Public Law Litigation and Legal Scholarship

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It is hard to turn around nowadays without hearing about the malaise in legal scholarship.¹ For example, Richard Posner, a former president of the Harvard Law Review, announced in that periodical's centenary issue that the Review "may have reached the peak of its influence—may, indeed, have started its journey down the mountain."² If even the august Harvard Law Review is sliding, one does sense an ancien régime aroma of decay. But Posner's main message was that scholarship has become more diverse, and that the hegemony of traditional doctrinal analysis has been broken.³ More generally, the malaise is attributed to the supposed disappearance of doctrinal challenges due to the success of the doctrinal analysts of the past. Others have gone farther, however. They argue that "legal scholarship can best be described as an open scandal . . . since the late fifties,"⁴ and that, in the face of such events, "[t]hose with true intellectual courage would abandon the law and become full-time social scientists."⁵ For these critics, it seems that only a social science diet can suffice.
In this atmosphere of self-doubt, it is appropriate to reflect on the value and continuing importance of successful legal scholarship of the past. In this Article, I will examine Professor Abram Chayes's 1976 article *The Role of the Judge in Public Law Litigation*. Professor Chayes began the article modestly enough, observing that it was "a sketch of work in progress," composed of "preliminary hypotheses, as yet unsupported by much more than impressionistic documentation." Nevertheless, the article was promptly embraced as a classic, perhaps an icon. But icons usually influence only the previously converted; explaining the article's success and assessing its lasting importance therefore remain challenging.

My purpose is to try to determine whether the article has had more than a talismanic impact. On this, the returns are mixed. Measured in terms of doctrinal impact, a traditional yardstick for evaluating legal scholarship, the article was a failure, as later carping by Chayes about decisions of the Burger Court confirms. But this fate may have been inevitable since the article was bereft of any doctrinal prescription. Perhaps more basically, Chayes's focus on public law litigation seems ill-conceived because the incidence of the kind of lawsuits he had in mind—school desegregation and prison conditions cases—was waning even as he wrote. Taking a broader view, however, one finds that Chayes's article connects directly with today's major procedural issues—coping with the tort "crisis," managerial judging, and the increasing enthusiasm among judges (and others) for mediation rather than adjudication. The emergence of these issues can be traced to judges' experience with the kinds of cases Chayes was describing, and resolution of the problems they raise requires, as Chayes suggested, reconsidering the clas-

Most (including me) justify to themselves mining the intersection of the disciplines: employing behavioral theory to criticize the law. This approach makes possible rapid insights in comparison with ordinary legal scholarship, as should well be expected. A well-drafted set of rules will have anticipated most objections that derive from the ideas that dominate standard legal thought. But such rules will be as vulnerable as an alien who cannot speak the native language to the criticisms of a science with different presuppositions and organizing thoughts.

*Id.* Priest admits that "[s]cholarship of this nature—the criticism of one language by another—is essentially shallow." *Id.*

7. *Id.* at 1281 n.*.
8. See infra text accompanying notes 29-38.
sical model of adversary litigation posited by Lon Fuller. As a result, the Public Law Litigation article may be viewed as a catalyst of the current academic renaissance in thought and research about procedure, certainly an impressive legacy.

The conclusion that Chayes's article had wide effect does not mean, however, that traditional legal scholarship may rest easy in the face of charges of malaise. As hinted by Chayes's unpretentious description, the article itself defies categorization as traditional legal scholarship, and the causal connection between the article and events since 1976 seems fairly tenuous. Accordingly, its success seems an unusual, albeit not unique, event that contributed to new and innovative ways of addressing legal issues. For most legal academics, such innovative undertakings are not likely to prove successful; even Chayes could not reasonably look toward enjoying such success again.

I. THE ARTICLE

Even for those who have studied the Public Law Litigation article, it is useful to revisit its central themes. The starting point was the classical adversary model of litigation that was most thoroughly examined and justified by Lon Fuller. This nineteenth-century vision of litigation was highly individualistic, conceiving of the law as limited to enforcing private voluntary arrangements (which linked, of course, to Fuller's interest in contract law). This focus was reinforced by the academy's Langdellian preoccupation with appellate opinions as technical exercises in explication of "scientifically" derived principles of private law. Together, these tendencies left the trial judge almost entirely out of the picture, as both the litigants and the appellate courts were perceived as the prime actors in the litigation scene. These attitudes also assumed that litigation had

11. In any event, it seems that Chayes has other fish to fry. See Chayes, Nicaragua, the United States and the World Court, 85 COLUM. L. REV. 1445 (1985).
12. See Fuller, supra note 10.
13. For an examination of Langdell's use of legal science, see Heflich, Law & Geometry: Legal Science from Leibniz to Langdell, 30 AM. J. LEGAL HIST. 95 (1986).
14. Indeed, Chayes seems preoccupied with the interests of his late nineteenth-century predecessors at Harvard Law School. In Public Law Litigation, he concentrated on "the academic debate about the judicial function," which had focused on the technical skill exhibited in a few appellate opinions. Chayes, supra note 6, at 1285-86. There is no particular reason to believe that trial judges shared the attitudes of Harvard law professors, however, so the significance of those attitudes for judicial activity is unclear.
certain fixed characteristics: it focused on a dispute between two individuals, was controlled by the parties, did not affect others in ways that concerned the courts, and turned on evaluation of information about past events. This backward-looking orientation, in turn, resulted from the fact that the remedy flowed directly from the finding of a violation.

Whether this vision accurately reflected what was really happening in trial courts seemed unimportant until the Realists exposed the limitations of the classical view after World War I. Chayes recognized that the classical view was a doubtful description of litigation even in the nineteenth century, asserting that “[s]ometime after 1875, the private law theory of civil adjudication became increasingly precarious in the face of a growing body of legislation designed explicitly to modify and regulate basic social and economic arrangements.” The country increasingly embraced private enforcement of public norms, a curious compromise between the regulatory and the individualistic ideals: instead of relying on government lawyers to enforce public norms, the idea was to leave the initiative to affected citizens, and the actual enforcement to judges. This new model of litigation hit full swing in the wake of Brown v. Board of Education, as federal courts tried to make local officials comply with an increasingly broad menu of constitutional requirements, an effort that still seemed to be in high gear as Chayes wrote. Indeed, he began with the doubtful assumption that the “dominating characteristic of modern federal litigation” was that it focused not on private rights but on “the vindication of constitutional or statutory policies.”

All this was too familiar to be noteworthy; Chayes’s new step was to reflect on the impact the emerging trends had on the classical vision of litigation and the related stresses they placed on a variety of procedural rules and forms. In this, he was acting as a sort of Latter Day Realist, cataloging the differences be-

15. Id. at 1288. In a footnote, Chayes explained that he chose 1875 as the approximate date because general federal question jurisdiction was first granted to the federal courts in 1871 and the “interaction between economic regulation and the fourteenth amendment” dated from Supreme Court decisions of the 1870’s. Id. at 1288-89 n.35.


17. Chayes, supra note 6, at 1284. This seems to be a qualitative rather than a quantitative judgment. To a large extent, it seems to depend on the fact that academics find these cases interesting. Chayes tells us that “[t]he cases that are the focus of professional debate, law review and academic comment, and journalistic attention are overwhelmingly, I think, new model cases.” Id. at 1304. Below, I suggest that the supposedly distinguishing features of public law litigation are not in fact so distinct. See infra text accompanying notes 83-128.
tween what judges were actually doing and the classical vision of what they should be doing, and pointing out how the existing rules therefore failed to guide judges in handling the new problems presented by such litigation. In the process, he developed a morphology of public law litigation that contrasted sharply with the Fulleresque vision: Far from being a tightly confined confrontation between two individuals, the new litigation had a “sprawling and amorphous” party structure that resulted from its ambiguous contours. At the center of the action stood the judge, who had to take control of the entire litigation process in order to fashion a decree that would achieve the regulatory purpose. This effort became necessary because of the broad effect of the decree, and because the finding of a violation provided little information about the remedy that should be used to undo the wrong. For example, a finding that a school system was illegally segregated, or that the deficiencies in a prison violated the eighth amendment rights of the prisoners, told the judge little about what should be done to make the situation legal. As a consequence, the principal fact-finding activity tended to be prospective and supervisory, as the judge tried to determine what steps would correct the violation. In order to avoid the pitfalls of crafting a decree in such uncertain waters, the judge would often try to pressure the parties into negotiating a decree. On the whole, Chayes concluded, a suit concerning the conditions in a prison or a school is “recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge.”

This shift in litigation models eroded traditional assumptions about how several procedural rules should be applied. Most significantly, the new litigation placed extreme stress on rules governing standing, and on the closely related question of party joinder, whether through necessary party practice or intervention. Such difficulties were compounded by the class action, which Chayes opined would never “be taught to behave in accordance with the precepts of the traditional model of adjudication.” Equally important was the shift in the function of the judge—hence the title of the article—who became “the dominant figure in organizing and guiding the case.”

18. Chayes, supra note 6, at 1302.
19. Id. at 1302.
20. Id. at 1291.
21. Id. at 1284.
tutions, sometimes with the assistance of a squadron of special masters or other underlings, "[w]e may not yet have reached the investigative judge of the continental systems, but we have left the passive arbiter of the traditional model a long way behind."22

Is this a bad thing? Turning to this question, Chayes appeared to be a receptive agnostic who urged an "hospitable reception" to the new developments in litigation.23 He was, however, troubled by the murkiness of the legal limitations on trial court innovation in public law litigation.24 Recognizing the need for somebody to implement constitutional guarantees, Chayes suggested that judges had a variety of institutional and professional attributes that would assist them in meeting the challenges of that task.

In sum, this article is a distinctive piece of legal scholarship for several reasons. First, it is almost bereft of traditional doctrinal analysis. At most, it describes ways in which doctrine does not fit what is happening in court; Chayes overtly undertook only to describe shifts in activity and suggest implications. Second, the article is highly impressionistic. Although it cites cases, it uses them neither as authority nor as a source of empirical data. The empirical work, Chayes suggested, needed yet to be done. Third, it is far from specific on how the rules that are discussed should be regauged to accommodate the shift Chayes described in the character of litigation. At most, the article might act as a stimulus for work by others that would give content to these musings. Finally, it tied the characteristics of "mundane" procedural rules to broad issues of social policy, hardly the norm of much procedural scholarship at the time.

Postscript: Somewhat more than six years later, Chayes revisited the subjects raised in his Public Law Litigation article in a Foreword to the Supreme Court issue of the Harvard Law Review.25 There he assessed the record of the Burger Court in coping with the tensions he had identified earlier, noting that "[t]he long summer of social reform that occupied the middle third of the century was drawing to a close" by the mid-1970's.26 Employing traditional doctrinal analysis, Chayes then dissected the Court's efforts to curb the public law litigation movement by re-

22. Id. at 1298.
23. Id. at 1313.
24. See id. at 1313.
26. Id. at 7.
affirming limitations on standing, curtailing some aspects of class actions, and trying to insist on a direct connection between remedy and wrong. In sum, the Court tried to make public law litigation over into an “effigy of the traditional lawsuit.”

Nevertheless, Chayes concluded, “the attributes of public law litigation are strongly resistant to conscious efforts at reversal,” so that “even a conservative Court is reduced, perforce, to practicing public law litigation.”

II. The Splash

It is hard to know what reception Chayes expected when the Public Law Litigation article appeared. Clearly, the article represented a great deal of work, but equally clearly, he viewed it as tentative and exploratory. Even more obviously, this was not a doctrinal breakthrough that could be taken up by courts or commentators. Instead, it was a stream-of-consciousness invitation to further work that might or might not have attracted the attention of others.

