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Dispositions Unsettled: What Tax Court Procedure Can Teach Us About Federal Civil Procedure

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ABSTRACT

In the federal district courts, cases may be disposed of any of three ways: by trial, by motion, or by settlement. The district courts have embraced settlement through managerial techniques, while Supreme Court decisions have granted them expansive powers to dispose of cases on motion. Simultaneously, legal scholars have argued that settlement and dispositions on motion threaten the legal system itself, depriving litigants of the right to jury trials and obscuring the law. Few attempts have been made to reconcile these positions or to provide guidance to the district courts beyond encouraging more jury trials.

This article examines the attitudes of both the judicial and scholarly communities toward the three forms of disposition. It concludes that, far from resting on fundamental issues of law, these groups' conceptions of the relative values of the modes of disposition are simply based on different normative understandings of the purpose of disposition itself. Courts see their goal as resolution, providing results in particular cases. The academic community, on the other hand, considers public vindication of rights, not specific results, as the primary goal of disposition.

As a illustration of the fact that the district courts' and the academy's views merely rest on different conceptions of the role of disposition, this article reviews the very different view of dispositions entertained by the United States Tax Court, which values trial and settlement equally, while disfavoring dispositive motions. Using the practices and attitudes of the tax court as examples, the article then provides prescriptions to enable the district courts to reconcile the goals of resolution and vindication and lend dignity to each of the three forms of disposition.

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I. INTRODUCTION

At a recent presentation to a group of tax controversy practitioners, Judge Maurice B. Foley of the United States Tax Court explained that he and other judges of the tax court would prefer to dispose of cases "on the merits," through either trial or settlement between taxpayers and the Internal Revenue Service, rather than via dispositive motion.[1] This statement is unsurprising to attorneys familiar with the tax court. That court disposes of the vast majority of its cases through one of two alternatives: settlement or trial.[2] Dispositions on motions are relatively rare, even in frivolous cases.[3]

However, Judge Foley's statement undoubtedly comes as a shock to legal scholars or to others used to practices in the United States District Courts. As many commentators have recognized, motions[4] and settlements[5] are both routine modes of disposition in district court cases, while trials are comparatively rare.[6]

The district courts themselves recognize these trends.[7] With

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[1] Maurice B. Foley, Judge, Remarks at American Bar Association Section of Taxation May Meeting (May 7, 2009).

[2] *See e.g.*, CCH, *IRS Intends to Litigate Tax Shelter Cases, Settle Most Other Cases*, FEDERAL TAX WEEKLY, Sept. 7, 2000, http://intelliconnect.cch.com/scion/secure/dps/downloadDocuments?1266540512681&requestidentifier=1266540512357 (stating that in 1999, the Tax Court settled 76.4% of cases, 19.7% were defaulted or dismissed, and 3.9% were tried and decided by the Tax Court); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 405 (1982) ("Eighty-five to ninety percent of all federal civil suits end by settlement."); David M. Trubek et. al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) (stating that approximately 8% of civil suits filed in state or federal court went to trial).

[3] *See* CCH, *supra* note 2 (noting that declaratory judgment cases were not included in the IRS statistics).

[4] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1049-56 (2003) (discussing increase in summary judgment rates); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV.1217, 1224 (2008) (discussing increase in number of motions to dismiss granted). These conclusions should be viewed with caution, however. Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 114, 122-24, 147-49 (2007) (explaining that studies may overstate or understate the rates at which courts dispose of cases via summary judgment).

[5] *See* Resnik, *supra* note 2, at 403 ("Only when informal discussions fail do judges take their places on the bench at formal trials and hearings.").

[6] *See* CCH, *supra* note 2 (in 1999, only 3.9% of cases were tried and decided by the Tax Court.).

[7] *See generally* John Lande, *How Much Justice Can We Afford?: Defining the*

attitudes ranging from caution to enthusiasm, over the past several decades, district judges have adopted a "managerial" stance toward their cases, encouraging early disposition of cases through settlement.[9] While judges' attitudes toward dispositive motions are somewhat less enthusiastic,[10] they, too, form a fundamental part of the district courts' view of the acceptable modes of disposing of a case.[11] The rarity of trials in district courts is seen as a simple fact of litigation.[12]

The most popular view among legal scholars also contrasts sharply with the tax courts. During the same period that courts have become more "managerial" and less trial-focused, the academy has grown ever more distrustful of both settlement and dispositive motions. A majority of legal scholars are suspicious of settlement, viewing it as favoring more powerful litigants and obscuring the law.[14] Dispositive motions are similarly viewed as subversions of litigants', particularly plaintiffs', right to jury trials.[15] Like the district courts, the traditional academic view characterizes settlement and motion practice in the same way; however, in the academic view, they are both negative rather than positive.

There have been few attempts to reconcile the judicial and academic positions, and much scholarship implies that such reconciliation is impossible. Both scholars and courts view the dispute as a straightforward choice between efficiency on the district court side and protection of rights

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Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice, 2006 J. DISP. RESOL. 213 (2006) (discussing District Court clerks' statements regarding incidence of modes of disposition).

[9] *See* Resnik, *supra* note 2, at 403 (judges devote substantial amounts of time to case management thereby encouraging settlement). Professor Rersnik's work remains the most significant and influential examination of the phenomenon of managerial judges. *See also Rex* R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 16-17, 24-26 (2004) (discussing emphasis placed on settlement by judges and the dangers of this trend).

[10] *See, e.g.*, Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (judge describing summary judgment as "a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain").

[11] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (describing summary judgment as part of the just determination of actions rather than a "disfavored procedural shortcut").

[12] *See* Resnik, *supra* note 2, at 403 (asserting that trials or hearing take place "[o]nly when informal discussions fail").

[14] *See* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076-78, 1085 (1984); Perschbacher & Bassett, *supra* note 9, at 23-26.

[15] *See generally* Miller, *supra* note 4; Hoffman, *supra* note 4, at 1242 (criticizing increased grants of motions to dismiss and, as an analogy, describing summary judgment as "extraordinary remedy" because "we are taking a case away from the jury").

on the academic side.[18] However, the tax court's according of equal value to settlement and trial implies that the dichotomy is false.

The real dispute is not between efficiency and trial rights, but between two legal subcommunities' normative conceptions of the legal system's goals. The district courts see their goal as the resolution of cases, preferably as early as possible.[19] Accordingly, the district courts emphasize settlement, the form of disposition that theoretically forces the quickest resolution to cases. In contrast, the focus on trial in the academic view of dispositions implies that the goal of litigating a case is not to resolve the dispute, but to vindicate the rights of the plaintiff. Trial is seen as a public form of vindication that preserves not only substantive rights, but procedural ones as well, including the right to jury trial.

The tax court's wildly different attitude demonstrates that the dispute between the district court and the academic views rests on different theories of the role of disposition rather than absolute realities of the law. It further shows that resolution and vindication are not opposed goals. Instead, they should work together. An ideal scheme should apply all three modes of disposition: trial, settlement, and motion, resolving cases in a way that vindicates legal positions. Dispositions should be fair, consistent, and predictable in order to be respected by actors in the legal system, and in order to be dignified.

This article argues that the tax court's view of disposition provides valuable perspective on the use of the three modes of disposition. By adapting some of the procedures and attitudes applied in the tax court, district courts can avoid the pitfalls highlighted by the academic view, as well as those created by their current emphasis on resolution alone as a goal of the disposition system, enhancing the validity and effectiveness of each of the three forms of disposition.

The article briefly discusses each of the three forms of disposition: motion, settlement, and trial. It then reviews the way the district courts approach each of the three, concluding that the district courts' emphasis on resolution as a systemic goal leads them to devalue motions and, particularly, trials unnecessarily. The article then considers the most

[18] *See id.* at 1007, 1009 (criticizing interest in efficiency as a basis for reducing the number of jury trials); Hoffman, *supra* note 4, at 1267 (describing "the familiar thematic tension between access and efficiency that runs through procedural law"); Lande, *supra* note 7, at 214.

[19] *Id.* at 220 (citations omitted); Resnik, *supra* note 5, at 395 (citations omitted).

popular academic view of disposition. It concludes that this view's emphasis on vindication overstates the importance of jury trials and focuses excessively on the value of argument. The article then considers the tax court's "anomalous" view of dispositions and explains why it might have arisen. Finally, it provides some prescriptions for the district courts to encourage them to grant all three forms of disposition the dignity they deserve.

I. OVERVIEW OF THE THREE FORMS OF DISPOSITION

A. Trial

Of the three modes of disposition, trial has the longest and most hallowed history.[20] While attitudes toward trial vary, it has been praised as an essential means of establishing truth and a bulwark against tyranny.[22] Trial, by its very nature, requires the application of law to fact. Decisions at trial have been praised for their consistency and the deliberation that they reflect.[23]

Though a constitutional right to a jury exists only in some actions in the district courts, most examinations of trial vis-à-vis the other forms of disposition conflate the notion of trial with the idea of jury trial.[25] As various scholars have noted, throughout the nineteenth and early twentieth centuries, courts created a body of evidentiary law and procedural controls that eliminated juries' power to interpret law, limited the evidence juries could consider to material that courts deemed reliable, and even enabled

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[20] Miller, *supra* note 4, at 1077-81.

[22] Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22 (2006); Miller, *supra* note 4, at 1077-78 (citing 3 WILLIAM BLACKSTONE, GEORGE SHARSWOOD & BARRON FIELD, COMMENTARIES ON THE LAWS OF ENGLAND (1840)).

[23] *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehm or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 624-26 (2004) (contrasting the law generated by decisions at trial favorably with that generated by dispositions on summary judgment).

[25] U.S. CONST. amend. VII (limiting the right to jury trial to "suits at common law" in which the amount at issue exceeds twenty dollars); *see* Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506 (1959) (clarifying extent of jury trial rights in mixed cases of law and equity); *see also* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); *see, e.g.*, Miller, *supra* note 4, at 1080-81 (discussing Supreme Court decisions regarding legal and equitable determinations and implying that claims triable by juries are preeminent). Defenses of the right to trial alone, rather than jury trial, are comparatively rare, though various commentators have noted the value of public trials in terms that could apply to non-jury cases. *See, e.g.*, Galanter, *supra* note 22, at 22.

trial judges to overturn verdicts that they found untenable.[29] While these reforms might be said to limit the power of juries, the rationale behind these reforms appear to have been to enhance the existing accountability, consistency, and predictability of the jury trial system.[30]

Although the quality of jury decisions has periodically been criticized,[31] trial, as exemplified by jury trial, remains the paradigmatic form of disposition. Significantly, other forms of disposition are defined in reference to trial, being referred to as "pretrial." Trial remains the most lauded form of disposition, particularly in the academic community, and critiques of the other forms of disposition often rest on favorable comparisons of trial with them.[32]

B. Dispositive Motions

At least in the Article III judicial and academic views, dispositive motions[33] occupy a strange, intermediate state between trial and settlement. Attitudes toward motions are somewhat ambivalent. Some consider them an essential tool for case resolution, while others view them as a shortcut that threatens the validity and primacy of trials.[34] Courts see motions as both time-consuming expenditures of effort and means of resolving cases

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[29] *See, e.g.*, Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 640-41 (1994); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 79-82 (2003); *see also* FED. R. CIV. P. 50.

[30] *Cf.* Molot, *supra* note 28, at 77 (noting that "[j]udges intervened [in the jury trial process] largely at the initiation of the parties, and did so subject to applicable legal standards that were accessible to both sides").

[31] Miller, *supra* note 4, at 1078 n.495 (citing Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 968-69 (1987) (recognizing that "[t]here is something of a tradition of disdaining juries")).

[32] *See generally* Miller, *supra* note 4 (criticizing increased use of summary judgment through advocacy of the importance of the right to jury trial); Molot, *supra* note 28, at 88 (suggesting formalization of non-trial procedures to enable judges to use them in an adjudicative role).

[33] For the purposes of this article, a "dispositive motion" is any motion whose decision formally determines the outcome of a case in the absence of trial. Thus, in practice the term refers to motions to dismiss, particularly motions to dismiss for lack of jurisdiction, *see* FED. R. CIV. P. 12(b)(1), or for failure to state a claim upon which relief may be granted, *see* FED. R. CIV. P. 12(b)(6), and motions for summary judgment, *see* FED. R. CIV. P. 56.

[34] *See generally* Miller, *supra* note 4; *see also* Hoffman, *supra* note 4, at 1262-63 (discussing potentially disproportionate impact of stricter pleading standards on specific types of litigation).

more quickly, while scholars debate their proper role.[37]

Much of this ambivalence probably arises from the comparatively brief and checkered history of dispositive motions as a concept. Motions to dismiss and for summary judgmentare ostensibly creations of the Federal Rules of Civil Procedure.[40] But, their roots lie in the age of code pleading, in mechanisms such as the demurrer.[41] Such mechanisms ostensibly dealt with formal, rather than substantive, aspects of pleadings or other litigation, such as whether a plaintiff had properly alleged each element of a cause of action or even whether claims were pled in specific language.[44] The Federal Rules abolished specialized dispositive motions and moved away from the technicalities of code pleading.[45] As time passed, encouraged by the "liberal ethos" of pleading and disposition, courts believed that the Federal Rules were meant to advance and began to disfavor dispositive motions.[47]

1. The Summary Judgment Trilogy

With regard to motions for summary judgment, this trend ultimately reversed, culminating in the Supreme Court's three 1986 decisions that have

[37] Molot, *supra* note 28, at 45 (noting that educating parties on the merits of their position through summary judgment orders rather than settlement conferences requires a greater expenditure of judges' time and efforts, leading courts to prefer settlement to motion), at 88 (noting incentives for courts to use "less time-consuming alternatives" as opposed to the consistent application of summary judgment standards); *see* Hoffman, *supra* note 4, at 1225 (noting that while a majority of scholars oppose increased use of motions to dismiss, a substantial minority do not); *compare* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007), *and* Wald, *supra* note 10, *and* Miller, *supra* note 4 (all opposing broad use of summary judgment), *with* Lizotte, *supra* note 4, at 108 (arguing that summary judgment cannot be demonstrated to have damaged the legal system).

