PROMOTING SETTLEMENT, FOREGOING THE FACTS

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INTRODUCTION

Some judicial policymakers, including former Chief Justice Burger, some members of the Advisory Committee on Civil Rules, and a few members of Congress, have been advocating new settlement incentives and mechanisms,[1] and procedural changes to remove certain types of cases, claims, or authority to award compensation from the courts.[2] According to the proponents of

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1. *See, e.g.*, the recent ruling in Marek v. Chesny, 105 S. Ct. 3012 (1985), and the proposals to amend Rule 68 of the Federal Rules of Civil Procedure, published by the Advisory Committee on Civil Rules, 98 F.R.D. 337, 361-67 (1983), and 102 F.R.D. 407, 423-37 (1984); both are discussed *infra* in the text accompanying notes 8-28.

2. *See, e.g.*, S. 2847, 96th Cong., 2d Sess. § 10, 126 CONG. REC. 15,225 (1980) (Senator Hart's "Asbestos Health Hazards Compensation Act of 1980"); this bill and similar proposals are described *infra* notes 29-32 and accompanying text.

these changes, it will be more efficient and less costly, both for the litigants and the courts, if more cases settle earlier, and if some categories of cases, or certain aspects of a claim within a case, are removed from the courts altogether.[3]

What these policymakers propose is a substantial change in the role of our judiciary. They propose to significantly curtail the process of judicial adjudication, and to also curtail (and in many cases eliminate) the fact-finding which is part of that process.[4] But the advocates of these changes have not discussed sufficiently the broader impact of curtailing judicial adjudication and fact-finding. This omission is notable, given the rather sizable nature of the changes proposed. The purpose of this article is to encourage discussion of the broader impact of these "case settlement" incentives and "alternative forum" proposals, and in particular to focus attention on the fact that changes of this type are likely to curtail or abrogate judicial fact-finding.[5]

It is the thesis of this article that much of the judicial fact-finding that currently occurs is quite useful—both within the adjudicative process[6] and also in serving other public information, policy, and planning purposes.[7] Very little, however, has been said about the ways in which eliminating or sharply reducing this fact-finding will impact on litigants, the judicial system, and the public. This article suggests that this impact must be discussed openly before steps to curtail judicial fact-finding are taken, since it is likely that the proponents of settlement and nonjudicial forums eschew fact-finding to an extent that will prove problematic.

Part I of the article describes recent instances in which some judicial policymakers have advocated new mechanisms and pressures for case settle-

3. *See infra* notes 17-20, 29-32, 179-86, 195 and accompanying text.

4. Adjudication is the process by which courts explore, decide, and explain how legal principles generate decisions on the basis of facts in particular cases. It is, thereby, the process by which courts give specific, operational meaning to legal axioms, be they common law, statutory, or constitutional. *See* Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 592 (1983); Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). Professors Henry Hart and Albert Sacks have suggested that adjudication is comprised of three interrelated parts: the declaration of law, the identification of fact, and the application of law to fact. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374-75 (tentative ed. 1958).

Judicial fact-finding is thus an integral part of that process. However, it has not received as much analytical attention as other parts of the process. Compare the extensive commentary on judicial interpretation and the declaration of constitutional law, cited in sources such as G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 20 (11th ed. 1985); *see also* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985); and other materials in the *Symposium on Interpretation*, 58 S. CAL. L. REV. 1 (1985).

5. Recently, some commentators have discussed the societal value of the adjudicative process, *see, e.g.*, Fiss, *supra* note 4 and Spann, *supra* note 4, and criticized proposals to curtail or eliminate that process, *see, e.g.*, 1 R. ABEL, THE POLITICS OF INFORMAL JUSTICE 267-320 (1982); Abel, *Informalism: A Tactical Equivalent to Law?*, 19 CLEARINGHOUSE REV. 375 (1985); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). This article is the first to examine the impact which proposals to curtail or eliminate the adjudicative process will have on the fact-finding component of the process.

6. *See infra* Parts.II.A and II.B.

7. *See infra* Part II.C.

ments, or the rerouting of some cases or claims to alternative forums with diminished fact-finding, and how these kinds of changes are likely to result in the restriction or elimination of judicial fact-finding. Part II outlines the functions currently served by judicial fact-finding, and analyzes some of the characteristics of this fact-finding. Part III discusses why some judicial policymakers may be willing to sharply curtail or abrogate judicial fact-finding, and comments on some of the implications of doing so.

I
RECENT DEVELOPMENTS AND PROPOSALS THAT CURTAIL JUDICIAL FACT-FINDING

In June 1985, in *Marek v. Chesny*,[8] the Supreme Court decided that a plaintiff in a civil rights case who rejects a settlement offer, and subsequently fails to recover a judgement as favorable as the offer, thereby forfeits any statutory claim to attorney's fees for services rendered after the offer.[9] The Court reached this result by construing both the language in Federal Rule of Civil Procedure 68 (requiring, *inter alia*, that a party who rejects what turns out to be a comparatively favorable settlement offer bear her own postoffer costs)[10] and the language in the Civil Rights Attorney's Fees Awards Act of 1976 that provides for the court to award a prevailing party "a reasonable attorney's fee *as part of the costs*."[11] Since approximately sixty-five of the federal fee-shifting statutes contain similar references to attorney's fees as costs or as part of costs,[12] the impact of the *Marek* decision will be felt in a number of case categories, including environmental, antitrust, securities, and consumer, as well as civil rights, litigation.

In these categories of litigation, plaintiffs—and particularly their attorneys—will now be under strong pressure to accept settlement offers tendered by defendants pursuant to rule 68, even if they have completed very little fact investigation and discovery in their cases. Although a plaintiff may be willing to continue to litigate with the risk that her attorney will not receive any statutory attorney's fees for services rendered after the date of the offer, the attorney may urge settlement if the plaintiff lacks the financial resources to pay the postoffer portion of the fees herself.[13] Plaintiffs in many categories of cases covered by fee-shifting statutes do not have other resources with which to

8. 105 S. Ct. 3012 (1985).

9. *Id.* at 3018.

10. Rule 68 provides, in pertinent part: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68.

11. 42 U.S.C. § 1988 (1982) (emphasis added).

12. *See* statutes listed in the Appendix to Opinion of Brennan, J., dissenting, 105 S. Ct. at 3036.

13. *But cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decision concerning the objectives of representation . . ., and shall consult with the client as to the means by which they are to be pursued. *A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter . . . .*") (emphasis added).

retain and compensate counsel, according to congressional findings.[14] Because of their financial position, these plaintiffs may feel compelled to accept a rule 68 offer.

Since rule 68 allows defendants to make a settlement offer any time after the complaint is filed and provides the plaintiffs with only ten days to accept or reject the offer,[15] plaintiffs may have to decide whether to accept an offer very early in the course of litigation. Unless a plaintiff has been able to obtain substantial information before filing the complaint, she may have to forego fact-finding and give up her opportunity for discovery and trial, or risk forfeiture of attorney's fees. Therefore, the rule 68 offer may effectively preclude the fact-finding processes of informal and formal discovery and trial.[16]

Nevertheless, Chief Justice Burger and the five justices who joined with him in the *Marek* majority valued the use of the rule 68 mechanism to promote settlement notwithstanding the ruling's curtailment of fact-finding. These justices articulated a strong preference for settlement over litigation in civil rights and other types of lawsuits. The majority opinion emphasizes rule 68's "clear policy of favoring settlement of all lawsuits,"[17] and asserts that settlement will provide plaintiffs "with compensation at an earlier date without the burdens, stress, and time of litigation."[18] These statements echo pro-settlement views that the former Chief Justice has expressed frequently in other forums,[19] and that other members of the Court have begun to articulate also.[20]

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14. *See, e.g.*, S. REP. NO. 1011, 94th Cong., 2d Sess. 2 (1976) (explaining that Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976 because:

> [i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.).

15. FED. R. CIV. P. 68.

16. As Justice Brennan pointed out in his dissenting opinion in *Marek*:

> The Court's decision inevitably will encourage defendants who know they have violated the law to make "low-ball" offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability. Indeed, because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery.

105 S. Ct. at 3029.

17. *Id.* at 3018.

18. *Id.*

19. *See, e.g., Law Scope: On the Merits*, 70 A.B.A. J. 28 (1984) (reporting comments made by Chief Justice Burger at the American Bar Association's midyear meeting).

20. *See* Evans v. Jeff D., 106 S. Ct. 1531, (1986) (Justice Stevens, writing for the majority, cited the benefits of settlements in civil rights cases in holding that defense counsel can condition a favorable offer to settle the merits upon plaintiff's willingness to waive statutory attorneys' fees, and in suggesting that under some circumstances plaintiff's counsel may be ethically

The *Marek* decision is not the only recent instance in which judicial policymakers have suggested that we should value the promotion of settlements, but have failed to discuss the impact on fact-finding. The Advisory Committee on Civil Rules has twice proposed amendments to rule 68 that would require a litigant, who rejects a settlement offer and subsequently fails to recover a judgment as favorable as the offer, not only to forfeit any statutory claim to an award of attorney's fees for services rendered after the offer (as in *Marek*), but also to pay the attorney's fees incurred by her opponent after the offer.[21]

Proposals of the type published by the Advisory Committee would, if adopted, place litigants under coercive pressure to settle on the terms offered by their opponents. As noted above, a party who rejected an offer and continued to litigate would risk the possibility of having to pay not only her own but also her opponent's postoffer attorney's fees—regardless of who prevailed. Liability for an opponent's attorney's fees could total tens, or in some cases hundreds, of thousands of dollars.[22] In these circumstances, many if not most recipients of rule 68 offers would be reluctant to continue litigating at the risk of an attorney's fee sanction, particularly since it is impossible to predict the outcome of future litigation (or the likelihood of a sanction) with any degree of certainty.[23] Therefore, the receipt of a rule 68 offer would bring with it a substantial, if not compelling, incentive to accept during the designated time period.

The first proposal to amend rule 68, published in 1983 for comment,

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obligated to accept such a settlement on plaintiff's behalf). For further references to the likely effects of the court's ruling in *Evans v. Jeff D.*, see notes 145, 201, 205 *infra*.

21. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 361-67 (1983), and Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure, 102 F.R.D. 407, 432-37 (1984). For a discussion of these proposed amendments to rule 68, see Branham, *Offers of Judgment and Rule 68: A Response to the Chief Justice*, 18 J. MAR. L. REV. 341 (1985); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719 (1984); Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statutes: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 842 n.71 (1985); and Note, *The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions*, 70 IOWA L. REV. 237 (1984).

22. State and local governments, as well as private litigants, often expend such sums in attorney's fees. For example, South Carolina spent at least $500,000 in attorney's fees during a six-month period of reapportionment litigation. *See The Legal Fee Equity Act: Hearing on S. 2802 Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 98th Cong., 2d Sess. 395 (1984) (prepared statement of Charles Victor McTeer). For further example, the county of Sumter, South Carolina, spent more than $406,000 in fees paid to outside counsel over a six-month period to defend a voting rights lawsuit. *Id.* The city of Fort Lauderdale, Florida, spent more than $90,000 in fees paid to outside counsel over a three-month period to defend a voting rights lawsuit. *Id.*

23. *See* B. Goldstein, Comments Submitted by the NAACP Legal Defense and Education Fund, Inc. Pursuant to the Notice Published September 1984 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Regarding Proposed Amendments to Rule 68 of the Federal Rules of Civil Procedure 11-15 (Jan. 29, 1985) (explaining the ways in which assessments of settlement offers and litigation prospects are based on subjective judgments) (on file at the offices of the New York University Review of Law & Social Change).

would have allowed either party to make an offer at any time after the filing of the complaint, and would have provided only thirty days for a response.[24] In this respect, it would have allowed either party to cut short or foreclose use of the judicial fact-finding process, much as the ruling in *Marek* now allows the defendant to do. The second Advisory Committee proposal, revised in response to criticisms of the 1983 version, would have required the parties to wait a minimum period of sixty days after the service of the summons and complaint before making a rule 68 offer and to leave the offer open for a period of sixty days.[25] This 1984 proposal would have thus permitted a four-month period for discovery at the outset of the litigation before either party could require the other to choose between a rule 68 offer and further fact-finding via discovery and trial (at the risk of incurring attorney's fee penalties).[26] However, these modest revisions did not alter the basic thrust of the Advisory Committee's proposal promoting more and earlier settlements.[27] As in *Marek*, however, the proponents of settlement have extolled its virtues without fully considering a significant disadvantage of promoting more and earlier settlements—the foreshortening or foreclosure of opportunities for fact-finding in judicial forums.[28]

There is a second major category of proposed litigation reform in which the significance of judicial fact-finding has also been ignored or overlooked. This category consists of proposals that legislatures remove from the courts certain categories of cases (i.e., tort claims for injuries caused by occupational hazards),[29] or certain types of factual proof and remedial authority in some

24. 98 F.R.D. at 361-62 (1983).