Chayes must have been gratified by the reception his article received; any law professor would be. To begin with, he was showered with overt accolades. Professor Kellis Parker of Columbia lauded the article as a “brilliant discussion,” and Professor Richard Fallon of Harvard (and several others) labelled it “seminal.” In his article on public law remedies, Judge Frank Coffin acknowledged that he was “indebted to Abram Chayes”

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27. Id. at 8.
28. Id. at 57. Chayes found this to result from the pervasive shift in the nature of litigation typified by school desegregation and like cases, but hardly limited to them, and not dependent on a “liberal” decision of the merits:

When, for example, the Court pronounces on the constitutionality of an indemnity scheme for nuclear accidents or the existence of a statutory requirement for deinstitutionalization of retarded persons, the essential character of the litigation is the same whether the Court upholds the claim or rejects it. Whatever the outcome, the Court is not engaged in settling a dispute between private individuals, or even between an individual and a public official. It is resolving a controversy growing out of “the systemic effects” of government action. Such decisions will necessarily have far-reaching effects on myriads of persons not individually before the Court and on political, economic, and institutional structures.

Id. at 57-58 (footnote omitted). The same might, of course, be said of the invalidation of New Deal legislation during the 1930’s, but Chayes’s claim that more litigation has these characteristics now than it did in the 1930’s seems beyond debate.

for his analytical framework. Another commentator asserted that “[t]he debate over public law litigation stems largely from the seminal article by Professor Chayes.” Indeed, some seem to treat the whole idea of public law litigation as Chayes’s personal property. Finally, the article received that highest of tributes—mild praise from Mark Tushnet—who called it “one of the few stimulating articles on court procedure in recent years.”

As measures of success, these explicit accolades are borne out by cruder measures of impact. The crudest is simple numbers. By 1985, a commentator who actually counted the number of citations of articles reported that the article already ranked Number Eleven on the all-time citation list, and that it was third among all articles in citation frequency since 1977.

This enviable citation record does not depend upon repeated citation by law students preparing notes or comments on the season’s most exciting legal development. To the contrary, the article is almost never cited by law students, even though it has been excerpted in several casebooks. Not only are the people citing the article full-fledged judges, lawyers, or academics, but among them are many of the most distinguished participants in the current legal life of the nation. Among judges who also write for law reviews, the list includes (in addition to Judge Frank Coffin, noted above) Harry Edwards, Henry Friendly (twice),

35. Shapiro, The Most-Cited Law Review Articles, 73 CALIF. L. REV. 1540, 1550 n.45 (1985). It should be noted that Shapiro’s article pays no attention to citation by courts; only citation in another law review counts for this listing. See id. at 1545.

The subject matter of articles that cite Public Law Litigation is similarly diverse. In addition to articles on issues of procedure or constitutional litigation, the article has been cited in articles on a variety of other subjects: family law, employment discrimination, administrative law in Japan, SEC enforcement suits, corporate law, court-supervised adjustments in long-term contracts, evidence, antitrust, national park legislation, zoning, and the role of the courts in dealing with nuclear power.

The breadth of subjects covered and the diversity of people citing the article suggest a further reason to view this citation record as remarkable. These people did not come across this article by conventional legal research. Instead, they cited the article because they were familiar with it, impressed enough to remember it, and convinced that it was worth citing to make a point. This is a greater accolade than any explicit praise, for it indicates that the writer has made a lasting impression on a wide variety of influential people.

A closer examination of the citation history, however, raises questions. Most seem merely to invoke Chayes's article or the "public law litigation" label rather than considering the reasoning process underlying the article. To those who feel that Chayes has a sort of proprietary interest in the idea of public law litigation, the citation may be nothing more than a bow to him. More often, people cite the article as a kind of talisman, or as a substitute for describing the phenomenon. Some even seem to view the self-consciously nonempirical observations that Chayes made in the article as a substitute for empirical proof that what he described actually was occurring.38 One could conclude that the

37. This list is incomplete. It has been edited to give the reader a feel for the variety involved, not to suggest that those not listed are not important.
article is all things to all people; like some pieces of great literature, it offers almost everyone a pithy quotation that can be used to good effect in connection with one's own work. At the least, citing the article shows that one is in tune with the times.

One is therefore left to ask why this article received such attention. By 1976, the concept of public law was hardly new. Neither was the phenomenon of public law litigation wholly new. For some time, commentators had been writing about the "new wave" lawyers who brought nontraditional cases.39 Others had recognized that this activity raised problems that were difficult to explain in traditional terms. A notable example is John Dawson's series of articles on the curious evolution of the law of underwriting attorneys' fee awards in public interest litigation, which appeared in the Harvard Law Review during the period Chayes was presumably working on his article.40 Beyond that, concern about the legitimacy of judicial efforts to implement social policy through structural decrees was widespread. The 1968 and 1972 presidential campaigns, as well as congressional efforts to curtail school desegregation remedies, show widespread dissatisfaction with such judicial activism.41 On a more academic plane, others had probed the problem before Chayes.42

The most facile explanation for the article's splash is that nothing succeeds like success. However things may have changed by the time Posner wrote for the one-hundredth anniversary of the Harvard Law Review in 1987,43 as of 1976 the magazine was


42. See, e.g., Glazer, Towards an Imperial Judiciary?, 41 PUB. INTEREST 104 (1975).

43. Posner, supra note 2.
still riding high. It was the clear leader in frequency of citation, and had a circulation that was roughly twice that of its nearest law review competitor, and at least four times as large as most law reviews. Coupled with the wide circulation is an undeniable Old Boy Network explanation for at least some of the citation history—the frequent citation of the article by Harvard professors would seem to result from something more than the fact that they get their school’s review for free. Moreover, the article was particularly favorably placed because it was in the same issue as the much-cited Developments on class actions, a study that many people who would find Chayes’s message intriguing would likely want to refer to often. Add to that the great felicity of Chayes’s prose. It is hard to resist interesting thoughts expressed by one who can, for example, describe the trial judge’s refusal to certify a class action as follows: “[W]hat if the trial judge refuses to cast the magic spell?” Where that person is a prominent professor at Harvard and has pub-

44. Thus, Maru ranked 278 legal periodicals on the basis of number of times cited during 1972 and found that the Harvard Law Review ranked first. The Yale Law Journal ranked second, having been cited approximately 63% as often as Harvard. The Columbia Law Review ranked third, having been cited approximately 47% as often as Harvard. Only 21 other reviews had been cited even 10% as often as Harvard. Maru, Measuring the Impact of Legal Periodicals, 1976 AM. B. FOUND. RES. J. 227, 234.


For legal academics, of course, these circulation figures are not very important because most law school libraries are likely to stock most law reviews. Nevertheless, the substantial differences in circulation must have an effect on citation frequency because of accessibility, even for law professors. A significant number of subscriptions to the Harvard Law Review are probably from individual faculty members. Although these people could go to their law school libraries to look up material in other reviews, it must be simpler to pull this review off their library shelves. Moreover, because they regularly receive their own copies, they will be more likely to read something outside their area of concentration, which partially explains the appearance of citations to Public Law Litigation in articles on such a variety of subjects. For those outside the law school world, circulation figures translate into basic access considerations; almost everyone can find an issue of the Harvard Law Review nearby, but greater effort may be required to obtain many others.


47. Chayes, supra note 25, at 42.
lished such nuggets in the venerable Harvard Law Review itself, the magnetism becomes almost irresistible.

No doubt the above factors contributed to the great success of the Chayes article, but even legal academe is not so fickle that these explanations suffice. Leading professors often publish articles in the same review, and many of those articles are also elegantly written, but they have not become instant classics. Moreover, others were talking about the same issues, often in prominent places and with highly readable prose; thus these superficial distinguishing points do not explain why this article outperformed the rest.

At the same time, the explanation must take account of what might be called the substantive enigma—the almost total lack of traditional doctrinal analysis in the article. By way of contrast, John Dawson's articles on fee awards in public interest litigation concentrated on the evolution and oddities of existing doctrine, and the peculiar way in which it had developed over a century of haphazard expansion.48 Focusing on the same period, Chayes paid no attention to such doctrinal development. In his 1982 Foreword, he did engage in doctrinal analysis, but essentially as part of an effort to show that the prevailing analysis did not work in several areas because it relied on terms that did not fit the reality that courts regularly had to face. Certainly, the explanation for Public Law Litigation's success is not that Chayes offered a great substantive breakthrough that caught on among courts or commentators.

Neither was the absence of substantive content a unique feature of this article. Others had already contributed accounts of activity out in the trenches.49 Indeed, one might characterize the early 1970's as a time of experimentation with unorthodox law review articles that drew their strength from something other than their analytical content.

I suggest that what made this article notable, and still makes it important, is the coincidence of three factors:

(1) The article was not only prominently displayed but timely, if not trendy. Although there were rumblings of concern in the academy about the issues that Chayes addressed, most of those efforts had not yet reached fruition. Within a couple of years, both Owen Fiss's book on structural injunctions50 and Donald

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48. See supra note 40.
50. O. Fiss, THE CIVIL RIGHTS INJUNCTION (1978). Indeed, Fiss's casebook on injunctions had already appeared in 1972, and it included a full chapter on structural injunc-
Horowitz's book on judicial implementation of social policy had appeared; surely neither Fiss nor Horowitz started work after Chayes's article appeared. Neither would Chayes's work have packed such a wallop if these other pieces had been published first.

(2) Readers' immediate reaction to Chayes's article was that its description was accurate. The reason that both Congress and other commentators had been concerned with such litigation was that there was something worth worrying about. Many readers found themselves nodding their heads as they read, probably thinking that they wished they had said these insightful things first. Indeed, the assent that the article received among judges is perhaps the best proof that Chayes's descriptions were accurate even though they were based on impressionistic evidence.

(3) Chayes offered a framework for analysis. Despite leaving us with the substantive enigma, Chayes was very much a lawyer as he approached his task. Thus, he broke the problem into categories and organized the categories in a way that permitted others to pursue the problem further. These categories could easily be contrasted to Fuller's criteria for effective adjudication, thus placing the analysis within a recognized niche in the evolution of legal theory.

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52. However one feels about the correctness of Chayes's observations in general, as to some matters he was clearly wrong. For a striking example, consider his argument for concluding that suits against governmental officials undoubtedly have widespread effects: "Officials will almost inevitably act in accordance with the judicial interpretation in the countless similar situations cast up by a sprawling bureaucratic program." Chayes, supra note 6, at 1294. Chayes offers no empirical support for this assertion, and one may question whether it comports with the experience of lawyers representing persons dealing with such bureaucratic organizations as welfare agencies, where compliance with judicial decisions may be rather slow. Certainly, Chayes did not reckon with an America in which officials like Attorney General Meese suggest that judicial decisions do not actually declare the law, and that they accordingly need not be followed by the bureaucrats. See Meese, The Law of the Constitution, 61 Tul. L. Rev. 979, 983 (1987).
III. THE LASTING IMPORTANCE

Was the article merely a media splash? A sensible way to decide is to ask about its lasting impact. As a starting point, it is hard to conclude that the article had any significant effect on the law. But the article does seem to connect with (although not to foresee) the procedural issues that currently have the greatest importance. Largely as a consequence, it has contributed to the resurgence of academic interest in procedure.

A. Doctrinal Impact

For the systematizers of the late nineteenth and early twentieth centuries, doctrinal analysis was the objective of legal scholarship, and doctrinal impact was accordingly the measure of success. Indeed, over time Wigmore or Williston may well have become better authority than the decisions that supposedly provided the foundation for the assertions they made in their treatises. At least they could point to a multitude of citations adopting their work and, often, rejecting the contrary views of judges in the process. But the efforts of the Wigmores and the Willistons may have been too successful. As order was imposed on the chaos of disorganized case law, and previously overlooked legal problems diminished in number, so also did the opportunity for scholars to have a comparable doctrinal impact decline. As a result, traditional doctrinal analysis has not recently produced many such success stories. The diminished opportunities have not prevented people from trying to influence courts, however. Failing that, they could excoriate the courts for resisting the better way.

53. Certainly it was not a media splash in the conventional sense. Lest one think that no law review article could be, recall the reception of Elman, The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-60: An Oral History, 100 Harv. L. Rev. 817 (1987), in which Elman reported that the Justice had ex parte communications with him about Brown v. Board of Education while the case was pending and Elman was, or soon would be, litigating the case on behalf of the government. This article did get real media attention. See Taylor, Key 1954 Bias Case: A Drama Backstage, N.Y. Times, Mar. 22, 1987, at 1, col. 5.

