). The court's power to appoint masters in complex trials is not unlimited, see *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957), and can be criticized for its ad hoc approach to the problems of complex litigation, see Silberman, *supra* note 12.

92. See, e.g., Elliott, *supra* note 91, at 505; Luneburg & Nordenburg, *supra* note 50; Note, *supra* note 85; cf. *In re Richardson-Merrill, Inc. "Bendectin" Prods. Liab. Litig.*, 624 F. Supp. 1212, 1217 (S.D. Ohio 1985) (discussing option of blue-ribbon jury with counsel), *aff'd*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

93. A great deal of attention has been paid to the authority and wisdom of suspending jury trial in complex cases, with cases and commentary generally supporting suspension in some situations. See, e.g., *In re Japanese Elec. Prods. Litig.*, 631 F.2d 1069 (3d Cir. 1980); ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978), *aff'd on other grounds sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); Bernstein v. Universal Pictures, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976); Devlin, *supra* note 16; Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CAL. L. REV. 1 (1981); Douglas W. Ell, Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978); King, *supra* note 50; Note, *supra* note 30. There is a strong minority view. See, e.g., *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); Arnold, *supra* note 50; Blecher & Daniels, *supra* note 50; Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977); Lempert, *supra* note 16; Huttner, *supra* note 50. See generally Symposium, *The Jury in Complex Litigation*, 65 JUDICATURE 393 (1982) (discussing the use of a jury in complex litigation). When the factfinder is a judge who likewise is unable to resolve the dispute rationally, the logical disposition of the case would be to dismiss it. The literature generally is silent on the circumstances under which this result might be necessary. See EXPEDITING ANTITRUST CASES, *supra* note 54, at 135 (comments of Judge Higginbotham); cf. SCHWARZER, *supra* note 54, § 7-2(A) (noting that "judges are not necessarily better prepared to resolve unaided the questions complex trials raise" and that "the less disciplined presentation of the case by counsel in a bench trial can compound the difficulty of the judge's task").

94. As the Third Circuit observed:

The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.

3. Complexity in the Remedy

A third procedural feature that has been used to define complex litigation is difficulty in the implementation or administration of a remedy. For instance, the *Handbook* singled out for special treatment cases either involving "an ad damnum of \$1,000,000 or more; [or] involving [a] request for injunctive relief affecting the operations of a large business entity."⁹⁵ The *Handbook's* direct descendent, the *Manual for Complex and Multidistrict Litigation*, eschewed the former description, but retained the latter description concerning injunctive relief.⁹⁶ Numerous authors have noted that a case in which the relief might have consequences on the national economy is complex;⁹⁷ Francis McGovern has discussed the administrative problems associated with the implementation of settlements in the Dalkon Shield case;⁹⁸ and Peter Schuck has detailed the opening rounds of remedial problems in the *Agent Orange* litigation.⁹⁹

Curiously, however, most of the literature specifically addressing the subject of complex litigation has ignored the problem of

In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1079 (3d Cir. 1980); see also Note, *supra* note 30, at 906-09. I develop a somewhat more refined description of "principled resolution" later in the Article. See *infra* note 246 and accompanying text.

95. *Handbook*, *supra* note 14, at 375, 434; see also MARCUS & SHERMAN, *supra* note 24, at 2 (stating that "the amount of money involved may prompt litigation efforts of such dimension that a case that would otherwise not be complex becomes complex").

96. MCML, *supra* note 14, § 0.22.

97. See *supra* note 29.

98. McGovern, *supra* note 20; see also *In re A.H. Robins Co.*, 880 F.2d 709 (4th. Cir.), cert. denied, 493 U.S. 959 (1989) (affirming class certification and settlement orders); BACIGAL, *supra* note 14 (detailing history of the Dalkon Shield litigation and settlement).

99. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), subsequent proceedings, 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in part and rev'd in part*, 818 F.2d 179 (2d Cir. 1987); SCHUCK, *supra* note 14; Schuck, *supra* note 22.

remedy. Although the literature on the problems of remedial implementation is vast,¹⁰⁰ and the cases struggling with the administration of remedies are legion,¹⁰¹ neither the *Manual for Complex and Multidistrict Litigation* nor the *Manual for Complex Litigation* discusses the issues involved in the implementation of a settlement, consent decree, or judgment.¹⁰² Marcus and Sherman's casebook largely ignores the subject.¹⁰³ The American Law Institute's *Complex Litigation Project* notes only in passing that "the administration of certain 'complex' forms of relief" is a "case management problem[]" often associated with complex litigation."¹⁰⁴

Although these practical "matters of trial administration"¹⁰⁵ might not be as conceptually interesting as the shaping and trial of

100. See, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 1-58, 528-827 (2d ed. 1984); M. KAY HARRIS & DUDLEY P. SPILLER, JR., *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* (1977); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); LIMITS OF JUSTICE (Howard I. Kalodner & James J. Fishman eds., 1978); RAYMOND WOLTERS, *THE BURDEN OF BROWN* (1984); DETRICK A. BELL, JR., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); CURTIS J. BERGER, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); ABRAM CHAYES, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); BARRY FRIEDMAN, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992); DONALD L. HOROWITZ, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; ROBERT F. NAGEL, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); SUSAN P. STURM, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991) [hereinafter *Sturm, Public Law Remedies*]; SUSAN P. STURM, *The Rhode Island Prison Decree*, excerpted in LOUISELL ET AL., *supra* note 46, at 1243 [hereinafter *Sturm, The Rhode Island Prison Decree*]; Special Project, *supra* note 91; DIANE S. KAPLAN & RICHARD M. ZUCKERMAN, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) [hereinafter Note, *The Wyatt Case*]; Little, *supra* note 50; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977). See generally FISS & RENDLEMAN, *supra*, at 827-30 (containing a bibliography of literature concerning structural injunctions).

101. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Spallone v. United States*, 493 U.S. 265 (1990); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

102. The *Manual for Complex and Multidistrict Litigation* suggested techniques to resolve only pretrial complexity, although its recommendations for the final pretrial conference raised certain issues concerning the trial itself. See MCML, *supra* note 14, §§ 4.0-13. The MCML never discusses post-settlement or post-trial problems. The *Manual for Complex Litigation* includes techniques that judges might use to settle cases and to obtain a meaningful jury verdict, see MANUAL, *supra* note 13, §§ 22.45, 23.1, but likewise does not consider remedial issues involved in administration of a settlement or judgment.

103. There is a short section concerning judicial control of class action settlements. MARCUS & SHERMAN, *supra* note 24, at 507-38. The materials concern only the initial responsibilities of assuring notice and evaluating the negotiated settlement under the proper legal criteria; they do not delve into the problems of implementation or administration. Similarly, there are brief materials on the judge's role in encouraging settlement, *id.* at 674-89; and the award of attorney's fees, *id.* at 771-807. The authors spend less than seven pages on the specific problem of remedial implementation and compliance. *Id.* at 765-71.

104. COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 2-3.

105. Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953).

complex claims, the consideration of "remedial complexity" is absolutely critical to understanding the problem of complex litigation. Even when a case ultimately does not result in the creation of a remedy, potential difficulties in remedial compliance can dictate pretrial and trial strategies.¹⁰⁶ Moreover, should a remedy be declared, the remedial phase in complex cases often lasts far longer, and is far more costly in terms of judicial and attorney resources, than the high-profile pre-remedial phase.¹⁰⁷ Unless interested in attaining only a moral victory, a lawyer must consider—from the very first moment a complex case enters the office—the real-world problems that a remedy might create.

Our present experience suggests that complex remedial issues take one of two forms. The first is difficulty in determining the scope of the remedy in the face of an amorphous declaration of entitlement. A judgment stating that a school system unconstitutionally has segregated its students or an admission by a company that it has wrongfully exposed residents to a hazardous chemical does little to define the nature of the remedy. Although almost all lawsuits involve some uncertainty about the extent of the remedy, remedial complexity involves either inordinate expense in obtaining and managing the information needed to choose a proper remedy, or the necessity of solomonic, creative, and somewhat unprincipled solutions to intractable remedial questions.¹⁰⁸

The other form of remedial complexity concerns its administration. Even when the scope of the remedy has been declared, it may be costly to identify the claimants who meet established criteria, or

106. The defendant faced with massive liability to a great number of persons—all of whom want a first bite at the defendant's limited resources—will often resist joinder. See Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 LAW & CONTEMP. PROBS. 227, 231-33 (1991). Courts also might consider problems of remedial complexity in deciding whether to allow joinder. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1016-18 (2d Cir. 1973) (holding that difficulties in distribution of a potential recovery made a Rule 23(b)(3) class action unmanageable), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). Similarly, remedial problems create an understandable incentive for courts to decide liability issues in an initial trial, with the hope for a negotiated settlement in the event of a defendant's loss at trial. See MANUAL, *supra* note 13, § 21.632.

107. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991); WOLTERS, *supra* note 100 (describing 30 years of efforts to desegregate the four school districts involved in *Brown v. Board of Education*); McGovern, *supra* note 20, at 686-88 (describing early results of Dalkon Shield remedial plan).

108. See SCHUCK, *supra* note 14, at 143-91; Berger, *supra* note 100; Chayes, *supra* note 100, at 1296-303; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44-56 (1979); see also Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 626 n.1 (1980) (quoting L. Sargentich, *Complex Enforcement* 23, 29 (Mar. 1978) (unpublished manuscript, on file with the Harvard Law School Library)) (defining complex enforcement remedies to be those remedies that are "complicated, detailed, prolix" and also involve a "unified system of prescriptions").

to distribute funds to those claimants.¹⁰⁹ The possibility of non-compliance might require the ongoing involvement of judges and quasi-judicial officials.¹¹⁰ Just as the problems involved in determining the scope of the remedy require the court to function as a legislature, remedial administration transforms the court into a para-executive agency—complete with staff and enforcement capabilities.¹¹¹

At first blush, the relationship between remedial complexity and pretrial or trial complexity is tenuous. Remedial complexity may involve the same information management problems that plague pretrial and trial complexity, but these problems do not arise inevitably.¹¹² Unlike pretrial or trial complexity, remedial complexity focuses on the difficulties faced by the parties and interested nonparties in complying with a judicial decision, rather than on the difficulties of lawyers and jurors. If some fundamental theme unites these three types of complexity, it is not readily apparent.

4. Complexity Caused by the Number of Parties

A final feature that frequently emerges in procedural definitions of complexity is the existence of multiple parties. The single label of “numerous parties,” however, masks two distinct ways in which the commentary has related multiple parties to the issue of complexity. The first, and more typical, way is to assert that the sheer number of parties renders a case complex. The Western District of Kentucky, for example, included in its definition of complex litigation all class actions, all derivative actions, and all other cases “having more than five defendants, more than five counterclaim defendants, or more than five third-party defendants.”¹¹³ Similar descriptions look either for significant numbers of parties in a suit or for a procedural feature—such as a class action, a derivative suit, or multidistrict litigation—that serves as an indicator of numerous

109. See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 754-62 (E. & S.D.N.Y. 1991); *In re “Agent Orange” Prod. Liab. Litig.*, 689 F. Supp. 1250, 1257-60 (E.D.N.Y. 1988); *In re Corrugated Container Antitrust Litig.*, 1981-1 Trade Cas. (CCH) ¶ 64,114, at ¶ 76,718 (S.D. Tex.) (approving use of “share-and-share-alike” formula for distribution of antitrust settlement proceeds due to the “overwhelming” complexities and costs of developing an accurate weighted-distribution formula), *aff’d*, 659 F.2d 1337 (5th Cir. 1981).

110. See, e.g., Special Project, *supra* note 91, at 821-37; cf. *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991) (detailing numerous contempt and monitoring issues that arose after entry of consent decree in prison litigation).

111. See *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 F.2d 1042 (1983); *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972); *supra* note 108.

112. For example, a court may determine that the appropriate remedy for a segregated school system is busing, but either the trenchant opposition of parents, administrators, and legislators or their refusal to take the initiative may make implementation of the remedy a dicey matter. The problem here is not managing information; it is wielding power effectively against private and bureaucratic decisionmakers with significant residual authority. See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 93-94 (1979); Robert A. Katzmann, Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980).

113. W.D. Ky. R. 19(a)(5) (superseded July 1, 1987) (copy on file with author).

parties.¹¹⁴

Standing alone, however, the number of persons cannot serve as a useful description of complexity. Consider a disappointed offeree who files a securities class action because of a material misrepresentation in a securities offering on behalf of millions of other, similarly situated persons who never bought stock. Because securities fraud can be maintained only by buyers and sellers of stock,¹¹⁵ the existence of a class action magically does not transform this legally simple case into a complex one. A typical class action is complex, therefore, not because of numbers per se; complexity is rather a function of the additional information and the consequent problems of pretrial, trial, or remedial complexity that great numbers often generate. Thus, like substance-based complexity, "multiple-party complexity" is not a separate type of complexity, but rather a fairly accurate barometer for the presence of other problems of complexity.¹¹⁶

There is also a second, and very different, way in which complexity and multiple parties have been linked. Best articulated by the American Law Institute's *Complex Litigation Project* (hereinafter *Project*), this definition focuses on repetitive litigation involving the same or similar factual and legal claims:

As used in this project, . . . "complex litigation" refers exclusively to multiparty, multiforum litigation; it is characterized by related claims dispersed in several forums and often over long periods of time [C]omplex cases share two defining characteristics: They all involve duplicative relitigation of identical or nearly identical issues, and consequently, they all involve the enormous expenditure of resources.¹¹⁷

Under this description of complexity, the issues in any given case do

114. See, e.g., D. ARIZ. R. 36 (identifying multidistrict litigation as a "probable complex case"); N.D. OHIO RULE FOR COMPLEX LITIGATION 2.01(d); OHIO COMMON PLEAS SUPP. R. 8.01(B)(1); COMMISSION ON MASS TORTS, *supra* note 14, at 6 (torts with damages exceeding \$50,000 by "at least one hundred persons"); RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 211; MARCUS ET AL., *supra* note 46, at 401; JUDICIAL ADMINISTRATION STANDARDS, *supra* note 21, § 19(c); Hondorf, *supra* note 15, at 545 ("enormous number of persons"); Kendig, *supra* note 24, at 705-06; Thomas J. Wylie, *Use of the Manual for Complex Litigation—The Defendant's Viewpoint*, 15 F. 163, 163 (1979). See also authorities cited *supra* note 24.

115. See, e.g., *Holmes v. Security Investors Protection Corp.*, 112 S. Ct. 1311 (1992); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

116. Several commentators have noted this relationship between multiple parties and other first-order procedural complexities. See, e.g., LOUISELL ET AL., *supra* note 46, at 1223 (observing that "[c]omplex cases can be identified by the fact that they involve large stakes, broad-ranging discovery, and sometimes multiple parties"); Mullenix, *supra* note 69, at 525; Resnik, *supra* note 12, at 509; Schuck, *supra* note 22, at 338 n.7.

117. COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 11-12. For other commentators adopting the same description, see Kendig, *supra* note 24, at 708; Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41, 41 n.2 (1991); Mullenix, *Complex Litigation*, *supra* note 16, at 174 n.15;

not necessarily lead to intractable pretrial, trial, or remedial problems; rather, complexity develops from the burden that the sheer volume of cases imposes on the court system.

Like so many other definitions, however, the *Project's* definition fails to capture the right set of cases. First, the definition seems underinclusive. There is simply no reason to conclude that complex cases must be both multiparty *and* multiforum. For instance, two parties may engage in wasteful and costly re-litigation of identical issues in more than one forum,¹¹⁸ whereas hundreds of parties may litigate their related claims in separate lawsuits within a single forum.¹¹⁹ Multiparty and multiforum litigation certainly leads to duplication and expense, but so do two-party multiforum and multiparty single-forum litigation.

Conversely, the definition seems overinclusive. Even simple cases can be multiparty and multiforum. For example, *Finley v. United States*¹²⁰ involved multiple parties—one plaintiff and three defendants. After the Supreme Court's decision, the case was also multiforum—the case against the United States proceeded in federal court, while a case against the remaining defendants lay in state court.¹²¹ The entire case, however, turned on a relatively straightforward question: Who, if anyone, was negligent in failing to maintain a runway light.¹²² *Finley* is hardly the material of which complex cases are made,¹²³ but it is complex nonetheless under the *Project's* definition.¹²⁴

In defense of the *Project*, a case such as *Finley* might be screened out of the definition of complexity not by the formal requirements of a multiparty, multiforum dispute, but rather by the “two defining characteristics”—duplicative litigation and enormity of resources expended—that undergird the definition. Even these characteristics, however, may result in the erroneous classification of cases.

Rowe & Sibley, *supra* note 16, at 10. The *Manual for Complex Litigation* likewise recognizes, and briefly addresses, the problem of related-case litigation. *MANUAL*, *supra* note 13, § 31.

118. See, e.g., *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Kerotest Mfg. v. C-0-Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Kahn v. General Motors Corp.*, 889 F.2d 1078 (Fed. Cir. 1989); *Semmes Motors v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970).

119. For example, unless another state with an “open courts” provision offered distinct procedural or substantive advantages, a mass environmental exposure in which all plaintiffs and all defendants are residents of a single state and in which all claims arose in that state most likely would be resolved exclusively by the courts of the state. See *Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

120. 490 U.S. 545 (1989).

121. See *id.* at 555.

122. See *id.* at 546.

123. The case seemingly presented no problems of vast discovery, jury comprehension, or remedial implementation. For other acknowledgements that run-of-the-mill multiparty, multistate cases involving duplicative litigation of issues are not necessarily complex, see Freer, *supra* note 16 at 850-51; Rowe & Sibley, *supra* note 16, at 23, 30. In 1990, Congress rejected the Court's result in *Finley* and created, in many instances, a grant of supplemental jurisdiction over parties whose claims are related to claims properly in federal court. See 28 U.S.C.A. § 1367 (West Supp. 1991).

124. See text accompanying *supra* note 117.

The latter criterion simply is not useful. Does "enormity" refer to an amount relative to potential recovery? If so, then a simple multiforum car accident might be complex, whereas the asbestos litigation—in which several billion dollars have been spent in an effort to stave off claims that are orders of higher magnitude¹²⁵—would not be. Alternatively, is "enormity" an absolute number, say \$500,000, spent on the proof of identical issues in separate cases? If so, then the Project should identify the threshold level, and defend it against the inevitable criticism of arbitrariness.

The first "defining characteristic" of complex litigation—the duplicative litigation of issues—also is not helpful sufficiently in separating the routine from the complex. The amount of factual and legal overlap needed to make the re-litigation of issues "duplicative" is unclear. Would a medical malpractice case be complex if it arose from the use of a surgical procedure identical to the surgical procedure involved in unrelated actions against other physicians? Do two unrelated employment discrimination cases become complex when they raise similar issues on the uses and limitations of statistical testimony? The resources devoted to re-litigation of these and a myriad of other issues in "unrelated" cases far surpass the resources spent on the re-litigation of issues in related "multiparty, multiforum" cases.¹²⁶ Even though the Project's "defining characteristics" suggest that transactionally unrelated cases are complex, the Project nonetheless limits its definition to "related claims."¹²⁷

125. One estimate puts the total legal fees in asbestos cases as of 1986 at well over one billion dollars. David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up, and Litigation*, 99 HARV. L. REV. 1693, 1694 (1986) (reviewing PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985)); see also REPORT ON ASBESTOS LITIGATION, *supra* note 14, at 13 (noting that one asbestos defendant spent \$119.7 million on legal fees and litigation costs during 1989). At the same time, however, projected wage losses (exclusive of pain and suffering and punitive damages) and medical expenses from asbestos litigation were projected to exceed thirty to forty billion dollars, with additional billions in property damage; in fact, Johns Manville estimated claims against it alone to be in excess of fifty billion dollars. Rosenberg, *supra*, at 1693 & n.6.

126. A court may not use collateral estoppel to prevent the re-litigation of similar factual issues in unrelated cases. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (allowing use of collateral estoppel only against a party bound by a prior judgment); COMPLEX LITIGATION PROJECT Draft No. 2, *supra* note 16, § 5.05 (arguing for extension of collateral estoppel only to those persons with related claims who had knowledge of prior suit and an opportunity to participate in it). Until finally resolved by a court of highest authority, the re-litigation of legally identical issues also is likely to occur among factually unrelated cases. Consider, for instance, the enormous sums spent thus far to litigate the meaning of one single term—"defect"—in products liability cases in each of the fifty states. Although it is impossible to estimate the total amount spent proving the same facts or arguing for the same legal standard in unrelated cases, it is safe to say that the amount far exceeds the legal fees generated in the complex cases that meet the Complex Litigation Project's definition.

127. COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 11. Subsequently, however, the Project recommended that the federal courts be given the power to transfer and consolidate federal cases that "involve one or more common questions of fact or

The failure of the *Project* to develop a comprehensive definition stems in part from its deliberate modesty. The *Project* candidly admits that multiparty, multiforum complexity is an inadequate description; complexity also can arise from substantive rules, from the scope and management of discovery and trial, from the administration of "certain 'complex' forms of relief," and from protraction.¹²⁸ The consequence of the decision not to seek a global definition, however, is the creation of less-than-global solutions. As the *Project* recognizes, the obvious remedy for multiparty, multiforum complexity is the abolition of existing impediments to consolidation found in jurisdictional, venue, and party joinder rules.¹²⁹ The huge cases created by assembling all the parties in one forum, however, might generate the pretrial, trial, and remedial difficulties often associated with multiparty suits.¹³⁰ The *Project* concedes as much, and consequently provides the court with discretion to deny joinder in the event of undue problems of pretrial or trial complexity.¹³¹

This recognition that other problems of complex litigation are different than—and may even trump—the specific problem of multiparty, multiforum litigation highlights the dissonance between the *Project's* definition of complex litigation and the other procedural definitions we have examined. Systemic burdens on the court system appear at best to be a distant cousin of the individual, case-specific problems of pretrial, trial, and remedial complexity. Viewed from the narrow perspective of individual case adjudication, it is difficult to see how the sum total of cases can be complex when no individual case is complex. Indeed, the lack of any evident relationship between the *Project's* "re-litigation complexity" and the other types of procedural complexity seemingly means one of two things: that re-litigation complexity is in fact a spurious form of complexity; or that no common thread runs through all of complex litigation. Arguing that "[c]omplex litigation" has no uniform definition," the *Complex Litigation Project* adopts the latter view.¹³² The question remains whether there might exist a third possibility: that re-litigation

law." *Id.* § 3.01. The extent to which the *Project* intends the power to apply to unrelated cases is unclear; it seems to contemplate some overlap of legal claims in order for there to be consolidation on factual issues; and there must be factual overlap in order to consolidate on legal issues. *Id.* § 3.01, at 56-58. The *Project's* later proposals to allow removal into federal court of state cases and preclusion of nonlitigators both require that the removed or precluded claims arise from "the same transaction, occurrence, or series of transactions or occurrences" as an existing federal case. COMPLEX LITIGATION PROJECT Draft No. 2, *supra* note 16, §§ 5.01(a), 5.05(a)(1). Thus, the *Project* contemplates no sweeping powers to dispose of similar factual and legal claims in unrelated cases.

128. See COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 2-3.

129. See AMERICAN LAW INST., COMPLEX LITIGATION PROJECT (Tent. Draft No. 3) 1-2 (1992) [hereinafter COMPLEX LITIGATION PROJECT Draft No. 3]. For other proposals to eliminate the restrictions that frustrate joinder of related cases, see *supra* note 16.

130. See *supra* note 116 and accompanying text; see also *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971) (certifying some classes in antitrust cases but denying certification of another class that was so large as to be unmanageable).

131. COMPLEX LITIGATION PROJECT Draft No. 3, *supra* note 129, at 235-36, 241-43; COMPLEX LITIGATION PROJECT Draft No. 2, *supra* note 16, §§ 5.01, 5.03, 5.05; COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, § 3.01(b) & cmt. d.

132. See COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 11.

complexity is related to other types of procedural complexity in ways that the commentary on procedural complexity has not perceived.

5. "Laundry List" Definitions

Before considering the various efforts to develop an inclusive definition, a final observation about procedural and substance-based definitions should be made. Many writers—perhaps sensitive to the problem of underinclusion—have developed definitions that include more than one form of procedural or substantive complexity. For example, in its local rules, the United States District Court for the Northern District of Ohio has developed a list of complex cases that mirrors the list developed by the *Handbook* in 1960.¹³³ Ohio's Court of Common Pleas has developed a somewhat different list.¹³⁴ Other courts and commentators—many of whom were discussed in connection with a particular aspect of complexity—have also developed lists.¹³⁵

With the exception of underinclusion, "laundry list" definitions are subject to the criticisms already discussed. The flaws in using substantive theory to define complex litigation are not removed simply by tacking the "complex" legal theories onto a list containing the various types of procedural complexity. "Laundry list" definitions run a great risk of overinclusion—improperly designated cases under any category on the list will now be deemed complex. Finally, these lists smack of a certain arbitrariness; without any apparent relationship among the various elements, the reason for their inclusion on a single list is unclear. The lack of uniformity among the

133. A comparison of NORTHERN DISTRICT OF OHIO RULE FOR COMPLEX LITIGATION 2.01 with the *Handbook*, *supra* note 14, at 375, reveals that both lists include antitrust cases; cases requesting relief in excess of \$1,000,000; cases requesting injunctive relief affecting a major business entity; cases involving many parties or an association of large membership; and patent cases involving "an unusual multiplicity or complexity of issues." Other than minor stylistic and semantic differences, the only disparity between the lists is the Northern District of Ohio's inclusion of an additional catch-all category of complex cases: a suit that "may otherwise be a protracted case." N.D. OHIO RULE FOR COMPLEX LITIGATION 2.01(f).

134. The factors used to identify complex litigation in Ohio's Courts of Common Pleas are the number of parties; the presence of a class action; the existence of a products liability claim; the presence of "other related cases involving unusual multiplicity or complexity of factual or legal issues"; the extent of discovery; and the "[n]umber or availability of parties and witnesses for trial." OHIO COMMON PLEAS SUPP. R. 8.01(B).

135. See, e.g., W.D. KY. R. 19(a) (superseded July 1, 1987) (copy on file with the author); RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 211; MARCUS & SHERMAN, *supra* note 24, at 1-2; MARCUS ET AL., *supra* note 46, at 401; JUDICIAL ADMINISTRATION STANDARDS, *supra* note 21, § 19(c); Kendig, *supra* note 24, at 703-04; Rubin, *Complex Limitation*, *supra* note 29, at 1396-97; Schuck, *supra* note 22, at 338 n.7; Andrew J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN'S L. REV. 493 (1988); Steckler, *supra* note 54, at 524; Wylie, *supra* note 114, at 163.

D. Descriptive Definitions of Complexity

A few commentators have sought to develop an inclusive description of the criteria that every complex case must meet. These commentators have proceeded in one of two fashions: either by observing cases that are considered complex in order to find common features, or by developing a normative model of adjudication from which certain cases—the “complex” cases—deviate in theory. The succeeding Section discusses these latter, normative definitions of complexity; this Section examines three positive descriptions of complex litigation.

1. The Generic Definition of the Manual for Complex and Multidistrict Litigation

The first attempt at a catholic description of complex litigation comes from the *Manual for Complex and Multidistrict Litigation*: “‘Complex litigation,’ as used in this Manual, includes one . . . or more related cases which present unusual problems *and* which require extraordinary treatment, including but not limited to the cases designated as ‘protracted’ and ‘big.’”¹³⁷ Because neither “unusual problems” nor “extraordinary treatment” is a self-defining term, this description has evident difficulties. A reading of the treatise gives at least some sense of the meaning of the terms. The problems that are considered “unusual” include pretrial complexity, related cases (re-litigation complexity), and some aspects of trial complexity.¹³⁸ “Extraordinary treatment” is the use of case management principles that include, among other things, consolidation, bifurcation, and phased discovery.¹³⁹

Although ambiguous, this definition is significant. For the first time, a source on complex litigation has made explicit the link which had been made implicitly by many of the “nondefiners”: the existence of a necessary relationship between complexity (“unusual problems”) and case management (“extraordinary treatment”).¹⁴⁰ Unfortunately, the *Manual for Complex and Multidistrict Litigation* fails to explore the reason that this link is necessary. Consequently, this description of complexity has the same problem of arbitrariness, vagueness, and breadth that plagues substantive and laundry-list

136. No two laundry lists are identical, nor is any feature common to all of the lists.

137. MCML, *supra* note 14, § 0.11 (emphasis added). The United States District Court for the Western District of Washington employs the MCML definition. W.D. WASH. R. 102.

138. See MCML, *supra* note 14, §§ 0.3-3.53 (describing pretrial difficulties raised in complex civil cases); *id.* §§ 4.1-13 (discussing problems of trial which should be addressed at a final pretrial conference or during trial); *id.* §§ 5.1-5 (examining problems of related civil cases).

139. See MCML, *supra* note 14, §§ 0.3-5.5.

140. See *supra* notes 34-51 and accompanying text.

definitions of complexity.¹⁴¹ The authors seem tacitly to acknowledge these deficiencies—three sections later they offer a laundry list of the types of cases that may require “special treatment.”¹⁴²

2. *Schwarzer's Criteria of Principled Resolution*

The next universal definition of complexity also proves insufficient, but again holds the promise of deeper insight. In *Managing Antitrust and Other Complex Litigation*, Judge William Schwarzer outlines four factors that serve as the indicia of complexity: (1) “complicated and unfamiliar practices, developed over a period of years, requiring extensive oral and documentary evidence on both sides”; (2) “proof of a pattern of conduct consisting of numerous seemingly unrelated acts or events”; (3) “rules of law stated with constitution-like generality, leaving the courts with little reliable guidance for judging the relevance of evidence and placing policy-making responsibility on the trier of fact”; and (4) “technical and economic issues foreign to [the] experience” of courts and juries.¹⁴³ According to Judge Schwarzer, only the latter two criteria are necessarily present in complex cases; the first criterion, however, “often” occurs, and the second one “may” occur.¹⁴⁴

Much of this definition is familiar. The “constitution-like generality” of the law and the massive evidence bearing on this law correspond to the common threads uniting complex substantive theories.¹⁴⁵ The bulk of evidence often amassed in these cases calls to mind the “voluminous” discovery that gives rise to pretrial complexity.¹⁴⁶ The problem of juror and judicial comprehension, as well as the related problems of trial proof, match aspects of both pretrial and trial complexity.¹⁴⁷

Nonetheless, some key ingredients are missing. Problems of complicated factual discovery and proof are described as possible—but not essential—attributes of complex litigation. Problems of complexity in the remedial phase are never mentioned; nor, for the most part, are the strains that related cases put on the court

141. See *supra* notes 62-67, 133-36 and accompanying text.

142. MCML, *supra* note 14, § 0.22. As mentioned above, the successor to the MCML, the *Manual for Complex Litigation*, abandoned the search for a universal definition altogether. See *supra* notes 34-45 and accompanying text.

143. SCHWARZER, *supra* note 54, § 1-1. The four criteria Schwarzer develops in this treatise largely systematize and generalize the reasons of the Attorney General's Antitrust Commission that antitrust cases are usually complex. See REPORT ON ANTITRUST LAWS AND PROCEDURES, *supra* note 14, at 521-22. In another writing, Schwarzer declines to define complex litigation. See William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 575-76 (1991).

144. SCHWARZER, *supra* note 54, § 1-1.

145. See *supra* note 67 and accompanying text.

146. See *supra* notes 68-74 and accompanying text.

147. See *supra* notes 84-94 and accompanying text.

The description or omission of these ingredients can be defended in theory.¹⁴⁹ Schwarzer's essential criteria—ambiguous doctrine that gives little guidance and adds problems of comprehension of evidence—concern the problems of judges and jurors in resolving cases during the trial phase of a lawsuit. The theme uniting these criteria is a concern for rational deliberation and decision in an existing dispute. Because the presence of other suits or the administrative headaches of implementing a remedy do not directly threaten the roles of rational deliberation and decision assigned to the judge and jury in any given suit, re-litigation and remedial complexity are not inherent aspects of complexity. The same is true of pretrial complexity, which creates no threat to the decisionmaking functions of a judge or jury until the first day of trial. Of course, without a modicum of pretrial management, reasoned decisionmaking at trial might sometimes be impossible; in those cases, pretrial management preserves the rationality of later deliberation. Thus, although pretrial complexity and case management are often aspects of complex litigation, they are not necessarily present in every complex case.

This justification for Judge Schwarzer's definition creates, for the first time, a useful and universal "form," or definition, of complexity: Cases are "complex" when the existing rules of pretrial, trial, and substantive law make the principled deliberation of a dispute highly problematic. Indeed, this "form" provides the missing link—the need to assure rational deliberation of a pending dispute—that unites pretrial and trial complexity.¹⁵⁰ The same missing link explains the reason that complexity and case management are necessarily related: Judges must employ case management techniques when necessary to protect rational deliberation.¹⁵¹ In addition, this "form" provides the benchmark against which to test any solution to complex litigation: whether the solution advances the principled deliberation of a dispute.

This "form," however, has substantial problems. First, it proves too little: The narrow focus on rational deliberation in a single case fails to account for the observed problems of re-litigation complexity and remedial complexity, both of which are unrelated to judicial and juror decisionmaking in a pending lawsuit. Second, the "form" of rational deliberation proves too much. For example, the "constitution-like generality" of negligence law makes the rational deliberation of every malpractice case involving technical medical evidence

148. Schwarzer devotes a short chapter to the management of class actions. SCHWARZER, *supra* note 54, §§ 9-1 to -7. He does not, however, discuss its utility as a device for the consolidation of numerous pending or potential lawsuits.

149. I do not contend that Judge Schwarzer actually had this argument in mind when he developed the criteria for complexity. It is, however, a plausible explanation for his omission of certain aspects of procedural complexity.

150. See *supra* note 94 and accompanying text.

151. See *supra* notes 34-51 and accompanying text.

problematic. Finally, it is not at all clear that Schwarzer would accept this "form" as the guide for solutions to complex litigation. According to Schwarzer, "[m]anagement is a process, pragmatic rather than platonic," designed to achieve "the just, speedy and economical disposition of the litigation."¹⁵² When a conflict arises between the needs of economy and the goal of rational deliberation of individual disputes, Schwarzer recommends that a balance be struck among competing goals.¹⁵³ His willingness to sacrifice rational deliberation to efficiency strongly suggests that other principles not explicit in his four criteria enhance his definition of complex litigation.

3. *Chayes' Morphology*

A third description of complex litigation is Professor Abram Chayes' discussion of "public law" litigation.¹⁵⁴ According to Chayes, the role of the modern lawsuit—and consequently the role of the modern judge—has evolved during the past century. No longer are suits two-sided affairs in which the litigation process is party initiated and party controlled.¹⁵⁵ No longer is litigation focused retrospectively on private wrongs, where the violated right logically dictates the remedy and the effects of the remedy are confined to the participants.¹⁵⁶ No longer is the trial judge a passive arbiter, a disinterested umpire instructing the jury in legal principles deduced scientifically from existing appellate precedent.¹⁵⁷

Rather, Chayes argues, the nineteenth century's "private law" model of litigation is in the process of being supplanted by a new, "public law" model. Chayes proposes a "morphology," a list of "the crucial characteristics and assumptions," associated with this new litigation.¹⁵⁸ They are: (1) "the scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties"; (2) the party structure is not bilateral, "but sprawling and amorphous"; (3) the factual inquiry is "predictive and legislative"; (4) the relief is forward-looking, flexible, ad hoc, and significant to "many persons, including absentees"; (5) the remedy is negotiated; (6) the remedy's implementation requires continued judicial involvement; (7) the judge has significant responsibility for fact evaluation and case management; and (8) the controversy concerns "a grievance

152. SCHWARZER, *supra* note 54, § 1-1, at 8.

153. *Id.* at 8-9.

154. Chayes, *supra* note 100. A further explication of Chayes' public law theme can be found in Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

155. Chayes, *supra* note 100, at 1282, 1289-92.

156. *Id.* at 1292-96, 1298.

157. *Id.* at 1283, 1296-302.

158. *Id.* at 1302.

about the operation of public policy.”¹⁵⁹ In short, as the nature of disputes has become more “public,” the trial judge claims a larger role in the litigation at the expense of the parties, their attorneys, and the appellate courts.

Nowhere does Chayes claim that his morphology constitutes a definition of complex litigation.¹⁶⁰ Nonetheless, Chayes claims as examples of “public law” litigation the types of cases—such as securities fraud, antitrust, and desegregation litigation¹⁶¹—that are often identified by other writers as complex. Indeed, some commentators have treated Chayes as describing at least a rough outline of complex litigation.¹⁶²

Regardless of whether Chayes intended to develop a definition of complex litigation,¹⁶³ his contribution to its understanding is enormous. The empowered judge unites the seemingly disparate concepts of pretrial, trial, remedial, and re-litigation complexity. In each of these areas, the judge exceeds the strictures placed upon her by the traditional adversarial model. In all aspects of the litigation, she is no longer passive, but active; no longer above the fray, but the central figure in it. The reason for judicial activism is the political nature of the controversy. Faced with political branches and large business entities unwilling or unable to perform their legal obligations, the judge must assume certain powers in order to give broad effect to entitlements frequently unpopular among the established authorities in society.¹⁶⁴ Thus, complex cases seem to be wide-ranging, politically charged situations in which the judiciary’s need to effect justice does not allow the judge to respect the limited pretrial, trial, remedial, and joinder roles established for the court under the adversarial theory of umpireal judging.¹⁶⁵

159. *Id.*

160. Chayes occasionally uses terms such as “complex forms of ongoing relief,” “complex, ongoing regime of performance,” and “case of any complexity.” *Id.* at 1284, 1298. He also cites the 1973 version of the *Manual for Complex Litigation* in connection with a discussion of the problems created by the volume of material in complex litigation. *Id.* at 1298 n.77.

161. *Id.* at 1284. Other substantive categories mentioned by Chayes include employment discrimination, prisoner civil rights cases, bankruptcy and reorganizations, union governance litigation, consumer fraud, housing discrimination, electoral reappointment, and environmental management. *Id.* It is interesting to note that Chayes, having eschewed a formal definition of public law litigation, *see infra* note 163, nonetheless chooses to provide a descriptive list of substantive theories that meet his conception of “public law litigation.”

162. *See* LOUISELL ET AL., *supra* note 46, at 1203-08 (using excerpts from Chayes’ article in its introductory section of materials on complex litigation); MARCUS & SHERMAN, *supra* note 24, at 3-5 (same).

163. The use of the morphology as a measuring stick of complex litigation would probably strike Chayes as wrong-headed. He concedes a lack of interest in replacing old forms with new ones. He never worries about whether the judge’s role is legitimate in the narrow sense of exceeding the appropriate “form” of adjudication. “Public law” litigation exists, Chayes proclaims, regardless of whether it should exist in theory or not. Thus, formal analysis acts as more of a hindrance than a help, for it diverts attention from the important question—“Are judges effective when they participate in policy-making roles?”—to the more trivial question—“Should they participate in those roles?” *See* Chayes, *supra* note 100, at 1307-09, 1313-16.