25. 102 F.R.D. at 432-33 (1984).

26. The draft Advisory Committee Note accompanying the 1984 proposal explains that the new draft of the rule "acknowledges that the offeree may need to resort to discovery to evaluate the offer," 102 F.R.D. at 435 (1984), and in this way suggests that discovery may occur during the sixty-day response period after the offer is made as well as during the initial sixty-day period after the service of the complaint and summons but before an offer can be made.

27. *See* Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure: Letter of Submission to Bench and Bar, 102 F.R.D. at 423-24 (1984); *see also* W. Mansfield & A. Miller, Proposed Amendment of Rule 68: Background Memorandum 1-5 (April 15, 1984) (distributed at the 1984 Ninth Circuit Judicial Conference) (on file at the offices of the New York University Review of Law & Social Change).

28. In response to criticism of its 1983 proposal, the Advisory Committee recognized the unfairness of allowing a rule 68 offer (with increased penalties) before discovery sufficient to appraise the strengths and weaknesses of a claim or defense has occurred. Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure: Draft Advisory Committee Note, 102 F.R.D. at 434-35 (1984). But the four-month period allowed for discovery (in the 1984 Committee draft) could easily prove inadequate in many cases, particularly those where the facts are complicated or controverted. Neither this difficulty, nor the impact that by-passing fact-finding will have upon the judicial system, have been mentioned by the Advisory Committee.

Recently, after approximately three years of consideration, the committee voted to table the rule 68 proposal. *See* Letter from Judge Frank M. Johnson, Jr., Chairman of the Advisory Committee on Civil Rules to Laura Macklin (May 19, 1986) (on file at the offices of the New York University Review of Law & Social Change).

29. *See* S. 2847, 96th Cong., 2d Sess. § 10, 126 CONG. REC. 15,225 (1980) (Senator Hart's "Asbestos Health Hazards Compensation Act of 1980"); H.R. 2740, 96th Cong., 1st Sess. § 205

types of cases (i.e., authority to award damages for pain and suffering and lost future earnings in tort cases),[30] and authority to award punitive damages in all cases.[31] Those who advocate these types of changes in the courts' role often do so for reasons similar to the reasons given by proponents of more case settlements: nonjudicial forums with abbreviated fact-finding or truncated judicial procedures can compensate claimants sooner, without the delay, expense, and frustration of litigation.[32] Yet, the proponents of redefining the courts' role, like the advocates of more case settlements, overlook the value of judicial fact-finding.

In assessing the worth of fact-finding that occurs during a lawsuit, it is helpful to distinguish between the process in which a judge or other neutral decisionmaker makes factual determinations (for example, at a trial or in ruling on a motion), and the process in which the parties engage in fact investigation and fact gathering (often referred to as discovery, although the scope and mechanisms of this process may extend beyond formal discovery). The former process will be referred to here as judicial fact determination; the latter will be referred to as fact gathering, fact investigation or discovery. Terms such as fact-finding in the judicial process or judicial fact-finding will be used to refer generally to both of these processes.

Although the two processes are related, and often both occur within a single lawsuit, fact investigation by the parties occurs more frequently than fact-finding by a judge. Fact-finding by a judge at trial currently occurs in only five percent of federal court cases.[33] Statistics are not available on the number of federal court cases in which a judge makes factual determinations in ruling upon motions (for example, upon preliminary injunction motions), although the case does not later proceed to trial. Hence, the available statistics indicate that judicial fact determination occurs in at least five percent of federal court cases, and perhaps in a significantly larger percentage of cases when fact determinations in the context of motions practice are included.

By comparison, fact investigation by the parties occurs in a much larger percentage of federal court cases. Available statistics suggest that the parties record discovery requests in approximately one-half of federal court cases.[34]

(1979) (Rep. Fenwick's "Asbestos Health Hazards Compensation Act"); *cf.* Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 558 (1985) (proposing that all claims for nonintentional torts be removed from the courts).

30. *See* Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L. J. 1643, 1655-56 (1985).

31. *Id.*

32. *See, e.g.*, Sugarman, *supra* note 29, at 651-59, 664 (advocating non-judicial forums); Newman, *supra* note 30, at 1644-45 (advocating the omission of certain types of factual proof and remedial authority in tort cases).

33. According to the 1984 Annual Report of the Director of the Administrative Office of the United States Courts, 95% of federal court cases were disposed of by settlement or other means short of trial; only 5% reached trial. 1984 Report of the Proceedings of the Judicial Conference of the United States 152.

34. P. Connolly, E. Holleman & M. Kulman, Judicial Controls and the Civil Litigation Process: Discovery 27-28 (Federal Judicial Center, June, 1978).

Statistics are not available on the percentage of cases in which the parties engage in a significant amount of fact gathering outside the discovery process, but recent changes in Rule 11 of the Federal Rules of Civil Procedure (requiring, *inter alia*, that an attorney or party make reasonable inquiry into the factual basis for a pleading or motion)[35] may have increased the amount of preliminary fact investigation.

This article discusses both types of fact-finding process, although the primary emphasis is on fact-finding that involves or culminates in a judicial determination. As judicial procedures are currently structured, most cases that involve the judicial determination of facts also involve an earlier period of fact investigation and discovery by the parties. For this reason, references herein to the value of judicial fact determination assume the availability and use of fact-gathering processes. Current proposals to promote case settlements and to redirect cases to nonjudicial forums with abbreviated fact-finding processes would adversely affect both the process of judicial fact determination and the process of fact gathering by the parties.

In assessing the worth of judicial fact-finding, it is also useful to consider that the cases in which litigants complete full discovery and proceed to trial have generally survived an elaborate filtering process. One part of this process, in both the federal and state courts, is the application of constitutional and jurisprudential doctrines such as standing, ripeness, and justiciability to determine whether the case will be heard. In the federal courts, doctrines of comity and abstention also restrict the number of cases that are heard. This limits the overall expenditure of judicial and litigant resources on fact-finding[36] on the basis of the judicial policies developed in those doctrines. Depending on the extent to which those doctrines are developed thoughtfully and applied consistently,[37] this type of filtering mechanism may be preferable to the ones described in the foregoing pages. Each of the changes described in the foregoing pages would significantly curtail or eliminate judicial fact-finding. Before endorsing these changes, for either the federal or the state courts, it is necessary to take a closer look at the value of judicial fact-finding in these forums.

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35. *See* 1983 Amendments to Rule, and Advisory Committee Note.

36. However, some judicial and litigant resources may be expended on fact-finding in the context of adjudicating the preliminary constitutional or jurisprudential issue. *See, e.g.*, Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978), where the district court held four days of hearings and conducted detailed fact-finding on the issues of standing and ripeness (reported at 431 F. Supp. 203 (W.D.N.C. 1977)).

37. For a discussion of current justiciability and standing doctrines, see Spann, *supra* note 4 (suggesting that justiciability and ripeness doctrines should be reformulated based on an expository, rather than a dispute resolution, model for Article III courts). *See also* Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 n.3 (1984) (criticizing current standing rules and citing to other recent critiques).

II

FUNCTIONS SERVED BY JUDICIAL FACT-FINDING

The processes of judicial fact-finding currently serve three functions. First, fact gathering and judicial fact determinations provide a court with a traditionally recognized basis for adjudicating a lawsuit, ordering relief, and enforcing its orders. Second, fact gathering and judicial fact determinations often provide both trial and appellate courts with a set of facts upon which to base constitutional and statutory interpretation, and upon which to premise the development of common law principles. Third, judicial fact determinations often provide members of the public, and other private and public entities, with a source of tested information.

Each of these judicial fact-finding functions is served in almost every category of cases currently litigated in the federal courts. In some respects, the functions may be best illustrated in the kinds of cases Professor Chayes has referred to as "public law" cases[38] and Professor Fiss has described as "structural reform" cases.[39] But the significance of the courts' fact-finding functions is not confined to these case categories, nor confined to large, complex, or "test" cases. A series of damages actions brought by injured individuals (as in the asbestos disease cases and Dalkon Shield litigation),[40] a habeas corpus petition, or a suit by one person seeking declaratory and injunctive relief, may result in fact-finding that has as much or more value—to the litigants, the courts, and the public—than the record compiled in a class action or "test" case.

A. Providing a Basis for Adjudication, Relief, and Enforcement

The processes of fact compilation and of fact determination (whether by a judge, a jury, or both) play an essential role in the exercise of judicial authority. In our basic model of litigation, findings of fact, together with conclusions of law, provide a predicate for a judicial order of relief, and for subsequent judicial enforcement of that order. In these respects, both findings of fact and conclusions of law are integral to the judicial process.[41]

The judicial finding of facts is, of course, closely related to the judicial declaration of law. A detailed determination of the facts enables a court to decide, in a case where the legal standard is clear and unambiguous, whether

38. Chayes, *The Supreme Court 1981 Term Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

39. Fiss, *supra* note 4.

40. *See generally* P. BRODEUR, OUTRAGEOUS MISCONDUCT (1985) (describing the history of the asbestos disease cases); Van Dyke, *The Dalkon Shield: A "Primer" in IUD Liability*, 6 W. ST. U.L. REV. 1 (1978) (describing Dalkon Shield litigation).

41. Professor Fiss refers to the process by which courts make findings of fact and develop conclusions of law as a process of "dialogue" in which the judge confronts grievances, listens to a broad range of persons and interests, assumes individual responsibility for his or her decision, and justifies the decision in terms of the norms of the constitutional system. Fiss, *supra* note 4, at 13, 45.

that legal standard has been violated. In a case where the legal standard may require judicial interpretation or construction, the court's factual findings may provide information that assists in that interpretation or construction. This latter type of process, in which judicial fact-finding plays a role in the interpretation of constitutional or statutory mandates or in the development of common law doctrines, is described in Part II.B., below.

Proponents of proposals to increase the number of case settlements and the likelihood that settlements will be achieved earlier in the litigation process (such as the proposals to amend rule 68) may have in mind those situations where there is no need for judicial action, and hence little, if any, need for fact-finding. One example of this is where the parties to a suit are able to resolve their differences without judicial assistance by negotiating, interpreting, and abiding by an agreement.[42] However, if a court is asked to approve the parties' agreement,[43] or is subsequently asked to interpret that agreement,[44] it will need a factual predicate for its actions. So although judicial fact-finding may not prove necessary in every case, it is necessary where a court must design, approve, interpret and/or enforce a remedial order.[45]

In these respects, judicial fact-finding plays a particularly important role in the remedial portion of the lawsuit. In civil cases, the type and extent of relief that a court will order are often closely tied to the type and extent of factual proof presented in the case, as well as to the judicial declaration of law. In race discrimination cases, for instance, the design and issuance of injunctive relief is heavily dependent on the plaintiffs' factual and historical proof of discrimination. For example, in *Milliken v. Bradley*,[46] the Supreme Court pro-

42. In this respect, the *Marek* case could be viewed as one in which the plaintiffs' acceptance of the defendants' lump sum offer would have eliminated any need for further judicial proceedings or action. 105 S. Ct. at 3014. Cast in this narrow perspective, *Marek* may have been an appropriate case in which to encourage settlement at the expense of fact-finding. But the rule announced in *Marek* is not limited to cases in which the acceptance of a monetary settlement offer obviates the need for further judicial action. It is likely to apply (although not without difficulties) to cases involving requests for injunctive orders (*but cf. id.* at 3029, Brennan, J., dissenting: "it is altogether unclear how the Court intends judges to go about quantifying the 'value' of the plaintiff's success" in cases involving declaratory or injunctive relief) and requests for judicial approval of consent decrees, as well as to cases in which the court will be subsequently called upon to interpret, modify, or enforce those orders or decrees. For an example of the problems that can arise when a court is asked to modify or enforce a consent decree without a factual predicate, see the discussion of *Firefighters Local Union No. 1784 v. Stotts, infra* in the text accompanying notes 58-62.