54. This is not to say that doctrinal problems disappeared. While there is no way to compare the raw number of problems, it does seem that problems have become more difficult, and that today academics cannot bring to the task of doctrinal analysis the kind of confidence that their nineteenth-century predecessors felt as they attacked the formalism that typified the decisions of that era.
By this measure, one would not expect Chayes's article to be counted a success because it did not even focus on doctrinal analysis. The reader is left to wonder how a judge is to react if persuaded by Chayes's arguments. Were there any doubts about whether Chayes had reoriented decisions, he seems to have gone some distance toward dispelling them himself in his 1982 Foreword, where he chronicled the efforts by the Burger Court to restrain public law litigation using the model of traditional litigation. These decisions owed little to Chayes's article; none of them cites it. More to the point, their spirit is surely not sympathetic to the public law litigation model.

Had this cutback resulted from Chayes's efforts to call attention to the tensions of public law litigation, one could see this as a doctrinal impact and classify Chayes as another promoter of changes who was left to carp about the courts' unwillingness to adopt his view. Indeed, the 1982 Foreword has such a sour grapes aura to it. Nor has the Court's resistance to Chayes's vision abated since 1982. In a widely criticized 1983 case, for example, it refused to allow a black man who had been injured when Los Angeles police officers subjected him to a choke hold to sue for an injunction against what he claimed was routine use of this dangerous hold, seemingly forbidding equitable relief against allegedly illegal police behavior.

A similar resistance to what might be seen as a consequence of a public law vision of litigation is evident in the Court's 1986 decision in Diamond v. Charles. In that suit, pro-choice doctors claimed that the 1975 Illinois Abortion Act was unconstitutional. Diamond, also a doctor but an opponent of abortion, was allowed to intervene on the defense side to argue the constitutionality of the act. The district court enjoined certain provi-

55. According to Shepards, as of May 1988, the article has never been cited in a majority opinion of the Supreme Court, although it has been cited in dissenting opinions. If this is discouraging, perhaps some solace can be found in the fact that the Court is reportedly citing law review articles less frequently than it did in the past. See Sirico & Margulies, The Citing of Law Reviews by the Supreme Court: An Empirical Study, 34 UCLA L. REV. 131, 134 (1986).

56. City of Los Angeles v. Lyons, 461 U.S. 95 (1983). The majority held that the plaintiff not only did not have standing to sue for the injunction, but that he would also be unable to satisfy the traditional limitations on the availability of injunctive relief. Even though he could sue for damages, the plaintiff could not show he was likely to be subjected to the hold again, "a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." Id. at 111. For a stinging criticism of this decision, see Fallon, supra note 30. For related arguments, see Chayes's criticism of Rizzo v. Goode, 423 U.S. 362 (1976), in Chayes, supra note 6, at 1305-07.

57. 476 U.S. 54 (1986).
sions of the act on the ground that they were unconstitutional, and the Seventh Circuit affirmed. Although the state did not appeal to the Supreme Court, Diamond tried to do so. The state accommodatingly filed a letter of interest endorsing Diamond's arguments as "essentially co-terminous" with the state's position. Even though, as an intervenor, Diamond had the full right to litigate in the lower courts, the Court dismissed the appeal because, absent the state's active participation, there was no case or controversy sufficient to give the Court jurisdiction. In the process, it held that Diamond had not suffered injury in fact despite his arguments that, as a pediatrician, he would gain patients if the abortion requirements were tightened. This ruling seems in keeping with the traditional view that private citizens do not have the right to seek judicial assistance in compelling enforcement of the criminal law.

From a procedural standpoint, the more interesting issue was whether the fact that Diamond had already participated in the litigation as an intervenor should make a difference. On this point, the Court showed some ambivalence. Though acknowledging that intervenors are usually considered full parties and therefore entitled to appeal, the Court held that they had to satisfy Article III requirements independently to appeal in the absence of the party on whose side they intervened. The Court declined, however, to decide whether a party seeking to intervene must satisfy not only the requirements of Rule 24(a), dealing with intervention of right, but also Article III, noting only that "the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals." This problem was highlighted by Chayes in his article and presents one of the most perplexing aspects of adapting conventional notions of litigation to the extended effects of decisions.

A good illustration of the intervention problem, and of the kind of innovative view of participation in litigation that seems tempting in public law litigation, is presented by the 1972 decision in United States v. Reserve Mining Co. by District Judge Miles Lord. After the United States sued to prevent defendant mining company from continuing to dump a byproduct of its operation into Lake Superior on the ground that such dumping vi-
olated the Federal Water Pollution Control Act and Refuse Act, there were suggestions that, even if alternative methods of disposing of the material could be found, they might be so expensive that the company would shut down its operations rather than comply. This prospect prompted more than a dozen requests to intervene. Most of these were on the defense side by local governmental organizations and civic organizations worried about the economic effect on the region of a shutdown of the defendant's plant. As to these intervenors, it could not be said that they had any "right" to litigate at all. Environmental groups and others, meanwhile, sought to intervene as plaintiffs; it was unclear whether they could have sued Reserve Mining independently had the government not chosen to sue.

Judge Lord decided to allow all the intervenors into the case, stressing provisions of the Water Pollution Control Act that direct the court to fashion a decree with "due consideration to the practicability and to the physical and economic feasibility of complying with such standards." Given this invitation to consider the impact on the local economy, the judge decided that the intervention net could be cast widely. Strikingly anticipating what Chayes said four years later in the *Public Law Litigation* article, the judge explained:

The role of a court in such a situation, because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.

Thus, the basic thrust is a democratic one—before it enters a decree that will affect a large number of people, the court should allow them to be heard. Obviously, Judge Lord did not need Chayes's yet-unwritten article to develop this concept. Tying that attitude to the requirements of the pollution statute may have been a political measure by the judge; it is hardly true that such considerations of impact on others are irrelevant to tradi-

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64. This democratic thrust was substantially eroded by the judge's simultaneous imposition of a variety of restrictions on the intervenors' freedom of action. See id. at 420 (requiring intervenors and current parties to cooperate and act together in most phases of case); cf. *Stringfellow v. Concerned Neighbors in Action*, 107 S. Ct. 1177 (1987) (upholding such limitations).
tional criteria for fashioning injunctions. Moreover, this attitude sets little store by questions of legal interest; none of the intervenors on the defense side had a legal right to insist that defendant go on operating and polluting in the area, and the plaintiff intervenors may have had no independent right to sue challenging the defendant’s dumping activities. Rather, it is a pragmatic and sensitive adjustment of a long-standing procedural device to the problems presented by new forms of litigation.

Does the Supreme Court want to put a stop to this kind of thing? Its ambivalence in Diamond v. Charles makes the answer unclear. Some of the Court’s post-1976 decisions show a more receptive attitude toward adapting traditional molds to achieve regulatory objectives but also show the strain of trying to do so in the traditional way. Consider, for example, the trick solution the Court used to solve the problem presented when a class representative’s individual claim became moot after trial court denial of class status, but before appellate review of that decision. In Deposit Guaranty National Bank v. Roper, after the trial court denied the plaintiffs’ motion to certify a class in an action charging usurious interest, the defendant bank tendered to them the maximum amounts that they could recover on their individual claims, $889 and $423 respectively. Because they sought to represent a class composed of 90,000 credit card holders, the plaintiffs rejected this offer, but the district court entered judgment in their favor for these amounts anyway. The plaintiffs appealed, contending that they should have been allowed to prosecute the case as a class action, and the Court held that they still had a sufficient interest in the litigation to continue to litigate this issue. Writing for the majority, Chief Justice Burger extolled the virtues of class actions as devices to deal with “injuries unremedied by the regulatory action of government.” Despite these benefits, he insisted that the plaintiffs’ right to continue pursuing class certification depended on their interest in the “procedural” right, which he explained was “ancillary to the litigation of substantive claims.” In a footnote,

65. See e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (refusing injunction requiring cement plant to cease emissions that constituted a nuisance because injunction would result in closing of plant in which defendant had very large investment and in which over 300 people were employed).
66. See supra text accompanying note 59.
68. Id. at 339.
69. Id. at 332.
the opinion suggested that the plaintiffs’ critical stake was to spread their litigation costs, which would be possible only if their claims were aggregated with those of other credit card holders. More realistically, the stake was the lawyer’s and, derivatively, society’s. The opposite ruling would invite efforts by defendants in the position of the bank to “buy off” small claims, thereby nullifying the utility of the class action as a device for enforcing the societal norms reflected in usury laws and the Truth in Lending Act. In a companion case, the Court did not even try to justify the “procedural claim” sleight of hand on cost-sharing grounds. Instead, it explained blandly that this fiction was necessary to “achieve the primary benefits of class suits” and therefore “more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the ‘personal stake’ requirement.”

At this point, it should be clear that the Court itself is not averse to reaching anomalous results to deal with the felt necessities of public law litigation; as Chayes pointed out in 1982, even an unsympathetic Court must sometimes play the game by the new rules. But that is hardly because of the scholarly work of Chayes or anybody else; the problems existed before the scholars began to describe them. Hence the most that can be said regarding the impact of the article at the highest reaches of the American judiciary is that it has identified a set of problems that the Court prefers to resist but cannot overcome.

Perhaps a greater doctrinal impact might be expected among the lower courts, but it is hard to say that has happened. As Judge Lord’s innovative attitudes in Reserve Mining demonstrate, some judges did not need an academic invitation to experiment with new attitudes. But the sort of flexibility he displayed was not universal. Indeed, it may even have been considered inappropriate at the time. It is worth noting that the

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70. Id. at 338 n.9.
71. Thus, it is difficult to understand why the plaintiffs themselves would have felt slighted by the offer made by defendant, which gave them everything they individually could have obtained had they won the suit. Counsel, however, was presumably unwilling to take attorneys’ fees out of such a small sum and eager to generate a common fund from which to claim a much larger fee using the doctrine examined by Professor Dawson. See supra note 40 and accompanying text. Unless the plaintiffs would have to pay more in fees should class status ultimately be denied, it is hard to understand how they personally had any stake in the class certification issue. To the contrary, their personal interests might be compromised by class treatment because they would need court approval to settle their claims. See Fed. R. Civ. P. 23(e).
73. Id. at 403. For Chayes’s own evaluation of this reasoning, see Chayes, supra note 25, at 43-45.
Eighth Circuit later removed Judge Lord from the Reserve Mining case on the ground that other rulings he had made showed that his involvement in the situation had undermined his judicial impartiality.74

Since Chayes's article appeared, it does not seem that other judges have rushed to embrace Judge Lord's attitude.75 For example, consider the reactions of Judge Justice of the Eastern District of Texas, himself no stranger to structural litigation as the judge who presided over the massive suit restructuring the Texas Department of Corrections.76 In a class action challenging conditions at Texas institutions for the mentally retarded, he was presented with a request for intervention on the defendants' side by a parents group concerned that the state might react to the judge's decree by closing the affected institutions. After quoting from Chayes's "now famous law review article,"77 the judge refused to allow intervention for reasons that indicate great skepticism about undue relaxation of traditional rules in such litigation:

Class action injunctive suits seeking institutional reform—the so called "public law litigation" or "structural reform" suits—tend to draw in intervenor-applicants in an ever-widening, self-destructive whirlpool. Courts must exercise control over the lawsuit to keep it manageable while ensuring that all legally cognizable interests are represented and protected.78

Even knowledgeable and sympathetic judges, then, may shy away from embracing some implications of Chayes's work.79

74. Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).
75. This is not to say that the lower courts share the Supreme Court's attitudes. For example, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (discussed supra note 56) is said to have "at best a grudging following in the lower courts," which sometimes resort to "transparent evasions." Schuwerk, Future Class Actions, 39 Baylor L. Rev. 63, 92-93 (1987). Moreover, courts have taken speculative academic work like that of Chayes quite seriously. See, e.g., Battle v. Anderson, 708 F.2d 1523, 1537-38 (10th Cir. 1983) (embracing Professor Fiss's analysis).
78. Id. at 21-22.
79. Judge Justice did say that the objecting parents had sufficient representation because he allowed them to file amicus curiae briefs. Id. at 22-23. But that opportunity is surely much short of being allowed to participate as an intervenor. On the other hand, Judge Lord, with his open-handed view of intervention, substantially curtailed the inter-
Of course, we cannot be sure what Chayes would have prescribed for Judge Justice's case. In large measure, the absence of doctrinal impact is a result of Chayes's failure to provide a doctrinal prescription. It is hard to say what the new rule should be among judges who do embrace his vision. It is fine to say, as Chayes did, that the traditional preoccupation in standing law with injury in fact and legal interest should be supplanted in public law cases with a focus on the "fundamental issue," the question of representation. But that tells us little about how to assess the concerns that the concept of legal interest addressed by limiting the number of people who could bring matters into court. Judge Lord, for example, seemed unconcerned that the intervening municipal organizations had no legal interest in Reserve Mining's pollution of Lake Superior, or the resulting employment for residents of the area. Judge Justice, in contrast, seemed comforted by the idea that the intervenors in his case


80. See Chayes, supra note 25, at 44 ("The verbal gymnastics in many of these cases would not have been necessary, however, if the Court had focused on the fundamental issue of representation."). In his Public Law Litigation article, Chayes spent several pages on the problem of representation, mainly reacting to the points made in an earlier article by his colleague Professor Richard Stewart, who had suggested that such problems might be handled using existing procedural tools. See Chayes, supra note 6, at 1310-13. He closed by acknowledging that his views were "fragmentary and impressionistic," and admitting to uneasiness about the sorts of issues that Judge Justice cited: "A critical question for research is whether this potential is or can be exploited to produce a party structure that is adequately representative in light of the consequences of public law litigation without introducing so much complexity that the procedure falls of its own weight." Id. at 1312. Chayes did not explain how this research should be done. For an example of creative efforts actually to analyze such problems, see Brunet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Ga. L. Rev. 701 (1978) (using economic analysis to evaluate the utility of additional participation in litigation).

