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WHERE EQUITY MEETS EXPERTISE:
RE-THINKING APPELLATE REVIEW
IN COMPLEX LITIGATION

Michael J. Hays*

The field of complex litigation continues to grow as both an academic study and a popular phenomenon. One cannot escape news accounts of major class action litigation, and lawyers continue to find new ways to push the outer bounds of civil litigation practices to accommodate large-scale disputes involving multiple claims or parties. Many question whether traditional procedures can or should apply to these cases. Drawing on this well-recognized procedural tension, this Article explores the relationship between trial and appellate courts in complex litigation and argues for a revised standard of appellate review for trial court decisions affecting the party structure of a lawsuit. The Article examines historical equity practices and modern principles of administrative law to explain the function of a trial court in complex litigation and to justify the form of appellate scrutiny that is applicable to that role.

INTRODUCTION

In his moving first-person account of the work leading up to the 1995 Dayton Peace Accords, Richard Holbrooke describes the only feasible resolution to his diplomatic mission in the former Yugoslavia: “The three Balkan Presidents would soon have to be brought together in an all-or-nothing, high-risk negotiation.” Holbrooke’s intuition is the same instinct that informs much of what is often called complex litigation. The notion is that complicated disputes require bringing together everyone in a single lawsuit. Many provisions of the current Federal Rules of Civil Procedure adopt, at least implicitly, this emphasis. Even before the adoption of the

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1. RICHARD HOLBROOKE, TO END A WAR 185 (1998).
2. Cf. Richard L. Marcus, Confronting the Consolidation Conundrum, 1995 BYU L. REV. 879, 880 (“[T]he [American Law Institute Complex Litigation] Project’s principal thrust was to remove obstacles to consolidation.”).
3. See, e.g., FED. R. CIV. P. 18(a) (permitting joinder of “as many claims . . . as the party has against an opposing party.”); FED. R. CIV. P. 19 (concerning “joinder of persons needed for just adjudication”); FED. R. CIV. P. 20(a) (permitting joinder of all persons with whom or against whom there are asserted “right[s] to relief jointly, severally, or in the alternative”); FED. R. CIV. P. 24(b) (permitting a party to intervene if, among other things, the “applicant’s
Federal Rules, and before any widespread conception of "complex litigation," the procedures of equity advanced a similarly all-inclusive view of justice. 4

But bringing everyone together in a single lawsuit is not always possible. In our judicial system, parties exercise great control over the course of their litigation. 5 As such, many of the joinder devices available under the Federal Rules of Civil Procedure rely on the parties to invoke them. 6 Therefore, while bringing everyone together may serve the interests of "justice" in some abstract sense, an individual litigant may choose not to pursue joinder if it does not advance her interests. In particular, joining large numbers of parties into a single piece of litigation can give it some of the same "all-or-nothing" or "high risk" features that produced the Dayton Peace Accords, 7 features that may make it undesirable to the participants (in addition to considerations of expense, manageability, and various other strategic calculations). Also, parties sometimes face difficulties knowing who needs to be joined in a particular lawsuit. 8 Further, even if the system could identify every interested party, and even if the original litigants wanted to include all of these people, the laws of personal and subject matter jurisdiction may make complete joinder impossible. 9

This tension—the policy in favor of complete joinder as against legal doctrines and other forces that inhibit it—is the basic stuff of claim or defense and the main action have a question of law or fact in common."); Fed. R. Civ. P. 42(a) (permitting courts to order consolidation or joint proceedings when "actions involving a common question of law or fact are pending before the court").


5. See Jay Tidmarsh & Roger H. Trangsrud, Complex Litigation and the Adversary System 87-88 (1998) (describing the plaintiff's autonomy as "master of the complaint" and exploring the relationship of that doctrine to complex litigation).

6. See, e.g., Fed. R. Civ. P. 24 ("Upon timely application anyone shall be permitted to intervene in an action . . . ."). But see Fed. R. Civ. P. 21 ("Parties may be dropped or added by order of the court . . . . of its own initiative . . . .").