[40] FED. R. CIV. P. 12(b), 56.

[41] FED. R. CIV. P. 12 (advisory committee's note); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1975 (1989).

[44] FED. R. CIV. P. 12 (advisory committee note) (discussing demurrers and similar devices in context of rule's adoption); *see* Shapiro, *supra* note 39, at 1975.

[45] Shapiro, *supra* note 39, at 1975 (noting that "the elaborate rules of pleading, the prissy limitations on [pretrial practice] were . . . toys for the playing of elaborate and expensive parlor games[,]" and "obstacles to achieving a just and informed adjudication").

[47] Hoffman, *supra* note 4, at 1255 (citing Robert E. Shapiro, *Requiescat in Pace*, 34 LITIG. 67, 68 (2007); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 431-32 (2008)) (discussing "liberal ethos" of pleading); *see* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (adopting strict standards for motions for summary judgment)).

since come to be regarded as a "trilogy" on summary judgment.[48] The first, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[49] required the nonmoving party to produce "persuasive evidence" that its claim was plausible in order to create a genuine issue of material fact sufficient to defeat a summary judgment motion.[50]

The second, *Anderson v. Liberty Lobby, Inc.*,[51] refined this standard and recast it in terms of the jury trial, harking back to the procedural reforms that led to directed verdicts and related mechanisms.[52] A district court may grant summary judgment if "but one reasonable conclusion as to the verdict," a decision in favor of the movant, was appropriate.[53] Conversely, summary judgment should be denied if "a reasonable jury could return a verdict for the nonmoving party."[54] Determining whether a particular verdict would be reasonable in turn required the district court to weigh evidence from both parties so that it could determine how a jury would rule. Accordingly, something beyond a "scintilla of evidence" would be required to establish a claim in the face of a summary judgment motion.[55]

The final case, *Celotex Corp. v. Catrett*,[56] imposed differential requirements for surviving summary judgment on plaintiffs and defendants.[57] Plaintiffs were required to establish each element of their cases to survive a summary judgment motion, while defendants had no affirmative burden of production.[58] More importantly for the purposes of this article, the Supreme Court explicitly described summary judgment not as a "disfavored procedural shortcut," but "an integral part of the Federal Rules as a whole."[59]

Notably, despite these decisions, district courts retain discretion to deny even well-founded motions for summary judgment.[60] This curious

[48] Hoffman, *supra* note 4, at 1259.
[49] 475 U.S. 574 (1986).
[50] *Id.* at 587.
[51] 477 U.S. 242 (1986).
[52] *See id*. at 250.
[53] *Id.* (citing Brady v. S. Ry. Co., 320 U.S. 476, 479-80 (1943)).
[54] *Id.* at 248.
[55] *Id.* at 252.
[56] 477 U.S. 317 (1986).
[57] *Id*. at 321-22.
[58] *Id.* at 323.
[59] *Id.* at 327.
[60] "Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it." Forest Hills Early

contradiction of the trend displayed by the trilogy cases seems to be a holdover from the early days of summary judgment, when it was explicitly viewed by both courts and litigants as an extraordinary form of disposition and a short-circuiting of the trial process, rather than a valid mode of disposition in its own right. [63]

Aside from the legal conclusions that they announced, these decisions had a more abstract but equally important effect on the legal community. They changed not only the way summary judgment is applied, but also the way it is perceived. Prior to the trilogy, summary judgment was an extraordinary remedy, a specialized tool neglected by practitioners and courts alike.[64] The trilogy elevated summary judgment from "a disfavored procedural shortcut" to an integral part of the "'just, speedy, and inexpensive determination of every action.'"[66] As discussed more fully below, later commentators have viewed the Court's statement as a wrongheaded diminishment of the primacy of trial and, with its mention of "speedy and inexpensive" dispositions, the sign of a slide toward efficiency and expediency as the guiding principles of civil procedure.[67]

This conclusion is not irrational, but it overlooks the first portion of the Supreme Court's famous pronouncement. The new summary judgment was not only fast and stamped with the Court's "favor"; it was also "just."[68] By this designation, the Court implied that summary judgment can produce fair, decent results every bit as worthy as the results of trials. Essentially, the trilogy was meant to legitimize summary judgment practice in the eyes of courts and the legal community in general. As discussed below, granting such dignity to a mode of disposition is an essential step in its effective use by the courts.

Learning Center, Inc. v. Lukhard, 728 F. 2d 230, 245 (4th Cir. 1984). *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND MARY KAY KANE, 10A FEDERAL PRACTICE AND PROCEDURE § 2728 (West 3d. ed. 2009) (collecting case pronouncements recognizing that courts have discretion to deny a summary judgment motion "even though the summary-judgment standard appears to have been met").

[63] Some commentators continue to hold this view. *See* Hoffman, *supra* note 4, at 1242 (referring to summary judgment as "an extraordinary remedy"); Miller, *supra* note 4, at 1019-24 (discussing cautious attitudes toward summary judgment in the decades immediately following adoption of the Federal Rules of Civil Procedure); *see also* Section III, infra.

[64] Miller, *supra* note 4, at 1019-24.

[66] *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

[67] *See, e.g.*, Miller, *supra* note 4; Wald, *supra* note 10.

[68] *Celotex*, 477 U.S. at 327.

2. A "Trilogy" for Motions to Dismiss?

At present, the motion to dismiss under Federal Rule of Civil Procedure 12 may be going through a process similar to that undergone by the motion for summary judgment during the period of the trilogy cases. Recently, the Supreme Court has decided such cases as *Bell Atlantic Corp. v. Twombly*[69] and *Ashcroft v. Iqbal*.[70] Commentators and lower courts have debated the significance of these cases and are likely to continue to do so until the Supreme Court provides further clarity in the area.[72] However, one thing seems certain: by raising the requirements a plaintiff must put forth to state a claim, they have made cases more likely to be dismissed on motion. It is too soon to determine what the cases' long-term effects will be. For the purposes of this article, they are more significant for the reactions that they have generated than for any changes in the law that they may have produced.

While the data has not been examined statistically, anecdotal evidence from reported cases suggests that the decisions have rendered district courts somewhat more accepting of motions to dismiss.[73] This acceptance may represent a preference on the courts' part for resolving cases on motion.

In contrast, although academic response to the decisions has been varied, a majority of scholars have criticized the trend that these cases reflect.[74] Such critiques most frequently rely on the importance of notice pleading under the Federal Rules, but the way in which the are stated suggests a more practical rationale.[76] Many argue that a permissive attitude toward motions to dismiss disproportionately prevents meritorious cases, particularly civil rights claims brought by marginalized plaintiffs, from

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[69] 550 U.S. 544 (2007).

[70] 129 S. Ct. 1937 (2009).

[72] *See* Hoffman, *supra* note 4, at 1224-25 (citations omitted) (collecting scholarly discussions).

[73] *See* Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814-15 (2008).

[74] *See, e.g.*, Shapiro, *Requiescat in Pace*, *supra* note 44; Hoffman, *supra* note 4, at 1224-25 (collecting sources).

[76] *See* Brian Thomas Fitzsimmons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scales for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 206 (2007). Some scholars have generated more nuanced criticisms as well. Hoffman, *supra* note 4, at 1225 (arguing that reliance on "liberal ethos" and notions of notice pleading do not adequately respond to pro-*Twombly* arguments and proposing alternative counterarguments).

reaching trial.[77] This position has significant implications for the theoretical basis of the scholarly view of disposition, as discussed in Section III, below.

C. Settlement

Though settlement has undoubtedly existed as long as the concept of a civil action, until relatively recently, it has remained outside the spotlight of both scholarly and judicialattention.[80] Settlement is often characterized as bargaining "in the shadow of the law,"[81] and, as the term "shadow" implies, settlement has historically been viewed as secretive and sometimes disreputable.[83]

Settlement differs radically from both trial and motion in that it occurs off the record, protected from disclosure by a battery of evidentiary rules and other procedural safeguards.[85] Settlements entered on the record specify results; they do not state points of law. [86] Settlements themselves,

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[77] *See* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709-12 (2007) (citing evidence suggesting summary judgment is granted in a disproportionate number of sex discrimination cases and that the procedure is damaging to female plaintiffs in general); Miller, *supra* note 4, at 1052 (describing the use of summary judgment by civil rights defendants as "Pavlovian"); Hoffman, *supra* note 4, at 1258, 1262-63.

[80] The most important early discussion, which continues to set the tone for mainstream scholarly consideration of settlement, is Fiss, *supra* note 13; *See, e.g.,* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994). Early considerations of settlement in the federal courts were generally limited to broad statements of a public policy favoring settlement. *See* Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 37-38 (1996) (quoting St. Louis Mining and Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898); Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910)).

[81] *See, e.g.,* Perschbacher & Bassett, *supra* note 9, at 26 (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)); *see also* Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 55 (2007).

[83] Perschbacher & Bassett, *supra* note 9, at 17-21, 26 (referring to settlements as applying "'shadow' law . . . something . . . drained of law's vitality"); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995) (arguing secrecy of settlements offends democratic morality); Fiss, *supra* note 13, at 1089 (calling settlement "a poor substitute for judgment").

[85] FED. R. EVID. 408 (rendering settlement offers and acceptances, as well as "[e]vidence of . . . conduct or statements made in compromise negotiations[,]" inadmissible).

[86] Scholars have frequently criticized settlement for this reason. Luban, *supra* note 70, at 2648; Perschbacher & Bassett, *supra* note 9, at 21-22, 26, 59-62; Fiss, *supra* note 13,

unlike the outcomes of trials and motions, are, in some sense, extralegal.[87]

Of course, many settlements in the Article III courts undoubtedly take place without the involvement of judges; they are privately negotiated between the parties. However, court-mandated settlements have received more attention from both judges and scholarly commentators. Such settlements came to prominence with the rise of "managerial judging" and scholarly examination of that phenomenon.[88] Because it arose from inquiries into generalized case management, scholarly discussion of settlement vis-à-vis courts usually deals with how courts use settlement to control their dockets and the consequences of its use, rather than the legal principles underlying it.[89]

Interestingly, courts have taken a similar approach to settlement to scholars. Judicial consideration of settlement has focused on outcomes more than on practice and standards.[90] Some courts have considered settlement very extensively, but they have done so in their role as docket managers and, sometimes, as court rule makers, not as writers of case decisions or crafters of law.[91] Even today, with settlement accepted as a fact of litigation, whether grudgingly or enthusiastically, few court rules or decisions describe the contours of settlement.[92] In contrast to the numerous Federal Rules detailing motion and trial practice, not to mention the decisions interpreting them, there essentially is no "law of settlement." Courts have repeatedly explained that settlements are simply contracts between parties, governed by the same principles as any other contract.[93] The existing decisions on settlement primarily deal with the enforcement of

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at 1085; Molot, *supra* note 25, at 43-45 (contrasting summary judgment favorably with settlement for this reason).

[87] *See* Perschbacher & Bassett, *supra* note 9, at 21-22, 26 (arguing that settlement is actively destructive to law).

[88] The leading discussion remains Resnik, *supra* note 5.

[89] *See, e.g.*, Resnik, *supra* note 5, at 379-80, 386-91, 404, 417-31; Perschbacher & Bassett, *supra* note 9, at 26; *but see* Carrie Menkel-Meadow, *Whose Dispute Is It, Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2696 (1995) (quoting Luban, *supra* note 70) (calling for development of a "jurisprudence of settlement").

[90] *See, e.g.*, Lande, *supra* note 7, at 214-16, 221-22, 233-39; *cf.* Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to the Them for Trial*, 2006 J. DISP. RESOL. 335 (2006) (surveying effects of mediation programs on cases assigned to California state judges).

[91] Resnik, *supra* note 5, at 395-400.

[92] Molot, *supra* note 25, at 90-92 (highlighting problems of unfettered judicial discretion with regard to settlement conference imposition and procedures).

[93] Cordray, *supra* note 80, at 9.

established settlements, not how new settlements should be reached.[94] While commentators have decried the fact that dispositions by settlement do not establish substantive law[95] because of their private, contractual basis, settlement dispositions do not establish a procedural law of settlement either.

Instead, what little law of settlement exists in the federal courts is embodied in local district rules that describe the requirements for settlement conferences.[96] Like the scholarly discussions mentioned above, these rules deal with the technical aspects of settlement rather than its procedural contours or substantive content in particular cases. The rules vary widely from court to court.[97] They often provide for conferences to be held before a judge, and often a judge other than the one assigned primary responsibility for the case.[98] Parties are normally required to prepare for such conferences by submitting confidential memoranda to the settlement judge under an order issued by that judge, though the rules do not indicate how the judge should review those memoranda or conduct the conference itself.[99] The rules also vary on the timing and mandatory nature of settlement conferences. Some courts require settlement conferences in every case, often very early in the proceedings.[101] Others provide for such conferences at the suggestion of either party or upon ruling by the judge assigned to the case.[103] Finally, local rules provide for non-judicial means of alternative dispute resolution, such as mediation or arbitration.[104] However, such rules

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[94] *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 378 (1994) (determining that federal courts may not enforce a settlement agreement entered in a case the court has already dismissed); U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994) (holding that mootness as a consequence of during appeal settlement does not justify vacating underlying judgment).