164. *Id.* at 1304, 1314-16.

165. *See id.* at 1315-16. Geoffrey Hazard has recently described certain cases that

Nonetheless, Chayes' "definition" of complex litigation suffers from two critical defects. The first is that his analysis suggests virtually no limits on the political role of the judiciary, or presumably on the procedures that a court could implement in order to accomplish its goals. Except to the most strident advocates of judicial power, this lack of apparent limits should be unsettling. Second, "public law" litigation is unique not just because, as Chayes acknowledges, it thrusts judges into the realm of political discourse; it also is unique because, as Chayes fails to acknowledge, the increase in the judge's power occurs at the expense of other players who otherwise would have had a larger role in informing that discourse. Viewed from this perspective, Chayes' arguments for the legitimacy of the judicial role in political debate seem wide of the mark. In effect, Chayes succeeds in proving two points: As a positive matter, judges are claiming a larger role in "public law" litigation than they had claimed in "private law" cases,¹⁶⁶ and as a normative matter, the judge's increased power is legitimate with respect to the political branches.¹⁶⁷ Chayes fails to demonstrate the normative legitimacy of the judge's power with respect to the jury, the parties, and the lawyers. Given that litigation over public rights is inevitable, why

might be regarded as "complex" in language similar to that of Chayes. Hazard's "definition" suggests a dichotomy between "routine" litigation and "salient" litigation. See Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. Rev. 469, 471 (1989). "Routine" litigation involves claims of ordinary citizens with conflicting expectations under largely agreed-upon legal norms; the conflicts are those for which society has not developed means of resolution other than litigation. *Id.* at 471-73. In contrast, "salient or high-profile litigation [is] litigation that significantly perturbs established systems of authority and to which adjustment has not yet been made." *Id.* at 474. Formerly muted interests are given voice, defendants "regard the intrusion of litigation as unfair or illegitimate," and "a cultural lag" has not yet resulted in absorption of the "challenging interests into revised patterns of conduct." *Id.* Novel legal theories, the use of existing legal theories in novel contexts, and the claim of "new 'rights'" with correlative new limitations on the existing "legal autonomy" of "constituted authority" are aspects of this type of litigation. *Id.*

Although Hazard's more skeptical appraisal of the efficacy and legitimacy of salient litigation distinguishes him from Chayes, compare *id.* at 476 with Chayes, *supra* note 100, at 1313-16, the content of Hazard's "salient" litigation and Chayes' "public law" litigation seems largely to overlap. As a definition of complex litigation, however, Hazard's description of salient litigation falls short. In the first instance, the procedural implications of the "form" of "saliency" are unclear. Furthermore, one can envision a mass tort—perhaps an airplane crash or a product-defect suit—that would raise significant issues of pretrial, trial, remedial, or re-litigation complexity. Although such a case might have been "salient" thirty or forty years ago, the present acceptance by airlines and manufacturers of their obligations in tort and the widely accepted right of tort victims to claim compensation appear to make these complex cases "routine" in Hazard's nomenclature. Hazard's recognition that adjudication does not necessarily entail application of facts to established legal principles is nonetheless an important normative confirmation of Chayes' descriptive, non-normative observations that modern adjudication does not exclusively involve disputes over established rights. For the relevance of this insight to the definition of complex litigation, see *infra* notes 244-52 and accompanying text.

166. Chayes, *supra* note 100, at 1288-304.

167. *Id.* at 1307-16.

should the judge, and not the other players in the litigation enterprise, be the ones to shape the political-judicial debate?¹⁶⁸

The answer to this question is the missing piece in the puzzle that Chayes so niftily assembles. Because it might also be the key to understanding the limits on the court's powers, the answer is crucial. Less concerned with form than with description, however, Chayes aborts the search before it has begun.

E. Normative Definitions of Complexity

The missing piece in Chayes' description might be found in an analysis concerned, as Chayes is not, with the proper form and limits of adjudicatory behavior. Although neither purports to provide a normative definition of complex litigation, two writers, Mirjan Damaska and Lon Fuller, have developed principled descriptions of a proper adjudicatory system. Starting from different premises, both Damaska and Fuller find that certain cases poorly fit the form of adversarial adjudication prevalent in the United States today. Their somewhat differing descriptions of these ill-fitting cases develop two final pieces of data—the array of possible roles for the participants in adjudication and the notion of party participation through proofs and reasoned arguments—needed to assemble a form for complex litigation.

1. Damaska's Forms of Justice

In *The Faces of Justice and State Authority*,¹⁶⁹ Mirjan Damaska argues that procedural systems are a function of two independent variables: the nature of the authority exercised by the adjudicatory tribunal and the political objectives of the state. The first variable can correspond to either a "hierarchical" or a "coordinate" ideal.¹⁷⁰ In the hierarchical ideal, the official before whom the case is placed initially is a bureaucratic functionary executing the will of hierarchical superiors who make all critical decisions on the basis of summaries provided by the functionaries and who thus are immunized from the

168. The issue is hardly academic. As Chayes recognizes, courts are not precluded necessarily from consideration of political issues merely by the formal incantation of separation of powers; each branch of government exercises "a large and messy admixture of powers," *id.* at 1307, and courts in particular have a complex relationship with the legislature, *id.* at 1314. The same can be said of the judicial branch itself: It is a "messy admixture" of litigants, interested bystanders, juries, lawyers, and judges. The assertion by judges of additional powers often comes at the expense of at least one of these other participants, thus invoking concerns of autonomy (when the traditional rights of parties and bystanders are altered), democratic participation (when the traditional role of the jury is disturbed), and adversarial procedure (when the role of the lawyers is reduced). Given our country's historical antipathy to the imperial Chancellor—who is in modern dress the public-law trial judge, compare MILLAR, *supra* note 2, at 39-42 (discussing the historical emergence of equitable relief in federal courts) with Chayes, *supra* note 100, at 1292-96 (noting the increasing importance of equitable relief)—Chayes' failure to justify the judge's assertion of power ought to prevent an unqualified embrace of the public-law judge whom Chayes so optimistically portrays.

169. MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

170. *Id.* at 17.

particulars of individual cases.¹⁷¹ The officials are professional, strictly organized into levels of authority, and "legalistic" in the sense of following the technical terms of the law rather than assuring individual justice.¹⁷² The coordinate ideal, on the other hand, envisions a single but "amorphous" stratum of decisionmaking with "few sharp and obvious lines that separate its officials and its attitudes toward decisionmaking from the rest of society."¹⁷³ The officials are amateurs who perform their roles for a limited time; there is a wide distribution of authority among "roughly equal lay officials"; and decisions accord with common sense and a feeling of substantive justice that distrusts legalistic solutions and elitist norms.¹⁷⁴

Damaska plots the second variable—the political aspirations of the state—on a different axis. Here too he divides the world into two models: reactive states and activist states.¹⁷⁵ The reactive state is largely laissez-faire, intruding into citizens' lives only to "provid[e] a supporting framework within which its citizens can pursue their chosen goals."¹⁷⁶ Because the state consequently has "no notion of separate interest apart from social and individual (private) interests," it finds its functions largely limited to the protection of order through the resolution of disputes.¹⁷⁷ The law is designed to facilitate and support "autonomous regulation" by the citizens themselves, and individual rights are strongly preserved against state encroachment.¹⁷⁸ The administration of justice reflects this aim, and is consequently party-driven combative in motif, and concerned only with the development of formal rules to ensure a fair fight.¹⁷⁹ The decisionmaker is neutral, and dependent upon parties for information; the lawyer is simply an assistant to the client.¹⁸⁰ Damaska labels this type of system "conflict-solving process."¹⁸¹

In contrast, the activist state "espouses or strives toward a comprehensive theory of the good life," and develops government programs to implement its vision.¹⁸² Social institutions and practices can be reshaped to conform to the governmental ideal; individual autonomy commands little deference.¹⁸³ Law "springs from the

171. *Id.* at 18-23.

172. *Id.*

173. *Id.* at 23-28.

174. *Id.*

175. *Id.* at 72.

176. *Id.* at 73.

177. *Id.*

178. *Id.* at 76-77.

179. *Id.* at 77-80, 97-135.

180. *Id.* at 135-45.

181. *Id.* at 80.

182. *Id.*

183. *Id.* at 80-81.

state and expresses its policies. . . . [I]t tells citizens what to do and how to behave."¹⁸⁴ Consequently, the administration of justice considers the resolution of disputes irrelevant to its task of ensuring the realization of state policy.¹⁸⁵ Procedures are controlled by state officials rather than by parties, are investigative rather than combative, and obviously are concerned with achieving the correct policy outcome.¹⁸⁶ The decisionmaker is not neutral, but active and interested in advancing the appropriate substantive outcome; the lawyers' roles are much reduced, and a tension exists between their role as advocate and their desire to realize state programs.¹⁸⁷ Damaska labels this system "policy-implementing process."¹⁸⁸

Damaska then merges the two concepts, and creates four possible procedural scenarios: the policy-implementing process of hierarchical officialdom; the conflict-solving process before hierarchical officialdom; the conflict-solving process before coordinate officialdom; and the policy-implementing process of coordinate officialdom. He then derives the type of procedural system that normatively should be associated with each scenario, and attempts to validate his hypothesis by examining existing civil and criminal procedural systems to determine the degree of overlap between the predicted and the actual procedures.¹⁸⁹ His study finds a high degree of correlation.

The relevance of Damaska's work to the problem of complex litigation lies in the intriguing possibility that some cases (i.e., the "complex" cases) within our society might not fit the dominant mode of process, and must therefore be resolved under procedures different than those governing the vast majority of cases. In his final pages, Damaska essentially makes this claim for complex litigation. Not surprisingly, Damaska considers the dominant mode of American procedure to be a conflict-solving process of coordinate officialdom; its characteristics of adversarialism, neutral judges, lay juries, single episode of trial, and lawyer control of issues and proceedings are precisely the features that this model would predict.¹⁹⁰

Nonetheless, the United States is not an entirely reactive state; "the polity is an unstable mixture of activist and reactive impulses in which the latter still predominate."¹⁹¹ The procedural system to resolve these "activist" disputes has remained coordinate—still characterized, Damaska says, by "amateurism, decentralization, [and] hostility toward legalism."¹⁹² In these cases, which involve numerous parties contesting public rights,¹⁹³ the apt procedural model is the policy-implementing process of coordinate officialdom. This

184. *Id.* at 82.

185. *Id.* at 84.

186. *Id.* at 84-88, 147-68.

187. *Id.* at 168-78.

188. *Id.* at 88.

189. *Id.* at 181-239.

190. *Id.* at 214-22.

191. *Id.* at 231-32.

192. *Id.* at 232.

193. *Id.* at 237 n.122.

model maintains some of the features of the conflict-solving process, such as the need for the existence of a dispute, the filing of a complaint, and adversarial steps. The judge, however, can be more aggressive in shaping the case, the trials are "less the climactic centerpiece of a lawsuit than the occasion for bringing issues of public policy into focus," and the court has power to fashion a remedy beyond the scope of the parties' request.¹⁹⁴ Therefore, like Chayes—upon whom Damaska relies for his description of this process¹⁹⁵—Damaska finds a lessening of adversarialism and an increase in judicial power to be essential aspects of the American complex case. Unlike Chayes, however, his analysis suggests a reason for the assertion of judicial power and inherent limitations on that power: The power is needed to respond to a new political orientation in which the state wishes to protect its policy interests, and the activist and coordinate characteristics of this model combine to impose certain limits on the judge's power.¹⁹⁶

Damaska's compelling analysis still has several flaws. First, although remedial complexity necessarily is an aspect of the policy-implementing process of coordinate officialdom, his analysis does not predict adequately the problems of pretrial, trial, or re-litigation complexity. Although these latter three complexities, which are widely acknowledged to be aspects of complex litigation,¹⁹⁷ might surface on occasion, there is no sense that these complexities inhere in the policy-implementing process of coordinate officialdom. Nor does Damaska claim that these complexities can never occur in cases for which the conflict-solving process of coordinate officialdom is still the mode of resolution.¹⁹⁸ Conversely, factually simple but politically significant cases—such as a controversy involving abortion-rights protestors or a refusal to issue a check due under a welfare program—do fit into this policy-implementing process of coordinate officialdom. Overall, the fit between the observed manifestations of complexity and the policy-implementing process of coordinate officialdom seems less than perfect.

Second, there remains a significant question whether the increase

194. *Id.* at 237-38.

195. *Id.* at 237 n.122.

196. *Id.* at 237-39. Damaska does not claim that American civil procedure has any strains of hierarchical officialdom. If it did, those strains presumably also would suggest similar rationales for and limits on judicial power.

197. See *supra* notes 68-94, 116-32 and accompanying text.

198. Although Damaska suggests that re-litigation complexity occurs in the various types of complex litigation that he apparently believes to fit within the policy-implementing process of coordinate officialdom, see DAMASKA, *supra* note 169, at 237 n.122, he makes no claim that re-litigation complexity can occur only in those types of cases.

in judicial power effectively can accomplish any policy-implementing ends. As Damaska recognizes, the mix of reactive and active aspects of American society means that the state often cannot determine the appropriate policy to implement.¹⁹⁹ It is fatuous to give a judge the power to implement a societal policy when the policy is nonexistent. Even if she could divine a policy, however, the coordinate nature of authority makes it difficult, if not impossible, for a single judge to have an impact beyond the persons most directly affected by the dispute.

More generally, there are obvious tensions between coordinate authority and policy-implementing process. Coordinate authority suggests lay decisionmakers; policy-implementing process suggests a decisionmaker associated with the state. Coordinate authority suggests the accomplishment of individual justice, which might be inconsistent with the official declaration of entitlements; policy-implementing process suggests adherence to social policy. In this clash, the precise limits of judicial authority are poorly outlined; there is no evident reason that judicial authority and adherence to social policy should win. Thus, Damaska's claims for the primacy of judicial power are somewhat arbitrary. Unlike his analysis of the other three forms of process, in which he begins with a prediction of what the procedural system should be, he begins his analysis of the policy-implementing process of coordinate officialdom with the description of the procedures that public-interest cases are in fact using. He then seems content to assume, in the policy-implementing process of coordinate officialdom, that the current system is the correct one. But other reconciliations of the conflict are equally possible. For instance, the jury, assisted by lawyers who owe some obligation to assure that state policy is considered, could be the institution to implement state policy.

By assuming that what public law litigation is also is what it should be, Damaska inverts formal analysis, and thus ultimately leaves open the question also unanswered by Chayes: Why should the judge in complex cases be entitled to assert power reserved in the traditional model of American procedure to the lawyers, jury, and parties?

2. *Fuller's Forms of Adjudication*

When Lon Fuller wrote *The Forms and Limits of Adjudication* in 1959,²⁰⁰ the concept of complex litigation was in its infancy, its full scope still dimly understood.²⁰¹ Fuller's article attempts to derive

199. *Id.* at 238-39.

200. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) [hereinafter Fuller, *Forms and Limits*]. Although written in 1959 (and possibly revised in 1960, see *id.* at 394 n.27), Fuller's article was not published until after his death in 1978. See *id.* at 353. The ideas in the article were known among the faculty at Harvard, including Abram Chayes. See Chayes, *supra* note 100, at 1299 n.82. Fuller also presented the ideas from the article in somewhat different fashion in other published works. See LON L. FULLER, *ANATOMY OF THE LAW* 84-112 (1968) [hereinafter FULLER, *ANATOMY OF LAW*]; LON L. FULLER, *THE MORALITY OF LAW* 168-78 (rev. ed. 1969) [hereinafter FULLER, *MORALITY OF LAW*]; Fuller, *supra* note 62.

201. For a sampling of articles discussing the problems of complex cases in the

the fundamental form of adjudication, to determine the procedural features that best advance that form, and to establish the limits of that form. He first posits the two basic forms of social ordering: organization by common aims and organization by reciprocity.²⁰² Elections and contract are the respective mechanisms used to resolve disputes in these two forms of ordering. He then posits adjudication as a third method "of reaching decisions, of settling disputes, of defining men's relations to one another."²⁰³ Adjudication guarantees the affected persons a different mode of participating in the ultimate decision. That mode is the "[p]resentation of proofs and reasoned arguments."²⁰⁴ For Fuller, then, this ability to present proofs and reasoned arguments is the essence, the form, of adjudication. Adjudication is the device, and the only device, "which gives formal and institutional expression to the influence of reasoned argument in human affairs."²⁰⁵

Fuller next examines the role of rationality in adjudication. He argues that the assertion of a claim of right is not an essential attribute of the form of adjudication. Nevertheless, because meaningful participation through reasoned argument logically implies that the litigant must "assert some principle or principles by which his arguments are sound and his proofs relevant," these principles are easily converted into claims of right.²⁰⁶ Thus, Fuller derives the most fundamental limit on adjudication as a form of social ordering: it cannot be used "in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined 'rights' and 'wrongs.'" ²⁰⁷

Fuller then turns to "the optimum and essential conditions for the functioning of adjudication."²⁰⁸ Three matters are essential. He finds that "the integrity of the judicial process itself depends upon the participation of the advocate" because adversarial procedure

1950s, see *supra* note 14. The early cases and articles concerning complex litigation were only a trickle which anticipated the flood of cases and commentary in the following three decades.

202. Fuller, *Forms and Limits*, *supra* note 200, at 357.

203. *Id.* at 363.

204. *Id.*

205. *Id.* at 366.

206. *Id.* at 369.

207. *Id.* at 371. Fuller gives as examples the reluctance of courts to enforce agreements between spouses about the "internal organization of family life" and a court's inability to run a coal mine or any other enterprise in which "successful human association depends upon spontaneous and informal collaboration." *Id.*

208. *Id.* at 364. A more empirical description of the attributes of adjudication can be found in HOROWITZ, *supra* note 100, at 33-56. There is a high degree of correlation between Fuller's normative and Horowitz's descriptive discussions of adjudication.

best assures that “impartial judgment can attain its fullest realization.”²⁰⁹ Moreover, he contends that the arbiter must be impartial yet knowledgeable about the matter involved in the dispute,²¹⁰ and finally, that adjudicatory decisions must be retrospective.²¹¹ Among the nonessential but optimal conditions, he specifically mentions that arbiters should almost never act on their own motion in initiating a case, should generally (but not necessarily) provide a statement of reasons to accompany the decision, and should generally (but again, not necessarily) rest the decision on grounds urged by the parties.²¹² He concludes by arguing that adjudication is not necessarily a power of government, but may be exercised by private individuals in arbitration proceedings.²¹³

After articulating the form of adjudication, Fuller explains the limits that this form imposes on adjudication. Having already mentioned the inapplicability of adjudication to those areas in which decision by application of proofs to principles would be destructive or ineffective, he now suggests a second limitation: “polycentric” disputes. To Fuller, polycentric disputes are “many centered” situations in which any decision has significant rippling effects far beyond the parties who present reasoned proofs and arguments.²¹⁴ Although rapidly changing circumstances and a multiplicity of parties are not inevitably aspects of polycentrism, these situations are likely to be instances in which meaningful participation through proofs and reasoned arguments is impossible to achieve. Fuller recognizes that the line dividing polycentric disputes from those susceptible to adjudication is not a bright one,²¹⁵ but argues that one of three results is likely to occur when a polycentric matter is submitted for adjudication: the adjudicatory solution fails; the arbiter experiments with techniques that exceed her power under the form of adjudication; or the arbiter “reformulate[s] the problem so as to make it amenable to solution through adjudicative procedures.”²¹⁶

209. Fuller, *Forms and Limits*, *supra* note 200, at 382-85. Unfortunately, Fuller's original text simply referred the reader to a report he had co-authored on the subject of professional responsibility; the editors inserted excerpts from the earlier work into the article published after Fuller's death. See *id.* at 382 n.22. Because the earlier work was written with a somewhat different purpose, see LON L. FULLER & JOHN D. RANDALL, PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, *reprinted in* 44 A.B.A. J. 1159 (1958), it is not clear whether Fuller viewed adversarial process as an essential attribute of adjudication, or simply as an optimal condition. The language of the Report and Fuller's insistence on a party's ability to participate through proofs and reasoned argument strongly suggest, however, that Fuller viewed the adversarial system as an essential attribute of the form of adjudication.

210. Fuller, *Forms and Limits*, *supra* note 200, at 385-91.

211. *Id.* at 391-92.

212. *Id.* at 385-91.

213. *Id.* at 392-93.

214. *Id.* at 394-95. Fuller's strongest examples of polycentric disputes are the use of adjudication to set wages and prices throughout society or the attempt to adjust the wages of various categories of workers in a textile plant. In each case, one decision will affect certain persons, whereas a different decision will affect another group of persons. It is difficult for all the affected persons to participate through reasoned proofs and arguments.

215. *Id.* at 397 (noting that “the distinction involved is often a matter of degree”).

216. *Id.* at 401.

Because these solutions are not faithful to adjudication's form,²¹⁷ the only permissible solutions to polycentric disputes are managerial direction or contract, which are associated with the other two forms of social ordering.²¹⁸

From the perspective of complex litigation, Fuller's normative work adds two key elements. First, he establishes a baseline—participation through proofs and reasoned argument—against which all procedural arrangements can be tested.²¹⁹ Second, Fuller creates the concept of the “polycentric” case, which seems to embody some of the features often seen in complex cases: multiple parties creating difficult problems of proof and comprehension; remedies affecting broad segments of society; and judges experimenting with novel management techniques to whittle cases down to adjudicatively digestible size. If “polycentric” and “complex” cases are equated, Fuller's article also suggests the following definition for complex cases: those cases in which the interests of all persons significantly affected by a controversy cannot be definitively resolved through the parties' adversarial presentation of proofs and reasoned argument to a neutral arbiter.

In spite of its apparent appeal, this definition has significant drawbacks. The first is an empirical critique. One consequence of using this definition is to declare that no complex case can be resolved through the adjudicatory process, an assertion that ignores the fact that judges and lawyers have, at least on occasion, successfully adjudicated “polycentric” disputes.²²⁰ Another consequence is that this definition establishes, to use Damaska's phrase, a “conflict-solving process of coordinate officialdom” as the only legitimate model of adjudication.²²¹ Not only does this definition de-legitimize the procedural systems under which most of the world operates, but it also fails to account for Chayes' observations of the changes in even the

217. See *supra* notes 205-13 and accompanying text.

218. Fuller, *Forms and Limits*, *supra* note 200, at 398-99. Fuller later demonstrates that some types of “adjudication” are actually a mix of adjudication and other elements of social ordering. *Id.* at 405-09. He does not necessarily condemn all instances in which adjudication is used as a tool or a cloak to accomplish these other types of social ordering. *Id.* at 405.

219. A version of this baseline has appeared in some prior descriptions of complex litigation, most particularly in that aspect of trial complexity that concerns lack of juror comprehension and in Schwarzer's criteria for complex cases. See *supra* notes 84-94, 143-53 and accompanying text.

220. See, e.g., *Dalehite v. United States*, 346 U.S. 15 (1953); *In re Richardson-Merrill, Inc. “Bendectin” Prods. Liab. Litig.*, 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

221. Fuller's description of party-driven adjudication with a neutral arbiter resolving private disputes corresponds precisely to Damaska's predicted form for a conflict-solving process before coordinate officialdom.

American procedural system.²²² Although Fuller might respond to these empirical observations by asserting that most of the world does not engage in true adjudication, the obvious Anglo-American ethnocentricity of Fuller's ideal form is a basis for questioning whether he might have drawn too narrow a definition.

Second, Fuller's definition may be too broad in one particular: his belief that adjudication can occur beyond the auspices of government. Because adjudication typically is considered a matter of state prerogative,²²³ Fuller's reliance on a single element for adjudication (participation through proofs and reasoned argument) may cast too wide a net and permit private dispute-resolution mechanisms, such as arbitration, to be regarded as adjudicatory.

Third, the opportunity to present proofs and reasoned arguments and the rationality of decision are not as intricately tied together as Fuller suggests. On the one hand, we can visualize an inquisitorial system in which judges accumulate all the evidence, shape the case, and rationally resolve the appropriate issues without party participation.²²⁴ On the other hand, we can visualize an adversarial system in which the parties are given the chance to present proofs and arguments, after which the decisionmaker, locked away from view, flips a coin and then writes a statement of reasons to mask an obviously irrational resolution. If there are other methods to achieve a rational resolution, and if party presentation of proofs does not necessarily guarantee one, then rational resolution and party participation truly are distinct concepts. Of the two, rational resolution seems more crucial to the form of adjudication.²²⁵

Finally, Fuller's list of optimal procedures—that arbiters generally should not initiate a case, should rest a decision on grounds asserted by the parties, and should provide a statement of reasons for a decision—fails to ring true. Assuming that these procedures best advance Fuller's norm, the use of these procedures cannot be derived from Fuller's norm itself. Any set of procedures that fulfills

222. See *supra* notes 154-59 and accompanying text.

223. "Adjudicate" derives from the Latin "adiudicare," which literally means "to award as judge" or "to divide (a case) in favour of." OXFORD LATIN DICTIONARY 44 (P.G.W. Glare ed., 1983). The English definition is "to adjudge; . . . [t]o try and determine judicially; to pronounce by sentence of court." OXFORD ENGLISH DICTIONARY 158 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989); see also AMERICAN HERITAGE DICTIONARY 79 (2d coll. ed. 1985) ("[t]o hear and settle (a case) by judicial procedure"); BLACK'S LAW DICTIONARY 42 (6th ed. 1990) ("[t]o settle in the exercise of judicial authority"); cf. W.J. Habscheid & P. Schlosser, *Improvement of Civil Litigation by Lessons Derived from Arbitration*, in JUSTICE AND EFFICIENCY 153 (Dr. W. Widekind ed., 1989) (discussing the "almost unanimous and categorical" rejection by "national reporters" from Austria, Sweden, the Netherlands, Italy, Greece, and Argentina of a proposal that parties to litigation be allowed to appoint their own judge, for the stated reason that "normal administration of justice would not appear to tolerate that parties appoint as 'their' judge whatever member of court they desire").

224. See DAMASKA, *supra* note 169, at 174-76.

225. For discussion of this point, see *infra* notes 244-47 and accompanying text. It is interesting to note that Professor Subrin has found Fuller's claim for rational decision-making, not Fuller's claim for presentation of proofs and arguments, to be the central aspect of adjudication. See Subrin, *supra* note 2, at 988 ("As Lon Fuller and others have taught us, it is resolving disputes through reasoned and principled deliberation, based on rules, that is at the heart of adjudication.").

the norm of party participation is valid; Fuller's further assumption that procedures that better advance the norm are somehow "more valid" does not seem to be required normatively.²²⁶ In any event, under Fuller's own analysis, all of the essential and optimal attributes of adjudication simply seem to be means to the end of assuring party participation, and cannot be justified when other means better accomplish the same objective. When this conclusion is combined with the prior conclusion that rational resolution appears more significant than party participation, it suggests that Fuller's essential and optimal attributes are not necessarily the ones that best advance adjudication.

None of these critiques impugns Fuller's methodology. By working from within the notion of what an adjudicatory system should be, he was able to derive a description of cases that predicted at least some aspects of complexity. If complex cases are demonstrably different than routine ones, then the best place to begin might well be a re-examination of the fundamental nature of adjudication. That nature might reveal the similarities among cases, as well as the specific ways in which complex cases put a strain on the normative and the optimal operation of an adjudicatory system.

F. Summary

The initial inquiry finds no universal description of complex litigation; instead, it finds many competing "definitions." Some definitions are mundane, while others are theoretical. Some definitions—like those that tie complexity to particular legal theories—are inaccurate. This lack of an obvious synthesis seemingly vindicates the numerous writers who simply decline to supply a definition.

As long as the label has no special relevance, there is no reason to insist on precision in the definition of complex litigation. All of us operate with a common and roughly equivalent sense of what words mean. For example, we generally can agree on whether the object we are observing is a car, and have little trouble distinguishing it from a truck or a boat. Borderline objects will always force us to confront our disagreements on the precise contours of a definition—think of a jeep-like vehicle owned by a suburban family. We are unlikely to care much about conflicting nuances until it matters,

226. Elsewhere Fuller argued that "[w]hatever protects and enhances the effectiveness of [the parties'] participation, advances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity." Fuller, *supra* note 62, at 19. Because Fuller recognizes that even "bad" adjudication is still adjudication, this claim for the choice of the "better" or "more valid" procedure logically cannot be derived from the form of adjudication without an additional utilitarian assumption not inherent in Fuller's form.

as it does, for instance, when the family has to decide whether to license the vehicle as a car or as a truck.

We now have arrived at the point where the definition of complex litigation matters. Proposals to create special rules for complex cases abound.²²⁷ One proposal's meat can be another proposal's poison. For example, the preferred solution to re-litigation complexity—joinder of all interested claimants in one case—might well create insurmountable problems of complexity in the pretrial, trial, and remedial phases.²²⁸ A blue-ribbon jury²²⁹ might stand in the way of the stronger assertion of judicial control desirable from a “public law” perspective. Indeed, a focus on micro-solutions to specific manifestations of complexity ignores the effect of a solution on the larger whole,²³⁰ and precludes a complete evaluation of a solution's merit.

The issue remains whether these micro-manifestations of complexity are tied together by a single thread. If not, then complex litigation should perhaps be viewed as the sum total of all the different types of complexity. Thus, complex litigation would exist when there is (1) a need for case management; or (2) pretrial complexity; or (3) trial complexity; or (4) remedial complexity; or (5) multiparty, multiforum litigation; or (6) “public law” litigation; or (7) deviation from the conflict-solving process in our laissez-faire state; or (8) polycentrism; or (9) any other manifestation of complexity. The solution to competing definitions of complexity would be to include everyone's definition: To adopt, in other words, the “laundry list” approach pioneered by the *Handbook of Recommended Procedures for the Trial of Protracted Cases* and other writers.²³¹

Although this eclectic approach has the virtue of easy compilation, its vices are prohibitive. First, it provides no mechanism for excluding “crazy” definitions. To return to the example of the car, suppose that one person's definition of a car is “anything with a motor and two axles.” We would clearly want to reject the definition as overbroad because it includes motorcycles, go-carts, farm tractors, and a host of other vehicles. But an approach that simply compiles a list of all possible definitions of a “car” is powerless to exclude these definitions from the list. The only way to exclude the “crazy” (and usually overinclusive) definition is to admit that the fundamental form of an object (whether it be a car or complex litigation) inherently rejects the claim of some definitions to validity. To make that admission is also to concede that the enumerative approach is misguided.²³²

227. See *supra* notes 15-18 and accompanying text.

228. See *supra* notes 130-31 and accompanying text.

229. See *supra* note 92 and accompanying text.

230. See McGovern, *supra* note 15, at 441 (observing that “[m]ini solutions may be inappropriate for major problems”).

231. See *supra* notes 133-36 and accompanying text.

232. Cf. JOHN GUINTEHER, *THE JURY IN AMERICA* 217 (1988) (arguing that the failure to define “complexity” is a ploy of the opponents of jury trial, who can use the vagueness of the term to abolish the jury-trial right indirectly when they cannot do so directly). I do not contend that the term “car,” or the term “complex litigation” for that matter,

Second, an eclectic approach provides no mechanism for choosing among competing solutions. In an eclectic approach, no solution that reduces some aspect of complexity is illegitimate. Nor is there an a fortiori method of deciding which solution is preferable. Although we would be tempted to balance the complexities and minimize their sum, nothing in the eclectic approach dictates that utilitarian resolution. An approach that required a judge to adopt the solution that comes earliest in the alphabet would be equally valid.

Even the seemingly sensible utilitarian approach presents enormous problems. First, "complexity minimization" requires a court to adjudicate even the most "polycentric" dispute, at least as long as it is less costly to adjudicate than to do nothing.²³³ Second, the minimization method might support draconian rules that are efficient, but that hardly comport with our sense of litigative fairness.²³⁴ Finally, minimization requires an ability to evaluate the costs of the

necessarily must have a single meaning in all contexts. See Cook, *supra* note 21, at 337-39. My minimal contention is that, in any given context, a term must have some definition independent of whatever meaning the reader chooses to assign to it. Although even this contention is debatable, see, e.g., CARNEY & SCHEER, *supra* note 32, at 67-82, it is a standard legal assumption, see, e.g., CPSC v. GTE Sylvania, 447 U.S. 102 (1980). This Article provides a definition of complex litigation to be used in the context of attempting to discover the procedural consequences, if any, that follow from a designation as "complex litigation."

Nor do I contend that enumerative lists are valueless. As this Section of the Article has attempted to demonstrate, studying the exemplar instances of an object is often a first step in defining its fundamental characteristics. Once the fundamental criteria of the definition are established, it is then possible to speak of various examples or factors that fulfill the criteria. Without such criteria, however, the examples or factors that comprise complex litigation cannot be segregated from those that do not. Having spent this Section of the Article developing the enumerative list, the next task, taken up in the remainder of the Article, is to find complexity's common criteria.

233. There are some instances in which it is not socially beneficial for parties to bring litigation that they have a private incentive to prosecute. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 113-17 (2d ed. 1989); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 265-70 (1987). These cases are not congruent with the cases in which there is an issue of "polycentricity" (i.e., judicial competence), for it might be socially beneficial to resolve some disputes incompetently, and not beneficial to resolve other cases competently.

234. For instance, in asbestos litigation, a coin flip on liability might well be more efficient than existing adjudicatory procedures. Although the coin flip carries a 50% error rate, the existing system of adjudication involves transaction costs of 61 cents per dollar spent. KAKALIK ET AL., *supra* note 14. Some minimal procedure to assure that the plaintiff suffered injury from asbestos and a subsequent coin flip would seem to lead to greater efficiency in the aggregate than case-by-case adjudication. The lack of reasoned judgment in each individual case, however, would lead most of us to reject such an approach.

Of course, in the asbestos situation there might exist other alternatives, such as bankruptcy or multidistrict proceedings, that are more fair and efficient than either of these options. See generally *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) (transferring 26,639 actions for personal injuries obtained from exposure to asbestos pursuant to the statute governing transfer in multidistrict cases); *In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991) (approving a

various types of complexity accurately and quickly. The intangible nature of certain costs and the inability to generate the information required for the minimization calculus combine to make complexity minimization more attractive in theory than in practice.

Far more satisfying than the “laundry list” would be a definition that clarified the scope of complex litigation and established its inherent limitations. The challenge, then, is to meld into a single concept the various types of procedural complexity, the case management concepts so often associated with complex litigation, the inductive observations of Chayes, and the juridical forms of Fuller and Damaska. Each element provides an insight, a clue, to the puzzle of complexity. Thus far, however, the form of complex litigation has eluded all.²³⁵

II. *The Form of Adjudication and the Goals of Modern Procedure*

The search for an encompassing definition of modern “complex” litigation begins with the nature of modern litigation. The reason to start here is two-fold. First, “complex” litigation is still, at bottom, litigation, and consequently shares certain goals and assumptions with its “routine” cousins. These common characteristics might shed useful light on the points of similarity and departure between “routine” and “complex” cases. Second, locating complex litigation within the structure of modern adjudication might adumbrate some of the outside parameters of permissible responses to complex litigation.

Modern adjudication is a blend of normative and positive elements. Normatively, modern litigation cannot contravene the intrinsic attributes of and limitations on the form of adjudication.²³⁶ Nevertheless, just as the knowledge of the form of a car does not help a person to decide whether to buy a coupe or a station wagon, the form of litigation cannot dictate all of the choices of procedural rule. Therefore, any procedural system makes certain choices that are neither dictated nor excluded by the form of adjudication.²³⁷ Those decisions are guided by the positive assumptions that a society wishes its litigation system to meet.

The following sections describe the form of adjudication, explain

settlement of class action claims against a trust established to compensate victims of asbestos exposure in bankruptcy proceeding to avoid case-by-case litigation by hundreds of thousands of plaintiffs). My more general point—that the efficient solution is not always the fairest in individual cases—nonetheless remains valid.

235. See Kendig, *supra* note 24, at 709 (stating that “[t]he reader must draw his or her own conclusions as to what criteria or characteristics distinguish the cases in the [MCML’s complex] categories from all other cases”).

236. For the time, I assume an equivalence between litigation and adjudication—that the only legitimate function of litigation is to adjudicate a dispute. I relax this assumption somewhat in Part IV, where I examine the role of courts in litigation that is polycentric. See *infra* notes 562-66 and accompanying text; see also Fuller, *Forms and Limits*, *supra* note 200, at 405-09 (recognizing that adjudicatory process can contain a mix of other methods of social ordering).

237. For a discussion of the indeterminacy of formal analysis, see Unger, *supra* note 21, at 570-71.

the positive assumptions that inform the Federal Rules of Civil Procedure, and examine the relationship between adjudication and the positive assumptions. The analysis is not designed to be exhaustive; instead, I sketch a background against which the form of complex litigation can be understood.

A. *The Form of Adjudication*

The classic study of the form of adjudication remains that of Lon Fuller.²³⁸ According to Fuller, adjudication's essential form—participation through proofs and reasoned argument—is fulfilled best by certain procedural attributes such as adversarial proceedings, neutral but knowledgeable arbiters, written reasons for decisions, and retrospective application.²³⁹ Fuller's form, however, turns out to be inadequate on several fronts. The completeness of Fuller's model has been challenged powerfully by the descriptive work of Chayes and Damaska, both of whom demonstrate that adjudication can, and does, occur in circumstances that either lack the procedural attributes that Fuller finds so essential or else possess a high degree of polycentrism.²⁴⁰ Conversely, Fuller's model fails to exclude some forms of dispute resolution—such as arbitration—that are not adjudicatory but that involve participation through proofs and reasoned argument.²⁴¹ Nor does participation through proofs and reasoned argument necessarily guarantee, as Fuller believed, rationality in the decisionmaking process.²⁴² Finally, the attributes that Fuller finds essential to adjudication are in fact only means that must be abandoned when they fail to advance the end of rationality in party participation and decision.²⁴³

At the same time, however, Fuller's form is not entirely misguided. On its face, the exercise of reasoned decisionmaking seems critical to adjudication. Fuller correctly emphasizes the opportunity to participate through proofs and reasoned argument, which constitutes a useful, even if not essential, aspect of adjudication. His recognition that the form of adjudication puts certain matters beyond the bounds of legitimate resolution provides the impetus to discover adjudication's true limits, once a form of adjudication that addresses the criticisms of Fuller's model is developed.

The task, therefore, is to develop a form that unites the insights of Fuller and the criticisms of his conclusion. Four attributes meet

238. See FULLER, *ANATOMY OF THE LAW*, *supra* note 200; FULLER, *THE MORALITY OF LAW*, *supra* note 200; Fuller, *supra* note 62; Fuller, *Form and Limits*, *supra* note 200.