43. In class actions, for example, the court is required to approve proposed settlement agreements. FED. R. CIV. P. 23(e).

44. See, for example, the parties' subsequent request for judicial interpretation in *Firefighters Local Union No. 1784 v. Stotts,* discussed *infra* in the text accompanying notes 658-62.

45. Judicial fact-finding may also be essential, as members of the Supreme Court have recently pointed out, when a court is asked to invalidate an agreement made without judicial participation. *See* Wygant v. Jackson Bd. of Educ., 54 U.S.L.W. 4479, 4482, 4486 (U.S. May 20, 1986) (Opinions of J. Powell and J. O'Conner) (public employers who adopt affirmative action plans to remedy discrimination must be prepared, if challenged, to demonstrate that discrimination in the context of judicial review).

46. 418 U.S. 717 (1974).

hibited the use of a metropolitan, multidistrict remedy to achieve school desegregation because the plaintiffs had not shown that the suburban school districts had operated *de jure* school systems and that there was an interdistrict segregative effect.[47] In two subsequent cases however, *Columbus Board of Education v. Penick*[48] and *Dayton Board of Education v. Brinkman (Dayton II)*,[49] the Court upheld systemwide injunctive remedies to achieve school desegregation. In both cases, the Court found that nonstatutory dual school systems had been knowingly maintained by school board action and inaction.[50]

Factual proof is also a key factor in decisions about awarding damages. For example, in 1971 the first jury to hear a product liability lawsuit brought against asbestos-insulation manufacturers awarded a worker who had contracted asbestosis sixty-eight thousand dollars in actual damages.[51] Punitive damages were not requested. After several years of similar litigation, involving additional fact investigation and discovery, plaintiffs' attorneys obtained documents demonstrating that many of the asbestos-insulation manufacturers had known about the hazards of handling asbestos for years, and had either ignored or suppressed the information.[52] After this evidence became available, judges began to allow juries to consider, and juries began to award, punitive as well as compensatory damages against the manufacturers.[53] The size of jury verdicts in favor of individual workers with asbestos diseases increased considerably, by virtue of both punitive damages and larger compensatory awards. In many cases juries awarded several hundred thousand dollars;[54] in some cases the awards to the dependents of individual workers exceeded one million dollars.[55] It took plaintiffs' attorneys several years and several cases to secure the necessary factual proof regarding the manufacturers' knowledge of asbestos hazards. The information had an important impact not only on the

47. *Id.* at 744-48.

48. 443 U.S. 449 (1979).

49. 443 U.S. 526 (1979).

50. *Columbus*, 443 U.S. at 455-67; *Dayton*, 443 U.S. at 534-41. Most commentators point out that although the Supreme Court required proof of the defendants' knowing discrimination in the *Columbus* and *Dayton* cases, the Court instructed the lower courts to use certain presumptions in plaintiffs' favor when weighing and determining the facts. *See, e.g.*, Note, *School Desegregation Doctrine: The Interaction Between Violation and Remedy*, 30 CASE W. RES. L. REV. 780, 805-10 (1980); Note, *Busing Across District Lines: The Ambiguous Legacy of Milliken v. Bradley*, 18 HOUS. L. REV. 585, 592-94 (1981).

Some scholars have criticized the idea that injunctive relief in a case involving constitutional violations must be narrowly restricted to the precise constitutional injury reflected in the facts of the case. Professor Fiss, for example, has suggested that the relief should be broad enough to ensure that the conditions that allowed the constitutional violation to occur are altered. *See* Fiss, *supra* note 4, at 46-50. The design of this type of remedy also requires full fact-finding.

51. P. BRODEUR, *supra* note 40, at 64.

52. *Id.* at 216-17.

53. *Id.* at 216-24.

54. *Id.*

55. *Id.* at 217.

damages awards, but also on the more basic question of the manufacturers' strict liability in tort. Once it became available, it precluded the defendant manufacturers from arguing successfully (as they had in some earlier cases) that they were not liable for failing to warn of their product's danger because they could not have reasonably foreseen that danger.[56] In both of these respects, the course of asbestos-disease litigation in the United States from 1978 onward was strongly influenced by the fact-finding that occurred during the discovery and trial of cases brought between 1969 and 1978.[57]

Both race discrimination and asbestos-disease cases illustrate the fact that a specific factual predicate may be essential to the judicial exercise of remedial authority. This point has been reiterated by the Supreme Court. Recently, in *Firefighters Local Union No. 1784 v. Stotts*,[58] the majority of justices relied heavily on two factors in holding that the district court "exceeded its powers" when it enjoined the Fire Department from using a seniority-based layoff system that would have reduced the number of Black employees in certain job categories: 1) that the case had been settled by a consent decree which did not address the question of lay-off policy,[59] and 2) that the individual plaintiffs had not "demonstrate[d] that they have been actual victims of [a] discriminatory practice."[60]

In *Stotts*, the five-justice majority held that in order for the district court to provide such injunctive relief, the plaintiffs would not only have had to prove at trial that the Fire Department followed a pattern or practice having a discriminatory effect, but also have had to prove in a series of *Teamsters* hearings that the discriminatory practice had adversely affected each individual member of the plaintiff class.[61] One member of the *Stotts* majority, Justice O'Connor, emphasized the point even further in her concurring opinion: "To be sure, in 1980, respondents could have gone to trial and established illegal discrimination in the Department's past hiring practices, identified its specific victims, and possibly obtained retroactive seniority for those individuals . . . . But . . . [respondents] chose to avoid the costs and hazards of litigating their claims . . . . They entered into a consent decree without establishing any specific victim's identity."[62] Justice O'Connor, Justice White (who authored the majority opinion), and the other members of the *Stotts* majority thus stressed the limitations of settlement agreements and emphasized the plaintiffs' decision to forego factual proof that might have later entitled them to a necessary remedy. In so doing the justices relied on the absence of fact-finding as a basis for declining to modify or enforce the consent decree in the manner urged by

56. *Id.* at 216-17.

57. Some of these cases were litigated as diversity cases in the federal courts; some were litigated in the state courts.

58. 104 S. Ct. 2576 (1984).

59. *Id.* at 2585-88.

60. *Id.* at 2588.

61. *Id.* at 2588-89.

62. *Id.* at 2593 (O'Connor, J., concurring).

the plaintiffs.[63]

As the *Stotts* decision suggests, judicial fact-finding is an essential foundation when it becomes necessary for a court to modify or enforce a remedial decree and when an appellate court reviews the trial court's action. For example, in *Rhem v. Malcolm*,[64] Judge Morris Lasker held a lengthy trial and made detailed factual findings on the ways in which conditions for pretrial detainees at the Manhattan House of Detention violated constitutional due process and equal protection standards.[65] Shortly thereafter, the judge ordered the city defendants to submit a plan to correct the conditions.[66] The defendants delayed, and then refused to submit a plan.[67] Consequently, pending compliance, Judge Lasker enjoined further confinement of detainees at the facility after thirty days from the date of his order.[68] When the city defendants appealed, the Second Circuit unanimously affirmed the district court's findings of fact and conclusions of law.[69] The court of appeals placed considerable emphasis on the district court's findings of fact, and confirmed its authority to enter a remedial order prohibiting the future use of the facility for pretrial detainees (although it did suggest that the district court consider some modifications in its remedial order).[70]

For further example, in *Wyatt v. Stickney*,[71] the district judge determined, after detailed testimony and fact-finding, that conditions in three Alabama facilities for the mentally handicapped were so seriously deficient as to deprive the patients of their constitutional rights.[72] Initially, the district judge gave the defendants an opportunity to implement a remedy of their own design.[73] When they failed to develop and implement an adequate remedy, the court held additional hearings and imposed a detailed remedial order.[74] The defendants appealed, arguing, *inter alia*, that the district court had exceeded its powers in ordering the prescribed relief, and sought a stay of the order.[75] The court of appeals denied the stay and affirmed the remedial order, after carefully summarizing the facts in the district court record on "how far short the hospitals fall of meeting the three fundamental conditions of adequate and

63. Recently, Justice O'Connor, and Justice Powell, again emphasized the importance of fact-finding in examining the validity of an affirmative action plan adopted by a public employer. Wygant v. Jackson Bd. of Educ., 54 U.S.L.W. 4479, 4482, 4486 (U.S. May 20, 1986).

64. 371 F. Supp. 594 (S.D.N.Y. 1974).

65. *Id.* at 599-622.

66. *See* 507 F.2d 333, 335 (2d Cir. 1974) (describing the history of the litigation).

67. *Id.*

68. 377 F. Supp. 995, 1000 (S.D.N.Y. 1974).

69. 507 F.2d 339, 342 (2d Cir. 1974).

70. *Id.* at 339-42.

71. 325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (M.D. Ala. 1971); 344 F. Supp. 373, 390 (M.D. Ala. 1972).

72. *Id.*

73. 325 F. Supp. at 785-86.

74. 344 F. Supp. at 390-92, 394-407.

75. Wyatt v. Aderholt, 503 F.2d 1305, 1307, 1310, 1312-16 (5th Cir. 1974).

effective treatment defined by the district court."[76]

These cases, and many others in which courts must draft remedial orders and take ongoing responsibility for supervising and enforcing orders or consent decrees, underscore the importance of fact-finding as a predicate for judicial action in civil cases.[77] But fact-finding not only enables the judiciary to design and implement relief in civil cases, it also provides a foundation for the declaration of legal principles, another important component of the adjudicative process.

B. Providing a Basis for Constitutional and Statutory Interpretation and for the Development of Common Law Principles

Judicial fact-finding is an integral part of the process of adjudication in a second, related respect. It provides information which the judiciary can use in interpreting and applying constitutional, statutory, and common law principles. In various cases, factual materials from a wide variety of sources may be compiled and used for these purposes. The factual findings derived and used by the courts will often fall into one or both of two categories. In the first category are facts about what happened to or between the parties in an individual case. Facts of this type are often referred to as *historical* or *adjudicative* facts.[78] In the second category are facts about what is likely to happen, both to the parties and to others who might be affected by the decision. These are often referred to as *legislative* facts.[79] Although some observers of the judicial process have argued that courts are better suited to finding historical facts,[80] there is increasing recognition that courts at all levels must determine and utilize both types of facts in the course of their decision making.[81]

Legislative facts play a particularly prominent role in the adjudication of constitutional questions and other public law issues. Scholars who have studied fact-finding in constitutional cases have concluded that legislative facts are at the core of virtually every case involving constitutional questions, and hence

76. *Id.* at 1310-16.

77. As one of my colleagues has pointed out, in this respect the courts function very differently in civil and criminal cases. In the latter context, the courts often enter remedial orders (sentences) on the basis of minimal or no fact-finding if the defendant has entered into a plea bargain.

78. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3, at 413 (1979) (adjudicative facts are those pertaining to the parties and their activities); *see also* H. HART & A. SACKS, *supra* note 4, at 384 (adjudicative facts are those relevant in deciding whether a given general proposition is or is not applicable to a particular situation; they are ordinarily, but not always, facts about what happened in a particular case).

79. *See* K. DAVIS, *supra* note 78, at 413 (legislative facts "do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion"); *see also* H. HART & A. SACKS, *supra* note 4, at 384 (legislative facts are those relevant in deciding what general propositions should be recognized as authoritative; they are ordinarily, but not always, facts about what generally happens in a class of cases).

80. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 45-51 (1977).

81. *See* Karst, *Legislative Facts in Constitutional Litigation*, 1960 S. CT. REV. 75, 76-81, 99-112; Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 252 (1983).

are determined, either explicitly or implicitly, in every such case.[82] These scholars use several recent cases to illustrate this point.