[95] Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1384 (1994) (noting that "[i]n a forum where most cases settle, legal signals may lose clarity").

[96] *See* Lande, *supra* note 7, at 224 (citation omitted) (surveying variety among court assistance regarding settlement procedures).

[97] *See id.* n.62.

[98] *See, e.g.*, D. ARIZ. R. CIV. P. 72.2(a)(5) (providing for settlement conferences to be held before magistrate judges without specifying whether settlement judge may try case); S.D. CAL. R. CIV. P. 16.3(c) (disqualifying settlement judge from trying the case, except upon stipulation of the parties); D. AK. R. CIV. P.16.2(k) (providing for mediation by neutral to be selected by parties).

[99] Authority to be added (discussion of orders).

[101] *See, e.g.*, S.D. CAL. R. CIV. P. 16.3(a), 16.3(l)(6) (requiring settlement conference before judicial officer within 45 days of filing of answer).

[103] *See, e.g.*, D. ARIZ. R. CIV. P. 83.10.

[104] *See* Lande, *supra* note 7, at 224 (citation omitted); *see also* 26 U.S.C. § 651(b) (2010) (requiring courts to adopt local rules implementing alternative dispute resolution

often provide few details on how such proceedings should operate.[105] In contrast with trial and motion practice, lack of uniformity across courts characterizes settlement practice.

With all of this in mind, it is difficult to draw general conclusions about settlement aside from the fact that it is confidential and generally unbound by precedent or procedural rules. As discussed below, this renders settlement the most flexible form of disposition, but it also leads to suspicion that settlement is easily abused.

II. JUDICIAL VIEWS OF DISPOSITION

As discussed above, the legal status of each of the three modes of disposition differs. Trial is hallowed by tradition, as well as extensive bodies of rules and decisions. Dispositive motions, though they arose from a now-discarded age of formalism, have relatively recently received the blessings of the modern Supreme Court. Finally, settlement operates primarily outside the documented scope of the law.

Based solely on the amount of available law, therefore, one might presume that courts would favor trial over motion over settlement in the disposition hierarchy. In practice, courts' attitudes appear to be almost exactly opposite.[107] The preferences courts show in practice, as opposed to the ones they display in the law, are described in this section.

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programs).

[105] Shweder, *supra* note 69, at 57 (quoting Brian J. Shoot & Christopher T. McGrath, *"Don't Come Back Without a Reasonable Offer": The Extent of, and Limits on, Court Power to Foster Settlements*, 76 N.Y. ST. B.J. 10, 10-11 (Apr. 2004)).

[107] The available data are not perfect indicators of judges' preferences; judges' individual opinions vary widely. *Compare* Wald, *supra* note 10 (discussing dangers of summary judgment and calling for more trials), *with In re* Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (asserting that "a bad settlement is almost always better than a good trial"); *see also* Shweder, *supra* note 69, at 60-64 (collecting statements by judges reflecting a variety of attitudes toward settlement). Further, much of the data that could establish judicial preferences is either kept confidential or simply not tracked by the courts. Lizotte, *supra* note 4, at 122-24, 147-49 (noting potential errors in data relied on by scholars to demonstrate increased grant rates of summary judgment); *see also* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). On some level, perhaps one that is more influential than commentators realize, conclusions about courts' preferences regarding disposition may be colored by the observer's perceptions.

While it is difficult to generalize[108] about a group as large as the community of federal district court judges, on the whole, judges favor settlement, accept motions, and disfavor trial.[109] This ranking has been criticized repeatedly by the scholarly community, as discussed more fully below.[110] Scholars generally argue that the courts' attitudes are based on an excessive interest in efficiency.[111] However, as discussed below, these attitudes rest on a wide variety of rationales, not just expediency.

A. Dispositions and Attitudes Toward Them in the District Courts

The district courts' views of disposition are fundamentally driven, or at least justified, by the practical challenges that they face. While scholars have questioned the existence of a "litigation explosion,"[112] the amount of case work district judges must handle is indisputably high. As scholars have explained, over the past several decades, this workload has encouraged district courts to adopt a "managerial" stance toward their dockets, decreasing their involvement with the legal issues in each case and encouraging faster conclusions to litigation.[113] Judges have grown concerned with the strain litigation places on resources, both those of the courts and those of litigants.[114] Judges are particularly distressed by the time expended in resolving pretrial discovery disputes.[115] Courts seek to ensure that they provide adequate consideration to legitimate disputes while spending as little time as possible on those that do not absolutely require

[108] *See* Lizotte, *supra* note 4, at 122-24, 147-49 (noting that available data both overstate and understate courts' predilections toward motion dispositions).

[109] *See infra* Section II and accompanying notes.

[110] *See supra* Section III and accompanying notes.

[111] *See, e.g.*, D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 875-76 (2006) (stating that "[t]he primary justification for summary judgment has always been efficiency"); Miller, *supra* note 4, at 1110, 1113 (citing *In re* Software Toolworks, Inc. Sec. Litig., 789 F. Supp 1489, 1496 (N.D. Cal. 1992)) (describing judicial attitude as "a mindset premised on the assumption that early resolution is the most efficient method of disposing of cases").

[112] Galanter, *Reading the Landscape of Disputes*, *supra* note 107 (asserting that no "litigation explosion" has taken place); Miller, *supra* note 4, at 992-94 (implying claims of a "litigation explosion" are an anti-lawyer political sham); *but see* Resnik, *supra* note 5, at 396-97 (citations omitted) (suggesting that judges have adopted a managerial role in response to increased case loads due to increased numbers of potential litigants, types of cognizable actions, numbers of attorneys available, and possibilities of payment of attorneys' fees for winning plaintiffs).

[113] *Id.*

[114] Lande, *supra* note 7, at 220-22; Shweder, *supra* note 69, at 51; *Twombly*, 550 U.S. at 558-59.

[115] Lande, *supra* note 7, at 220-22; *see also* Resnik, *supra* note 5, at 391-93.

their involvement.[116]

Accordingly, courts generally prefer settlement to disposition on motion and disposition on motion to trial. Some judges have gone so far as to argue that settlement is always preferable to trial.[117] Because settlements can take place with minimal input from judges, they can be the quickest form of disposition.[118] Moreover, settlement lacks the procedural trappings of the other modes of disposition, enabling judges to craft settlements and act to create them with minimal time and oversight.[120] Trial, on the other hand, requires a significant investment of time on a court's part.[121] Likewise, courts' concern over discovery-related motions has spilled over into other areas of motion practice; judges are often wary of dispositive motions, believing them to be legal gamesmanship on the part of litigants rather than requests to resolve a dispute.[122] Judges sometimes view trial and motion practice as a burden imposed on the legal system by litigants' refusal to accept settlement.[123]

Most proposals for disposition reform that originate with courts, therefore, have focused on facilitating and encouraging settlement.[125] Courts have adopted local rules to provide for and manage settlement conferences, as discussed above. Indeed, all district courts have been required to implement some form of alternative dispute resolution program.[126] Some such programs establish highly organized mediation or

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[116] Resnik, *supra* note 5, at 414-15; Shweder, *supra* note 69, at 51 (quoting uncited statement by Judge Preska); *cf.* Hatfield v. Commissioner, 68 T.C. 895, 899 (1977) (disposing of cases lacking legal justification "needlessly disrupt[s] consideration of . . . genuine controversies").

[117] *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. at 740.

[118] Resnik, *supra* note 5, at 414-15.

[120] Shweder, *supra* note 69, at 57 (quoting Brian J. Shoot & Christopher T. McGrath, *"Don't Come Back Without a Reasonable Offer": The Extent of, and Limits on, Court Power to Foster Settlements*, 76 N.Y. ST. B.J. 10, 10-11 (Apr. 2004)).

[121] Lande, *supra* note 7, at 220-21.

[122] Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429, 438 (1991)

[123] *Id.*

[125] This article does not consider disposition reform proposals originating from groups outside the academy or judiciary, such as the various legislative proposals regarding class action litigation. *See* Stephen Shapiro, *Restrictions on Class Action Settlement Agreements*, 12 IUS GENTIUM 175 (2006).

[126] Alternative Dispute Resolution Act of 1998, H.R. 3528, 105th CONG. §§ 2(1)-(3) (1998). Just as courts have devoted increasing attention to alternative dispute resolution, so have scholars. A full discussion of alternative dispute resolution, its virtues, and its flaws lies beyond the scope of this article. For an introduction to the area, *see generally* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION (2d. ed.,

arbitration systems, while others allow for more discretion by the judge assigned to the case and more flexibility for the parties.[127] Most of these programs grant individual judges significant power over settlements.[128] The Supreme Court has contributed to this trend, granting courts only limited authority to revisit settlement agreements and providing little direction on what constitutes proper settlement procedure.[129]

B. Rationales for These Attitudes

The way the district courts view these challenges and the types of reform proposals they generate reflect a variety of theoretical rationales. Fundamentally, however, all these rationales rest on the idea of resolution, the concept that resolving cases is a good in and of itself, regardless of the outcome in any particular case.

1. Efficiency

Efficiency is both the best known and most criticized rationale for the courts' preferences regarding dispositions. Judges have repeatedly stated that they seek to resolve disputes as efficiently as possible.[130] In the judicial view, "efficiency" incorporates two closely connected concepts: speed of disposition and conservation of resources.[131]

First, judges seek to dispose of cases as quickly as possible. As mentioned above, courts are keenly aware of the pressure on their

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Thomson/West 2007) (2001).

[127] *See* The Harvard Law Review Association, *Developments in the Law- the Paths of Civil Litigation: VI. ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives*, 113 HARV. L. REV. 1851, 1858 (2000) (referring to 1999 survey indicating that twenty-two District Courts provide court-annexed arbitration, as opposed to less formalized processes such as judicial settlement conferences).

[128] *See, e.g.*, S.D. CAL. R. CIV. P. 16.5(l)(1), (6), (7) (10) (2008) (detailing powers of judicial officers overseeing settlement discussions)).

[129] *See generally* Cordray, *supra* note 80.

[130] Shweder, *supra* note 69, at 51 (articulating resource concerns of District Judge Preska); RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 124 (1985) (noting that judges generate unpublished opinions because "they are trying to use their limited time as productively as possible").

[131] Many commentators argue against efficiency by arguing against the term as used in economic theory, *see, e.g.*, Rave, *supra* note 97, at 907-09 (noting that summary judgment is not necessarily economically efficient) or against the use of economic theories in law in general; *see also* Miller, *supra* note 4, at 1114-26 (discussing reasonableness standards in the context of jury determinations vis-à-vis summary judgment). However, judicial appeals to efficiency rely on a more general understanding of the term.

dockets.[132] While the concern with speed has been repeatedly criticized,[133] there is nothing wrong with courts' concern with quick dispositions when considered in the abstract.[134] It would surely be senseless to argue that a well-considered disposition after six months of litigation is somehow inferior to an identical, equally well-considered disposition reached after two and a half years of litigation.

Second, efficient dispositions serve the related goal of conserving judicial resources. Courts recognize that they have only a limited amount of time and personnel to devote to each case.[135] The more carefully these resources are applied, the courts believe, the higher the quality of the resulting dispositions.[136] Although conservation of resources can take many forms, in practice, it means that courts seek to have every case disposed of at the earliest appropriate point in its life. Thus, it relates closely to the goal of quick disposition.

It is easy to see how motion and settlement serve these goals better than trial. Trial, particularly jury trial, consumes a great deal of judicial time.[137] Further, as the culmination of the district court litigation process, it inevitably comes later in that process. In contrast, dispositive motions are filed relatively early. Summary judgment, by definition, takes place before trial, and dispositive motions on the pleadings actually precede or supplant a responsive pleading.[139] Additionally, while writing a dispositive order can certainly be time consuming, an order granting a motion, particularly an unpublished order, can be drafted comparatively quickly.[140]

Settlement is even better suited to conservation of court time and resources. Settlement can take place at any point in a case, even before a

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[132] Lande, *supra* note 7, at 220-22; Shweder, *supra* note 69, at 51.

[133] Miller, *supra* note 4, at 1074-77.

[134] Resnik, *supra* note 5, at 417 ("No one can oppose efforts . . . to make dispute resolution quick and inexpensive"); *but see id.* at 415 (expressing doubt that judge-driven means of speeding dispositions generates good for the greatest possible number of litigants).

[135] Shweder, *supra* note 69, at 51; Lande, *supra* note 7, at 220-22.

[136] *See Id.*; Shweder, *supra* note 69, at 51.

[137] Lande, *supra* note 7, at 220-21.

[139] *See* FED. R. CIV. P. 56, FED. R. CIV. P. 12.

[140] UNPUBLISHED JUDICIAL OPINIONS: HEARING BEFORE THE SUB-COMM. ON COURTS, THE INTERNET, AND INTELLECTUAL PROP. OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 107TH CONG., at 13 (2002) (statement of Judge Kozinski); Molot, *supra* note 25, at 88; *but see* Rave, *supra* note 97, at 876 (arguing that disposition by summary judgment may be inefficient in the economic sense).

responsive pleading is filed.[141] Significantly, traditional settlement takes place on the initiative of the parties, not the court, thus conserving judicial resources.[142] Even in cases where the court becomes deeply tangled in settlement discussions, the expenditure of judicial effort may be less than that required to prepare for, schedule, and oversee a trial, or even to review and weigh written arguments in motions. Parties, not courts, prepare settlement memoranda and other documents related to settlement. The expenditure of judicial effort is particularly slight in jurisdictions where a magistrate judge, or an officer other than an Article III judge, handles settlement matters.