By the time he wrote the Foreword, Chayes felt that the problem of representation could be factored into standing law, and that "[f]ocus on the representational issues would not necessarily lead to unqualified acceptance of the public action and subversion of all limits on standing." Chayes, supra note 25, at 25. His proposed limiting factors, however, hardly seem to provide useful guidance. See id. at 25-26; cf. id. at 36-37 (proposed approach to class certification "unlikely to generate dispositive criteria"). Thus, Chayes never articulated a new test he viewed as workable, which may be symptomatic of the kinds of disappointments that lead modern doctrinal analysts to despair and to speak of a malaise in legal scholarship. See infra note 81.

81. Chayes felt that the framers of the Federal Rules had also punted on this one: [I]f the right to participate in litigation is no longer determined by one's claim to relief at the hands of another party or one's potential liability to satisfy the claim, it becomes hard to draw the line determining those who may participate so as to eliminate anyone who is or might be significantly (a weasel word) affected by the outcome—and the latest revision of the Federal Rules of Civil Procedure has more or less abandoned the attempt.

Chayes, supra note 6, at 1290.
had no legal right in the continued operation of illegal facilities for the mentally retarded. Besides endorsing the idea of considering other interests, as Judge Justice did, Chayes did not propose a workable substitute for the legal interest idea.

With regard to initiating litigation, some qualitative assessment of interests is quite inviting. If all affected individuals prefer the existing regime, courts should be reluctant to upset it at the behest of an outsider. In those circumstances, the courts may refuse the outsider's request by invoking the generally accepted proposition that, without more, plaintiffs generally have no abstract right to petition the courts to enforce the law. What Judge Lord and Judge Justice confronted, however, was a slightly different problem: Once a proper plaintiff has invoked the court's aid, particularly for equitable relief, should the court entertain the views of others who may be affected by its decree? One might be inclined to relax the quality of interest analysis in that situation on the theory that it is in the nature of equitable discretion to consider the impact on others. Hence the unwillingness of the Court in *Diamond v. Charles* to insist that intervenors demonstrate standing. The Court's ambivalence in *Diamond* might be a signal that a forceful new thesis could carry the day. But Chayes left the central question unanswered. Identifying the problem is useful, but saying only that it is a problem of representation is not. Chayes did not provide the key to the problem, and this failure limited the doctrinal impact of the article.

A different reason for the lack of doctrinal impact is hinted at in the 1982 *Foreword*: the frequency and importance of public law litigation, as Chayes described it, began to decline in the 1970's. In Chayes's terms, then, one would expect the issues he discussed to become less important as well; perhaps the concept of public law litigation was not useful. Nevertheless, the central concerns raised by Chayes remain important.

**B. Treating Public Law Litigation Differently: The Link Between Chayes and Current Issues**

Chayes's starting point was that public law litigation was significantly different from other litigation, and his article was certainly taken to refer principally to the new breed of litigation that resulted from judicial activism in the wake of *Brown v.*
Yet his article is more circumspect on this point. Besides tracing the shift away from the classical model of litigation back to 1875, certainly a time when there were few school desegregation suits, Chayes included different sorts of cases in his general description of the new litigation—"[a]ntitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management." This expansive view has merit because successful monopolization suits or suits to undo illegal mergers make courts fashion decrees whose provisions do not flow obviously from the finding of a violation. Often such decrees can involve judicial supervision over years, even decades. Moreover, as Professors Eisenberg and Yeazell pointed out in their 1980 article challenging Chayes, one can find somewhat analogous exercises of equitable judicial power centuries ago in English litigation.

Without conceding any of this, in his 1982 Foreword Chayes backtracked on his earlier emphasis on the nature of the decree as central to the public law aspect of litigation, arguing that the distinguishing features of the sort of litigation that interested

83. 349 U.S. 294, 301 (1955) (directing that school desegregation proceed “with all deliberate speed”).
84. Chayes, supra note 6, at 1284.
85. Perhaps the leading example is the odyssey of the meatpacker decree. In February 1920, the United States sued the five leading meatpackers, charging them with monopolization. The defendants consented to entry of a decree forbidding them from engaging in certain practices. Beginning nine years later, the defendants tried to convince the court to change these provisions in light of changed circumstances. See United States v. Swift & Co., 286 U.S. 106 (1932). This initial effort to undo the decree was unsuccessful; the decree was not dismantled until the 1980's. See D. Laycock, supra note 36, at 1029-35.
86. Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465, 466 (1980) (“[M]uch of what other commentators see as confined to institutional litigation is present, although in somewhat disguised forms, in all litigation.”).
him were "the nature of the controversy, the sources of the governing law, and the consequent extended impact of the decision."87 Little as this explains, it does show that Chayes was finding it more difficult than originally appreciated to decide what was and what was not public law litigation.

Given the decline in structural civil rights litigation—which Chayes recognized88—the 1982 recalibration seems unwarranted if it was designed to limit the focus to such cases. There is a real problem in deciding what public law is, popular though the concept may be. At one extreme, it would seem that enforcement of contracts is distinctly private in the sense that the courts are simply implementing private arrangements made by the parties. But even those cases involve an overlay of legal rules imposed by society.89 True, one may consider various constitutional protections more important or valuable than laws against usury, but a regulatory tenor pervades civil litigation as a private substitute for public enforcement. In this atmosphere, the private/public dichotomy becomes extremely difficult to apply.90 Is "public law litigation," for example, different from "public interest litigation"? Do Chayes's revised guidelines provide a meaningful focus?

One view is that all legal rules reflect public values.91 Due to the increasingly regulatory tinge to much American "private" law, there is a public interest in litigation outcomes. Recall Chief Justice Burger's explanation for his benign view of class actions in Deposit Guaranty National Bank v. Roper—that they should be available when the government's regulatory efforts fail.92 Moreover, it is becoming apparent that there is a significant public interest in all civil litigation; because litigation is sup-

87. Chayes, supra note 25, at 58.
88. See supra text accompanying note 26.
89. Putting aside such limitations on the mythical freedom of contract as laws against usury, courts will occasionally revise the terms of contracts to adjust them to unexpected and calamitous developments. See generally Hillman, Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, 1987 DUKE L.J. 1.
90. Indeed, the dichotomy may be breaking down as a general matter. See generally A Symposium, The Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982).
91. See Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 35-36 (1979) (stating that "all rights enforced by courts are public").
92. 445 U.S. 326 (1980); see supra text accompanying note 68. This private enforcement approach has some appeal: "[L]egislatures or courts make law, but leave it to citizens to enforce. We have effectively 'privatized' litigation by delegating the task of enforcement to those holding the greatest incentive and amount of information regarding a dispute, the private litigants." Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 Tul. L. Rev. 1, 20-21 (1987).
ported by public funds and uses public officials, the public has an interest in how this public facility is performing.  

The enduring significance of what Chayes described, therefore, should not and cannot be limited to some small class of "public law" cases, however defined. Even as these are in decline, the themes identified by Chayes remain with us. Although he focused on what may prove to be a transitory phenomenon in our legal culture, he actually posed the questions that must be addressed in connection with litigation in general.

In this section, I will explore this conclusion by examining the three most controversial subjects in litigation at present. First, the growing concern with the tort "crisis" shows how hard it is to segregate public law litigation as an area of special importance. Instead, the reaction to this new preoccupation ties in with my other two subjects—managerial judging, and the growing disaffection with adjudication that has spawned the alternative dispute resolution movement—and with Chayes's probing. Accordingly, it seems that, although he focused on a phenomenon of waning importance, Chayes somewhat unwittingly pointed out the issues that continue to be important.

1. The tort "crisis"—Personal injury litigation seems to display few of the features that Chayes found peculiar to public law litigation. The legal rules have evolved over time, but they certainly look different from the high-toned constitutional principles that typify the school desegregation or prison conditions suit. The relief seems to be prototypically private—a single transfer of money from defendant to plaintiff if plaintiff wins.

But tort law has changed. The nineteenth-century individualism that supported doctrines like the fellow-servant rule and made contributory negligence a complete defense has yielded to a different attitude that views tort remedies as ways to shift the costs of accidents. More significantly, products liability, scarcely an important part of the docket fifty years ago, has emerged as the major focus of innovation in tort law. Path-breaking scholars and courts have propelled plaintiffs into new theories not solely to improve the plaintiffs' chances of compensation, but also and explicitly to alter the behavior of providers of goods and services. Thus courts are increasingly willing to entertain the idea


of punitive damages in products liability cases, explicitly endorsing relief designed to alter conduct.

These developments have, not surprisingly, provoked spirited opposition. The insurance industry, in particular, has regularly complained that shifts in the law have undermined its ability to make the calculations necessary to set premium levels. 95 A few notable bankruptcies resulting from massive tort litigation (e.g., Manville Corp. and A.H. Robins) seem to lend substance to arguments that tort liability has gotten out of hand. Even the instrumental argument has been turned on its head by those who assert that regulation through jury verdicts is stifling innovation in technology. 96 It is harder to say now than it was in 1976 that "conventional" tort litigation has only private significance; in terms of social importance, it may rival the sort of cases Chayes had in mind.

Moreover, at least some tort cases display characteristics very similar to those Chayes identified in public law litigation. Consider, for example, Smith v. Western Electric Co., 97 a Missouri state court case. The plaintiff, Mr. Smith, suffered increasingly severe reactions to his fellow workers' smoke in the workplace, including nausea, dizziness, blackouts, loss of memory, and cold sweats. When Mr. Smith's employer, the defendant, refused to alter its rules on smoking to protect him, Smith sued, claiming that the defendant had breached its duty to use all reasonable care to provide a safe workplace.

At first blush, this looks like a standard tort suit. The twist was that the plaintiff did not sue for damages, perhaps because his injuries had not yet reached the point where they would be considered compensable, or perhaps because under applicable workers liability legislation, he could not sue his employer but only could seek benefits through an administrative scheme. Instead, Smith sued for an injunction requiring his employer to protect him against exposure to smoke. After the trial court dismissed the case for failure to state a claim for relief, the appellate court reversed, reasoning that compensatory damages were

95. For an examination of these arguments, see Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987).
96. See Huber, Safety and the Second Best: The Hazards of Public Risk Management, 85 Colum. L. Rev. 277 (1985) (arguing that the tort system is antagonistic toward new technology and therefore stifles innovation).
97. 643 S.W.2d 10 (Mo. Ct. App. 1982).
inadequate, and particularly so where "the harm has not yet re­sulted in full-blown disease or injury." 98

The court's reasoning has a great deal of appeal. Even Judge Posner recognizes that compensatory damages are an inadequate substitute for avoiding the harm altogether.99 Not only does this recognition fit the traditional inadequacy of legal relief prerequisite for equitable remedies, it also makes an injunction an extremely attractive judicial reaction to the specter of personal injuries. Subjecting people to personal injuries is hard to justify if an injunction could prevent the injuries.