7. See Holbrooke, supra note 1, at 185.

8. This has been a particular problem in the asbestos litigation, where many people were exposed to asbestos, but not everyone had developed an injury by the time of various lawsuits. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (affirming the reversal of a class certification where the class action was brought as a global settlement and the purported class was to include future claimants).

9. The American Law Institute ("ALI") has argued that "[i]f the unitary resolution of related elements of complex cases is to be achieved, there must be effective jurisdiction . . . mechanisms," including special nationwide jurisdictional statutes for complex cases. Am. Law Inst., Complex Litigation: Statutory Recommendations and Analysis § 3.08 chs. a & e (1994).
any study in complex litigation.¹⁰ Examining the intricacies of that tension yields, like so many legal dilemmas, more questions than answers.¹¹ I wish to explore in these pages a narrower tension: that between trial courts and appellate courts in complex cases. Some of the literature emphasizes that complex cases are “different” from standard litigation.¹² But complex cases do not occur in a different court system. Nor, ordinarily, are they judged under different procedural rules.¹³ These cases, like all others, often work their way through trial courts, intermediate appellate courts, and possibly courts of last resort, with each weighing in on the questions that are unique to complex litigation. When a multitude of courts with varying relationships to one another try to resolve issues that are, by definition, “complex,” it creates an additional layer of complexity. Lawyers, judges, and litigants trying to understand complex litigation face a cacophony of voices. Often these voices speak from different vantage points and try to advance differing agendas.¹⁴

¹⁰. See, e.g., RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (3d ed. 1998); TIDMARSH & TRANGSRUD, supra note 5.
¹¹. Even Professors Tidmarsh and Trangsrud, who offer an ambitious look at both the principles of the adversarial system and the unique needs of complex litigation informed by a targeted (and probably accurate) definition of complex litigation, see TIDMARSH & TRANGSRUD, supra note 5, at 85–86, still do not offer any solutions to the “dysfunction” they identify as the principal problem of complex litigation. Id. at v–vi.
¹². See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1284 (1976) (“The characteristic features of the public law model are very different from those of the traditional model.”).
¹³. The Federal Rules of Civil Procedure govern all actions in federal courts, FED. R. CIV. P. 1, but complex cases do enjoy some unique procedures. For example, under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation is empowered to transfer “civil actions involving one or more common questions of fact ... pending in different districts” to a single federal court for “coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a) (2000).
¹⁴. One federal appellate court, in vacating and remanding a lower court’s decision, recognized this tension:

We recognize and are sympathetic to the burdens placed on trial judges by cases involving multiple parties and multiple lawyers. It is fine for commentators and appellate courts to speak of the systemic efficiency of trying one lawsuit in lieu of many, but a multi-party action obviously does little in the short run to alleviate the workload of the individual trial judge to whom it is assigned. Instead, the trial judge faces only the demands of managing a complex proceeding, maintaining order among many litigants, and assembling a coherent record out of a jumble of pleadings, testimony and evidentiary exhibits. ... Nevertheless, the judicial system as a whole benefits substantially when similar complaints are resolved in a single unified proceeding, and the advantages in terms of efficiency and uniformity are simply too great to ignore.

Cook v. Boorstin, 768 F.2d 1462, 1472 (D.C. Cir. 1985).
This Article examines the nature of complex litigation and the powers trial judges exercise over those cases in order to show that the traditional relationship between trial courts and appellate courts is inappropriate for complex cases. In particular, I argue that reviewing courts should apply a more deferential standard of review to trial judges' joinder determinations. This conclusion follows from a brief exploration of the history of judicial discretion and a borrowed doctrine from administrative law. Part I describes the contours of complex litigation and introduces some of the problems it creates. Part II examines the role of the trial judge in complex litigation, and Part III outlines my proposal for a new standard of appellate review inspired by the administrative law doctrine of "Chevron deference." The Article concludes by arguing that an administrative law model is particularly appropriate in light of the tasks trial judges perform in complex cases. As commentators have explained in describing a familiar form for complex litigation, "a class action resembles a 'quasi-administrative proceeding, conducted by the judge.'"