Thus, efficiency not only explains why courts prefer motion to trial, but also why they prefer settlement to motion. Both serve to resolve disputes faster and require fewer resources than trial, but settlement, at least in theory, requires the least time and effort of all. Thus, it should be unsurprising, though troubling, that courts may deny dispositive motions in orders devoid of legal reasoning, then pressure the parties to settle.[143]

2. Discretion and the Desire for Fairness

While courts are often criticized for their interest in efficiency, courts are equally concerned with fairness. Judges want to dispose of cases in an impartial manner[144] and to make litigation useful to litigants.[145] Judges want to be fair. That is, judges seek to make decisions that conform to the law as it is or as they believe it ought to be.[146] Interestingly, this desire leads courts to the same preferences for motion and settlement as their concern with efficiency.

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[141] Some jurisdictions demand such early attempts to settle cases.

[142] Molot, *supra* note 25, at 91-93 (discussing problems inherent in settlements that originate with courts rather than parties).

[143] *Id.* at 88 (criticizing practice of issuing "single-sentence opinions denying summary judgment" as evidence that courts are not taking summary judgment seriously as a means of disposition).

[144] *See* Shweder, *supra* note 69, at 60-66 (discussing ethical dilemmas related to settlement faced by various judges); *see also* MODEL JUD. CODE, Canon 3(B)(8) (directing judges to "dispose of all judicial matters promptly, efficiently, and *fairly*" (emphasis added)).

[145] Lande, *supra* note 7, at 223-25.

[146] This subsection presumes that judges are generally and sincere in their desire to achieve fair results and to apply the law as they believe it should be applied. Note that this assumption does not also require one to assume that judges *are* fairer than other legal actors, only that they believe themselves to be. The academic view discussed in Section II rests on the same facts regarding discretion but highlights the dangers posed by judges who do not apply the law fairly or consistently. See Section II, *infra*.

For courts, fairness is inextricably bound with the concept of discretion. That is, discretion is the means by which courts believe that they ensure fairness.[147] The development of judicial controls over juries in the period before the Federal Rules of Civil Procedure, discussed above, illustrates this connection.[149] Courts undertook these reforms not for their own sakes, but because they believed they would generate fairer, more accurate outcomes at trial.[150] The Supreme Court routinely states that various matters rest "in the sound discretion of the trial judge."[151] Again and again, the message is the same: discretion ensures fairness.

With the foregoing discussion in mind, it is easy to understand why the district courts prefer settlement to motion and motion to trial. Despite the jury controls mentioned above, jury trial still affords courts the least opportunity to affect outcomes of any form of disposition. While a judge retains control of the law in a jury trial, facts are weighed at the whim of lay jurors. It is not difficult to imagine a judge mistrusting jurors' evaluation of evidence. Indeed, the law of directed verdicts and judgments notwithstanding verdicts has been crafted to cabin judges' potential desire to act on this mistrust.[154] Considered from a concerned judge's point of view, jury trial affords the most potential of any form of disposition for an unfair outcome that cannot be repaired by the judge's sound discretion.

Dispositive motions, on the other hand, offer judges significant control over a case's disposition. A judge deciding a dispositive motion acts alone, and, aside from any substantive constraints of precedent, the disposition lies within the judge's sole control. From the deciding judge's point of view, the only way the motion can be unfairly decided is if the judge makes an unfair decision, and, of course, the judge will not intentionally decide the case unfairly. From a court's viewpoint, dispositions on motion avoid the potential for wrongful decisions by jurors or even by litigants.

While appellate courts and their pronouncements on the law provide a brake on unfettered judicial discretion over motions, both individual judges and the law itself allow courts to minimize its impact. As

[147] *See* Resnik, *supra* note 5, at 434 (noting that proponents of the benefits of managerial judging consider judicial discretion essential to its success).

[149] Molot, *supra* note 25, at 79-82.

[150] *Id.* at 78.

[151] Scales v. U.S., 367 U.S. 203, 256 (1961).

[154] *See* Fed R. Civ. P. 50(a)(1), (b).

commentators have recognized, judges may choose to deny motions that they find unfounded with sparse orders devoid of content[155] or cast decisions in a light favorable to their conclusions,[156] rendering appellate review less forceful than it might otherwise be. Similarly, as noted above, judicial discretion to deny even a well-founded motion for summary judgment is enshrined in the law.[157] Scholars have argued that the Supreme Court's recent decisions regarding pleadings vest trial courts with similar power over motions to dismiss.[158] Overall, motions afford district courts far more discretion over disposition than trial. Thus, courts' preference for dispositions on motion serves their interest in fairness.

Settlement offers even more discretion to judges and thus, theoretically more potential for fair outcomes.[159] At first blush, this seems counterintuitive. As defenders of the settlement process have repeatedly pointed out, a disposition by settlement reflects, or is meant to reflect, the parties' understanding of a case, not the court's.[160]

While this is correct in the abstract, such a conception of settlement overlooks its procedural aspects. First and most obviously, a case in litigation cannot be settled unless the presiding court approves the settlement, and no law requires a court to approve any settlement. A court concerned with the fairness of the settlement can simply exercise its discretion to refuse approval, thus forcing the parties back into negotiation.

More importantly, as scholars have noted, unlike motion practice and very much unlike trial settlement procedures, even in courts that regulate settlement heavily, are ad hoc and off the record.[161] Although district courts' local rules provide for settlement conferences, these rules

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[155] Molot, *supra* note 25, at 88.

[156] *Cf.* Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1203 (7th Cir. 1987) (Parsons, J., concurring and dissenting) (quoting Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1339-40 n. 172 (1986) (noting that a judge imposing sanctions may write an opinion that casts arguments as frivolous in order to justify the sanction)).

[157] *See* WRIGHT, MILLER & KANE, *supra* note 52, § 2728 nn.11-12 (note the cases cited therein).

[158] *See* Hoffman, *supra* note 4, at 1240-41, 1267-70 (examining theoretical relationships and inconsistencies between dismissal on the pleadings and summary judgment).

[159] Molot, *supra* note 25, at 45-46.

[160] *See, e.g.*, Shweder, *supra* note 69, at 53; Menkel-Meadow, *supra* note 76, at 2689-90.

[161] Molot, *supra* note 25, at 43.

bind the parties, not the court evaluating the settlement. No law tells judges how to consider settlement documents or how to weigh facts, law, and arguments at the settlement stage.[162] Judges may employ a variety of tactics to force parties to a particular resolution or, indeed, to any resolution.[163] Further, because even settlements on the record do not describe or define law,[164] judges need not follow existing substantive law in approving a settlement.

For example, presume a judge believes that the fairest possible outcome for a case is a payment by the defendant to the plaintiff of $100,000, but the substantive law favors the defendant. In this situation, a judge seeking to achieve the fairest possible result can deny dispositive motions without explanation, order the parties to attempt settlement, and then propose the $100,000 payment as a compromise. This example demonstrates the astounding breadth of discretion judges enjoy in the settlement process.

This nearly unfettered discretion explains why courts prefer disposition via settlement to disposition on motion or at trial. As with motion practice, judges need not fear unfair decisions based on other actors' (mis-)apprehension of the case. However, settlement offers judges a further guarantee that their ability to achieve fairness will not be second-guessed, because it occurs off the record and without definite procedural requirements. In settlement practice, unlike motion practice, the court determines procedure and standards as well as reviews the relevant law.[165] For a concerned judge, settlement offers the most discretion of any option and thus the greatest guarantee of fairness.

C. The Judicial Goal for Disposition: Resolution

As discussed above, the judicial concerns for both fairness and efficiency lead courts to prefer settlement to motion and motion to trial as modes of disposition. By considering these preferences and the concerns underlying them, it is possible to make some generalizations about how

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[162] *Id.* at 30. The Supreme Court has rendered a few opinions discussing settlement agreements, but those opinions deal with post-settlement procedures, not the settlement process itself. *See* Cordray, *supra* note 80 (surveying cases).

[163] Robinson, *supra* note 77, at 337-41 (surveying scholarship on the subject and noting dangers of excessive judicial involvement); Shapiro, *supra* note 109, at 175-76 (describing particular judicial actions to force settlement).

[164] *See* Galanter & Cahill, *supra* note 67, at 1384.

[165] Molot, *supra* note 25, at 90-94 (criticizing current settlement practices for these reasons).

courts conceive of their role and the purpose of the legal system as a whole.

Courts view their purpose as the resolution of individual cases. Disposition is a good thing in and of itself. In contrast to the scholarly view discussed below, judges see value both for individual litigants and the class of litigants as a whole in providing conclusions to cases, preferably as promptly as possible. In this view, litigation does and should proceed toward a final, recognizable conclusion. Additionally, as the emphasis on discretion and fairness suggests, judges recognize their own central role in the disposition process. A disposition is not a disposition unless it is approved by a court in its role as a guarantor of fairness. Whether grounded in fairness, discretion, or both, courts implicitly or explicitly acknowledge resolution as their primary goal and the basis for their existence.[166]

III. ACADEMIC VIEWS OF DISPOSITIONS

While judges presume that resolution is the primary and most proper goal of the courts, the general academic view of disposition differs radically.[168] In an inversion of the courts' preferences, the legal academy generally favors trial, distrusts motions, and recoils from settlement.[169] While the most common rationales for this ranking are a desire to protect plaintiffs with meritorious claims[170] and to foster the public role of law,[171]

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[166] Barbara Cosens, *Truth or Consequences: Settling Water Disputes in the Face of Uncertainty*, 42 IDAHO L. REV. 717, 762 (2006).

[168] Like judges, individual scholars vary wildly in their opinions on disposition. It is essential to note that while most scholars of litigation favor trial and mistrust the other modes of disposition, some do not. *See, e.g.*, Richard Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 64 (2007) (supporting increased use of disposition by motions on the pleadings); Molot, *supra* note 25, at 88, 92 (contrasting summary judgment favorably with judicial settlement conferences); Menkel-Meadow, *supra* note 76, at 2687-92 (arguing for the ethical worthiness of settlement). Most notably, many scholars specializing in alternative dispute resolution appear to support settlement. *See, e.g.*, *id.*; Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-95 (1978); Shweder, *supra* note 69, at 53-54 (discussing advantages of alternative dispute resolution over ordinary litigation).

[169] Fiss, *supra* note 13, at 1073, 1078-85 (criticism of settlement and praise of trial); Perschbacher & Bassett, *supra* note 9, at 16-28 (criticism of settlement and praise of trial); Galanter & Cahill, *supra* note 67, at 1339, 1384 (criticism of settlement and praise of trial); Miller, *supra* note 4 (criticism of summary judgment and praise of trial); Hoffman, *supra* note 4, at 1242 (caution regarding expanded use of motions to dismiss and acknowledgement of trial as standard form of disposition).

[170] Hoffman, *supra* note 4, at 1263 (noting that "when a heightened pleading standard is imposed, some meritorious cases will not be filed and, further, some that are filed well be dismissed (or settled for marginal value)"); Schneider, *supra* note 66, at 726; *see also* Miller, *supra* note 4, at 1048.

an analysis of academic views of the three forms of disposition reveals that a rationale as complete as the courts' underlies academic preferences.

A. The Academic Preference for Trial

The most commonly held academic view of dispositions holds that trial should enjoy primacy.[172] A majority of scholars considering disposition argue that motions and settlement have spiraled out of control, preventing meritorious cases from reaching trial.[173] Such scholars often focus on the effects of settlement and dispositive motions in civil rights cases, reflecting an emphasis on socially beneficial litigation and the protection of marginalized plaintiffs.[174] The academy has repeatedly raised the dangers of power imbalances in settlements[175] and the excessive judicial discretion and lack of clarity created by the phenomenon of judges as case managers rather than legal decision makers.[176] Academic discussions of disposition emphasize the role of trial in producing judicial opinions and the idea of jury trial as a public education and good.[178]

Such discussions have generated a variety of proposals for disposition reform, often based on decisional law. Some commentators have argued for a more exacting decisional law with regard to motions to dismiss[179] or motions for summary judgment,[180] to increase denials of such

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[171] Perschbacher & Bassett, *supra* note 9, at 18-20.

[172] *See* Fiss, *supra* note 13, at 1078-85; Miller, *supra* note 4; Hoffman, *supra* note 4, at 1242.

[173] Hoffman, *supra* note 4, at 1263 (arguing against increased use of dispositions on motions on the pleadings); Fiss, *supra* note 13, at 1089 (criticizing settlement); Miller, *supra* note 4, at 1133-34 (criticizing use of summary judgment as eroding historical importance placed on jury trials).

[174] *See, e.g.*, Miller, *supra* note 4, at 1048; Schneider, *supra* note 66, at 771-75 (in context of gender discrimination, arguing that grants of summary judgment inhibit proper consideration of "social issues or issues of public importance").

[175] One of the first to do so was Professor Fiss. Fiss, *supra* note 13, at 1076-78. Later commentators have frequently restated Professor Fiss's conclusions. *See* Perschbacher & Basset, *supra* note 9, at 24 (citing Isaac Shapiro, et al., Priorities, *Pathbreaking CBO Study Shows Dramatic Increase in Income Disparities 1980s and 1990s: An Analysis of the CBO Data*, Center on Budget and Policy, 1 (2001), *available at* http://www.cbpp.org/5 31 01taxthm (last visited August 19 2009) (citing budget study showing increased income disparity to demonstrate that concerns articulated by Professor Fiss are increasingly serious)); *see e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

[176] Resnik, *supra* note 5, at 425-31; Molot, *supra* note 25, at 30-31, 90-92.

[178] *See, e.g.*, Perschbacher & Bassett, *supra* note 9, at 26; Miller, *supra* note 4, at 1077-78; Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22 (2006).

[179] Hoffman, *supra* note 4, at 1225 ("[t]he majority view among academics has

motions and thus the number of cases that proceed to trial. Others have called for more intense judicial scrutiny of settlements, apparently with a similar goal in mind.[182] They usually discuss trial in the context of jury trial, despite the fact that not all claims brought before the district courts carry a right to jury trial.[183]

B. Rationales for These Attitudes

Two philosophical strands run through all these pronouncements. First, scholars view litigation as a guarantee of rights, not a means to resolve disputes. Second, the academic perspective presumes that confrontation itself is a worthy goal.

1. Rights-based Thinking

An emphasis on rights, particularly the rights of claimants, permeates the academic understanding of dispositions. Where the judicial view treats dispositions as goals in themselves, the academic view regards them as incidental: dispositions are only meaningful to the extent that they preserve or deny legal rights.[184]

This characterization reaches far beyond the academic sphere and the issue of dispositions. Historically, the legal community has been preoccupied with rights, viewing their protection as the highest possible moral good in a dispute situation.[185] In this view, litigation is not a means of resolving particular disputes, but a means of advancing or protecting rights.[186] Decades ago, one prominent scholar defined the work of courts as

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been that robust efforts to regulate at the pleading stage are wrongheaded"), 1234-39 (surveying scholarship on motions to dismiss).

[180] *See* Miller, *supra* note 4, at 1133-34; *see also* Lande, *supra* note 7, at 250-51 (noting that courts could increase rates of trial by denying more motions for summary judgment, but that this would be "highly inappropriate").

[182] *See* Perschbacher & Bassett, *supra* note 9, at 24-27 (arguing settlement, particularly judicial promotion of settlement, is destructive to the legal system).

[183] *See Beacon Theaters, Inc.*, 359 U.S. at 510-11. Claims in equity are not subject to the Seventh Amendment guarantee of jury trial. *See* U.S. CONST. amend. VII. Additionally, claims at law may be tried by the court without a jury upon stipulation or motion. *See Beacon Theaters, Inc.*, 359 U.S. at 510-11.

[184] *See* Perschbacher & Basset, *supra* note 9, at 26-27, 32 (decrying the fact that private resolutions of disputes involves the application of "near law," "private law," and "non-law"); Menkel-Meadow, *supra* note 76, at 2669 (noting that "those who privilege adjudication focus almost exclusively on structural and institutional values").

[185] *See* Menkel-Meadow, *supra* note 76, at 2269-71.

[186] *See id.*

rendering legal determinations of the rights of litigants.[187] While the judicial view focuses on the "determination" part of this definition, the academic view focuses almost exclusively on the "rights" portion.[188]

Notably, these rights may be procedural or substantive. Interests in both foster the academic preference for trial and hostility to settlement and motion.

Although scholarly treatments of the forms of disposition rarely discuss substantive law, a strong implication that litigants' (particularly plaintiffs) substantive rights are more important than the outcome of any specific case runs through the literature.[189] One of the characteristic academic criticisms of settlement is that it does not establish or delineate legal rights; rather, it merely resolves a dispute.[190] Similarly, while decisions on motions *may* produce thorough opinions discussing parties' legal rights, they *need* not.[191] In particular, a decision pursuant to a motion that disposes of a case on procedural grounds prevents a court from considering substantive arguments by definition. Because both settlement and motion are comparatively unlikely to address, much less preserve, particular substantive rights, the rights-based academic view prefers trials.

More significant to an understanding of the theory underlying disposition, the academic interest in procedural rights produces the same set of preferences. Repeatedly, scholarly discussions of dispositions refer to preservation of the right to jury trial.[192] This emphasis persists even though many of the claims that may be brought before the district courts are equitable rather than legal and despite a lingering distrust of lay opinion in the legal community.[193] On a purely formal level, this rationale for the preference for trial could be said to rest on the controlling procedural law. The right to jury trial in most legal actions is constitutionally guaranteed,

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[187] *See* Molot, *supra* note 25, at 34-35 (citing Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (defining traditional judicial role as relying on parties to frame disputes and making determinations with reference to an identifiable body of law).

[188] *See* Fiss, *supra* note 13, at 1079, 1083; Shweder, *supra* note 69, at 54-55.

[189] *See* Fiss, *supra* note 13, at 1079, 1083; Shweder, *supra* note 69, at 54-55.

[190] *See* Fiss, *supra* note 13, at 1085, Perschbacher & Bassett, *supra* note 9, at 25-27.

[191] *See* Molot, *supra* note 25, at 88.

[192] *See*, *e.g.*, Miller, *supra* note 4, at 1132-34.

[193] *See* Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1868 (1998) (noting "the popular tendency to disparage juries"); *see also* Miller, *supra* note 4, at 1094 (noting judicial instances of this belief).

while no law grants a right to settlement or disposition on motion.[195] On a more abstract level, it rests on the high status traditionally placed on the right to jury trial within the legal community.[196]

2. The Traditional Preference for Confrontation

Tradition exerts a profound influence on the way attorneys and legal scholars think about litigation, and is undoubtedly one basis for the academic preference for trial. Traditionally, trial is the capstone of litigation,[197] and trial practice makes up a significant proportion of law schools' practical training despite the rarity of trials in practice.[198] Trial dominates popular images of attorneys.[199] Few scholars have openly appealed to tradition as a reason to reject settlement and motion in favor of trial, but it strains credulity to believe that the preference for trial has no basis whatsoever in tradition.[201]

It would be a mistake to view the trial preference's basis in tradition as mere mental inertia on the academy's part. The tradition arises out of a fundamental philosophy that itself forms a separate basis for the preference for trial: a belief in the value of confrontation.[202]

From the confrontation clause to the strong protections accorded political speech under the First Amendment to the very name "adversary system," confrontation and conflict occupy a central place in legal thinking.[204] Argument and dispute are viewed as virtuous for their own sakes, as the best possible means to improve society.[205] Thus, it is unsurprising that the legal community, as represented by the legal academy,

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[195] U.S. CONST. amend. VII.

[196] Lande, *supra* note 7, at 223 ("trials represent the symbolic and sometimes glamorous pinnacle of litigation").

[197] *Id.*

[198] *See id.* at 239-41 (citing STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS standard 302(a)(2), (4) (A.B.A. 2009-10), *available at* http://www.abanet.org/legaled/standards/2009-2010%20Standards.pdf (last visited Aug. 19, 2009) (discussing the role of training in trial advocacy)).

[199] *Id.* at 219, 223.

[201] However, critiques of "managerial judging" argue that the District Courts work best when operating in ways in which they are familiar in their "traditional" role. *See* Molot, *supra* note 25, at 90-94 (contrasting the trial-like features of summary judgment favorably with the unfettered discretion and non-adversarial structure of judicial settlement conferences); *see also* Resnik, *supra* note 5, at 383-86.

[202] *See* U.S. CONST. Amend. VI.

[204] *Id.*

[205] *See* Menkel-Meadow, *supra* note 76, at 2668-71 n.32.

prefers methods of disposition that maximize conflict. Trial, with its public, elaborate, and ritualized nature, not only prolongs the conflict in a district court case to the last possible point; it raises the prominence of the conflict as well.[206] Settlement is regarded with suspicion partly because it rests on the notion of concession, a term that the legal community tends to equate with "surrender."[207] Motions, while they are normally a contest between litigants, terminate the conflict in a case "early," potentially before all possible arguments have been raised.[208] Because it normally occurs late in the litigation process, trial provides the most opportunities for argument of any of the three modes of disposition. As representatives of a profession that values argument, it is easy to see why scholars prefer trial as a mode of disposition.

C. The Scholarly Goal for Disposition: Vindication

Taken together, the academic preference for trial and the rationales behind it represents a very different theory of litigation from the judicial view discussed above. In the academic view, the goal of litigation is not resolution, but vindication.

The term "vindication" demands some clarification. The purpose of litigation, in the academic view, is to establish a legal position that can withstand a competing position.[209] In the paradigmatic case,[210] the legal position in question is the existence of a substantive legal right, its vindication in the face of competing factual and legal arguments. For example, in the academic view, the purpose of a civil rights claim by a plaintiff is not so much to provide the plaintiff with a recovery as to establish, before the court and the community of potential plaintiffs and defendants, that the plaintiff's legal rights have been violated in the factual situation presented, despite the defendant's counterarguments.[211]

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[206] *See* Galanter, *supra* note 21, at 22. Commentators have described the heightened conflict at trial in idealized, even rapturous, terms. *Id.*; *see also* Resnik, *supra* note 5, at 382-83 (discussing images of justice).

[207] Fiss, *supra* note 13, at 1086 ("To settle for something means to accept something less than ideal[.]"); Galanter & Cahill, *supra* note 67, at 1371 (noting that settlement involves sacrificing one part of a position to secure another).

[208] *See* Miller, *supra* note 4, at 1075-76, 1132-34. Notably, Professor Miller repeatedly equates trial with a plaintiff's "day in court," implying that pretrial disposition is not truly litigation in the same sense as a trial. *See, id.* at 1075.

[209] *See* Perschbacher & Bassett, *supra* note 9, at 17-19.

[210] The scholars most critical of non-trial dispositions focus on the effects of such dispositions on civil rights cases or other litigation considered socially beneficial. *See, e.g.*, Schneider, *supra* note 66, at 769-75.

[211] *See* Perschbacher & Bassett, *supra* note 9, at 17-19.

As the discussion above implies, trial serves the goal of vindication ideally. A disposition by trial is, by definition, public, unlike a settlement and potentially unlike a disposition on motion.[212] Trial, because it maximizes confrontation, provides a legal position with the opportunity to prevail against the greatest number of possible arguments. In contrast, settlement, the most doubtful mode of disposition in the academic view, minimizes both confrontation and publicity.[213] Trial provides an ideal vehicle for vindication. For this reason, it represents the pinnacle of disposition in the academic hierarchy.

IV. RESOLUTION VERSUS VINDICATION: COMPETING VALUES

Based on the foregoing discussion, it is possible to draw some preliminary conclusions about the implications of both the judicial and academic views of disposition. The very fact that two such differing views exist at the same time implies that each has a legitimate basis. The academic and judicial views of dispositions are not, from a philosophical rather than a practical standpoint, contradictory or reprehensible.

A. The Value of Vindication

The academic view, promoting trial and thus vindication, has been vigorously defended in the literature of disposition for decades.[214] As mentioned above, vindication dovetails neatly with the legal profession's conception of itself as a guarantor of rights and a promoter of confrontation. Further, vindication obviously benefits the individual litigants who receive it.

Significantly, vindication also provides a source of psychological satisfaction to attorneys. Even if an attorney does not feel he or she is contributing to society by representing a particular client, if the attorney sees vindication of rights and the promotion of abstract due process as personal goals, he or she can still derive some satisfaction from representing any client in any case.[215]

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[212] *See id.*; *see also* Molot, *supra* note 25, at 89.

[213] *See* Perschbacher & Bassett, *supra* note 9, at 22-24; Fiss, *supra* note 13, at 1075.

[214] *See, e.g.*, Fiss, *supra* note 13.

[215] *See* Resnik, *supra* note 5, at 424-31 (discussing role of disposition in promoting due process rights).

In a broader sense, as scholars have implied, decreasing the rate of settlement in favor of the other modes of disposition is likely to increase the number of judicial opinions generated and, thus, increase the amount of precedent available to practitioners.[217] Ideally, the increased amount of law generated by these processes will enable future potential litigants and their attorneys to make more reliable, informed decisions.[218]

Finally, it is essential to note that even the academic view's proponents may carry its terms too far in advancing it. Some criticisms of settlement and motions, carried to their logical conclusions, could be read to imply that trial is the only legitimate form of disposition.[221] Despite implications, however, most proponents of what I have termed the academic view do not argue that all cases should go to trial, but that more trials should occur.[222]

Moreover, and perhaps most importantly, some of the dangers of settlement, and, to a lesser extent, motions, identified by scholars are real. Because motion practice and particularly settlement are not tightly bound by a framework of decisional and code-based law, the dispositions they offer can be erratic.[223] Further, practice in these areas is subject to the whims of particular judges, creating challenges for attorneys and unpredictability for clients.[224] Some judges may seek to force settlements where they are not appropriate.[225] And while it is unclear how much effect a judge-brokered settlement can be influenced by differences in power

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[217] Galanter & Cahill, *supra* note 67, at 1384.

[218] *See id.*; Perschbacher & Bassett, *supra* note 9, at 26-27; *cf.* John B. Snyder, III, *Barbarians at the Gate?: The Law of Frivolity as Illuminated by Pro Se Tax Protest Cases*, 54 WAYNE L. REV. 1249, 1289-90 (2008) (arguing that increased numbers of precedential opinions will educate potential litigants about frivolous arguments).

[221] Fiss, *supra* note 13, at 1085 (arguing that settlement is inherently less just than other forms of disposition); *See* Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 179-80 (2007).

[222] Hoffman, *supra* note 4, at 1218 (arguing for a balance between early disposition of illegitimate cases and adequate consideration of meritorious ones); Lande, *supra* note 7, at 216 (claiming that "no one is proposing a trial rate above [fifty percent] or even close to that"); *see also* Menkel-Meadow, *supra* note 76, at 2691-93 (asserting on theoretical grounds that settlement may be the most appropriate disposition in some cases).

[223] Resnik, *supra* note 5, at 439-40; Molot, *supra* note 25, at 90-94; *see also* Galanter & Cahill, *supra* note 67, at 1384.

[224] *See* Molot, *supra* note 25, at 92-93; Shapiro, *supra* note 39, at 1989-91.

[225] *See* Molot, *supra* note 25, at 92-93; Peter H. Schuck, *The Role of the Judge in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 359 (1986) (noting the risks of "judicial overreaching, judicial over-commitment, and procedural unfairness[]" when judges become involved in settlement).

between parties,[226] academic concern over power imbalances between parties[227] to settlement are not unreasonable.

B. The Value of Resolution

The judicial attitude is equally defensible. Resolution is not, in and of itself, an ignoble goal. Even some scholars who oppose an expanded role for dispositive motions, for example, acknowledge that early resolution of improperly brought cases benefits all parties to the legal community.[228] Faster resolution reduces cost to litigants[229] and enables courts to devote additional time to more complex or legally involved cases.[230]

Further, it can be argued that the academic view's focus on trial, particularly jury trial, mistakes a means for an end. In the controversy over trial, it is easy to overlook the fact that trial is valuable not merely for its own sake, but because it is believed to produce fair, just results.[231] In theory, then, any mode of disposition that produces equally fair, just results is as worthy as trial. The judicial view encourages observers to focus on the validity and worthiness of results, not the forms used to reach them.

C. Dignifying Dispositions: A Synthesis of Resolution and Vindication

Why, then, do scholars castigate courts for focusing on resolution? The answer explains a great deal about the true relationships among the forms of disposition and the real, as opposed to stated, bases for the

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[226] In such a situation, the danger is the imbalance of power between the judge and the parties rather than between the parties themselves. *See* Shapiro, *supra* note 39, at 1989-91. Some have argued that judges can use their power over settlement to force governments, unquestionably the more powerful parties in most cases that involve them, to agree to potentially inappropriate settlements. *See* Shweder, *supra* note 69, at 64.

[227] *See* Fiss, *supra* note 13, at 1076-78; Perschbacher & Basset, *supra* note 9, at 24.

[228] *See* Hoffman, *supra* note 4, at 1218. Notably, although Professor Hoffman devoted most of his article to establishing a nuanced, theoretical attack on increased use of motions to dismiss, he chose "burning up the chaff," an image associated with excising the meritless, rather than one associated with preserving the valuable, as his piece's title. *See id.*

[229] *Id.* at 1231-32 (quoting *Twombly*, 550 U.S. at 558-59); Resnik, *supra* note 5, at 415-17, 422; *but see id.* at 424 (arguing that increased judicial management neither speeds disposition nor reduces costs).

[230] Hoffman, *supra* note 4, at 1232-34 (noting that *Twombly* court justified its conclusions by reference to curbing non-meritorious suits).

[231] *See* Galanter, *supra* note 21, at 22.

academic and judicial views.

Simply put, both views are products of culture and experience. As implied above, both conceptions of disposition are grounded not in the law itself, but in normative self-conceptions of the judicial community and the legal academy. Judges have developed their views of dispositions not through decisional law, but through the practice of case management and meetings among court personnel.[233] Similarly, scholars have developed their views through the exchange of philosophies among themselves rather than through the experience of litigation, forging a relatively united front in their opinions on dispositions.[235]

The very term "legal academy" suggests a distinct, social group, with its own values and norms.[236] Similarly, while judicial attitudes traditionally have not been described as products of a judicial culture,[237] it has been recognized for decades that courts' views on dispositions are products of the shift from judges as decision makers to judges as comprehensive case managers since the 1970s.[238] This should be characterized as a cultural shift among judges, particularly given the fact that judges and their staffs have frequently discussed the matter at meetings of their peer groups.[239] The judicial view is a product of the challenges faced by the federal judiciary as a social unit: high caseloads, shortages of personnel, limitations on the time available to individual judges, and potentially involved pretrial litigation, particularly in relation to

[233] *See* Resnik, *supra* note 5, at 391-402 (discussing advent of judicial management); *see also* Molot, *supra* note 25, at 87-94 (contrasting judicial view of disposition grounded in management with one grounded in adversarial, law-based disputes); *see generally* Lande, *supra* note 7 (discussing attitudes of court clerks).

[235] As noted previously, individual opinions among scholars vary extensively. Hoffman, *supra* note 4, at 1224-25. However, even scholarly positions that contradict the majority view of dispositions have been characterized as parts of ideological communities. *Id.* (characterizing opponents of increased dismissals on motion as "Traditionalist" and proponents as "Reformist" groups).

[236] *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 903 (1991) (acknowledging that social groups have their own identities).

[237] *But see* Shweder, *supra* note 69, at 58-60, 69-70 (noting influence of Judicial Canons on court attitudes toward settlement).

[238] *See generally* Resnik, *supra* note 5 (documenting the rise of managerial judging). Professor Resnik's account remains the leading discussion of the "managerial judging" phenomenon.

[239] *See generally* Lande, *supra* note 7 (discussing attitudes among clerks of the District Courts of the Eighth Circuit); Robinson, *supra* note 77 (discussing attitudes among California judges). In each case, these attitudes were expounded after consultation with other judicial personnel. *See also* Shweder, *supra* note 69, at 60-66 (discussing attitudes of particular judges).

discovery.[240]

Once one recognizes that the judicial and academic views of dispositions differ due to subjective, normative, and philosophical differences between legal communities rather than absolute realities of the law, developing a clearer policy of dispositions becomes far simpler. Resolution and vindication are both valid goals, but an ideal scheme of dispositions should incorporate both goals rather than rejecting one at the expense of the other. Similarly, since no mode of disposition is inherently bad, an ideal scheme should incorporate all three modes.

As scholars have noted, judicial dispositions are at their best when they involve a weighing of law and facts, consistency of results, and clear pronouncements on the law.[241] This conception of disposition incorporates both vindication and resolution. The notion of weighing law and facts recalls the rights-based nature of vindication, while the availability of the clear law and consistency it promotes will make dispositions faster and easier, advancing the goal of resolution. Such a disposition, one that serves both resolution and vindication, can be said to be "dignified." That is, courts, litigants, attorneys, and potential litigants can all perceive that the disposition is coherent and reliable.

As the majority academic view of disposition explains, trial meets these requirements: it is the paradigmatic example of an application of law to fact. It produces decisions that involve clear pronouncements on the law and, ideally, produces consistent results.[243] It is a mode of disposition on which parties and courts can rely to produce acceptable results. Its promotion of resolution and vindication renders it dignified.

The real struggle for the district courts is to grant dignity to the other forms of disposition: settlement and motion. As noted above, the Supreme Court attempted to grant some dignity to motions for summary judgment through its trilogy of cases, by formalizing the process's requirements and designating it "just." However, additional changes to summary judgment procedure, such as requiring the issuance of orders detailing the issues left

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[240] *See* Lande, *supra* note 7, at 216-21, 229-32.

[241] *Cf.* Molot, *supra* note 25, at 34-35 (citing Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-81 (1978) (arguing that courts function most effectively when they rely on parties to frame disputes and make determinations with reference to an identifiable body of law).

[243] *See* Molot, *supra* note 25, at 84-86, 108 (describing judicial rejection of informal trial control mechanisms that did not relate to an identifiable body of law).

resolved and unresolved on all summary judgment motion decisions, would lend additional dignity to the process.[244] The group of cases dealing with motions to dismiss may represent a similar attempt to dignify that form of disposition. Additional proposals for lending dignity to disposition on motion are discussed in Section VI, below. In summation, while disposition on motion may not yet be dignified, one can conceive of ways that it might become so.

Even if one acknowledges that dispositive motions can be a dignified form of disposition, serving the goals of both resolution and vindication, settlement presents a thornier problem. As previously noted, settlement continues to be viewed with suspicion for failure to prominently advance the goal of vindication, while district courts encourage it to excess for its value in achieving resolution.

However, the experience of the United States Tax Court indicates that settlement is not an inherently undignified form of disposition. In fact, as explained in the following section, the tax court's disposition practice not only provides evidence that the academic and district court judicial views of disposition are merely products of specific legal subcultures, it points the way toward changes the district courts could implement to render all three forms of disposition more dignified.

V. THE ANOMALOUS VIEW OF THE U.S. TAX COURT

The surprisingly distinctive attitudes toward the modes of disposition in the United States Tax Court demonstrate the subjective nature of the district courts' and the academy's views of disposition. In stark contrast to both of those views, the tax court favors both settlement *and* trial, while it disfavors motions.[245] This view is particularly surprising given the fact that most of the tax court's procedural rules are identical to those of the district courts. Thus, the differences in attitudes toward disposition in the tax court are not the results of differences in law, but differences in the culture of tax court practice.

A. Dispositions in the Tax Court

The tax court faces many of the same challenges facing the district courts. Most notably, the tax court's caseload is equally heavy.[246]

[244] Molot, *supra* note 25, at 89.
[245] Foley, *supra* note 1.
[246] Authority to be added (Tax Court statistics).

Significantly, one challenge is even more apparent in the tax court than in the district courts: pro se litigation. A majority of tax court petitioners appear without attorneys.[247]

Despite these challenges, the tax court has adopted neither the pro-settlement attitudes of the district courts, nor the academic hostility to settlement in favor of trial. Rather, the tax court has dignified settlement as a mode of disposition while preserving the significance of trial. Despite the obvious power imbalances between the Internal Revenue Service and individual taxpayers, commentators on tax court practice have not expressed the concerns over settlement that preoccupy many surveys of disposition in the district courts. Further, trial in the tax court is relatively common, at least in comparison to the frequency of trials in federal district courts.[248]

The differences in attitude toward disposition between the tax court and the district courts arise from two sources. Some are compelled by tax court procedure. That is, they are grounded in the law in the same way that summary judgment and trial have been formalized in the decisional and procedural law of the district courts. Others arise from the distinctive factual circumstances and customs of tax court practice. As explained below, together, these distinctive circumstances and customs create a culture in the tax court community that is receptive to both settlement and trial.

B. Tax Court Practice: Procedure and Custom

To understand the way tax court procedure and custom affect the tax court community's "culture of disposition," it is important to survey the rules applicable to tax court actions and the informal, but recognized, procedures that guide the life of a tax court case.

The tax court is an Article I court, created by act of Congress.[249] The earliest version of the tax court was known as the "Board of Tax Appeals," a title reflecting the court's role as a reviewer of agency action.[250]

Fundamentally, all tax court actions are governed by the rules of the tax court. These rules are promulgated in a manner similar to the Federal

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[247] Authority to be added (Tax Court statistics); Foley, *supra* note 1.
[248] Authority to be added (Tax Court statistics).
[249] 26 U.S.C. § 7441 (2010) (establishing Tax Court).
[250] Authority to be added.

Rules of Civil Procedure.[251] The tax court's rules generally cover the same topics as the Federal Rules of Civil Procedure; many parallel provisions exist.[252] Additionally, the tax court, as a trial-level court, has also prescribed rules to deal with matters that would be the subjects of local rules of practice in federal district courts.[253] Notably, unlike most district courts, the tax court has not promulgated rules related to settlement or settlement conferences.

Tax court cases experience a similar "life cycle" to federal civil actions, though the process is much more formalized and routine. The majority of cases are commenced by a taxpayer's filing a petition, analogous to a complaint, regarding a particular tax liability.[254] The Internal Revenue Service subsequently files an answer.[255] As in most district courts, the court issues a pretrial order governing conduct of the case; these orders are normally in the form of the court's standing pretrial order.

The tax court's discovery rules closely resemble those of the district courts.[256] However, formal discovery is comparatively rare in tax court practice. Most documentary exchanges are dealt with by informal requests or simple provision of documents to the opposing party without direction.

The most significant divergence in tax court practice from case conduct in the district courts is the formalized nature of settlement discussions. This divergence is particularly surprising because settlement discussions are initiated by a party rather than the court. In the vast majority of tax court deficiency proceedings,[257] the Internal Revenue Service refers the case to its Office of Appeals for settlement discussions with the taxpayer or taxpayer's representative.[258] Specific practices vary

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[251] *Compare* U.S. TAX CT. R. 1, *with* 28 U.S.C. § 2071.

[252] *Compare, e.g.,* U.S. TAX CT. R. 121, *with* Fed. R. Civ. P. 56 (both authorizing summary judgment); *compare* U.S. TAX CT. R. 40, *with* FED. R. CIV. P. 12 (both authorizing presentation of defenses via motion).

[253] *See, e.g.,* U.S. TAX CT. R. 23 (prescribing forms of papers and pleadings).

[254] U.S. TAX CT. R. 20, 30, 33.

[255] U.S. TAX CT. R. 36. Until recently, the IRS was not required to file an answer in "S" cases, but answers are now required in all actions.

[256] U.S. TAX CT. R. tit. VII, VIII, IX, X.

[257] Deficiency cases are brought to determine the amount of a particular tax liability. 26 U.S.C. § 6211. The Tax Court has jurisdiction over a few other types of matters, but deficiency cases remain the most common and most paradigmatic feature of its docket. *See* 26 U.S.C. § 7442 (listing full jurisdiction of Tax Court).

[258] Authority to be added (regulations governing referral to Appeals). This will be in Tax Practice book. Cases that have already been reviewed by the Office of Appeals

from case to case, but most of these settlement discussions involve the taxpayer providing documents to the Internal Revenue Service and the Internal Revenue Service then conceding all or part of the case. Most tax court cases settle at this point.[259] Where district court settlements are often criticized and viewed with suspicion of unfairness by outside commentators, there is little perception of systematic unfairness with regard to tax court settlements.[260]

Cases that do not settle at this stage proceed to trial. As in many district courts,[261] parties to a tax court case must stipulate to any undisputed facts prior to trial.[262] In contrast to district court trials, all trials before the tax court are bench trials.[263] Due to the extensive stipulations created during the pretrial process, most tax court trials are short, lasting only a few hours.[264] Although the available evidence is somewhat sketchy, trials appear to take place in a greater proportion of tax court cases than district court cases. [265] Appeals from tax court decisions are taken to the court of appeals for the circuit in which the tax court is sitting.[266]

Like the local rules of many district courts, the tax court's rules provide for different case "tracks."[267] At a petitioner's option, any case involving a controversy of less than $50,000, exclusive of interest and penalties, for each tax year involved, may be brought as an "S" (or "small") case rather than a "regular" case.[268] Rules of evidence and other procedural requirements are relaxed in "S" cases.[269] While what little evidence exists suggests that "expedited" case tracks are rarely used in the district courts that provide for them,[270] both "S" and "regular" cases are routinely brought

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during the pre-litigation process are not referred in this manner.

[259] Authority to be added.

[260] Authority to be added.

[261] *See, e.g.*, D. NEV. LR R. 16-4.

[262] U.S. TAX CT. R. 91.

[263] *See* U.S. TAX CT. R. 152(a).

[264] Authority to be added (Tax Court statistics).

[265] Authority to be added (Tax Court statistics).

[266] The Tax Court applies the law of the circuit in which it sits, meaning that different decisional law may apply in Tax Court cases depending on where they are brought. *See* Golsen v. Commissioner, 54 T.C. 742, 756 (1970), *aff'd*, 445 F. 2d 985 (10th Cir. 1971).

[267] U.S. TAX CT. R. tit. XVII.

[268] U.S. TAX CT. R. 170.

[269] U.S. TAX CT. R. 174(b). It should be noted that the rules of evidence in the Tax Court are far more relaxed than those applicable in the District Courts, even in regular Tax Court cases.

[270] Lande, *supra* note 7, at 249-50 (finding that expedited case procedures were

in the tax court.[271]

As Judge Foley's statement, mentioned at the beginning of this article, implies, while trials and settlements are common in tax court, dispositions on motions are not, at least in comparison with the district courts.[272] Motion practice is to the United States Tax Court what it was to the district courts before the summary judgment "trilogy" and related decisions: a terra incognita where comparatively little law and experience exist to guide the court and practitioners. Although the tax court has rules providing for several types of dispositive motions,[273] paralleling provisions of the Federal Rule of Civil Procedure,[274] decisions applying and interpreting those rules are relatively rare. Notably, unless a party is willing to travel to Washington, D.C. for a hearing, hearings on motions before the tax court take place during regular calendar sessions – the same sessions at which trials are scheduled to take place.[275] This may mean that the same case is scheduled for both a motion hearing and a trial on the same day. This schedule may be due to the fact that the tax court is not in continuous session in cities other than Washington, D.C.; consolidating court proceedings saves travel time and resources for both the court and parties.

C. Tax Court Attitudes Toward the Modes of Disposition

These circumstances have created a very different view of dispositions among tax court judges from that of their Article III brethren. As Judge Foley's remarks indicate, the tax court views dispositive motions with skepticism, yet favors trial and settlement.[276] Each of the factors discussed above influences this culture of disposition in the tax court.

1. Formalization of Settlement and Trial

The administrative roots of the tax court foster the prominence of settlement in much the same way that the focus on vindication fosters the academic preference for trial. As discussed above, the idea of vindication and the consequent preference for trial arise from the academic focus on

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rarely used in two courts that provided for them).

[271] Authority to be added (Tax Court statistics). These data indicate that the "S" designation is actually the preferred mode of action for Tax Court petitioners.

[272] Authority to be added (Tax Court statistics).

[273] *See, e.g.*, U.S. TAX CT. R. 40, 121.

[274] *Compare* FED. R. CIV. P. 12 *with* U.S. TAX CT. R. 40; *compare* FED. R. CIV. P. 56, *with* U.S. TAX CT. R. 121.

[275] U.S. TAX CT. R. 50(b), 130(a).

[276] Foley, *supra* note 1.

rights and confrontation, while the judicial preference for resolution arises from the preoccupation of district court judges with discretion and efficiency. Similarly, the administrative law traditions of agency examination of factual records and review of agency action in hearings are reflected in tax court settlements and trials, respectively.

Further, the routine nature of settlement conferences with the Internal Revenue Service Office of Appeals has led to formalization of the settlement process. Settlements between the Internal Revenue Service and taxpayers in tax court, unlike settlements in district court civil litigation, operate in a relatively consistent, predictable fashion. Unlike private litigants, the Internal Revenue Service must abide by specific guidelines in compromising a tax liability, including doing so by settling a tax court case.[277] These guidelines prescribe the range of outcomes the Office of Appeals will agree to in a settlement and, thus, the universe of settlements presented to the tax court for approval and its litigants for consideration. A tax court case will not be settled based on "nuisance value" or even based on the expenditure of resources involved in defending it.[278]

As scholars have noted, this type of predictability and consistency is essential to reaching "legal" conclusions.[279] By fostering it, the tax court has made settlement more like trial: a recognizable, coherent framework that produces a consistent range of results that are believed to be adequately fair and just. Far from being the extralegal loose cannon feared by scholars in the district courts, tax court settlements adhere to a set of rules, both written[280] and unwritten but understood by the court and its clients.[281] The formalization of settlement has rendered it similar enough to trial to be acceptable to the court's litigating and judicial community.

This formalization has also "dignified" settlement in the tax court. As previously mentioned, in the district courts, settlement is traditionally viewed as shady, a bolt-hole in which parties can avoid "real" litigation at

[277] Authority to be added (settlement on liability, collectability, effective tax admin.)

[278] *Id.* This contrasts sharply with the world of District Court settlements. The possibility of excessive litigation costs is both a mark against settlement for the academic view, in that it may force inappropriate settlements, Perschbacher & Basset, *supra* note 9, at 23-24, and the motive for the judicial desire to force parties to settle early, *see id.*; Resnik, *supra* note 5, at 423-24.

[279] *See* Molot, *supra* note 25, at 34-35.

[280] Authority to be added.

[281] Such unwritten rules include the Tax Court's presumption that the IRS regularly follows its own settlement procedures.

any point.[282] In the tax court, on the other hand, settlement is simply a choice among modes of disposition; if a case does not settle during the established, pretrial process, it proceeds to trial. Moreover, the lack of direct involvement by tax court judges in the settlement process obviates many of the concerns expressed by scholars and litigants over the excessive involvement of district court judges in attempts to force settlements.[285] In the tax court, settlement is a mode of disposition that both parties and judges can respect.

2. The Problem of Tax Court Motion Practice

Why, then, are motions disfavored by the tax court? First, as mentioned above, tax court motions are rare. Thus, in contrast to the tradition of trial that grounds the academic view of disposition and the tradition of settlement in the tax court, tax court motions lack a historical grounding. Tax court judges have never become sufficiently familiar with them to become comfortable with them.

Additionally, the importance of trial and settlement has stunted the legal development of dispositive motion practice in tax court. Just as scholars argue that the prominence of settlement in district courts forces cases that should be resolved through trial to be settled, hampering the development of law,[286] so tax court assumptions that cases should be settled or tried have rendered it reluctant to review motions.

D. Theoretical Implications of the Tax Court's View

The tax court's views of and experience with disposition demonstrate the value of granting dignity and legitimacy to each of the three modes of disposition. It shows that, contrary to the district court view, trial need not be a slow, costly, disfavored operation and that, contrary to the academic view, settlement need not be a spawning ground for judicial abuses and imbalances between litigants. The case of the tax court should be taken as evidence that any of the three modes of disposition can serve the goals of both the academic and judicial views.

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[282] Perschbacher & Bassett, *supra* note 9, at 17-26; Fiss, *supra* note 13, at 1089.

[285] *See* Resnik, *supra* note 5, at 424-27; Perschbacher & Basset, *supra* note 9, at 25-26; Molot, *supra* note 25, at 30-31, 90-94; Shapiro, *supra* note 39, at 1989-91; Shweder, *supra* note 69, at 71 (listing judicial actions to foster settlement that attorneys find appropriate and inappropriate).

[286] Janet Alexander Cooper, *Do The Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991); Galanter & Cahill, *supra* note 17, at 1384.

The tax court view also suggests two important, theoretical points. First, it implies that the academic view is correct insofar as it applauds the value of trial. Trial does indeed foster the development of new law, clarify existing law, and enhance the predictability of outcomes. Thus, the district courts should consider the academic view carefully when appraising their attitudes toward trial. To some extent, this appraisal may require courts to reduce their managerial stance toward their dockets, at least when a case approaches trial, replacing a pure focus on resolution with some eye toward vindication as a goal.[287]

Second and more surprisingly, the tax court's view suggests that one crucial aspect of the academic view is erroneous. It implies that, while academic praise of the trial is deserved, academic criticism of settlement is not. The consistent nature of tax court settlements and the fact that the tax court and its litigants consider them dignified show that the academic view, like the district court view, is based on a false dichotomy. The fact that trial is valuable does not mean that settlement is not.

Once one recognizes that both trial and settlement may serve the goals of both resolution and vindication, the tax court's attitude indicates that both the district court and academic views about motion practice are wrong. Dispositive motions are neither tools of abuse, as the academic view suggests, nor are they obstacles to resolution, as the district courts sometimes see them. Certainly, the divergence between the tax court's hostility to motions and the murkier attitudes of the district courts and the academy shows that the tax court's view is not necessarily correct. Motions are simply another form of disposition, with the same virtues and dangers as the others. As commentators have pointed out, dispositive motions can be a fair and effective mode of disposition so long as courts adopt certain strategies with respect to them.[289] The following section explains methods for applying those strategies in the district courts and extends them to settlements as well.

VI. SOLUTIONS FOR DISPOSITIONS IN THE DISTRICT COURTS

A. Dignifying Dispositions: The Tax Court Example

As discussed above, the tax court has dealt with trial and settlement so successfully because it has granted them dignity. The tax court

[287] *Cf.* Molot, *supra* note 25, at 45, 89; Resnik, *supra* note 5, at 424-35.
[289] *See* Molot, *supra* note 25, at 88-92.

community, judges, attorneys, and litigants, view both settlement and trial as effective ways to resolve cases and vindicate parties.[290]

Trials in the tax court have inherited their aura of legitimacy from the larger legal community, as well as its own traditions and culture. As mentioned previously, trial remains the paradigmatic form of disposition even for attorneys who prefer not to try cases. Aside from tradition and cultural acceptance, trials draw their legitimacy from the fact that they operate in a consistent fashion, from their recognized set of procedures, and from the way they involve applying law to facts.[291]

The tax court has succeeded in dignifying settlement because tax court settlements display these same features. Because all tax court settlements involve the Internal Revenue Service, they must all comply with a single, recognized set of procedural requirements accessible to any litigant.[292] This compliance fosters consistency among tax court settlements. Further, it requires parties, in creating settlements, to apply these requirements to the specific facts of their cases, mirroring the application of law to fact that characterizes trials.

Additionally, the tax court community has fostered a legal culture that emphasizes both settlement and trial. This is a simple point that deserves emphasis. Litigants in the tax court almost universally recognize that the court expects the parties to make honest attempts at settlement *and* that it will try cases that do not settle. Both are seen as means to the ends of resolution and vindication. This view contrasts sharply with the situation in the district courts, where judges may confuse the means of early settlement with the end of resolution, leading them to force parties into settlement for its own sake rather than as a means of reaching a proper resolution.[293]

The district courts should follow the tax court's lead. In contrast to the academic view, district courts should not entertain more trials for their own sakes. The solution is not to reduce settlements and motion dispositions in favor of trials, but to make settlements and motion dispositions more *like* trials. The district courts should encourage the development of a legal culture that values trial, motion, and settlement

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[290] Foley, *supra* note 1.

[291] *Cf.* Molot, *supra* note 25, at 34-35.

[292] *See id.* at 69-74 (discussing history of judicial reliance on identifiable bodies of law); authority to be added (IRS settlement regulations).

[293] Molot, *supra* note 25, at 92-94; Perschbacher & Bassett, *supra* note 9, at 24; Robinson, *supra* note 77, at 337-39.

equally. The following subsection explains how the district courts might do so.

B. Recommendations for the District Courts

As discussed above, both the academic and judicial communities have proposed reworking the district courts' approach to dispositions. The most prevalent academic view, with its conception of litigation as a means of vindication, treats motions and settlement as dangerous infringements on litigants' rights and argues that courts should reemphasize the primacy of trial, particularly jury trial.[294] The dangers of power imbalances in settlements and the lack of clarity in law and the judicial role provide the impetus for this line of thought.[297]

As noted above, reflecting the academic view's positive conception of confrontation, many academic proposals to combat these concerns rest on decisional law. Proposals regarding dispositive motions call for standards that will reduce the number of such motions granted.[298] Proposals for reform of settlement call for more intense court scrutiny in order to protect disempowered litigants.[299]

The district courts have taken the opposite approach. In pursuit of the goal of resolution rather than vindication, judges have supported exacting case management that grants them power over settlement to resolve cases early without regard to the parties' wishes.[301] Similarly, they enjoy broad discretion with respect to granting and denying dispositive motions.[302] The Supreme Court, intentionally or inadvertently, has aided

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[294] Hoffman, *supra* note 4, at 1224-26 (describing schools of thought); Fiss, *supra* note 13, at 1085 (criticizing settlement); Miller, *supra* note 4, at 1132-34 (calling for restraint in the use of summary judgment).

[297] Fiss, *supra* note 13, at 1076-78, Perschbacher & Bassett, *supra* note 9, at 26-27, Resnik, *supra* note 5, at 377-80; Molot, *supra* note 25, at 40-42.

[298] Hoffman, *supra* note 4, at 1224-25 (citations omitted) (collecting scholarship criticizing Supreme Court's recent jurisprudence on motions to dismiss); Miller, *supra* note 4, at 1132-34 (calling for judicial skepticism of motions for summary judgment).

[299] *See, e.g.*, Luban, *supra* note 70, at 2637; Fiss, *supra* note 13, at 1077-78; *see also* Molot, *supra* note 25, at 46-58 (outlining managerial judicial techniques applied in reviewing class actions).

[301] Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256, 261(1986); Molot, *supra* note 25, at 30; Resnik, *supra* note 5, at 414-17; Shweder, *supra* note 69, at 60-63 (describing attitudes of individual judges who use their powers to encourage settlement); *but see id.* at 63-66 (describing attitudes of judges who are less eager to use their powers to encourage settlement).

[302] *See* WRIGHT, MILLER & KANE, *supra* note 52, § 2728 nn.11-12 (note the cases

the district courts by reinforcing the courts' discretion with regard to motions and adopting a "hands-off" policy toward settlement agreements.[303]

As the discussion of the tax court above suggests, neither approach is ideal. Providing dignified conclusions, not resolution or vindication alone, should be the goal of any court's policy of disposition. No particular mode of disposition need dominate; as the tax court's situation shows, settlement is not inherently less worthy than trial. Courts lend dignity to modes of disposition when they produce visible, predictable, coherent results.[304] Courts must avoid both over-disposition, through forcing a case to resolution when not appropriate, and under-disposition, through allowing a case to proceed past the point at which it should have reached disposition.[305] The fact that the tax court has lent a measure of dignity to both trial and settlement indicates that the district courts can do the same.

The district courts can adopt the tax court's example in several ways. Some require changes to procedural rules or statutory law, some may be created by decisional law, and others can be put into practice by philosophical changes in the way courts think about dispositions.

1. Theoretical and Philosophical Solutions

Some solutions are straightforward shifts of perspective, requiring change in neither policy nor law. Most simply, district judges should recognize that, while settlement may generate an early resolution, it may not be in the parties' best interests in all cases. The academic view has brought one aspect of this seemingly obvious statement to prominence: some parties may be "overpowered" by their opponents in the settlement process.[306] However, no power imbalance need be involved; some parties require specific results that cannot realistically be achieved through bargaining, such as an unconditional victory.[307] For that reason, judges should not use

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cited therein (discretion over summary judgment)); Hoffman, *supra* note 4, at 1236 (discussing expansive ability of courts to dismiss cases on motion).

[303] *See generally* Cordray, *supra* note 80 (explaining how recent Supreme Court decisions have prevented District Courts from enforcing existing settlement agreements).

[304] *Cf.* Molot, *supra* note 25, at 43-49; Perschbacher & Bassett, *supra* note 9, at 26.

[305] *See* Hoffman, *supra* note 4, at 1218.

[306] *Id.* at 1258, 1262-63 (noting disproportionate impact of high pleading standards on civil rights claims, among others).

[307] For example, a governmental party may be prohibited from settling or concession by force of its organizing regulations. *Cf.* Shweder, *supra* note 69, at 64 (citation omitted) (noting that "[s]ome scholars argue that judges use their power

their power to force parties to accept settlement in lieu of another form of disposition. This solution avoids the problem of over-disposition with regard to settlement.

Similarly, courts must avoid the problem of over-disposition with regard to dispositive motions. Meritorious cases should not be dismissed. This problem has received extensive attention in the academy.[308] While some have argued for legal changes in this area, one easy but essential reform is for courts to acknowledge that a case need not be disposed of on motion simply because a dispositive motion has been submitted.[310]

Finally, courts should recognize that trial, like the motion for summary judgment, is not a disfavored procedural mechanism. The academic view is incorrect; encouraging trial, in and of itself, does nothing to dignify the litigation process. However, avoiding trial is not a legitimate goal for courts either. Courts must put aside enough of their interest in resolution to recognize that settlement should not be forced on parties merely to prevent trial. Settlement and trial are both legitimate, but they are not interchangeable. Thus, if parties do not settle, courts must learn to respect their wishes to proceed to trial.

2. Decisional Solutions

Some of the policy-based solutions just addressed could be announced in court decisions. However, decisional law can play an even more prominent role in bringing dignity and fairness to dispositions.

The tax court's hostility to dispositive motions highlights the importance of developing case law for each of the three modes of disposition. As the tax court's experience shows, the longer a mode of disposition lies neglected by decisions, the less likely it is to develop clarity, which only encourages further neglect.

Decisional law occupies a central role with respect to dispositive motions. As noted previously, a mode of disposition has dignity when it is consistent, fair, and predictable. The summary judgment trilogy represented a great stride toward dignifying summary judgment. Those

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effectively to force government agencies to agree to consent decrees").

[308] *See, e.g.*, Hoffman, *supra* note 4, at 1218, 1262-63; Miller, *supra* note 4, at 1133-34.

[310] *See* Hoffman, *supra* note 4, at 1224-25 (collecting sources arguing for overruling of arguing for overruling of *Twombly*).

cases set forth the parameters of when cases could be resolved on summary judgment in ways that both courts and litigants could understand, enhancing the clarity of summary judgment as a mode of disposition. Scholars, however, have argued that courts still do not have sufficient guidance on summary judgment to avoid over-disposition of cases on motion.[311] Certainly, additional decisions would be beneficial in explaining the scope of summary judgment.[312]

This conclusion is even truer with respect to motions to dismiss. Until the Supreme Court clarifies its recent decisions in this area through further case development, practice in this area will remain unsettled and motions to dismiss will remain an ineffective mode of disposition.

While commentators have emphasized the dangers of over-disposition with respect to motions, changes in decisional law can also help avoid under-disposition. Currently, district courts enjoy discretion to deny even well-founded motions for summary judgment.[313] This discretion is a relic of an earlier period, before the summary judgment trilogy, when such motions were still seen as "a disfavored procedural shortcut."[314] The discretion to deny a proper, well-founded motion incorrectly suggests that such motions are more tools for delay and obstacles to the judicial goal of resolution than legitimate requests for disposition. The Supreme Court should remove this stigma from the motion for summary judgment and require courts to grant such motions whenever they determine such motions are proper. Note that the increased number of decisions both granting and denying summary judgment motions that this would generate would also create a body of decisional law that future litigants could use to predict outcomes, enhancing the clarity and visibility of the law.[315]

Moreover, district courts should be required to issue complete orders

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[311] *See* Miller, *supra* note 4, at 1132-34.

[312] *See* Molot, *supra* note 25, at 88-89 (explaining benefits of increased clarity in orders granting summary judgment).

[313] *See* WRIGHT, MILLER & KANE, *supra* note 52, § 2728 n.11. Professor Miller himself has argued against any broadening of the law of summary judgment. *See* Miller, *supra* note 4, at 1132-34. However, he has also recognized that "the court's discretion to deny summary judgment when it otherwise appears that the movant has satisfied the Rule 56 burden should be exercised sparingly" to avoid vitiation of the procedure. WRIGHT, MILLER & KANE, *supra* note 52, § 2728.

[314] *Celotex*, 477 U.S. at 327.

[315] *See* Molot, *supra* note 25, at 88, 92; Galanter & Cahill, *supra* note 67, at 1384 (describing dangers of unclear law); Perschbacher & Bassett, *supra* note 9, at 26 (describing dangers of unclear law).

when ruling on dispositive motions.[316] Dispositions on motion have been criticized for hampering the development of law. Requiring a reasoned order, rather than a conclusory one, for every dispositive motion would generate a larger body of procedural law, increasing the predictability of outcomes. Additionally, such orders might, over time, generate new procedural rights for litigants, serving the goal of vindication.

Decisional law should also play a role in clarifying the role of settlement. As extensively discussed above, settlement practice is currently controlled by a patchwork of local and individual judges' rules. The Supreme Court has shied away from even enforcing existing settlements, let alone defining what a settlement in federal court is or should be.[317] What little decisional law exists with regard to settlements is borrowed from the law of contracts. Courts would do well to develop a decisional law specific to settlements.[318] Such a body of law could delineate how much a judge can do to encourage settlement and describe the procedures necessary to render a settlement fairly negotiated. A body of decisions on settlement would bring much-needed clarity to this mode of disposition and, perhaps, begin the process of ridding settlement of its shabby image.

3. Rule-based Solutions

The notion of a decisional law of settlements presents an obvious problem. An adversarial system requires courts to wait for parties to bring them disputes, and one purpose of settlement is to resolve disputes without a court decision. If courts seek to create a body of case law to define and regulate settlement, they may have to wait a long time.

This problem, no doubt, is part of the reason settlement practice is governed by local rules rather than case law. However, such rules bend at the whims of judges and provide little guidance to parties who have not reached the stage of litigation, but might potentially face settlement discussions. Certainly, such rules do not generate interpretations in case law.

The situation differs in the tax court. While the court itself has no rules governing settlement, the regulations binding the Internal Revenue Service control all tax court settlements. These regulations are consistent

[316] *See* Molot, *supra* note 25, at 88.

[317] *See* Cordray, *supra* note 80, at 9-10, 73-74.

[318] *See* Menkel-Meadow, *supra* note 76, at 2696 (quoting Luban, *supra* note 70) (calling for development of a "jurisprudence of settlement")).

from case to case and are regularly interpreted through agency decision[319] or judicial review.[320]

The district courts do not enjoy the tax court's advantage of a repeat litigant with its own settlement procedures, but they can experience the benefits of a consistent, universal set of rules to describe and control settlements.

Accordingly, the Supreme Court should promulgate additional Federal Rules of Civil Procedure to govern the settlement process. These rules should cover the same subject matter as the existing local rules regarding settlement. They would have several advantages over those rules, however. First, they would reinforce the existing judicial canons and contract doctrines that guide settlement and the way judges handle it, simplifying and clarifying judges' settlement-related duties. Second, the mere fact that the new rules would be promulgated under the Rules Enabling Act, rather than the auspices of a particular court, would lend them a sense of significance that the current settlement rules lack. Finally, they would apply consistently from judge to judge and court to court, rendering their interpretation easier and the settlement process itself less prone to manipulation by individual judges.

Essentially, such rules would transform settlement from a means of judicial case management to a recognized, respected form of disposition. The clash between the judicial and academic views may lead observers to believe that the goals of resolution and vindication are always opposed, but they need not be. Creating rules to guide courts and litigants through the settlement process is the first step in rendering settlement a tool for vindication as well as resolution.

VII. CONCLUSION

Analysis of disposition has historically been colored by the circumstances of the analyst. District courts, focused on efficiency and fairness through discretion, have seen resolution as the goal of the legal system. Results and the speed with which they are obtained have taken precedence over the quality of those results. Accordingly, courts have discouraged trial and encouraged motion and settlement practice.

Similarly, the legal academy has viewed dispositions through the

[319] Authority to be added.
[320] Authority to be added.

lenses of rights-based thinking and the traditional preference for confrontation. In this view, means are more important than ends; vindication of legal positions is more significant than the result in any particular case. Thus, the academy has argued for the value of trial and the flaws of settlement and motion.

As the tax court's attitudes toward disposition show, neither view is entirely correct. Trial need not be an obstacle toward resolution, and settlement and motion need not hamper the vindication of rights. Resolution and vindication are not opposing goals; they should complement one another.

Courts should approach dispositions with an eye toward achieving resolution in a manner that vindicates rights. Such resolutions are dignified. That is, they are predictable, consistent, and fair. As the tax court's approach shows, any of the three modes of disposition can be dignified. Developing an ideal policy of dispositions, then, is not a matter of rejecting one mode in favor of another, but a matter of ensuring that each of the three modes work in a consistent, fair manner.

Reconciling resolution with vindication is no mere theoretical exercise, either. The pressure of mounting caseloads has encouraged the district courts, in their increasingly managerial role, to view resolution as a goal in and of itself.[322] For decades, the academy has argued against this belief by rejecting resolution in favor of vindication. These arguments have not changed the courts' attitudes. Resolution remains the basis of the courts' policy of disposition, and settlement and motion remain popular. It is time to cease rejecting them out of hand and to begin seeking ways to improve them. Granting all three modes of disposition dignity is a first, necessary step to ensuring that all cases reach just resolutions in which all actors in the legal system can feel confident.

[322] Resnik, *supra* note 5, at 396-97.