To accept that reasoning, however, immerses the court in most of the problems that Chayes felt were peculiar to public law litigation. Although the plaintiff had a particularly violent reaction to smoke in the workplace, such exposure harms many, as Smith alleged in his complaint.100 Like the plaintiff in a public law case, then, Smith had drawn the court's attention to an evil and asked the court to rectify it.101 Indeed, given the current concern with toxins in the workplace, one might well suggest that the court should not stop with cigarette smoke but also investigate other possibly dangerous substances in the defendant's plant. The tightly constructed traditional lawsuit seems far behind.

The relief problem in Smith is also similar to the public law model. Particularly if it tries to eliminate the possible harm to other nonsmokers, the court has no legal guidance on what it should decree to solve the problem. The court could forbid smoking in the plant. Before doing that, however, it should consider representation for the workers at the plant who smoke. Another possibility is to establish (and monitor) rules for smoking in the plant, although there is no legally obvious model for such rules.102 Moreover, particularly if the court broadens its atten-

98. Id. at 13.
99. See R. Posner, Economic Analysis of Law 189 (3d ed. 1986) ("[T]he tendency of tort damages, although so often criticized as excessive, is in fact to undercompensate the victims of serious accidents. If damages compensated the victim fully, he would be indifferent between being injured or not being injured.").
100. See Smith, 643 S.W.2d at 12 ("The petition further states that, although 'second-hand smoke' is harmful to the health of all employees, defendant is permitting them to be exposed in the workplace to this health hazard . . . .").
101. See Chayes, supra note 6, at 1297 ("Attention is drawn to a 'mischief,' existing or threatened, and the activity of the parties and the court is directed to the development of on-going measures designed to cure that mischief.").
102. By way of illustration, in Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976), the court ordered the employer "to provide safe working conditions for plaintiff by restricting the smoking of employees to the nonwork area presently used as a lunchroom." Id. at 531, 368 A.2d at 416. In Smith
tion to include consideration of other dangerous substances in the workplace, there will be a prospective fact-finding problem: How much protection is enough?

Even at the level of enforcement, there are analogies to the public law model. In the public law cases, many have pointed out the limitations on the court’s ability to force public officials to spend money they do not have as a result of hard fiscal times. As we have seen, similar concerns animated requests for intervention in *United States v. Reserve Mining Co.* Locking up the officials seems unproductive and unlikely to solve the fiscal problems. *Smith* does not present such problems so long as the court confines its attention to cigarette smoke, as opposed to other toxic substances, but recalcitrant smokers might frustrate many measures. Should the court put them in jail for disobeying the new smoking rules? Even if it has the power to do so, the court would have to monitor and enforce an ongoing regime of compliance much like a court in a school desegregation case.

Undeniably, there are differences between classically private law litigation and public law litigation. One way to distinguish them is to make a qualitative judgment in favor of constitutional values and against more mundane concerns. But that approach becomes more difficult to justify when serious personal injuries or threats to health are at issue. Most personal injury litigation has not developed the characteristics that make *Smith v. Western Electric Co.* so troubling, however; usually the court system’s approach to personal injuries will be to dole out inade-

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itself, defendant argued that the state law tort action was preempted by the Occupational Safety and Health Act (OSHA), but the court rejected this argument, noting that there was no applicable OSHA standard covering tobacco smoke. *See Smith v. Western Elec. Co.*, 643 S.W. 2d 10, 13-14 (Mo. Ct. App 1982). Certainly, one may make legitimate arguments that such standards are more properly designed by regulatory bodies like the National Institute for Occupational Safety and Health (established pursuant to OSHA) than by courts. The point here is that, given the rather abstract goal of a safe workplace, the court is without legal direction in framing a decree, just as the court seeking to rectify unconstitutional conditions at a prison is left to its own resources in framing relief.


104. *See supra* text accompanying notes 61-63.

105. As employees of defendant, these smokers might be subject to contempt for violation of the decree. *Cf. FED. R. CIV. P. 65(d)* (injunction binding on “officers, servants, employees, and attorneys” of a party enjoined). To this it could be argued that the smokers’ smoking was not in the course of their employment, and was therefore beyond the reach of an injunction. But there is at least some authority for enjoining nonparties who have the ability to disrupt implementation of the court’s decree. *See United States v. Hall*, 472 F.2d 261 (5th Cir. 1973) (holding nonparty in contempt of order from court supervising integration of school that forbade anyone except teachers and students to go on school grounds where outsiders had previously disrupted integration process); *Note, Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965).
quate compensation rather than to try to prevent injuries with an injunctive regime. Nevertheless, it is becoming increasingly difficult to view public law litigation as hermetically sealed from other litigation, even conventional tort litigation. Instead, the growing judicial consensus seems to be that most, or all, litigation should be treated as imbued with public interest. That, in turn, leads judges presiding over all types of litigation to engage in what Chayes observed in public law litigation—managerial judging.

2. Managerial judging—There can be little doubt that Chayes was correct in perceiving a great shift in judicial behavior from the classical model in which the judge was a passive arbiter. He saw this change as resulting from the judge’s need to fashion a remedy for unconstitutional conditions, a development that made the judge step in and take over matters that formerly would have been left to the parties. Active judicial involvement, then, was a response to necessity.

In retrospect, it seems that Chayes perceived the necessity and the response too narrowly. The features of public law litigation that prompted judicial efforts to control litigation cannot meaningfully be limited to that kind of litigation. As might have been expected, judges promptly applied the lessons they had learned from their public law litigation experiences outside that realm. Having found a significant public interest in most civil litigation, judges reacted by taking charge of ordinary cases in a way somewhat similar to that in which they had taken control of the cases Chayes described. As Professor Subrin has recently reminded us, equity conquered law in the framing of the federal rules,\footnote{106. See Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909 (1987).} and Chayes properly described what he saw as the “triumph of equity.”\footnote{107. Chayes, supra note 6, at 1292. In his footnotes, Chayes paid homage to the role of equity rules in American procedural reform. See id. at 1283 n.11 (“[I]t was essentially the equitable procedure that was adopted in the reforming codes of the last half of the nineteenth century.”). But Chayes did not follow through on the insight; the core issue (which is implicitly raised by Chayes’s work) is the expansion of trial court power that results from the adoption of the equity model for rules.} What Chayes did not appreciate was the pervasiveness of this triumph.\footnote{108. On these points I am indebted to Steve Burbank. See Burbank, The Costs of Complexity (Book Review), 85 Mich. L. Rev. 1463, 1469-76, 1478-80 (1987); see also Subrin, supra note 106, at 913 (stating that Chayes’s article “does not do justice to the revolutionary character of the decision inherent in the Federal Rules to make equity procedure available for all cases”).}

Beginning at about the time that Chayes was writing, district judges in a number of metropolitan districts began expanding...
their role in the pretrial preparation of most civil litigation through status conferences and similar devices designed to enable the judge to influence the development of all cases. Finding this experience helpful in disposing of cases, these innovative judges soon began to proselytize for their more active role in litigation. These efforts bore fruit in the 1983 amendments to the Federal Rules of Civil Procedure, which promote such activity by all judges. Thus, since 1983, judges have been required to set deadlines in all civil cases for the completion of discovery and related matters and encouraged to involve themselves in all phases of all lawsuits.

Although Chayes apparently did not foresee this development, it flows from the triumph of equity and raises many of the same concerns he voiced in his article. As a result, the Public Law Litigation article is a starting point in assessing and criticizing the growth of managerial judging. Specifically, managerial judging involves a relaxation of forms that usually attend the interaction between the judge and the lawyers in connection with civil litigation. In this sense, it flows from the relaxed tradition of equity as compared with the rigidity of the common law. That rigidity might have appealed to Fuller, whose vision of litigation assumed a trial judge tightly constrained by the litigation choices of the parties, on the one hand, and the close scrutiny of appellate courts, on the other. As Professor Subrin has recently reminded us, there are costs associated with abandoning that rigid structure.

To illustrate: while the judge might well become involved in litigation before trial in the classical model, that would usually be in response to motions made by the parties. The motion process itself imposed constraints on the judge's involvement. The moving party would first have to make the motion, usually supported by written reasons, and the opponent would ordinarily be given a chance to respond in writing, with a reply by the proponent often permitted. Only then would the judge become involved, and then customarily only to resolve the disputed issues.

109. For a description of the way in which judges were handling such matters in the mid to late 1970's, see Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770 (1981).

110. See generally Marcus, Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure, 66 JUDICATURE 363 (1983). It should perhaps be noted that courts may, by rule, exempt certain specified classes of cases from this requirement.

111. The leading example of such an assessment is Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982).

112. See supra text accompanying notes 12-14.
raised by the parties. Indeed, so legalistic was this process that judges often took to dispensing with oral hearings on such motions and deciding them on the papers. This pretrial role conformed to the classical model of judging because the judge was to apply legal principles to the issues framed by the parties in adversary give-and-take.

In the era of managerial judging, many of these forms have been discarded for much of the judge's pretrial activity. Instead of awaiting the parties' motions, the judge takes the initiative and schedules a status conference at which the parties are likely to be called upon to announce their intention to make motions. The judge will then schedule the motions along with the other matters covered by the initial pretrial order. The judge will often schedule further pretrial conferences to monitor the progress being made in preparing for trial. More significantly, judges are often inclined to bypass the traditional motion procedure and make on the spot decisions regarding issues that would otherwise be presented by motion. Although this practice can be seen as cutting through red tape and delay, it also materially alters the dynamics of the pretrial decision-making process. The advocate who does not have notice that a certain matter will be raised at a status conference often fails, when confronted by the judge's questions, to make all the arguments that might occur with the reflection afforded by the motion process. And nothing limits such sessions to the minutiae of discovery, as the rules invite the judge to use such conferences to decide whether claims or defenses are groundless. Some judges take this as an opportunity to pressure lawyers to drop claims they perceive as wrong on the facts.

113. A number of federal district courts have local rules directing that motions usually be decided without oral argument. See e.g., S.D. Fla. R. 10B; N.D. Ga. R. 220(c); D. Idaho R. 2-109; D. Kan. R. 206(d).

114. Thus, Judge Peckham explains that "[t]he informal outline of the issues at the outset of the status conference also helps the parties focus on possible grounds for dismissal or summary judgment." Peckham, supra note 109, at 780.

115. For example, consider Judge Peckham's attitude in United Food & Commercial Workers Local No. 115 v. Armour & Co., 106 F.R.D. 345 (N.D. Cal. 1985). The suit alleged that defendant had refused to arbitrate, but it had not. After conducting discovery, defendant was therefore successful on its motion for summary judgment. It then sought sanctions against the plaintiff's counsel under Fed. R. Civ. P. 11. While finding that sanctions were appropriate because there was no basis in fact for the suit, Judge Peckham allowed only a portion of defendant's legal expenses because its lawyers had not called his attention to the factual baselessness of the suit before embarking on discovery. He reasoned that this failure to involve him was in essence a failure to mitigate:

Once Armour had pointed out, in the presence of the court, that it had agreed to arbitrate, it seems likely that Union's counsel would have had to acknowledge his failure to investigate and would have dropped the suit. And if Union's coun-
The obvious result of this protean role for the judge is to expand the judge's control over the development of the case, sometimes including responsibility for the proper preparation of the case. On a much broader scale than Chayes realized, then, modern judging raises problems of legitimacy of the investigating magistrate when measured against the classical model. Ad hoc judicial activity is hard to square with the notion that the Federal Rules of Civil Procedure should be applied in the same manner in all cases; the triumph of equity now seems to mean that the rules are merely guideposts. As a result, there is a troubling possibility that judges may indulge their own preferences about kinds of litigation in expanding or contracting litigation opportunities. The 1983 amendments even provide some support for that by inviting judges to restrict discovery if the expense seems unwarranted by "the importance of the issues at stake in the litigation." Without seeming to realize it, Chayes hit upon a fundamental shift in judicial behavior. The theoretical ramifications of that shift are increasingly important in the academy, and resolution of these issues turns largely on reassessing the Fuller-esque view of litigation, as Chayes suggested.

3. Adjudication v. mediation—Another feature of public law litigation that Chayes focused on may be even more fundamental than managerial judging. Chayes noted the tendency of judges to sidestep their responsibility to devise remedies by pressuring the parties to negotiate a consent decree. He properly perceived that this sort of prodding could not easily be fit into the classical image of the judge as a decision maker, not a facilitator.

As with the judicial management phenomenon, the idea of the judge as mediator was gaining popularity at the time Chayes was

sel refused to drop the suit, the court could have asserted its powers of oversight of litigation to dismiss the suit. 

Id. at 349. Thus, resort to formal procedures may no longer be viewed as a proper alternative to employing the new informal mode.

116. See Peckham, supra note 109.

[T]he judge should consider his sense of the attorneys' diligence, experience, and competence. Since a structured pretrial can force attorneys to prepare, even a simple case can benefit from elaborate pretrial where the attorneys might otherwise allow the case to fall into confusion. A judge should also be alert to the particularly combative attorney who, if the case is not actively managed during pretrial, might succeed in turning a trial that should be a molehill into a mountain.

Id. at 781; see also Vance v. Texas A & M Univ. Sys., 117 F.R.D. 93 (S.D. Tex. 1987) (declaring mistrial because plaintiff's lawyer is inadequately prepared).

writing, and it also applied to a much greater range of cases than Chayes appreciated. In part, this was a reaction to the increasing pressures of growing caseloads, but it also represented the feeling of some judges that all or nothing outcomes in court often were inferior as a matter of justice to the negotiated outcomes that could result from mediation.\textsuperscript{118} The relation between the flexibility of negotiated outcomes and the incentives to settle litigation was hardly a new insight,\textsuperscript{119} but judges did not begin acting on that insight in large numbers until the late 1970's. By 1983 the practice had achieved such acceptance that it was enshrined in the amendments to the federal rules.\textsuperscript{120}

Managerial judging was originally designed to speed adjudication, but it lends itself to mediation as well because it provides the judge with much information about the case and many occasions for inviting or persuading the litigants to consider alternatives. But mediation is even more difficult to fit into the classical model of litigation. Thus, for decades after the federal rules were adopted in 1938, many judges felt that judicial involvement in the settlement process was inappropriate. The insight that the all or nothing results dictated by the law often will be less attractive to the parties than a compromise in no way undermines this traditional reluctance. To the contrary, the law's preference for all or nothing results suggests that compromises are to be shunned.

It is not surprising that public law litigation would strain the traditional view, however, because the remedy so often seems detached from the finding of a violation. As a consequence, one could say the all or nothing motif does not apply in such cases because it is so hard to know what the "all" might be, and always possible that the court will fashion something less than "all."\textsuperscript{121}

But the ambivalence in public law cases ran deeper; very often the consent decree was a negotiated resolution of both violation

\textsuperscript{118} See Tone, The Role of the Judge in the Settlement Process, in \textsc{Seminars for Newly Appointed United States District Judges} 57, 60 (1975).

\textsuperscript{119} See Coons, Approaches to Court Imposed Compromise—The Uses of Doubt and Reason, 58 \textsc{NW. U.L. Rev.} 750, 751 (1964) (seeing "fair" decision unattainable by law furthered by "judicial power to compromise between the often harsh alternatives of all-or-nothing").

\textsuperscript{120} See \textsc{Fed. R. Civ. P. 16(c)(7)}.

\textsuperscript{121} This possibility also exists in more traditional cases. See, e.g., Boomer v. Atlantic Cement Co., 26 \textsc{N.Y.2d} 219, 257 \textsc{N.E.2d} 870, 309 \textsc{N.Y.S.2d} 312 (1970) (discussed supra note 65). In Boomer, the court declined an injunction against continued operation of defendant's cement plant and instead granted plaintiffs (farmers in the area) only the damages they had proven.
and remedy. This reality flowed easily from the nature of the problem courts confronted in framing decrees. The remedy problem in a prison conditions case, for example, arises because no single aspect of the prison's operations is necessarily unconstitutional if considered apart from all the others. In *Hutto v. Finney*, for example, the district court found the Arkansas prison system to violate the eighth amendment because it was "a dark and evil world completely alien to the free world." It then tried to prod the defendants to improve conditions. When that failed, the court imposed a specific injunction which, in part, set thirty days as the maximum sentence for confinement in isolation. The problem was that confining inmates in isolation for more than thirty days was not, standing alone, a constitutional violation. The Supreme Court nevertheless upheld the thirty day limitation because "[t]he length of time each inmate spent in isolation was simply one consideration among many" and, "taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance."

If the problem with fashioning a decree is caused by the difficulty of identifying exactly which features of the defendant's conduct constitute a violation, it is a short step to prodding the parties to make a deal on both violation and remedy. In taking that step, the court can build on the long history of consent decrees in antitrust and employment discrimination cases. But once that step is taken, the distinguishing features of public law litigation seem to recede; if hard liability decisions can be avoided in those cases, they can be escaped in others as well. Moreover, to the extent the public law litigation cases take up a lot of judicial time and energy, it is attractive to use mediation to dispose of the other less weighty portion of the docket. The current tort crisis atmosphere reinforces this trend. Should tort plaintiffs be left to pursue the all or nothing result at trial or encouraged to accept a "fair" settlement? Where the

main uncertainty is the proper amount of compensation, the judge can feel relatively comfortable urging acceptance of a fair amount, based on the verdicts obtained in similar cases, whether or not that suggestion can be backed up with punishment for the party who resists the judge's suggestions. 126 But liability is often unclear; in such cases, judges may have more effective tools to capitalize on uncertainty, because liability often depends more on the judge's decisions than does the measure of damages, which is usually left to the jury. By suggesting proplaintiff or prodefendant inclinations on the legal issues, the judge can powerfully affect the settlement atmosphere. 127 Where the judge's influence is greatest, however, there are no referents like jury verdicts in other cases to guide the judge in selecting a settlement figure. What is the right amount to settle a weak case? How does a judge develop rules for that? What will rules regarding "fair" settlements of weak cases do to the substantive law, with its increasingly regulatory impetus, if they dilute the distinction between cases in which there should and should not be liability? 128

To recognize and explain the shift in attitude thus does nothing to justify or confine it. Instead, one must again confront the concerns Chayes explored in connection with the judicial role in the negotiation of the structural litigation decree. Many scholars

126. See, e.g., Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985). In Kothe, a medical malpractice action, the judge recommended at a pretrial conference that the case be settled for an amount between $20,000 and $30,000 and warned the parties that he would punish the dilatory party if the case were settled for such an amount at trial. When the parties settled for $20,000 on the first day of trial, the judge imposed sanctions on defendant. The court of appeals reversed. Recognizing that the law favors voluntary settlement of civil suits, it stated that "pressure tactics to coerce settlement simply are not permissible." Id. at 669. But it qualified this statement by pointing out that although the court had been aware during the pretrial conference that plaintiff would accept a figure in the $20,000 range, defendant had not known, adding that under these circumstances, defendant "should not have been required to make an offer in this amount simply because the court wanted him to." Id. at 670. Given the rarity of appellate review of judicial pressure to settle, this qualification about full disclosure seriously dilutes the importance of the earlier statement regarding pressure tactics.

127. For a prominent example, consider the settlement promotion strategy used by Judge Weinstein in the Agent Orange litigation. In his dealings with both the plaintiffs' and the defendants' attorneys during settlement negotiations, the judge played up the possibility that he would rule unfavorably to the side being assessed on legal issues relating to liability. To defendants, he stressed his intention to adopt the plaintiffs' theory that all manufacturers were liable for injuries caused by herbicides manufactured by any. See P. Schuck, Agent Orange on Trial 154-55 (1986). To plaintiffs' counsel, he hinted strongly that he would have to grant a directed verdict to defendants on the issue of causation. See id. at 160-61. In Professor Schuck's words, the judge "played a massive game of chicken." Id. at 259.

are now exploring these difficulties. Although they are address­
ing a phenomenon that is not the same as the one Chayes dis­
cussed, they begin ordinarily with a bow to him. That bow is a
recognition that his work relates directly to these current issues.

C. Academic Renaissance

Whether or not there is a malaise in legal scholarship gener­
ally, one can reasonably suggest that there has been one in pro­
cedural scholarship. To put things in context, recall John Hart
Ely's explanation in 1974 for the persistence of what he viewed
as a misperception of the Erie doctrine: "Part of the fault has
surely been the commentators': to one accustomed to the sav­
gagery of constitutional criticism, writers on procedure seem
strangely, if refreshingly, accepting." 129 Much as he may have
been refreshed at the attitudes he encountered, Ely clearly felt
that a bit of savagery would have punctured the balloon long
before. But Ely's article, which Chayes himself labeled "the
work of an adept," 130 was the work of one adept at traditional
doctrinal analysis. Moreover, while it has perhaps not been
savaged, Ely's article has been forcefully criticized for narrow­
ness of vision. 131 Whatever one's view of savagery, however,
there is some merit to the suggestion that in the mid-1970's, pro­
cedural scholarship was in doldrums.

The situation has changed, largely in reaction to the forces
mentioned in the preceding section. By 1979, Owen Fiss was
able to report that "the academy is today filled with talk about
procedure," 132 and it seems fair to suggest that procedure has
experienced a renaissance as the focus of creative talents. It is
not merely that proceduralists suddenly changed their spots, but
also that new blood took interest in procedural issues. Perhaps
outside influence is normally needed in procedure (and in most
other areas). John Coffee recently suggested that, as war is too
important to leave to the generals, procedure may be too impor­
tant to leave to the proceduralists. 133 But that would not seem to

131. Professor Burbank has dissected Ely's treatment of the Rules Enabling Act and
found it wanting. See Burbank, The Rules Enabling Act of 1934, 130 U. PA. L. REV. 1015,
132. Fiss, supra note 91, at 5.
133. Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and
be a problem with an eclectic scholar like Chayes, and it is not surprising to find commentators reporting that the Public Law Litigation article "set the tone for so much procedural scholarship of late." Hence, it is worthwhile to reflect on the nature of the changes that have occurred, for they draw on Chayes's work.

1. Theory—There is a tendency to treat procedure as the machinery of the law. Charles Clark's image of procedure as the Handmaid of Justice set the tone for a generation of scholars. In the abstract, of course, the theory is that procedure should be nothing more than machinery, and that outcomes should depend on the application of substantive law. Courts continue to proclaim that results must be determined by the substantive merits of the cases even in the face of flagrant violation of procedural rules by litigants who might be trying thereby to frustrate the substantive rights of their adversaries. Although no thinking


135. See Clark, The Handmaid of Justice, 23 WASH. U.L.Q. 297 (1938). Flush with his success in presiding over the drafting of the Federal Rules of Civil Procedure, Clark used this lecture to encourage vigilance lest the new rules assume importance comparable to substantive law. As he explained:

A handmaid, no matter how devoted, seems never averse to becoming mistress of a household should opportunity offer. Just so do rules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers—unless, indeed, they are continually restricted to their proper and subordinate role.

Id. at 297. Professor Subrin has explained that "[f]or Clark, procedural history was a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law." Subrin, supra note 106, at 973.

136. The starting point for this attitude is Hovey v. Elliot, 167 U.S. 409 (1897), which held that a court could not, consistent with due process, strike a defendant's answer and enter default as punishment for disobedience of the court's order. For a recent application, see Phoceene Sous-Marine v. United States Phosmarine, Inc., 682 F.2d 802 (9th Cir. 1982). The defendant there obtained a continuance of the trial date by presenting the court with a telegram stating that Lecocq, its principal officer, could not participate in a trial for medical reasons. On learning that the telegram was phony, and that Lecocq had tried to cover up the deception by asking a doctor to lie, the district court entered an order finding defendant in default. The court of appeals reversed, reasoning that "Lecocq's deception related not to the merits of the controversy but rather to a peripheral matter: whether Lecocq was in fact too ill to attend trial on October 10." Id. at 806. Several courts continue to insist that ultimate sanctions not be used for disobedience of discovery rules unless lesser sanctions are considered and found insufficient to undo the effects of the failure to comply with discovery. See Titus v. Mercedes Benz, 695 F.2d 746 (3d Cir. 1982). Further, to save litigants from sanctions caused by the misbehavior of their lawyers, the Third Circuit now requires that before ultimate sanctions are used, the court itself send notice of the motion for sanctions directly to the client. See Dunbar v. Triangle Lumber & Supply Co., 816 F.2d 126 (3d Cir. 1987).

The Supreme Court, meanwhile, has become more receptive to punishing litigants with sanctions that go to the merits. Thus, in Taylor v. Illinois, 108 S. Ct. 646 (1988), it upheld a conviction in a criminal case where defendant was prohibited from calling two
observer could believe that outcomes never depend on procedure rather than substantive law, the rather negative Handmaid image probably contributed to a lackluster impression of procedure in the trendiest academic circles because few scholars would want to be always the bridesmaid, never the bride. Perhaps as a consequence, scholars tended toward the rather mechanical recalibration of rules instead of reexamining their theoretical underpinnings, a tendency that contributed to the malaise.

Getting back to theoretical basics is an effective method of dealing with this malaise, and Chayes provided a significant nudge in that direction. As Melvin Eisenberg recognized in his memorial essay on Fuller, "The development of public law litigation challenges in an important way Fuller’s view of the limits of litigation. Chayes’s article marks the beginning of an effort to rationalize this development . . . ." From this beginning, the challenge has gained momentum. Eisenberg, for his part, found Fuller’s framework “the best worked out and most persuasive perspective from which to criticize this development.” Others, perhaps more sympathetic to the development of public law litigation itself, have taken a different attitude. Most notably, Owen Fiss has challenged the private law precepts of Fuller’s views and propounded in their place the idea that the primary and most legitimate role of judges is to give expression to our “public values.”

At this level, the procedural debate is anything but mechanical. Instead, it focuses on the assumptions underlying Fuller’s view that the adversary system is essential to the “moral force” of a judgment. Is the adversary system a good thing, putting aside history? Should the parties control the litigation them-

witnesses because they were not identified in response to pretrial discovery. The Court was not concerned that a lesser sanction might have protected the prosecution’s interests: “Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate.” Id. at 656. See generally Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 HARV. L. REV. 1033 (1978).

137. Professor Hazard, writing in 1963, reported that “[w]ith but few exceptions, the product of procedural scholarship in the last 25 years is conspicuously bare of any serious attention to what might be called the philosophy of procedure.” G. HAZARD, RESEARCH IN CIVIL PROCEDURE 63 (1963). He concluded that “[i]t would seem overdue to give greater heed to the repeated calls for filling the theoretical vacuum in procedure.” Id. at 88-89.


139. Id.

140. See Fiss, supra note 91, at 5-17.
selves in the way envisioned by Fuller, given the wider social importance of litigation? Should the judge be encouraged to take control—in the manner Chayes described—thereby supplanting the parties as the prime actor?

It is hard to understand why these basic questions have not seemed central until relatively recently. Clark’s procedural rules had an ambivalent effect on the enduring validity of the Fuller-esque vision. On the one hand, in keeping with the Handmaid of Justice image, Clark’s rules seem designed to make procedural rules unimportant to the outcome. The relaxation of fetters on pleading, discovery, amendment, and the like was designed to leave the contours of litigation open as much and as long as possible so that, at the culmination of the process, the judge, as a Fuller-esque impartial decider, could determine who should prevail. On the other hand, the very laxness of the rules bespeaks the equity orientation, and it seems that Clark actually expected this orientation to encourage judges to treat litigation as something more than simple dispute resolution in order to achieve larger social purposes.\(^{141}\) So questions about the validity of Fuller’s view were present all along due to the Federal Rules’ inherent relaxation of the tethers on litigation, but this potential was largely overlooked due to the shared culture of judicial non-intervention that led judges to maintain a “hands off” attitude. The difficulties presented by school desegregation and similar structural litigation overcame that reticence in the ways Chayes described. The perceived “boom” in litigation then prompted widespread abandonment of the ethos of judicial passivity in the case management and judicial mediation movements. These developments, in turn, are leading to both theoretical and comparativist examination of the ramifications and continuing vitality of the adversary model\(^{142}\); this process is fueled by the vision of the judge as central actor in public law litigation.

\(^{141}\) See Subrin, supra note 106, at 966.

\(^{142}\) For an ambitious recent example, see M. Damaska, The Faces of Justice and State Authority (1986). Drawing on Continental and Anglo-American experiences, Damaska develops two theoretical visions of the state and relates them to procedure. One type of state he labels the “reactive state.” It is designed to promote order and ensure that citizens may pursue the goals they choose for themselves. The “activist state,” by way of contrast, energetically pursues its vision of the good life through a vigorous regulatory program that places much less stock in the individual initiative of the citizens. Damaska’s view of procedure in the activist state looks strikingly like Clark’s, and even uses the same images:

\[\text{(P)rocedural rules and regulation in an activist state occupy a much less important and independent position: procedure is basically a handmaiden of substantive law. . . . A proper procedure is one that increases the probability—or maximizes the likelihood—of achieving a substantively accurate result rather than}\]
Passing beyond these basic strands of disagreement, one finds that subsidiary issues have begun to flower into areas of theoretical reexamination. Many have explored the ramifications of judicial intervention in local political institutions through government by decree. Besides raising questions about whether judges should keep their hands out of certain kinds of cases, this analysis traces the ways in which the new tasks judges undertake depend on changing the procedures they use to accomplish their objectives. For example, how does a judge adapt the very limited resources of the court to achieving institutional change? If the answer is to delegate tasks to others, such as special masters, what are the consequences of that action for the idea that the judge should personally fashion the relief? Whether approached on separation of powers or other grounds, these problems present basic issues of procedural theory.

Provocative though his article was, Chayes did not start this shift toward more basic questions, as others had already forcefully challenged the American devotion to the adversary ideal. Neither was the willingness to reexamine basic premises limited to the procedural issues on which Chayes focused. Yet the Chayes article occupies an important niche in the development of the phenomenon.

2. Empirical inquiry—Chayes began his article by quoting a “fashionably empirical slogan” by Holmes and then observing that, even though Holmes seemed to endorse an empirical antidote to nineteenth-century formalism, he was actually not empirical. After World War I, of course, the realist movement embraced extreme forms of empiricism. Depressed by such efforts as Underhill Moore's monumental and ultimately inconclusive one that successfully effects notions of fairness or protects some collateral substantive value. In this sense, then, the procedural law of the activist state follows substantive law as faithfully as its shadow.

Id. at 148.

143. E.g., Diver, The Judge as Political Power Broker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43 (1979); Frug, supra note 103.

144. Perhaps the most notable example during the period when Chayes was writing was Judge Frankel's 1974 lecture before the Association of the Bar of the City of New York, later published as Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975). Judge Frankel recommended that the profession “question the premise that adversariness is ultimately and invariably good,” id. at 1052, suggesting that the pursuit of truth might be regarded as a preferable objective; see id. at 1055-57.

145. Professor Fiss thus recently suggested that theoretical reexamination characterizes current American legal scholarship across a wide spectrum. See Fiss, The Death of Law, 72 Cornell L. Rev. 1, 1 (1986) (“Today everyone is talking about theory.”).

146. See Chayes, supra note 6, at 1281-82 (quoting Holmes's advice that scholars focus on “what the courts will do in fact, and nothing more pretentious”).
study of parking in New Haven, most legal academics retreated from such endeavors. Chayes himself endorsed such studies but did not conduct them, preferring to rely on armchair empiricism supported by anecdotal evidence that was illustrated by reported cases and other materials he had at hand.

Real empirical analysis is regaining popularity, in many ways as a result of the fundamental reappraisal of our basically adversary system of civil justice. Many are properly uneasy with tampering with that system on the basis of armchair empiricism rather than hard data from social science research. Such research may even be used to shed light on the Fulleresque question of whether the adversary system contributes to the "moral force" of a judgment. In this connection, the work of Walker and Thibaut, in trying to use social science testing procedures to gauge the importance of adversary techniques and participation in the process on acceptance of outcomes, offers promise for more than armchair speculation on such questions. At the same time, we must be cautious in embracing such results and recognize that others have cogently questioned their methods (as always seems to happen when such testing procedures are employed).

Other types of social science research could be employed to provide hard data that would be useful in evaluating the

147. For a discussion of this research, see Schlegel, American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore, 29 BUFFALO L. REV. 195, 264-303 (1980).


These efforts seem to overcome one of the problems of using empirical research—the need to explore the matters that are important to theoretical inquiry. On this, consider Stone, From A Language Perspective, 90 YALE L.J. 1149 (1981):

[O]ne measure of organization of law scholarly activities is the extent to which those engaged in gathering data respond to what the theorists need for the testing of their theories; some coherence would be confirmed if the theorizers even read the empiricists' work. Does anyone really believe, though, that those who do empirical research on the criminal justice system have a clear idea of what those who are doing Big Theory Justice are about, or vice versa? Doubtless, the direction of empirical research in law is most strongly influenced by the availability of grants, the techniques that are fashionable in social science research, the kind of research that is technologically feasible, and what sounds exciting. The data that the rest of law scholarship might need, or even find useful, do not orient the empiricists' thinking.

Id. at 1155.

armchair empiricist’s reaction to trends in litigation. For himself, Chayes was content simply to assert that “the dominating characteristic” of modern federal litigation was the shift to what he viewed as public law cases. Surely this could not be supported with statistics because the absolute number of such cases at the height of their popularity was quite small. But statistics are a dangerous way to measure the significance of litigation activity. To take a notable example, during his last years on the Court, Justice Powell was fond of citing the growth in the number of civil rights suits as proof that there was no need to promote such litigation because there was already too much of it.\textsuperscript{150} Statistics, of course, cannot tell us what the proper number of suits should be.

More rigorous work is now being done. Thus, there is now some statistical evidence to counter Justice Powell’s concerns.\textsuperscript{151} Both the Rand Corporation and the Civil Litigation Research Project of the University of Wisconsin have gathered data on what occurs in civil litigation in this country. Already this work has yielded results. For example, a study of jury verdicts has shown that, at least in two metropolitan areas, juries do return high verdicts against deep pocket defendants, confirming the assumptions of many.\textsuperscript{152} But another study found that the frequency of large verdicts is not so great as some might surmise, and that the frequency of judicial reduction of such verdicts is greater than many might suppose.\textsuperscript{153}

It is harder to be confident about the promise of this work in dealing with basic questions, however. The work is extremely

\textsuperscript{150} See, e.g., Pulliam v. Allen, 466 U.S. 522, 555-56 (1984) (Powell, J., dissenting) (asserting that since enactment of Civil Rights Attorneys’ Fees Awards Act, 42 U.S.C. § 1988 (1982), civil rights suits have “increased geometrically”). More generally, Justice Powell seems to have been inclined to rely on gut reaction empiricism. Consider, for example, his remarks when he dissented from the promulgation of amendments to the Federal Rules of Civil Procedure in 1980 on the ground that the amendments did not go far enough to curb what he perceived as abuses of discovery: “One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution of disputes. If there is a disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen’s ability to afford legal remedies.” Dissenting Statement of Powell, J., 446 U.S. 997, 999 (1980). On the empirical results, see infra note 155.

\textsuperscript{151} See Eisenberg & Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 642-43 (1987) (“Both national data . . . and our findings about a key federal district suggest that the image of a civil rights litigation explosion is overstated and borders on myth.”).

\textsuperscript{152} Hammitt, Carroll & Relles, Tort Standards and Jury Decisions, 14 J. LEGAL STUD. 751, 754-56 (1985).