I. WHAT IS COMPLEX LITIGATION AND WHY IS IT A PROBLEM?

A. General Considerations

A thoroughgoing definition and analysis of what is meant by the phrase "complex litigation" is best left to treatises on the topic. But an understanding of the types of cases that warrant a revised standard of appellate review is one ingredient of my proposal. In the following paragraphs, I briefly explore the problems of complex litigation, with an eye toward the additional problems for appellate review that these cases engender. Throughout the Article, I will focus principally on the federal courts and on the "joinder complexity" aspect of complex litigation.

15. See infra Part III.
16. See infra Parts II.A., III.
19. E.g., Marcus & Sherman, supra note 10; Tidmarsh & Trangsrud, supra note 5.
20. See Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 GEO. WASH. L. REV. 1683, 1780-89 (1992) (describing joinder complexity as how the constraints of judicial procedure and adversarial ethics "combine to cause either lawyer or party dysfunction" in the essential task of selecting the party structure of a lawsuit).
One of the first critical looks at the modern notion of complex litigation came in Professor Lon Fuller's article, *The Forms and Limits of Adjudication.* In this posthumously published piece, Fuller describes his notion of a “polycentric” problem resembling a spider web, where “[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.” For Fuller, this sort of problem, which many identify with the types of disputes that comprise “complex litigation,” is “unsuited to solution by adjudication,” and must be solved by other means. In other words, Fuller contends that complex litigation does not belong in the judicial system at all. He reaches this conclusion by exploring the philosophical essence of the adjudicatory system and its incongruity with the types of disputes he calls polycentric.

Abram Chayes, writing in the same time period, took a much more practical approach: “Whatever its historical validity, the traditional model [of adjudication] is clearly invalid as a description of much of current civil litigation . . . .” Instead of focusing on the theoretical concerns that seemed to drive Fuller, Chayes looked to “what federal courts and particularly federal trial judges are doing ‘in fact.’” This view accords with a more recent description of the federal courts as a “contemporary, complex litigation-laden legal system.” Chayes argued that we should accept the changed reality of adjudication and focus new energies on shoring up the legitimacy of that reality.

Where Chayes’s reality meets (or rather, fails to meet) Fuller’s theory is the basic area of debate regarding complex litigation. On the one hand, as Chayes emphasizes, much of modern civil litigation has become “polycentric.” Yet, as Fuller eloquently explains, resolving these disputes can strain the traditional understanding of judicial business. The question facing modern commentators is what to do about it. Some believe the answer lies in procedural

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22. Id. at 395.
23. See, e.g., Tidmarsh, supra note 20, at 1729.
24. Fuller, supra note 21, at 398.
25. See, e.g., id. at 400 (“Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication.”).
27. Id. at 1282.
29. See Chayes, supra note 12, at 1312–16.
30. See, e.g., Fuller, supra note 21 at 394–400 (discussing polycentric problems and “the limits of adjudication”).
innovations applicable only to complex cases, such as the Judicial Panel on Multidistrict Litigation and the corresponding *Manual for Complex Litigation*. Others contend that the current rules are adequate to the task of meeting any difficulties complex litigation poses. Regardless, the belief that the “problem” of complex litigation persists inspired the American Law Institute to undertake its Complex Litigation Project, and it influences much of the academic literature on the topic. This paper tries to isolate a discrete area within the “problem” of complex litigation—appellate review—and offer a targeted solution drawn from existing bodies of law.

**B. Defining Complex Litigation**

As mentioned above, defining the problem of complex litigation can fill a book. In fact, many have struggled with the definition. The most instructive effort comes from Jay Tidmarsh’s lengthy article, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*. After a careful review of past efforts to define the

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31. