Doing the State's Business: From Collective Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts

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Twentieth-century narratives of class action are steeped in views about how the 1966 reforms of Rule 23 liberated aggregation. But the key decision enabling today's aggregates dates from the early 1950s, when the Supreme Court relaxed the strictures of the Due Process Clause to enable banks to preclude subsequent claims by beneficiaries of pooled trusts. In the 1960s, rule drafters built on that model to deploy federal courts to do other kinds of work – facilitating group-based resolutions of claims filed by civil rights plaintiffs and consumers, pursuing cases that could not have proceeded individually.

Rule 23 reflected and embedded new constitutional understandings of due process to permit what jurists interpreting the Fair Standards Labor Act had in the 1940s assumed to be impossible: a mechanism that could bind absentees without their affirmative consent or participation at the inception of a lawsuit.

Rule 23 successfully normalized aggregate processing, even for the very cases presumptively exempt in the 1960s – mass torts. By 2015, another aggregate form, multi-district litigation (MDL), accounted for some forty percent of the federal courts' docket of pending civil cases, and product liability cases were ninety-two percent of the MDL docket.

The rise of aggregation intersects with other shifts in courts, including swelling numbers of unrepresented litigants and judicial promotion of settlement through private exchanges outside public purview. Although remands for trial in MDLs and opt-outs in Rule 23 provide illusions of autonomy, in practice very few litigants have the capacity to go their own way.

Conflicts over class actions and efforts to derail them gained intensity in the 1990s, as Congress banned legal service lawyers from bringing class actions and imposed constraints on prison and securities class actions. In 2011, the Supreme Court went further by interpreting the Federal Arbitration Act (FAA) to permit job applications and consumer forms to ban aggregation.

The preclusion of class actions through the FAA and the prevalence of aggregation share a conceptual predicate: the sufficiency of legally-constructed, rather than actual, consent.

Through both, individuals are not the authors of the terms under which their rights are decided. Yet the reasons for doing so diverge. Class and MDL proceedings aim to enable access to remedies through group-based redress in a public forum. Class action bans – whether imposed by the public or private sectors – impose costs on the pursuit of rights that cut off access and suppress information relevant to other potential claimants.

How can aggregation be retooled to respond to the challenges of incorporating participatory and egalitarian values in courts filled with poor people, aggregates, and powerful judges and lawyers determining resolutions? The key to legitimacy is representation of interests and, since its inception, discussions of Rule 23 have focused on the similarities and the differences across claimants at two points -- certification of classes and approvals of settlements.

But fifty years of class actions have made plain that settlements are not the end point. Just as civil rights cases have a long implementation trajectory, distributions of funds can also entail a sequence of post-settlement decisions. Moreover, at the time of settlement, not all information about implementation may be available.

Hence more procedure is needed to elaborate this third, post-settlement phase. Individual and collective interests require making patent — rather than opaque — decisions shaping distribution systems under the rubric of class actions and MDLs. Doing so requires pushing current First Amendment doctrine beyond its focus on a public right to attend trials and related court proceedings. Likewise, due process concerns about participation need to pave ways for returns to public courts throughout the implementation phase. Rulemaking is one method to bring under the court's aegis and before the public's eye whatever problems of interest representation so as to shift (again) constitutional understandings of what courts can and should do.

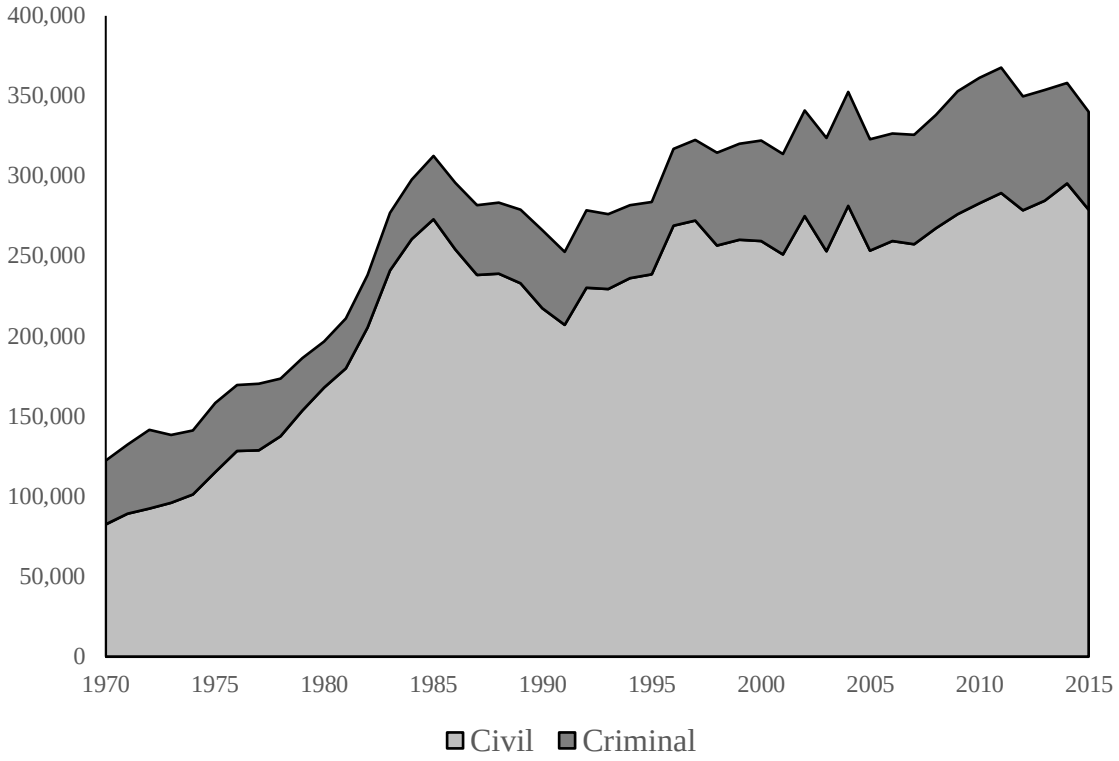
Table of Contents

I. **Collectively Dependent**

Five facts about the docket and doctrine of the federal courts inform my reflections on the 50th anniversary of the modern class action, created in 1966 when Rule 23 of the Federal Rules of Civil Procedure was substantively revised. These key facets are flattened filings; the large proportion of pending cases aggregated through multi-district litigation; the high numbers of unrepresented litigants; the constriction of class actions; and the absence of trials and much else by way of public proceedings in the federal judicial system.

First, filings in the federal court system, which had more than doubled between 1970 and 1985, have experienced little growth in the last three decades. The details are in Figure 1,[2] U.S. District Court Filings, 1970-2015.[3]

Figure 1: U.S. District Court Filings, 1970-2015

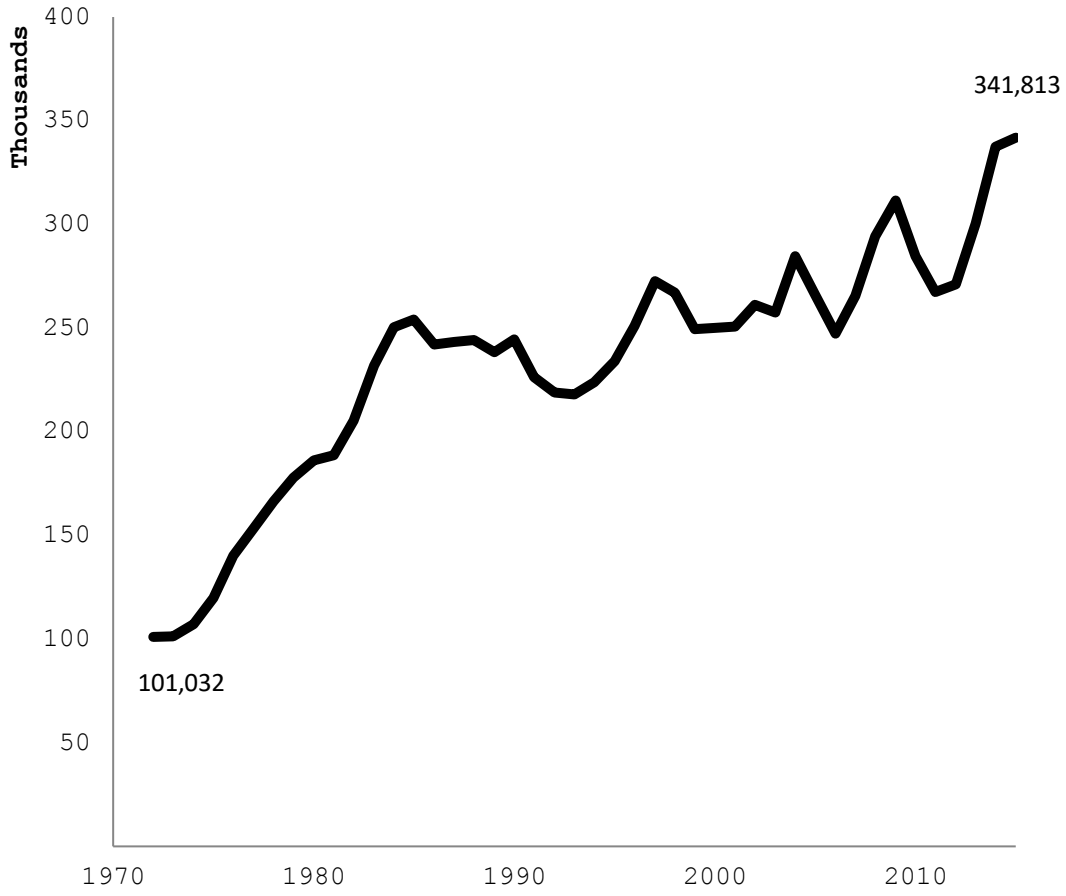


Over the past fifteen years, civil and criminal filings ranged from about 300,000 to 360,000 cases per year.[4] In 2015, 279,036 civil cases were filed, and the federal government brought more than 60,000 criminal cases,[5] a significant proportion of which involved multiple defendants.[6]

Second, a remarkable amount of civil litigation in the federal courts is clustered together, consolidated under the 1968 "multi-district litigation" (MDL) statute[7] and distributed in an uneven pattern to specific district court judges around the United States. In contrast to flattened *filings* in the last decades, the

number of *pending* civil cases, tracked in Figure 2,[8] has grown — more than tripling between 1970 and 2015 and increasing from about 300,000 in 2010 to 341,813 cases in 2015.

Figure 2: Civil Cases Pending in Federal District Courts, 19702-2015



But thousands of these cases are not dealt with individually. Rather, as of the fall of 2015, almost 40 percent of federal civil cases were part of MDLs,[9] created when the statutory criteria

("civil actions involving one or more common questions of fact . . . pending in different districts") for pre-trial aggregation are met.[10]

The growth in the aegis of MDL is significant, as is charted in Figures 3[11] and 4.[12] In 1991, fewer than 2,232 cases (or about one percent of the civil docket) were part of MDL proceedings.[13] By September 2015, of 341,813 federal civil cases pending,[14] 132,788 were concentrated in 247 proceedings aggregated before a single judge, selected by the MDL panel.[15] In 2015, more than 150 judges were assigned one MDL, twenty-eight had two MDLs each, and ten had three or more, some of which involved different manufacturers of a product alleged to be harmful.[16]

Figure 3: Percentage of the Pending Federal Civil Docket in Multidistrict Litigation, 1972-2015

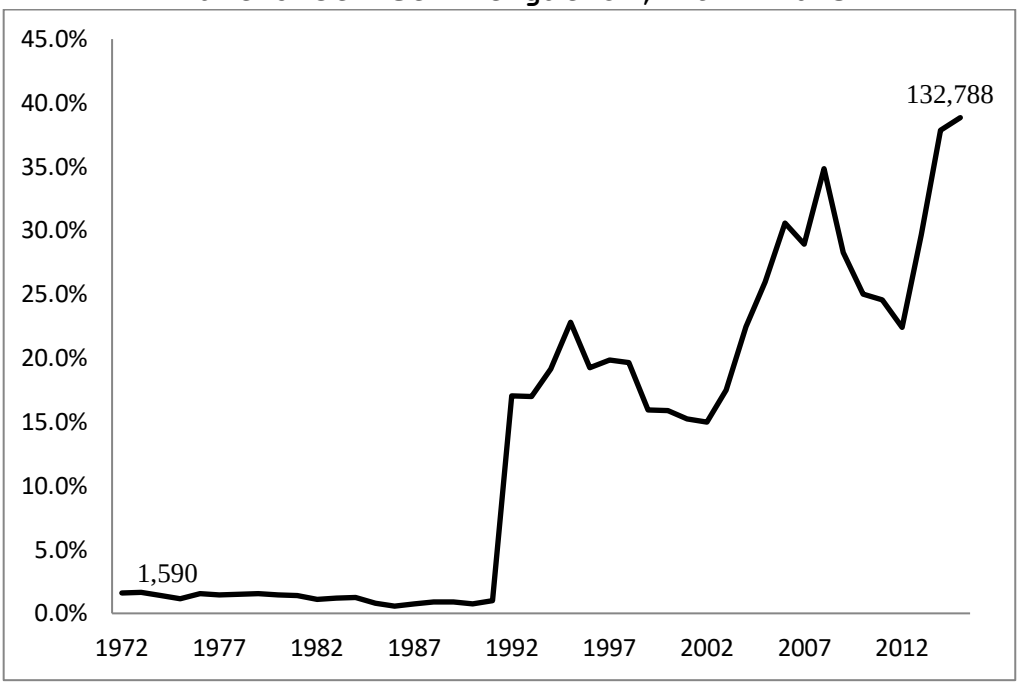
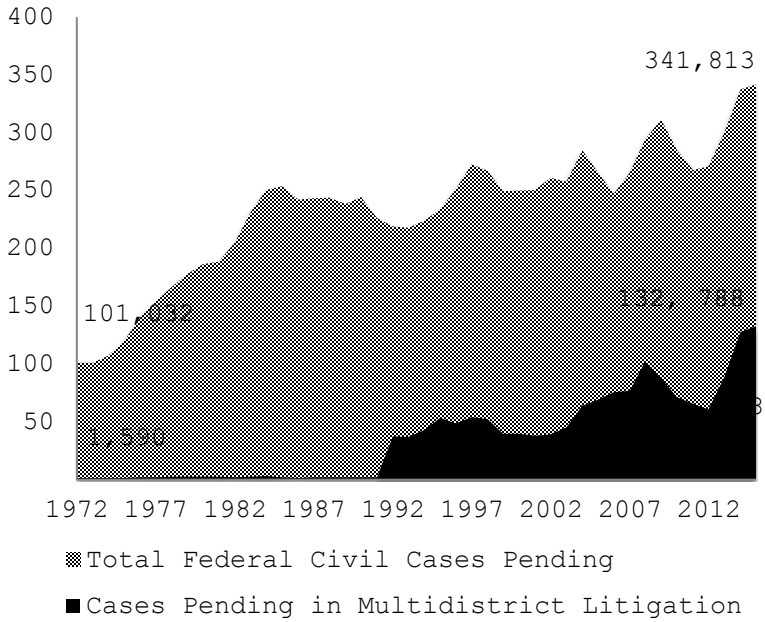


Figure 4: Pending Multidistrict Litigation Compared to Pending Civil Cases in Federal District Courts, 1972-2015



The third structural fact, illustrated in Figures 5[17] and 6,[18] is the absence of lawyers in a significant portion of the federal docket. More than twenty-five percent of the plaintiffs filing civil cases in federal courts do so without counsel at the trial level,[19] and on appeal, more than fifty percent of litigants do.[20] Disaggregated by circuits, the range runs from about a third to sixty-four percent of the filings.[21] These numbers include both thousands of prisoner filings and many cases brought by people who are not incarcerated.[22]

Figure 5: Filings by Unrepresented Plaintiffs in the U.S. District Courts, 2004-2015

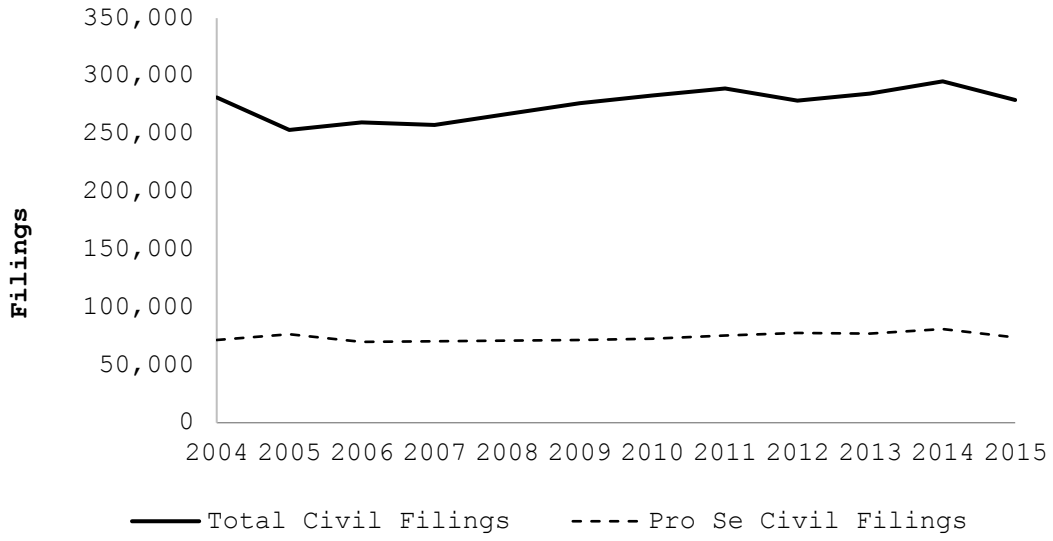
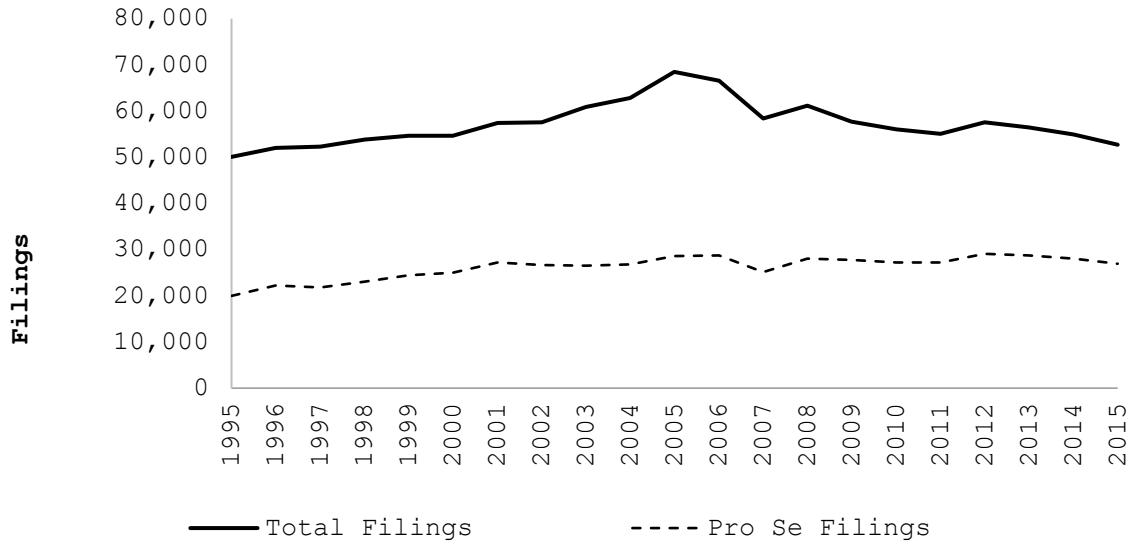


Figure 6: Filings by Unrepresented Plaintiffs in the U.S. Court of Appeals, 1995-2015



Fourth, the use of class actions has been limited by interpretations of Rule 23, by federal statutes, and by decisions about the 1925 Federal Arbitration Act (FAA) which permit

enforcement of terms in consumer and employee documents that prohibit aggregation.[23] Constraints on class actions date back to the 1970s when, in *Eisen v. Carlisle & Jacquelin*, the Supreme Court insisted that under the then-recently-amended Federal Rule 23, plaintiffs provide and pay for notice to individual class members.[24] That requirement priced some lawyers out of the class action market.

Major inroads into class action practice came in 1996, when Congress deprived the neediest litigants of ready access to class actions. Altering rules governing the Legal Services Corporation (LSC), Congress banned recipients of LSC funds from bringing class actions.[25] In the same year, Congress enacted the Prison Litigation Reform Act (PLRA), which limited access for prisoners to file lawsuits and imposed new costs on prison conditions class actions.[26] Congress provided that defendants and interveners could move to terminate injunctive relief (including long-standing consent decrees).[27] Congress further limited the fees that lawyers for prisoners could be paid.[28]

In 1996, Congress also enacted the Private Securities Litigation Reform Act (PSLRA),[29] creating a more restrictive format for that kind of class action. Before seeking class certification, plaintiffs had to publish in "a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class."[30] Congress thereby

slowed down certification and required judges to announce which clients and their lawyers would gain leadership status as the "most adequate plaintiff."[31] In 2005, class action took another hit, this time through the Class Action Fairness Act (CAFA),[32] which enabled federal courts to take jurisdiction over certain large-scale class actions filed in state courts under state law. The operative assumption of CAFA's proponents was that once federal judges had such cases, they would decline to certify classes.[33]

More recently, the U.S. Supreme Court has been at the forefront of curbing class actions,[34] although the decisions vary with the substantive rights and the stage of the litigation.[35] Thus, the interpretative narrowing of Rule 23 is tempered by its ongoing vitality in a variety of arenas,[36] from high-profile settlements of class actions such as claims involving Volkswagen emissions[37] and the BP oil spill[38] to cases involving prisoner conditions, including solitary confinement.[39]

Yet the Court has applied the FAA expansively — to condone class action bans, inserted into a variety of forms provided to consumers and prospective employees — so as to preclude aggregation before any dispute has arisen.[40] Yet another limit on court-based class actions comes from federal government responses to 9/11 and the BP oil spill, in which the government supported group-based settlements outside the court system.[41]

The fifth key fact about the federal courts is that almost no cases reach trial. As of 2015, about one in 100 civil lawsuits filed began a trial before either a judge or a jury.[42] Which cases make it to trial is not readily knowable; a preliminary review of available data on the under 3,000 cases tried in 2015 permits only a window into factors such as whether the litigants were unrepresented, in classes or MDLs, the subject matter, and the distribution across the United States.[43]

Of course, judges do a good deal of adjudication without trials. Assessments of judges' spent in open court ("bench presence"), based on statistics from the federal courts Administrative Office (AO), tracked a "steady year-over-year decline in total courtroom hours" from 2008 to 2012, resulting in less than two hours a day on average in 2012 in the courtroom, or about "423 hours of open court proceedings per active district judge."[44] While judges may be interacting with litigants and lawyers through forms of alternative dispute resolution, those exchanges are outside the public realm.[45]

These five structural facts are all about the relationship of "class," in different senses of that word to courts as state-provided services. Around the world, commentators describe judiciaries navigating this "age of austerity."[46] In the United States, state courts are identified as at the center of struggles, given their own lack of financial wherewithal and legions of

unrepresented individuals. Tallies from both West and East Coasts detail the millions of civil litigants in courts and lacking lawyers.[47] But as twenty-five percent of the trial level and fifty percent of the appellate filings in the federal courts come from unrepresented parties, Article III courts need to be brought into view as also searching to cope. Even as they are comparatively rich, a significant proportion of their litigants are not.

Turning from "class" in the sense of the economic capacity of individuals and judicial systems to "class" as a form of litigation, the federal court docket underscores how dominant aggregation is, marking almost forty percent of the civil docket, largely through MDLs, enabling cost-sharing through cross-plaintiff subsidies.

Classic discussions of class actions have argued their usefulness for individuals with neither the resources nor knowledge to litigate single-file,[48] and for providing economies of scale for judges by limiting repetitive work and inconsistent decision-making, and through holding out promises of a "comprehensive resolution"[49] if not "global peace."[50] What the contemporary facts of the federal courts reflect is that judges also need aggregation to ensure that some cases are staffed by lawyers with resources to clarify the claims advanced. Thus, an irony of the class action "wars"[51] is that the federal judiciary

should be included in an accounting of those "injured" by assaults, as launched again in Congress in 2017.[52]

Pointing to the utility *for the state* of aggregate litigation is not novel.[53] Yet this celebration of Rule 23 in 1966 as the modern source of representative litigation may obscure that the key facets of the 1966 class action provisions -- binding absentees who have not participated and are functionally without realistic opportunities to litigate individually -- was enshrined in U.S. law more than a decade earlier.[54] The foundational re-conception of the Due Process Clause came in 1950 in *Mullane v. Central Hanover Bank & Trust Company*[55] when the U.S. Supreme Court approved aspects of N.Y. State Banking Law, providing for trustees to obtain judicial clearance, in the aggregate, of potential claims from beneficiaries of pooled trusts. Not only did the Court license binding individuals whose "whereabouts could not with due diligence be ascertained,"[56] the Court revised its jurisdictional rules to permit a state to close off the rights of individuals from other states. Moreover, the Court structured notice requirements to avoid making them too costly. As Justice Jackson explained,

> "[t]he vital interest of the State in bringing any issues as to fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process

Clause which would place impossible or impracticable obstacles in the way could not be justified."[57]

In the 1960s, a new substantive "vital interest" - facilitating civil rights and small consumer claimants - came to the fore. Aggregate litigation was then enlisted through revisions of Rule 23 that moved due process parameters once again. As I write, efforts to dislodge aggregation – akin in the name of state interests in unfettering public and private authority – have taken center stage. My argument, in contrast, is that aggregation has important contributions to make, but that doing so requires reconceptualizing the arc of litigation to bring the post-settlement implementation under the courts' aegis and before the public's eye. Hence, this essay proceeds in three segments.

I first sketch the developing "class-consciousness" in the twentieth century, as judges and legislators devised methods to welcome new sets of litigants through a mix of substantive legal entitlements and procedural endowments, including the subsidies provided by collective actions. To clarify the conceptual constitutional leap that the 1950 decision of *Mullane* entailed and that Rule 23 consolidated, I begin with the 1938 Fair Labor Standards Act (FLSA), whose text seemed to provide a radically capacious invitation for representative litigation.

But federal judges insisted that the FLSA's authorization for employees to file on behalf of "other employees similarly

situated"[58] could not, constitutionally, permit lawsuits to proceed without record evidence of individuals' personal consent.[59] The 1940s FLSA case law's loyalty to individual participation rather than to interest representation underscores the distance traveled in constitutional interpretation thereafter and now generally taken for granted[60]: the binding of absentees who have not affirmatively appeared in court through class actions.[61]

The second part of my discussion is devoted to *Mullane*'s rereading of the Due Process Clause, the purposefulness of Rule 23, and aggregation's expansion through multi-district litigation. The 1966 Rule did on a grand scale what the judges reading the FLSA thought was impermissible — deciding the rights of absentees without their affirmative consent.[62] But even with impressive ambitions, the drafters of Rule 23 focused on arenas in which they thought the need for lawyers most pressing. Notes by the Rule Committee's 1966 presumptively excluded mass torts, thought to be individualized in a way other cases were not and resourced through contingency fees. Yet the 1966 system redistributing power to civil rights and consumer plaintiffs had utility for an older form of rights claims, torts. That almost forty percent of the federal civil docket functions through MDLs, of which mass torts dominate, reflects the market utilities of collective actions across the litigation landscape.

I close by analyzing what fifty years of aggregate practice, mixed with other shifts in federal practice, has taught. Heavy reliance on MDLs is evidence that attempts to eviscerate class actions are dysfunctional – lessening the regulation of aggregation while not abating the form. Decades of debating whether classes should be mandatory or not[63] have distracted us from understanding how profound has been the eclipse of the individual litigation model. Opt-out classes appear to validate values of individual autonomy, consent, and participation that have come to be associated with due process, but only rarely are clients and lawyers able to vote with their feet and go their own way.

What then are the "vital interests" of the state for which reconstruction of constitutional doctrine and rules are again in order?[64] While binding absentees through aggregation and the preclusion of class actions by signatures on employment applications and consumer product circulars both reflect the diminution of individual authorship and participation in events that structure their rights, the two have divergent goals. The reason to tolerate aggregation's incursions on individual volition is because class actions and MDLs enhance another form of autonomy – the ability to participate in collective efforts to obtain redress in public for alleged illegalities. In contrast, individualization through aggregation-bans stifle joint action and

close off needed resources – thereby reducing the public's access to information about both rights and remedies.

Further, the numbers of lawsuits filed by unrepresented individuals demonstrate the hopes that people put in courts as well as the misfit between institutions designed for lawyers and their use by non-professionals. Unrepresented individuals place enormous pressures on their opponents and on judges, as can be seen through a review of the 2,975 cases in which trials were held in fiscal year 2015; we located about fifteen percent (450 cases) in which unrepresented litigants were one or both sides.[65] In short, in the world full of rights and riddled with inequality, the federal courts themselves have become all the more dependent on aggregation to resolve and sometimes to adjudicate claims.

But even as court-based aggregation enhances the capacity to pursue rights, the current practices are not sufficiently responsive to other "vital interests" of democratic orders, encoded in the United States in due process and the First Amendment. Aggregate lawsuits do not end at settlement because time is needed to implement remedies, and information is often developed post-settlement about the means to and challenges of doing so. Yet neither rules nor doctrine have structured post-settlement decision-making to ensure participation, address claimed inequalities, and provide public access to the decisions made. To do so, First Amendment doctrine needs to move beyond its

focus on a public right to attend trials and related court proceedings, so as to enable oversight of both the processes and the outcomes of collective resolutions. Likewise, due process concerns about participation need to come into play not only at certification and when settlements are approved but also as decisions on remedies for sets of individuals within the aggregate are made.

II. Courting Collectivity: Access Subsidies, Litigation Incentives, and Efficiency Boosts

A. "By any one or more employees for and in behalf of himself or themselves and other employees similarly situated": The Fair Labor Standards Act

To understand the transformation in the 1950s and 1960s of constitutionally licit collective action requires context. The markers creating the frame are the 1938 enactments of Rule 23 and of the Fair Labor Standards Act.

In July of 1938, the American Bar Association (ABA) and Western Reserve University in Ohio hosted an "Institute on Federal Rules."[66] One of the presenters, Charles Clark, the 1938 Rules Reporter, called the version of the class action rule a "real attempt at clarification of . . . an ancient rule of equity and . . . allowed under code practice, but the limits of which have always been rather doubtful."[67]

Clark explained that this Rule 23 was not "designed to state new principles" but to make the old rule "more usable" by distinguishing three forms of class actions: "true class suit," in which all within the class had a "joint, or common" right; the "hybrid class suit," where a common property was to be adjudicated; and the "spurious class action," in which rights were separate and for which the Rule had found "a place in the federal system."[68]

As noted, in the same year (and subsequently overshadowed by the 1966 class action rule[69]), Congress enacted the FLSA[70] or, as a 1939 symposium called it, "The Wage and Hour Law."[71] The statute required minimum wages (not "less than the new 30-cent minimum hourly wage") and overtime pay (if working more than "42 hours weekly"[72]). About eleven million employees were, in 1939, estimated to be covered,[73] and enforcement came by way of criminal prosecution, civil injunctions, and private lawsuits.[74]

Section 16(b) of the original statute bears reading, for it not only created what today are called litigation incentives, but also what could have been understood to permit lawsuits akin to what the 1966 class action rule authorized.

> Any employer who violates the . . . [minimum wage or maximum hours provisions] . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or

> such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment award to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.[75]

What kind of lawsuits did the FLSA create? The only legislative history comment comes from one congressman, who described private suits as having "the . . . virtue of minimizing the cost of enforcement by the Government;" the self-help provision "puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act."[76] Other virtues ascribed to the FLSA sound familiar to those steeped in discussions of Rule 23 and MDL. In 1942, James Rahl, an attorney in the Office of Price Administration administering the FLSA, explained:

> To require each employee to sue individually might well congest court calendars immeasurably and produce long delays in the gaining of rightful recoveries. Joinder in cases where it would be permissible under the practice rules of jurisdiction might prove an impracticable and cumbersome device, and in some jurisdictions might be totally ineffective if interpreted strictly according to some of the rules of permissive joinder.[77]

Yet, as Rahl noted, the collective action provision did not detail "the requirements to be satisfied, the procedure for courts to follow in reaching a decision as to the numerous individual claims, and the process and effect of judgment."[78]

Three points follow about then-understood constitutional limits on representative actions, power inequalities, and federal court docket concerns. First, decisions within the first decade of the FLSA's enactment recorded federal judges' anxiety that, if employees were to be included "who did not wish to enter their appearance," Section 16(b) could be "unconstitutional."[79] Lower court federal judges read the "constitutional requirement of due process of law" as requiring employees personally to intervene or through other "affirmative action" record that they had designated the representative plaintiff to "proceed on their behalf."[80] One judge explained: Congress could not "force one to become a plaintiff against his will or without his consent or to select for him an agent or attorney to represent him."[81] Such opinions reflected the impact of the Supreme Court's 1940 ruling in *Hansberry v. Lee*, famously holding that a prior enforcement action of a racially restrictive covenant could not constitutionally preclude a new challenge because the earlier representative did not have identical interests to those purported to be represented.[82]

Judges were nonetheless determined to find ways to welcome additional litigants into FLSA proceedings. Thus, although wage and hour claims were not "identical," and hence not a "true" class action, a 1942 decision concluded that they were sufficiently "similar" (arising "out of the same character of employment") to

be "presented and adjudicated" together even as they were also "separate and independent of each other."[83] The keys were that individuals specifically consented and that "certain questions of both law and fact" (such as whether they worked in interstate commerce) were "common to all employees".[84]

Second, judges read the statute as empowering employees by easing access to court and by enabling safety in numbers. Courts interpreted Section 16(b) as liberalizing intervention rules,[85] such that all "who care to come into the case" could join, including simply by notifying the court (rather than a lawyer filing a motion) that they had signed onto others' lawsuits. Moreover, for purposes of the statute of limitations, intervention was deemed by some judges to date back to the filing of "the main suit."[86] Further, collectivity protected vulnerable employees. As the Third Circuit explained in 1945, "no one of them need stand alone in doing something likely to incur the displeasure of an employer."[87]

Third, judges repeatedly referred concerns about responding to a high volume of cases. To "avoid multiplicity of suits" lower courts read the FLSA to permit spurious class suits[88] or easy intervention.[89] Through liberal administration, the FLSA avoided "a litigious situation."[90]

Cutbacks on the FLSA came in 1947, when Congress revisited the terms of its collective action provision. Prompted by interest

in correcting the Supreme Court's reading of the FLSA to require compensation "portal-to-portal," Congress revised Section 16(b) by limiting initiation of private damage actions to employees only, rather than representatives such as unions, and by expressly requiring employees who were joined to (in contemporary parlance) opt in by filing written consent in court.[91] The FLSA continued to include incentives. Courts could award "a reasonable attorney's fee" and costs paid to plaintiffs by defendants.[92] Further, akin to Rule 23, judges have a role in overseeing settlements; the Supreme Court interpreted the FLSA to prohibit settlements that had employers pay less than the law required.[93]

B. Due Process Shifts: *Mullane*, the Puzzle of Notice, and the Ambitions of Rule 23

The incentives to invite lawsuits were not novel to the FLSA.[94] Encouraging private enforcement of new federal rights has a long history, dating back to the Civil Rights Act of 1871 and the Sherman Anti-Trust law. But the FLSA's collective action provisions were innovative. Even if read in then-conventional terms, the practice under the FLSA made plain the utility of bringing individuals together to generate what was described as "countervailing power."[95]

Of course, the FLSA was part of a broader set of developments, running from the New Deal through the War on Poverty, the Second Reconstruction, and the civil rights, consumer, environmental, and

equality movements of the last decades. Equipping these rights-holders was at the heart of the revisions of Rule 23, drafted in the 1960s by the committee appointed by Chief Justice Earl Warren and chaired by Dean Acheson.[96]

To do so entailed expanding the reach of courts. More than a decade earlier, the Court had paved the way by revisiting the strictures of the Due Process Clause in service of another set of litigants: banks aiming to obtain judicial approval of their investments so as to preclude beneficiaries from bringing challenges thereafter. In 1937, the New York State Legislature adopted a practice developed elsewhere to permit asset pooling in common trusts.[97] To lower administrative costs and to insulate banks from potential claimants, the statute instructed banks periodically to bring a kind of declaratory action to obtain judicial affirmation that they had properly discharged their fiduciary duties.[98] If constitutional, the law of res judicata would block unhappy beneficiaries from subsequently alleging imprudent investments.[99]

The New York State Legislature also required that notice about this procedure be put in the initial trust documents and, when banks filed their actions "settling accounts," in selected newspapers. Further, the statute provided that judges appoint lawyers to serve as guardians ad litem. Thus, in the Central Hanover accounting, Kenneth Mullane was designated to represent

what was functionally one subclass, the inter-vivos beneficiaries, and James Vaughn was assigned the testamentary beneficiaries.[100]

In 1950, in *Mullane v. Central Hanover Bank and Trust Company*, the Supreme Court expanded the ability of states constitutionally to bind individuals outside their physical boundaries by upholding the grant of nation-wide jurisdiction to N.Y. courts over the trust and its beneficiaries, but tempered its ruling by holding that the statutory method of providing notice violated the Constitution.[101] Justice Jackson read due process as not imposing "impossible or impractical obstacles" to producing a decision about the banks' prudence, while also requiring an "opportunity" for those affected to know so as to be able to present objections.[102]

Mullane held that publication notice could suffice in some circumstances, but not when names of beneficiaries were "at hand" and "easily" found on the bank's books.[103] Yet personal notice was not to impose too great an economic burden on the underlying activity. A form of sampling could be used because an "individual interest does not stand alone" but was "identical with that of a class," as everyone shared interests in "the integrity of the fund and the fidelity of the trustee."[104] Therefore, "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all."[105]

In today's terms of voice, loyalty, bonding, and exit, we can theorize that those noticed could both provide information to and monitor the actions of their court-selected representatives. But *no method of exit* was provided; these property holders were placed in what came to be called a mandatory class. Further, the individually small stakes made responses (in and especially outside of New York) unlikely. While the 1950 decision discussed enabling objections from those whose property interests were affected,[106] in the decades since, neither recorded challenges by beneficiaries or successful challenges by guardians ad litem have been identified.[107] Objections may not, however, be the metric by which to judge *Mullane's* impact. As of 2015, pooled funds were thriving, and the effect notice and accountings have on prudential investments and distribution of funds remains unclear.[108]

What is clear is that *Mullane* provided a constitutional path to large-scale resolutions by courts whose legitimacy to bind absentees rested on telling a subset that their interests were being determined through a representative structure. *Mullane*'s potential was realized in the 1966 revisions to Rule 23, this time in service of other interests. We know from records of the Advisory Committee[109] that the point of the revision was to bind a set of absentees beyond those covered under the "true" class action.

Motivation to do so came from concerns about cases then pending in the courts. For example, school desegregation claims

were understood as based on individual rights that would have qualified as "spurious class actions." But Rule 23 drafters wanted to make them binding to enable enforcement beyond when any particular plaintiff graduated.[110] Thus, rule drafters created what became Rule 23(b)(2), defined as permitting no exit by co-plaintiffs when the "party opposing the class has acted or refused to act on grounds that apply generally to the class" and injunctive relief was appropriate. Another concern was cases involving limited funds (later formalized as a 23(b)(1) class), in which plaintiffs could be in competition with each other when remedies were awarded or defendants subjected to incompatible standards of conduct. A third exemplar came from small claimants who lacked the resources and knowledge to pursue rights, but who since the invention of what became 23(b)(3) classes gained routes to court.

The question of the constitutionality of bundling all these kinds of class members together for a final adjudication was addressed early on, in 1962 by the Reporter and the drafter of Rule 23, Professor Benjamin Kaplan of Harvard Law School. In a 1962 memo, Kaplan discussed the issues. A key point is that the memo did not equate constitutionality with individual notice.

Rather, Kaplan wrote about leaving notice "to the discretion of the judge on the firing line" the decision on the "character and timing" of notice.[111]

> The question of whether a binding class action is proper must not become tied in mechanical fashion to the question whether notice has been given; the grand criterion for a class action remains the homogenous character of the claim.[112]

Kaplan explained that what was needed was a court with a "sufficient connection with a class situation," so that it could exercise "jurisdiction by necessity" (borrowing the phrase from an article discussing *Mullane*) and bind absentees.[113] Reflecting *Mullane*'s structure, the memo did not assume that class members had an "absolute right to opt out."[114] Such opportunities might not seemed relevant, as the memo also raised the option of having some one-way class actions, in that members could benefit from a favorable judgment but not be adversely affected by an unfavorable one.[115]

The 1962 memo also commented that notice to absentees was especially important for the draft's formulation of what became (b)(3) classes: "if a satisfactory manner of giving notice is employed, it seems likely that the requirements of the due process clause will be satisfied."[116] Moreover, "common decency" entailed taking some "steps" to let those affected by a litigation know that it was "under way."[117] That memo also explained that notice was not to be equated with personal service of process, nor turn into a vehicle for attorneys to solicit clients.[118]

Yet the memo said that notice "and adequate representation" sufficed to assuage "doubts about the constitutionality of the representative procedure." Kaplan nonetheless questioned "how much 'individual freedom' each member of the class" actually had; the "pressure" to submit and be bound by a 'model' trial [would] often be so high" as to constitute "compulsion."[119] The memo also noted that individuals did not have a "meaningful" interest in pursuing an individual lawsuit if "a single district" was "obviously and pre-eminently the most convenient forum."[120]

The 1962 memo, mentioning both *Hansberry v. Lee*, and *Mullane*, reflected that Supreme Court case law on what was required to bind absentees was then opaque. The 1940 *Hansberry* ruling refused to enforce racially restrictive covenants because it held that the prior representatives had interests that were "not necessarily or even probably the same as those whom they deemed to represent," did not given absentees what due process required.[121] The due process problem was disunity of interests, and the Court did not mention notice as the solution.

Further, the Court left the door open for other ways of binding absentees: if "the rights of the members" turned on "a single issue of fact or law," states could create procedures that would be preclusive of subsequent litigation.[122] What was required were procedures "devised and applied as to insure

that those present are of the same class as those absent and that the litigation is so conducted as to ensure the full and fair consideration of the common issue."[123] One could try to read the 1950 *Mullane* ruling about notice as providing such a method, but the Court's requirement of reasonable efforts to provide adequate notice built on a state statute already calling for notice.

In 1964, the Advisory Committee circulated for public comment a proposed rule for what would become (b)(3) class actions. The Committee spoke of "reasonable notice" to such classes but discussed "specific notice" only for "each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class."[124] Further, the 1964 version proposed that, for what became (b)(3) classes, judges had to approve requests for opting out.[125] Indeed, as promulgated in 1966, Rule 23 did not mandate notice for its (b)(1) and (b)(2) classes of the pendency of the class action at the outset,[126] and, while it called for "reasonable notice" if a dismissal or "compromise" were in the offing, the Rule did not detail the kind, quality, or comprehensiveness of that notice. And the notice that was required for b(3) classes when certified invoked *Mullane*'s standard of "best practicable under the circumstances," [127] which could be understood as far afield from what the Court read it in Eisen to mandate.[128]

A summary is in order to reflect on the distance between constitutional law, as judges reading the 1938 FLSA provisions understood it in the 1940s, and what the Rule 23 drafters accomplished.[129] Their rule, premised on the view that these cases reflected instances when "community or solidarity of interest" was strong,[130] forced individuals who had filed no consent with a court to be parties, bound by outcomes through (b)(1) and (b)(2) classes. Even for the (b)(3) class action (to be certified if a judge found that method of adjudication "superior" to individual litigation), the Committee did not adopt the FLSA sign-up-with-the-court model but crafted instead a default of inclusion, subject to opting out affirmatively. Rule 23 drafters were thus remarkably successful in disentangling autonomy, consent, and individualization in litigation from the strictures of the Due Process Clause.

The impact of their work was intertwined with related efforts by Congress to ease access to the federal courts, from the creation of the Legal Services Corporation in 1974 to fee-shifting statutes for civil rights cases in 1976 and a host of new causes of action. Rule 23 thus contributed to our understanding of what lawsuits can do, as it enabled judges to oversee long-term school desegregation decrees and paved the way for parallel structural remedies addressing jails, prisons, mental hospitals, and employment.[131]

Further, the Rule's goal of providing for low-value claimants (in Kaplan's words "without effective strength to bring their opponents into court at all"[132]) came to fruition. An equitable doctrine developed early in the twentieth century evolved into a "common benefit" doctrine, requiring compensation to plaintiffs' lawyers for conferring the benefit through providing them with a percentage of the funds recouped.[133] Thus, small claims turned into potentially lucrative aggregations, enticing lawyers to take the risk of serving as "champions of semi-public rights" and thereby augmenting administrative regulatory oversight.[134]

III. **The Success of Aggregation as the Norm: The Case of the Tort and the Expansion of Multi-District Litigation**

The market-driven structure of Rule 23 was reflected in the rule-makers' exclusion of tort claimants. Given the contingent fee system, the drafters wrote about the lack of a "need" to push against the traditions of individualization or to face federalism conflicts stemming from *Erie*'s impact on choice of law.[135] But, as we know now fifty years later, the aggregate structure that they created for civil rights and an array of consumers would not only be used *by* tort plaintiffs, but also be needed *for* them. Indeed, mass torts have become a dominant form of large-scale aggregation in the federal courts – by way of class actions, multi-district litigations, and bankruptcies.

A sketch of why the 1960s class action rule presumptively excluded torts and of how torts became a familiar facet of aggregate litigation, in class actions as well as in MDLs, underscores how assumptions about the individuality of certain kinds of claims gave way through changing understandings of "vital state" and of individual interests as well as of constitutional constraints. To do so requires a return to the 1962-63 drafting of Rule 23.

At the time, the proposed Rule had two, not three kinds, of class actions. One category (then labeled Rule 23(c)) addressed "presumptively maintainable" class actions, and a second (under 23(d)) covered "class actions maintainable at the court's discretion."[136] But in 1963, the drafters discussed whether it would be better to follow the 1938 pattern of delineating three categories, even as they abandoned the reason (distinguishing between binding and nonbinding class actions) of the 1938 rule for doing so. Kaplan commented that the absence of categories "might also tend toward the indiscriminate use of the class-action device in 'mass tort' situations, a result surely to be avoided."[137] At the time, the referent was train or plane crashes, fires, and the collapse of building structures.[138]

Kaplan continued that torts neither would likely "meet the stated criterion" of the Rule nor would judges discretionarily certify, given the individual interest" of pursing one's "own

litigation" in a forum selected by that individual.[139] Kaplan proposed a note to state:

> A "mass accident" resulting in injuries to numerous persons is on its face not appealing for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[140]

John Frank, a committee member, responded that he was "unpersuadably opposed to the use of class actions in the mass tort situation."[141] The reminder is that Frank wanted Rule 23 limited to civil rights claims alone,[142] of which he was a staunch supporter.[143] Kaplan replied that eliminating the reach of the proposed class action rule would be "so retrograde a move" as to prevent publication of any revised draft.[144]

Whether Kaplan wanted to mollify an adamant committee member or believed torts ill-suited for class treatment,[145] he wrote that he too was "anxious to keep [mass accidents] out":

> It seems to me that it would strain interpretation to say that particular actions by injured parties in a mass accident will [quoting a part of the proposed criteria for class actions] "impair or impede the ability of the other members to protect their interests"; th[is] clause is redolent of claims against a fund.[146]

The result was that what became Rule 23(b)(3) was accompanied by the 1966 Committee's note stated that "a 'mass accident' . . . is

ordinarily not appropriate for a class action . . . .”[147]

In published comments after that, Kaplan did not suggest that that doing so was animated by constitutional barriers but by practical problems. Indeed, Kaplan acknowledged the “dilution of procedural safeguards” entailed in Rule 23(b)(3),[148] when describing the Rule’s ambit. Kaplan distinguished between some “litigious situations affecting numerous persons ‘naturally’ or ‘necessarily’ [which] called for unitary adjudication,”[149] and those involving “individual preference,”[150] for which opting out would be provided. Class treatment was not needed “where the stake of each member bulks large and his will and ability to take care of himself are strong.”[151]

These exchanges reflect that, at the time, the contingency fee system seemed viable to equip tort victims, and defendants and their insurance companies appeared to have sufficient funds to cover any dollars awarded in mass accidents. Moreover, to include torts might have prompted opposition from contingent fee attorneys. Given the rule drafters’ ambitions, tort cases were not a priority for which they took additional political risks.

Moreover, another exemplar of damage actions - antitrust cases -- were on the agenda of a different judicial committee, “the Coordinating Committee on Multiple Litigation in the United States District Courts,” charged in the 1960s “with developing methods for expediting.” That committee’s work became the source

of the 1968 MDL legislation.[152] Members of the two committees met in 1963 and, as the 1966 Class Action Committee Note also reflects, special procedures — changes in the federal rules—would assumed to be the primary (but not exclusive) vehicle for dealing with the challenges that mass accidents posed for the federal courts.[153]

Above, I used the 1940s FLSA cases to mark how much work *Mullane* and Rule 23 did in reframing constitutional conventions. The 1966 Committee note on mass torts offers another baseline against which to measure change, which happened relatively quickly. Thus, the central function of Rule 23 — displacing the once conventional constitutional wisdom about the legality of binding absent, non-participatory, non-directly consenting individuals – became licit in tort and through other forms of aggregation as Rule 23's aggregate modality migrated across the litigation spectrum.

The practical pressures came from a rising number of individuals injured by the same products or events. The cost of such injuries showed that a (b)(1) class (protecting rights-holders to a "limited fund") could well have application to mass torts, as damages exceeded insurance policy funds. Further, the stakes and the scale of such cases made plain that the individual contingent fee lawyer was not equipped to carry the load. Thus, commentators and judges soon questioned the Advisory Committee's note on mass torts.[154] By the 1980s, federal district judges had

certified mass tort cases in a range of cases, including famously Agent Orange.[155]

Lessons on aggregation of torts also came from another form of litigation – bankruptcy; tort defendants such as Johns Manville (for asbestos) and A.H. Robins (the defendant in the Dalkon Shield litigation) brought tort claimants into such proceedings. In both class settlements and bankruptcy, lawyers and judges invented new institutions – "claims facilities," which resembled both insurance companies making payments and mini-court systems resolving individual post-liability disputes. In lieu of tort victim and tort lawyer as solo actors, a mass of tort victims came to the fore as co-claimants in shared — and limited — funds, produced by PSCs and defense lawyers resolving "litigations," often with the help of the judges who thereafter assessed the adequacy of the settlements.

By 1988, the Judicial Conference of the United States "approved in principle the creation of federal jurisdiction based on minimal diversity to consolidate in the federal courts multiple litigation in state and federal courts involving personal injury or property damage arising out of a single event or occurrence."[156] In 1991, the Judicial Conference endorsed a report of the Ad Hoc Committee on Asbestos Litigation recommending aggregate treatment of the pending asbestos cases.[157] The American Law Institute (ALI) likewise became a proponent, first through a project on "complex

litigation" in the 1980s and then by endorsing the "principles of aggregation"[158] in 2010. But as is familiar, the Supreme Court's decisions in the late 1990s in *Amchem* and in *Ortiz* took much of the steam out of large-scale mass tort class actions.[159]

Yet, because consensus had already emerged that aggregate processing was essential, mass torts found a home in MDLs, whose genesis also bears a brief reflection. Its source come from the mix of rising caseloads post World War II and a spate of antitrust cases, which prompted the federal judiciary's leadership to argue that courts had to take control of "protracted cases" or those cases would "threaten the judicial process itself."[160] In the early 1960s, after the United States had successfully pursued antitrust claims against electrical equipment manufacturers, "more than 1800 separate damage actions were filed in 33 federal district courts."[161] The Judicial Conference created the "Co-Ordinating Committee for Multiple Litigation of the United States District Courts," noted above as having met with the Rules Advisory Committee, and comprised of nine federal judges charged with supervising nationwide discovery in these damage antitrust cases, in part through "uniform" pretrial orders.[162]

Thereafter, the 1968 MDL statute incorporated a different method of coordination, the transfer of all pending cases to a single judge. Akin to the 1966 class action rule, the 1968 MDL legislation created a *mandatory* pre-trial aggregation, with no

personal rights of consent during that phase of the litigation. But because cases were to be "remanded" to the originating courts at the conclusion of the "pretrial proceedings,"[163] MDL appeared to provide only a temporary arrangement and (unlike Rule 23) retained the convention of individual lawyers presenting individual plaintiffs.

Yet the statute, promoted by federal judges, was read as a managerial effort to deal with pending cases, and unlike the controversy inspired by Rule 23, MDLs garnered little attention until recently.[164] The divergent responses reflected what, once, were the differing ambitions of the two provisions. Class action revisions aimed to *enable* litigation, as Kaplan had stressed, so that "people who individually would be without effective strength to bring their opponents to court. . . ."[165] MDL was assumed to be only a vehicle to *expedite* cases already filed, and thereby to protect the judiciary and, to some extent, defendants at risk of repeated discovery requests; in contrast, class actions helped sets of new plaintiffs - schoolchildren, prisoners, consumers, and employees – make their way into the federal courts.

Moreover, in its first few decades, the MDL panel shared the Rule 23 Advisory Committee's skepticism about tort aggregation. The (in)famous example is asbestos. As caseload filings mounted in federal court, the Judicial Panel on Multidistrict Litigation (JPML) repeated rejected (in 1977, 1980, 1986, and 1987) requests

to assign the cases to a single judge.[166] The JPML's reasons echoed Kaplan's explanation — that cases lacked the requisite commonality and that the existing litigation system sufficed.[167]

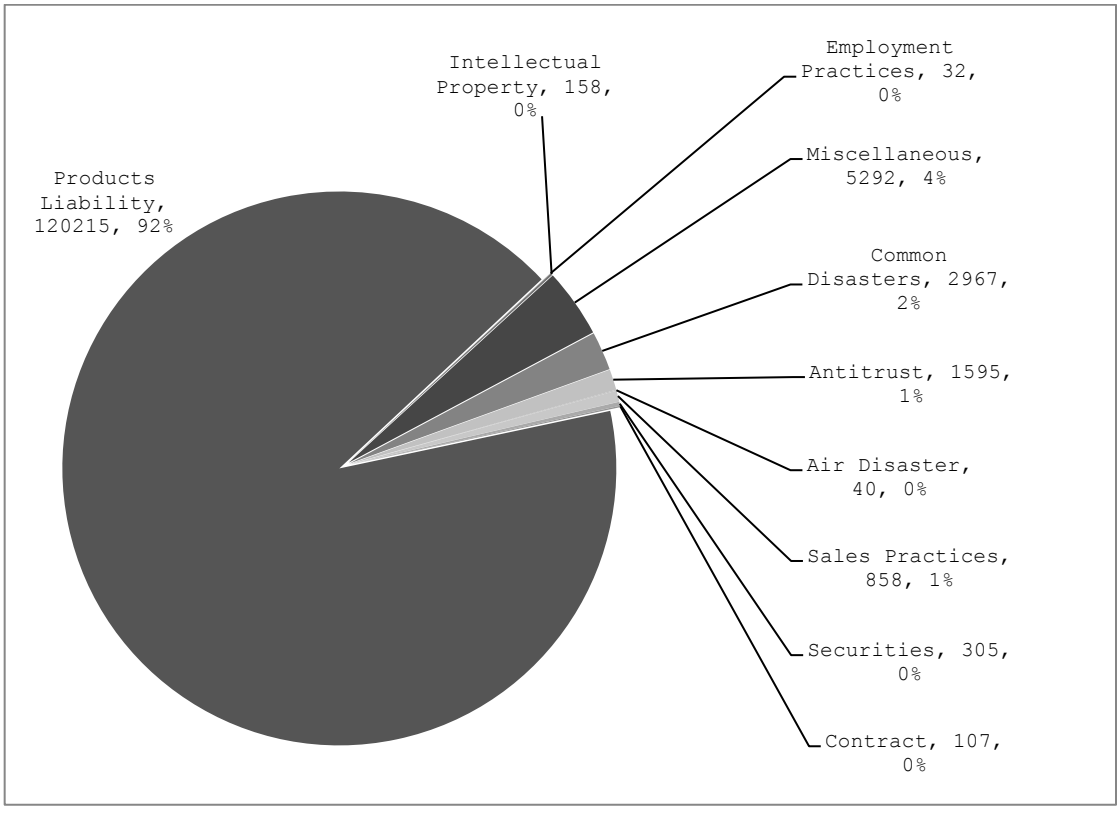
But, in 1990, Chief Justice Rehnquist appointed an Ad Hoc Committee on Asbestos Litigation, which called for a statutory solution but, in the interim, MDL treatment.[168] The MDL panel responded the next year. Quoting the Ad Hoc Committee's description of "long delays," "the same issues . . . litigated over and over"; "transaction costs" exceeding recovery "by nearly two to one"; and "exhaustion of assets," the panel assigned all the pending cases — "26,639 actions pending in 87 district courts" — to a federal judge in Pennsylvania.[169]

Return to the five structural federal facts about the federal courts, circa 2015, with which I began — flattening filings, the rise of MDL garnering almost 40 percent of the docket, the prevalence of unrepresented litigants, the decline of class actions, and the rarity of trials. As those facets reflect, the distinction drawn between MDL aggregation only for pretrial and class action full-blown aggregation has been eclipsed. The "pretrial" is the dominant form that federal litigation takes. Aggregate resolutions are the route for almost everyone, as the remand rate in 2015 for MDLs demonstrates: about 19 out of 20 cases in an MDL closed before being returned for trial.[170]

Disaggregating the types of claims in MDLs also makes plain

that the presumption of individualization in tort has likewise waned. Product liability cases were, as of July 2015, about 24 percent of the 287 then pending MDLs; adding air crashes brings the total of tort MDLs to approximately a quarter of the MDL portfolio.[171] As Figure 7[172] details, when moving from the level of the MDL to the cases within them, mass torts represented more than 90 percent of the pending MDL cases.[173]

Figure 7: Distribution of Pending MDL Actions by Type as of July 15, 2015



Data courtesy of Judicial Panel on Multidistrict Litigation
Figure created and provided by Samuel Issacharoff from Procedural Silos, AALS July 14, 2016 presentation.

Furthermore, another distinction drawn in the 1960s - between class actions as enabling new cases and MDLs as only expediting

cases already filed - has also dissipated. Under the MDL, the practice has emerged of what are called "direct filings," in which a case is brought into an MDL after the MDL exists, thus cutting the administrative costs of going to another "transfer" court first and then "tagging along."[174]

MDLs produce the subsidies that Benjamin Kaplan deployed class actions to create. Judges identify the lawyers who will speak for the group; the lawyers have agreements about cost and fee sharing, and judges have the common benefit doctrine to award fees to pay lead lawyers (primary counsel, PSCs, and the like), who recoup the largest sums.[175] And, in practice, the litigants — individual tort victims — have attenuated relationships (at best) with the lawyers dealing with the judges and adversaries in MDL litigations. When "individual" cases are settled, the "agreements" — standard forms with little opportunity for individuals to pursue claims outside the MDL rubric — generally include assent to be bound by fee allocations. Indeed, many settlements include "back door" or "walk away" provisions for defendants to exit if an insufficient number of claimants agree to be bound.[176]

In sum, both *Mullane* and Rule 23 altered the landscape of litigation by reconceptualizing the capacity of courts to generate decisions binding individuals — which is to say, changing the meaning of what constituted "due process" in courts. Yet the individualized model once seemed sufficient for personal injury

cases, which in the early 1960s, comprised almost forty percent of the federal courts' docket.[177] Moreover, in the 1940s, even as judges understood the congressional mandate in the FLSA to help workers obtain countervailing power, they thought it unconstitutional for Congress to "force one to become a plaintiff against his will or without his consent or to select for him an agent or attorney to represent him."[178] Today, we use phrases such as "the asbestos litigation" and the "vaginal mesh litigation," and call for congressional resolutions of asbestos, 9/11, and BP without hesitation – reflecting the assumption of the legality of insisting on aggregate responses.

IV. Revisiting the Regulation of Class Actions and MDL Aggregates: Due Process, the First Amendment, and Rules for Remedies

As this account of the history, rules, and doctrine of aggregation makes plain, reforms have and should be motivated by identifying the problems to be solved. Proposals such as the 2017 anti-class action statute presume aggregation is itself the problem, producing too many claimants without substantive rights. The reason I began this essay by outlining central elements of contemporary federal court dockets is because they demonstrate both the demand *for* and the contribution made *by* aggregation.[179] Vital state interests, on this account, entail thriving court

systems welcoming individuals of all classes and providing opportunities for decisions about rights and remedies that are subjected to public scrutiny. Courts are thus one venue of the democratic, in the sense of enabling iterative debates through offering disciplined opportunities for participation by those affected, oversight through third-party public rights of observation, and commitments to equitable distributions across sets of similarly-situated claimants.[180] Disagreements about the scope of legal rights and the function of remedies result through such public contestation.

Yet, to document the need for aggregation is not to say that the current class action, MDL, and contemporary due process and First Amendment doctrine suffice. What fifty years have taught – and which needs acknowledgement through new rules and doctrine -- is that aggregate litigation has three stages: initiation, resolution through a mix of litigation and negotiation, and providing the remedies. All the relevant information about implementation (either in terms of locating recipients, dealing with recalcitrant defendants, or deciding how to revise remedies in light of changing conditions) is not always available at the time of settlement. That understanding is reflected in civil rights class actions, which have regularly relied on special masters and compliance monitors and on repeated trips to court.

Class actions involving monetary relief have likewise spawned a retinue of actors. Escrow agents and claims facilities have, however, been subjected to less public scrutiny, in part because defendants seeking closure have few incentives to raise questions about the distribution of remedies. In some cases, distribution may be relatively easy, as records such as sales and losses in securities transactions are accessible, and technology can lower the transaction costs of disbursing sums. Yet in other cases, only a small subset of plaintiffs recoup, either because the time and effort required to do so are greater than the likely recovery, or the information demanded is not easily available.

These problems require revisiting a classic rationale for aggregation - to conserve the time of lawyers and judges. More time, not less, is needed during the remedial phase to make the outcomes effective in terms of being tied to legal entitlements, fairly distributed across a set of claimants, with modifications if new information develops and, hence, legitimate. A significant portion of that work belongs rightly to judges under whose watch large-scale relief is provided. And even as judges have long described themselves as serving as "fiduciaries" for the absentees,[181] they have generally not (outside the context of structural injunctions) taken that obligation past certification and settlement into the implementation phase. Nor have courts insisted on public mechanisms for dealing with conflicts that can

emerge during distributions or documenting the actual impact of the remedies provided. Indeed, in some instances, such as in the Dalkon Shield bankruptcy, co-claimants were barred from learning what others had received.[182]

What rules and doctrine can do is create a framework for relationships between courts and litigants that run the full course of aggregate litigation. Doing so draws on the criticism leveled against class actions from those aiming to disable the form (who cite implementation failures as arguments for declining class certifiations) and turns some of those ideas into *class-enabling* reforms. For example, one debate centers on the low claims rates for settlement funds. One law firm selected what it termed a "sample" of class actions cases, begun in 2009 and closed in 2012, and argued that consumer and employees had not benefitted, while lawyers had.[183] That report prompted sharp disagreement from the National Association of Consumer Advocates and the American Association for Justice, reviewing the same cases and arguing their utility in terms of individual remedies and injunctive relief.[184] Another report on 419 consumer financial class actions analyzed by the Consumer Financial Protection Bureau (CFPB) found on average a claims rate of 21 percent across 105 settlements.[185] Academics have likewise sought to document class actions' impact; one recent study found that automatic payments to have special utility.[186]

Yet systematic information deficits shadow all these analyses. Nicolas Pace and Bill Rubenstein described the "veil of secrecy" falling over class action litigation that begins "the moment the judge signs off on the agreement."[187] Their review of thirty-one class settlements identified public data in "fewer than one of five closed cases."[188] More recently, Lynn Baker, Michael Perino, and Charles Silver recounted their efforts to open the "black box" of federal court class action securities settlements, numbering more than seventy a year.[189] Likewise, Deborah Hensler has detailed how little we know about class actions in general, from filing to disposition and remedies.[190]

The class action critics' response - as again put forth in 2017 by some members of Congress — is that courts ought, *ex ante*, to require "that each proposed class member suffered the same type and scope of injury as the named class representative or representatives."[191] But that approach would, as Geoffrey Shaw detailed,[192] undermine the very purpose of the class action — gathering those who do not themselves know that legal harms may have occurred.

Instead, such problems ought to be addressed *ex post*, through elaborating the post-settlement phase of aggregation. Given the low likelihood of exiting (if ever it was an option[193]) from group-based resolutions, we need build up the remedial authority of judges to insist that plaintiffs' and defendants'

lawyers bear significant obligations to facilitate remedial implementation. Further, if distributional debates arise, their resolution ought not be left to the private decision-makers authorized under such settlements without a subsequent opportunity for a return to public courts. And, although a line of cases recognize the public's First Amendment right to have access to criminal to civil litigation,[194] doctrine needs to clarify that reporting (with privacy of individuals) on remedies are "judicial documents" to which access is constitutionally obliged.[195]

Rule drafters have begun to explore some of these concerns. As of this writing, Rule 23 revisions propose that judges, when considering approval of class settlements, consider whether class members be "treated equitably relative to each other";[196] assess "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required";[197] and require some form of disclosure about "side settlements," which can be used to buy off potential objectors. Yet the suggested text only calls for judges to learn about the proposed system of "distributing relief" rather than be tasking them with requiring information on implementation, permitting post-settlement subsets to petition the court, and thereby overseeing distribution.

Furthermore, while an Advisory Committee proposed note comments that it "may be important to provide that the parties

will report back to the court on the actual claims experience,"[198] the draft rule does not put the onus on either the parties or the court to put distribution data on the record. In short, proposed revisions do not organize an oversight system of remedies, create mechanisms for returning to court if conflicts emerge, or require that data on implementation become public.

The numbers of unrepresented litigants in the courts serves as a reminder that any new procedural aspirations need to be accompanied by incentives to get both plaintiff and defense counsel to help make settlements work. But courts have less leverage over lawyers paid directly by their clients than the plaintiffs' lawyers, seeking common benefit fee awards. An exemplar focused on plaintiff-side fees comes from the 1996 Private Securities Litigation Reform Act, which mandated that fees "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[199] Parties are reported to have found methods of settlement that fulfill the mandate but do not slow attorneys' fees.[200] More dramatic is the 2017 proposed class action litigation, banning class counsel fees until all accountings of distributions are made.[201]

But my interest is in putting defense and plaintiff counsel, as well as judges, to work in insuring implementation. Rule 23 could, for example, commend that, in appropriate cases, courts meet regularly on the record with all the lawyers (thereby imposing

some costs on defendants) to learn about barriers to recovery. Further, the Rule could permit judges to tax uncooperative defendants by setting aside their funds to pay extra funds to plaintiffs' lawyers unless defendants use their best efforts to implement remedies. If, for example, funds are distributed to a large majority of claimants, the set-aside extra lawyers' fee funds could revert to the defendant. Moreover, while settlements under Rule 23 now permit for more than one opt-out by plaintiffs, the rule does not direct judges to regulate the fairness of "back door" provisions permitting defendants to withdraw. Just as side-agreements are seen as a topic into which courts such inquire, back doors should be read as warnings that defendants may not be fully committed to helping claimants obtain the remedies provided.

The focus on attorneys' fees as a means of structuring and regulating implementation of relief brings me to MDLs. The potential for disaggregation — remands for trials individually — as well as the lack of complete aggregation because MDLs do not cross state and federal lines, opens up the possibility of competing cases, undercuts the unilateral authority of judges and their appointed PSCs, and may provide information (akin to side settlements) on the utility of remedies. Incomplete aggregation can also provide the opportunity for different legal rules to influence the resolutions, even if they are eventually wrapped into one global agreement.[202]

What MDLs also offer are lurking lawyers — the individually retained plaintiffs' attorneys (IRPAs, as Denny Curtis, Deborah Hensler and I once called them to provide a counterbalancing acronym to the PSC[203]). These lawyers could be used as a means of recognizing the individual needs of litigants, and the time spent building relationships with them could be acknowledged and rewarded through structured fee awards that link fee payments to IRPAs to work done in implementing remedies.

In sum, federal rules and statutes need to be enabling of aggregation because neither judges, litigants, nor the public fare well in a lawyer-less world, where economic disparities among disputants vitiate the potential for access to a fair process, or access to any process at all. What the federal docket, circa 2016, teaches is that federal courts themselves benefit from class and aggregate proceedings. But the individuals affected and the public at large have too attenuated a relationship with the resulting remedies.[204] Constitutional reinvention is again in order to enable, to constrain, and to legitimate the distributional decisions made.

I have only skimmed the surface of the kinds of proposals and mechanisms that could be mined, were one committed to the proposition that the collective dependency of courts and litigants on lawyers and aggregation requires a new imagination of what courts could and must provide. The need for aggregation is plain.

Yet the forms that it could take to honor constitutional obligations of openness in courts, of litigant involvement with processes determining their rights, of accountability of judges, and of equal treatment of litigants have only begun to be developed.

ENDNOTES

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[1] Judith Resnik, All rights reserved, February 2017. This essay was prepared for the Symposium, "1966 and All That: Class Actions and Their Alternatives After Fifty Years," held by University of Pennsylvania Law Review, in November of 2016. Thanks are due to the Law Review and to Stephen Burbank, Jonah Gelbach, and Tobias Wolff for asking me to participate; to commentators Janet Alexander and William Fletcher and to other panelists; to Deborah Hensler and again to Jonah Gelbach for collaborative assistance on obtaining data on the federal judicial docket; to Sam Issacharoff and to Andrew Bradt for materials related to multi-district litigation; to Brian Fitzpatrick, Larry Fox, John Leubsdorf, Geoff Shaw, Adam Zimmerman, Scott Dodson, David Noll, and Zachery Copton and to Denny Curtis for comments; to John Coffee, Roberta Romano, and Michael Klausner for insights into securities litigation; to members of the staff of the Administrative Office of the U.S. Courts and of the Federal Judicial Center - Emery Lee, Carol Krafka, Donna Stienstra, Wendell Skidgel, and Brad Sweet – for providing assistance on a myriad of research questions related to federal data keeping; to the staff at the Special Collections of the Harvard Law Library; to Yale Law Librarians Michael VanderHiejden; to Reva Siegel, Abbe Gluck, David Super, John Witt, and other participants in the Yale Faculty Workshop, and to a wonderful group of students with whom I have learned a great deal – Matt Butler, David Chen, Kyle Edwards, Marianna Mao, Urja Mittal, Heather Richard, Regina Wang, Emily Wanger, Clare Kane, and Iva Velickovic; and to Bonnie Posick, for her expert editorial assistance. Like others, I have participated in some of what I write about. See, e.g. Opinion Letter from Judith Resnik & Thomas D. Rowe, Jr., to the Honorable Thomas M. Reavley, Chair of the Ad Hoc Committee on Asbestos Litigation, on the constitutionality of that committee's recommendations.

[2] The data for this figure were derived from multiple sources. Data for 1975-1998 were taken from William F. Shughart II. & Gokhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904-2002* (ICPSR 3987), Inter-Univ. Consortium for Political and Soc. Research (Apr. 6, 2009), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987 (based primarily upon data published by the Administrative Office of the U.S. Courts). Data for 1999-2015 were taken from Fed. Judicial Ctr., Historical Caseloads in the Federal Courts (Jan. 4, 2016), http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page. Data for 2000 through 2015 were also adapted from tables C & D of the respective yearly reports accessible at Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics (Jan. 4, 2016),

http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics. Note: Criminal filings are of cases, not defendants.

[3] Table C-1, U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2015, Judicial Business of the United States Courts, ADMIN. OFFICE OF THE U.S. COURTS (2015).

[4] Figure 1, Federal District Court Filings, 1970-2015, is drawn from data in Tables C & D of the respective yearly reports accessible at Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics (Jan. 4, 2016), http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics.

[5] Table D, U.S. District Courts — Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending September 30, 2014 and 2015, Judicial Business of the United States Courts, ADMIN. OFFICE OF THE U.S. COURTS (2015).

[6] Aggregation is prevalent in criminal prosecutions. In 2015, the U.S. government commenced prosecutions against 80,069 defendants, meaning that at least 24% of all defendants were prosecuted in a multi-defendant case. Table D-1, U.S. Courts — Criminal Defendants Commenced, Terminated, and Pending (Including Transfers), During the 12-Month Period Ending September 30, 2015, Judicial Business of the United States Courts, ADMIN. OFFICE OF THE U.S. COURTS (2015).

[7] 28 U.S.C. § 1407 (2012).

[8] The data come from the Administrative Office of the U.S. Courts. For the data from 1968 to 1990, see Admin. Office of U.S. Cts., Reports of the Proceedings of the Judicial Conference of the United States, tbls. C-6a, C-6b. For the data for 1991 to 2015, see Caseload Statistics Data Tables, Table C-6 US District Courts – Civil Cases Pending, by Length of Time, Admin. Office of U.S. Cts., http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C-6&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=. Note: data for each year between 1968 and 1990 are for the year ending in June 30; data for each year between 1991 and 2015 are for the year ending in September 30.

[9] Specifically, 132,788 cases out of 341,813 pending cases were in MDLs. Annual Reports of the Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/statistics-info. Data are from the year ending on June 30.

[10] *See* 28 U.S.C. § 1407(a).

[11] The data on pending civil cases come from the Administrative Office of the U.S. Courts. For the data from 1968 to 1990, see Admin. Office of U.S. Cts., Reports of the Proceedings of the Judicial Conference of the United States, tbls. C-6a, C-6b. For the data for 1991 to 2015, see Caseload Statistics Data Tables, Table C-6 US District Courts – Civil Cases Pending, by Length of Time, Admin. Office of U.S. Cts., http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C-6&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=. Note: data

for each year between 1968 and 1990 are for the year ending in June 30; data for each year between 1991 and 2015 are for the year ending in September 30. The MDL data for 1972 to 1990 are from the Annual Reports of the Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/statistics-info. The MDL data for 1991 to 2015 are from the United States Judicial Panel on Multidistrict Litigation, Fiscal Year Statistics (1992-2015), available at http://www.jpml.uscourts.gov/statistics-info. Note: data for each year from 1972 to 1990 are for the year ending in June 30; data for each year from 1991 to 2015 are for the year ending in September 30.

[12] The data on pending civil cases come from the Administrative Office of the U.S. Courts. For the data from 1968 to 1990, see Admin. Office of U.S. Cts., Reports of the Proceedings of the Judicial Conference of the United States, tbls. C-6a, C-6b. For the data for 1991 to 2015, see Caseload Statistics Data Tables, Table C-6 US District Courts – Civil Cases Pending, by Length of Time, Admin. Office of U.S. Cts., http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C-6&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=. Note: data for each year between 1968 and 1990 are for the year ending in June 30; data for each year between 1991 and 2015 are for the year ending in September 30. The MDL data for 1972 to 1990 are from the Annual Reports of the Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/statistics-info. The MDL data for 1991 to 2015 are from the United States Judicial Panel on Multidistrict Litigation, Fiscal Year Statistics (1992-2015), available at http://www.jpml.uscourts.gov/statistics-info. Note: data for each year from 1972 to 1990 are for the year ending in June 30; data for each year from 1991 to 2015 are for the year ending in September 30.

[13] *See* Figure 4. 1991 Annual Report of the Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/statistics-info. Data are from year ending on June 30.

[14] *See* TABLE C-1. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015, ADMIN OFFICE OF THE U.S. COURTS (Sept. 30, 2015), http://www.uscourts.gov/file/19511/download. The pending cases use the end date of September 30, while the MDL reports on the fifteenth of each month.

[15] *See* 28 U.S.C. § 1407(a); *Statistical Report. Statistical Analysis of Multidistrict Litigation Fiscal Year 2015*, U.S. JUDICIAL PANEL ON MULTIDIST. LITIG.(2015), http://www.jpml.uscourts.gov/statistics-info.. A few MDLs have played a disproportionate role in contributing both to the federal docket and to the number in MDL. For example, if as of 2015, one were to remove asbestos (numbering 856 pending cases) and vaginal mesh litigation from both the numbers of MDL cases and the federal civil docket, the number of pending federal civil cases would be 267,877 and the number of pending cases in an MDL 58,852. Thus, the percentage of the federal pending cases that fall under the MDL rubric would be 17.2%, rather than almost 40 percent.

[16] To calculate the number of MDLs per judge, we relied on the Summary By Docket of Multidistrict Litigation Pending as of September 30, 2015, Or Closed Since October 1, 2014. *Statistical Report. Statistical Analysis of Multidistrict Litigation Fiscal Year 2015*, U.S. JUDICIAL PANEL ON MULTIDIST. LITIG.(2015), http://www.jpml.uscourts.gov/statistics-info. The prestige generated by being assigned an MDL is detailed in Abbe Gluck, *Unorthodox Procedure* [forthcoming Penn symposium/cross cites].

[17] Data for the years 2004-2014 come from the Administrative Office of the U.S. Courts. See Judicial Business: Tables C-13, U.S. District Courts – Civil Pro Se and Non Pro Se Filings, U.S. Cts., http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D (last visited Feb. 2, 2017). The categories provided by the Administrative Office are "Prisoner Petitions" and "Nonprisoner Petitions."

[18] Data for 1996-2014 come from Tables B-19–Pro Se Cases Commenced, by Source—in the Administrative Office of the U.S. Court's Judicial Reports (1996 - 2014). *See* Judicial Business, U.S. Cts., shttp://www.uscourts.gov/report-names/judicial-business?tn=B19&pt=All&t=37&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= (last visited Feb. 6, 2017). Data for 1995 were from Table 2.4—U.S. in the Administrative Office of the U.S. Courts of Appeals Judicial Facts and Figures. See Admin. Office of U.S. Cts., U.S. Courts of Appeals Judicial Facts and Figures: Table 2.4, U.S. Courts of Appeals – Pro Se Cases Filed (2014) http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf. The categories provided by the Administrative Office are: "Criminal," "Prisoner Petitions," "U.S. Civil," "Private Civil," "Bankruptcy Appeals," "Administrative Agency Appeals," and "Original Proceedings and Miscellaneous Applications."

[19] The federal district court database details what it terms "pro se filings" back to 2005. Every year with data has seen at least 25 percent of civil cases filed by pro se plaintiffs. *See Judicial Business*, U.S. COURTS, http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D (last visited May 23, 2016).

[20] U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL FACTS AND FIGURES, PRO-SE CASES FILED, BY NATURE OF PROCEEDING tbl.2.4 (Sept. 30, 2014), http://www.uscourts.gov/statistics/table/24/judicial-facts-and-figures/2014/09/30.

[21] The range was thirty-three percent in the Court of Appeals for the District of Columbia to sixty-four percent in the Fourth Circuit. Federal Pro-Se Appeals 2015, supra.

[22] The AO categories for which pro se filers are recorded were "Criminal, U.S. Prisoner Petitions, Other U.S. Civil, Private Prisoner Petitions, Other Private Civil, Bankruptcy, Administrative Agency Appeals, Original Proceedings and Miscellaneous Applications. In 2014 and 2015, non-prisoners filed 24,274 and 25,117 cases pro se, respectively. *See Judicial Business*, tbl.C-13, ADMIN. OFFICE OF U.S. COURTS (Feb. 25, 2016), http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=All&t=All&m %5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%.

On appeal, non-prisoner, non-criminal cases consisted of forty-four percent of all pro se cases filed. See Table B-9. U.S. courts of Appeals—Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2015, Admin. Office of the U.S. Courts (2015), http://www.uscourts.gov/statistics/table/b-9/judicial-business/2015/9/30. In 1995, about 40 percent of the 50,000 appeals were pro se. In 2014, 51 percent of some 55,000 appeals were pro se. Thus, more than 28,000 appeals were lawyer-less on at least one side, and about 12,000 of those appellants were not prisoners. Because filings categorized as prison petitions were about 13,000–14,000 in 1995 and in 2014, the rise in pro se filings cannot be attributed to prisoner petitions.

[23] Obtaining data on the use of class actions over the years is difficult, as is identifying *proposed* class actions. See Emery G. Lee, III & Thomas E. Willging, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules, FEDERAL JUDICIAL CENTER (Apr. 2008), file:///Users/reginawang/Downloads/fourth_interim_ report_ class_action_1.pdf].

[24] 417 U.S. 156 (1974).

[25] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. *See generally* Judith Resnik & Emily Bazelon, *Legal Services: Then and Now*, 17 YALE L. & POL'Y REV. 291 (1998).

[26] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.).

[27] *See* 18 U.S.C. § 3626(b)(1)(A); 18 U.S.C. § 3626(a)(2).

[28] *See* 42 U.S.C. § 1997e(d).

[29] 1995, Pub. L. 104-67, § 101(b), 109 Stat. 737.

[30] 15 U.S.C. § 78u-4(a)(3)(A)(i).

[31] *See* 15 U.S.C. § 77z-1(a)(3)(A); 78u-4(a)(3)(B)(i).

[32] Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

[33] *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); *see also* Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1934 (2008).

[34] See *Comcast v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).

[35] [Penn: cross cite to Maria Glover, this symposium.]

[36] *See* Linda S. Mullenix, *Class Actions: A Court Divided*, 8 PREVIEW OF U.S. SUP. CT. CASES 291, 291 (2016).

[37] *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 148 F. Supp. 3d 1367, 1370 (U.S. Jud. Pan. Mult. Lit. 2015); see https://www.hbsslaw.com/uploads/case_downloads/volkswagen/06.28.16_hagens_berman_vw_settlement_agreement.pdf).

[38] Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Litigation and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014).

[39] *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2011); Stipulation, *Parsons v. Ryan*, No. CV 12-00601-PHX-DJH (D. Ariz. Oct. 14, 2014), ECF No. 1185; Settlement Agreement, Ashker v. Gov. of Cal., No. C 09-05796 CW (N.D. Cal. Sept. 1, 2015), ECF No. 424-2; Settlement Agreement, Disability Rights Network of Pa. v. Wetzel, No. 1:13-cv-006535-JEJ (M.D. Pa. Jan. 9, 2015), ECF No. 59. Aggregation also comes through the Department of Justice's litigation under the Civil Rights of Institutionalized Persons Act (CRIPA) and gathering of aggregate data about prison conditions that is used both administratively and in litigation to drive reforms. *See, e.g.*, ASCA Liman Time-in-Cell (2015), system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

[40] *AT&T v. Concepcion*, 563 U.S. 333 (2011); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

[41] Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253 (2014).

[42] In arriving at this figure, we examined data released by the Federal Judicial Center on all civil cases. Federal Judicial Center, Federal Court Cases: Integrated Data Base (2015), available through http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36110.

[43] Thanks are due to Emery Lee for access to a Federal Judicial Center data set (to be posted in 2017 on a new www.fjc.gov website and hereinafter referenced as FJC FY 2015 Termination Data), to Jonah Gelbach for directing us such data, and to Deborah Hensler advising us on its import. The information comes from court clerks, who use civil cover sheets and other materials prepared by lawyers and complete forms (JS5 and JS6) transmitted at least quarterly to the AO. No independent methods of verifying uniformity or accuracy are undertaken centrally.

[44] Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565–66 (2014).

[45] Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015).

[46] *See, e.g.*, Xandra Kramer & Shusuke Kakiuchi, *General Report of the XV World Congress of Procedural Law: Relief in Small and Simple Matters in an Age of Austerity* (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610773.

[47] Jonathan Lippman, Chief Judge of the State of New York, The State of the Judiciary 2015: Access to Justice: Making The Ideal a Reality (Feb. 17, 2015); Sargent Shriver Civil Counsel Act, California Assembly Bill 590 (Cal. 2012).

[48] *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

[49] Lynn Baker, *Mass Torts and the Pursuit of Ethical Finality*, FORDHAM L. REV. (forthcoming 2017) in Colloquium: Civil Litigation Ethics at a Time of Vanishing Trials [update in late February].

[50] In contrast, some argue that class litigation puts corporate defendants at risk of "betting the company," a phrase used by Justice Scalia's decision for the Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011), and if governments, at risk of undue oversight by the courts.

[51] See Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979).

[52] See Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017).

[53] *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 2-4 (1987).

[54] *See* John Leubsdorf, *Unmasking Mullane: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS LAW J. 1694, 1729 (2015).

[55] 339 U.S. 306 (1950).

[56] Id. at 317.

[57] *Id.* at 313-314. Justice Burton dissented, arguing that states had discretion to decide whether they had to "supplement the notice" to beneficiaries. *Id.* at 319.

[58] 29 U.S.C. § 216(b).

[59] *See, e.g., Wright v. U.S. Rubber Co.*, 69 F. Supp. 621 (S.D. Iowa, 1946), *infra* notes _-_ and accompanying text.

[60] *But see* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

[61] A caveat comes from the ruling that federal courts cannot exercise jurisdiction over absent class action plaintiffs seeking monetary relief without their assent. *See Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

[62] *See generally*, Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996). FLSA cases can also proceed as class actions. See *Erwin v. OS Restaurant Services, Inc.* (doing business as Outback Steakhouse), 632 F. 3d 971 (7th Cir. 2011).

[63] *See, e.g.*, David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Torts*, 115 HARV. L. REV. 831 (2002).

[64] My focus is courts, but these issues lace informal groupings by lawyers and judges as well as in administrative agencies, aggregating through grids as well as through rules authorizing agency class actions. See *Judith* Resnik, *From "Cases" to "Litigation,"* 54 L. & CONTEMP. PROB., *5 22-25 (1991);* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. Rev. 805 (2011); Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. _ (forthcoming 2017), available at https://ssrn.com/abstract=2827187.

[65] FJC Termination Data, 2015, supra note _.

[66] *See* Rules of Civil Procedure for the District Courts of the United States, with Notes, and Proceedings of the Institute on Federal Rules (William W. Dawson ed., 1938) [hereinafter 1938 FEDERAL RULES INSTITUTE PROCEEDINGS].

[67] Id. at 263.

[68] Id. at 254. The original 1938 version of Rule 23 read, in pertinent part:

> a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is
> (1) joint, or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought. . . .

Thus, the three types of classes were labeled, respectively, a "true" class, a "hybrid" class, and a "spurious" class. 2 JAMES W. MOORE, FEDERAL PRACTICE 2235-41 (1938); 3 JAMES W. MOORE, FEDERAL PRACTICE 2601-03 (2d ed. 1969).

[69] *See* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1321 (2008).

[70] Fair Labor Standards Act of 1938, Pub. L. No. 75-718 § 16(b), 52 Stat. 1060, 1069 (1938). The current Section 216(b) of the Fair Labor Standards Act (FLSA) was originally enacted as Section 16(b).

[71] *See* Foreword, *The Wage and Hour Law Symposium*, 6 LAW & CONTEMP. PROBS. 321 (1939).

[72] Id. at 321.

[73] Carroll R. Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 6 LAW & CONTEMP. PROBS. 406, 409 (1939).

[74] The contemporary exemplar is *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which was filed as both a collective action and a class action, and the jury verdict "combined the two." *See* 136 S. Ct. at 1054 n.1 (Thomas, J., dissenting).

[75] FLSA, § 16(b); *see* James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119, 123 (1942).

[76] 83 CONG. REC. 9264 (1938) (statement of Rep. Kent Ellsworth Keller, making the sole reference to the provision's enforcement). See Joseph V. Lane, Jr., *Is the Fair Labor Standards Act Fairly Construed?*, 13 FORDHAM L. REV. 60, 66 (1944).

[77] James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119, 122-23 (1942).

[78] Id. at 123. The "any court of competent jurisdiction" included state and federal courts; Congress also prohibited retaliation by making it a criminal offense. Within a year of the enactment, one commentator tallied six criminal prosecutions and sixteen civil enforcement actions brought by the Wage and Hour Division of the Department of Labor, as well as twenty-five "civil employee suits. Samuel Herman, *The Administration and Enforcement of the Fair Labor Standard Act*, 6 LAW & CONTEMP. PROBLEMS 368, 385-88, n.114, n.115, n. 126 (1939).

[79] *Wright v. United States Rubber Co.*, 69 F. Supp. 621, 624 (S.D. Iowa. 1946) (citing Hansberry v. Lee, 211 U.S. 32 (1940)); *see also Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941). To glimpse how courts applied § 16(b) in its first decade, I reviewed the thirty-seven cases flagged as Notes of Decision annotations in Westlaw for the years 1938 to 1948 under: "Class or Group Actions, Parties and Pleadings;" "Consent to be parties, parties and pleadings."

[80] *Shain*, 40 F. Supp. at 490; *see also Swettman v. Remington Rand*, 65 F. Supp. 940, 944 (S.D. Ill. 1946); *Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D. N.J. 1944); *Smith v. Stark Trucking, Inc.*, 53 F. Supp. 826, 827 (N.D. Ohio, 1943).

[81] *Lofther*, 45 F. Supp. at 989. Furthermore, "the defendant has a right to know by whom it is being sued and for what . . . ." *Id.*

[82] 311 U.S. 32, 45 (1940).

[83] *Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky, 1941) ("regardless of the academic question of whether or not [the FLSA provision was] a true class suit," the Constitution required approval by those who were to be represented).

[84] *Id.* at 490.

[85] *See, e.g.*, *Saxton v. W.S. Askew Co.*, 35 F. Supp. 519, 520 (N.D. Ga., 1940).

[86] *Wright*, 69 F. Supp. at 624.

[87] *Pentland v. Dravo Corp.*, 152 F.3d 851, 853 (3rd Cir. 1945). The FLSA thus "brings something of the strength of collective bargaining to a collective lawsuit." *Id.*

[88] *See, e.g.*, *Pentland*, 152 F. 2d at 853.

[89] *See, e.g.*, *Fowkes v. Dravo Corp.*, 62 F. Supp. 361, 362 (E.D. Pa. 1945); *Winslow v. National Electric Products Corp.*, 5 F.R.D. 126, 129 (W.D. Pa. 1946); *Culver v. Bell & Loffland*, 146 F.2d 29, 31 (9th Cir. 1944).

[90] *See Barrett v. National Malleable & Steel Castings Co.*, 68 F. Supp. 410, 416 (W.D. Pa. 1946). *See also Fink v. Oliver Iron Mining Co.*, 65 F. Supp. 316, 318 (D. Minn. 1941).

[91] *See* Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947). The Supreme Court addressed the mechanisms in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), and committed to district courts the discretion to facilitate notice to employees who might be interested in joining. *Id.* at 169. *See generally* David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129 (2003).

[92] FLSA, § 16(b).

[93] *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 108 (1946). Some lower courts thereafter held that settlements require the supervision of the Department of Labor or the federal courts. *See, e.g.*, Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352–53 (11th Cir. 1982); Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1237 (M.D. Fla. 2010). Court assessment resembles the inquiry under Rule 23(e) for approval of class action settlements with an added criterion of whether a compromise "frustrates implementation of the FLSA." *Dees*, 706 F. Supp. 2d at 1241.

[94] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010).

[95] *See* Luke Norris, *Labor and the Origins of Civil Procedure*, N.Y.U. L. REV. (forthcoming 2017); Kate Andrias, *The New Labor Law*, 126 YALE L.J. [RECHECK CITE] (2016).

[96] *See* Announcement of the Chief Justice of the United States, Committee on Rules of Practice and Procedure, Apr. 4, 1960, reprinted in 28 USCA at xvii (in first volume of FRCP).

[97] *See* Nat'l Conference of Comm'rs on Unif. Laws, Uniform Common Trust Fund Act 3 (1938) (approved 1939), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ uctf3852.pdf (noting that its Uniform Act reflected what "approximately twenty states" had undertaken, albeit "in a different form").

[98] As Justice Jackson explained, "[m]ounting overheads have made administration of small trusts undesirable to corporate trustees." *Mullane*, 339 U.S. at 307. By 1949, ten banks, representing "by far the largest volume of trust business

in New York State," had established common trust funds. Brief of New York State Bankers Ass'n at 1–2, *Mullane*, 339 U.S. 306 (No. 378). While in *Mullane*, the trust was established in 1946 and a first accounting was brought in 1947 (339 U.S. at 309), as of 2016, accountings are to be brought "[a]t least once every ten years." N.Y. BANKING § 100-c(6) (also requiring mailing as well as publishing notice).

[99] N.Y. BANKING § 100-c (repealed 1986; codified as revised at N.Y. BANKING § 100-c (2008)). Several other states authorized pool trusts without creating this form of accounting. Leubsdorf, supra note _, at 1708.

[100] N.Y. BANKING 100-c(12). Mullane had argued that, without notice sent directly to more beneficiaries, a bank would use pooled trusts "'as a dumping ground for its own shaky and depreciated securities.'" Appellant's Brief at 26, Mullane, 339 U.S. 306 (No. 378), 1950 WL 78701 (quoting Robert W. Bogue, *Common Trust Fund Legislation*, 5 LAW & CONTEMP. PROBS. 430, 435 (1938)). Vaughn did not object to the provision.

[101] Mullane, 339 U.S. at 312–13, 320.

[102] *Id.* at 313-314. The reminder for those steeped in contemporary state action requirements is that the dispute was between private parties, enlisting the state's courts to settle the accountings.

[103] *Id.* at 319.

[104] Id.

[105] Id.

[106] The Court identified two forms of property interests: the "rights to have the trustee answer for negligent or illegal impairments," and the risk of a "diminution" in their funds through an "allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest." Id. at 313.

[107] By 1961, 511 funds controlled $3.5 billion in assets. Leubsdorf, supra note _, at 1725. After federal regulation came into play, mutual funds attracted investors' interest, including through pooling such as in Collective Investment Trust Funds. *Id.* at 1727.

[108] See John Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005).

[109] A note on sources is required. The Administrative Office of the U.S. Courts (AO) has put a subset of materials from the rules committees on its website. *Records and Archives of the Rules Committees*, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees. In addition, I reviewed unpublished materials then located in boxes housed in the late 1980s at the National Records Center in Record Group No 116, Accession No 82-0028. Thereafter, the Congressional Information Service (CIS) put some National Archive Records on microfiche, albeit not organized in an easily accessible manner. In 2014, the Harvard Law Library made available Benjamin Kaplan's papers in its Special Collections [hereinafter Kaplan Papers].

In addition, Andrew Bradt provided me with copies of materials he obtained from the papers of Dean Phillip Neal of the University of Chicago Law School.

[110] *See* Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 102 (1966) (proposed rule 23 advisory committee's note) (explaining that civil rights actions were "[i]llustrative" of the purpose of Rule 23(b)(2) and listing school desegregation cases as examples).

[111] This memo was co-authored by Al Sacks, who joined as a reporter. *See* Benjamin Kaplan and Al Sacks, Tentative Proposal to Modify Provisions Governing Class Actions – Rule 23 EE-12 (May 28 – 30, 1962), *microformed on* CIS No. CI-6309-44 (Cong. Info. Serv.). Kaplan thought shareholder derivative actions were an exception. *Id.* and at EE-5. He also noted that *Hansberry v. Lee* could be read to have given notice "independent significance" in deciding whether a class action comported with due process in binding "outsiders." *Id.* at EE-10-EE-11. Yet he also commented that notice could be "something short of formal process." *Id.* at EE-11, n. 5.

[112] Kaplan, Tentative Proposal at EE-11, n. 5. *See also* Benjamin Kaplan, Modification of Rule 23 on Class Actions EE-13 (un.) (on file with Harvard Law Library, Kaplan Papers, Box 79) [hereinafter Kaplan, Modifiation of Rule 23].

[113] Kaplan, Some Further Thoughts, *supra* n. , at 9. (citing *Mullane* inter alia).

[114] The discussion of an "absolute right to 'opt out'" was described in a memo of January 31, 1964 from Reporters Kaplan and Sacks to the Committee. They concluded that judges ought instead to decide whether class members' "inclusion" was "essential to the fair and efficient adjudication of the controversy" and state reasons for doing so. Memorandum from Benjamin Kaplan and Al Sacks to the Advisory Committee 5 (Jan. 31, 1964), *microformed on* CIS No. CI-7003-08 (Cong. Info. Serv.) [hereinafter Kaplan and Sacks Memo, Jan. 1964]. But the final rule in 1966 provided opt-outs without judicial permission.

[115] Kaplan Papers, Modification of Rule 23 on Class Actions, Box 79, folder 4, at EE-7; EE-35 (proposed note). Those views reflect the influence of the Kalven and Rosenthal article, supra note _, which had argued in 1941 that if a class representative won, absentees should be able to benefit even if they were not to be bound by a loss. 8 U Chicago at 701.

[116] Benjamin Kaplan, Class Actions – Some Further Thoughts 9 (Aug. 1962) (on file with Harvard Law Library, Kaplan Papers, Box 75) [hereinafter Kaplan, Some Further Thoughts].

[117] Kaplan, Modification of Rule 23 at EE-5 (quoting Professor Chafee).

[118] *Id.*, and at EE-36.

[119] Kaplan, Some Further Thoughts at 10.

[120] *Id.* at 11.

[121] 311 U.S. at 45. But facts appearing central to the holding - such as that only 54 percent of the owners of the footage had signed the restrictive covenants – are not supported in a search of the land records. See Jay Tidmarsh, *The Story of Hansberry: The Rise of the Modern Class Action*, in CIVIL PROCEDURE STORIES at 233 (Kevin Clermont ed., 2d ed. 2008)

[122] 311 U.S. at 43.

[123] 311 U.S. at 43.

[124] PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 34 F.R.D. 325, 384-95 (1964) [recheck pamphlet version has it at text page 97, lines 123-130]

[125] Id. ("[T]he court shall exclude those members who, by a date to be specified, request exclusion unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor");

[126] In 2003, amendments to the rule expressly authorized district judges to use their discretion to require notice for b(1) and b(2) class members. FED. R. CIV. P. 23 (c)(2)(A) (2003 amendments).

[127] See Rule 23 [ADD CITE TO SUBPART, 1966 VERSION]. A prescient student note by Lawrence Fox detailed how the 1966 Rule did not answer "important questions" related to notice – what it entailed and who paid for it, "whenever" it was required. See *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Law*, 116 U. Penn. L. Rev. 889, 905-915(1968). Fox argued that the Advisory Committee erred in interpreting *Mullane* to require individual notice in class actions. Id. at 914-915.

[128] *See* Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 S. Ct. Rev. 7.

[129] I have not found the FLSA much discussed; mention came in the context of a discussion of (b)(3) classes in a June 1965 Statement, when the Committee stated that the (b)(3) class was designed to "use the experience with the 'spurious' action to develop something better" and rejected the "retrogressive" views that mistakenly assume that "(b)(3) is merely the 'spurious' action by another name with the judgment extending more broadly." Also, John Frank argued that FLSA cases provided examples of why the drafters ought to worry about champerty. *See* Kaplan, Some Further Thoughts, supra note _, at 14. Kaplan also noted that the FLSA seemed to "envision a standard class action" but case law did not support that interpretation. Congress might not have wanted to "bind any particular employee by the adverse result of a suit in which he had not explicitly consented to join as a party." Tentative Proposal to Modify Provisions Governing Class Actions – Rule 23, Topic EE at 28, in Kaplan Papers, Box 75, folder 5, undated likely 1962. Another mention comes in the 1966 Advisory Committee note, noting that "Reference is also made to 'wage hour' cases but these are covered by special legislation having a special history. . . ." See [GET CITE TO THE ADVISORY NOT RULE *See* June 1965 Report p. 8.

[130] Benjamin Kaplan, *Continuing Work of Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376 (1967).

[131] *See generally* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

[132] Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

[133] Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 , 337-38 (1996).

[134] Kalven & Rosenfield, *supra* note __, at 717.

[135] As Kaplan wrote in 1962, "if the claim is fairly large, then, at least if a contingent-fee arrangement is available, there is no need for the individual claimaint to resort to a class action in order to get a lawyer properly paid." Kaplan, Some Further Thoughts, supra note _, at 12.

[136] Kaplan Papers, Modification of Rule 23 on Class Actions, Box 79, folder 4, at EE-11. [136]

[137] Memo from Ben Kaplan to Advisory Committee, Box 24 (Topic EE, Class Actions), January 17, 1963 at 1 (folder labeled "Kaplan memo 1/17/63 enclosing Topics EE and FF for February meeting").

[138] *See* 1966 advisory committee note on subdivision (b)(3). *See also* Transcript of the Oct. 31-Nov. 2, 1963 Advisory Committee Meeting, Discussion of Rule 23-Topic EE, pages 1-85 Kaplan Papers, Box 81, folder 7, at 5 (comments of George Doub] [hereinafter Advisory Committee Class Action Drafting 1963 Transcript].

[139] Kaplan, Jan. 17th memo, at _; *Id.*, Box 24 at EE-3, *supra* note ___.

[140] Advisory Committee Class Action Transcript [or recheck Kaplan Papers].

[141] Letter from John P. Frank to Benjamin Kaplan (Jan. 21 1963) (on file with the Harvard Law Library, Kaplan Papers).

[142] Advisory Committee Class Action Drafting 1963 Transcript, *supra* note _, at 12. Frank argued the potential of defendants trying to buy off plaintiffs' attorneys to cut off future claims. Id. at 18.

[143] Frank joined Thomas Emerson in organizing a brief in 1949 on behalf of 189 law professors supporting the integration of law schools in *Sweatt v. Painter* 1950 WL 78683 (U.S.) at Appendix A.

[144] Advisory Committee Class Action Drafting 1963 Transcript, supra note _, at 12-13.

[145] Kaplan stated that he was not arguing a "wild appeal to bring in mass accidents," but sought a flexible rule that permitted judges to decide what kinds of cases fell within it. Id. at 14, 15. Yet, when Judge Wyzanski said he was not that concerned "about the risk with respect to the mass accident" (even

as he saw a problem of rights to jury trials), Kaplan replied that "the case of a mass accident will be, and probably ought to be, excluded from the class suit." *Id* at 17. Co-Reporter Al Sacks championed flexibility and noted that while many would "today feel very strongly" against class treatment of airplane accidents, attitudes would like change. *Id*. at 42.

[146] Letter from Benjamin Kaplan to John P. Frank 2 (Feb. 7, 1963) (on file with Harvard Law Library, Kaplan Papers, Box 79).

[147] 1966 Advisory Committee Note to Rule 23(b)(3), 39 F.R.D. 69, 103.

[148] Kaplan, *Continuing Work*, *supra* note __, at 390; *see also* Kaplan's comments at 28th Annual Judicial Conference—Third Circuit, Proceedings, The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure, 39 F.R.D. 375, 516-18 (1965) ("To what extent is it right to throw a particular claim under an umbrella with other similar claims . . . ?").

[149] Kaplan, *Continuing Work*, 81 HARV. L. REV. at 386.

[150] *Id.* at 391 (explaining that the rule still permitted individuals to opt out, even when their stakes are "so small as to make a separate action impracticable").

[151] Kaplan, A Prefatory Note, *supra* note _, at 497.

[152] *See* Resnik, From Cases to Litigation [pin cites]; Andrew D. Bradt, *"A Radical Proposal:" The Multidistrict Litigation Act of 1968*, [forthcoming U.PA L. REV.]; Andrew Bradt, *Something Less and Something More: MDL's Roots as a Class Action "Alternative,"* forthcoming symposium on Class Actions, U PA L. REV.]

[153] Kaplan informed the Advisory Committee that judges on the Coordinating Committee on Multiple Litigation thought that mass accidents ought not be "absolutely excluded" from Rule 23. See Memo from Ben Kaplan and Al Sacks to the Chairman and Members of the Advisory Committee on Civil Rules, Dec. 2, 1963, Topic EE: Class Actions, at 5 [hereinafter Kaplan, Sacks Memo Dec. 2, 1963.]. "[N]o single device . . . [would] `solve' the question of questions of procedure and management posed by massive litigation affecting numerous parties." Rather, "a variety of devices" needed to be invented, and rather than "stiff rules," "play in the joints" was "imperatively required." *Id.* at 4. See also Bradt, *"A Radical Proposal:" supra* note _.

[154] *See, e.g.*, J. William Moore, Federal Practice 23-811, ¶ 23.45 [3] n.35 (Matthew Bender, 1969) ("a mass accident appears peculiarly appropriate for class treatment"; the "question of liability to all those injured in a plane or train crash is . . . likely to be uniform").

[155] 100 F.R.D. 718 (E.D.N.Y., 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom Pickney v. Dow Chemical*, 484 US 1004 (1988). *See generally* Peter H. Schuck, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987). See also *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986), rehearing denied, 785 F.2d 1034 (5th Cir. 1986).

[156] Prepared Statement of William W. Schwarzer, Concerning HR 3406, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice,

Committee of the Judiciary, US House of Representatives at 1 (November 15, 1989); Report of the Proceedings of the Judicial Conference of the United States at 22 (CITE NEED WHETHER FALL OR SPRING, I.E SEPT OF MARCH 1988).

[157] Linda Greenhouse, Aid Sought from Congress to Ease Asbestos Caseload, NY Times D2 col 5 (March 12, 1991).

[158] See ALI, Complex Litigation Project, Tentative Draft No 2 (April 1990); Reporters' Study, Enterprise Responsibility for Personal Injury, Volume II, Approaches to Legal and Institutional Change ch. 13 (Mass Torts and Collective Judicial Proceedings), at 383-440 (ALI, April 15, 1991); *See* Principles of the Law of Aggregate Litig. (2010). *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628 (2011).

[159] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999).

[160] Committee to Study Procedure in Anti-Trust and Other Protracted Cases, 13 FRD 62, 64 (1953). See Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5 (1991) [first cite?]; Judith Resnik, Trial as Error etc. CITE .

[161] Transfer of Pretrial Proceedings in Multidistrict Litigation, House Judiciary Committee Report No 1130, 90th Cong.2d Sess at 2 (1968) ("H.R. Rep. No. 1130").

[162] Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 AM. BAR ASS'N J. 621, 623 (July 1964).

[163] That requirement was loosely enforced until 1998, when the Supreme Court read the statutory "shall remand" text to require sending cases back for trials. *Lexicon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[164] A shift is underway. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. (forthcoming 2017); Howard M. Erichson, *Symposium: Multidistrict Litigation and Aggregation Alternatives: Foreword*, 31 SETON HALL L. REV. 877 (2001). Moreover, the 2017 congressional effort to restrict class actions included proposed limits on MDLs as well. [cite to its subpart

[165] Kaplan, A Prefactory Note, supra note _, at _. ADD CITE

[166] Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 111 (2013).

[167] *See In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909-11 (J.P.M.L. 1977) (per curiam). While not determinative, the parties' objections also were relevant.

[168] *See* www.uscourts.gov/file/1653/download at 33; Report of the Judicial Conference AD Hoc Committee on Asbestos Litigation (1991).

[169] *In re Asbestos Prod. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 418-20 (J.P.M.L. 1991).

[170] U.S. Judicial Panel on Multidist. Litig., Statistical Analysis of Multidistrict Litigation Fiscal Year 2015 (2015), http://www.jpml.uscourts.gov/statistics-info (1,934 cases remanded; 30,695 cases closed by the transferee court).

[171] Samuel Issacharoff from Snapshot of MDL Statistics, *supra* note _, at 2.

[172] The distribution of pending MDL actions by type as of July 15, 2015, were provided by Prof. Issacharoff from Snapshot of MDL Statistics, *supra* note _, at 2.

[173] Figure 10, Distribution of Pending MDL Actions by Type as of July 15, 2015, provided by Prof. Issacharoff from Snapshot of MDL Statistics, *supra* note _, at 2.

[174] Case management orders or stipulations provide that jurisdiction or venue *will not be contested. See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 795-801 (2012). For example, in February of 2012, the JPML assigned a federal district judge in West Virginia some 150 cases related to failures of transvaginal mesh, used for pelvic surgery repairs. C. Gavin Shephard, *Transvaginal Mesh Litigation: A New Opportunity to Resolve Mass Medical Device Failure Claims*, 80 TENN. L. REV. 477, 478 (2013). By the fall of 2015, more than 70,000 pending cases were part of the seven transvaginal mesh MDLs (organized by product manufacturer), of which thousands had been filed directly in that court. U.S. Judicial Panel on Multidist. Litig., Statistical Analysis of Multidistrict Litigation Fiscal Year 2015 at 3 (2015), available at http://www.jpml.uscourts.gov/statistics-info (28,939 cases filed directly in the transferee court).

[175] *See* Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425 (1998); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

[176] Legal ethicists debate whether lawyers can agree to use their best efforts — including promising to withdraw — to ensure that their clients accept the global deals proffered in settlements. *See* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. _ (2016); Lynn Baker, Mass Torts and the Pursuit of Ethical Finality, FORDHAM L. REV. (forthcoming 2017) in Colloquium: Civil Litigation Ethics at a Time of Vanishing Trials [recheck for permission to cite].

[177] "In 1960, 38.4% of all civil filings were torts." Galanter, *supra* note _, at 936.

[178] *Lofther*, 45 F. Supp. at 989.

[179] Data from state courts makes the point all the more acutely. About three-quarters of the litigants in a study of more than 900,000 cases in ten major urban counties were unrepresented; about four percent of the cases ended in a trial. *See* NATIONAL CENTER STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 14-16, 21, 33 (2015).

[180] See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011); Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. art. 1 (2011).

[181] Judges often invoke that term when considering whether to approve settlements. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652–53 (7th Cir. 2006).

[182] A $2.3 billion settlement fund, as part of the A.H. Robins bankruptcy, compensated those injuries from that intrauterine device; the Trust and Claims Resolution Facility did not disclose awards. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 617-18 (1992).

[183] *See, e.g.*, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions, Mayer Brown LLP 1-2 (Dec. 2013), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf [http://perma.cc/DT6J-T2YE]. Of the 148 class actions it followed form 2009 to closure in 2013, the firm picked eighteen cases resolved by "claims-made settlement," and reported it has found "meaningful data" on six.[183] (Not discussed were settlements with automatic distributions, which had accounted for thirteen of the forty cases identified as settled.).

[184] National Association of Consumer Advocates and American Association for Justice, *Class Actions Are a Cornerstone for our Civil Justice System: A Review of Class Actions Filed in 2009* (February 27, 2015), http://www.consumeradvocates.org/sites/default/files/Class%20Action%CC20Report%202-27-15.pdf (last visited Oct. 10, 2016) [hereinafter Consumer Advocates Study]. This report identified that where settlements has automatic distrib*d.* at 4-5, 9.

[185] Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a), Consumer Fin. Protection Bureau § 1, at 11; § 8, at 4, 16 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/P5B9-JPSZ] [hereinafter CFPB 2015 Arbitration Study] (finding benefits for some 160 million consumers, with $2.0 billion in cash and $644 in-kind relief).

[186] *See, e.g.*, Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767 (2015).

[187] *See* Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* at 3, RAND INSTITUTE FOR CIVIL JUSTICE WORKING PAPER (July 2008), billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf. *See also* Stephen Yeazell, *Transparency for Civil Settlements: Nasdaq for Lawsuits?*, *in* CONFIDENTIALITY, TRANSPARENCY AND THE U.S. CIVIL JUSTICE SYSTEM 143 (Joseph Doherty, Robert Reville, & Laura Zakaras eds., 2012).

[188] Pace & Rubenstein, *supra* note __, at v.

[189] *See generally* Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1375-81 (2015) (analyzing 431 securities settlements form 2007-2012).

[190] [Penn cross cite to Hensler article]

[191] *See, e.g.*, Fairness in Class Action Litigation Act of 2017, H.R. 985, 11_Cong. § 1716 (2017); H.R. Fairness in Class Action Litigation Act, H.R. 1927, 114th Cong. [need CITE TO subSECTION NUMBER] (2015).

[192] Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354 (2015).

[193] See John Witt and Samuel Issacaroff, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VANDERBILT L. REV. 571 (2007).

[194] *See, e.g.,* Delaware Coalition for Open Government, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013), *cert. denied* 134 S.Ct. 1551 (2014); N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 290 (2d Cir. 2011).

[195] *Compare* U.S. v. Erie County, 763 F.3d 235 (2d Cir. 2014) (requiring access to a monitor's report related to jail conditions), *to* IDT Corp. v. eBay, 709 F.3d 1220, 1224, n.1 (8th Cir. 2013) (declining to require access) *and* SEC v. American International Group, 712 F.3d 1 (D.C. Cir. 2013) (holding that reporters had no common law or First Amendment right of access to reports ordered to be provided by an independent consultant, dispatched pursuant to a court decree). *See generally,* Resnik, *The Contingency of Openness in Courts*, supra note ___.

[196] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*, Rule 23(3)(2)(D), ADMIN. OFF. U.S. COURTS (Aug. 2016), http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment [hereinafter Proposed 2016 Amendments to Federal Rule 23].

[197] *Id.* at Rule 23(e)(2)(C)(ii).

[198] *Id.* at Rule 23 Comm. Note.

[199] 15 U.S.C. § 78u-4(a)(6).

[200] Securities settlements can be worded to craft a complete distribution plan and provide fees for it. Stipulation of Settlement at 17-18 *Kmiec v. Powerwave Techs Inc.* no. 8:12-cv-0022 CJC (JPR) (C.D. Ca., 2015). Such provisions may benefit large stakeholder-plaintiffs, if less than complete (and less expensive) notice results in redistributions going to them. Some judges, however, withhold 50 percent of the fee award until distribution is made. See email from the Hon. Jed Rakoff, Nov. 26 2017 (on file with author). Thanks are due to Stanford Securities Litigation Analytics and to Michael Klausner and Jack Coffee for pointing me to these issues.

[201] H.R. 985, §1719.

[202] *See, e.g.*, J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 1 (2014).

[203] Resnik, Curtis & Hensler, supra note -, at [pin cite]. *see e.g., In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992); *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 300 (1st Cir. 1995).

[204] The result may well be disaffection, rather than affiliation and compliance. *See generally* Tom R. Tyler, WHY PEOPLE OBEY THE LAW (2006).