239. Fuller, *Forms and Limits*, *supra* note 200, at 381-93.

240. See *supra* notes 154-59, 189-95 and accompanying text.

241. See *supra* notes 206-13 and accompanying text.

242. See *supra* notes 224-25 and accompanying text.

243. See *supra* note 226 and accompanying text.

these criteria and consequently define the essential form of adjudication:

1. A dispute exists between two or more persons concerning the allocation of an obligation recognized under existing constitutional, statutory, regulatory, or other legal arrangements;
2. The claim of obligation is asserted against a person who is required under existing principles to provide a remedy if the claim is justified;
3. The state provides a decisionmaker who determines the obligations of the defendant; and
4. The decision is reached through the application of reasoned judgment, which is based on the consideration of the disputants' circumstances, the relevant evidence, and the nature of the claimed obligation.

Any decision that fulfills each of these criteria is an adjudicatory decision; any decision lacking one or more of these elements is not.

The fourth element is the one most closely aligned with Fuller. Unlike Fuller, however, this element does not insist on the parties' right to present proofs and reasoned argument. As Damaska's discussion of the policy-implementing process before hierarchical officialdom demonstrates, parties in adjudication cannot always insist upon the right to shape a case through presentation of proofs and arguments.²⁴⁴ Once we acknowledge this fact, Fuller's argument that rational decisionmaking is an essential aspect of adjudication also collapses.²⁴⁵ The fourth element consequently rebuilds the principle of rationality on a firmer footing. Rather than requiring party participation, this element requires rational decisionmaking: the use by the decisionmaker of judgment informed by the facts and the principles relevant to the dispute.²⁴⁶ The shift to rational decisionmaking is descriptively satisfying, for it embraces not only

244. See DAMASKA, *supra* note 169, at 182-86, 201-04. Fuller might reply that the policy-implementing process before hierarchical officialdom described by Damaska is not in fact adjudicatory because of this lack of party participation. Two responses are possible. The first is that party participation does not invariably assure rational decisionmaking, whereas the policy-implementing process before hierarchical officialdom can assure that result. Under these circumstances, insistence on party participation seems an irrational fetish. Second, the norm of party participation illegitimizes the procedural systems used in many parts of the world. See *id.*; MARTIN M. SHAPIRO, *COURTS* (1981) (describing the adjudicatory systems in England, Western Europe, imperial China and traditional Islamic countries). Although I do not suggest that the descriptive reality of "what is" should necessarily determine the norms of "what should be," see Unger, *supra* note 21, at 571, a norm obviously inconsistent with the breadth of procedural options is suspect. See generally Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2361-63 (1990) (discussing the differences between pragmatism and normative analysis). The recourse to existing examples of adjudication is a logical—albeit inductive and pragmatic—methodology for finding the unifying criteria of adjudication. See *supra* note 232 and accompanying text.

245. Fuller had contended that rational decisionmaking inhered in the principle of presentation of proofs and arguments, and thus did not need to be justified separately. See Fuller, *Forms and Limits*, *supra* note 200, at 365-67. Although that argument is certainly debatable on the merits, see *supra* notes 220-23 and accompanying text, it clearly falls apart once the centrality of presentation of proofs and arguments is disproved.

246. By "rational decisionmaking" or "reasoned judgment" I mean decisionmaking that is based on the syllogistic application of facts to relevant principles (or norms) of broad application. See JOHN RAWLS, *A THEORY OF JUSTICE* 44-45, 235-39 (1971); Melvin

Fuller's optimal system of adversarial party participation and passive judging but also the more inquisitorial and activist procedural systems described by Damaska and Chayes. Prescriptively, placing rational decisionmaking at the center of adjudication preserves the role of reason for which Fuller persuasively argued and which neither Chayes nor Damaska disputed. As the nature of the state changes, the nature and content of the controlling law change the methodology of decisionmaking and the result that a person might

A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976) (noting that "[a]djudication is conventionally perceived as a norm-bound process centered on the establishment of facts and the determination and application of principles, rules, and precedents"); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 754 (1982). This type of decisionmaking has three components. First, the "fact-finder" must be able to deduce the relevant facts through the use of reason. Second, the "fact-applier" must be able to match these facts to the relevant principles and determine the consequences. Third, the "principle-finder" must be able to determine the proper principles that a particular set of facts involves. See Eisenberg, *supra*, at 644.

The second of these three functions is an entirely rational process; in fact-application, there is no room for hunches or intuition. When the facts and principles are in legitimate dispute, however, the first and third functions often will involve a certain intuitive sense. As long as the fact-finder attempts to resolve the factual dispute by integrating the evidence with the life experiences that form intuition, the resolution remains a rational one. When the fact-finder utterly ignores the evidence and resolves facts only on the basis of pre-existing experience or intuition (for instance, by resolving the facts against a corporate defendant in a securities case solely based on non-legal principles such as "big companies always lie" or "big companies are rich"), the resolution of the factual disputes will be neither principled nor rational. Shy of this extreme situation of ignored evidence, the "life experience" bias through which evidence is viewed does not make a factual resolution that is generally consistent with pre-existing bias an irrational one. Similarly, principle-finding can be viewed, at least in part, as an intuitive process. Principles are not necessarily objective, pre-determined norms; they often require intuitive assessment, especially when questions of fact or public policy are bound up with the question of responsibility. See Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 857-63; Unger, *supra* note 21, at 567-70; Wells, *supra* note 244, at 2386-88. As long as the principle-finder does not base its choice of the applicable standard solely on facts or arguments irrelevant under existing modes of thinking, the ultimate choice is rational.

Adjudication is simply a particular type of rational decisionmaking. As the first element of adjudication demonstrates, the particular type of principle involved in adjudication is the principle of law. See *infra* note 249 and accompanying text. Given the panoply of persons (e.g., lawyers, judges, experts) and techniques (e.g., summaries and charts) that can assist the fact-finder and fact-applier in their tasks, the failure of rational fact-finding and fact-application in adjudication is an extremely rare occurrence. Reasoned judgment can, however, occasionally be threatened. First, when a fact-finder is presented with a mass of conflicting evidence that it cannot comprehend, organize, or remember in a way that permits it to resolve the relevant disputes, the fact-finder has no choice but to resort to pre-established bias or other legally illegitimate decisionmaking principles. Second, when the legal principles are opaque, the fact-finder might be unable to discern the relevant factual issues, or the fact-applier might be unable to apply the facts to the legal principles. Third, when persons untrained in the patterns of legal thinking are entrusted with declaring the law or deciding mixed questions of law and fact, the possibility of irrational law-finding exists. In a society in which the law-finders are schooled in legal doctrine and patterns of legal thinking, the problem of irrational law-finding is unlikely to arise in any systemic way.

expect;²⁴⁷ but reasoned judgment, which gives effect to the relevant societal and legal concerns of the state, remains the bedrock expectation of the process of adjudication itself.

Unfortunately, the replacement of Fuller's attribute of participation through proofs and reasoned argument with the attribute of reasoned judgment has an untoward side-effect: it insufficiently distinguishes adjudication from other forms of social ordering and other decisionmaking processes. Entering a contract and voting for legislation typically rely on the reasoned application of facts to existing legal principles, as does a decision whether to take the long way home or a shortcut through a neighbor's property. Because the decision in each of these cases descends from the application of a socially or legally significant principle (that a contract is enforceable, that the legislature should respond to the will of the majority, that the neighbor might sue for trespass if I take the shortcut), judgment formed after considerations of principles and facts cannot constitute the only attribute of adjudication.

Additional attributes therefore must delineate adjudication's form. The first of these is a dispute over the existence of an obligation under existing legal principles. Although the existence of principles is implicit in the notion of reasoned judgment,²⁴⁸ this criterion makes explicit two distinctive aspects of adjudicatory decisionmaking: that there must be a dispute concerning a "legal" (state-sponsored and capable of being enforced by the state) obligation;²⁴⁹ and that the obligation must be either presently in existence or capable of being derived through the use of reasoned judgment

247. In America, for instance, we might insist that we have "our day in court" with a hired gun blazing away at witnesses. A Soviet citizen—at least until this past year—might have demanded that the dispute be resolved in a way that advanced the interests of the state. The common denominator between these disparate expectations is rational decisionmaking. In America, with a generally laissez-faire attitude toward state intervention and rules of law, rational decisionmaking requires party participation in the trial; in the Soviet Union, with a legal system that traditionally used private disputes for public purposes, rational decisionmaking required consideration of the state's interests. See DAMASKA, *supra* note 169, at 202-04, 219-22; see also COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 90 (Jethro K. Lieberman ed., 1984) [hereinafter THE ROLE OF COURTS] (stating that reasoned decisionmaking is an essential characteristic of adjudication).

248. For discussion of this point, see *supra* note 246 and Fuller, *Forms and Limits*, *supra* note 200, at 365-72.

249. The concept of "legal obligation" used in this element is intentionally minimalistic. I do not claim that a legal obligation must be either "fair" or in accordance with some underlying notion of natural or positive law. It is enough that the obligation involve a claim that a person's liberty or property interest is held wrongly according to the principles created and enforced by the state.

Likewise, the concept of "dispute" also is minimalistic. The only dispute necessary is that one person seek to disgorge (or at least declare invalid) a liberty or property interest held by another through the invocation of a "legal obligation" that, if applicable, would require the transfer or elimination of the liberty or property interest. Neither the claim of obligation nor the other person's opposition to relinquishment of the interest must be made in good faith.

Implicit in this concept are three additional points. First, the dispute can involve either coordinate or conflicting obligations. An example of coordinate obligations is a claim of assault, to which the defendant asserts a claim of self-defense; each party asserts a distinct obligation to justify its claim to the liberty or property interest. An example of

from present legal principles or modes of analysis.²⁵⁰ This requirement distinguishes adjudication from social ordering based on reciprocity, such as contractual bargaining, because the person who is negotiating to obtain an object has no present entitlement to it.²⁵¹ It also distinguishes adjudication from social ordering based on common aims, such as legislative or rulemaking processes, because

conflicting obligations is the argument about whether negligence or strict liability principles should govern particular injury-causing conduct. In this instance, unless it is possible to adopt both, at least one (and perhaps both) of the obligations must be rejected. Although the instance of coordinate obligations rarely creates problems of rational "principle-finding," see *supra* note 244 and accompanying text, the instance of conflicting obligations can.

Second, implicit in the concept of "state-enforced" obligations is the question of remedy. Obligations that are merely state-sponsored (e.g., the national health-care platform of the winning political party or presidential endorsement of specific policies or legislation) cannot give rise to adjudicatory claims for the simple reason that the state is unwilling to put its coercive force behind the obligation. See *THE ROLE OF COURTS*, *supra* note 247, at 90; RAWLS, *supra* note 246, at 236. Although a state enforcement mechanism for legal obligations implies that the ability to provide efficacious remedies is a necessary aspect of adjudication, it is not necessary that the obligation create a single, unwavering remedy, or that the remedy be calculated to recompense precisely the person who seeks to disgorge the opponent's liberty or property interest. The focus is not on the right of the plaintiff to a remedy; it is on the wrong of the defendant in acquiring and possessing the relevant interest. Hence, the right and entitlement of the person seeking disgorgement to relief is not a necessary component of adjudication; the obligations of the defendant—not the rights of the plaintiff—are all that need be put into dispute. See generally Chayes, *supra* note 100, at 1298-302 (discussing a decree as an order tailored to enforce a defendant's obligations); Fiss, *supra* note 108, at 44-58 (analyzing remedy-shaping as a tool to force a defendant to meet his obligations). In this respect, I depart from those who perceive adjudication as necessarily involving a dispute about whether an aggrieved person has a "legal entitlement." See, e.g., *THE ROLE OF COURTS*, *supra* note 247, at 87.

Finally, declaratory relief is not inconsistent with adjudication. See 28 U.S.C. § 2201 (1988). When a dispute over a liberty or property interest exists, it is not necessary that the state immediately order coercive relief to disgorge that interest. *Id.* As long as coercive remedies remain as the fallback to a declaration of obligations, see *id.* § 2202, the disputants certainly can be given the opportunity to conform their conduct to the state's declaration of responsibilities.

250. Resolution of legal obligations already in existence is the paradigmatic instance of adjudication. See RAWLS, *supra* note 246, at 235-37. The more difficult issue is the extent to which a decision can create new obligations and still be called adjudication. See, e.g., *id.* at 238. The answer I suggest in the text, which admittedly draws no bright line, is that the present, existent body of legal rules, principles, and accepted arguments must contain sufficient data to shape a cogent and logical argument (i.e., an argument that corresponds to the patterns of legal argumentation and analysis prevalent in a society) for the development of new obligations. The obvious objection to this answer is its breadth. For instance, because most existing legal rules, principles, and arguments recognize the goal of compensation, wholesale changes in the law could seemingly be justified through the selective use of the compensation argument. There are two replies to this objection. The first is that, under our prevalent patterns of legal argumentation and analysis, compensation alone has never been deemed sufficient ground for the creation of liabilities. See, e.g., W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 4 (5th ed. 1984). The second is that various bodies of substantive law may contain their own internal constraints (a "form") that preclude the development of new obligations beyond a certain point. See *infra* note 562.

251. For a description of ordering by reciprocity, see Fuller, *Forms and Limits*, *supra* note 200, at 357-59.

rulemaking creates new obligations rather than declares responsibility under existing obligations.²⁵²

Even when this attribute is joined with reasoned judgment, however, adjudication has not been separated sufficiently from other modes of reasoned judgment. If I believe that present entitlements give me a right to cut across my neighbor's property, my reasoned decision to take the shortcut meets the first and fourth elements of the form of adjudication. A person who has suffered harm due to another's tortious behavior might ask a third person (for instance, a legislature) to make good the damage; the third person's decision likewise meets the criteria of reasoned judgment and existing legal obligation.²⁵³ Also satisfying these two criteria are most dispute resolution processes, including settlement, mediation, mini-trials, early neutral evaluation, dispute-resolution centers, summary jury trial, rent-a-judge programs, and arbitration.²⁵⁴

The second and third elements therefore are necessary to distinguish adjudication. The second element—that the claim of obligation be asserted against a person who is required to make the plaintiff whole—is necessary to distinguish adjudication from situations in which a plaintiff petitions a third person with a sense of largesse to remedy the plaintiff's loss.²⁵⁵ The third element—that the

252. For a description of ordering by common aim, see *id.* The reality that a legislative or executive body frequently is involved in the creation of new entitlements and obligations does not preclude these bodies from also engaging in adjudication. For instance, a legislature can designate itself as the tribunal under which the allocation of existing entitlements will be decided. See, e.g., U.S. CONST. art. I, § 3, cl. 6 (Impeachment Clause). Similarly, an executive agency with rulemaking power also can engage in adjudication, and an adjudicatory body can engage in rulemaking. See, e.g., 28 U.S.C. § 2072 (1988) (authorizing Supreme Court to create rules of procedure for federal district courts); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (upholding federal agency's use of adjudicatory rather than rulemaking procedures). An instance on the borderline of adjudication and rulemaking is the overruling of prior precedents. When the overruling is obvious and derivable from the direction of prior precedents, it would not appear that the court is legislating. When the overruling occurs "out of the blue," however, the court's result partakes more of legislation than adjudication.

253. The situation arises whenever a potential or actual litigant petitions the legislative body to amend existing law in order to make recovery either more simple or more difficult. See, e.g., 42 U.S.C. §§ 300aa-11 to -17 (1988) (authorizing petitions against government fund for injuries due to childhood vaccines); National Swine Flu Immunization Program of 1976, § 2, 90 Stat. 1113 (authorizing claims against government for liability of Swine Flu vaccine manufacturers); S. REP. NO. 640, 102d Cong., 1st Sess. 1-2 (1991) (proposing cutback on existing state remedies for product liability). Although the legislature's decision to create compensatory mechanisms or to modify existing law often involves reasoned judgment and thus satisfies the fourth element of adjudication, it obviously is not an adjudicative decision. On the other hand, once the legislature has decided to enact a measure creating a new compensatory mechanism (for instance, a vaccine compensation fund), then an obligation has been created, and a decision on that claim will be adjudicatory.

254. See generally STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (1985) (discussing benefits and drawbacks of various methods of dispute resolution).

255. Although it is essential that the claim be pressed against a person obligated to remedy the situation, it is not essential that the claim be prosecuted by the person who has suffered the harm. See *DAMASKA*, *supra* note 169, at 152-53, 202-04 (discussing systems in which others might prosecute on behalf of a disinterested claimant); *supra* note 249. It also is not essential that the defendants in adjudication only are those under an immediate obligation to remedy their failures of obligation; in theory, others who could assist in the remedy can also be joined.

state provide the decisionmaker—distinguishes adjudication from my unilateral decision to cut across my neighbor's property. It also distinguishes adjudication from alternate methods of dispute resolution.

The insistence on a state decisionmaker may seem an unnecessary fetish. Fuller, for instance, claimed that consensual arbitration was a form of adjudication.²⁵⁶ Indeed, arbitration frequently has the feel of adjudication, especially when accompanied by rules: that govern discovery, subpoena and interrogation of witnesses; require decisions on the merits of a claim; permit reconsideration of improper awards; and authorize adversarial party participation.²⁵⁷ Nonetheless, the common perception of adjudication envisions a judicial process in which the judge and jury are agents of the state.²⁵⁸ Moreover, the first attribute of adjudication—the existence of a dispute over existing legal obligations—implies that the decision must be based on state-created obligations. Arbitrators, however, need not decide disputes in accordance with state-created principles; they may use business or ethical norms that have no counterpart in state-created law and equity.²⁵⁹ Finally, arbitration has no method for

256. See Fuller, *Forms and Limits*, *supra* note 200, at 386, 392-93. Although it is not entirely clear that he limited adjudicatory arbitration to situations in which the arbiter's decision was binding, Fuller's examples apparently all concerned binding arbitration. See, e.g., *id.* at 387, 389, 395-96, 406, 408; see also GOLDBERG ET AL., *supra* note 254 (treating arbitration as a form of adjudication).

257. See United States Arbitration Act, 9 U.S.C. §§ 7, 10-12 (1988 & Supp. II 1990); Uniform Arbitration Act §§ 7-13, 7 U.L.A. 5 (1955); AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (1964) [hereinafter COMMERCIAL ARBITRATION RULES], reprinted in A DICTIONARY OF ARBITRATION AND ITS TERMS (K. Seide ed., 1970); AMERICAN ARBITRATION ASS'N, VOLUNTARY LABOR ARBITRATION RULES (n.d.) [hereinafter LABOR ARBITRATION RULES], reprinted in A DICTIONARY OF ARBITRATION AND ITS TERMS (K. Seide ed., 1970). See generally Habscheid & Schlosser, *supra* note 223 (discussing arbitration).

258. See THE ROLE OF COURTS, *supra* note 247, at 90 (stating that "the tribunal must be a governmental entity"); *supra* note 223 and accompanying text; see also Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) (noting that "[a]n arbitration hearing is not a court of law").

259. See COMMERCIAL ARBITRATION RULES, *supra* note 257, § 42 ("The Arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties."). Interestingly, the labor arbitration rules, also promulgated by the American Arbitration Association, do not even require that the arbitrator's decision be "just and equitable." See LABOR ARBITRATION RULES, *supra* note 257; see also 29 C.F.R. § 1404.15 (1991) (similarly expressing no standards to guide decisions in labor arbitrations).

The distinction between the exercise of equitable discretion under the Commercial Arbitration Rules and the adjudicatory discretion exercised by courts of equity is that the chancellor derives his or her ability to "do justice" from the state, so that the principles of equity become an aspect of each citizen's obligation. See *supra* note 249. On the other hand, the arbitrator does not necessarily look to the state or state-recognized principles of justice to resolve the dispute.

enforcing its rules and decisions. Although discovery can be ordered or an award made against a party, the party is under no obligation to abide by the arbitrator's decision.²⁶⁰ The principle of reasoned judgment implies the ability to enforce the decision reached; otherwise, the exercise of judgment will have been a meaningless and irrational exercise.

These four elements of adjudication do little to flesh-out the detailed contours of a procedural system.²⁶¹ To be sure, the attributes limit the range of procedural possibilities to some extent; for instance, rules that permit decision by coin flip or by rulemaking process do not conform to the adjudicatory model.²⁶² On the other hand, as long as each permits the exercise of reasoned judgment, a system of notice pleading with extensive pretrial discovery and a system of extensive fact pleading with no pretrial discovery both fulfill the requirements of adjudication. Similarly, nothing in the form of adjudication implies that the system will be adversarial or inquisitorial, or that the decisionmaker will be passive or active. Nor does reasoned judgment demand that procedures lead to the "best," most efficient, or most just resolution; all procedures that permit a rational resolution are permissible.²⁶³

In order to develop a procedural system more fully, then, additional, positive assumptions must be made. In the following two Sections, I explore the additional assumptions made by the procedural system in use in federal district courts, and analyze which of the assumptions are required by the form of adjudication.

260. For the general unenforceability of discovery orders see, for example, *Burton*, 614 F.2d 389, and *De Sapio v. Kohlmeyer*, 321 N.E.2d 770 (N.Y. 1974), and compare *Coastal States Trading v. Zenith Navigation S.A.*, 446 F. Supp. 330 (S.D.N.Y. 1977) (leaving open the possibility of discovery in an arbitration proceeding in exigent circumstances). Although the United States Arbitration Act and the Uniform Arbitration Act provide for court enforcement of arbitration decrees, see United States Arbitration Act, 9 U.S.C. §§ 9, 13 (1988); UNIF. ARBITRATION ACT §§ 14-16, 7 U.L.A. 5 (1955), the parties ultimately must apply to the state's adjudicatory process for enforcement of awards.

261. The four criteria of adjudication intentionally are minimalistic in order to account for the array of adjudicatory systems represented by the four procedural models in *DAMASKA*, *supra* note 169; the "public law" litigation model discussed in *Chayes*, *supra* note 100; and the "adaptionist" or "instrumentalist" models of *Fiss*, *supra* note 100, and *THE ROLE OF COURTS*, *supra* note 247.

262. Coin flips depart from adjudication's requirement of reasoned judgment because there is no attempt to apply fact to principle. See *supra* note 246. Rulemaking departs from adjudication's requirements that the claim of legal obligation be already in existence and that the decision be based on the relevant facts of the case. See *supra* notes 246, 249.

263. The insistence on the use of the procedures that best fulfilled his form of adjudication was one of Fuller's errors. See *supra* note 226 and accompanying text. Although a reasonable enough assumption, it is not logically required by the form of adjudication. A Mercedes may be a better car than a Yugo, but both meet the definition of a car, and nothing in the definition of "car" can tell us which car we should choose. Similarly, the fact that adversarial proceedings, passive arbiters, and provision only for retrospective relief might lead to a better system of adjudication does not illegitimate an activist inquisitorial system that meets adjudication's minimal norms.

B. *The Assumptions of Modern American Procedure*

Although it is conceivable that a government will spew out procedural rules without giving any thought to the goals that adjudication is to accomplish in the society, it is far more likely that adjudicatory rules will be crafted to conform to predetermined values. Like the attributes of adjudication, these values necessarily do not dictate all the details of a procedural system, but they make choices of specific rules more evident. In the United States, although the procedures among federal and state courts are hardly uniform,²⁶⁴ a set of seven shared assumptions has generated a largely homogenous set of rules whose differences (at least in comparison to Continental or Asian systems of procedure) are far less striking than their similarities. The assumptions are "case or controversy," due process, adversarialism, jury trial of cases at law, post-pleading formulation of issues, "transactionalism," and "trans-substantivism."

The first five assumptions are obvious to anyone who has sat through a basic course in civil procedure. The "case or controversy" requirement of Article III of the United States Constitution,²⁶⁵ together with prudential considerations of standing,²⁶⁶ ripeness,²⁶⁷ and mootness,²⁶⁸ restrict access to federal courts to those persons who have an actual stake in the outcome of a dispute,²⁶⁹ and bar advisory opinions.²⁷⁰ The second assumption, due process, is the cornerstone of American procedure. The Due Process Clause,²⁷¹ first and foremost, demands that affected persons receive adequate notice and the opportunity to participate in adjudicatory decisions that directly impinge on their rights to life, liberty, or property; a failure of notice and opportunity to be heard

264. See *supra* note 11.

265. U.S. CONST. art. III, § 2, cl. 1.

266. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 476-82 (1982) (discussing constitutional and prudential aspects of standing); cf. FED. R. CIV. P. 17(a) (requiring action to be prosecuted by a real party in interest).

267. See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (holding that an injury that is "certainly impending" is ripe for adjudication); *Buckley v. Valeo*, 424 U.S. 1, 113-18 (1976) (discussing constitutional and prudential aspects of ripeness).

268. See, e.g., *Honig v. Doe*, 484 U.S. 305, 317-18 (1988) (requiring that a controversy either be "actual and ongoing" or capable of repetition); *Preiser v. Newkirk*, 422 U.S. 395 (1975) (same).

269. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (requiring an "actual injury redressable by the court"); *Flast v. Cohen*, 392 U.S. 83 (1968); 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3529 (1984).

270. See, e.g., *EPA v. Brown*, 431 U.S. 99 (1977). Some states have relaxed this assumption to allow the judiciary to issue advisory opinions. E.g., MASS. CONST. pt. 2, chap. III, art. II. These provisions do not violate the United States Constitution, but may preclude the exercise of federal jurisdiction. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8 n.2 (1988).

271. U.S. CONST. amend. V.

eliminates the preclusive effect of any earlier decisions reached in the person's absence.²⁷² Second, the Clause acts as a limitation on the territorial power of state sovereigns over the person and property of those located elsewhere.²⁷³ Third, due process requires that the decisionmaker use reasoned judgment in arriving at the decision.²⁷⁴ Fourth, the Clause expresses a preference for those procedures that minimize the sum of litigation costs and error costs.²⁷⁵ Finally, the Clause expresses a preference for adversarial proceedings.²⁷⁶

Even though the third assumption, adversarialism, is to some extent dictated by due process, American procedure has embraced the adversarial model even beyond the bounds of constitutional requirement. Increasingly criticized,²⁷⁷ the adversarial assumption insists that adjudication be controlled by the parties, who formulate and present their version of the dispute to a dispassionate decisionmaker with no prior knowledge of or interest in the dispute.²⁷⁸

272. See *Martin v. Wilks*, 490 U.S. 755 (1989) (superseded by the Civil Rights Act of 1991, § 108, Pub. L. No. 102-166, 105 Stat. 1076); *Hansberry v. Lee*, 311 U.S. 32 (1940); COMPLEX LITIGATION PROJECT Draft No. 2, *supra* note 16, § 5.05, at 105-11.

273. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1877), *overruled by Shaffer*, 433 U.S. at 206.

274. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 501 (1972), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (Black, J., dissenting); *Fay v. New York*, 332 U.S. 261, 288 (1947), *overruled by Taylor*, 419 U.S. at 522; *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); Note, *supra* note 30, at 910 & n.68; cf. *Tanner v. United States*, 483 U.S. 107, 126 (1987) (recognizing a Sixth Amendment right to a tribunal that was "impartial and mentally competent," but refusing to allow an evidentiary hearing on alleged alcohol and drug use by jurors during deliberations (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912))).

275. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Obviously, as more procedural protections are provided, the cost of litigation rises. On the other hand, fewer protections increase the likelihood of error, which has its own costs. *Eldridge* suggests that the determination of the process due balances the costs of additional procedures against the risk of erroneous deprivation. Taken to its extreme, this cost-minimization concept, often associated with the law and economics movement, vaults efficiency over all other process values. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.1 (3d ed. 1986); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 30-35 (1984).

276. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (superseded by FED. R. CIV. P. 99); *Goldberg*, 397 U.S. at 268-71; *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring); cf. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (discussing the importance of adversarial procedure to "our system of jurisprudence to promote justice and to protect . . . clients' interests").

277. The classic critique of unfettered adversarialism is Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906) ("The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point."), reprinted in 35 F.R.D. 273, 281 (1964). For other discussions, which are by no means exhaustive of the literature, see Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976); Marvin E. Frankel, *The Search for the Truth: An Unimpaired View*, 123 U. PA. L. REV. 1031 (1975); Walter V. Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159 (1976). Dissatisfaction with overly adversarial procedure also motivated, at least in part, significant changes in the Federal Rules of Civil Procedure in the 1980s—changes that include new powers to limit discovery, see FED. R. CIV. P. 26(b)(1); the creation of new sanctions provisions, see FED. R. CIV. P. 11, 26(g); and increased powers of case management, see FED. R. CIV. P. 16.

278. See THE ROLE OF COURTS, *supra* note 247, at 88-93; Chayes, *supra* note 100, at 1285-88; Fuller, *Forms and Limits*, *supra* note 200, at 381-93. The Due Process Clauses of

Although adversarialism always has been tempered by the need for judicial power to prevent unfettered gamesmanship, the power may be exercised only within a narrow range that keeps the playing field level.²⁷⁹

The next assumption—jury trial in cases at law—represents another constitutional cornerstone of American procedure.²⁸⁰ The form of adjudication does not itself specify the nature of the decisionmaker. The Seventh Amendment of the United States Constitution, like similar provisions in state constitutions, fills the void by dividing the adjudicatory function between judges and juries.²⁸¹

the Constitution do not invariably insist on party control of proofs and arguments. See *Eldridge*, 424 U.S. at 332-35; JAMES & HAZARD, *supra* note 4, § 1.2.

279. Lord Chief Justice Hewart once described the civil judge as the person "who merely keeps the ring." *Rex v. Harris*, 2 K.B. 587, 590 (Crim. App. 1927). In theory, the judge cannot shape the issues, conduct an independent investigation into the case, or examine witnesses; she can only sanction conduct that exceeds the rules for party combat. See DAMASKA, *supra* note 169, at 220-21; Miller, *supra* note 275, at 19-20, 33-34; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). In practice, of course, even the most adversarial of systems have permitted judges and juries to exercise some of the adversaries' powers. See JAMES & HAZARD, *supra* note 4, § 1.2; LOUISELL ET AL., *supra* note 46, at 1098-105. As a general matter, however, there is no doubt that the litigants and their attorneys control the presentation of evidence and arguments. A timeless description of this contest in action remains LEON GREEN, *JUDGE AND JURY* 395-403 (1930).

280. See U.S. CONST. amend. VII.

281. The precise parameters of the relationship between judge and jury are quite complex and vary among jurisdictions. In general terms, judges in the federal courts decide pure questions of law in all cases, questions of fact in suits sounding solely in equity, and some questions of fact in cases at law; juries decide all remaining questions, including mixed questions of law and fact. There are, however, exceptions. First, although juries are not constitutionally mandated in equitable suits, Congress may provide for them by statute or the parties may consent to their use; conversely, parties to an action at law can waive their jury trial right. See FED. R. CIV. P. 38(a), 38(d), 39(c). Second, although judges typically decide "pure" questions of law in all cases, mixed questions of law and fact are often left to the jury in cases tried at law; and the boundary between "law" and "fact" has changed throughout history. See JAMES & HAZARD, *supra* note 4, § 7.2. But see FED. R. CIV. P. 49(a) (allowing use of special verdicts). Third, juries preempt judicial fact-finding on issues relevant to legal and equitable claims tried in a single proceeding. *Lytle v. Household Mfg.*, 494 U.S. 545 (1990); *Beacon Theaters v. Beaver*, 359 U.S. 500 (1959). But judges also are entitled to intrude upon the fact-finding process of the jury through devices such as summary judgment and judgment as a matter of law. See FED. R. CIV. P. 50(a), 50(b), 56. When Congress permits, judges also can decide some of the factual issues not essential to the right of jury trial. *Tull v. United States*, 481 U.S. 412 (1987).

States may divide responsibility between judge and jury differently than the federal system. Some have allowed juries to hear cases in equity. See JOHN J. COUND ET AL., *CIVIL PROCEDURE* 895 (5th ed. 1989); MILLAR, *supra* note 2, at 39-42. States may use more or less restrictive standards for the judge's ability to intrude on the fact-finding process of the jury. See, e.g., *Simblest v. Maynard*, 427 F.2d 1 (2d Cir. 1970). They also may vary in their view of the power of the legislature to interfere with the right of jury trial. Compare *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (en banc) (finding legislative cap on noneconomic tort damages violative of Washington's right to jury trial) with *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (finding no infirmity in United States or Virginia Constitutions for legislative cap on all tort damages), *unrelated certified questions answered*, 389 S.E.2d 670 (Va. 1990).

The fifth assumption of American procedure rejects the common law's devotion to pleading as the process for the definition of issues. Recognizing that there must be some way to narrow a dispute to the relevant questions of law and fact, however, modern procedure requires less specific pleadings, followed by an opportunity for the parties to narrow issues and eliminate meritless claims through pre-trial informational disclosures that "discover" the true nature of the opponent's case.²⁸² The requirement of disclosure conflicts, of course, with the strict adversarial ethic; the resulting accommodation allows discovery of information about the factual occurrences in the dispute while protecting attorney advice, attorney impressions, and other materials prepared in anticipation of litigation.²⁸³

The final two assumptions are less widely known. A reaction against the common law's use of the writ as the unit around which to organize a lawsuit,²⁸⁴ "transactionalism" holds that the unit around which a lawsuit should be organized is the transaction or series of factual events that give rise to the claim(s) of legal entitlement.²⁸⁵ Although the writ system's focus on the plaintiff's personal legal entitlement made joinder of other affected parties largely unnecessary and therefore exceedingly difficult, the transactional approach requires rules that also permit the joinder of other persons affected by the same series of events.²⁸⁶ Thus, transactionalism contemplates the broad joinder of claims, defenses, and parties whenever the event giving rise to the dispute implicates them.²⁸⁷

Finally, the Federal Rules of Civil Procedure aspire to be a "trans-substantive" procedural system. Again a rejection of common law procedure, "trans-substantivism" requires that the same set of rules be applicable to all cases; there are no longer separate rules for tort

282. See FED. R. CIV. P. 8-10, 26-37; see, e.g., *Conley v. Gibson*, 355 U.S. 41 (1957); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). For theoretically more restrictive rules of modern code pleading, see, e.g., N.Y. CIV. PRAC. L. & R. 3001-45 (McKinney 1991); *Gillispe v. Goodyear Serv. Stores*, 128 S.E.2d 762 (N.C. 1963); CLARK, *supra* note 4, § 38.

283. The prohibition against disclosure of attorney-client information, an attorney's mental impressions of a case, and opinions of experts informally consulted on a case are nearly absolute, whereas the showing required for disclosure of other forms of "work product" is high. See FED. R. CIV. P. 26(b)(3), 26(b)(4); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses*, 622 F.2d 496 (10th Cir. 1980).

284. See MAITLAND, *supra* note 10, at 5; *supra* notes 2-4 and accompanying text.

285. See FED. R. CIV. P. 13(a), 13(g), 18. Under the Federal Rules, a party's ability to join claims actually exceeds the narrow requirements of transactionalism. In some instances, a party may assert in one pleading claims that do not arise out of the same transaction or occurrence, although the court then retains the power to split those claims off for separate proceedings. See *id.* 13(b), 18, 42(b).

286. See *id.* 13(h), 14, 19-24.

287. The justifications for transactional procedure can be found in CLARK, *supra* note 4, § 19, at 137-48. See also Chayes, *supra* note 100, at 1290 (discussing the transactional assumption); *supra* note 9 and accompanying text (discussing the demise of arcane pleading procedures). Under the Federal Rules, if the resulting case becomes too large, the court retains the power to pare the case down into digestible pieces. See FED. R. CIV. P. 42(b). That power derives not from the transactional assumption, but from that aspect of the Due Process Clause that prefers streamlined, cost-effective procedures. See *supra* note 275 and accompanying text.

cases, contract cases, and equitable claims.²⁸⁸ Trans-substantivism, which can perhaps best be summarized by the phrase "all cases treated procedurally alike," does not require precise equivalence of procedures in all cases; rather, it requires that the procedural differences that inevitably occur among cases not influence the outcome of the case. Necessarily, therefore, trans-substantivism implies a certain amount of discretion. For instance, a rule that limited a party to ten depositions in all cases would have potentially outcome-determinative consequences when applied in one case which has three witnesses and in another which has fifty witnesses. Thus, this facially neutral rule actually would violate the trans-substantive assumption. On the other hand, a judicially-tailored limit of five depositions in the case with only three witnesses and a different limit of fifty depositions in the case with thirty witnesses does not treat the cases disparately. Given the infinite patterns of claim and party joinder possible under transactionalism, trans-substantivism appears to work optimally with a set of "general," "loosely textured" rules in which judges have the discretion to shape procedures to ensure that the rules do not unduly influence the outcomes of cases.²⁸⁹

Paradoxically, however, the discretion to fashion case-specific rules also threatens trans-substantivism—not at the level of formal rule, but at the level of rule implementation in individual cases.²⁹⁰ The efficiency preferred by the Due Process Clause,²⁹¹ the party control of proceedings required by adversarial process, and the widely varying purposes of different bodies of substantive law²⁹² make the accomplishment of the trans-substantive goal even more difficult. Therefore, although arguably required by the Enabling

288. See FED. R. CIV. P. 1, 2. For defenses and critiques of the trans-substantive assumption, see Burbank, *supra* note 21, at 1471-76; *supra* note 12.

289. See Carrington, *supra* note 12, at 2079-84. Roscoe Pound spearheaded the drive for judicial discretion, making it his first principle of procedural reform. See Pound, *supra* note 10, at 402 ("It should be for the court *in its discretion*, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and *such discretion* should be reviewable only for abuse.") (emphasis added). The Federal Rules of Civil Procedure, which use the word or concept of discretion in nearly a third of its rules, see Subrin, *supra* note 2, at 923 n.76, have largely been built around the concept of the neutral, wise, and professional judge. Carrington, *supra* note 12, at 2082.

290. See Burbank, *supra* note 21, at 1474; Burbank, *supra* note 12, at 714-19; cf. DAMASKA, *supra* note 169, at 239 (noting that, in the policy-implementing process of coordinate officialdom, "considerable uncertainty and instability are introduced into the legal system"); RAWLS, *supra* note 246, at 238 (arguing that necessary precepts of formal justice are "that laws be known and expressly promulgated, that their meaning be clearly defined, and that statutes be general both in statement and intent"); Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2125-26 (1989) ("Is there any inconsistency [between the exercise of judicial discretion and] the trans-substantive goal?").

291. See *supra* note 275 and accompanying text.

292. See Cover, *supra* note 12.

Act of 1934,²⁹³ trans-substantivism remains procedure's most elusive goal, both because of the internal problems of developing a uniform yet useful set of rules and because of the external conflict with other procedural and substantive assumptions.

The inherent tensions of trans-substantivism require a deeper examination of its underpinnings. This principle of "treating *all* cases procedurally alike" is actually an amalgamation of four separate ways of articulating the principle of "treating *like* cases procedurally alike."²⁹⁴ The first way posits that two cases that are transactionally alike should receive the same procedures. Thus, it is wrong for one slip-and-fall to receive notice pleading, liberal discovery, and a jury, while a second slip-and-fall receives fact pleading, no discovery, and trial to the bench. Such disparate procedures risk different substantive outcomes among legally and factually similar cases. For lack of a better phrase, I will call this articulation of the "like treated alike" principle "inter-transactional neutrality."

A different conception of the "like treated alike" principle is that all cases that involve a single legal theory should receive procedures that create no differences in substantive outcome. The assumptions of transactionalism and inter-transactional neutrality neither require nor preclude the application of a single set of procedures to unrelated and factually dissimilar transactions that incidentally invoke recovery under the same legal theory. Arguably a vestige of the writ

293. The Enabling Act required that the rules of procedure promulgated by the Supreme Court be "general." Enabling Act of 1934, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2073(a) (1988)). With the exception of the merger of law and equity—specifically authorized by the Rules Enabling Act—the sparse legislative history of the Rules Enabling Act does not suggest that Congress contemplated the creation of a trans-substantive procedural code. See S. REP. NO. 1049, 73d Cong., 2d Sess. (1934); H.R. REP. NO. 1829, 73d Cong., 2d Sess. (1934); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1094-98 (1982). Among the early proponents of the Rules Enabling Act and the members of the Advisory Committee that created the 1938 Federal Rules, there came to be a recognition that the "general" rules would be uniform and simple, making no distinction between legal and equitable theories; but discussion of the effect of "general" procedural rules on related cases, claims, and parties seemed lacking. See Burbank, *supra*, at 1061-94; Subrin, *supra* note 2, at 959-61, 972-73, 977. For a debate about whether the term "general" in the Enabling Act implies trans-substantive rules, compare Carrington, *supra* note 12, at 2079 (stating that "general" presumes "trans-substantive") with Kaplan, *supra* note 290, at 2125 (concluding that "general" could mean only that rules be uniform in all federal courts).

294. Both formalists and instrumentalists recognize the importance of treating like cases procedurally alike. Rawls posits that the "rule of law also implies the precept that similar cases be treated similarly." RAWLS, *supra* note 246, at 237; cf. 2 THE SUMMA THEOLOGICA OF THOMAS AQUINAS 1018 (English Dominican Province trans. 1981) ("[L]aw is a general precept."). Fiss likewise intimates his acceptance of the principle that "similar communities be treated alike." FISS, *supra* note 100, at 51. As Rawls acknowledges, however, "this notion does not take us very far." RAWLS, *supra* note 246, at 237. Justice does not "require[] that *all* communities be treated identically," FISS, *supra* note 100, at 51, and it is often difficult to choose the community with which a claimant is more properly associated, see *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198 (N.Y. 1991). To decide which procedural "communities" are important and which are not, it is first necessary to articulate the different ways in which similar cases can be treated with procedural dissimilarity. The second step is then to develop priorities among the different types of procedural dissimilarity. See *infra* notes 305-08, 521-29 and accompanying text. This two-step effort has never been attempted in the context of civil procedure.

system,²⁹⁵ this application of the "like treated alike" principle opts for common procedures; thus, any procedural differences that might exist between a slip-and-fall and a mass tort cannot be the cause of a victory for one plaintiff and a loss for another. I will call this application of the "like treated alike" principle "intra-substantive neutrality."

Taken together, inter-transactional and intra-substantive neutrality point in the direction of trans-substantivism. Nonetheless, it is possible to satisfy both assumptions with a writ-like system in which each distinct legal theory asserted in a case receives its own system of procedures.²⁹⁶ When the adjudicatory unit cuts a horizontal, fact-driven swath across substantive legal theories, however, it makes little sense to retain vertical fences of separate substantive procedures. Thus, the third aspect of the "like treated alike" principle holds that, within a single lawsuit, all claims and defenses must receive the "same" procedures—procedures that do not result in the disparate handling of evidence or arguments relevant to two or more claims or defenses. Unlike the two prior applications of the "like treated alike" principle, this application does not focus on disparate results among legally or factually similar transactions; it concerns itself with the potentially disparate impact of procedural rules on the various legal theories within a single transaction. I will call this application "transactional neutrality."

Finally, the principle of "like treated alike" can mean that all parties to a lawsuit must receive procedures that do not cause disparate outcomes. This application of the principle is related to, but different than, transactionalism, which requires that all parties to a transaction be capable of joinder but does not dictate the procedures that should be applied to the parties after joinder. It is also distinct from

295. The writ system conceived of procedures "vertically"—in terms of the form of the plaintiff's action rather than "horizontally"—in terms of the factual events surrounding the transaction. See *supra* notes 2-4, 284-87 and accompanying text. Once procedure identifies the transaction as the basic unit of adjudication, there is no reason to insist that two cases that have dissimilar facts but that coincidentally involve the same legal theory should receive the same procedures.

296. For example, consider a set of procedural rules that demand that any contract claim be supported by the testimony of five bishops, even though any competent evidence can support a tort claim. For a products liability case alleging both warranty and strict liability claims, these evidentiary rules satisfy the assumption of inter-transactional neutrality, because the same rules apply to all similar contract-tort cases. They also satisfy the assumption of intra-substantive neutrality, because the rules specify one set of evidentiary rules for all cases sounding in contract and one (albeit different) set of rules for all cases sounding in tort. Nonetheless, if a plaintiff cannot secure the testimony of five bishops, her warranty claim will be lost on summary judgment, but her tort claim still may survive through trial. The disparate results between the theories derive entirely from the difference in procedural rules.

transactional neutrality, which focuses on the procedures to be applied to the claims asserted in a case. This aspect of trans-substantivism, which I will call "inter-personal neutrality," means that no procedure that causes outcome-determinative differences among the plaintiffs harmed in a transaction is legitimate. Likewise, there can be no outcome-determinative differences among defendants who participated in the transaction.

The only way to satisfy simultaneously all four aspects of the "like treated alike" principle is to adopt, and enforce, a trans-substantive code that treats all cases procedurally alike. Should any of the four neutralities be abandoned, trans-substantivism would also collapse.

Just as it often is difficult to satisfy simultaneously all four neutralities, it is impossible to satisfy simultaneously all seven of modern litigation's assumptions. In a particular case, adversarial proceedings might not be cost-effective; in another, jury trial of only some claims might thwart transactional neutrality. With the exception of assumptions of constitutional stature, which trump other assumptions when a direct conflict exists, modern procedure provides no method for ordering the seven assumptions to resolve inherent conflicts among them. Therefore, the assumptions cannot themselves specify a single procedural code. Instead, as experience and tastes change, different emphases can be given to different assumptions, and different procedural rules can be created. Because all of the assumptions must be satisfied to some degree, the range of possible rules is limited. Nevertheless, choices remain, and procedural tinkering is an expected consequence of modern procedure.²⁹⁷

C. *The Relationship Between the Form of Adjudication and the Assumptions of American Procedure*

Until now, I have assumed that the assumptions made in American procedure are entirely positive, that is, they are not dictated by (but also not inconsistent with) the normative form of adjudication. As the insistence of due process on reasoned judgment demonstrates, however, some of modern procedure's assumptions also are normatively required.²⁹⁸ Therefore, the separation of normative from positive assumptions might well be crucial to an understanding of the form of complex litigation and the limits on its solutions. The reason is simple: Proposals that transgress the normative (and therefore inviolable) attributes of adjudication are not legitimate solutions in adjudicatory system; whereas proposals that violate only the positive (and therefore impermanent) assumptions of modern

297. For instance, during the 1980s the Federal Rules of Civil Procedure have undergone a general shift in favor of efficiency at the expense of adversarialism. See FED. R. CIV. P. 11, 16, 26(b)(1), 26(f), 26(g), 37(g); Miller, *supra* note 275, at 30; Resnik, *supra* note 279. Decisions interpreting the Federal Rules and the courts' inherent powers likewise have demonstrated, either consciously or subconsciously, a greater willingness to weigh the societal burdens of litigation more strongly than the individual opportunity to be heard on the merits. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976); Marcus, *supra* note 15, at 443-44.

298. See *supra* notes 246, 295 and accompanying text.

procedure remain candidates for further consideration.²⁹⁹

Five aspects of modern procedure are fundamental to the form of adjudication. First, and most obviously, that aspect of the Due Process Clause that prefers decision by reasoned judgment³⁰⁰ meshes with adjudication's identical requirement. The remainder of the requirements of due process—notice and opportunity to be heard, territorial limitations, efficiency, and adversarial process—are not, however, fundamental attributes of adjudication.

Second, adjudication's requirement that a claim be brought against a person legally obligated to provide a remedy replicates one aspect of modern procedure's "case or controversy" assumption. The "case or controversy" assumption, however, is much broader; it also requires that the claim be brought by a person who has suffered an actual injury.³⁰¹ This aspect of the "case or controversy" requirement finds no counterpart in the form of adjudication.³⁰²

The third procedural assumption of normative stature is transactionalism. Transactionalism's normative character derives from adjudication's insistence on reasoned judgment by the decisionmaker. If reasoned judgment is to be guaranteed, the decisionmaker cannot be bound to accept one of the proffered positions, but must instead have the freedom to range over facts and legal theories not presented by the participants.³⁰³ In order to provide this freedom, a

299. Of course, solutions that violate neither the normative assumptions of adjudication nor modern procedure's positive assumptions would be preferable. As Part III will show, however, complex litigation necessarily involves a challenge to a number of these assumptions. Hence, the sifting of essential from merely desirable attributes of adjudication is crucial.

300. See *supra* note 274.

301. See *supra* notes 265-69 and accompanying text.

302. See *supra* notes 248-52, 265-72 and accompanying text.

303. It is not necessary that the decisionmaker exercise this power in any given case; the parties may supply sufficient information and arguments for fact-finding, fact-applying, and law-finding to be accomplished rationally. Even Lon Fuller, who was as closely tied to the concept of adversarialism as any modern thinker, recognized that in some (albeit limited) instances the decisionmaker was entitled to go beyond the record provided by the parties. See Fuller, *Forms and Limits*, *supra* note 200, at 388-89. Fuller never justified his willingness to allow the decisionmaker some license, even though this license departs from his usual insistence on party proofs and argument. The only logical explanation is that reasoned judgment requires the decisionmaker to make adjustments in thinking when its rational processes lead it to find facts or legal principles advocated by neither party. Cf. FED. R. EVID. 706 (permitting use of court-appointed experts).

Once the primacy of reasoned judgment over party presentation is recognized, see *supra* notes 244-47 and accompanying text, then the limits that Fuller sets on the decisionmaker's power to inquire beyond the parties' presentations must also collapse. The only formal principle for limiting the decisionmaker's investigative powers is relevance. The decisionmaker's power to explore all aspects of a transaction necessarily does not invalidate all rules of procedure that preclude the introduction and consideration of evidence on nonrelevance grounds, see, e.g., FED. R. EVID. 501, 801-805, or on the grounds of failure to comply with procedural requirements in pleadings, discovery, and

procedural system necessarily must have the capacity to make an entire factual transaction available for adjudication. Therefore, any system that limits the decisionmaker to the resolution of particular facts or theories fails to meet adjudication's normative commands.

Like the due process and "case or controversy" requirements, however, transactionalism is not mandated completely by the form of adjudication. When the dispute before the decisionmaker cannot be resolved rationally without additional parties, the norms of adjudication require the joinder of other parties affected by the same course of conduct. These instances of compulsory joinder are exceedingly rare—far rarer than the instances of compulsory party joinder presently allowed under the Federal Rules of Civil Procedure.³⁰⁴ This stingy acceptance of party joinder displays adjudication's essentially conservative nature; as long as its four elements are satisfied, adjudication lacks the inherent power to choose other rules that lead to a "more" rational, more efficient resolution.

Next, the assumption of inter-transactional neutrality, which posits that legally similar transactions should receive the same set of procedures, is, at least in part, a necessary component of the form of adjudication. The normative component of this assumption derives from adjudication's first attribute: a dispute over a pre-existing obligation. The pre-existence of a legal obligation assumes that, if one person violates an obligation, another person acting under identical circumstances violates the same obligation. In other words, obligations exist independently of the specific adjudicatory proceedings that resolve them.³⁰⁵ If differences in procedure between similarly

pretrial orders, *see e.g.*, FED. R. CIV. P. 11, 15(a), 16 (f), 37(b)(2)(A)-(C). Incidental restrictions on the admissibility of some aspects of a transaction are necessary to protect nonadjudicatory societal interests or to assure focus on directly relevant evidence. Punitive sanctions for refusal to cooperate in adjudication are a necessary, albeit unfortunate, power to make the adjudicatory process meaningful. *See infra* notes 533-34 and accompanying text.

304. The form of adjudication requires party joinder in an adversarial system only when nonjoinder threatens an affected person's ability to present proofs and argument or to implement a remedy. *See infra* notes 429-37 and accompanying text. The Federal Rules allow compulsory joinder in three instances: joinder of persons needed for a just resolution, FED. R. CIV. P. 19; interpleader to avoid multiple or inconsistent liability, *id.* 22; and class actions, *id.* 23. Statutory interpleader under 28 U.S.C. §§ 1335 and 2361 is a fourth instance. To a certain extent, these rules overlap with the instances in which the form of adjudication requires joinder. But the Rules do not confine themselves to joinder necessary to accomplish rational adjudication in the limited sense in which the form of adjudication requires rationality. For a more detailed description of the relationship between the form of adjudication and the more expansive party-joinder principles of the Federal Rules, *see infra* notes 430-38 and accompanying text.

305. For a discussion of adjudication's need for principles that exist (or are at least discernible) prior to the adjudication, *see supra* notes 246, 249-50 and accompanying text; RAWLS, *supra* note 246, at 237-38; Fuller, *Forms and Limits*, *supra* note 200, at 365-81. This view contrasts with the view of legal realists or pragmatists who believe, to use Leon Green's phrase regarding tort law, that "we may have a process for passing judgment in negligence cases," but no "law of negligence" beyond the process itself. *See GREEN*, *supra* note 279, at 185. *See generally* P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1980) (perceiving that, in resolving the tension between deciding a case based on the effect the decision will have in the future and the desire to achieve justice in particular circumstances, modern courts have shifted toward placing more emphasis on the latter).

situated cases cause differences in the decision, however, no obligation can be said to exist until the procedures are established. Consequently, the form of adjudication insists that the procedures used to decide one claim of obligation be the same as procedures used to decide other claims that are not factually or legally distinguishable.³⁰⁶ When similar transactions involve factual differences that are legally relevant, however, adjudication does not insist on similar procedures; here, the differing legal obligations permit the use of different procedures.³⁰⁷

For a similar reason, certain aspects of inter-personal neutrality, which requires that the same procedures be applied to all parties to a single transaction, also inhere in the form of adjudication. If one plaintiff or one defendant receives the benefit of procedures not granted to identically situated plaintiffs and defendants, then the procedures established during the course of the adjudication would define the obligation. This result contravenes adjudication's requirement of violation of an obligation existing before the occurrence of the dispute. Of course, the form of adjudication does not preclude the use of disparate procedures for parties whose cases are legally or factually dissimilar. Thus, if the law does not recognize product misuse as a defense in a products liability action, the claims of one person who misused the product and one who did not cannot

306. Interestingly, this concern with equality of procedure among cases cannot be derived from adjudication's attribute of reasoned judgment. Reasoned judgment focuses on the decisionmaker's ability to resolve an existing dispute through the application of a universal substantive norm (or law) to fact. Thus, reasoned judgment would require only that the second case be resolved by applying the same substantive law to the facts. It would not insist on equivalence in procedures or outcomes.

Adjudication's embrace of inter-transactional neutrality also should be distinguished from the entirely different question of whether a particular "procedural" rule can have "substantive" effects. Adjudication does not deny that procedural rules influence substantive outcomes, and thus can conceive of procedural rules as an aspect of the pre-existing obligation. From the perspective of adjudication, the precise content of the obligation, and consequently of the procedural rules that enforce that obligation, is not especially significant; the important matter is that procedural rules not vary in a way that makes the obligations indeterminate or that otherwise conflicts with the norms of adjudication.

307. Because no two cases are identical, it is always possible to find factual differences that could justify disparate procedures. As the text indicates, however, the factual differences must be ones that the law recognizes as leading to different obligations. The temptation to create questionable, case-specific legal distinctions (e.g., by claiming that the defendant's obligation to use due care toward a boy during November differs from its obligation to use due care toward a girl during May) as a means of justifying case-specific procedural rules fortunately is limited by three notions. First, the concept of a principle implies that rules will have application beyond a given case; second, all law-finding must use reasoned judgment; and third, the legitimacy of the judiciary in our society depends on a certain consistency of result. See *supra* notes 246, 249; see also RAWLS, *supra* note 246, at 237 ("The requirement of consistency holds of course for the interpretation of all rules and for justifications at all levels. Eventually reasoned arguments for discriminatory judgments become harder to formulate and the attempt to do so less persuasive.").

be adjudicated under different, outcome-determinative procedural rules created to account for the misuse. On the other hand, if the law recognizes misuse, then procedures that lead to disparate treatment are not precluded by the form of adjudication.³⁰⁸

These five assumptions of modern procedure are the only ones essential to the form of adjudication. Trial by jury, efficiency of procedure, notice and opportunity to be heard, territorial power, adversarialism, post-pleading issue disclosure, most of transactional party joinder, and transactional and intra-substantive neutrality all are consistent with adjudication's attributes, but none is compelled. Although it could be argued that some or all of these assumptions better fulfill the ends of adjudication than other sets of assumptions, this assertion is just as irrelevant to the formal analysis of adjudication as a claim that a coupe is better than a station wagon is to the formal analysis of a car. These assertions mask the reality that both cars are still cars, and that inquisitorial, policy-implementing decisionmaking is every bit as adjudicatory as the adversarial, conflict-solving system preferred in America.

D. Summary

The foregoing "detour" through the form of adjudication and the positive assumptions of American procedure has provided both mandatory and desirable criteria for the adjudication of disputes. The most significant mandatory limit on procedural rules is that the rules must not frustrate the exercise of reasoned judgment. Other formal limits on procedural innovation preclude rules that prevent transactional joinder of claims or foster disparate outcomes among factually and legally indistinguishable transactions and parties. Desirable procedural aims—including efficient rules; adversarial process; and sameness of procedure among all causes of action in one case, among all cases invoking the same cause of action, and among differently situated parties involved in a transaction—further guide the choice of procedural rules, but may be sacrificed in the interests of adjudication.

III. The Form of Complex Litigation

Part II's analysis now brings the definition of complex litigation into sharp focus. As Part I demonstrated, most of the existing definitions of complex litigation myopically describe particular manifestations of substantive or procedural complexity. None of the definitions integrates these observed manifestations, complex litigation's uncertain relationship to case management, and the insights of Chayes, Fuller, and Damaska. In this Part, by joining these insights to the form of adjudication and the assumptions of modern

308. The difference in rules might well violate the positive assumptions of transactional neutrality and intra-substantive neutrality. Because neither of these neutralities inheres in the form of adjudication, however, the form of adjudication itself does not bar the disparate procedures.

American procedure, I develop a universal definition of complex litigation.

This definition contains two essential elements. First, complex litigation involves the inability of a properly functioning adversarial system to guarantee reasoned judgment, a reality that provokes a nonadversarial exercise of judicial power designed to preserve reasoned judgment. This attribute, which plays out the conflict between the formal requirement of reasoned judgment and the positive assumption of adversarial process, turns out to be insufficient as a definition of complex litigation. Also required is a second attribute: The procedures created by the assertion of increased judicial power clash with at least one of the four pillars of trans-substantivism—inter-transactional neutrality, intra-substantive neutrality, transactional neutrality, or inter-personal neutrality.

Even as they define complex litigation, these dual attributes suggest certain limitations on the use of judicial power. Frequently, however, two or more techniques fulfill the formal demands of adjudication, but each does violence in different ways to the positive assumptions of modern litigation. In this situation, choosing among the permissible techniques remains a difficult decision. Therefore, this Part closes with an analysis for selecting the techniques to resolve complexity's conflicts.

A. A First Glance: Dysfunction and the Modes of Complexity

The crucial clues in the search for the definition of complex litigation are those provided by Chayes and Fuller. As different as their endpoints are, both start from the traditional—and for Fuller, legitimate—model of American adjudication. Shaped by our common-law heritage, the model depends on the participation of several players. The first is the judge, a neutral arbiter who declares objective law, referees disputes between litigants, and enters judgments. The next group of players is the jury. As rational, dispassionate, and uninformed about the particulars of a case as the judge, the jury must resolve factual disputes based on the evidence presented and decide whether the facts adduced at trial require relief under the law declared by the judge. A third group are the parties, whose functions in litigation are limited to providing information (testimony and documents) and complying with the judgment of the court.³⁰⁹

309. See DAMASKA, *supra* note 169, at 220 ("Parties fade[] into the background . . ."). Another function of parties is to pay the fees of their attorneys. That matter is considered in *infra* note 317 and accompanying text.

At the center of the process is the final set of players: the lawyers.³¹⁰ They find the information concerning the event in question, they decide how much of that information should be told to the judge and jury, they choose the legal theories under which the case will be decided, they make the arguments that inform the judge or jury about how to decide the case. They perform these tasks by acting as advocates for one side, on the assumption that truth will be achieved through a clash of adversaries with an incentive to expose the weaknesses in an opponent's seemingly ironclad case.³¹¹

This model of adjudication proceeds on the assumption of neatly defined and, for the most part, mutually exclusive roles.³¹² As Chayes points out, however, "public law" litigation has muddled these neat divisions. The judge shoulders some of the responsibility for shaping the law and facts, asserts the right to make more of the factual decisions, and involves herself intricately in the parties' implementation of a remedy.³¹³ Chayes' problem, however, lies in justifying this judicial usurpation at the expense of the other actors in the litigation enterprise: the parties, the jury, and especially the lawyers.³¹⁴

Ironically, Lon Fuller, Chayes' intellectual nemesis, supplies the justification. Central to Fuller's conception of adjudication, as well as to the properly constituted form of adjudication outlined in Part II, is a process through which decisions are made by rationally applying legal principles to evidentiary proofs.³¹⁵ Perhaps, then, the increase in judicial power that Chayes and others have observed may be a consequence of the inability of the lawyers, the jury, and the parties to fulfill their traditional functions in the rational resolution of the dispute, and the commensurate need of the judge to step into the vacuum in order to ensure rational resolution. If that explanation were true, then the increase in judicial power is entirely justified. The positive assumption of adversarial process must bend to accommodate the unyielding norm of reasoned judgment.

To test the hypothesis that the nontraditional assertion of judicial power to protect reasoned judgment constitutes an essential element of a definition of complex litigation, we can examine the types of situations in which lawyers, jurors, and parties become incapable of fulfilling their adversarial tasks, and observe whether the response has been assertion of judicial power that in fact protects rational judgment. We then can analyze whether these situations

310. See DAMASKA, *supra* note 169, at 220.

311. See JAMES & HAZARD, *supra* note 4, § 1.2; Resnik, *supra* note 12, at 502-07; cf. COMMISSION ON MASS TORTS, *supra* note 14, at xiii (preface of Robert F. Hanley) (calling the adversarial system "the finest system ever designed to resolve human conflict").

312. In reality, there is some overlap of roles. For instance, judges and jurors can often ask some questions of witnesses, see LOUISELL ET AL., *supra* note 46, at 1098-105, and judges make certain factual determinations, see *supra* note 281 and accompanying text. The areas of overlap do not significantly displace the roles of the players in their primary area of responsibility.

313. Chayes, *supra* note 100, at 1296-302.

314. See *supra* notes 166-68 and accompanying text.

315. See *supra* notes 244-47 and accompanying text.

correspond to the types of complexity that the existing commentary has documented. If the formal theory and the empirical observations match, then we will have found a common theme uniting the seemingly disparate manifestations of complexity.

1. Lawyer Dysfunction: Herein of "Formulational Complexity"

The lawyer is the centerpiece of the traditional model of litigation. He formulates the evidence, the issues, and the arguments. This formulational process occurs both before trial, when the information about a transaction is marshaled and the legal arguments are shaped, and during trial, when the lawyer seeks to present the information in a persuasive fashion.

Lawyer dysfunction—the inability to perform this formulational task assigned by the adversarial system—can arise from a number of sources. First, the nature of information that the attorney must garner and marshal may make it impossible for the attorney to formulate adequate proofs and arguments. For instance, the underlying transaction may be so wide-ranging that the investigation to obtain all the relevant information from all potential sources prevents the case from being prepared for trial within a reasonable period.³¹⁶ More likely, the mass of information makes the discovery process so costly that the litigant is unable to afford to pay the lawyers to obtain information critical to reasoned judgment,³¹⁷ or the costs to other

316. By "reasonable period" I mean a period within which no evidence critical to a reasoned decision will be lost or destroyed. For instance, if both voluminous documentary evidence and the testimony of certain witnesses are crucial to the parties' arguments, the need to spend time first discovering the documentary material might result in faded memories or death. The absence of the crucial testimony makes the fact-finder's resolution a matter of hunch rather than reason.

Given the parties' ability to perpetuate testimony and to use depositions at trial in the event of death or lapsed memory, *see* FED. R. CIV. P. 27, 32(a); FED. R. EVID. 804(b), this situation will rarely arise except when subsequently added parties object to the introduction of evidence taken before they were added. *See* FED. R. EVID. 804(b)(1). The more typical, related problem of faded memories or death caused by lapse of time between the attorney conduct and the injury is considered *infra* note 319 and accompanying text.

317. Every case contains internal resource constraints dictated either by the pocketbook of the parties or by the value of the claim. In order for a case to satisfy this element of complexity the constraints on resources must result in a strategic decision by a party's attorney to leave untouched information critical to reasoned judgment. Such a decision is, of course, a rare occurrence in a large case between well-financed opponents. Such decisions, however, are a frequent occurrence when one party is impecunious or when the amount of the claim is small. As will be demonstrated subsequently, the claim of an impecunious party and the small claim are not complex litigation; more than a threat to reasoned judgment is necessary to render a case complex. *See infra* Parts III.A.5, III.B.

Nor does the mere costliness of discovery or trial make a case complex. In order for a case to be complex due to the costliness of obtaining information, the cost must force a party to abandon the search for critical information. Therefore, writers who have claimed that mere cost can create complex litigation have overstated the case. *See supra* note 22 and accompanying text. Moreover, by tying cost to the inability to obtain critical information, this definition of complexity also avoids the dual problems of arbitrariness

persons (including opponents) of revealing the information may be so high that they can make a legitimate claim that the burden on them justifies nondisclosure of the critical information.³¹⁸ Finally, the time lag between wrongful conduct and injury may be so long that critical evidence has been lost or destroyed.³¹⁹ Whatever the precise reason, the quality or quantity of information leaves an attorney with no choice but to enter trial with a command of fewer than all the necessary facts and a handicapped ability to formulate the case for reasoned decision.

A second, less frequent cause of lawyer dysfunction occurs because of the open-textured and uncertain nature of the substantive law. When combined with liberal rules of pleading and wide-ranging factual occurrences, the opacity of substantive law can make it difficult for a lawyer to know an opponent's legal theory of the case

(e.g., "complex litigation involves discovery costs in excess of \$50,000") and relativity (e.g., "complex litigation involves discovery costs that are disproportionate to the stakes in the case"). See *supra* notes 77-78, 125 and accompanying text.

318. The costs of revelation are not necessarily monetary. Revelation of some classes of information might be detrimental to societal interests. See Fed R. Civ. P. 26(b)(1), (b)(3), (c) (barring absolutely disclosure of privileged material, barring conditionally disclosure of work-product material, and permitting use of protective orders to prevent disclosures that will cause "annoyance, embarrassment, [or] oppression"). In other instances, however, the monetary costs of revelation simply are too great to permit disclosure. See *id.* 26(c) (allowing courts to issue protective orders when discovery is an "undue burden or expense"); see also *id.* 26(b)(1)(iii) (allowing nondisclosure when discovery is "unduly burdensome or expensive").

When the balance struck under these principles results in concealment of critical information, the lawyer's task of formulating issues is thwarted. But not every successful assertion of a privilege or issuance of a protective order creates lawyer dysfunction. In most cases, the decision to withhold information under privilege, work product, or protective-order principles does not result in the withholding of information critical to reasoned decisionmaking. Even when it does, the hypothesis of complexity requires the court to be able to respond to the lack of information with a curative assertion of judicial power. Both circumstances are unlikely to be present in many cases.

Nonetheless, as a general matter, tests that allow for nondisclosure of critical information obviously are inconsistent with the form of adjudication. To the extent that nondisclosure is based on a consideration of interests specifically protected by society, as is typically true of privileges, the form of adjudication must yield to Fuller's ordering by common aim, see Fuller, *Forms and Limits*, *supra* note 200, at 357; the dispute then becomes a "polycentric" one that is incapable of adjudication. See *infra* notes 517-19 and accompanying text. The only way to avoid this result is to allow the norm of reasoned judgment to override the competing interests for non disclosure. Cf. *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1159 (7th Cir. 1984) (holding in antitrust case that non-disclosure of information should be based on a balancing of the nature and magnitude of the hardship to each party, giving more weight to interests that have a distinctively social value than to purely private interests), *rev'd on other grounds*, 470 U.S. 373 (1985).

319. The long latency period between conduct and illness places many toxic torts and long-running commercial conspiracies into this category. According to the hypothesis with which we are working, however, a judge must be able to remedy the lawyer's dysfunctions before a case can be considered complex. When critical information has been lost or destroyed, there is usually little a judge can do other than bifurcate for trial other issues for which adequate evidence exists, and then hope for a negotiated solution of remaining issues before the trial. Cf. Mullenix, *supra* note 69, at 564-65 (discussing technique of reverse bifurcation in which punitive damages and affirmative defenses were tried before liability issues in asbestos class action).

in advance of trial.³²⁰ That uncertainty, which frustrates the lawyer's ability to formulate his own case for presentation, runs counter to the assumption of perfect information which undergirds the adversarial model.

A third problem, which lies in the borderland between lawyer and jury dysfunction, arises when the lawyer believes that the factfinder would be unable to comprehend or decide rationally the case if the facts were fully presented, and thus, tries the case based on a "fictionalized," simplified version of the transaction. Traditionally, the adversarial model has relied on opposing counsel to bring out the untold story; but here the opposing lawyer, fearful that the factfinder would become lost, acquiesces in perpetuation of the fiction.³²¹

Finally, lawyer dysfunction arises from the inability of lawyers representing the same or similar interests to develop a single, coherent, and rational position for presentation to a decisionmaker. Although this type of internal conflict usually would be controlled by the client, in some instances the client may lack sufficient interest to do so.³²² Even if the client has the interest, the competition of related parties in the litigation to increase or decrease their share of a limited asset may preclude effective cooperation.³²³ In either event, the result, if left unchecked, is a Tower of Babel in which attorney infighting threatens to undermine the effective formulation of a party's case.³²⁴

320. See Kirkham, *Good Intentions*, *supra* note 14, at 202; Kirkham, *Problems of Complex Civil Litigation*, *supra* note 14, at 498.

321. Of course, lawyers make tactical choices every day to leave an opponent's "fictions" undisturbed. For instance, Judge Schwarzer quotes trial lawyer Gerry Spence as claiming: "I have never tried a complex case. . . . [A]ll cases are reducible to the simplest of stories. . . . The problem is that we, as lawyers, have forgotten how to speak to ordinary folks." Schwarzer, *supra* note 143, at 576 n.6. In some cases, though, the reduction of grey and morally ambivalent areas into a morality play of black and white, good and evil, necessarily requires the paring out of information inconsistent with the litigant's "story," but highly relevant to the exercise of reasoned judgment. When the limitations of trial make it impossible for the opponent to present valid contrary evidence in an effective matter, reasoned judgment has been thwarted.

322. The classic example is the class member, who is not likely to receive much information about the course of the lawsuit or the conduct of counsel. Even clients directly represented by an attorney may not have the opportunity to monitor the lawyer's handling of the cases of related clients. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89. The same difficulties can affect defendants with certain common interests and other divergent interests.

323. The typical instances are the limited compensatory fund—in which plaintiffs often have an incentive to jockey their claims to the front of the pack—and the injunction—in which various groups of claimants disagree about the proper scope of relief. This situation should be distinguished from the related problem of competition for a fund or injunction among parties who are not all involved in the same litigation. In the latter instance, each party's ability to present an effective case and the decisionmaker's ability to decide each case rationally are not directly threatened. The problems raised by related case litigation are considered in *infra* Part III.A.4.

324. Multiple presentations of proofs and arguments rarely will frustrate reasoned

Translated into the terms in which the present literature and case law have described complexity, lawyer dysfunction encompasses pretrial complexity as well as certain aspects of trial complexity. "Vast" discovery³²⁵ and legal doctrines of "constitution-like generality,"³²⁶ which are typical descriptions of pretrial complexity, correspond precisely to the first two causes of lawyer dysfunction that the hypothesis of complexity would predict. The third and fourth causes of lawyer dysfunction—in which lawyers are unable to present evidence effectively at trial—correspond to certain aspects of trial complexity.³²⁷

According to the hypothesis of complexity, however, the lawyer's inability to perform his essential functions in the rational resolution of a dispute does not itself give rise to complexity; rather, the response to lawyer dysfunction must be sufficient judicial involvement to assure reasoned judgment. The empirical evidence demonstrates that judicial power in complex cases is in fact designed to fill the void left by dysfunctional lawyers. The most obvious example is the use of management techniques for the cases that the lawyers, left to their own devices, are incapable of reducing to manageable (and rational) proportions. Thus, case-management orders may order discovery in a certain sequence,³²⁸ defer discovery on costly or

judgment on an issue of liability; the two general exceptions are the extensive use of evidence inadmissible for some (but not all) parties' cases and questioning by co-parties which is so lengthy that it fades the factfinder's memory and reduces its comprehension. In the area of remedy, however, the jury's difficult task to remember individual defenses and damage claims of a large class creates a significant problem for rational decisionmaking.

325. See *supra* notes 69-72 and accompanying text.

326. See SCHWARZER, *supra* note 54, § 1-1, at 1; see also *supra* text accompanying note 67.

327. See *supra* notes 83-85 and accompanying text.

328. See FED R. CIV. P. 26(c)(3), (d); Association of Retail Travel Agents, Ltd. v. Air Transp. Ass'n, 623 F. Supp. 893 (D.D.C. 1985); *In re Greenman Sec. Litig.*, 94 F.R.D. 273, 285-88 (S.D. Fla. 1982). The concept of "wave discovery," in which the various types of written discovery and depositions are scheduled to occur in stages, was a central feature of the *Manual for Complex and Multidistrict Litigation's* pretrial management plan for complex cases. See MCML, *supra* note 14, §§ 0.5, 1.5, 2.2-3. The *Manual for Complex Litigation (Second)* de-emphasizes the importance of wave discovery. See MANUAL, *supra* note 13, § 21.421; see also 28 U.S.C. § 473(a)(3)(C)(ii) (Supp. 1990) (requiring courts to consider "phas[ing] discovery into two or more stages" in complex cases).

separable issues,³²⁹ restrict the duration of discovery,³³⁰ or urge informal discovery.³³¹ The judge may personally screen documents,³³² and become involved in matters of information management, storage, and retrieval in order to prevent cost-prohibitive duplication of effort.³³³ To remedy the problems of liberal

329. See FED. R. CIV. P. 26(c)(2), (c)(4); *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1159 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985); *Plummer v. Chicago Journeyman Plumbers' Local Union 130*, 77 F.R.D. 399 (N.D. Ill. 1977); *CBS v. American Soc'y of Composers*, 53 F.R.D. 231 (S.D.N.Y. 1971). Compare *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 797 (E.D.N.Y. 1980) (limiting discovery to one defensive issue) with *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 557 (E.D.N.Y. 1983) (ordering re-examination of earlier discovery rulings in light of decision to expand the issues to be tried). But see *In re Folding Carton Antitrust Litig.*, 83 F.R.D. 132, 135 (N.D. Ill. 1979) (refusing to limit examination on relevant issues). See generally MANUAL, *supra* note 13, § 21.421 (discussing restriction of the amount of time permitted for discovery).

330. See FED. R. CIV. P. 16(b)(3); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817-18 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); MANUAL, *supra* note 13, § 21.421; see also 28 U.S.C. § 473(a)(3)(C) (Supp. II 1990) (requiring courts to consider development of discovery schedule for complex cases).

331. See FED. R. CIV. P. 29; MANUAL, *supra* note 13, § 21.422; see also 28 U.S.C. § 473(a)(4) (Supp. II 1990) (requiring courts to consider the "encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices"). For instances of court encouragement or party agreement to informal discovery, see *In re Del-Val Fin. Corp. Sec. Litig.*, No. 90-Civ-7207, 1991 U.S. Dist. LEXIS 2877 (S.D.N.Y. Feb. 28, 1991) (suspending discovery but allowing informal discovery to continue); *Morales v. Turman*, 569 F. Supp. 332 (E.D. Tex. 1983); *Davis v. Washington*, 348 F. Supp. 15, 16 (D.D.C. 1972), *rev'd on other grounds*, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976); *Ash v. Commissioner*, 96 T.C. 459 (1991) (describing informal discovery methods encouraged in complex tax cases).

332. See *Kerr v. United States Dist. Court*, 426 U.S. 394 (1976); *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983) (en banc); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983).

333. Courts have the power to establish document depositories and master files. See, e.g., *In re Air Crash Disaster*, 1988 U.S. Dist. LEXIS 4287 (D. Colo. Apr. 18, 1988); *In re Folding Carton Antitrust Litig.* (N.D. Ill. Jul. 2, 1976), *reprinted in* SCHWARZER, *supra* note 54, at 223-37; *FDIC v. Blackburn*, 109 F.R.D. 66, 70 (E.D. Tenn. 1985); *In re Greenman Sec. Litig.*, 94 F.R.D. 273, 279-80, 284 (S.D. Fla. 1982); see also *In re Recticel Foam Corp.*, 859 F.2d 1000, 1001 (1st Cir. 1988) (discussing cost distribution of maintenance of document depository). See generally MANUAL, *supra* note 13, §§ 21.441, .444 (discussing the use of document depositories). Courts also can create special courtrooms to handle the logistics of a large-scale case. See *In re San Juan Dupont Plaza Hotel Litig.*, 768 F. Supp. 912, 935 n.81 (D.P.R. 1991) (describing assessment levied against plaintiffs' counsel for construction of special courtroom for the litigation); *supra* note 83 and accompanying text. Courts also have become more active in the development of computer databases to capture and store relevant information. See MANUAL, *supra* note 13, § 21.446; Edward F. Sherman & Stephen O. Kinnard, *The Development, Discovery, and Use of Computer Support Systems in Achieving Efficiency in Litigation*, 79 COLUM. L. REV. 298-302 (1979) (advocating a joint information system shared by the court and all counsel). But see *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.—II*, 953 F.2d 162 (4th Cir. 1992) (reversing order of multidistrict court which assessed state and federal litigants not in the Multidistrict Litigation (MDL) proceeding and non-litigating claimants a fee that was to be used to finance the MDL discovery).

pleading, the judge may require (or even draft) a single consolidated complaint or answer,³³⁴ order interim briefs or statements on particular aspects of the case in an effort to force factual or legal stipulations,³³⁵ forbid any deviation in legal or factual theory from pretrial submissions,³³⁶ or strike certain claims or defenses viewed as insubstantial.³³⁷ The judge can appoint herself, a magistrate, or a master to supervise discovery, with an eye toward keeping the parties narrowly focused on the central issues that the judge has isolated for decision.³³⁸ Similarly, in order to provide guidance to lawyers faced with amorphous law, the judge may exercise at the pretrial stage a power traditionally reserved to the trial: the declaration of applicable law. The surgical use of summary judgment³³⁹

334. See *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975); Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597 (1991).

335. See FED. R. CIV. P. 26(f); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 1988 U.S. Dist. LEXIS 17332 (D.P.R. Dec. 2, 1988); *United States v. AT&T*, 461 F. Supp. 1314, 1343-49 (D.D.C. 1978); RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 216-24; MANUAL, *supra* note 13, §§ 21.33, .34, .65; SCHWARZER, *supra* note 54, § 2-2(c)(3).

336. See *Rigby v. Beech Aircraft Co.*, 548 F.2d 288 (10th Cir. 1977); *G & R Corp. v. American Sec. & Trust Co.*, 523 F.2d 1164, 1172-73 (D.C. Cir. 1975); *FDIC v. Glickman*, 450 F.2d 416 (9th Cir. 1971); see also MANUAL, *supra* note 13, § 41.7 (suggesting model final pretrial order which precludes use of witnesses or exhibits not listed on the order "[e]xcept for good cause shown").

337. See FED. R. CIV. P. 12(b), 16(c)(1); *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375 n.6 (11th Cir. 1983); *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356-57 (5th Cir. 1983); *Holcomb v. Aetna Life Ins. Co.*, 255 F.2d 577, 580 (10th Cir.), *cert. denied*, 358 U.S. 879 (1958); *Michigan Wis. Pipeline Co. v. Moore*, 319 F. Supp. 753 (N.D. Miss. 1970); *Commonwealth Edison Co. v. Allis-Chalmers Mfg.*, 245 F. Supp. 889, 891-92 (N.D. Ill. 1965); see also MANUAL, *supra* note 13, § 21.33; SCHWARZER, *supra* note 54, § 2.3(a) (discussing inherent judicial authority to limit issues). But see *Fidelity & Deposit Co. v. Southern Util.*, 726 F.2d 692 (11th Cir. 1984) (holding that "Rule 16 by its terms does not confer special powers to enter judgment not contained in Rule 56 or the other rules"); *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1323 n.5 (7th Cir. 1976) (holding that court can encourage but not force factual stipulations).

338. See 28 U.S.C. § 636(b)(1) (1988); FED. R. CIV. P. 16(b), 53; *United States v. Hooker Chems. & Plastics Corp.*, 123 F.R.D. 62 (W.D.N.Y. 1988) (declining to expand scope of master's reference); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210 (W.D. Mo. 1985), *mandamus granted sub nom. In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985); MANUAL, *supra* note 13, §§ 21.52 to .53; SCHWARZER, *supra* note 54, §§ 3-6(D), 5-4. For the limitations on a master's appointment, see, e.g., *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165 (D.C. Cir. 1991). In these cases, the court and lawyers were capable of performing their pretrial and trial tasks without a master's assistance. Although the courts did not rely expressly on this lack of dysfunction, its absence acts as the strongest justification for the results in *La Buy*, *Armco*, and *Bituminous*. See RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 224-26; *Brazil*, *supra* note 15; *Hazard & Rice*, *supra* note 29; *Silberman*, *supra* note 12.

339. See FED. R. CIV. P. 56; RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14, at 226-31; MANUAL, *supra* note 13, § 21.34; SCHWARZER, *supra* note 54, § 2-3(B)(3). Compare *Poller v. CBS*, 368 U.S. 464, 473 (1962) (stating that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles") with *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986) (affirming summary judgment in antitrust case when ambiguous evidence failed to demonstrate a "rational economic motive to conspire").

Of course, the use of summary judgment is a bit like using a meat ax to perform open heart surgery. Judgment generally can be granted only with respect to claims for which judgment can be entered as a matter of law. See FED. R. CIV. P. 56(c). Except through the rarely invoked auspices of Rule 56(d), individual facts cannot be established and, even then, declarations of existing law are not authorized specifically. A recent proposal

and the issuance of "preliminary" memoranda of law³⁴⁰ can provide the lawyers with a roadmap through uncharted legal terrain.

If the lawyers continue to have difficulty discharging their formulative functions during trial, the judge's new-found power can extend beyond the pretrial process. The judge might order trial of fewer than all the issues or fewer than all the claims.³⁴¹ She might require the development of stipulations, statistical summaries, or narratives.³⁴² She might take an active role in questioning witnesses.³⁴³ She might cap the length of a party's case,³⁴⁴ or alter the usual "plaintiff-defendant-plaintiff's rebuttal" order of trial.³⁴⁵

Finally, judges can thrust themselves into internecine attorney squabbles that threaten the orderly presentation of a party's case. She has the power to appoint lead counsel, liaison counsel, and trial counsel.³⁴⁶ She can create committees of counsel and set them

to allow the summary disposition of law and fact did not survive the Federal Rules' revision process. See Carrington, *supra* note 12.

340. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (issuing "Preliminary Memorandum" on conflict of laws and ordering further briefing on the issue); Peterson & Selvin, *supra* note 106, at 239-41 (discussing use of preliminary rulings or deliberate refusal to rule as a means of exerting pressure on risk-averse parties).

341. See FED. R. CIV. P. 42(b); *Sanford v. Johns-Manville Sales Corp.*, 923 F.2d 1142 (5th Cir. 1991); *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); COMMISSION ON MASS TORTS, *supra* note 14, at 59-61; Manual, *supra* note 13, § 21.632; Mullenix, *supra* note 69; see also *In re New York Asbestos Litig.*, Nos. 88 Civ. 4213-19, 4221, 4222, 1990 U.S. Dist. LEXIS 8465 (S.D.N.Y. July 9, 1990) (denying reverse trifurcation because separate trials of the issues "would to an unacceptable degree be duplicative," but allowing bifurcation on issue of punitive damages); *supra* note 76 and accompanying text (discussing the use of bifurcation and interim instructions to assist jurors in complex cases).

342. See FED. R. EVID. 611(a); *Oostendorp v. Khanna*, 937 F.2d 1177 (7th Cir. 1991) (upholding use of deposition summaries against rules-based and constitutional challenges), *cert. denied*, 112 S. Ct. 951 (1992); *Walker v. Action Indus.*, 802 F.2d 703, 712 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *In re Air Crash Disaster*, 720 F. Supp. 1493, 1502-04 (D. Colo. 1989); MANUAL, *supra* note 13, §§ 22.3, .5; SCHWARZER, *supra* note 54, § 7-2(B)(5). For a description of the use of a special master to collect and present to a jury statistical profiles of class members, see McGovern, *supra* note 20, at 660-75; Mullenix, *supra* note 69, at 540-45.

343. See FED. R. EVID. 614(b); *In re IBM*, 618 F.2d 923 (2d Cir. 1980); *Continental Casualty Corp. v. National Steel Corp.*, 533 F. Supp. 369 (W.D. Pa.), *aff'd*, 692 F.2d 748 (3d Cir. 1982); MANUAL, *supra* note 13, § 22.42.

344. See *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1170-72 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); REPORT ON ANTITRUST LAWS AND PROCEDURES, *supra* note 14, at 535-36; see also *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (disapproving of "practice of placing rigid hour limits on a trial" in less complicated products liability suit).

345. See MANUAL, *supra* note 13, § 22.34.

346. See *In re Boesky Sec. Litig.*, 948 F.2d 1358 (2d Cir. 1991) (describing duties of chosen lead/liason counsel); *Vincent v. Hughes Air West*, 557 F.2d 759 (9th Cir. 1977); *MacAlister v. Guterman*, 263 F.2d 65 (2d Cir. 1958); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 526-29 (D. Nev. 1987) (describing tasks undertaken by "Plaintiffs' Legal Committee"); *In re Oracle Sec. Litig.*, 132 F.R.D. 538 (N.D. Cal. 1990) (detailing reasons for choosing one law firm over other firms bidding for position as class counsel); MANUAL, *supra* note 13, §§ 20.2, 24.23.

about different tasks.³⁴⁷

This judicial role is a necessary one: The judge is the only actor in the litigation enterprise who can overcome lawyer dysfunction. The attorneys obviously cannot; the limited and disinterested role of the jury makes it an ineffective instrument for resolution of formulational difficulties; and the parties, who might poorly understand the legal process, are no more capable of performing the lawyers' tasks than their lawyers. By default, the role of protecting adjudication's norm of reasoned judgment devolves to the judge.

At the same time, the permissible scope of judicial involvement in matters traditionally relegated to the attorneys is not unbounded. The first obstacle is the Due Process Clause, whose preference for adversarial process³⁴⁸ is at odds with the more inquisitorial role thrust on the judge. Because due process also requires the application of reasoned judgment,³⁴⁹ the Clause's internal inconsistency seems irreconcilable. A head-on collision, however, usually can be avoided. Adversarial procedure is an aspect of due process not for its own sake, but because it is believed to be the method that best assures the rational resolution of a dispute; when it cannot fulfill its function, some loosening of the strict adversarial model is required.³⁵⁰ Not surprisingly, the few cases that have challenged the court's power to amend its adversarial role have found no constitutional defect when the judge can overcome the lawyers' shortcomings.³⁵¹ An even more telling piece of information is that, with all the examples of "quasi-inquisitorial" judging collected in the *Manual* and elsewhere, only a few cases have even raised the due process issue.³⁵² Therefore, although due process undoubtedly precludes

347. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, No. MDL-721, 1988 U.S. Dist. LEXIS 17332 (D.P.R. Dec. 2, 1988) (appointing separate discovery counsel and settlement counsel).

348. See *supra* note 276 and accompanying text.

349. See *supra* note 274 and accompanying text.

350. See *supra* note 243 and accompanying text. This analysis also is suggested by the Supreme Court's recent refusal to protect in an absolute fashion the use of adversarial procedures in adjudication. Compare *Fuentes v. Shevin*, 407 U.S. 67 (1972) (finding constitutional requirement of adversarial process before prejudgment seizure of property) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring adversarial process prior to deprivation of welfare benefits) with *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (holding preseizure adversarial hearing not required by due process) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding adversarial process not required prior to suspension of Social Security benefits); see also Resnik, *supra* note 12, at 516-20.

351. See, e.g., *Oostendorp v. Khanna*, 937 F.2d 1177 (7th Cir. 1991); *Brennan v. Local Union No. 639, Int'l Bhd. of Teamsters*, 494 F.2d 1092 (D.C. Cir. 1974); *In re Joint E. & S. Dist. Asbestos Litig.*, 769 F. Supp. 85, 89 (E. & S.D.N.Y. 1991) (rejecting perfunctorily claim of third-party defendants that consolidation of 700 asbestos cases denied them due process).

352. To the extent that the proper inquiry concerning the meaning of the Due Process Clause is a historical one, see *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1046 (1991) (Scalia, J., concurring), it is important to note that the federal judge in historical equity practice possessed the powers of issue formulation now exercised by judges in complex cases. See Subrin, *supra* note 2, at 918-26. There was never a successful claim that these aspects of equity practice violated the Fifth Amendment.

the judge from stepping into the lawyers' role when there is no evidence of dysfunction,³⁵³ judicial activism that remedies lawyer dysfunction without foreclosing lawyers' participation in areas where they remain functional does not approach the outer limits of permissible judicial involvement.

Therefore, this hypothesis of complexity places two significant limitations on the judge's power to cure lawyer dysfunction. Most obviously, she cannot act when the lawyer is able to perform his task in the formulation of issues; to do so would violate the adversarial assumption for a reason not dictated by the primordial principle of reasoned judgment.³⁵⁴ Second, the power she wields must be able to overcome the formulational obstacles in the lawyer's path. If the panoply of procedural tools she possesses cannot effectuate a rational formulation of issues, the case is—to use Fuller's term with a somewhat different meaning—a “polycentric” one incapable of resolution through adjudication.³⁵⁵ The judge's exercise of power consequently would be unprincipled.

Thus, the hypothesis that suggests “formulational complexity”—lawyer dysfunction remediable by enhanced judicial authority over the tasks typically expected of lawyers—validates the literature's empirical observation that certain pretrial and trial features make a case complex.³⁵⁶ The hypothesis also develops inherent limitations on the exercise of judicial power that are rooted in a theory of rational adjudication. The issue is whether this same analysis can explain

353. See *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976); cf. *MANUAL*, *supra* note 13, § 22.24 (“Active involvement by the judge, however, need not and should not alter counsels' primary responsibility for collecting, organizing, and presenting the evidence.”). To the extent that the *Manual* suggests that the judge cannot step into the adversarial role in cases without dysfunction, it undoubtedly is correct. To the extent that it suggests this limit to judicial involvement in cases of dysfunction, it fails to appreciate the true nature of complex litigation.

354. I loosen this assertion somewhat in Part IV, in which I examine willful attorney intransigence and the role of efficient procedure. See *infra* notes 532-34, 551-61 and accompanying text. As a general matter, however, an adversarial process in which the lawyers respect the rules of litigation and in which the costs of the process are not inordinate precludes the judge's assertion of power over the adversaries' traditional functions. Justification for the judicial assertion of power arises only when a properly functioning adversarial process cannot result in a reasoned decision.

355. Fuller's conception of “polycentrism” involved situations in which the affected parties' rights to participate through proofs and arguments could not be guaranteed. See *supra* notes 207, 214-18 and accompanying text. Because my idea of adjudication is tied to reasoned judgment rather than to party participation, see *supra* note 246 and accompanying text, my conception of “polycentrism” involves a dispute not susceptible to reasoned judgment. As many disputes can be decided rationally even without party participation, the limits of judicial power suggested here are considerably narrower than those suggested by Fuller. As I will later demonstrate, however, the limits on judicial power extend beyond Fuller's conception of polycentrism in certain other ways. See *infra* Part III.B. Thus, although I use the same term as Fuller, my definition of “polycentrism” is considerably different.

356. See *supra* notes 68-82 and accompanying text.

the remaining types of complexity documented in the cases and commentary.

2. *Factfinder Dysfunction: Herein of "Decisionmaking Complexity"*

The second key player in American litigation is the factfinder, whose role is assumed by the jury whenever required by constitution or statute and demanded by a party, and assumed by the judge otherwise.³⁵⁷ In certain instances, the factfinder may be unable to fulfill her function of resolving factual disputes; bringing her common-sense experiences to bear on evidence, arguments, and instructions received; and applying the facts to the relevant legal principles. The causes of this dysfunction are varied. First, the factfinder may not have the intellectual capability to understand the evidence presented, either because it is highly technical or esoteric, or overwhelmingly voluminous or lengthy. Second, the factfinder may have a similar inability to understand the law. A factfinder may be expected to declare legal conclusions whose meaning and consequences lie beyond her knowledge, training, or understanding. Finally, the factfinder's life experiences may be so foreign to the key issues in the case that the factfinder cannot make the factual or legal inferences required by the case. Factfinder dysfunction generally corresponds to the second type of trial complexity noted in the cases and literature—the inability of lay decisionmakers to cope with massive or complicated evidence.³⁵⁸ Whatever the cause, the result of this dysfunction is that the factfinder's decision must necessarily be the product of guesswork rather than rational application of fact to law.³⁵⁹

357. See FED. R. CIV. P. 38(a), 39(b). Rule 39(b) also permits the use of advisory juries in the event that the case is tried to the judge.

358. See *supra* note 84 and accompanying text. The difference is that the existing discussion of factfinder dysfunction focuses almost exclusively on the inability of the jury to resolve a case rationally. The concept of factfinder dysfunction also recognizes that the traditional mode of trial can equally handicap the judgment of judges. The trial judge's ability to order post-trial briefs or arguments, her opportunity to re-open the record and to review evidence at a more thorough and reflective pace, and her years of education and experience certainly reduce the number of cases that she cannot resolve through rational application of law to fact, but some controversies still will lie beyond her understanding. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980). But see *id.* at 1092 (Gibbons, J., dissenting) (questioning whether judges are more capable of resolving complex cases); EXPEDITING ANTITRUST CASES, *supra* note 54, at 134-45 (same); SCHWARZER, *supra* note 54, § 7-2(A) (same); cf. Paul Lansing & Nina Miley, *The Right to a Jury Trial in Complex Commercial Litigation: A Comparative Law Perspective*, 14 LOY. L.A. INT'L & COMP. L.J. 121, 135-37 (1991) (discussing Pennsylvania proposal to create commercial court to try certain disputes without a jury before a specially trained business law judge).

359. See *supra* notes 85, 244, 246 and accompanying text. As with lawyer dysfunction, I assume that factfinder dysfunction arises only when a competent and neutral factfinder cannot come to a rational decision. A factfinder blinded by impairments such as intoxication or prejudice invokes other concerns and other corrective judicial powers. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991); *Tanner v. United States*, 483 U.S. 107 (1987).

According to the hypothesis of complexity, a case becomes complex when the response to factfinder dysfunction is increased judicial activism in the factfinding process.³⁶⁰ Once again, we find that many cases that typically are considered complex involve precisely this type of activism. In an effort to assert a measure of judicial control over the factfinding process, judges in complex cases frequently reduce the quantity of information contained in the lawsuit through devices such as the bifurcation of issues or parties,³⁶¹ the certification of class actions,³⁶² rigorous enforcement of evidentiary rules,³⁶³ and limitations on trial time.³⁶⁴ When a judge lacks the requisite common-sense experience in a case tried to the bench, she has the option to use an advisory jury.³⁶⁵ When minor procedural changes—such as the use of interim instructions and arguments or the use of narratives and graphic summaries of evidence—can help the factfinder to resolve the dispute rationally, she need not hesitate for want of power.³⁶⁶ The same is true of the court appointment of experts³⁶⁷ or masters³⁶⁸ and the judicial inquisition of witnesses.³⁶⁹

360. As with lawyer dysfunction, the judge is often the only actor capable of rectifying factfinder dysfunction. To the extent that the dysfunction is obvious and curable through the adversarial presentation of more evidence, lawyers certainly can act. Often, however, dysfunction arises from an excess of information or the consideration of facts and law foreign to the decisionmaker. In those areas, the lawyers can be of little help. Nor can the parties meaningfully assist the factfinder.

361. See FED. R. CIV. P. 42(b); *supra* note 341 and accompanying text. Although related, there is a technical difference between bifurcation of issues or parties in the pretrial phase to prevent lawyer dysfunction and bifurcation of issues or parties at trial to prevent factfinder dysfunction. The limitations of the trial process may require trial bifurcation in different (and generally more frequent) instances than the instances in which pretrial bifurcation is necessary. When trial bifurcation appears necessary at the outset of the case, it is of course entirely sensible to bifurcate pretrial proceedings for reasons of efficiency. Such pretrial bifurcation is in no sense required simply because trial bifurcation is necessary to assure reasoned decisionmaking at trial.

362. See FED. R. CIV. P. 23(c)(1). Class actions typically are not thought of as a means to assure reasoned decisionmaking. In some instances, however, the reduction of a case to representative claims and parties can avoid the problems of rational adjudication inherent in a factfinder hearing the claims of hundreds or thousands of similarly situated persons. In other instances, of course, a class action can generate such enormous quantities of information that it too can frustrate reasoned decisionmaking. In those instances, class certification would be improper.

363. See FED. R. EVID. 104(a); *Christophersen v. Allied Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (en banc); *Brock v. Merrell Dow Pharmaceuticals*, 874 F.2d 307 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

364. See *supra* note 344 and accompanying text.

365. See FED. R. CIV. P. 39(c).

366. See MANUAL, *supra* note 13, §§ 22.31-43; Schwarzer, *supra* note 143, at 582-85.

367. See FED. R. EVID. 706; *supra* note 91 and accompanying text; see also Elliott, *supra* note 91, at 504-05 (advocating use of panels of scientific experts); cf. *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351 (E.D. Mich. 1980) (rejecting use of court-appointed legal expert to assist jury).

368. See FED. R. CIV. P. 53. For the limitations on the use of a master at trial, see *supra* note 338 and sources cited therein.

which are more significant judicial incursions into the lawyer's traditional province.

All of these devices are designed to assure a rational factfinding process.³⁷⁰ Within certain limits, the judge also might have the authority to change the factfinder from one incapable of reasoned judgment to one capable of rational decisionmaking. The least intrusive of these techniques is to permit the jury to answer only special interrogatories, thus reserving to the court the task of applying these facts to the relevant legal principles.³⁷¹ More intrusive means are a vigorous use of summary judgment and the entry of judgment as a matter of law.³⁷² The most drastic intrusions into the lay decisionmaking process, however, are the empaneling of a special jury with particular expertise in the subject matter of the dispute, and the outright denial of jury trial in favor of judicial factfinding.³⁷³

All of these latter techniques, which come into play only when the factfinder is a jury, necessarily implicate the constitutional right to a jury trial as well as implementing statutes that typically require jury

369. See FED. R. EVID. 611(a); *Care Travel Co. v. Pan Am. World Airways*, 944 F.2d 983, 992 (2d Cir. 1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289-90 (2d Cir.), cert. denied, 111 S. Ct. 297 (1990). Once again, the court's power to ask questions to cure factfinder dysfunction is related to, but distinct from, the inquisitorial power to cure lawyer dysfunction. See *supra* note 343 and accompanying text.

370. See JOE S. CECIL ET AL., JURY SERVICE IN LENGTHY CIVIL TRIALS 37-39 (1987); GUINTEHER, *supra* note 232, at 214-17; Carrie P. Withey, *Court-Sanctioned Means of Improving Jury Competence in Complex Civil Litigation*, 24 ARIZ. L. REV. 715, 715 (1982).

371. See FED. R. CIV. P. 49(a). A related, although somewhat less intrusive, technique is the general verdict accompanied by answers to interrogatories. See *id.* 49(b); see, e.g., *Tol-O-Matic v. Proma Produkt-Und Marketing Gesellschaft m.b.H.*, 945 F.2d 1546 (Fed. Cir. 1991).

372. See FED. R. CIV. P. 56 (summary judgment), 50(a) (judgment as a matter of law during trial), 50(b) (judgment as a matter of law after trial). The use of summary judgment to remove issues that cannot be resolved rationally by a jury is somewhat different from (but again related to) its use as a tool to limit issues to overcome lawyer dysfunction. See *supra* note 339 and accompanying text. Although not explicit in the opinions, the fear of irrational decisionmaking could explain the Supreme Court's apparent attitudinal shifts from *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and from *Poller v. CBS*, 368 U.S. 464 (1962), to *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The fear also can explain the more energetic use in complex cases of directed verdicts and granting of post-trial motions for judgment notwithstanding the verdict or for a new trial. Compare *Oxendine v. Merrell Dow Pharmaceuticals*, 506 A.2d 1100 (D.C. 1986) (reversing grant of judgment n.o.v. on issue of causation in *Bendectin* case), *appeal after remand*, 563 A.2d 330 (D.C. 1989), cert. denied, 493 U.S. 1074 (1990) with *Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988) (upholding grant of judgment n.o.v. on issue of causation in *Bendectin* case involving nearly identical testimony), cert. denied, 493 U.S. 882 (1989).

Of course, the use of these devices is improper unless the judge, by virtue of her experience or the advantages of studious deliberation, can resolve a dispute rationally when a jury cannot. When neither judge nor jury is capable of rational resolution, then obviously a judge cannot use these powers. When a jury is capable, then the judge ought not use summary judgment to resolve genuine issues of fact, and should enter judgment as a matter of law only when it is obvious that the jury has failed to resolve the factual disputes in a plausible (i.e., rational) way. See, e.g., *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

373. Unlike the prior techniques, which simply provide a check on the passions or prejudices of lay jurors, these latter techniques replace the lay jury with a specialized, presumably more expert factfinder.

pools to be comprised of a cross-section of the community.³⁷⁴ From the perspective of the form of adjudication, neither a cross-sectional jury pool nor even the jury itself is sacrosanct. Both can be tolerated as long as they do not violate the norms of adjudication, but when they do, the jury's membership must be changed or it must be eliminated in favor of a factfinder who can decide rationally. From the perspective of constitutional law and theory, however, the positive procedural assumption of jury trial cannot be discarded so easily. Courts are not free to ignore plain constitutional or statutory mandates. Nor can they cavalierly deny the participatory democratic values inherent in jury service.³⁷⁵ Therefore, in cases in which a jury cannot be trusted to exercise reasoned judgment, the form of adjudication and the form of participatory democracy appear to be on a collision course.³⁷⁶

Nevertheless, the collision need not occur. The seemingly plain language of the Seventh Amendment can be avoided through one of two textual interpretations. The first, and less promising, avenue is to contend that the Seventh Amendment contains a "complexity" exception to the jury trial right.³⁷⁷ A second avenue is to argue that the Due Process Clause, which embodies the principle of reasoned

374. See, e.g., 28 U.S.C. §§ 1861-1869 (1988) (implementing U.S. CONST. amend. VII); ILL. ANN. STAT. ch. 78, ¶¶ 1-15 (Smith-Hurd 1987) (implementing ILL. CONST. art. 1, § 13).

375. For descriptions of the participatory benefits of a civil jury see, for example, *In re Japanese Electric Products Antitrust Litigation*, 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J., dissenting); GUNTHER, *supra* note 232, at 219-31; Higginbotham, *supra* note 93, at 58-60.

376. It is not clear how a direct conflict between the form of social ordering represented by participatory democracy and the form of social ordering represented by adjudication should be resolved. Although not expressly stated, Fuller's conclusion seems to be that adjudication must give way to organization by common aim when the two conflict. The reason is that Fuller viewed organization by common aim to be one of "two basic forms of social ordering . . . [w]ithout [which] nothing resembling a society can exist." See Fuller, *Forms and Limits*, *supra* note 200, at 357. As a third form of social ordering, see *id.* at 363, adjudication would seem necessarily subservient. The ability of Congress to remove factfinding from the adjudicatory arena, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and to prescribe rules of procedure and evidence for civil adjudication, see, e.g., 28 U.S.C. § 2072 (1988), also generally suggests that participatory democracy is the dominant form.

377. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (stating that the right to a jury trial is determined by historical practice, the nature of the relief requested, and "the practical abilities and limitations of juries"); *Dairy Queen v. Wood*, 369 U.S. 469, 478 (1962) (suggesting that a plaintiff who can show that a case is "of such a 'complicated nature' that only a court of equity can satisfactorily unravel" might be able to avoid a jury trial); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976) (finding that the limitations of a lay jury in a complex securities case overcame the Seventh Amendment right to a jury trial); Devlin, *supra* note 16. Recent decisions of the Supreme Court have downplayed the possibility of a "complexity exception" to the Seventh Amendment. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that *Ross's* "practical abilities and limitations" language applies only to instances in which Congress has entrusted fact-finding to an administrative agency or specialized court); *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 565 n.4 (1990) (same). But see *id.* at

judgment, is violated when a jury that cannot deliberate rationally is empaneled.³⁷⁸ Similar legal acumen can overcome the apparently flat statutory prohibition against special juries.³⁷⁹

The more difficult issue is whether the triumph of the form of adjudication is the desired result. I believe it is. As an instrumental matter, there seems to be little, if any, damage to values of participatory democracy when a special jury is used; the special jury simply replaces the participatory experience of six average citizens with a participatory experience of six citizens peculiarly knowledgeable about a topic.³⁸⁰ Even when a judge decides to resolve the case herself, the cost in terms of lost participatory benefits is minimal. Many "public law" cases, in which the claim for citizen participation is greatest, presently do not require juries;³⁸¹ most of the remaining complex cases, such as mass torts and corporate litigation, are private disputes with a more marginal need for public participation.³⁸² Given the numerous devices through which the judge can preserve

583 (Stevens, J., concurring) (noting that one factor in the right to jury trial is whether "the issues . . . are typical grist for the jury's judgment").

378. See U.S. CONST. amend. V. As with other constitutional rights, see, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 n.18 (1980), the conflict in constitutional rights would need to be resolved through a balance, with the scales arguably tipping in favor of reasoned judgment. See *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107 (Fed. Cir. 1985) (tipping balance in favor of Seventh Amendment); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (finding a due process trump on the Seventh Amendment); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979) (finding no due process trump), *cert. denied*, 446 U.S. 929 (1980); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351 (E.D. Mich. 1980) (rejecting *Japanese Electronic* arguments).

379. The Jury Selection and Service Act of 1968 allows the chief judge of a district court to exclude from jury service any person who "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service." 28 U.S.C. § 1865(b)(4) (1988). Although the apparent intent is only to exclude persons so infirm that they could not adequately serve as a juror in any case, the section could be interpreted liberally to give the judge the power to exclude unqualified persons from specific complex cases. That interpretation would avoid any arguable conflict with the Due Process Clause. Cf. *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir. 1985) (holding that there is no Sixth Amendment right to a jury comprised of a cross-section of the community).

380. The theoretical damage to participatory democracy here would be the substitution of the rule of a technocratic elite for the rule of the common citizen. Although this damage cannot be discounted, the rule of the common citizen envisioned in our society presupposes that the common citizen is educated enough to participate in the societal debate. When that presupposition is false, the claim for the rule of the common citizen becomes a claim for the rule of the mob, a result not contemplated under the Constitution. See *THE FEDERALIST* No. 10 (James Madison).

381. For example, there is no requirement for a jury in an equitable case. See Chayes, *supra* note 100, at 1292-96, 1303 & n.93.

382. I do not suggest that public participation in decisions concerning the nature of product design or competitive markets is irrelevant, or that these decisions are an entirely private matter. Nonetheless, the traditional methods by which our form of government has channeled participation in these decisions are voting and lobbying. More important, the present power to bring these disputes before the jury largely rests with private parties who in most instances ultimately use other methods of private (e.g., settlement) or public (e.g., summary judgment) dispute resolution. The haphazard and ad hoc participation of certain citizens to resolve certain private questions for which no other dispute resolution mechanism turns out to be tactically advantageous is not a form of public participation especially worthy of protection. Cf. *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F. Supp. 994, 1007 (D. Mass. 1989) (ordering advisory jury in part because of the "appropriate primacy of that expression of direct democracy in our dispute resolution process"); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that the parties' power to settle,

jury trial,³⁸³ the outright rejection of a jury demand should be an exceedingly rare event that will cause no significant damage to participatory democracy. On balance, the damage to the model of adjudication should juries resolve cases irrationally seems far greater than the damage to the model of participatory democracy should they on rare occasion be stricken.

This instrumental analysis, however, provides little comfort to the formalist, who cannot resolve conflicts among forms with a balancing test but must instead divine the primary and subservient forms.³⁸⁴ Under a formal analysis, however, the first question is whether a "true conflict" exists between the forms; if jury service is not essential to participatory democracy, then no violence is done to the form of participatory democracy when the jury is jettisoned to protect the reasoned judgment essential to the form of adjudication. Normatively, it can be claimed persuasively that a properly functioning adjudicatory system is an inherent part of a participatory democracy, and irrational adjudication for the sake of democracy is something of a non sequitur.³⁸⁵ Empirically, it is difficult to suggest

although a necessary evil to a certain extent, deprives the nation of a public resolution of important questions).

383. For a discussion of these devices see, for example, *In re Eastern & S. Districts Asbestos Litigation*, 772 F. Supp. 1380, 1386 (E. & S.D.N.Y. 1991); Schwarzer, *supra* note 143; Sperlich, *supra* note 21; *supra* notes 361-73 and accompanying text. Among the hundreds of thousands of cases filed in federal court in the past fifteen years, only a handful of reported decisions have struck a jury demand. See *Cotton v. Witco Chem. Corp.*, 651 F.2d 274 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 444-49 (N.D. Cal. 1980), *aff'd on other grounds sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976); *Bernstein v. Universal Pictures*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re U.S. Fin. Sec. Litig.*, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980). Of these cases, the courts of appeal in *U.S. Financial* and *Witco* reversed the trial courts' decisions to strike a jury demand, whereas *ILC Peripherals* and *Japanese Electronic* were ultimately decided on issues not requiring jury involvement. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). Other federal courts have refused to strike jury demands when the jury was capable of rational resolution. See, e.g., *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985); *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *City of New York v. Pullman, Inc.*, 662 F.2d 910 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Brisk v. City of Miami Beach*, 726 F. Supp. 1305 (S.D. Fla. 1989); *Davis-Watkins Co. v. Service Merchandise Co.*, 500 F. Supp. 1244 (M.D. Tenn. 1980), *aff'd on other grounds*, 686 F.2d 1190 (6th Cir. 1982).

Only a few reported decisions have discussed a complexity exception to a state-created right to jury trial. See *Kenny v. Scientific, Inc.*, 512 A.2d 1142 (N.J. Super. Ct., Law Div.), *rev'd*, 517 A.2d 484 (N.J. 1986) (striking of jury demand reversed on appeal); *S.P.C.S., Inc. v. Lockheed Shipbuilding & Constr. Co.*, 631 P.2d 999 (Wash. Ct. App. 1981).

384. See RAWLS, *supra* note 246, at 42-44 (discussing "serial or lexical" ordering of principles).

385. See *id.* at 59-60, 235-39 (arguing that formal justice, which includes principled and rational resolution of disputes, is a necessary although not sufficient component of a just state); cf. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1085 ("[T]he

that participation in the adjudicatory resolution of disputes is a fundamental attribute of participatory democracy; of all the countries practicing some form of universal democratic participation, the United States is alone in its assurance of a jury trial in a significant number of civil cases.³⁸⁶ Furthermore, even in this country, juries typically have not participated in the resolution of equitable suits³⁸⁷ or public-rights disputes entrusted to executive agencies.³⁸⁸ Because these suits include some of the most politically charged issues of the day, the right to jury trial can hardly be viewed as an inherent aspect even of American democracy. Therefore, because the jury is not a fundamental attribute of participatory democracy, a federal court has the power under the form of principled adjudication to strike a jury incapable of assisting in the rational resolution of a civil case.³⁸⁹

Again the hypothesis of complexity predicts the observed phenomenon of factfinder difficulty and the responsive movement toward more judicial control over factfinding. It provides a framework

Supreme Court has consistently refused to rule that preservation of civil jury trial is an essential element of ordered liberty required of the states by the due process clause of the fourteenth amendment.”); THE FEDERALIST No. 83 (Alexander Hamilton) (arguing that the civil jury is not an inherent aspect of representative democracy). Another interesting but indirect argument against the necessity of a jury in a representative democracy derives from James Madison, who argued that a representative democracy best protects against the inevitable passions and self-interestedness of direct democracies. THE FEDERALIST No. 10 (James Madison). Under this analysis, the direct participation of citizens by “jury governance” should be viewed with a certain amount of suspicion and even some alarm.

386. For a discussion of the fate of the jury in other countries, see VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 30 (1986); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 13 n.3 (1966) (discussing criminal jury trials in various countries); Edson L. Haines, *The Disappearance of Civil Juries in England, Canada and Australia*, 4 DEF. L.J. 118 (1958). One estimate is that 80% of all jury trials, both civil and criminal, occur in the United States. HANS & VIDMAR, *supra*, at 31. Given that numerous countries allow criminal juries, this estimate highlights the virtual disappearance of civil juries in Western democracies.

387. In four states—Georgia, North Carolina, Tennessee, and Texas—there is a right to jury trial in equitable suits. See COUND ET AL., *supra* note 281, at 895. Moreover, since the merger of law and equity in the federal system, juries must decide overlapping factual issues relevant to a legal and an equitable claim. See *Lytle v. Household Mfg.*, 494 U.S. 545 (1990); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). Otherwise, equitable cases are heard without a jury.

388. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977).

389. This power does not mean that the Seventh Amendment is a dead letter in complex cases. Given the minimal criteria of rationality described above, see *supra* note 246, and given the numerous techniques available to preserve jury trial, the command of the Seventh Amendment usually can be obeyed. When that task becomes impossible, however, the court is required to determine if it (or an elite jury) rationally can resolve the facts.

From the viewpoint of complex litigation, the constitutional dimension of the right to jury trial makes it perhaps the most problematic of the positive procedural assumptions. The elimination of the common jury may preserve reasoned judgment, but at the same time it often violates one or more of the four neutralities that comprise trans-substantivism. See *infra* Part III.B. The simplest way to avoid this dilemma would be to abolish the Seventh Amendment, and require all civil cases to be tried to the court. Because it is unlikely that this solution will be adopted, the positive assumption of a right to jury trial guarantees that the problem of complex litigation will not soon disappear from the legal landscape.

for resolving the constitutional debate over the right to a jury trial. Finally, it suggests limits on the court's power to tamper with traditional factfinding and factfinders: Tampering is legitimate when necessary to preserve reasoned judgment, but illegitimate either when the factfinder is capable of reasoned judgment, or when judicial interference with the factfinding process will not result in reasoned judgment.

3. *Party Dysfunction: Herein of "Remedial Complexity"*

The least noticeable players during litigation are the parties, whose role is typically confined to providing information and paying costs and fees. At the conclusion of the litigation, however, the parties become the central figures, for they implement the court's judgment or decree. In three instances, the parties, if left to their own devices, will simply be unable to implement the declared remedy.³⁹⁰ First, a losing party may be unable to accomplish the remedy because that party already is subject to different and inconsistent legal obligations. Second, the prevailing parties might be beneficiaries of a remedy that is insufficient to satisfy them all.³⁹¹ In this situation, the prevailing parties' conflict of interest among themselves—and perhaps with their attorneys as well—gives each party the incentive to enhance his or her own claim and exclude (by lack of notice or disputation of proof) the claims of others. Unless the prevailing parties and their attorneys can voluntarily negotiate a resolution to the conflict, the implementation of the remedy will come to a standstill. Finally, a party who is personally willing to comply with a decree might require the consent of nonparties who are neither controlled by the parties nor willing to accept the remedy. This latter category includes many "public law" cases, in which effectuation of the remedy often depends on the fiscal backing of the legislature, the cooperation of the bureaucratic executive, and the approval (or

390. These instances of inability to implement a declared remedy must be distinguished from instances in which a party simply refuses to comply with a judgment or decree. In the former situation, an otherwise willing party is unable to comply because of external forces. In the latter situation, an otherwise able party is unwilling to comply because of internal beliefs. This latter situation can be handled through the use of contempt. See generally 11 WRIGHT & MILLER, *supra* note 76, § 2960 (discussing judicial authority to punish a contempt of court).

391. This result can arise in three ways. First, the parties' legitimate claims can exceed the available funds. Second, the costs of allocating the remedy among the parties might consume all or most of the remedial fund, leaving the prevailing parties largely uncompensated. Third, the attorney's demand for fees might reduce the available funds to a point where the clients receive inadequate compensation and thus have a conflict with their lawyer. More than one of these circumstances can co-exist in a given case.

at least tacit acceptance) of the affected citizenry.³⁹² When the parties who must implement the remedy are unable to secure the necessary approval of nonparties, the parties are unable to meet the obligations imposed on them by the American procedural model.

Party impotence poses a threat to reasoned judgment. If the rational application of fact to law dictates in theory a result impossible to accomplish in practice, the legal declaration is a nullity. Implicit in the notion of reasoned judgment is the belief that the declaration of legal obligations intended to change the status quo actually will have that effect as long as the parties have the financial capacity to bring about the change.³⁹³ If the declaration does not have the actual effect of changing legal relationships, then nothing has been adjudged.

In order for a case to be remedially complex, the hypothesis of complexity requires not only that the parties be unable to perform their role in a way which brings the suit to closure, but also that an increase in judicial power be the effective solution to the parties' dysfunction. For these intractable cases, which correspond to the problem of remedial complexity described in the existing literature of complex litigation,³⁹⁴ judicial involvement in the parties' traditional role becomes essential.³⁹⁵ To protect the interests of unrepresented parties, courts approve the fairness of all class notices, settlements, and dismissals.³⁹⁶ They also have set attorney fees,³⁹⁷

392. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) (Alabama prison litigation), *aff'd sub. nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); WOLTERS, *supra* note 100; Sturm, *The Rhode Island Prison Decree*, *supra* note 100; Note, *The Wyatt Case*, *supra* note 100. The problem of third-party acceptance is not limited to public law litigation. For instance, the settlement of a mass tort or securities claim might require creditor or stockholder acquiescence, especially when the remedy involves corporate reorganization. See, e.g., *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va.), *modified*, 1988 U.S. Dist. LEXIS 8697 (E.D. Va. July 29, 1988), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

393. An efficacious remedy also is implied in two other elements of adjudication: the existence of legal obligation and the existence of a state enforcement mechanism. See *supra* notes 249-51 and accompanying text. A declaration that does not oblige a party to do something is hardly an "obligation," and would make the apparatus of state enforcement superfluous.

394. See *supra* notes 95-112 and accompanying text.

395. Unlike lawyer and factfinder dysfunction, there is another player who often can remedy dysfunction without recourse to the judge. The lawyer frequently mediates disputes among his clients or works out allocations with other beneficiaries. He can voluntarily reduce or waive fees. Likewise, the opposing lawyers, who do not wish to see a hard-fought settlement or judgment later undone, might insist upon certain safeguards for unrepresented parties and certain guarantees of cooperation from third parties. Of course, lawyer intervention cannot smooth out conflicts inherent in the attorney-client relationship, and it cannot work through all problems of party or third-person conflict. Nevertheless attorney intervention does reduce significantly the number of cases in which party dysfunction would otherwise require judicial involvement.

396. FED. R. CIV. P. 23(c)(2), (c)(3), (d)(2), (e).

397. See MANUAL, *supra* note 13, § 24. For an instance in which the court dramatically slashed attorneys' fees in order to preserve the bulk of a settlement corpus for the claimants, see *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd in part and rev'd in part*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

established eligibility guidelines under which people can claim compensation,³⁹⁸ and created out of whole cloth quasi-administrative agencies to dispense funds.³⁹⁹ Judges have placed school systems into receivership,⁴⁰⁰ ordered busing,⁴⁰¹ and abolished impediments to the collection of taxes needed to pay for the remedy.⁴⁰² They have enjoined third persons from bringing lawsuits that threaten a remedy,⁴⁰³ and jailed third parties interfering with the implementation of a remedy.⁴⁰⁴ They have appointed masters, magistrates, and implementation committees to create remedial plans and recommendations,⁴⁰⁵ and enforcement apparatuses to uncover and adjudicate violations of the settlement or judgment.⁴⁰⁶ They have appeared at public forums to garner popular support for their

398. See *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250, 1263-66 (E.D.N.Y. 1988); *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982), *cert. denied*, 467 U.S. 1247 (1984). See generally *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1516-36 (1976) [hereinafter *Developments*] (discussing calculation and distribution of damages in class actions).

399. See *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. at 1266-68; *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751-54, 838-46 (E. & S.D.N.Y. 1991) (describing creation and operation of Manville Personal Injury Settlement Trust and approving significant changes); *In re A.H. Robins Co.*, 88 B.R. 755 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir. 1989). See generally Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1 (Autumn 1990) (describing operation of claim-resolution facilities in asbestos, Agent Orange, Dalkon Shield, and Triana cases).

400. See, e.g., *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Morgan v. Kerrigan*, 409 F. Supp. 1141 (D. Mass. 1975).

401. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

402. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Griffin v. School Bd.*, 377 U.S. 218 (1964).

403. See, e.g., *In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987).

404. See, e.g., *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972); cf. *Spallone v. United States*, 493 U.S. 265 (1990) (reversing decision to hold third-party legislators in contempt when the court had not exhausted efforts to assure party compliance).

405. See, e.g., *Hamilton v. Landrieu*, 351 F. Supp. 549 (E.D. La. 1972); Special Project, *supra* note 91, at 805-09; see also *Bradley v. Milliken*, 620 F.2d 1143, 1156-58 (6th Cir.) (requiring experts employed to assist court in creating remedial plan to prepare written reports to be placed in the record), *cert. denied*, 449 U.S. 870 (1980); Mullenix, *supra* note 69, at 545-50, 558-64 (describing use of court-appointed expert in group trial in an effort to determine damages in asbestos class).

406. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481-82 (1986); *Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir.), *vacated in part*, 688 F.2d 266 (5th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1042 (1983); *Inmates of the Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 25 (2d Cir. 1971); *Young v. Pierce*, 640 F. Supp. 1476 (E.D. Tex. 1986); *Morales v. Turman*, 383 F. Supp. 53, 126 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977) (per curiam); Note, *The Wyatt Case*, *supra* note 100, at 1352-69; Special Project, *supra* note 91, at 824-37; cf. *Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239 (4th Cir. 1987) (refusing to require district court to appoint a trustee to operate a corporate mass-tort defendant then in bankruptcy reorganization).

plans,⁴⁰⁷ and they even have undone and reconstituted a party's existing obligations.⁴⁰⁸

The resulting power of the courts to protect rational adjudication through the implementation of effective remedies necessarily countenances some remedies that "may be administratively awkward, inconvenient, and even bizarre."⁴⁰⁹ The reason for this judicial prerogative is that adjudication ultimately is not about the declaration and enforcement of "rights," but about the declaration and enforcement of "obligations."⁴¹⁰ When the parties are capable of developing and implementing the remedial consequences of a defendant's legal obligation, the defendant's obligation is translated easily into the language of plaintiff's right. When the parties cannot implement a remedy without the intervention of the judge, however, the dissociation of "right" and "obligation" becomes obvious. The judge's reconciliation of the competing claims of obligation means that some or all of the plaintiffs in complex cases will not receive the same remedy—that is, have the same "right"—as other plaintiffs in cases in which the parties can privately implement a remedy. Party dysfunction forces the court to credit obligation over right, with the consequence that, from the perspective of claimants' "rights," the remedy often appears overly flexible and even bizarre.⁴¹¹

As with formulational and decisionmaking complexity, "remedial complexity" creates some practical and constitutional discomfort for the judge. Here the specific danger is overstepping the powers of an Article III judge through the assumption of functions for which she has limited or no competence,⁴¹² through the abdication of judicial function or responsibility,⁴¹³ or through interference with

407. See, e.g., *Bradley*, 620 F.2d at 1156-58; *Berger*, *supra* note 100, at 711-24.

408. See, e.g., *Brown v. Board of Educ.*, 892 F.2d 851 (8th Cir. 1989), *remanded*, 112 S. Ct. 1657 (1992) (discussing series of remedies already imposed on school system and finding remnants of segregation that potentially will require remedies in addition to those already ordered); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991); cf. *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting nonparties to consent decree in employment discrimination case to challenge the merits of the decree in separate suit). But see *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984) (upholding refusal of district court to allow intervention to challenge environmental consent decree); *United States v. Olin Corp.*, 606 F. Supp. 1301 (N.D. Ala. 1985) (refusing to allow later claimants to challenge terms of environmental consent decree).

409. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

410. See *supra* note 249 and accompanying text.

411. For other discussions of the dissociation between "right" and "remedy," that do not make the specific distinction between "right" and "obligation," see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 241-52 (1985); Chayes, *supra* note 100, at 1292-302; Fiss, *supra* note 108, at 44-58; Sturm, *Public Law Remedies*, *supra* note 100, at 1360-65, 1388-90. Cf. *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (5th Cir. 1982) (ordering court to consider classwide relief when individual plaintiffs are unable to prove an entitlement to back pay awards); *Simer v. Rios*, 661 F.2d 655, 675-76 (7th Cir. 1981) (approving in principle, but denying on the facts of the case, the concept of a fluid class recovery).

412. See generally HOROWITZ, *supra* note 100 (arguing that judges possess little competence to ascertain social facts, to make social policy, or to consider social consequences of individual decisions).

413. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 54 (1981) (White, J., dissenting in part); see also Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J.

decisions reserved either to the other branches of federal government or to the state and local governments.⁴¹⁴ From the viewpoint of adjudication, these problems pose no danger; as Damaska's survey of procedural systems demonstrates, neither federalism nor separated legislative, executive, and judicial functions are inherent aspects of an adjudicatory system.⁴¹⁵ From the viewpoint of American constitutional theory, the problems are also more theoretical than real. The form of adjudication does not allow unfettered judicial activism. The judge can exercise her remedial power only when parties and their lawyers are unable to bring to rational closure a finding on the defendant's obligation, and her power will ensure the translation of obligation into remedy. Nor can she continue her activist role beyond the point at which parties are able to assume their adversarial functions.⁴¹⁶ She cannot engage in regulatory or legislative rulemaking to accomplish a political rather than a principled solution to an intractable situation.⁴¹⁷ Furthermore, she cannot

1442, 1462-63 (1983) (questioning long-term utility of masters in accomplishing remedial goals); Fiss, *supra* note 108, at 56-57 (same); Silberman, *supra* note 12, at 2163, 2175 (arguing that ad hoc appointment of masters constitutes an abdication of the judicial role).

414. See *Missouri v. Jenkins*, 495 U.S. 33 (1990) (questioning judicial power to order tax levies on federalism grounds); *Spallone v. United States*, 493 U.S. 265 (1990) (refusing to uphold contempt sanctions against third-party legislators largely on separation of powers grounds); *Milliken v. Bradley*, 433 U.S. 267, 280-81 ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (overturning district court's plan to try damage claims of asbestos class on group basis because it exceeded "the scope of federal judicial power" under the *Erie* doctrine, and infringed "upon the separation of powers between the judicial and legislative branches").

415. See DAMASKA, *supra* note 169, at 185-99.

416. Cf. *Freeman v. Pitts*, 112 S. Ct. 1430, 1444-45 (1992) (holding that "a federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control" even before "full compliance has been achieved in every area of school operations"); *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1990) (allowing elimination of forced busing in favor of neighborhood schools); *Bazemore v. Friday*, 478 U.S. 385 (1986) (holding that no discrimination in voluntary school club exists after the adoption of race-neutral policies and admission procedures).

417. Because of the dissociation of right and obligation, the key inquiry is whether a court rationally can implement or administer a defendant's obligation, not whether it can give effect to a plaintiff's right. See *supra* notes 249, 409-11 and accompanying text. As obligations typically can be implemented and administered rationally, this limitation is rarely a hindrance to the judge. When the choice of remedy relies on political expediency or distributive notions such as disbursement of the defendant's obligation to the especially needy, the decision lies—in our society at least—beyond the bounds of adjudication because the choice does not descend from pre-existing legal principle. Cf. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 186 (2d Cir. 1987) (approving distribution plan to dead and disabled class members but reversing district court's establishment of a class-assistance foundation because it might expend settlement proceeds "on activities inconsistent with the judicial function"), *on remand*, 689 F. Supp. 1250 (E.D.N.Y. 1988) (distributing settlement funds only to totally disabled veterans and families of deceased veterans who could demonstrate some possibility of exposure to chemical and reconstituting class-assistance program); *In re Folding Carton Antitrust Litig.*,

turn to judicial adjuncts unless they possess skills or knowledge that she does not and that are crucial to the implementation or administration of a rational remedy.⁴¹⁸

These limitations should overcome concerns about the scope of the court's powers in most complex private remedies. The exercise of quasi-executive or quasi-legislative powers to accomplish public remedies, however, seemingly sets the model of adjudication on another collision course with the separation of powers and federalism concerns at the heart of our representative democracy. Fortunately, like the Seventh Amendment "collision," a derailment is unlikely ever to occur. Separation of powers concerns arise only when the legislature or executive is unable to comply with the constitutional or statutory commands involved in public-law litigation. Because the model of representative democracy assumes the faithfulness of the executive to the legislative will of the people, and the obedience of the legislature and the executive to the Constitution, executive and legislative branch dysfunction casts the democracy into crisis. When judicial power can avoid this crisis in those matters properly subject to adjudication, the judiciary contributes positively to the functioning of our democratic institutions.⁴¹⁹

The conflict between federalism and adjudicative power likewise proves false. In the first place, a combination of the Supremacy Clause, exclusive jurisdiction, removal jurisdiction, and sovereign immunity precludes state judges from imposing remedies that dramatically affect federal institutions and core federal interests.⁴²⁰ The short and decisive answer to the converse problem—the interference of federal judicial power in the operation of state affairs—is

744 F.2d 1252 (7th Cir. 1984) (reversing district court's decision to use unclaimed settlement proceeds for an Antitrust Research Foundation in view of similar existing executive branch projects); Elliott, *supra* note 91, at 505-07 (discussing use of administrative-court hybrids to resolve issues of liability).

418. A court's power to appoint adjuncts with skills or knowledge not possessed by the judge should assuage the fear that judges lack the competence to decide complicated remedial questions. See *supra* note 412 and accompanying text. The court's lack of power to appoint an adjunct unless it is critical to the primordial principle of reasoned judgment also should deflect the criticism of an abdication of judicial responsibility. See *supra* note 413 and accompanying text. Indeed, a judge's failure to take rational measures to turn obligation into remedy when it lies within her grasp to do so is a far greater abdication of responsibility.

419. This argument provides a limited justification for judicial review of the constitutional behavior of the other branches of government and of the states. It does not explain the need for judicial review in those cases in which the President, Congress, and the States have no institutional inability to accomplish a remedy without judicial intervention. Therefore, the broader claim of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which legitimized review of the constitutionality of the political decisions of other branches, ultimately must rest on other grounds. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980) (discussing theories of judicial review); RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW* §§ 1.1-6 (1986) (same); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-1 to -6 (2d ed. 1988) (same).

420. See *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984, 1001 n.8 (5th Cir. 1991); PAUL M. BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 479-92 (2d ed. 1988).

the limited nature of federal jurisdiction: Federal courts have authority to interfere in matters of state interest only when the Constitution and Congress authorize the interference. Because Congress is not ignorant of the judicial powers that might be necessary to effectuate a remedy, its creation of federal jurisdiction to hear constitutional or statutory claims against state officials carries implicit authorization to use that power when state officials are incapable of meeting their constitutional or statutory obligations.⁴²¹ Thus, the real issue of federalism is the wisdom of allowing federal courts to adjudicate matters of state interest; once that political decision has been made, the model of representative democracy imposes few additional constraints on judicial power.⁴²²

421. There are, of course, certain constitutional and statutory limitations on the use of remedial power. See, e.g., U.S. CONST. amend. XI; 28 U.S.C. § 2283 (1988); 29 U.S.C. §§ 101-115 (1988). For the most part, these limitations do not affect the court's power in remedially complex cases. Some of these limitations may reflect the legislative determination that the obligations involved are not capable of principled, as opposed to political or economic, resolution. See ARCHIBALD COX ET AL., *LABOR LAW* 52 (10th ed. 1986). Other limitations can be interpreted in a way that gives some flexibility to judges to craft appropriate remedies. See *supra* notes 400-08 and accompanying text. Finally, the lack of a rational federal remedy does not preclude the use of state courts to create a rational remedy.

Beyond these instances, however, a clear legislative declaration that the court not use its remedial power even when it is necessary to protect reasoned judgment is a decision that the court must accept. This inability to use certain remedial tools means that a subset of remedially complex cases which were in theory capable of rational resolution cannot be resolved. The theory of rational adjudication suggests that such limitations on remedial tools are unwise; but the form of participatory democracy requires that we accept the popular judgment to create intentionally a class of "polycentric" disputes.

422. For the nature of the existing constraints, see *supra* note 421. Lack of democratic or federalist bars to the exercise of remedial power does not mean the penumbra of these constraints is irrelevant to the judge. In order to avoid a clash between reasoned judgment on the one hand and democratic and federalist values on the other, the judge presumptively should apply the least judicial power likely to effectuate the remedy, and then ratchet the power up if the initial power is unforeseeably inadequate. In the first instance, therefore, she actively should encourage party settlement or attorney mediation of disputes. When these mechanisms fail, democratic and federalist concerns counsel the judge to intrude upon political, economic, or social decisionmaking only to the extent necessary to resolve a dispute over existing legal obligations, and only after democratic processes have failed. Only when that cautious incrementalism is likely to cause more harm than good should more coercive judicial powers be applied in the first instance. Cf. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (authorizing federal court to withdraw remedial supervision incrementally); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (holding that district court, which slowly had taken steps to ensure adequate funding for remedial measures, erred when it leapfrogged over another interim measure and assumed for itself the power to levy property taxes, but leaving open the possibility of a judicial levy if the legislators refused to impose the tax increase); *Spallone v. United States*, 493 U.S. 265 (1990) (disallowing a district court's use of the contempt power against nonparty legislators, at least until all methods aimed at party compliance had been exhausted); *Green v. School Bd.*, 391 U.S. 430, 439-41 (1968) (permitting "freedom of choice" plans when they will be as speedy and effective as more intrusive desegregation options, but generally disapproving their use because of their ineffectiveness).

Cautious incrementalism makes good pragmatic sense. Swashbuckling judicial intervention is likely to generate significant negative reaction, both in the institutions subject to reform and in the public at large. That reaction itself can result in further party

The reality remains, however, that in rare matters application of judicial power might so polarize the parties, the community or the market that no remedy will be effective. The form of adjudication teaches that the court cannot adjudicate these matters. A court should struggle mightily to educate the public and to overcome the apparently insuperable. Ultimately, though, judges involved in the process of adjudication are not executives, legislators, or miracle workers. Unless we are willing to allow judges to perform nonadjudicatory tasks,⁴²³ their powers necessarily are constrained by the demands and the limitations of the adjudicatory process.

4. *Systemic Dysfunction: Herein of "Joinder Complexity"*

When combined with the curative application of judicial power, player dysfunction provides the unifying theme for pretrial, trial, and remedial complexity. The cases and literature, however, also mention a fourth type of procedural complexity—re-litigation complexity. Re-litigation complexity, which has an awkward and ill-fitting relationship with the other three types of procedural complexity,⁴²⁴ seems at first blush to lie outside the framework of this unifying hypothesis of complexity. Unlike the other types of complexity, re-litigation complexity does not immediately appear to involve the dysfunction of lawyers, factfinders, or parties; nor does re-litigation of related cases threaten the application of reasoned judgment in any given case.

In fact, however, the re-litigation of certain types of related cases is simply a special instance of lawyer and party dysfunction. One of the lawyer's primary tasks in the formulation of issues is the selection of parties and court system for the lawsuit. As "master of the complaint," the plaintiff's lawyer initially selects the party structure and the court.⁴²⁵ Within narrow parameters, the defendant's lawyer can change these choices.⁴²⁶ In making these choices, both lawyers are guided by two constraints. The first constraint, imposed by popular and judicial will, is the panoply of restrictions found in the relevant constitutions, statutes, and codes of procedure.⁴²⁷ The second

dysfunction and, if the reaction is trenchant enough, judicial impotence and resulting polycentrism. Thus, the rational approach to a problem of remedial complexity usually is less judicial power rather than more. See Fiss, *supra* note 108, at 54-56.

423. See *infra* notes 562-66 and accompanying text.

424. See *supra* note 132 and accompanying text.

425. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512 (1989); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 n.7 398-99 (1987); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913).

426. See, e.g., *FED. R. Civ. P.* 14, 19, 22, 23. For rules and doctrines that allow a defendant to change the plaintiff's choice of courthouse see, for example, 28 U.S.C. §§ 1404-1407, 1441-1450 (1988 & Supp. II 1990); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982).

427. See U.S. CONST. art. III, § 2; *id.* amend. XI; 28 U.S.C.A. §§ 1331-1367, 1391 (West Supp. 1992); *FED. R. Civ. P.* 17-24; *Helicopteros Nacionales de Columbia, S.A. v.*

constraint is the command of the adversarial ethic to represent a client's interests zealously.⁴²⁸ Working within the formal legal rules, the lawyer seeks to find the combination of claims, parties, and court that meets his adversarial obligation of securing the best outcome for the client.

In four circumstances, these dual constraints combine to cause either lawyer or party dysfunction. The first circumstance involves a fund insufficient to satisfy all the claimants. When joinder of more claimants would reduce the funds available to the lawyer's present client(s), the lawyer's obligation to the client forbids the joinder of additional claimants who will dilute the share.⁴²⁹ Although the decision not to join additional claimants does not threaten the quality of reasoned judgment in the present case, it does threaten reasoned judgment in the subsequent cases of the claimants not joined. For all practical purposes, the early depletion of the fund makes the exercise of reasoned judgment in the later cases futile.⁴³⁰ Thus, the tactical joinder decisions of the first lawyer render the formulational function of subsequent lawyers irrelevant, and also prevent the party from performing its assigned role of making good on the court's later judgments.

The same threat to the quality of the judgment in subsequently filed cases exists when the initial suit effectively determines a course

Hall, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

428. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

429. This problem of insufficient funds for purposes of "joinder complexity" is distinct from the problem of insufficient funds that can comprise one cause of remedial complexity. See *supra* note 391 and accompanying text. In the case of remedial complexity, the funds are insufficient to satisfy already existing parties. In the case of joinder complexity, the fear of insufficient funds drives one claimant to fail to join other claimants who are not yet parties in the case.

It is inaccurate to assume, however, that a lawyer attempting to claim against limited assets never has an incentive to join additional claimants who in theory will reduce the client's available share. Although a party's gross proceeds from a settlement or judgment might be reduced by joinder, the spreading of litigation costs and attorneys' fees among other claimants might increase a claimant's net proceeds. Moreover, the threat of a judgment to a large number of claimants might extract a higher settlement per claim than an individual case would. Finally, in order to maximize fees, the lawyers may have an incentive to join additional claimants even when it is not in the best interests of the client to do so. In each instance, as long as all claimants are joined, systemic dysfunction will not arise. Paradoxically, however, the tactical joinder of these parties, which cures the problem of joinder complexity, might then cause remedial complexity. See *infra* note 452.

430. The theme of practical impairment of a person's ability to present proofs and reasoned argument runs through the joinder rules of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 19(a)(2)(i), 23(b)(1)(B), 24(a)(2). With the exception of joinder required under Rule 19(a)(2)(i), however, the joinder of persons whose rights will be impaired is in no sense required; an existing party or the potentially impaired person must have both knowledge of the impaired person in the case, and tactical incentive to involve that person.

of conduct that a person adverse to the claimants must follow.⁴³¹ In this situation, which typically involves claims for specific relief, the standard of conduct for the adverse party is established effectively in the first proceeding, and the later claimants' proofs and reasoned arguments are practically meaningless.⁴³² From the viewpoint of lawyer dysfunction, this scenario means that the lawyer who represents later claimants again has been barred from performing his expected role. From the viewpoint of party dysfunction, the party is barred (here by prior court order) from performing its function of complying with the court's subsequently issued orders.

Third, a lawyer's tactical joinder choices can create long-term difficulty for the other party's ability to participate in rational adjudication. A defendant might succeed in keeping apart cases that independently are so costly to litigate that the opposing lawyers will be unable to prepare their cases effectively.⁴³³ Conversely, a plaintiff who chooses not to join other claimants might force the defendant to exhaust its resources on re-litigation of similar issues, thus making it difficult for the defendant's lawyers to defend subsequently filed cases.⁴³⁴

In each of these three instances, the conduct of one group of lawyers proceeding about their task of ensuring rational yet favorable judgment for their clients in one case threatens the ability of another set of lawyers to do the same in a subsequent case. The final way in which re-litigation can affect rational adjudication is, somewhat different: A nonparty holds the key to rational resolution of the dispute. A person whose interests would have an effect on the relief granted might not be joined by the lawyers and might decide not to request participation in the suit. If the absent person is necessary to assure complete relief, then the joined parties will be unable to perform their initial roles in the discharge of the ordered relief.⁴³⁵ If the absent person retains the right to challenge the

431. This aspect of systemic dysfunction is distinct from the inconsistent obligations that can give rise to remedial complexity. *See supra* text following note 390. With remedial complexity, a party with obligations from a prior suit may be ordered in a subsequent suit to perform differing and inconsistent obligations. With systemic complexity, a party with no existing obligations may be ordered in the present lawsuit to perform an obligation that ultimately might lead to conflicts in a later suit. These two aspects of inconsistent obligations are therefore flip sides of the same coin.

432. The theme of assuring joinder when an earlier suit effectively establishes the legal rights and obligations runs through some of the joinder provisions of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 19(a)(2)(ii), 22, 23(b)(1)(A), and 23(b)(2). As with practical impairment, *see supra* note 428 accompanying text, the Federal Rules (other than party joinder under Rule 19(a)(2)(ii)) do not compel parties in the first suit to join all persons interested in a defendant's obligation; the Rules simply provide the tools to effect joinder when it is tactically advantageous to do so. By definition, it is not tactically advantageous to effect joinder in cases of systemic dysfunction.

433. *See* *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Snyder v. Harris*, 394 U.S. 332 (1969).

434. In this instance, the plaintiff's choice, which is not necessarily made with the purpose of pushing a defendant to the brink of bankruptcy, might have that effect. The plaintiff's choice effectively depletes the funds available for later claimants, simultaneously causing another type of systemic dysfunction. *See supra* notes 429-30 and accompanying text.

435. *See* FED. R. CIV. P. 19(a)(1).

judgment and thus undo the rights established between the plaintiff and defendant in the original case, then this collateral attack will frustrate the parties' implementation of the court's initial judgment.⁴³⁶

In all four of these circumstances, the joinder decisions are guided by the external constraints of procedure, ethics, and self-interest. These factors either prevent another lawyer from formulating the issues, evidence, and arguments in a manner that assures and protects reasoned judgment, or prevent a party from implementing a remedy. In the first two circumstances, the lawyer's dysfunction derives from the prior decisions of another lawyer who represents similarly situated individuals. In the third circumstance, the lawyer's dysfunction derives from the joinder decisions of a lawyer representing generally adverse interests. In the final instance, the dysfunction results from the decision of other interested persons who refuse to join the fray, but who remain poised to upset the results of a lawyer's labors.⁴³⁷

Therefore, rather than being unrelated to the other types of complexity, re-litigation complexity must be seen as part of the same fabric. Because the lawyers, jury, and parties seem unable to overcome this dysfunction, the hypothesis of complexity suggests that the response to the problem of "joinder complexity" should be an increase in judicial power that wrests from early-filing lawyers and interested non-participants the initial joinder decisions. There is some evidence that this judicial response is occurring. Some of the open-ended provisions of the jurisdictional and party joinder rules are being construed (by judges, of course) to allow more sensible

436. See *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that Caucasian firefighters not made parties to a lawsuit finding discrimination against African-American firefighters could challenge the remedial decree between the plaintiffs and defendant in a subsequent suit). This situation should be distinguished from the mass injury case in which a series of plaintiffs sue a defendant seriatim, with different plaintiffs achieving different results. The subsequent plaintiffs, for tactical reasons, may have chosen not to join in the original lawsuit, but the judgments in their cases do not upset the obligations decreed in the earlier cases. Only when the decision on those obligations can be reopened is reasoned judgment in the original suit threatened. Thus, the mass tort causes systemic dysfunction only when it depletes either the funds available to later claimants or the defendant's resources to defend subsequent suits. See *supra* notes 429-30, 434 and accompanying text.

437. The concept of joinder complexity does not entirely explain the joinder provisions of the Federal Rules of Civil Procedure. Most significant, when the judgment in one case would not affect the lawyers' and parties' opportunity to perform their adversarial responsibilities in other related cases, reasoned judgment does not require joinder of related claims even when it would be more efficient to do so. But the Federal Rules often allow joinder in this situation. See FED. R. CIV. P. 20, 23(b)(3).

Of course, the form of adjudication does not expressly preclude efficiency-driven joinder. Nonetheless, the potential of cases with large numbers of parties to cause formulaic, decisionmaking, or remedial complexity counsels a cautious attitude toward the use of joinder devices purely for efficiency reasons. See *infra* note 452.

joinder results,⁴³⁸ and judges have extensive powers to assure that absent or unrepresented interests are protected from the lawyer's ethical pressures to ignore those interests.⁴³⁹ It is a mistake, however, to believe that the trend is uniform,⁴⁴⁰ or that individual judges ultimately have much power over the situation. The clear terms of the Constitution, the jurisdictional and venue statutes, and the Federal Rules of Civil Procedure cannot be avoided by creative glosses. Judicially created procedural obstacles to rational joinder—such as the “master of the complaint” rule, the “well-pleaded complaint” rule,⁴⁴¹ abstention rulings not designed to achieve rational joinder,⁴⁴² and claim or issue preclusion rulings that create systemic dysfunction⁴⁴³—are unlikely to be overruled and cannot be ignored in the meantime. The adversarial spirit is dying a far slower death in the area of party joinder than in other areas of complexity.

From the perspective of the form of adjudication, the reticent judicial role in matters of joinder is only partially justifiable. Because

438. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-14 (1985); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *Tafflin v. Levitt*, 865 F.2d 595 (4th Cir. 1989), *aff'd in part*, 493 U.S. 455 (1990); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986); *Cook v. Boorstin*, 763 F.2d 1462 (D.C. Cir. 1985); *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974); *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991); *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991); *In re Joint E. & S. Dists. Asbestos Litig.*, 769 F. Supp. 85 (E. & S.D.N.Y. 1991); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991).

439. For instance, judges can appoint guardians ad litem, invite participation of amici curiae, and allow permissive intervention. See *FED. R. Civ. P.* 17(c), 24(b); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *Ruiz v. Estelle*, 679 F.2d 1115, 1134-36 (5th Cir.), *vacated in part*, 688 F.2d 266 (5th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1042 (1983); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 772-73; *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y.). In class actions, the judge can take additional measures to assure that absent class members are adequately represented. See *FED. R. Civ. P.* 23(c), (d).

440. See, e.g., *Temple v. Synthes Corp.*, 111 S. Ct. 315 (1990); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Martin v. Wilks*, 490 U.S. 755 (1989); *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Tashire*, 386 U.S. at 537; *Zurn Indus. v. Acton Constr. Co.*, 847 F.2d 234 (5th Cir. 1988); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *In re Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Pan Am. World Airways v. United States Dist. Court*, 523 F.2d 1073 (9th Cir. 1975).

441. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

442. Cf. *New Orleans Pub. Serv. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) (refusing to uphold abstention in complex ratemaking case proceeding simultaneously in state court); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (holding that abstention was improper in spite of parallel state proceedings); *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991) (reversing order of abstention in federal case brought by insurance policyholders even though suit by insurance commission against same defendant was pending in state court). With the arguable exception of *University of Maryland*, none of the results in these cases is necessarily inconsistent with rational joinder, but the analysis in each case pays insufficient attention to the command of reasoned judgment.

443. See *Wilks*, 490 U.S. 755 (refusing to bind Caucasian firefighters to discrimination consent decree of which they had notice but to which they did not become parties); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (placing limitations on offensive collateral estoppel which might permit systemic dysfunction to occur in some cases). See generally *Green*, *supra* note 16 (discussing claim and issue preclusion rulings).

the form of adjudication must give way to the form of representative democracy when they clash, the judge obviously cannot twist beyond their terms the Constitution and the relevant statutory and procedural rules governing joinder. On the other hand, there is no reason for judge-made rules to act as additional barriers to the achievement of reasoned judgment. Nor is there any reason for courts to defer unduly to an adversarial ethic in areas where that ethic threatens the fundamental form of adjudication.

Therefore, the judicial response to joinder complexity must proceed in two stages: First, ensure that the courts have sufficient power to override the tactical decisions of lawyers not to join certain parties and of interested non-participants not to intervene; and second, eliminate judicially established doctrines that presently frustrate rational joinder. Thus, related cases pending in different districts or divisions of a single court system must be capable of consolidation in one courtroom; related cases pending in different court systems must also be capable of consolidation into one forum; and interested nonparticipants must be either forced into the lawsuit through compulsory joinder or precluded from ever asserting their claims.⁴⁴⁴ Thereafter, those aspects of jurisdictional doctrines that are prudential (like the well-pleaded complaint rule, complete diversity, abstention, and standing) must be interpreted by the court in a manner that permits a consolidated resolution in cases of dysfunction.⁴⁴⁵ Nor can the parties' selection of courts and parties be given any deference by means of "master of the complaint" and other unduly restricted notions of the judicial role in shaping claims

444. The legislative and procedural proposals of the American Law Institute's *Complex Litigation Project* have sought to achieve these three objectives by allowing more liberal consolidation of cases already in the federal system, see COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, §§ 3.01-.09; by allowing cases in the federal system to be transferred to state court and cases in one state court to be transferred to another state court, see COMPLEX LITIGATION PROJECT Draft No. 3, *supra* note 129, §§ 4.01-.02; by providing in most instances for removal to federal court of state actions related to a pending federal case, see COMPLEX LITIGATION PROJECT Draft No. 2, *supra* note 16, §§ 5.01-.03; and by empowering courts to preclude re-litigation of issues that were resolved in a proceeding of which a nonparty had notice and an opportunity to be heard, see *id.* § 5.05. Nevertheless, because the *Complex Litigation Project* ignores the role of reasoned judgment in the definition of complexity, see *supra* notes 117-32 and accompanying text, its proposals run two risks: joining cases in which reasoned judgment can be exercised even without joinder; and not joining cases (for reasons of efficiency, comity, or respect for party autonomy) in which joinder is essential to reasoned judgment. The latter risk directly and obviously threatens reasoned judgment; the former risk does so when efficient joinder results in formulational, decisionmaking, or remedial complexity. See *supra* note 437; *infra* note 452. Indeed, although the proposals of the *Complex Litigation Project* are a necessary part of the prescription for joinder complexity, their curative powers may end up being used—with occasionally fatal consequences—on the wrong patients.

445. There is, of course, no need to amend the present scope of these doctrines in cases that do not pose problems of complexity.

and party structure.⁴⁴⁶

Realistically, implementation of the first step can be accomplished only through the federal courts. No state acting alone can overcome the constitutional handcuff of personal jurisdiction.⁴⁴⁷ The development of voluntary uniformity among fifty states on the rules of party joinder, transfer, and consolidation is highly unlikely.⁴⁴⁸ Even if agreement on the rules were possible, the lack of a single appellate authority to iron out idiosyncratic interpretations of the uniform rules would make the uniformity more theoretical than real. Furthermore, in order to package an entire case, state courts would need to have the authority to adjudicate disputes that now lie within the removal or exclusive jurisdiction of the federal court.⁴⁴⁹ In contrast, the federal courts possess none of these flaws. Nationwide service of process, already available in some areas, can be expanded.⁴⁵⁰ A single ultimate tribunal and a largely uniform body of rules are already in place. Federal courts can hear complex cases without sacrificing the prudential reasons that Congress believes federal courts should have exclusive or removal jurisdiction, and federal judges have familiarity with the federal questions often inhabiting complex litigation. Therefore, although it is not necessary that the case actually be handled by the federal court, it is necessary that the federal courts have the power to decide the proper forum for the case.⁴⁵¹

446. See Freer, *supra* note 16. Unlike Professor Freer, however, I do not contend that the judge should possess case-shaping powers in cases that present no issues of systemic dysfunction. The broad claim to overthrow the "master of the complaint" doctrine or to permit judicial case-shaping in all cases is not compelled by the form of adjudication. In fact, because it violates the adversarial assumption, this broader claim must be rejected as long as we profess the adversarial ideal. See *supra* notes 274-79 and accompanying text.

447. The federal courts, of course, could constitutionally develop a rule of nationwide service of process. See, e.g., 28 U.S.C. § 2361 (1988); *Amendments to Federal Rules of Civil Procedure*, 134 F.R.D. 525, 603-05 (1991) [hereinafter *Amendments*] (describing proposal of Committee on Rules of Practice and Procedure to amend Rule 4 to allow nationwide service of process in federal question cases).

448. The States presently demonstrate a plethora of procedural variation on matters both large and small. See Oakley & Coon, *supra* note 11, at 1367; Subrin, *supra* note 11, at 2000. Proposals to permit transfer of related cases from federal to state court and among state courts are still on the drawing board. See COMPLEX LITIGATION PROJECT Draft No. 3, *supra* note 129, §§ 4.01-.02.; NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM TRANSFER OF LITIGATION ACT (1992).

449. See, e.g., 15 U.S.C. §§ 15, 26, 78aa (1988); 28 U.S.C. §§ 1338, 1346, 1441-1452 (1988). See generally 13 CHARLES A. WRIGHT ET AL., *supra* note 269, § 3527 (discussing federal court jurisdiction).

450. See *supra* note 449. Interestingly, the Supreme Court declined to amend Rule 4 to permit nationwide service of process in federal question cases when given the opportunity to do so in 1991. See *Amendments*, *supra* note 449, at 525 (choosing not to forward to Congress a proposal to create nationwide service of process in federal question cases). Even nationwide service of process for federal question cases, which would entangle the courts in a host of "pendent personal jurisdiction" issues, does not go far enough in eliminating this aspect of systemic dysfunction.

451. Cf. *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336 (1976) (holding that, in routine case not involving dysfunction, federal court could not remand a removed case to state court merely because it would be resolved more efficiently there). In contrast, an excellent example of a federal court using its power to package a case in state court is *Taffin v. Levitt*, 865 F.2d 595 (4th Cir. 1989), *aff'd in part*, 493 U.S. 55 (1990). In *Taffin*, an insolvent savings and loan was thrown into receivership in state court. Depositors

Thus, the form of adjudication strongly counsels the assumption of greater case-shaping power by federal judges when systemic dysfunction appears.⁴⁵² But this assertion of power, which obviously comes at the expense of the lawyers who now perform the tasks, also comes at the expense of state courts in which the cases would otherwise be brought.⁴⁵³ The specter of federal judges grabbing power at the expense of state courts is problematic for two reasons. First, as federal courts become the haven of multiparty, multicclaim litigation, state courts will likely become the repository of car accidents, simple breach of contract claims, and landlord-tenant disputes. Second, assertion of federal power over most multiparty, multicclaim litigation will severely tax the federal court system because many of these cases also are likely to involve other aspects of lawyer, factfinder, or party dysfunction.

and other claimants, most of whom were not diverse from the defendants, filed their claims in the receivership proceeding. A small group of creditors, however, sought to beat everyone to the available assets by filing federal question (securities fraud and RICO) claims in federal court. The district court dismissed the securities claim over which the federal courts had exclusive jurisdiction. It then found that state courts had concurrent jurisdiction over the RICO claim, and decided to abstain from hearing the claim under *Burford* abstention. *Id.* at 600 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)) (noting that abstention is proper when hearing the case would impact upon the state government's rightful independence). The Fourth Circuit affirmed, and the Supreme Court affirmed on the concurrent jurisdiction issue to which it had restricted its writ of certiorari.

Given the inability to join all parties in federal court because of the lack of complete diversity, the district court's procedural maneuvering evidenced a wise use of power to prevent systemic dysfunction. The district court, however, was able to effectuate rational joinder only because no securities claim lay within federal jurisdiction and because of an interpretation of *Burford* abstention that seems to conflict with the *Burford* analysis subsequently adopted in *New Orleans Public Service v. Council of the City of New Orleans*, 491 U.S. 350 (1989). The only long-term solution to the problem posed in *Tafflin* would be to eliminate the complete diversity gloss on 28 U.S.C. § 1332 in instances of systemic dysfunction, and then to give the courts the power to assure joinder of all claimants in federal court. Indeed, it is interesting to note that the Federal Courts Study Committee, which generally recommended the elimination of federal jurisdiction in several areas, advocated expanded jurisdiction for federal courts to handle complex cases. See FEDERAL COURTS STUDY COMMITTEE, *supra* note 16, at 38-50, 55-59, 81.

452. Of course, the aggregation of large numbers of claims to avoid systemic dysfunction might cause formulational, decisionmaking, or remedial complexity. To the extent that the threat to reasoned judgment posed by these types of complexity can be solved through the exercise of judicial power, there is no violation of the form of adjudication. Cf. *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1385 (E. & S.D.N.Y. 1991) (discussing techniques used to avoid factfinder dysfunction after consolidation of 64 cases for trial). When the solution to joinder complexity causes another form of dysfunction that cannot be cured by judicial power, however, the court is in a true dilemma—no technique can assure reasoned judgment. For discussion of this problem, see *infra* notes 517-20 and accompanying text.

453. For reasons similar to those discussed with remedial complexity, this assertion of power does not directly offend the notion of federalism inherent in the Constitution: When Congress has granted a federal court the authority to adjudicate a case, it has impliedly given the federal judge the power to resolve the dispute rationally. See *supra* notes 421-22 and accompanying text.

These problems illustrate two weaknesses of formal analysis. First, formal analysis is relatively indifferent to the indirect effects, substantive and otherwise, that rational adjudication will have on state courts.⁴⁵⁴ Second, rational adjudication assumes that the judge can execute perfectly her assigned functions.⁴⁵⁵ At a practical level, however, these concerns largely are ameliorated by the conservatism of the form of adjudication. The form does not require that federal courts eliminate judicial rules inhibiting party joinder in *all* cases; the rules must be abandoned only in the four limited circumstances that create lawyer or party dysfunction. The court also cannot act unless it will be effective in ending dysfunction; consider, for example, a case that can be resolved rationally only with the joinder of international parties not subject to American process.⁴⁵⁶ Finally, the "minor league" effect on state courts should be moderate as long as Article III precludes federal assertion of jurisdiction over multiparty state law disputes involving citizens of only one state.⁴⁵⁷

Thus far, however, Congress and the federal courts have largely failed to accept the invitation to reform joinder concepts to lessen "joinder complexity."⁴⁵⁸ For the other three modes of complexity, the hypothesis of dysfunction and application of remedial judicial

454. The pressure that this skewed distribution of cases may place upon substantive state law has received little attention in the literature, and certainly merits deeper exploration. For a further perspective on the problem, see *infra* notes 508-09 and accompanying text.

455. One tempting possibility—the use of ad hoc judicial officers such as masters—encounters significant practical and theoretical difficulties. See *supra* note 413 and accompanying text. Another possibility—an increase in the number of federal judges and magistrate judges—risks an undesirable dilution of the federal bench. FEDERAL COURTS STUDY COMMITTEE, *supra* note 16, at 8, 12; CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS 174-78 (1990). The final possibility—the elimination of certain substantive areas (such as diversity cases, prisoner civil rights petitions, or Social Security appeals) from the federal docket—might expose politically valuable rights to executive branch whim or exacerbate the tendency to make state courts into a "minor league."

456. *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (holding that state court could not exercise personal jurisdiction over foreign corporation with limited business contacts in the state); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 537 n.18 (1967) (noting possible problems of obtaining personal jurisdiction over Canadian citizens injured in bus crash in the United States).

457. See U.S. CONST. art. III, § 2.

458. Congress has occasionally acted; for instance, it enacted a multidistrict litigation transfer plan in 1968, see Act of April, 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (1988)), and it recently authorized supplemental jurisdiction over pendent claims and parties, see Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5113 (codified at 28 U.S.C. § 1367 (Supp. 1992)). Other suggestions to ease the existing joinder restrictions have been overlooked. See, e.g., MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 1991, H.R. 2450, 102d Cong., 1st Sess. (1991); AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968).

Similarly, the Supreme Court initially permitted more sensible joinder results in the 1966 amendments to the Federal Rules of Civil Procedure. See *Amendments to Rules of Civil Procedure for the United States District Courts*, 383 U.S. 1029, 1042-51 (1966). The Court subsequently has taken a narrow reading of the existing jurisdictional and joinder rules on numerous occasions. See, e.g., *Temple v. Synthes Corp.*, 111 S. Ct. 315 (1990); *Martin v. Wilks*, 490 U.S. 755 (1989); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Snyder v. Harris*, 394 U.S. 332 (1969).

power largely is descriptive of existing practice; the crucial question is whether judges are exceeding the inherent limitations on their power. For joinder complexity, the evidence of present dysfunction exists, but the remedial application of judicial power that the hypothesis suggests to be appropriate has been fitful, and thus remains largely a matter of prescription. In the area of party joinder, the full and proper limits of the judicial power available under the form of adjudication have not been achieved.

5. *Necessary but Insufficient Complexity*

The hypothesis of complexity—which holds that an essential attribute of complex litigation is lawyer, factfinder, or party dysfunction remediable by an assertion of judicial power—initially appears valid. Descriptively, it accounts for and partially justifies the movement toward the increased power of federal judges. Prescriptively, it suggests some limits upon that power, and also points in the direction of additional changes (mostly in the areas of jurisdiction and joinder rules) that have recently been made or that presently are being debated.

Indeed, all of the paradigmatic complex cases—cases such as the *AT&T* antitrust litigation,⁴⁵⁹ the *Agent Orange* product liability litigation,⁴⁶⁰ and the Kansas City school desegregation suit⁴⁶¹—involve these attributes. Nevertheless, a crucial question still remains: whether all cases that possess these attributes are complex. If they are, then a sufficient definition of complex litigation has been developed, and the limitations already identified are the only limitations on judicial power. If other attributes are essential to the definition, however, those attributes might reveal further limitations on judicial power.

In fact, other attributes must be essential. It cannot legitimately be claimed that every case in which the court comes to the aid of an actor unable to perform its adversarial function is complex. Take, for example, a simple car accident involving three fact witnesses (plaintiff, defendant, and police officer) and two experts (the plaintiff's physician and the defendant's Rule-35 examiner⁴⁶²). Assume that the defendant is penniless, and thus cannot afford the costs of defense. In a sense, these facts involve lawyer dysfunction, because the defendant's impecunious state frustrates her lawyer's ability to marshal and present evidence. The dysfunction could be remedied

459. *United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978).

460. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988).

461. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

462. See FED. R. Crv. P. 35(a) (allowing one party to obtain a physical or mental examination of another party on a showing of good cause).

through the application of judicial power: the suspension of all discovery; the issuance of bench subpoenas for trial; the court appointment of an expert medical examiner; and the judicial interrogation of witnesses on behalf of the defendant. Certainly the procedures would be novel, perhaps even wrong-headed, but the case is at bottom still a simple car accident. Under the present hypothesis of complexity, however, this use of judicial power to cure dysfunction would make the case complex.

Similarly, consider a trucking company that causes harm to two plaintiffs in unrelated incidents. One plaintiff is injured when one of the defendant's trucks runs a red light; a second plaintiff is harmed when the defendant defaults on a contract without excuse. Assume that each plaintiff is harmed in the amount of \$1,000,000, but that the total assets of the company are only \$1,500,000. Here the lawyers will be precluded from joining the case by procedural rules (joinder of parties here is precluded because their injuries do not arise out of the same transaction or occurrence⁴⁶³) and ethical considerations (joinder would reduce the client's share of the proceeds⁴⁶⁴). The court arguably could effect joinder, either by ordering consolidation of the cases,⁴⁶⁵ or by placing the company into a receivership.⁴⁶⁶ The court then could distribute the assets in a fair way. Although this nontraditional use of judicial power to overcome systemic dysfunction suggests that the case is complex, this conclusion intuitively does not seem correct as long as each of the bifurcated cases poses no internal problems of dysfunction.⁴⁶⁷

These hypotheticals demonstrate that the dual characteristics of dysfunction and curative judicial power do not adequately describe complex litigation. A moment's reflection on the facts of these cases reveals the significant difference between them and paradigmatically

463. See *id.* 20(a). Rule 20 allows joinder when "any question of law or fact" is common to the plaintiffs whose rights "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences." *Id.* The plaintiffs' respective rights to the full payment of their claims are arguably a common question of law that "arises out of" the occurrence of the defendant's possible insolvency; thus, Rule 20 could be interpreted to allow joinder. This reading of Rule 20, however, seems far more broad than the most generous readings given the Rule up to now, see *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974). In any event, Rule 20 still would require the consent of the parties, at least one of whom would have little incentive to join a case that will reduce the expected judgment by \$250,000.

464. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

465. See FED. R. CIV. P. 42(a) (authorizing a court to consolidate "[w]hen actions involving a common question of law or fact are pending before the court"); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1420-21 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990). Even assuming that a question of law is common to the cases, see *supra* note 465, Rule 42 cannot be used as a device for the court to effect joinder if one of the plaintiffs has not yet filed suit or has sued in state as opposed to federal court. See *Pan Am. World Airways v. United States Dist. Court*, 523 F.2d 1073 (9th Cir. 1975).

466. See FED. R. CIV. P. 66; 12 WRIGHT & MILLER, *supra* note 76, §§ 2982-2985.

467. Indeed, if this intuition were not true, then every bankruptcy case in which assets are insufficient to satisfy all the creditors within a particular priority would be complex. Bankruptcy cases, however, are not among the types of litigation typically considered to be complex. See *supra* notes 54-60, 62 and accompanying text.

complex cases such as *Agent Orange* and *AT&T*.⁴⁶⁸ In the hypotheticals, judicial power simply righted a sinking ship in a manner that assured that the nature and quality of the evidence—and thus the opportunity for reasoned judgment—were preserved. The disparate procedural treatment of the cases did not result in outcomes that were substantively different than the cases of similar persons with similar types of claims.⁴⁶⁹

Perhaps the same is not true of the paradigmatic complex cases, in which disparate procedural treatment accorded some claims or parties threatens to treat similar claims and parties dissimilarly. If true, this distinction suggests another crucial element in complex cases. Until now, this Article has demonstrated that complex litigation develops from the collision between the norm of reasoned judgment and the positive assumption of adversarialism. It might be that complex cases also involve a collision with another assumption of American procedure: the trans-substantive assumption that all like cases will be treated procedurally alike.

B. The Consequence of Complexity: Treating Like Cases Unalike

To explore whether complex litigation in fact involves a conflict with trans-substantivism, it is important to recall the four components of trans-substantivism: inter-transactional neutrality, which requires that parties in different transactions with similar legal claims be accorded the same procedures; intra-substantive neutrality, which requires that all cases involving a single substantive theory receive the same set of procedures; transactional neutrality, which requires that all substantive theories implicated by the factual occurrence at issue receive the same procedures; and inter-personal neutrality, which requires that each person (plaintiff or defendant) in a transaction receive the same procedures as all other similarly situated persons.⁴⁷⁰ The following analysis illustrates that, in complex

468. See *supra* notes 459-61 and accompanying text.

469. The reason that this statement is true in the first hypothetical is evident; the evidence available for decision is the same in all of the cases. In the second hypothetical, the reason the use of aggregation procedures like consolidation or receivership does not lead to disparate results is two-fold. First, assuming that the defendant had no other creditors, the same aggregative result achieved through the assertion of judicial power would be achieved through one plaintiff's invocation of bankruptcy proceedings. Second, the focus of formal adjudication is upon obligation, not right. See *supra* notes 248-52 and accompanying text. Obviously, the defendant's obligation to pay for its wrongs cannot exceed its available assets. Hence, although the aggregation of the claims leads to different rights for the plaintiffs (each receiving \$750,000 rather than the first to judgment receiving \$1,000,000 and the second to judgment \$500,000), the aggregation does not change the defendant's ultimate obligation to pay \$1,500,000 for its wrongs.

470. See *supra* notes 288-97 and accompanying text.

litigation, the assertion of judicial power required to avert dysfunction threatens at least one of these four neutralities. It also illustrates that, because some aspects of these neutralities are essential attributes of the form of adjudication, the judge's power to assure reasoned judgment is more constrained than the hypothesis of complexity has previously suggested.

1. *Disparate Treatment of Parties Involved in Similar Transactions*

The first assumption of trans-substantivism, inter-transactional neutrality, is that two or more plaintiffs with similar claims of legal obligation arising from two separate transactions will not receive procedures that cause the nature and quality of the evidence available to the decisionmaker to differ.⁴⁷¹ Should the nature and quality of evidence vary between the claims, then the disparate procedures risk disparate substantive outcomes for the same legal obligation.⁴⁷² In cases typically regarded as complex, there is evidence that the procedures used by judges to remedy dysfunction are in fact causing outcome-determinative differences among different sets of similarly situated parties. A classic instance is asbestos litigation involving the same factual scenario: the exposure of workers to many different asbestos products. Among the procedural techniques used to resolve this scenario have been individual plaintiff trials,⁴⁷³ consolidated and class action trials in which certain issues have been tried on a class-wide basis or the claims of certain bellwether plaintiffs have been litigated to conclusion,⁴⁷⁴ and now multidistrict proceedings.⁴⁷⁵ Some asbestos cases have involved masters; some have not.⁴⁷⁶ Some have employed burden-shifting devices; some have

471. See *supra* note 294 and accompanying text.

472. The point of inter-transactional neutrality is not that procedural rules should have no substantive consequences; it is that the substantive consequences of procedural rules must be predictable and uniform among all transactions involving the same legal and factual patterns. See *supra* note 306 and accompanying text.

473. For a history of the early individual trials, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985).

474. See, e.g., *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380 (E. & S.D.N.Y. 1991) (describing consolidation of state and federal cases and their separation into two trials of 64 and 15 claimants); *In re Joint E. & S. Dists. Asbestos Litig.*, 769 F. Supp. 85 (E. & S.D.N.Y. 1991) (finding that inter-district consolidation of federal cases was permissible). For a history of various bifurcation experiments in class actions pending in the Eastern District of Texas and the Eastern District of Pennsylvania, see Mullenix, *supra* note 69, at 500-09, 557-65. See also REPORT ON ASBESTOS LITIGATION, *supra* note 14, at 17-22.

475. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

476. See *In re Joint E. & S. Dists. Asbestos Litig.*, 129 F.R.D. 434 (E. & S.D.N.Y. 1990) (appointing settlement master for federal and state asbestos cases); McGovern, *supra* note 20, at 660-75; McGovern *supra* note 15, at 478-91; Mullenix, *supra* note 69, at 540-45.

not.⁴⁷⁷ Some defendants have used bankruptcy process to forge settlements; some have not.⁴⁷⁸ Indeed, some judges and commentators have praised procedural experimentation among similarly situated cases as a means of finding better methods to dispense justice.⁴⁷⁹

Because the focus of the judge, the lawyers, and the parties is on the rational resolution of the case at hand, the failure to consider the inequitable consequences of one case's procedure on other, transactionally unrelated cases is understandable. This oversight, however, raises a conflict with the assumption of inter-transactional neutrality—an assumption that is also normatively grounded in the form of adjudication when there are no relevant legal or factual differences among cases.⁴⁸⁰ When parties in similar transactions have claims or defenses that are factually and legally identical, therefore, the judge's adjudicatory power to select a procedure to remedy dysfunction is limited not only by the considerations of reasoned judgment already discussed, but also by the need to assure that the procedure chosen to assure reasoned judgment does not as a practical matter establish legal obligations that vary among identically situated parties.⁴⁸¹

In many instances, this limitation on procedural innovation is unlikely to affect the court's power. First, many procedural innovations will have no effect ultimately on the nature and quality of evidence available for adjudication. A judge in one complex case might order discovery in waves, and another judge in a similar case might limit the amount of time for depositions. If both methods of

477. Compare *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986) (refusing to burden-shift) and *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985) (same) with *Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir. 1988) (using a burden-shifting device).

478. See *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747 (E. & S.D.N.Y. 1991) (noting that 12 asbestos defendants have gone into bankruptcy, while others have used different techniques to cope with the burdens of litigation).

479. See, e.g., *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 423 & n.10 (assigning asbestos cases to Judge Weiner in part because of "his track record of accomplishment and successful innovation"); Weinstein, *supra* note 17, at 21-42; see also Mullenix, *supra* note 69, at 569-74 (approving generally of disparate innovations developed to try two asbestos class actions). Interestingly, Damaska's model predicts this type of experimentation in complex American litigation. DAMASKA, *supra* note 169, at 239 (noting that, in the absence of a strong judicial hierarchy in America, "[d]ifferent judges can each set off on a different voyage of discovering best solutions").

480. Adjudication's formal reliance on pre-existing obligation as the basis of decision means that cases that are legally and factually identical must receive the "same" (i.e., not outcome-determinative) procedures. When there are some legally relevant factual differences among transactionally alike cases, however, the form of adjudication does not insist on the use of the "same" procedures; but the non-normative assumption of transubstantivism still does. See *supra* notes 305-07 and accompanying text.

481. Cf. *SEC v. Elliott*, 953 F.2d 1560, 1573 (11th Cir. 1992) ("If relevant facts differ, then the law will treat the claimants differently. Thus, it is incorrect to say the law prefers one claimant if that claimant's situation differs in a legally cognizable way.").

case management lead to disclosure of the same evidence, these procedural variations probably will not alter a party's legal obligations. Second, the form of adjudication does not mandate that parties in similar transactions, but with dissimilar legal or factual positions, receive identical procedures. Consider, for instance, two neighborhoods polluted by releases from two separate factories. Assume that the only relevant differences among the cases are that the residents in Neighborhood A are not guilty of contributory negligence, whereas the residents in Neighborhood B are guilty; further assume the law of the relevant jurisdiction recognizes contributory negligence as an absolute bar to liability. If negligence were the residents' only viable claim, and if there were some evidence of contributory negligence, the two trial courts legitimately might establish different, outcome-determinative case management plans for each case. Because the legal obligations of the defendants are not identical, the form of adjudication does not insist that the procedures enforcing the obligations be the same.

The normative component of inter-transactional neutrality will, however, have an effect in at least two circumstances. First, assume that before the residents file suit, the state legislature abolishes contributory negligence as a bar in toxic tort cases. Now the trial court in the second case would no longer be justified in crafting a case-management plan that deviates from the management plan established for the first case. Although there is a factual difference between the cases (negligence on the part of one set of residents), the law no longer recognizes that defense as an aspect of the defendant's obligation. The form of adjudication countenances different procedures only when the factual differences are legally relevant. Second, in order to assure no variation in the nature of the evidence available to the decisionmaker, all subsequent cases that are legally and factually identical to the first case must accept the management blueprint of the first court.

In combination, these two limitations necessarily lead to a certain conservatism in the area of procedural innovation. Of course, this strait jacket is easier to announce than to enforce. The initial problem is that this limitation seemingly locks all subsequent judges in the relevant jurisdiction⁴⁸² into the procedural framework built by the first judge to enter an area. The only "solutions" to this problem are, first, to share information about dysfunctional cases and curative techniques with all judges,⁴⁸³ and second, to develop and

482. Because there is no expectation in our federal system that the legal obligations under state law be uniform, one state can adopt a set of procedures that will cause a different outcome for a dysfunctional case arising under that state's law than the outcome of a dysfunctional case arising under another state's law. When federal obligations are at stake, however, all courts, federal and state, would need to ensure that their later procedural choices do not cause different impacts than the procedural choices of earlier cases.

483. See REPORT ON ASBESTOS LITIGATION, *supra* note 14, at 36-37; Mullenix, *supra* note 69, at 573-74; cf. 28 U.S.C.A. § 479(b) (West Supp. 1991) (ordering the Judicial Conference to make available to the district courts recommendations on ways to improve litigation management and dispute resolution services).

promulgate specific rules for the various types of complex litigation—rules that describe in detail the range of procedural options and the innovations that are precluded.⁴⁸⁴ Although these are in a sense the goals of the *Manual for Complex Litigation*, the *Manual* falls well short of the mark. Instead of a procedural roadmap describing the permissible and impermissible methods of attacking particular types of complex litigation, the *Manual* is a compendium of useful techniques.⁴⁸⁵ The reason for the *Manual's* failure to make the difficult and necessary procedural choices lies in its decisions to ignore the definition of complex litigation and to focus instead on the efficient resolution of individual cases.

The form of adjudication demands a more systematic analysis of outcome-affecting procedural techniques. In developing that analysis into a series of specific rules, however, conflicts with other aspects of the trans-substantive assumption might arise. It is to these remaining assumptions that we must next turn.

2. *Disparate Treatment of Parties Involved in a Single Transaction*

A second aspect of trans-substantivism is inter-personal neutrality. Under this assumption, all plaintiffs and all defendants in a transaction should receive comparable procedural treatment that assures that litigant-specific procedural variations cause no disparity in substantive outcome.⁴⁸⁶ In complex litigation, instances of procedural discrimination among plaintiffs or defendants are somewhat rare, but they do exist. For instance, some *Bendectin*⁴⁸⁷ plaintiffs received a multidistrict trial in which the issue of causation was trifurcated and significant limitations were placed on the access of plaintiffs to the courtroom; they lost their case before a jury.⁴⁸⁸ Other plaintiffs who opted out of the multidistrict proceeding received a full, non-trifurcated proceeding, where, depending on the evidentiary rulings on the admissibility of expert testimony and the

484. Curiously, the failure of judges to recognize and heed the demands of inter-transactional neutrality, *see supra* note 479 and accompanying text, has actually been a boon to this task. With the amount of procedural innovation attempted by judges in recent years, the drafters of more specific rules should have a good sense of the breadth of possibilities, their relative efficacy, and their effects on substantive rights.

485. The second half of the *Manual* does develop some specific thoughts about the handling of six substantive areas of complex litigation. *See* MANUAL, *supra* note 13, §§ 33.1 to .6. This section, however, suffers from a lack of specificity, rarely stating a concrete and preferred set of procedures and never considering the effect of varying procedures on the substance of the parties' obligations. *Cf.* 28 U.S.C.A. § 479(c) (West Supp. 1991) (requiring creation of a manual designed to develop solutions for problems of cost and delay in federal civil cases).

486. *See* text accompanying notes 294-96.

487. *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

488. *See id.*

judges' perception of the strength of that evidence, they have encountered both victory and defeat.⁴⁸⁹ The same procedural variation can occur among defendants. For instance, in the *Triana DDT* litigation, which involved thousands of plaintiffs, the plaintiffs' cases against two defendants were separated. The litigation involving one defendant, the chemical manufacturer, was managed by a master, who chose to select twenty random members of the class for full trial and created a novel system of information disclosure. That suit ended with a \$15,000,000 class settlement.⁴⁹⁰ The litigation involving the other defendant, the owner of the land on which the manufacturing took place, was managed by the judge, who bifurcated the case by legal issue and adopted traditional discovery methods. After trial, the defendant in the second litigation prevailed.⁴⁹¹

These types of procedural disparity within a transaction suggest a conflict with inter-personal neutrality. Of course, when disparate procedures do not affect the outcomes of the cases of particular plaintiffs or defendants, no conflict exists. Different procedures, though, are frequently not outcome-neutral. Individual trials generate different outcomes than group trials: The group is more likely to recover, but will receive less money than the plaintiffs who are successful in individual trials.⁴⁹² Likewise, the use of masters, novel information disclosure devices, issue bifurcation, and a host of other procedural techniques can mean that different evidence is available to the decisionmaker, with different outcomes likely.

The analysis is precisely the same as the analysis developed for inter-transactional neutrality. Like inter-transactional neutrality, inter-personal neutrality has both a normative and a positive component: When there are no legally or factually relevant distinctions

489. See *Daubert v. Merrell Dow Pharmaceuticals*, 951 F.2d 1128 (9th Cir. 1991); *DeLuca v. Merrell Dow Pharmaceuticals*, 911 F.2d 941 (3d Cir. 1990); *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir.), *cert. denied*, 111 S. Ct. 370 (1990); *Brock v. Merrell Dow Pharmaceuticals*, 874 F.2d 307 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1046 (1990); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989); *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987); *Oxendine v. Merrell Dow Pharmaceuticals*, 506 A.2d 1100 (D.C. 1986), *appeal after remand*, 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990).

490. See *In re Redstone Arsenal DDT Litig.*, No. CV-86-C-5313-NE (N.D. Ala. Dec. 7, 1986) (approving allocation and distribution plan); *Olin Agrees to Settle Alabama DDT Case*, N.Y. TIMES, June 4, 1986, at A15. In a prior settlement, the same defendant agreed to pay \$24 million and provide health care to a prior group of plaintiffs, and further agreed to clean up land contaminated by its chemical. See *Olin Agrees to an Unprecedented Cleanup*, WASH. POST, Apr. 22, 1983, at A6.

491. *Floyd Wilhoite v. United States*, No. 84-C-5894-NE (N.D. Ala. July 29, 1986). The author was lead trial counsel for the United States in the case. Professor McGovern's implications that the two cases were coordinated for settlement and trial, see Francis E. McGovern, *The Discovery Survey*, 51 LAW & CONTEMP. PROBS. 41, 46 (Autumn 1988), and that the United States Army was involved in the settlement, see Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61, 63 (Autumn 1990), are both erroneous. The United States declined to participate in Professor McGovern's case management plan or in the settlement of the case. Further, the cases were not coordinated for trial; rather, the trials were scheduled to occur on different issues more than six months apart from one another.

492. See Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989).

among individual claims of obligation, the form of adjudication requires the same procedures; but when relevant distinctions exist, the same procedures are not required.⁴⁹³ When parties to a transaction have factual differences that are legally relevant, the court is not required by the form of adjudication to adopt the same procedures. Thus, the court's use of different procedures against the chemical manufacturer and the land owner, who had differing legal obligations, violated only the positive component of inter-personal neutrality. When no factual or legal differences are discernible, however, the court is precluded by the form of adjudication from providing different, outcome-determinative procedures to different parties to a transaction. Thus, the disparate, outcome-determinative procedures adopted in the *Bendectin* cases, in which the defendant's obligation was identical toward the claimants, violated the form of adjudication and consequently exceeded the courts' adjudicatory authority.⁴⁹⁴

Like inter-transactional neutrality, inter-personal neutrality puts a cap on procedural innovation, for it commits all judges who handle subsequent cases to accept the same procedures utilized by the first judge. Here again, the creation of a procedural manual which distributes information and addresses the range of proper procedures in particular cases will help to alleviate the problem.⁴⁹⁵ In contrast to inter-transactional neutrality, however, the judge has available other techniques that can eliminate the use of disparate procedures in significant numbers of cases: consolidation and joinder. When all of the apparent claimants and defendants already are involved in litigation, consolidation puts the entire case in the hands of a single judge who can assure that the forbidden or undesirable effects of outcome-determinative procedure do not occur. When some claimants or defendants are not yet involved in litigation or cannot otherwise be consolidated, the court should consider the use of joinder devices such as a class action or issue-preclusion doctrines to enforce the use of outcome-neutral procedure.⁴⁹⁶

493. See *supra* notes 308, 480-81 and accompanying text. When I use the term "same procedures," I do not mean "identical procedures," but rather procedures that cause no outcome-determinative differences in the nature and quality of evidence available to the decisionmaker.

494. Because each state is free to impose its own product liability obligations on a drug manufacturer, there is no reason that a court deciding a *Bendectin* case under California law would need to adopt the same procedures as one deciding a case under Louisiana law. See *supra* note 484. Once a case from a particular jurisdiction was placed in the multidistrict proceeding, however, the form of adjudication requires that plaintiffs who opted out of the consolidated *Bendectin* trial, as well as all subsequently filed cases decided under the law of that jurisdiction, receive the same procedures as those accorded the plaintiffs in the multidistrict proceeding.

495. See *supra* notes 483-85 and accompanying text.

496. Thus far, the Supreme Court has not looked favorably on the use of such joinder

Indeed, the desirability of inter-personal neutrality provides a powerful additional argument in favor of the elimination of restrictive jurisdictional and party joinder rules.⁴⁹⁷ It also suggests a special legitimacy for class actions, which should be a favored device to avoid disparate treatment of numerous parties claiming under a legal obligation arising from the same transaction.

3. *Disparate Treatment of Parties Claiming Under a Single Legal Theory*

As different as they might otherwise be, an asbestos case and a car accident share one feature: a common theory of liability.⁴⁹⁸ The assumption of intra-substantive neutrality holds that both cases should be resolved with the "same" procedures.⁴⁹⁹

The necessary assertion of judicial power in cases of dysfunction and the lack of such an assertion in "routine" cases⁵⁰⁰ almost invariably invokes the concerns of this assumption. If an individual is run over by a blue bus of unknown ownership, she must prove by a preponderance of the evidence that the defendant's blue bus did the dirty deed; but when an individual is a member of a large group of persons injured by a chemical of unknown manufacture, the defendant often bears the burden of avoiding liability.⁵⁰¹ An individual instance of discrimination is resolved by negotiation or trial; a mass instance often invokes a panoply of masters and novel settlement techniques.⁵⁰² A simple, two-party contract dispute leads to full discovery and a short trial; a massive commercial dispute leads to consolidation of parties, bifurcation of issues or claims, and staged trials.⁵⁰³ Similarly, substitution of judge for jury, limitation of trial

devices, and has shown no sensitivity to the effects of its decisions on the form of adjudication or the positive assumption of inter-personal neutrality. See, e.g., *Temple v. Synthes Corp.*, 111 S. Ct. 315 (1990); *Martin v. Wilks*, 490 U.S. 755 (1989); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Snyder v. Harris*, 394 U.S. 332 (1969).

497. For additional and somewhat different reasons to eliminate the restrictive rules, see *supra* Part III.A.4. Of course, class action and other joinder devices cannot be used when they would render a case incapable of rational resolution. See *supra* note 452; *infra* Part III.C.

498. In most jurisdictions the common theory will be negligence.

499. An asbestos case is also likely to contain product liability and warranty claims not present in the car crash at the corner. The assumption of intra-substantive neutrality requires only that the negligence theories in each of the two cases be treated procedurally alike; it does not require that the same procedures be used to resolve the other legal theories. See *supra* notes 295-96 and accompanying text.

By "same procedures," I again mean only that the procedures not result in outcome-determinative differences in the information available to the decisionmaker. See *supra* notes 480, 493.

500. By "routine cases," I mean only that the cases do not involve any of the four types of dysfunction—formulational, factfinder, remedial, or systemic—discussed *supra* Part III.A.

501. See *Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir. 1988); *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal. 1980); Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986).

502. See MANUAL, *supra* note 13, § 33.55.

503. See *id.* §§ 33.1, 33.3, 33.4.

time, limitation of discovery, summaries of testimony, and mass trials in which the histories of individual claimants are only perfunctorily or statistically presented all are likely to affect the decision in the case, and all of them are used primarily in cases of dysfunction. Therefore, the procedural innovations used to ameliorate dysfunction often result in a different nature and quality of evidence among routine and dysfunctional cases invoking a single theory.

Unlike the conflict between the form of adjudication and inter-transactional neutrality, however, the clash with intra-substantive neutrality creates no normative difficulties. Nothing in the form of adjudication requires that factually different cases involving the same legal theory be treated procedurally alike.⁵⁰⁴ Because the assumption of "like legal claims treated alike" is entirely positive, and because the judge's need to protect reasoned judgment is normative, the intra-substantive assumption must give way when a judge can protect reasoned judgment only by violating the intra-substantive assumption.

The lack of formal limitation does not mean, however, that a judge is free to discard intra-substantive neutrality as a consideration. It remains a positive assumption of procedure, to be followed whenever possible. Consideration of intra-substantive neutrality is especially important because of the Rules Enabling Act, which commands that procedural rules not abridge, enlarge, or modify substantive rights.⁵⁰⁵ Although the Enabling Act does not on its face mandate intra-substantive procedure,⁵⁰⁶ Congress' sensitivity to the doctrinal consequences of procedural rules nonetheless requires that judges respect, to the greatest extent consistent with the needs of adjudication, the intra-substantive assumption. Thus, a judge faced with a choice of two procedures that will remedy dysfunction should examine them to see if either technique will generate different outcomes among cases with the same legal theory. If one technique creates intra-substantive differences and one does not, then

504. See *supra* text following note 308.

505. See 28 U.S.C. § 2072(b) (1988).

506. The Act technically prevents only judicial rulemaking that affects substantive rights; it does not address the substantive consequences that occur in individual cases because of the judicial use of facially nonsubstantive rules such as bifurcation, or the use of a special master. See *id.* Moreover, some of the powers of federal judges to cure dysfunction, such as the development of issue-preclusion doctrines, derive from sources other than the Federal Rules of Civil Procedure and Federal Rules of Evidence to which the Rules Enabling Act is limited. See *id.* § 2072(a). Finally, the Act's concern that substantive rights not be abridged, enlarged, or modified appears to have been intended, at most, to bar rules that altered an entire body of doctrine. The related but less obvious problem of creating substantive rifts among cases invoking a single doctrine appears to have escaped legislative scrutiny. See *supra* note 293.

the judge's *prima facie* choice should be the procedure that guarantees similarity of treatment within a legal theory.⁵⁰⁷

So far, it appears that courts and commentators have paid insufficient attention to the question of intra-substantive neutrality. Although some people have expressed fears that trans-substantivism ought not to be readily discarded,⁵⁰⁸ only a few judges and scholars have questioned the effect that variant procedures for complex cases ultimately will have on the substance of a particular body of law; and no one has ever examined the dangers systematically.⁵⁰⁹

4. *Disparate Treatment of Claims Within a Single Transaction*

The final articulation of the "like treated alike" principle, transactional neutrality, requires a court to accord the same procedural treatment to all the substantive theories within a single transaction.⁵¹⁰ A court should not, for instance, apply fact pleading to a civil rights claim and notice pleading to a factually overlapping tort claim arising out of allegations of unconstitutional prison conditions; nor should it allow full discovery on one claim and no discovery on another.

Presently, there is little evidence that judges are treating individual legal theories in complex litigation disparately; indeed, of the four neutralities, this is the most likely to be respected in dysfunctional litigation.⁵¹¹ From the viewpoint of the form of adjudication, however, a court could, as a general matter, treat different theories disparately; transactional neutrality is an entirely positive assumption of American procedure.⁵¹² Thus, any manual considering the specific rules to be applied in specific types of dysfunctional cases⁵¹³

507. The *prima facie* analysis is refined *infra* notes 521-29 and accompanying text.

508. See Carrington, *supra* note 12, at 2069; Hazard, *supra* note 12, at 2237.

509. For brief discussions of the problem, see *In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir. 1990); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972); Burbank, *supra* note 21, at 1471-76; E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 327-29 (1986) (arguing that managerial judging can improve substantive justice under specified conditions); Subrin, *supra* note 2, at 985. Typically, however, cases adopting and commentators advocating novel procedures to resolve complex cases never overtly consider the substantive consequences of their procedural proposals. See, e.g., *Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir. 1988); COMMISSION ON MASS TORTS, *supra* note 14; MANUAL, *supra* note 13.

510. See *supra* text following note 296.

511. One of the few instances of discrimination among claims is the heightened specificity of pleading that courts require for some theories in a complaint, but not for others. See *In re First Chicago Corp. Sec. Litig.*, 769 F. Supp. 1444, 1453 (N.D. Ill. 1991); see also *Heller v. NCNB Corp.*, 768 F. Supp. 167 (W.D.N.C. 1991) (dismissing federal securities fraud claim but declining jurisdiction over, rather than dismissing, related state law fraud claim); *Wilkes v. Heritage Bancorp.*, 767 F. Supp. 1166 (D. Mass. 1991) (same). See generally Marcus, *supra* note 15, at 443-44 (discussing the revival of fact pleading in certain legal theories). It also is possible to treat one person's claims against different defendants in disparate ways; that point has been discussed in *supra* notes 490-91 and accompanying text.

512. See *supra* text following note 308. There is one qualification on this rule: Once a court has settled on the disparate procedures to handle the various issues raised in a particular piece of litigation, the assumption of inter-transactional neutrality would require every subsequent case involving the same factual and legal scenario to treat the claims in the same fashion. See *supra* notes 470-85 and accompanying text.

513. See *supra* notes 483-85 and accompanying text.

need not be constrained by the belief that all legal claims within a factual controversy be resolved simultaneously or even under procedures that assure that a similar quality of evidence is available for all the claims. Even as judges must cultivate greater respect for the effects of their management powers on related transactions and parties,⁵¹⁴ they must worry less about the effects of their powers on the legal theories and claims joined in a single action.

C. *Complexity's Decision Tree*

It is now possible to provide a formal definition of complex litigation: Litigation in an adversarial system in which the judicial power necessary to overcome the dysfunction of the lawyers, the jury, or the parties results in procedural disparities that cause substantively disparate outcomes among similarly situated parties, claims, or transactions. The definition contains three essential elements. The first element is dysfunction—the inability of the lawyers, jury, or parties to fulfill the responsibilities for rational adjudication assigned to them by the adversarial system. The second element is curative judicial power—the ability of the judge to establish procedures that remedy this dysfunction and thus allow rational adjudication, albeit in a manner inconsistent with the adversarial model. The third element is that like cases are treated unlike because of the tendency of the selected procedures to cause the nature and quality of evidence, and consequently the substantive outcome, to vary (1) among persons who have experienced the same or similar factual occurrences, (2) among cases seeking recovery under the same legal theory, or (3) among legal theories constituting a party's claim or defense.

Because this definition was developed against the backdrop of a normative and positive theory of adjudication, certain limitations on the exercise of judicial power also have been suggested. In this section, I summarize the analysis that a court facing an apparently complex case should adopt in choosing particular techniques.

1. *Acting Only When Dysfunction Exists*

The first step of the inquiry is to identify the nature of the dysfunction. Given the positive preference for adversarial process, the court cannot take a more active role as long as the other players can perform their tasks adequately enough to assure reasoned judgment. Although, under my definition, this conclusion is implicit in the court's determination that a case is complex, I raise it again here for two reasons. The first is to emphasize that the court must limit its activism to those tasks that lie beyond the powers of other players

514. See *supra* notes 473-81, 486-494 and accompanying text.

to perform rationally; for example, an instance of lawyer dysfunction during the pretrial phase does not justify judicial activism in the remedial phase. Rather, each application of judicial power must be justified separately. Second, judicial intervention cannot be justified simply on the basis that it will result in “better,” or more efficient, procedures. Although efficiency is one assumption on which our procedural system turns, it is not normatively required,⁵¹⁵ and it is not necessarily entitled to ascendancy over the other non-normative assumptions of procedure.⁵¹⁶ Our commitment to adversarialism contains a certain inefficiency. Until we discard the adversarial assumption, it is an inefficiency we must respect—up to the point, at least, at which it threatens rational adjudication.

2. *Ensuring a Judicial Remedy—Discarding “Polycentric” Techniques and Cases*

In order to be true to the form of adjudication, no technique adopted by a court can violate adjudication’s normative terms. The preceding analysis has shown that judicial techniques have the special potential to violate three of these normative terms: reasoned judgment; that aspect of inter-transactional neutrality that requires that persons in similar transactions who present legally and factually indistinguishable claims and defenses receive equivalent procedures; and that aspect of inter-personal neutrality that requires that persons in a single transaction who present legally and factually indistinguishable claims and defenses receive equivalent procedures. Thus, the court cannot select any technique that fails to facilitate reasoned judgment or any technique that treats persons with legally and factually identical cases in procedurally disparate ways.

Significantly, these requirements are cumulative: Even if a technique facilitates reasoned judgment, it must also pass muster under the two neutralities, and vice versa. For instance, the separation of a mass tort into individual plaintiff trials might be a logical method to avoid irrational judgment, but its use would be barred by the assumption of transactional neutrality if judgments in the earlier trials bankrupted the defendant and left later, identically situated parties without a remedy. Conversely, the use of a class action, which can successfully avoid the problems of inter-personal neutrality,⁵¹⁷ might create problems of formulational, decisionmaking, or remedial complexity that cannot be overcome even with the use of other judicial techniques. In these situations, both separation and class action must be rejected.

This analytical sifting might mean that no technique will survive the normative gauntlet. When that situation occurs, the case can no longer be resolved through adjudication. The case is—to use Fuller’s term with a somewhat different meaning—“polycentric.” Unlike Fuller, who pegs polycentrism to the inability to resolve a

515. See *supra* text following note 308.

516. See *supra* note 297 and accompanying text.

517. See *supra* notes 496-97 and accompanying text.

controversy through reasoned proofs and arguments of the disputants,⁵¹⁸ I do not view the adversarial presentation of proofs and arguments as being crucial to the form of adjudication. Instead, the ability of the decisionmaker rationally to apply facts to law is crucial, as is respect for the pre-existing distribution of legal obligations among factually and legally indistinguishable parties. If a court cannot tailor procedures to accommodate these essential attributes, then it cannot adjudicate the case.⁵¹⁹

In many cases, however, at least one technique survives the normative screening. If only one technique survives, the court's choice is easy. Frequently, more than one technique (or combination of techniques) will satisfy the formal requirements of adjudication. When that result occurs, the form of adjudication is incapable of choosing among those techniques.⁵²⁰ The analysis thus moves to a third step—the consideration of our procedural system's positive assumptions.

3. *Treating Like Cases Unalike—Choosing Among Imperfect Remaining Techniques*

By definition, the techniques that survive the initial screening cannot simultaneously satisfy all of the positive aspects of trans-substantivism: intra-substantive neutrality, transactional neutrality, and those elements of inter-transactional and inter-personal neutrality that allow legally dissimilar parties to be treated in a procedurally dissimilar manner.⁵²¹ It also is obvious that different techniques will violate different assumptions, and will do so to different degrees. Therefore, the question is whether there are other orderings of principles that can establish priorities for the selection of particular techniques.

Two orderings are possible. The first is to select from among the remaining available techniques the procedure which, although discarding none of the other positive assumptions of procedure, is the most efficient—that is, least costly in terms of the sum of error costs and implementation costs. This preference for efficient procedure

518. See *supra* notes 200-18 and accompanying text.

519. A separate question is whether the court can even entertain a polycentric case. Because nothing in the form of adjudication requires that adjudication be performed by an organ of government exclusively devoted to the task, there is no formal objection to the court's non-adjudicatory resolution of polycentric cases. For further consideration of this point, see discussion in *infra* notes 561-65 and accompanying text.

520. See *supra* text following note 308.

521. If a procedure is capable of satisfying each of these positive neutralities, then the third element of the definition of complex litigation ("like cases treated unlike") has not been fulfilled. Therefore, the case is not complex.

can be derived, of course, from the Due Process Clause,⁵²² the Federal Rules of Civil Procedure,⁵²³ and the Federal Rules of Evidence.⁵²⁴ The second is to assign a "pecking order" among the positive neutralities, sift out the techniques that violate the preferred neutralities, and apply efficiency analysis only among those techniques that lie on the same stratum.⁵²⁵ For example, assume that the pecking order is that intra-substantive neutrality is most important, followed in order by inter-transactional, transactional, and inter-personal neutrality. Then the procedures that violate none of the first three neutralities but violate the last neutrality would be preferred; if more than one procedure violated only this last neutrality, then the most efficient would be chosen. Likewise, if all techniques violated at least one of the first two neutralities, then the technique(s) that violated the transactional assumption would be preferred, with the most efficient technique chosen from the available group.

The obvious difficulty of the second methodology is the development of a principled ordering. On the one hand, intra-substantive neutrality lies within the penumbra of the Rules Enabling Act;⁵²⁶ on the other hand, the positive aspects of inter-transactional and inter-personal neutrality lie in the shadow of their normative aspects.⁵²⁷ Neither participatory democracy nor the form of adjudication dictates the pre-eminence of any neutrality. Nor can any of these assumptions claim priority over other positive procedural assumptions, such as the preference for efficient procedure. Indeed, because efficiency of process is more clearly derived from the Constitution and the legislative and judicial rulemaking surrounding adjudication than any of the three neutralities,⁵²⁸ an attempt to establish a "pecking order" of positive procedural assumptions would certainly put efficiency in the pre-eminent position.

Under either methodology, therefore, a court facing a complex

522. See *supra* notes 271-76 and accompanying text.

523. See FED. R. CIV. P. 1.

524. FED. R. EVID. 102.

525. For a further discussion of the use of serial or "lexical" ordering of conflicting principles, see RAWLS, *supra* note 246, at 42-44.

526. See *supra* note 506 and accompanying text.

527. See *supra* notes 480, 493 and accompanying text.

528. See *supra* notes 520-24 and accompanying text. The deference owed in our democracy to the Due Process Clause is evident. A similar deference is owed to the Federal Rules of Civil Procedure and Evidence. Congress has delegated the task of promulgating the Federal Rules of Civil Procedure and Evidence to the Supreme Court, and retains the right to review and amend all proposed amendments. 28 U.S.C. §§ 2072(a), 2074(a) (1988). Congressional review of the Rules is not perfunctory; when displeased with proposed revisions, Congress has either precluded their implementation or itself legislated the rule. See, e.g., The Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527 (codified as FED. R. CIV. P. 4); Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (approving rules of evidence proposed by the Supreme Court and empowering Supreme Court to amend rules of evidence subject to congressional approval); Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (annulling rules of evidence proposed by the Supreme Court). Therefore, the explicit choice of the Rules of Procedure and Evidence to adopt efficiency as a primary goal makes efficiency a positive assumption of the first order.

case must choose the most efficient procedure that violates no normative component of adjudication. The penumbral preferences for the positive neutralities associated with trans-substantivism are not entirely irrelevant to the efficiency calculus. The harm that any technique causes to the positive aspects of trans-substantivism are costs of the use of a particular technique, and must therefore be factored into the efficiency equation. Although none of the positive aspects of trans-substantivism is entitled to an absolute preference, a technique that does not violate these assumptions should be chosen over one that does when the other costs of the two techniques are roughly comparable.

However the efficiency balance comes out, the chosen technique inevitably will cause some disparity among similarly situated parties and claims. Like cases will not be treated alike. Whether the discrimination occurs within one transaction, among similar transactions, or within a single legal theory, there will be procedural discrimination. The only issue is whether that discrimination will cause "horizontal stratification"—separate procedures for cases involving a single legal theory—or "vertical stratification"—separate procedures for persons and claims involving a similar factual pattern.

As long as identically situated parties are treated alike, neither form of stratification violates the narrow, formal requirements of adjudication. But this necessary stratification does violate the aspiration of fairness we claim for our adjudicatory system. Irreducible injustice may thus explain the often-expressed view that complex cases are not suited to the judicial process;⁵²⁹ after all, the allocation of benefits and burdens among persons seems a peculiarly legislative matter. With the exception of the polycentric cases, however, courts still can adjudicate. Faced with a dilemma of injustice that cannot be resolved in the context of any individual litigation, the courts must slog ahead until they receive a legislative reprieve.

IV. Complex Litigation and the Future of Civil Procedure

The definition of complex litigation that this Article has proposed also provides a useful perspective on several matters that lie at the heart of procedural debate today. These matters include the movement toward case management; the proposals to create non-trans-substantive rules; the wisdom of an equity-based and discretionary system of procedural rules; the arguments to move away from adversarial process; the relevance of wealth maximization as a defining

529. See *supra* note 17 and accompanying text.

principle of our procedural system; and the politicization of the judiciary.⁵³⁰ In applying the lessons of a formal analysis to these issues, it is useful to recognize that the definition of complex litigation proposed in this Article divides cases into four categories. The first is "routine" cases: cases in which traditional adversarial procedure rationally resolves disputes with no harm to American procedural values. The second category comprises, for lack of a better word, "complicated" cases: cases in which the lawyers, the factfinder, or the parties are unable to fulfill their appointed tasks in the traditional model, but an assertion of judicial power in a matter usually left to the dysfunctional player again permits rational resolution with no harm to trans-substantive values. The third category is complex litigation, which differs from complicated litigation because the assertion of judicial power creates a conflict with the trans-substantive principle that like parties, claims, and legal theories should be treated procedurally alike. Last come the "polycentric" cases, in which no judicial technique simultaneously can ensure rational resolution and the like treatment of legally identical parties. Although each of the first three categories of cases can be resolved through adjudication, the last category cannot.⁵³¹

A. Case Management

In the past decade we have witnessed the growth of literature discussing the wisdom of managerial judging.⁵³² Both supporters and detractors speak with a certain religious fervor about their positions. The form of complex litigation suggests that both sides are correct, at least in part.

The simple reality is that the function and propriety of case management differs in each of the four categories of cases described in this Article.⁵³³ In polycentric cases, case management is inappropriate because judicial management is incapable of readying a case for

530. See *infra* notes 532, 537, 542, 548-50, 554-55.

531. Cf. *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1127 n.3 (Fed. Cir. 1985) (noting that, at that time, no one had "yet spelled out definitive, reliable criteria on which to determine clear boundaries for 'simple,' 'complex but not too complex,' and 'too complex'"). This Article has set out those boundaries. The Federal Circuit's "simple" cases correspond to the category I call "routine" cases; its middle category of "complex but not too complex" contains the cases I call "complicated" and "complex"; and the category of cases that are "too complex" corresponds to the cases I call "polycentric."

532. See, e.g., *COUND ET AL.*, *supra* note 281, at 802-11; *LOUISELL ET AL.*, *supra* note 46, at 1223-37; *Elliott*, *supra* note 509, at 306; Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 *HASTINGS L.J.* 505, 505-07 (1984); Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 *CAL. L. REV.* 770, 770-73 (1981); Peckham, *supra* note 15, at 255-67; Resnik, *supra* note 279, at 376-80; Rosenberg, *supra* note 1, at 248-50; Subrin, *supra* note 2, at 989-91.

533. Although he does not attempt to describe which cases deserve which treatment, Professor Elliott also has recognized that the need for case management varies among different types of cases:

[I]t should be clear that not all cases are alike; some present far more compelling circumstances for managerial judging than others. Similarly, not all techniques that are loosely grouped under the rubric "managerial judging" are equally appropriate or defensible. To improve the quality of managerial

adjudication. In complicated and complex cases, managerial judging is essential; only through more active judicial involvement in the litigative enterprise can the dysfunction of other players be cured and rational adjudication assured. In routine litigation, however, there is no dysfunction to cure. Until we amend our preference for adversarial process, the general claim that case management is appropriate or necessary for these cases therefore is wrong.

There is an exception to the general rule against case management in routine cases. First, the form of complex litigation has assumed that forces external to the lawyers, jurors, and parties have made it impossible for them to perform their adversarial obligations. There also are instances in which these players might wilfully refuse to perform their tasks—for instance, by refusing to provide documents, by asking harassing questions, by ignoring the relevant facts and law, or by recklessly failing to comply with a court's orders. When they occur, these failures of passion, prejudice, spite, or excessive adversarialism require judicial correction. The type of judicial management necessary to overcome these problems, however, is different from the management necessary to assure reasoned judgment.⁵³⁴ Although some of the techniques might overlap, the different purposes of case management in the four types of cases suggest that case management is not all of a piece, and the application of management techniques cannot be broadly justified apart from the precise reason that case management is deemed necessary.

The disparate functions of case management debunk several common beliefs. The first is that the Federal Rules' movement toward case management is a beneficial, or at least benign, development.⁵³⁵ In fact, the Rules' claim for case management is at once overdrawn—for case management is both futile in polycentric cases and unnecessary in routine cases with no willful dereliction of players' duty—and underdrawn—for the Rules give judges no guidance about the goals case management should be serving in a given case or the best methods of achieving those goals. Second, proper analysis belies the notion that any case management technique has universal validity; the case management inquiry must be sensitive to the

judging, we need to develop a more sophisticated understanding of the characteristics of cases that make them appropriate candidates for particular managerial techniques.

Elliott, *supra* note 509, at 333-34.

534. I do not mean to suggest that problems of willful disobedience cannot occur in complicated and complex litigation; on the contrary, the high stakes in many complicated and complex cases make disobedience a strong possibility. See Sofaer, *supra* note 80, at 722-23. This type of disobedience, and the judicial response to it, should never be confused with the separate issue of dysfunction.

535. See, e.g., Elliott, *supra* note 509, at 307; Flanders, *supra* note 532, at 507; Miller, *supra* note 275, at 12; Peckham, *supra* note 15, at 254; Simons, *supra* note 135.

precise nature of the willful or unavoidable dysfunction that generates the need for management. Finally, the analysis demonstrates that efficient procedure alone does not justify case management. The skirmish over case management must be seen as a part of a larger battle between the positive procedural assumptions of adversarialism and efficiency. Until one of the assumptions is abandoned, they will remain in conflict, and the balance certainly can be tipped to one side or the other at any given time.⁵³⁶ But the burden of justifying a movement away from adversarial process when the process is capable of performing its function is far greater than the burden in complex or complicated litigation; and the movement away from adversarial process ultimately rests on different and far weaker ground when there is no normative reason to depart from adversarial proceedings.

Thus, the examination of complex litigation's form reveals that case management—at least as it is presently conceived and discussed—is no panacea for the problems of litigation. At the same time, there is no reason to fear case management once its proper scope and function are understood.

B. The Value of Trans-Substantive Procedural Rules

Of late, a call for the creation of special procedural rules for various types of cases has been afoot.⁵³⁷ The usual reason given is, to paraphrase Maurice Rosenberg, that Cadillac-style procedures are not needed for bicycle-sized lawsuits.⁵³⁸ Unlike the writ system, which created procedures that vertically separated cases on the basis of their doctrinal form, this new movement seeks to separate cases horizontally on the basis of size or complexity. The wisdom of creating these divisions, which served as the starting point for this exploration into the form of complex litigation, remains hotly contested.⁵³⁹ Two matters, however, are clear. First, procedural stratification requires that the trans-substantive assumption of modern American procedure be forsaken. Second, the consequence of horizontal stratification will be the establishment of a new writ system. Admittedly, the forms of actions will be transactional ones, rather than writs based upon a particular substantive theory. But writs they will be.

As should now be obvious, a formal analysis of complex litigation dictates that some relaxation of the trans-substantive ideal will need to occur in order to accommodate the peculiar problem of complex cases. That relaxation, however, must occur on terms far different than the terms typical of the present debate. The only circumstance

536. See *supra* note 297 and accompanying text.

537. See, e.g., COMMISSION ON MASS TORTS, *supra* note 14; RECOMMENDATIONS ON COMPLEX LITIGATION, *supra* note 14; REPORT ON ASBESTOS LITIGATION, *supra* note 14; REPORT ON ANTITRUST LAWS AND PROCEDURES, *supra* note 14; Burbank, *supra* note 21, at 1474-75; Burbank, *supra* note 12, at 717-21; Silberman, *supra* note 12, at 2175-78.

538. Rosenberg, *supra* note 1, at 247.

539. For varying views on the value of trans-substantive procedure and its alternatives, see *supra* note 12; Burbank, *supra* note 21, at 1471-76.

that justifies a departure from trans-substantive procedure is the existence of dysfunction curable by judicial activism. A court typically should not opt for a non-trans-substantive technique when a technique that still respects the trans-substantive assumption exists, and must not do so when the technique violates one of the normative aspects of trans-substantivism. Put another way, the court generally should not make a complex case out of a complicated one, and cannot make a polycentric case out of a complicated one. Finally, the non-trans-substantive technique ultimately chosen must cause the least damage possible—considering not only the monetary costs of the procedure but also the harm to the trans-substantive ideal.

Until now, no one proposing special rules for complex cases has suggested these limitations on non-trans-substantive procedure. To a large extent, this failure results from the reluctance to define "complex litigation" adequately and the subsequent inattention to the four separate assumptions that comprise trans-substantivism. Indeed, the universal belief of those advocating non-trans-substantive procedure seems to be that procedural stratification will be horizontal—rules will be developed to separate big cases according to the legal theories and factual circumstances of each case. The realization that there are four pillars of trans-substantivism calls this belief into question. The more sensible resolution might be to induce outcome-determinative differences among claims or among legally and factually dissimilar parties involved in a single transaction.

The sacrifice of trans-substantive aspirations should be seen as an unfortunate but necessary evil in complex cases. The exact terms of that sacrifice, however, require a more fine-tuned exploration than the present literature has undertaken.

C. *The Role of Equitable Discretion*

As recent scholarship has made evident, the Federal Rules of Civil Procedure were based largely on the rules of equity then prevailing in the federal courts.⁵⁴⁰ The Rules were designed to minimize the consequences of technical miscues, to allow full disclosure of available evidence, and to imbue the district courts with sufficient discretion to avoid the gamesmanship inherent in an adversarial system geared to victory rather than truth.⁵⁴¹ Increasingly, the wisdom of that choice has come under attack, typically because of the cost and delay that result from the uncertainty and expense associated with

540. See Burbank, *supra* note 21, at 1468-70; Chayes, *supra* note 100, at 1289-92; Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 725 (1989); Subrin, *supra* note 2, at 982-91.

541. See, e.g., Pound, *supra* note 277, at 281-82; Subrin, *supra* note 2, at 922-25.

the loosely textured Federal Rules.⁵⁴² A close cousin of the movement away from trans-substantive rules, this movement demands greater predictability and precision in our procedural system.⁵⁴³

To a certain extent, the form of complex litigation supports less flexible procedures. As mentioned above, a logical and beneficial response in complex litigation would be the creation of a manual detailing fairly routine procedural courses for particular types of complex cases.⁵⁴⁴ At the same time, however, the form of complex litigation suggests that a general retreat from loosely textured, equity-based rules would be wrong. In complicated cases, the court must possess the discretion to innovate in order to overcome dysfunction. In routine cases, in which dysfunction is not a problem, more specific rules might create dysfunction that does not presently exist. We need only remember the example of the dysfunction caused by present jurisdictional and party-joinder rules to imagine the problems that would be engendered by a hard-and-fast rule allowing only twenty interrogatories and five depositions,⁵⁴⁵ or by requiring judgment for an opposing party in the event of some technical imprecision in the pleadings.⁵⁴⁶ As more specific rules cause the problems of dysfunction to rise, the number of complicated cases in which the court would need to exercise discretion in order to protect reasoned judgment also would rise. Likewise, unduly specific rules in routine cases only seem to increase disparate outcomes among parties, claims, and transactions, thereby creating new categories of complex litigation where none exist now. Therefore, because discretion must remain a necessary component of the procedural system to provide flexibility in complicated cases, the perceived benefits of highly specific rules for routine cases are difficult to find. The costs of more specific rules, on the other hand, are evident.

Of course, the precise contours of the discretion presently allowed under the Federal Rules is not compelled by the form of complex litigation. The Rules certainly could provide more guidance to

542. See, e.g., JUSTICE FOR ALL, *supra* note 50; Marcus, *supra* note 540, at 774-76; Subrin, *supra* note 2, at 982-87, 1001.

543. The relationship between non-trans-substantive rules and more predictable rules is obvious: As rules become more particularistic and rigid, they are likely to have differing effects on different substantive theories. The relationship is not, however, a logically necessary one.

544. See *supra* notes 483-85, 495, 513 and accompanying text.

545. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Questionable Local Rules*, in REPORT OF THE LOCAL RULES PROJECT at 96-99, 109-10 (1989) (finding that limitations on the number of interrogatories and the number or length of depositions conflict with the Federal Rules of Civil Procedure). For examples of such rules, see N.D. GA. R. 225-2(b) (limiting length of deposition to six hours without leave of court); E.D. VA. R. 11.1(A) (limiting interrogatories to 30 per party unless good cause for additional interrogatories is shown); *id.* 11.1(B) (limiting depositions to five per party unless good cause for additional depositions is shown); N.D. W. VA. R. 2.08(h) (limiting interrogatories and requests for admission to a cumulative total of forty without the opposing party's consent or leave of court).

546. See, e.g., Gibbons v. Pepper, 1 LD. Raymond 38 (1695) (judgment given for plaintiff because defendant pleaded lack of negligence as a justification rather than pleading it as a part of the general issue).

channel discretion—for instance, presumptive limitations of ten depositions or fifteen interrogatories.⁵⁴⁷ The court's equitable obligation, however, cannot be foreclosed entirely. Nor should its discretion be limited so severely that rules of pleading, discovery, and trial create new obstacles to lawyer, jury, and party. Although some fine-tuning is certainly possible, the form of complex litigation suggests that the Federal Rules have struck an acceptable balance between rule and discretion.

D. *The Future of the Adversarial System*

A fourth movement holding some academic sway is a call for the lessening of the adversarial nature of our adjudicatory process.⁵⁴⁸ Many of the specific measures attacking aspects of the adversarial system remain on the drawing board,⁵⁴⁹ but others have gained currency.⁵⁵⁰ From the viewpoint of the form of adjudication, these concepts cannot be dismissed out of hand. Nothing in the form of adjudication requires adversarial process. Indeed, strictly adversarial adjudication turns out to be useful only in routine cases not involving a willful refusal of a player to assume his or her adversarial function; in complex, complicated, and those routine cases involving willful disobedience, the adversarial allocation of roles is an impediment to the task of adjudication.

I am not, however, suggesting a mad embrace of nonadversarial procedure. Any other procedural system, whether it be inquisitorial or cooperative, must undergo the analysis developed in this Article for adversarial procedure. The analysis must begin by examining the roles that the various participants in a procedural system are assigned. Then we must search for those cases or instances in which each of the participants will be unable to fulfill his or her assigned function in the task of ensuring reasoned judgment—that is, look for instances of dysfunction. We must see if a re-definition of participants' roles can overcome this dysfunction (just as judicial involvement overcomes dysfunction in complicated and complex cases). We must finally examine whether this re-definition violates

547. See *Preliminary Draft*, *supra* note 75, at 107, 111-12, 118, 122 (proposing limitations of 10 depositions not exceeding 6 hours duration and 15 interrogatories, but allowing additional discovery with leave of the court).

548. For some of the literature expounding on the vices of the adversarial system, see *supra* note 277. The movement to lessen adversarialism is bound to two other present procedural phenomena: the rise of the case-management movement, see *supra* notes 532-536 and accompanying text, and the concern for the efficiency of process, see *infra* notes 551-61 and accompanying text.

549. See, e.g., *Preliminary Draft*, *supra* note 75, at 87-106 (requiring mandatory disclosure of information).

550. See, e.g., FED. R. CIV. P. 11, 16, 26(b)(3), 26(g). Although none of the rules outlaw adversarialism, each makes it more difficult for the lawyer to operate with the autonomy characteristic of a purely adversarial process.

fundamental norms of adjudication or causes unacceptably high damage to the positive expectations we bring to a procedural system (i.e., uncover the types of cases that are polycentric and complex), and compare this endpoint with the endpoint of adversarial process.

This analysis might well declare that adversarial process truly is the "best" engine for the accomplishment of the normative and positive objectives of our adjudicatory system. At this point, however, the analysis has not been performed. The jury is still out on the wisdom of adversarial procedure.

E. The Law and Economics of Procedure

Although the law and economics movement has not gained the ascendancy in civil procedure that it has in other areas, procedure has not escaped it altogether. Coase's theorem, from which the economic analysis of law descends, assumes that, in the absence of transaction costs, any legal rule is efficient.⁵⁵¹ Among the most significant of these transaction costs are the costs associated with the prosecution and defense of a lawsuit.⁵⁵² In general terms, therefore, the more costly the procedure, the less likely an efficient outcome.⁵⁵³ To the extent that society desires to achieve the efficient (wealth-maximizing) outcome, it must shape its procedural system to achieve the greatest reduction in the costs of procedure consistent with the overall reduction of costs to their lowest level.⁵⁵⁴ The reply to economic analysis typically has been the assertion that economic analysis is morally or politically illegitimate.⁵⁵⁵

The form of adjudication suggests that, at least in the area of procedure, some middle ground is appropriate. As a positive matter, there is no doubt that courts are motivated increasingly by concerns of efficiency,⁵⁵⁶ but it would stretch truth to the point of fiction to claim that the only concern of judges and lawyers when they create particular procedures is efficiency.⁵⁵⁷ As a normative matter, efficiency is not an essential element of adjudication, and must stand

551. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

552. In tort cases, for instance, the prosecution and defense of cases comprise 50% or more of the total expenditures. JAMES S. KAKALIK & NICHOLAS M. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (1986). Other transaction costs in adjudication would include the cost of maintaining the judiciary and the cost of errors. See *id.* at 6-8 (estimating that the costs of adjudicating tort claims are \$0.5 billion, or approximately one to two percent of the total expenditures in tort litigation); POSNER, *supra* note 275, § 21.1.

553. See SHAVELL, *supra* note 233, at 265-70; POLINSKY, *supra* note 233, at 113-17.

554. Cf. GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970) (contending that transaction costs should be factored into the development of tort doctrines that result in lowest total cost to society).

555. See, e.g., Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179 (1989); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989); Resnik, *supra* note 12; cf. Elliott, *supra* note 511, at 326-29 (arguing that a justice perspective can support procedures that lead to the efficient result). See generally Unger, *supra* note 21, at 573-76 (relating the critiques of objectivism and formalism).

556. See 28 U.S.C.A. §§ 471-482 (West Supp. 1992); Mathews v. Eldridge, 424 U.S. 319 (1976); *supra* notes 549, 555.

557. See FED. R. CIV. P. 1 (requiring the Federal Rules to be interpreted to accomplish

silent when inefficient procedures are necessary to protect either reasoned judgment or adjudication's other essential attributes.

Although efficiency is not a normative concern of adjudication, it is hardly irrelevant to the choice of procedure. As a positive assumption of American procedure, efficiency must be considered whenever two or more procedures are permissible under the form of adjudication. In routine cases, in which neither reasoned judgment nor the remaining attributes of adjudication are threatened, efficiency and adversarialism would appear to be the dominant and co-equal assumptions, thus allowing any efficient procedure that uses the adversarial process as its baseline to be chosen. In complicated cases, the procedure that most efficiently protects reasoned judgment would be preferred.⁵⁵⁸ In complex cases, as we have seen, the same is true: The most efficient procedure that does not create a conflict with a fundamental norm of adjudication should be selected.⁵⁵⁹ Thus, courts may not listen to the siren song of efficiency when it urges the disparate treatment of factually and legally identical parties and claims. Nor, in other instances of trans-substantive violation, can the efficiency equation consider only the elements of error and procedural costs on which economic procedural analysis has always focused; it must also factor in the systemic costs associated with the disparate treatment of similar (but not identical) claims, parties, and transactions.

In each of these three types of cases, a pure theory of wealth maximization would chafe at having to share the stage with or be the understudy to other procedural values. It is certainly true that the result under a pure efficiency analysis and the formal analysis developed here will not always be identical.⁵⁶⁰ Although the formal definition of complex litigation grants economic analysis a substantial

the just and speedy—as well as the inexpensive—resolution of cases). Indeed, in spite of the holding of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Due Process Clause has never been interpreted to mandate that the most efficient process be used in adjudication; if it were so interpreted, many of the Federal Rules would likely be unconstitutional. See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1054 (1991) (Scalia, J., concurring) (“A harsh or unwise procedure is not necessarily unconstitutional.”). Rather, the Clause has been used in a very different fashion: to invalidate those procedures that depart from the adversarial model without increasing the efficiency of the outcome. Compare *Connecticut v. Doe*, 111 S. Ct. 2105 (1991) (finding that pre-judgment seizure of real property without adversarial hearing violated due process) with *Mitchell v. W.T. Grant & Co.*, 416 U.S. 600 (1974) (finding no due process violation in pre-judgment seizure accomplished without adversarial hearing). Thus, the Due Process Clause has been far more protective of adversarial procedure than an efficiency-driven model of procedure would allow.

558. The proof generally would proceed along the lines discussed in *supra* notes 522-29 and accompanying text, except that the court would not need to assign a value to the departure from trans-substantive principles. The reason, of course, is that complicated cases do not involve a departure from those values.

559. See *supra* notes 522-29 and accompanying text.

560. See *supra* notes 528-29 and accompanying text.

role in the determination of procedure, the drafters of the Federal Rules had the order of the adjectives right when they declared that their goal was to assure the "just, speedy, and inexpensive determination of every action."⁵⁶¹

F. *The Politics of Procedure*

The final consequence of modern procedure has been the increasing injection of courts into political and social issues. The formal analysis of complex litigation offers three insights into the relationship between politics and procedure. The first is that there is nothing inherently illegitimate about the entry of the judiciary into politically sensitive issues. There obviously comes a point—the point of polycentrism—when disputes can no longer be resolved through adjudication's dual insistence on rational application of fact to pre-existing legal entitlement and like treatment of identical parties and claims. There is as well a separate point—the point of representative democracy—that adjudication cannot transgress.⁵⁶² Nonetheless, most of the highly charged controversies in which courts have been placed fall somewhat short of these points. When the adversarial system fails, adjudication does not hesitate to collectivize the disputants, to bureaucratize the judiciary, to enervate the lawyers.

Given the political nature of the controversies, a second issue arises: whether the legislature or the judiciary should be asked to make the choice of procedural rule. The form of adjudication certainly does not preclude legislatively, rather than judicially, enacted rules of procedure. In complex litigation, for which I suggest the creation of case-specific manuals to guide judges, the legislature is a logical institution to make those choices for three interrelated reasons. First, no procedural code can be politically neutral. Second,

561. FED. R. CIV. P. 1.

562. These two limitations can overlap. As the jurisdictional and joinder limitations imposed on federal courts demonstrate, the restrictions that the legislature places on the judiciary's ability to handle complicated suits can create polycentric cases. See *supra* notes 441-46, 458 and accompanying text.

There is, in addition, a third limitation on a court's ability to adjudicate a dispute: the illegitimacy of certain procedures when measured against the form that defines a particular substantive area. For instance, the form of tort law might be viewed by some to require individual rather than mass justice. See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989); see also *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972) (refusing to certify class action because its use would be inconsistent with policy underlying the Truth in Lending Act); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975) (arguing that class actions could lead to inefficient overenforcement). But see David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563 (1987) (arguing for collective adjudication). I have not considered substantive limitations on procedure in this Article, but it should be obvious from the preceding analysis that, should they exist, substantive limitations constrain procedural choice as significantly as the attributes of adjudication and the requirements of representative democracy. These limitations also increase the possibility of polycentrism, for they make the realization of rational, trans-substantive procedure more difficult. Cf. COMPLEX LITIGATION PROJECT Draft No. 1, *supra* note 14, at 3 (stating that substantive aspects of certain bodies of law contribute to complexity).

the legislature has particular competence in the allocations of benefits and burdens among citizens who, by definition, will be disparately treated. Third, the model of representative democracy (to which the form of adjudication is subservient) prefers that decisions concerning the extent of social obligations be made by elected representatives.

Nonetheless, legislative enactment of procedural rules is hardly required, and might even be suspect for two reasons. The resulting procedural code might well be a code for the politically powerful. Second, in the process of political horse-trading, the legislature is more likely to be insensitive to the normative and positive requirements of adjudication than the judiciary, and thus more likely to adopt politically acceptable procedures that violate these requirements. Although the first critique is of no moment to the form of adjudication, for its "like treated alike" principle worries about formal procedural equality rather than distributive equality,⁵⁶³ the possibility that a legislature might ignore the formal elements of adjudication risks the creation of broad categories of polycentric cases. Therefore, the balance between legislative and judicial rulemaking to cope with the problem of complex cases is even, with neither branch of government possessing clear institutional superiority to make the difficult—and frankly political—choices of procedural rules for complex cases.

The final insight concerns the recent upsurge in arguments for removal from the judicial system of cases that are complicated, complex, or polycentric.⁵⁶⁴ Although I would defer to the legislature's judgment to remove them from the judicial process, the form of adjudication certainly does not require such drastic measures for complicated and complex cases. Complicated cases can be handled comfortably within an adjudicatory framework once we appreciate that an adjudicatory process is not necessarily an adversarial one. Although complex cases present additional problems for adjudication, their inherent unfairness cannot be ameliorated by legislative action. Because legislative or administrative resolution can at best substitute one form of discrimination against like claims or claimants for another, the claim for legislative or administrative resolution of complex cases is not compelling.

Nor is the claim for nonjudicial resolution of polycentric cases compelling. Courts already perform significant nonadjudicatory

563. Lack of concern with distributive effects of procedural rules remains a weakness of the formal analysis of adjudication—a weakness that can be countered only by a sense of noblesse oblige and the limited guarantees of due process and equal protection. See *supra* note 454 and accompanying text.

564. See *supra* note 17 and accompanying text.

functions,⁵⁶⁵ and judges are not necessarily worse than legislatures or administrators in resolving matters that are not susceptible to reasoned judgment or that require that legally identical parties be disparately treated. Admittedly, matters not susceptible to reasoned judgment should, in our constitutional system, initially be within the province of the representative branches of government. On the other hand, the claim of the judiciary to superiority seems especially strong if the only reason that a case cannot be adjudicated is the inability to handle similar transactions similarly.⁵⁶⁶ When trans-substantivism is at stake, courts can be especially creative in developing case-specific procedural rules that assure reasoned judgment.

If it is empowered to handle a polycentric case, however, a court has no reason to hide behind the fiction of adjudication. Our procedural rules assume that adjudication is possible. When polycentrism makes adjudication impossible, there is no a priori reason to adopt any adjudicatory procedures unless they make sense. For a court handling a polycentric case, the sky is the procedural limit.

Conclusion

Twenty-three years ago, the *Manual for Complex and Multidistrict Litigation* opened with the observation that “[t]here are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management.”⁵⁶⁷ The *Manual*’s denial of a fundamental form of complex litigation and its acceptance of utilitarian analysis to solve problems of “protraction” have been echoed many times since its first publication. That approach stands in sharp contrast to a formal analysis of complex litigation, an analysis that finds meaning for and limitations on complex litigation within the normative nature of adjudication and the positive aspirations of procedure.

The lesson of this Article is that it is possible to develop a formal description of complex litigation that meaningfully distinguishes the complex from the routine. I do not contend that the definition is unwavering for all purposes. Instead, I have sought to find an answer only to the question of whether, for purposes of developing separate procedural rules for complex cases, the term “complex case” can be defined.⁵⁶⁸ Had the answer to this question been “No,” then all the myriad solutions proposed to redress the ills of “complex cases” would have been futile. Instead the answer was

565. For instance, the judiciary develops new rules of procedure and evidence through an administrative, rulemaking process. See 28 U.S.C. § 2072(a) (1988). It also can act as a lobbyist before the legislature on judicial matters, and it can make policy proposals for the future direction of the judiciary. See REPORT ON ASBESTOS LITIGATION, *supra* note 14.

566. For empirical observations that judges are also astute political operators who can accomplish the resolution of controversies not readily susceptible to reasoned judgment, see Chayes, *supra* note 100, at 1307-09; Fiss, *supra* note 108, at 53-55.

567. MCML, *supra* note 14, at xi.

568. See *supra* notes 19-21 and accompanying text.

"Yes," although the true meaning of the term also has called many of the "solutions" for complex litigation into doubt.

The formal analysis of complex litigation is nonetheless somewhat limited. Its definition is more evocative than crystalline; the concepts of player dysfunction, curative judicial power, and "like treated unlike" lack the technical precision required for easy translation into legal rule. Moreover, the formal analysis of complex litigation, which adumbrates the relevant considerations and limitations, still leaves unanswered the question of the case-specific solutions to complex litigation's dual problems of judicial power and unequal treatment.

The question is unanswered, perhaps, but not unanswerable. Four directions remain open. One is the abandonment, in either some or all cases, of our experiment in uniform (trans-substantive) procedural rules. A second is the abolition, again either in some or all cases, of adversarial process and its replacement with a new model of adjudication. A third is the substitution of a nonadjudicatory legislative or administrative process for the present judicial process. Finally, the status quo can be maintained. Each option has significant drawbacks, some of which have been explored in this Article. But the difficult work of comparing the options against each other remains.

In spite of its limitations, the form of complex litigation provides the framework for further analysis. As important, the form provides a coherent perspective from which the future of procedural reform can be viewed. Complex litigation is not exclusively—in fact not even primarily—about case management or the joinder of numerous parties. Ultimately, complex litigation is the story of a procedural system wrestling with the unavoidable unfairness its rules have caused. It is this quest for unattainable justice that gives complex litigation both its fascination and its peculiar bite.