In *Roe v. Wade*,[83] the Court considered a series of legislative fact questions in determining the constitutionality of state restrictions on abortion: e.g., did the state statutes prohibiting abortion serve to protect the health of pregnant women?[84] should a fetus be considered "in the law as a person in the whole sense?"[85] Cognizant of the role that the determination of these questions might play in the Court's decision, the parties and *amici* addressed these questions of legislative fact, as well as the legal issues, in their briefs.[86]

In *Branzburg v. Hayes*,[87] the Court identified the question of whether requiring journalists to reveal their sources during grand jury investigations would reduce the likelihood of communication from those sources as a key legislative fact question.[88] The majority of the Court then proceeded to ignore a district court finding and submissions indicating that compelled disclosure would have an adverse effect on newsgathering,[89] and instead assumed the opposite, without any proof.[90]

In *Williams v. Florida*,[91] the Court recognized that the question of whether juries consisting of less than twelve persons were likely to reach different verdicts than twelve-person juries must be addressed before determining if use of the smaller jury in criminal cases was constitutional.[92] Justice White, who authored the *Williams* opinion, referred to studies of jury behavior in concluding that the twelve-person jury is not "necessarily more advantageous" to the defendant than a smaller jury.[93] Unfortunately, there is reason to think that the Court may have erred in deciding this issue of legislative fact in *Williams*, and that the use of smaller juries is indeed less likely to yield an accurate verdict.[94]

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82. *Id.*

83. 410 U.S. 113 (1973).

84. *Id.* at 149-50; *see also* Miller & Barron, *The Supreme Court, the Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1211-13 (1975) (describing Justice Blackmun's approach to this question and the materials he relied upon).

85. 410 U.S. at 156-62; *see also* Miller & Barron, *supra* note 84, at 1225 (commenting on Justice Blackmun's effort to avoid answering this question).

86. *See* Miller & Barron, *supra* note 84, at 1199-1204.

87. 408 U.S. 665 (1972).

88. *Id.* at 680-82.

89. *Id.* at 730-33 (Stewart, J., dissenting); *see also* Shaman, *supra* note 81, at 238 ("record was replete with surveys, studies, and testimony from reporters and editors, all of which indicated that compelled disclosure of sources caused formerly cooperative informants to become silent" and one trial judge so found).

90. 408 U.S at 698-99; *see also* Shaman, *supra* note 81, at 238-40 (criticizing the Court's assumption that since it was uncertain whether compelled disclosure would have a chilling effect on communication, it necessarily followed that such disclosure would not have a chilling effect).

91. 399 U.S. 78 (1970).

92. *Id.* at 100-02.

93. *Id.* at 101 n.48.

94. *See* Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court,*

As the foregoing examples suggest, there is reason for concern about how the process of legislative fact determination works, particularly at the Supreme Court level. Scholars and commentators have identified several problems. Lower courts often fail to develop a record or make findings on questions of legislative fact.[95] Even when they do, the record and findings are sometimes ignored by the Supreme Court.[96] The Court lacks trial court fact-finding processes and has no particular methodology of its own for making decisions about legislative facts.[97] As a result, when it engages in legislative fact determination, either explicitly or implicitly, it often does so in a manner that is erroneous,[98] or even manipulative.[99] Furthermore, legislative fact determination, particularly in the Supreme Court, may be carried out without adequate notice to the parties, and without an opportunity to challenge the sources or materials the Court relies upon.[100]

Notwithstanding these criticisms, there is widespread agreement that legislative fact determination is an integral part of the adjudicative process in constitutional cases.[101] There is also consensus that it would be fairer and more reliable to treat this fact determination as an explicit and open part of the judicial process rather than to allow individual judges to simply employ their own factual assumptions in deciding cases.[102]

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and the Size of the Jury, 68 CALIF. L. REV. 1004, 1024-25 (1980); *see generally* Ballew v. Georgia, 435 U.S. 223, 232-39 (1978) (holding the use of a five-person jury in a criminal case unconstitutional), and studies cited therein.

95. *See* Karst, *supra* note 81, at 95.

96. *Cf.* Miller & Barron, *supra* note 84, at 1227 (the Court may actually "re-try" such facts, through an expanded use of judicial notice, or by stating general norms).

97. *See* Shaman, *supra* note 81, at 237.

98. *Id.*; *see also supra* text accompanying notes 91-94.

99. *See* Shaman, *supra* note 81, at 238-41, 246-48, 252-53.

100. *See* Karst, *supra* note 81, at 108-09; Miller & Barron, *supra* note 84, at 1211, 1226.

101. *See* Karst, *supra* note 81, at 76-77, 99-109; Shaman, *supra* note 81, at 236, 252.

102. *See, e.g.*, Karst, *supra* note 81, at 75, 99-112; Shaman, *supra* note 81, at 236-37, 252-53.

One of my colleagues has pointed out that the legislative facts under discussion here are not really "facts" in the same sense as other types of facts discussed in this article. Rather, such "legislative facts" may be theoretical assertions, normative assumptions, value judgments, or stated beliefs or preferences. His point is well taken. Statements such as "requiring journalists to later reveal their sources will hamper newsgathering efforts" (the "legislative fact" at issue in *Branzburg v. Hayes*) can be viewed as either empirically testable assertions of fact, or as expressions of a speaker's assumptions or beliefs. (To a certain, albeit perhaps lesser, extent so can many statements often referred to as statements of historical or adjudicative fact. *See infra* notes 169-71 and accompanying text.). One's description of the adjudicative process will vary with one's characterization of such statements. A court either decides a case on the basis of findings of fact and conclusions of law, *or* decides it on the basis of findings of fact, conclusions of law, *and* the judge's (or jury's) theoretical assertions, value judgments, stated beliefs and/or preferences. The former is, of course, the classic formulation; the latter may be the more realistic one.

Nevertheless, I have treated "legislative facts" as facts here because I think they play a role similar to (or perhaps even more powerful than) other facts in providing a basis upon which the courts adjudicate individual cases, interpret constitutional and statutory provisions, and develop common law principles. See Parts II.A. and B., above. I concede, however, that the judicial process probably does not provide the public with a source of "tested" legislative facts; it is unlikely that members of the public or public institutions use the courts' legislative "fact-find-

Legislative and historical fact-finding also play key roles in cases where courts are called upon to interpret statutory mandates or to develop common law principles. For example, in *Griggs v. Duke Power Co.*[103] the Supreme Court considered whether Title VII of the Civil Rights Act of 1964 prohibited an employer from requiring a high school education or the passing of a standardized intelligence test where neither requirement was shown to be related to successful job performance.[104] The Court was required to construe and apply both section 703(a) of the Act (which makes it an unlawful employment practice to limit, segregate, or classify employees to deprive them of employment opportunities or adversely affect their status because of race, color, religion, sex or national origin) and section 703(h) (which authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate).[105] In deciding how to interpret these two sections, the Court reviewed the detailed factual record made in the district court. It weighed, *inter alia*, the historical facts that prior to the Civil Rights Act the employer had openly discriminated on the basis of race in hiring and assigning employees at its plant, and that the employer initiated the use of the standardized intelligence test in question when Title VII became effective, although the plaintiff failed to show that it was instituted for discriminatory purposes.[106] The Court also weighed the legislative-type facts that both the high school education requirement and the standardized intelligence test operated to disqualify black applicants at a substantially higher rate than white applicants, and that Blacks seeking jobs at the plant might not perform as well on standardized intelligence tests because they had long received inferior education in segregated schools.[107] On the basis of these facts, and a review of the legislative history of section 703(h), the Court determined that use of the high school diploma requirement and standardized intelligence test violated Title VII.[108]

The California Supreme Court's decision in *Sindell v. Abbott Laboratories*[109] illustrates the manner in which courts employ both adjudicative and legislative facts to develop common law principles. The plaintiffs in *Sindell*

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ing" as a basis for public policy discussion or planning. See the function of judicial fact-finding described in Part II.C., below. This function of judicial fact-finding is more apparent in the public use of historical and adjudicative facts compiled and determined judicially. Also, the characteristics I have described in Part II.C. as distinguishing judicial fact-finding (readily accessible, tenacious, adversarial, involving a neutral and independent determination, and perceived as legitimate) describe processes the courts currently employ in finding historical and adjudicative facts; these terms may not be descriptive of the means courts currently employ for determining legislative facts.

103. 401 U.S. 424 (1971).

104. *Id.* at 425-26.

105. 42 U.S.C. § 2000e-2 (1984).

106. 401 U.S. at 426-28; *but cf.* D. HOROWITZ, *supra* note 80, at 41-42 (the factual record "evok[ed] suspicion about the motives of the particular employer before the Court").

107. 401 U.S. at 430.

108. *Id.* at 426-36.

109. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

suffered precancerous and cancerous vaginal and cervical growths because their mothers took diethylstilbestrol (DES) during pregnancy. They could not, however, identify the particular manufacturer of the drug taken in each instance since approximately two hundred companies had manufactured DES.[110] In weighing whether the plaintiffs should therefore be precluded from bringing product liability suits against the DES manufacturers, the court considered facts about the plaintiffs' injuries (and the injuries of numerous other women similarly situated), the defendants' manufacture of the drug, their knowledge of its danger, their failure to test the drug or warn of its potential danger, and the factual assertion that six or seven drug companies produced ninety percent of the DES marketed.[111] The court then established a modified principle of tort liability: if the plaintiffs each sued the manufacturers of a substantial share of DES, they could shift the burden of proof to the defendants to demonstrate that they could not have made the substance which caused the injury.[112] The California Supreme Court's development of this new common law principle thus rested on several adjudicative and legislative facts, as well as legal principles derived from prior cases.[113]

C. Providing the Public with a Source of Tested Facts

Judicial fact determination often serves a third, additional function: it provides members of the public, and other private and public entities, with a source of tested information. Often, the facts obtained during discovery and tested during trial can be used as a basis for making our public and private institutions more accountable, and employed more generally for policy planning purposes. In this context, the "consumers" or "users" of judicial fact-finding are not only the litigants and the courts, but also legislators, administrators, other government officials, interest groups, and members of the public at large.

Many federal and state court cases have produced facts that are useful in public policy contexts. The asbestos-disease litigation discussed above[114] is a good example. Although public access to information about the health hazards of asbestos exposure is critical, this information was ignored or suppressed by some officials in the asbestos-insulation and the insurance industries for almost fifty years.[115] It is unlikely, therefore, that this information would have been uncovered without the product liability litigation.[116]

110. 26 Cal. 3d at 593-94, 602, 607 P.2d at 925-26, 931, 163 Cal. Rptr. at 133, 139.

111. 26 Cal. 3d at 593-94, 611-12, 607 P.2d at 925-26, 937, 163 Cal. Rptr. at 133-35, 144-45.

112. 26 Cal. 3d at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145-46.

113. 26 Cal. 3d at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 143-45.

114. *See supra* notes 51-57 and accompanying text.

115. *See* P. BRODEUR, *supra* note 40, at 200-07, 209-17.

116. For a description of how public knowledge about the risks of asbestos insulation in schools, public buildings, homes and offices emerged from the insulation workers' product liability litigation, see *id.* at 3-245.

Nevertheless, some judicial policymakers have not only failed to acknowledge the crucial role played by the courts and litigants in disclosing asbestos risks, but have also advocated removing these types of occupational disease claims from the courts altogether and relegating them exclusively to administrative tribunals, such as those that currently administer worker's compensation programs. Recent proponents of this proposal include former Chief Justice Burger,[117] former Representative Millicent Fenwick,[118] and Senator Gary Hart.[119] It is debatable whether these administrative tribunals would, as their advocates claim, provide prompter, more adequate compensation for injured workers. However, as currently structured, it seems unlikely that these tribunals would serve as a useful source of information about the occurrence and causes of occupational diseases. Many administrative forums provide for only minimal fact-finding generally, no fact determination on issues of fault or responsibility, and little or no release of information to the public. As a result, these administrative forums have never supplied the type of information about occupational disease that the courts produced during the asbestos litigation.

Nor have administrative agencies or nonjudicial forums produced the type of information about medical risks and manufacturer responsibility that was disclosed during the recent Dalkon Shield (IUD) product liability litigation.[120] Facts adduced during approximately ten years of litigation against the contraceptive device manufacturer finally forced the manufacturer to issue a public health warning and an offer to pay for the removal of the product.[121]

Judicial fact determinations have also improved public knowledge about our schools,[122] hospitals,[123] mental health facilities,[124] prisons,[125] and other

117. *See id.* at 313.

118. *See* H.R. 2740, 96th Cong., 1st Sess. § 205 (Rep. Fenwick's "Asbestos Health Hazards Compensation Act").