\textsuperscript{153} See M. SHANLEY & M. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS (1987).
time consuming and expensive, the kind of problem that hamstrung much of the realist activity during the 1930's. More significantly, as the realists also discovered, the results often fail to answer the most important questions without interpretation that resembles the kind of armchair empiricism in which Justice Powell was inclined to indulge. Take the current debate about the existence of a litigation "explosion." After intense data-gathering in a number of jurisdictions, University of Wisconsin scholars were able to offer their judgment that there was no litigation explosion, or at least that current levels of litigation activity fit well within cyclical trends in frequency of litigation.\textsuperscript{154}

Beyond doubt, this work was important in providing a substitute for the kind of shoot-from-the-hip arguments that others have advanced using statistical data about increased filings in court. At the same time, selection of research methods and interpretation of the data often depend on a set of assumptions that leave open different conclusions.\textsuperscript{155} Ultimately, hard data, although it may show whether juries are awarding more against deep pocket defendants, probably cannot show whether Americans are suing too much because there is always a problem of identifying the baseline. To take Justice Powell's concerns, it is certain that the right baseline is not the level of civil rights litigation in Mississippi in the 1920's, but beyond that, we have no workable way of deciding what is the correct starting point. Even with the learning afforded by survey research, we will still have to rely to a significant degree on armchair empiricism.

In that connection, it is important to note a variant on the social science research idea—comparative data on what courts do. Judge Posner has recently suggested that the way to measure


\textsuperscript{155} To take an illustration pertinent to Justice Powell's concerns about discovery, it is interesting to note the differences in perspective resulting from two efforts to develop empirical data. The Federal Judicial Center sponsored a study of over 3000 civil cases in six federal districts to assess concerns about excessive discovery. It found that in 52% of the cases, there was no indication in the court files that any discovery had occurred. Only 5% of the files indicated that more than 10 discovery requests had occurred. P. Connolly, E. Hooleman & M. Kuhlman, \textit{Judicial Control of the Civil Litigative Process} 28 (1978). Based on interviews with Chicago litigators, however, Professor Brazil found that in at least 50% of complex cases, at least one party believes that it has avoided revealing something important despite discovery. Brazil, \textit{Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery}, 1980 Am. B. Found. Res. J. 217. As with the efforts to verify or discredit the idea that there is a litigation "explosion," these results show the difficulties in using empirical research to answer the most fundamental questions.
the value of innovative court procedures would be to test them in a sufficiently large number of cases to have statistical significance. Indeed, test programs with such techniques as mandatory arbitration of smaller cases have already proceeded in selected districts, partly in an effort to generate such data. This idea may hold promise, but it puts scientific inquiry on a collision course with the courts' goal of dispensing justice. Judge Posner's specific suggestion was that the utility of summary jury trials as devices for expediting cases be evaluated by randomly selecting one percent of all cases ready for trial for such treatment and refusing to use it in another randomly selected one percent of such cases (the control group). As a matter of social science research, that might yield reliable data. At the same time, however, using the courtroom as a laboratory in this fashion tends to undermine its effectiveness, at least in these cases, as either an institution for expressing public values (the Fiss ideal) or as a medium for resolving disputes. How exactly does one explain to the litigants who fall in one category that they may not employ the procedures that are being forced on the litigants in the other category?


157. See, e.g., N.D. Cal. R. 500 (mandating nonbinding arbitration for all actions seeking less than $100,000 in damages).

158. Posner, supra note 156, at 374-75.

159. Some district judges seem to lampoon Judge Posner's proposals. Consider, for example, the remarks of one district judge in Kentucky who rejected a Seventh Circuit holding that district courts could not require litigants to participate in summary jury trials:

It is clearly true, as Judge Posner points in his insightful article, that the effectiveness of summary jury trials has not been scientifically verified. I for one would welcome a controlled experiment along the lines he suggests to see if it can be verified and in what types of cases summary jury trials are most useful. . . . It is interesting to note, however, that a controlled scientific experiment such as that suggested by Judge Posner cannot be effectively conducted unless summary jury trials are mandatory.

It is true that to date we have only unscientific anecdotal evidence of the effectiveness of summary jury trials. But not everything in life can be scientifically verified. I have only unscientific anecdotal evidence that Hawaii is more beautiful than Covington [Ky.], but I intend to expend a considerable sum to go there as soon as I get the chance.


Posner seems to recognize that his suggestion is not politically feasible, and he therefore follows it up with other survey type suggestions designed to provide some feedback on the utility of summary jury trials besides random assignment of cases. See id. at 375-76 (suggesting that judges could record information about cases in which summary jury trials were used so that a comparison could be made to other cases, or that the Federal Judicial Center could survey lawyers anonymously to determine whether they find the
In sum, Chayes's bow to empiricism anticipated academic developments that are actually empirical, even though his work, like that of Holmes, obviously was not. Much as this work may dispel some illusions about features of litigation and confirm suspicions about others, it will probably not provide a substitute for armchair empiricism on the kind of issues Chayes raised.

IV. THE IMPLICATIONS FOR LEGAL SCHOLARSHIP

The above tale offers some support for the critics of legal scholarship. Chayes's impressionistic article is almost bereft of either usable doctrinal analysis or reliable empirical proof. Its success seems to have depended on gut reactions. Although it has been cited by a wide variety of important figures, the article has often been invoked as an ornament rather than followed. It does not tie in directly with the pressing legal problems of today because it is limited in focus to a type of litigation that is in decline. If renowned and innovative works can be criticized on this ground, there would seem to be little reason for confidence about the fate of more ordinary legal scholarship. Indeed, one might even characterize the success of the Public Law Litigation article as evidence of the ancien régime impasse in legal scholarship, a bit of fluff that got a lot of attention because it was prominently placed and trendy.

There is another lesson to be drawn from this analysis, however. The article's lack of doctrinal content and reliance on the informed reader's gut reaction distinguish it from other legal scholarship but not from all scholarship. It resembles the armchair empiricism of some social science scholarship such as the sociological work of the early twentieth century. That work relied for its force on the gut reaction of the reader that the writer's observations about behavior in society were correct. In the social sciences, work since World War II has turned increasingly away from such efforts in favor of harder data from survey research. As suggested above, such empiricism is unlikely ever to answer many of the more important questions about litigation. It seems peculiarly unworkable for study of the kinds of issues Chayes was addressing: contrasting the way judges actually approach their function at present with the classical model of judi-

procedure helpful). Something along these lines has been done, disclosing overwhelming support among lawyers for active judicial intervention. See Brazil, What Lawyers Want From Judges in the Settlement Arena, 106 F.R.D. 85 (1985).
cial involvement in all probability cannot be reduced to hard data. Here one must proceed in large measure by gut reaction.

Standing alone, however, armchair empiricism has little scholarly importance unless it is tied in with some theoretical framework. This, of course, is exactly what Chayes did by showing in essence, that the classical model of litigation was itself an ancien régime construct that failed to account for much of what actually happened in American courtrooms. Because this point had not been made effectively before, Chayes's observation was an important stride. Surely the judges who knew they were reacting to the new pressures of litigation rarely contrasted their real-life experiences with the Fuller-esque ideal. At most, they were aware that some of the things they were doing had been frowned upon by some of their predecessors. For these judges, bringing this reality face-to-face with a coherent theoretical framework was valuable.

For the law professor, Chayes provided something more as well—he called the attention of the academy to actual phenomena that needed to be considered. Beyond that, he offered an analytical framework that could provide a starting point for future work by identifying the problems to be addressed. The fact that he merely raised and did not try to provide definitive answers for these questions seems an unimportant criticism. Although many have pursued these themes, it would be hard to say that they have developed final answers to the problems. More significant is the resilience of the analytical framework, which is adapted to the problems of a new era of litigation stresses that Chayes apparently did not foresee. Indeed, it has been overtly adopted in a number of areas. 160 Thus, while Chayes's brand of public law litigation has been eclipsed as a phenomenon by the tort "crisis," the growth of managerial judging, and the related enthusiasm for settlement promotion, Chayes's article remains an important starting point for one who wants to evaluate the problems of the present and the future.

Seen in this light, Chayes's article could be a symbol of the flexibility of legal scholarship. It shows that nontraditional work can be used to reinforce and redirect more traditional doctrinal

analysis. It suggests that when theory fails to fit reality, the academy can begin to reassess theory, and that an ordinarily library-bound subject can be broadened to encompass empirical research and interdisciplinary work.

Lest this present too sanguine a view of the situation, some notes of caution are also in order. Most important is to recognize the possible malaise that Chayes's discussion suggests for procedural scholarship. As indicated above, the triumph of equity has relaxed the tethers on decisionmaking by trial level judges. To some extent, this relaxation reflects the inherent difficulty of articulating trans-substantive rules to govern the kind of case-specific determinations judges must make on such issues as intervention. Thus, one could treat the substantive uncertainty at the center of Chayes's work as a symptom of the malaise that has overcome much modern legal analysis, as balancing tests displace more precise and rigid rules. As indicated above, the task for the future is to deal with this ambiguity; unless it can be conquered, the malaise will infect our entire litigation system and not just legal scholarship.

From the perspective of scholarship, it is equally important to dispel the implicit cause-and-effect suggestion of much of the above discussion. I have linked a wide variety of phenomena and ideas to Chayes's work, but that does not mean that these were caused by it. To the contrary, it is likely that much, if not all, of the work others have done would have been done had this article not appeared. Just as judges behaved in nontraditional ways without prodding from Chayes, so would others have reacted to these developments had Chayes not written about them. Some of this scholarship had already appeared, and much more must have been in progress before Public Law Litigation was published. Quite possibly, there would have been just as much academic work had Chayes never turned to these problems.

Moreover, one must acknowledge that others, particularly Owen Fiss, have gone much further than Chayes in constructing alternative theories. As noted, Chayes's article was principally descriptive in its enumeration of contrasts between the classical model and the modern reality, a point Fiss has hastened to make. Chayes did not really propose a new thesis, but only

161. See, e.g., supra notes 80-81 and accompanying text.
163. See supra text accompanying notes 83-159.
164. See Fiss, supra note 91, at 36.
drew attention to the divergence between reality and the Fuller-esque ideal. At least some who have pursued these problems further in his wake have focused primarily on attacking developments rather than fashioning new theories. The work is still obviously unfinished.

Finally, if one accepts the proposition that the phenomena Chayes described are directly related to the recent trends toward judicial management of litigation and promotion of settlement, both in terms of the actual forces that prompted judges to behave in certain ways and in terms of the theoretical issues involved, one is left with something of an anomaly. The proponents of the unconventional judicial activity discussed by Chayes would generally be described as “liberals,” favoring this innovation to achieve social changes through litigation. But many of these scholars find themselves at odds with the next step in the development Chayes chronicled: the impetus toward general promotion of judicial management and settlement. Reacting to these symptoms of the shift in judicial roles, they endorse judicial restraint in the classical uninvolved model. Thus Professor Fiss suggests that judges should be restricted to giving voice to public values (presumably via judgments rendered in the classical mode), and Professor Resnik chastises judges for their preoccupation with output at the expense of outcomes litigated in the classical fashion. So the closing point is that scholarly insights sometimes lead in directions the scholar finds discomfiting. But that conclusion underscores the importance of the dispassionate scholar who observes and explores without a stake in a particular outcome.

**Conclusion**

Even though a new scholarly movement such as law and economics can have widespread effects on the law, a single article is not likely to do so. Legal scholarship is not, after all, like science, where a single breakthrough can have such an effect. Consider, for example, the scientists who shared the 1987 Nobel physics prize. Their article on superconductivity at much higher temperatures than before believed possible was described as “breaking a sort of magic barrier” and “turning the world of physics on its ear in the space of a year.”

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Chayes's *Public Law Litigation* article did not have such dramatic effects. Indeed, one may question whether it had any effect, since the course of litigation and scholarship would probably have been much the same had the article not been published. In law, however, one may also question whether it is desirable to promote such breakthroughs since law is a human endeavor and insights that never occurred to anybody before may be too remote from experience to be helpful. The value of Chayes's article is that it builds on experience and prompts evaluation of that experience in light of other considerations that had not been brought to bear on the phenomena described. No one should expect this sort of scholarship as steady work. Sea changes in law are relatively rare, and few are positioned to seize the time and attach their names to such changes. Although some law professors may abandon the law and become social scientists, very few can hope to emulate Chayes's success in *Public Law Litigation*.

166. See Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (suggesting that "brilliant" paradigm-shifting work is dangerous in law and in economics because the brilliant insight is unlikely to occur to anyone but the brilliant person, while law and economics both deal with the behavior of more ordinary people).