119. *See* S. 2847, 96th Cong., 2d Sess. § 10, 126 CONG. REC. 15,225 (1980) (Senator Hart's "Asbestos Health Hazards Compensation Act of 1980"); *cf. Drive to Limit Product Liability Awards Grows as Consumer Groups Object*, N.Y. Times, Mar. 2, 1986, at A32, col.1 (describing a recent proposal by Senator John Danforth that would allow victims to choose between a traditional tort litigation and an expedited, alternative claim system such as a state board which would grant compensation for "actual economic losses" only.)

120. *See generally In re* A.H. Robins, "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540 (1975) (Judicial Panel on Multidistrict Litigation) (summarizing litigation to date); *see also* Van Dyke, *The Dalkon Shield: A "Primer" in IUD Liability*, 6 W. ST. U.L. REV. 1 (describing the litigation).

121. *See Words of Warning About an I.U.D. (Recalls)*, Time, Nov. 26, 1984, at 86 (reporting on the manufacturer's announcement).

122. *See, e.g.*, Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) (public education offerings for disabled and exceptional children were limited or nonexistent).

123. *See, e.g.*, Greater Washington D.C. Area Council of Senior Citizens v. District of Columbia Gov't, 406 F. Supp. 768 (D.D.C. 1975) (treatment and care of patients at public hospital fell well below any acceptable level of quality and efficiency).

124. *See, e.g.*, Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) (serious deficiencies amounting to constitutional violations found at state hospitals for care and treatment of mentally retarded persons).

125. *See, e.g.*, Gates v. Collier, 349 F. Supp. 811 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291

public institutions. Often, fact investigation and determination in these types of "public law" cases has prompted administrative improvements and legislative oversight or reform, as well as provided a basis for the exercise of judicial authority.[126]

Of course the news generated by judicial fact determination is not always widely welcomed, particularly when it reveals serious violations of constitutional rights and abuses of authority. Nevertheless, a useful function was served by the jury's determination in *Waller v. Butkovich*[127] that two Ku Klux Klansmen, three Nazis, two police officers, and one police informer were responsible for the death of a demonstrator killed during a 1979 anti-Klan rally in Greensboro, North Carolina.[128] And a similarly useful function was served by another jury's determination in *Cullen v. New York State Civil Service Commission*[129] that from 1973 to 1976 the Nassau County (New York) Republican Committee had required government workers to contribute one percent of their salaries to the Republican Party in order to get promotions and wage increases.[130] In each of these cases it is unlikely that the facts disclosed as a result of sustained litigation and fact determination could have been obtained publicly through other means. However, because the facts were obtained and disclosed, the public was able to learn who violated legal constraints and social norms, and to consider whether existing rules and enforcement procedures were adequate to prevent the recurrence of these problems.

Facts determined by a judge or jury have been, and continue to be, an undisputed source of information for public consumption. However, there is debate about whether facts adduced in the discovery process (and not presented at trial) may be made available to the public (before, after, or without the occurrence of a trial). The Supreme Court's 1984 ruling in *Seattle Times Co. v. Rhinehart*[131] prohibits the public dissemination of discovery

(5th Cir. 1974) (conditions which deprived inmates of basic elements of hygiene and adequate medical treatment, solitary confinement conditions, and failure to provide adequate protection against physical assaults and abuse by other inmates constituted cruel and unusual punishment).

126. For example, litigation such as *Mills*, 348 F. Supp. 866, in various states around the country was instrumental in focusing public attention on serious deficiencies in the public school programs for educating disabled children, and prompted Congress' enactment of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 774 (1975).

127. 584 F. Supp. 909 (M.D.N.C. 1984) (describing litigation and ruling on preliminary motions).

128. *See Civil Rights Forces Win Part of 1979 Klan Case*, Wash. Post, June 8, 1985, at A6, col. 1 (reporting results of trial and noting "confusion" among the lawyers over the verdict finding liability for only one of the five shootings).

129. 435 F. Supp. 546 (E.D.N.Y. 1977) (describing litigation and ruling on motions to dismiss and motion for class certification).

130. *See Nassau G.O.P. Made Employees Donate Money, Jury Finds*, N.Y. Times, Sept. 5, 1985, at A1, col. 1; *but cf. Nassau G.O.P. Agrees to Settle Kickbacks Suit*, N.Y. Times, July 24, 1985, at B2, col. 6 (reporting that the parties earlier tried to settle the case).

131. 104 S. Ct. 2199 (1984).

materials covered by a judicially issued protective order.[132] On its facts, this aspect of the *Seattle Times* decision seems unassailable. The Seattle Times sought to publish information, gained in discovery, about the identity of a private religious organization's members and donors.[133] The religious organization and its representatives argued that compelled production of the identities of its members and donors would violate their rights to privacy, freedom of religion, and freedom of association. The organization and its representatives successfully moved for a protective order prohibiting public disclosure,[134] although the newspaper opposed the motion on first amendment grounds.[135] The Supreme Court upheld the issuance of the protective order, ruling that a trial judge has broad discretion in deciding whether good cause exists for the issuance of a protective order and that the imposition of such an order pursuant to a finding of good cause does not require heightened first amendment scrutiny.[136]

The *Seattle Times* decision leaves a number of questions unanswered. For example, may a trial court deny public access to discovery materials covered by a protective order issued solely to protect judicial interests in expediting discovery and minimizing discovery disputes between the parties?[137] Should the trial court be required to weigh the public interests favoring disclosure of factual materials gained during discovery?

The majority opinion in *Seattle Times* is based on a broad reading of the trial court's discretion under rule 26 (and other similarly worded state court rules), and there is reason to think that the Court has not yet weighed the strong public interests favoring disclosure of discovery materials. There is limited commentary available on this topic; most of it discusses whether and when first amendment principles require the release of discovery materials.[138] While the constitutional debate may continue, the disclosure issue does not have to be resolved, generally or in each case, on constitutional grounds. There may be reasons for the courts to make discovery materials publicly

132. *Id.* at 2209-10.

133. *Id.* at 2203.

134. *Id.* at 2203-05.

135. *Id.* at 2203-05, 2206-10.

136. *Id.* at 2203-10; *cf. In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979) (requiring close scrutiny in light of first amendment principles; ruling criticized by the Supreme Court in *Seattle Times*).

137. *See generally* Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 11 (1983) (asserting that lower courts and litigants "have come to rely on protective orders that limit the disclosure of information obtained through discovery to speed up the discovery process and minimize disputes. Particularly in complex litigation, these orders have become an accepted part of the civil litigation landscape.") For an example of one such order, see *In re* Agent Orange Product Liability Litigation, 96 F.R.D. 582 (E.D.N.Y. 1983); *see also* 98 F.R.D. 539, 543 (E.D.N.Y. 1983) (later lifting the order in part); 99 F.R.D. 645 (E.D.N.Y. 1983) (similar partial lifting of order).

138. *Compare* Marcus, *supra* note 137 (arguing against a first amendment or common law right of public access to discovery materials) *with* Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984) (arguing in favor of a first amendment right of access to discovery materials).

available even if their release is not constitutionally compelled. For example, the release of discovery materials submitted in support of or opposition to a motion for summary judgment may serve to furnish the public with information about the basis for the court's ruling, and thus serve "as a check on possible abuses by the court system, and [help] to produce an 'informed and enlightened public opinion.' "[139] Nevertheless, until these types of issues are addressed by more courts and in varied case contexts, it is fair to assume that fact discovery by the parties, unlike judicial fact determination, may not serve as a source of public information (at least not where a protective order covers pertinent discovery materials).

Judicial fact-finding is not, of course, the only source of public information about the actions of individuals and institutions. Other entities that perform fact-finding and frequently make the results available to the public include: congressional committees, research and educational institutions, executive agencies and advisory commissions, journalists and other employees of public media organizations, and private organizations such as foundations, churches, non-profits, and interest groups.

The judicial fact-finding function complements, rather than duplicates, the fact-finding roles of these other entities, and is distinct in five respects. First, judicial fact-finding, by its very nature, can be initiated and maintained by persons with little or no access to other institutional forms of fact-finding. The low threshold requirement for access to the judicial process, that a plaintiff with a colorable claim of injury be able to pay the filing fee, allows a more diverse set of persons and groups access to a detailed and sustained fact-finding process than virtually any other form of institutional fact inquiry. This is not to say that other fact-finding forums, such as congressional committees, administrative agencies, and research institutions, never provide access to individuals or groups with few economic or financial resources, or limited political clout. But none of these entities has provided, or is likely to provide, the type of consistent and repeated access that the courts provide for a broad, diverse selection of individuals and groups.[140]

There is one significant practical constraint on access to judicial fact-finding: an individual or group who seeks to use the judicial process must be able to obtain effective legal counsel which frequently requires substantial financial resources. Recognizing this constraint, public and private institutions have taken steps to ensure the availability of competent counsel via congressional initiatives such as the Civil Rights Attorney's Fee Awards Act of 1976 and other similar fee-shifting legislation,[141] the federal funding of legal services

139. *In re* Agent Orange Product Liability Litigation, 98 F.R.D. 539, 543 (E.D.N.Y. 1983); *see also* 597 F. Supp. 740, 769-70 (E.D.N.Y. 1984) (discovery materials to be maintained under seal at courthouse following settlement, and court to retain authority to order release).

140. As Professor Fiss has pointed out, judges have an obligation "to confront grievances or claims they would otherwise prefer to ignore . . . [and] to listen to a broad range of persons and spokesmen." Fiss, *supra* note 4, at 13.

141. *See generally* E. R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES

programs for low-income persons,[142] the private founding and funding of community-based legal services providers,[143] and the formation of public interest law organizations.[144] During the past decade, these measures have helped to ensure that a significant cross section of our citizenry has access to the judicial process.[145] To the extent that they are successful in guaranteeing wide-spread access, these measures will also yield judicial fact-finding that provides members of the public with more detailed information about a wider range of activities and problems than is likely to be available from other fact-finding organizations.

Second, judicial fact-finding frequently, although not always, allows for a more detailed and sustained inquiry into the facts than is provided by other public and private entities. Other fact-finding bodies, such as congressional committees, may have competing priorities that will allow only brief investigation and the scheduling of a single hearing on a particular problem. While a court may have a number of cases before it, it must provide each litigant with the discovery procedures and hearings necessary to adjudicate her case. In the judicial fact-finding process, it is the parties (and their counsel)—who have a direct stake in the consequences of the fact-finding—who play a major role in determining the amount of time and resources to expend on factual investigation. This may make their fact-finding efforts more tenacious than the efforts of other fact-finders, such as journalists or advisory commissions. Also, the investigatory tools available in a judicial context may be more varied and more efficacious than those available to other fact-finding organizations. For example, courts have the power to compel the appearance and testimony of witnesses and the production of documents. Few of the other fact-finding entities (with the exception of congressional committees and most executive agencies) have this type of authority.

(1981) (describing the Civil Rights Attorney's Fee Awards Act of 1976 and listing other fee-shifting statutes).

142. *See generally* E. JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM (1978).

143. *See generally* E. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES (1951 & Supp. 1961).

144. *See generally* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976); B. WEISBROD, J. HANDLER & N. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978).

145. The Supreme Court's recent decision in Evans v. Jeff D., 106 S. Ct. 1531 (1986), may substantially diminish the effectiveness of the Civil Rights Attorney's Fee Awards Act of 1976 (and similar fee-shifting statutes) in ensuring that citizens with limited income have access to competent legal counsel and to the judicial process. By permitting defense counsel to make settlement offers conditioned on full fee waivers, the Court in *Evans v. Jeff D.* has sanctioned a practice that will substantially reduce the number of attorneys willing to litigate these cases on plaintiffs' behalf. *See* 106 S. Ct. at 4369-71 (Brennan, J., dissenting) ("The cumulative effect this practice will have on the civil rights bar is evident.... The conclusion that permitting fee waivers will seriously impair the ability of civil rights plaintiffs to obtain legal assistance is embarrasingly obvious.")

Judicial fact-finding is also distinct from the fact-finding performed by other institutions and entities in a third respect: it employs a particular methodology, based upon an adversary process. Those factual propositions, both general and specific, that are of particular significance in deciding a case are likely to be probed and tested in detail by litigants (and counsel) with sharply opposing viewpoints and interests.[146] Other institutions that investigate facts and compile a record, such as congressional committees, executive agencies and advisory commissions, media organizations, and private groups, may not be as rigorous and consistent as courts in allowing for both fact gathering and fact testing by opposing parties.[147]

This is not to assert that the judicial fact-finding methodology, based upon an adversary process, is always superior to other types of fact-finding. There are other methodologies, such as those employed in scholarly or scientific research, that may be more useful in studying some issues and in generating some types of information. Some research methodologies may, for example, involve a broader, less linear exploration of an issue, and a greater tolerance for the continued study of ambiguous or "irrelevant" data or phenomena. The judicial fact-finding function may often complement these and other forms of fact-finding. For example, litigation may furnish policymakers and members of the public with information about the existence of a problem, but nonjudicial investigation, research, and study may be required to decide upon and implement the best long-range solution to the problem.[148]

Judicial fact-finding, when it includes fact determination, is also distinct from that performed by other entities in a fourth respect: the factual decisions are made by a neutral, detached third party—either a judge or jury, or in some cases both. Although some other fact-finders, including research and educational institutions and some journalists and media organizations, do seek to be neutral and independent, these characteristics are safeguarded in the judicial context to an extent that is not duplicated elsewhere.

Professor Fiss points to this neutrality and independence as characteristics which make the courts able adjudicators of constitutional norms.[149] Within the adjudicative process, these characteristics are also key in enabling the courts to fulfill their fact-finding role. The determination of facts by a detached person or persons, via procedures designed to minimize the possibil-

146. There are cases, however, in which the Supreme Court makes factual determinations without providing for a testing of the facts, or even the submission of argument about facts, by opposing parties. *See supra* notes 95-100 and accompanying text.

147. For a critique of the adversary process as a method of determining and conveying the truth, see J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80-102 (1949), discussed *infra* notes 163-66 and accompanying text.

148. One illustration of this can be found in the litigation that focussed public attention on the problems encountered by schoolchildren who speak a language other than English. *See* Lau v. Nichols, 414 U.S. 563 (1974). Educators and public policymakers are still working to develop effective ways to address the educational needs of these students.

149. Fiss, *supra* note 4, at 12-14.

ity of bias, is likely to result in a set of findings that the parties, the court, and the public view as legitimate.

Such perceived legitimacy, derived from the determination of facts by a neutral and independent decisionmaker, might be viewed as a fifth characteristic of judicial fact-finding. Fact-finding by other governmental and private institutions may well be perceived as legitimate and untainted by interest or bias, depending on the subject matter and the methodology employed. In this respect, judicial fact determination is not entirely distinguishable from fact-finding by other entities. Nevertheless, perceived legitimacy seems to be a well-established characteristic of judicial fact-finding[150] and one which is essential to each of the three functions that fact-finding fulfills: 1) furnishing a basis for adjudication, relief, and enforcement; 2) providing a basis for constitutional and statutory interpretation, and the development of common law principles; and 3) supplying the public with a source of tested facts.

To reiterate briefly, one can identify five ways in which judicial fact-finding is distinct from the fact-finding performed by other institutions and groups. These are ways in which judicial fact-finding is particularly likely to provide the public with facts that will prove useful in holding institutions accountable and in planning public policy. First, judicial fact-finding is *accessible* to a broad, diverse range of individuals and groups. Second, it is *tenacious*; it permits a detailed and sustained inquiry into the facts. Third, it uses a particular *methodology* in which the significant facts are probed and tested by *opposing parties*. Fourth, it involves a *determination* of the facts by a *neutral and independent* person or persons. Fifth, the judicial process provides a guarantee of *legitimacy* in its fact-finding decisions.

However, judicial fact-finding is not a wholly unique, perfectly configured tool for providing information for public policy purposes. It shares with other forms of inquiry a specific and limited time frame. Although judicial inquiry is frequently more detailed and sustained than the inquiry undertaken in other forums, it is subject to time constraints which can make it at least as limited, if not more so, than that undertaken by other fact-finders. For example, the parties' need for, and the court's interest in, an expedited disposition of the case may lead to an abbreviated factual inquiry or a decision to forego the trial process altogether. For further example, there are fact-finding methodologies, such as longitudinal studies, that have significant research value but cannot be performed in a judicial setting because the time frame for inquiry in that setting is shorter than the studies would require.

A second limitation is that judicial fact-finding is often performed on a *post hoc* basis. As noted above, some commentators have asserted that courts are generally best-equipped to engage in *post hoc* fact-finding, that is, to deter-

150. Not all observers of the process have viewed the judicial fact-finding as a legitimate process, untainted by interest or bias; *see* the discussion of Judge Jerome Frank's views *infra* notes 163-66 and accompanying text.

mine historical or adjudicative facts.[151] However, it is increasingly acknowledged that courts can and frequently do make prospective or legislative factual determinations, and that indeed they must in order to resolve many controversies.[152] For instance, a court may need facts about what may happen in order to determine whether the Constitution or a law has been violated,[153] or to structure relief.[154] A third limitation on the usefulness of judicial fact-finding in a policy planning context is its narrowness and specificity. Like many other forms of fact-finding, judicial inquiry has a problem-solving orientation. Although this can be a useful aspect of the process, enabling the parties and the court to concentrate on the facts that are key in resolving the case or controversy, it limits fact-finding by narrowing the scope of inquiry to an individual case or a small number of cases. Hence, the picture that emerges, even after a year or more of litigation, can be unrepresentative or piecemeal.[155] This limitation can be offset, however, since even in an individual case, an institutional advocate or a class of plaintiffs may be able to adduce factual information that is broader in scope and more representative of an overall problem.[156] Also, if a particular issue or problem is the subject of a series of cases, litigated over several years, there is a greater likelihood that a clear factual picture will emerge.[157]

Finally, judicial fact-finding does not regularly or consistently provide for the kind of "follow-up" fact-finding that is necessary to evaluate the effects of governmental action and typically associated with policy review. Yet when courts decide cases they often dictate governmental action—either by issuing a direct order, or by sustaining or invalidating agency action. Nevertheless,

151. *Cf.* D. HOROWITZ, *supra* note 80, at 45-51 (questioning courts' ability to make prospective factual determinations).

152. *See, e.g.*, H. HART & A. SACKS, *supra* note 4, at 384; Karst, *supra* note 81, at 75-84; Shaman, *supra* note 81, at 236.

153. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 381-82 (1968) (Court assumed, both factually and legally, that to allow the willful mutilation or destruction of Selective Service certificates would interfere with the smooth and proper functioning of the system that Congress established to raise armies); *see generally* Karst, *supra* note 81, at 84 (among the questions of legislative fact often determined in constitutional cases are the following types of prospective questions: (1) "How much *will* this regulation advance the chosen governmental objective?" (2) "How much more *will* this regulation advance the objective than some other regulation which *might* interfere less with constitutionally protected interests?" (3) "How much *will* freedom (of speech, of commerce, etc.) be restricted by [the] regulation?" (4) "How much more restrictive is this regulation than some other which *might* achieve the same objective?") (emphasis added).

154. For example, in Wyatt v. Stickney (*see supra* discussion accompanying notes 71-76) the district judge needed information both about current conditions at the state mental hospitals and about how certain types of changes would affect conditions there in order to design his remedial order. 334 F. Supp. 1341 (M.D. Ala. 1971); *see also* 344 F. Supp. 373 (M.D. Ala. 1972); 344 F. Supp. 387 (M.D. Ala. 1971), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See generally* Chayes, *supra* note 38, at 1296-98 ("In the remedial phases of public law litigation, fact-finding is . . . clearly prospective.").

155. *See* D. HOROWITZ, *supra* note 80, at 35-45.

156. *See* Fiss, *supra* note 4, at 19-20.

157. *See*, for example, the asbestos litigation discussed *supra* notes 51-57 and accompanying text.

once a case is decided, the court often does not receive or analyze any further information, including information about the effect of its ruling on the parties. Sometimes even in those cases (such as institutional reform cases) where the court retains continuing jurisdiction to administer its decree, the information it receives may be limited. The court may be more likely to learn whether its order is being complied with than whether and in what ways its order is affecting either the litigants or other persons, unless a party seeks modification of the order.

Each of these four characteristics—limited time, *post hoc* perspective, narrowness, and lack of follow-up inquiry—may sometimes restrict the utility of judicial fact-finding as a source of information for the public, particularly for public policy planning purposes. Nevertheless, because of its other attributes, judicial fact-finding has generated, and continues to generate, useful information that is often not produced by other institutions and entities. For this reason, judicial fact-finding plays an important, albeit complementary, role in supplying the public with information. Moreover, this same fact-finding process continues to be the courts' main source of information upon which to base individual case adjudication, the exercise of remedial and enforcement authority, and decisions about constitutional and statutory interpretation and common law development. In each of these respects, the judicial fact-finding process is important, if not indispensable. Why then are several of our judicial policymakers willing to curtail, or even abrogate, the process as part of an effort to promote case settlements or to redirect some categories of cases to nonjudicial forums?

III
POSSIBLE REASONS FOR A WILLINGNESS TO CURTAIL OR ABROGATE JUDICIAL FACT-FINDING

As noted above, several members of the Supreme Court and some members of the Advisory Committee on Civil Rules, as well as some academicians[158] and members of Congress,[159] have recently supported mechanisms to promote case settlements[160] or to remove certain types of litigation from the courts in whole or in part.[161] These changes would substantially curtail or effectively eliminate the judicial fact-finding process (including both discovery and trial). None of the advocates of settlement or of "alternative" forums have identified or discussed the fact that they are promoting these measures at the expense of judicial fact-finding, and it is difficult to ascertain their reasons for doing so. Nevertheless, it is useful to ask how and why some policymakers have become willing to forego the facts.

158. *See, e.g.*, Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889 (1984); Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985).

159. *See supra* notes 2, 29 and accompanying text.

160. *See supra* notes 1, 8-28 and accompanying text.

161. *See supra* notes 29-32, 117-19 and accompanying text.

Four possible reasons are discussed in the following pages. A willingnesss to curtail judicial fact-finding may stem from general skepticism about our ability to ascertain facts accurately, or from a perception that the costs of determining facts in a judicial proceeding are too high. Some judges and judicial administrators support the idea of promoting settlement (even to the detriment of judicial fact-finding) because they believe that the courts can function more efficiently if the number of cases in which judgment must be rendered is decreased and if some portion of the orders that must be entered are based on the consent of the parties. Finally, some individuals or entities may be seeking a curtailment of judicial fact-finding because they want to avoid its consequences: public scrutiny and judicial, or other governmental, regulation of their activities. Each of these rationales for promoting settlement and eschewing fact-finding are discussed below, as are some of the implications of adopting them.[162]

A. Fact Skepticism

Some policymakers may be willing to reduce or eliminate judicial fact-finding because they are doubtful of its worth. Such skepticism about judicial fact-finding may take one of two forms. The first form is doubt about whether the parties and the courts are capable of accurately compiling and determining facts. Skeptics in this category generally assume that facts can be ascertained, but doubt whether our judicial processes, as they have developed, are well-suited to ascertaining them. Judge Jerome Frank, in a 1949 critique of the judicial process, enumerated some of the weaknesses in judicial fact-finding, including the fallibility of witnesses, judges, and juries, and the undue partisanship of lawyers.[163] He pointed out that witnesses may have poor powers of observation, memory, or recollection, may tend to report what happened inaccurately, or may be biased.[164] Judges and jurors may poorly perceive what is reported to them, or may misconstrue such information because of bias.[165] Moreover, according to Judge Frank, the adversary system and the partisanship of opposing lawyers frequently "blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it."[166]

The concerns voiced by Judge Frank have persisted. Thirty-six years later, Judge Jon Newman has reiterated these concerns in an article arguing

162. In a recent article discussing the general decline in support for adjudicatory procedures, including judicial fact-finding, Professor Judith Resnik has identified several factors that may contribute to this diminution in support: fact skepticism, rule skepticism, perceptions of adversarial imbalances and lawyer misconduct, increased caseloads, and a changing conception of the paradigm case for federal courts. *See* Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. — (1986) (forthcoming).

163. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 14-33, 80-102 (1949).

164. *Id.* at 15-21.

165. *Id.* at 22-23.

166. *Id.* at 81; *see also id.* at 80-102.

for a marked restriction of judicial fact-finding processes,[167] and a concomitant elimination of judicial damage awards based on pain and suffering and lost future income (in tort suits) and punitive damages (in all cases).[168] Judge Newman thus concedes, in fact assumes, the relationship between proof of facts and the exercise of the court's remedial authority,[169] and he acknowledges that in most instances the courtroom trial yields "a useful approximation of the truth . . . adjusting disputes peacefully and with a vital aura of legitimacy."[170] He insists, however, that since the process is fallible, we should limit our efforts to improve it and instead try to abbreviate or omit parts of it.[171] Furthermore, he is not convinced that the value of fact-finding procedures has been demonstrated.[172]

The second form of skepticism about judicial fact-finding has a much broader basis. This is skepticism about whether "facts" exist and can be ascertained at all, by courts or by any other type of institution.[173] Those who take this view remind us that the statements we label "facts" are often simply assumptions, value judgements, or theories, legal and otherwise.[174] In its most basic form this viewpoint raises a difficult epistemological question, one that will not be addressed in this article. However, there is considerable evidence to support the idea that many of the factual statements made by courts are actually factual assumptions, normative judgments, or theories about what we should think.[175] Nevertheless, many, if not most, judicial decisions (particularly at the trial court level) contain factual statements that are reasonably separate from value judgments, legal norms, or theories.

Additionally, it is worth noting that judicial fact-finding is not the only process that assumes that facts can be ascertained. The processes of other legal institutions, such as legislatures and executive agencies, also assume that facts are ascertainable, as does the design of our legal rules (both statutory and common law). Our laws generally accord rights and responsibilities on the basis of facts about persons and business entities—facts to be ascertained by our executive officials and judicial forums.

This does not mean that the pertinent facts will be ascertainable in every

167. *See* Newman, *supra* note 30, at 1647-48.

168. *Id.* at 1655-56.

169. For a discussion of this relationship between proof of facts and the exercise of the court's remedial authority, see *supra* text accompanying notes 41-77.

170. Newman, *supra* note 31, at 1648.

171. *Id.*

172. *Id.*

173. *See, e.g.*, Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1169-70 (1985), and materials cited therein. Professor Peller explains this view in the following terms: "[T]here is no way to achieve *closure* with respect to the meaning of expressions or events. The distribution of meaning depends on socially *created* and *contingent* representational conventions."(emphasis in original). *See generally* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286-90 (D. Kairys ed. 1982).

174. *Id.*

175. This is particularly characteristic of some of the Supreme Court's statements about facts. *See* Shaman, *supra* note 81, at 236-42.

case. There will still be instances, for example, in which medical, scientific, or other types of knowledge may not have developed fully enough for the facts to be determined in a judicial proceeding. The *Agent Orange Product Liability Litigation*,[176] brought by Vietnam veterans who alleged injury from the spraying of this herbicide during their service in Southeast Asia, illustrates this difficulty. After the litigation had been pending for several years, but before it was tried, the judge stated that in his opinion it was doubtful "that present scientific knowledge would support a finding of causality."[177] He therefore approved a compromise settlement that provided a limited fund for compensating the plaintiff class members, in amounts that are probably much less than what the plaintiffs could have won if they had the factual evidence to proceed with and prevail at a trial.[178]

B. Concern About the Cost of Judicial Fact-finding

Some judicial policymakers may be willing to eschew judicial fact-finding because they believe that it costs too much. Large complex cases (such as the *Agent Orange* case) and suits against public institutions (such as police departments) are often cited as examples of litigation that is too costly.[179] For some policymakers, this concern about expense is also related to a certain amount of skepticism about the efficacy and worth of judicial fact-finding.[180] Others acknowledge the effectiveness of the judicial fact-finding process, but nevertheless think that it is often too expensive, for both the litigants and the courts.

In these respects, the calls for more case settlements and the referral of cases to nonjudicial forums can be viewed as an extension of the push for "discovery reform." Proponents of discovery reform, proponents of settlement, and proponents of nonjudicial dispute resolution all contend that fact-finding, whether it be during discovery or at trial, consumes too many resources. One proposed method to reduce the costs of discovery is to directly limit its use (i.e., by limiting the number of interrogatories or depositions,[181] or by sanctioning their inappropriate or excessive use[182]). Another approach

176. *See generally In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984) (describing the litigation and tentatively approving the proposed settlement).

177. *Id.* at 775; for the judge's review of the available information on the causality issue, see 597 F. Supp. at 775-99.

178. *Id.* at 767-68, 857. Professor Sugarman characterized the settlement in these terms: "A $180 million settlement of the [Agent Orange] cases was reached on the eve of trial. Without deducting plaintiff legal fees and other costs, this would amount to an average of $1500 per plaintiff when spread over an estimated 120,000 claims (to use a frequently employed figure)." Sugarman, *supra* note 158, at 598.

179. *See, e.g.*, Sugarman, *supra* note 158, at 598 (commenting on costs in the Agent Orange litigation); City of Riverside v. Rivera, 106 S. Ct. 5 (1985)(Rehnquist, J.) (granting stay of order for attorney's fees totalling $245,456.25 in a police misconduct case, on the ground that the fee award was "disproportionate" to the monetary judgment obtained—$33,350).

180. *See, e.g.*, Newman, *supra* note 30, at 1645, 1647-48.

181. See, for example, Judge Newman's proposal that parties be limited to five to ten interrogatories and two or three depositions. *Id.* at 1650-51.

182. See, for example, the 1983 amendment to Rule 26 of the Federal Rules of Civil Proce-

is to restructure the judicial process so that the opportunity for discovery is virtually eliminated (as the proponents of more case settlements urge), or so that significant numbers of cases are channelled to nonjudicial forums, where the tools for evidentiary development are more limited and the fact-finding processes more restricted. The latter methods assume both a pervasive problem and a need for a sweeping solution.

But there are those who think that the case for broad scale discovery reform has not been made. As Professor Jack Friedenthal pointed out in 1981, it is quite possible that the recent assumptions that discovery is too costly and is often abused may be only that—assumptions.[183] Professor Marc Galanter has suggested that those judges, academicians and practitioners who seek reform of "discovery abuse" are mislabelling a phenomenon that occurs in a very small number of cases as a widespread problem.[184] As Professor Galanter explains, these critics tend to have a limited and fragmentary view of the legal system because they are attuned to only the top level of the system—appellate courts, federal courts, and the small segment of law practice that represents large clients in large cases.[185] Moreover, much of their research and writing on excessive litigation and abuse of the litigation process has been characterized by speculation and undocumented assertion.[186]

Furthermore, before we conclude that the judicial fact-finding process is too costly, we should examine the contentions about cost more closely. A detailed and thorough examination is beyond the scope of this article;[187] however, a couple of points are worth noting. First, complaints about the cost of the judicial process, and proposals to revise that process in a way that will reduce or eliminate fact-finding, often emanate from institutional defendants and from those who regularly represent them.[188] But most of the defendants who voice these complaints and support these proposals do not themselves bear the costs of judicial fact-finding or the costs of other parts of the adjudicative process. If the defendant in a case is a government entity, or a business that deducts its legal expenses as a cost of doing business, then to a substantial

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dure, requiring counsel's certification of a discovery request, and providing for sanctions if a certification is made in violation of the rule. FED. R. CIV. P. 26(g).

183. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 813 (1981) (those who have studied the problem have found that the frequency of discovery abuse is greatly exaggerated by persons seeking discovery reforms).

184. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61-62 (1983).

185. *Id.*

186. *Id.* at 61-69.

187. For a useful presentation of empirical research on the costs of litigating cases in the "middle range" of civil disputes, see Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

188. *See, e.g.*, the 1983 report issued by the Institute for Civil Justice of the Rand Corporation criticizing the costs of asbestosis litigation, and Brodeur's discussion of the report and of Rand's funding from institutional defendants. P. BRODEUR, *supra* note 40, at 301-02.

degree these costs are borne by members of the public.[189] It may be that some of the institutional defendants who complain about the costs of our current adjudicatory procedures are in fact seeking to limit or avoid the use of those procedures to adjudicate liability, not simply to contain their legal costs.

Second, although government entities frequently complain about the costs of fact-finding and other legal expenses in the cases they defend, these same governmental entities are willing to incur significant costs to ascertain facts that are viewed as a necessary basis for the exercise of the state's coercive power. For example, few if any complaints are voiced about the costs of grand jury proceedings, or tax investigations and fraud prosecutions brought by the Internal Revenue Service. This suggests that more than simple "cost consciousness" is at issue when entities who are regularly defendants in civil litigation advocate substantial procedural changes, and curbs on fact-finding.

Those who advocate more and earlier case settlements as a means of curbing the "excessive" use of discovery propose a solution that far exceeds the scope of the problem. The adoption of settlement mechanisms and incentives of the type contained in the recent rule 68 proposals will not only foreshorten the parties' factual investigation, but will also eliminate entirely the judicial role in fact-finding. This sacrifices some of the distinct advantages of the process, such as the neutrality and independence of the fact-finder. Both the parties and the public will be left with whatever facts the parties can glean before a Rule 68 offer is made, but without an unbiased, detached determination of the facts relevant to disposition of the case or controversy.

Even those policymakers who assert that the current procedures of discovery and trial are generally too expensive nevertheless believe that in certain categories of cases these procedures are indispensable and the expenditures are justified. For example, Arthur Liman, a member of the Advisory Committee on Civil Rules, stated at a 1985 hearing on the rule 68 proposal that the issues to be tried in libel cases are probably important enough that libel plaintiffs would and should continue to seek trials, even if other parties in civil litigation should be encouraged to settle more cases earlier.[190] Mr. Liman commented at a time when the *Sharon v. Time, Inc.* libel trial had just ended[191] and the *Westmoreland v. CBS* libel trial was proceeding[192], each at a substantial cost.

189. If the defendant is a business entity, it may deduct legal expenses as a cost of doing business pursuant to the tax code. 26 U.S.C. § 162(a) (1982).

190. *See Hearings on the Proposed Amendments to the Federal Rules of Civil, Criminal and Appellate Procedure and the Proposed Amendments to the Rules Governing Proceedings Under 28 U.S.C. 2254 and 2255*, at 18-19, 71-72 (Feb. 1, 1985) [hereinafter cited as *1985 Washington, D.C. Hearing*].

191. *See Time Cleared of Libelling Sharon, But Jurors Criticize Its Reporting*, N.Y. Times, Jan. 25, 1985, at A1, col. 2; *see also* Sharon v. Time, 599 F. Supp. 538 (S.D.N.Y. 1984) (describing litigation briefly and ruling on pretrial issues); 575 F. Supp. 1162 (S.D.N.Y. 1983) (denying motion to dismiss).

192. *See Jurors in CBS Case Get Preview of Summations*, N.Y. Times, Feb. 1, 1985, at B4, col. 1; *see also* Westmoreland v. CBS, Inc., 596 F. Supp. 1170 (S.D.N.Y. 1984) (denying defendant's motion for summary judgment). The Westmoreland lawsuit was dropped by the plaintiff

Nevertheless, he chose to single out that category of cases as one that should be exempted from increased pressures to settle. In this respect, he implicitly acknowledged the value of fact-finding in at least one category of cases.

Opinions among policymakers also differ substantially as to which categories of cases should be subjected to increased settlement pressures. For example, Chief Justice Burger implied in *Marek v. Chesny* that civil rights cases should be settled more frequently.[193] In discussing their rule 68 proposal, members of the Advisory Committee on Civil Rules expressed no opinion as to whether civil rights cases should be settled more frequently, but did point to product liability, other tort cases, and maritime cases as ones in which they believed the proposal would have a salutory effect.[194] It is not surprising that opinions among judicial policymakers vary as to which cases are more or less "worthy" of full discovery and trial procedures, and which ones "ought" to be settled. It is surprising, however, that the same policymakers who recognize the value of fact-finding in at least some case categories have sought to impose "reforms" (such as the rule 68 proposal) that would sharply reduce or eliminate fact-finding in virtually all types of cases.

This curtailment of the judicial fact-finding process will, as its supporters assert, save litigants' and courts' resources in many cases. However, unless and until undue cost and over-use of the judicial fact-finding processes have been demonstrated as problems in a wide range and large number of cases, we should be hesitant to endorse the kinds of sweeping "solutions" embodied in the *Marek v. Chesny* ruling, the rule 68 proposals, and many of the proposals to redirect cases outside the judicial system.

C. A Way to Reduce Judicial Workload

Some judges and policymakers may be willing to promote case settlements, even if it means foregoing fact-finding, in order to reduce the judicial workload and improve efficiency. This reduction can be achieved by disposing of cases on a consensual basis, rather than by imposing judicial rulings, and by reducing the amount of judicial resources that are devoted to each case. Furthermore, some assert that if the overall workload of the courts is reduced but their resources are maintained at the same level, then judicial delays can be reduced and judicial handling of cases improved.[195] Hence, public respect for the courts will increase.[196]

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several weeks later before the trial concluded. *See A Joint Statement Ends Libel Action by Westmoreland*, N.Y. Times, Feb. 19, 1985, at A1, col. 6.

193. 105 S. Ct. at 3017-18. *See also* Evans v. Jeff D., 106 S. Ct. 1531 (1986) (Stevens, J.) (again citing the value of settlement in civil rights cases).

194. *See 1985 Washington, D.C. Hearing*, *supra* note 190, at 18-19.

195. For an example of this type of thinking, see the memorandum by Judge Mansfield and Professor Miller urging Advisory Committee members to redesign and adopt the proposal increasing Rule 68 sanctions against parties who reject settlement offers, *supra* note 27. *See generally* Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1980).

196. *See* R. Mansfield & A. Miller, *supra* note 27.

But at some point in the effort to promote case settlements, serious problems arise which may interfere with or outweigh the objectives cited above. An excessive emphasis on case settlements, to the detriment of judicial fact-finding, may undermine the courts' ability to exercise their authority in the future. For example, in a wide variety of cases, the detailed factual predicate that may have seemed dispensable at the time when a settlement or consent decree was signed will turn out to be important later. If circumstances change, or new problems not covered by the consent decree arise, the court and the parties may need a set of detailed factual findings as a basis for judicial modification of the decree. As noted above, this occured in *Firefighters Local Union No. 1784 v. Stotts*,[197] where the Supreme Court decided that the district court was without authority to provide minority firefighters with protection from layoffs because the parties had not specified this protection in their consent decree and the court had not, at an earlier stage, made the type of detailed findings of fact necessary to support it.[198]

As this example suggests, it is short-sighted for the courts to eschew fact-finding in many cases, unless we want to drastically curtail their adjudicatory role. Many forms of judicial action, if taken without a factual foundation, may be reversed on appeal and may lack legitimacy from the public's perspective. For this reason, judges and policymakers who generally agree with the current ambit of judicial authority should reject proposals that overemphasize the desirability of case settlements at the expense of judicial fact-finding.

D. Another Form of Deregulation

Some judicial policymakers, public officials, and academicians may be willing, or even eager, to curtail judicial fact-finding as a means of avoiding its implications. For example, one may seek to avoid the imposition of a judicial remedy in a particular case or type of case. Without a factual predicate, the imposition of a judicially-designed remedy is unlikely. For further example, one may wish to forego fact-finding so as to avoid a judicial, and public, pronouncement of fault, liability, or responsibility. Similarly, one may eschew fact-finding in order to avoid private or public pressure for additional judicial or other government involvement in a particular controversy or problem.

In these respects, current pressures to convert the judicial role from fact-finding and adjudication to settlement facilitation, and to curtail or eliminate the exercise of judicial authority in certain categories of cases, can be seen as another aspect of the current advocacy of deregulation and decreased government involvement. As Professor Milner Ball has pointed out in commenting on efforts to promote "alternative dispute resolution," such efforts can be viewed as "another form of the deregulation movement, one that permits private actors with powerful economic interest[s] to pursue self-interest free of

197. 104 S. Ct. 2576 (1984).
198. *Id.* at 2586-88.

community norms."[199] Professor Fiss has suggested recently that the proponents of alternatives to litigation may be seeking not simply to reduce the caseload of the judiciary, but also to insulate the status quo from reform by the judiciary.[200] In these respects, deregulation may be one of the explicit aims of policymakers who advocate increased pressure to settle cases; in any case, it is a probable result of increased settlement pressure.

How will the *Marek v. Chesny* ruling and proposals such as the one to amend rule 68 if adopted, deregulate the controversies before the courts? After *Marek v. Chesny*, a plaintiff will still be able to file an action alleging that her rights have been violated under 42 U.S.C. Section 1983 or other civil rights statutes.[201] However, immediately after that action is filed, the defendant can seek to avoid judicial fact-finding and adjudication by tendering either a single low settlement offer, or a series of low, but slightly increasing offers, pursuant to rule 68.[202] The plaintiff must either accept one of those offers or proceed at the risk of not recovering a statutory award for attorney's fees.[203] If the changes of the type proposed in rule 68 were to be adopted, the plaintiff will be required to accept an even greater risk to proceed: the risk of not only forfeiting her own entitlement to statutory fees, but of also having to pay whatever attorney's fees are incurred by her opponent after the date of the offer.[204] As a consequence of these kinds of pressures, many plaintiffs will choose not to continue to litigate, and over time, some number of potential litigants will decide not to file actions at all.[205] The number of cases in which the federal courts are asked to interpret, apply, and enforce federal statutes and constitutional norms will probably decline. The amount of factual information about civil rights problems available to the public will decline as well. This might also result in less public pressure to protect and advance civil rights.

Nevertheless, the majority in *Marek* articulated a different and more favorable view of how encouraging settlement would affect those persons seeking enforcement of civil rights laws. Chief Justice Burger opined that many civil rights plaintiffs would benefit from the offers of settlement encouraged by rule 68:

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199. Professor Ball was quoted in McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 n.33 (1985).

200. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985).

201. This assumes that the plaintiff will still be able to locate counsel willing to file the action on her behalf, notwithstanding the diminished incentives for counsel to do so in light of the Supreme Court's *Evans v. Jeff D.* ruling (discussed *supra* notes 20, 145) or will be able to proceed *pro se*.

202. *See* comments in Justice Brennan's dissenting opinion in *Marek*, quoted *supra* note 16.

203. *See supra* text accompanying notes 8-14.

204. *See supra* text accompanying notes 21-23.

205. The proportion of potential litigants who decide not to file actions at all may be increased by difficulties that plaintiffs will have in finding counsel subsequent to the Supreme Court's ruling in *Evans v. Jeff D.* (allowing defense counsel to condition settlement offers upon a waiver of attorney's fees), discussed *supra* notes 20, 145, 201.

> Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.[206]

These are broad assertions and, at the least, seem to assume a model of civil rights litigation in which once the complaint is filed and a settlement offer is made no party to the litigation has a need to seek judicial action or assistance. Such a model is not descriptive of many civil rights cases in the courts. It cannot be said, for example, that the consent decree in *Stotts* "served the interests" of the plaintiff class members when they later sought judicial assistance in retaining their jobs in the face of threatened layoffs.[207] Although the consent decree may have initially enabled them to avoid "the burdens, stress, and time" of further litigation, it did not provide the factual predicate that the Court later viewed as essential to remedial action by the district court.[208]

How will proposals to redirect from the courts, certain kinds of cases, claims, and proof away from the courts contribute to deregulation in the judicial branch? These proposals will directly reduce the number of cases that the courts must adjudicate, and the scope of their adjudication in some case categories. To that extent, at least in terms of judicial involvement, the actions of the defendants in these cases will be deregulated. Whether this will be a complete deregulation, however, depends on the agencies and tribunals to which these cases are redirected, and upon the rules which these newly assigned "adjudicators" use to resolve the cases. For example, if occupational health claims are removed from the courts and assigned exclusively to state workers' compensation agencies where fact-finding as to cause or responsibility is eliminated and compensation is paid from a general fund or public monies,[209] then the business organizations who formerly defended against these claims in the courts will no longer be regulated through either the courts or the alternative "adjudicators."

Proponents of deregulation, or "de-adjudication" as it might be called, may be willing to forego judicial fact-finding because they view the cases the courts handle as private disputes that represent only a temporary disruption of an otherwise harmonious relationship between two parties.[210] If those two parties can be persuaded to settle or resolve their dispute, and if it and similar disputes are unlikely to recur, then a detailed inquiry into the facts surrounding it may be unncessary. This view of contemporary litigation may accu-

206. 105 S. Ct. at 3018.

207. *See supra* discussion of *Stotts*, text accompanying notes 58-62.

208. *Stotts*, 104 S. Ct. at 2588-89.

209. *See* proposals cited *supra* notes 29-32.

210. Professor Fiss has suggested this in *Against Settlement*, 93 YALE L.J. 1083 (1983).

rately characterize only a small number of cases.[211] Yet it is essentially the model that is employed by many settlement or "alternative resolution" advocates.[212]

CONCLUSION

Judicial fact-finding currently serves three important functions: 1) providing a basis, in individual cases, for adjudication, relief, and enforcement; 2) supplying a foundation for constitutional and statutory interpretation, and for the development of common law principles; and 3) furnishing the public with a source of tested facts, which may be useful in public policy discussion and planning. Detailed and comprehensive fact-finding does not occur now in every case before the courts. Many cases are settled or otherwise disposed of after only a limited amount of informal fact investigation and discovery; others are settled or disposed of after fuller factual development but before trial and a determination of facts by the judge or jury. Nevertheless, the number of cases in which fact gathering and judicial fact determination occurs and the extent to which these processes occur may be significantly reduced if procedural mechanisms to promote more settlements and redirect cases to nonjudicial forums with abbreviated fact-finding process are adopted.

We should not adopt procedural mechanisms of this type until we have ascertained that: 1) a need for these procedural devices has been demonstrated; and 2) these measures would not reduce the overall availability of judicial fact-finding to a level at which it no longer serves its current functions. Admittedly, it is difficult, if not impossible, to identify the reduced level at which judicial fact-finding would no longer serve these functions adequately. The foregoing analysis of the purposes served by judicial fact-finding processes does not demonstrate that these processes must be maintained at precisely their current level, or that they are indispensable in any particular case. Arguably, the foregoing analysis suggests that it would be desirable to have fact-finding in a larger number of cases and/or to increase the amount of fact-finding in some cases. But that is not the purpose of this article. Rather, the purpose here is to point out that fact compilation and judicial fact determination are highly useful activities and that if we *substantially* reduce the group of cases in which these processes occur now we will be curtailing or eliminating valuable activities.

With the exception of deregulation, the reasons posited for advocating settlement at the expense of fact-finding, or for advocating alternative, nonjudicial forums with little or no fact-finding capacity, do not seem adequate. If our fact-finding tools are imperfect, as some "fact skeptics" believe, then the appropriate response would seem to be their direct improvement, or a restructuring of the fact-finding process, but not the wholesale abrogation of fact-finding likely to result from changes such as the proposal to amend rule 68.

211. *Id.*
212. *Id.*

Similarly, if after obtaining much better empirical analyses than are currently available we conclude that judicial fact-finding costs too much in some cases, then this problem should be resolved in a direct and discrete manner—not by instituting mechanisms that make it virtually impossible to conduct fact-finding in all cases. If the overall judicial workload is too heavy (and again, the information currently available indicates that in many courts it is not[213]), then that problem should also be dealt with directly and in an appropriately limited manner—not by a *de facto* restructuring of the judicial process so that it becomes, without fact-finding, a very different, less functional, and less legitimate system than we have now.

Only if we consciously seek deregulation in the judicial branch does it make sense to significantly reduce or omit the fact determination process. But if this is indeed our aim, then we are restructuring the judicial process and judicial system in ways that are new and quite different from those we have currently. And such changes, including the curtailment in judicial fact-finding, ought to be the subject of open, sustained inquiry and thorough debate. That kind of inquiry and debate about systemic changes was largely absent in the *Marek v. Chesny* decision, was not a major part of the Advisory Committee's consideration of its rule 68 proposal, and has been lacking in the recent public pronouncements about the general advantages of settlement and alternative forums and processes for resolving cases. However, this type of inquiry and debate is necessary before we act upon measures to promote settlement at the expense of fact-finding.

213. *See* Galanter, *supra* note 184, at 6-11, 64-67.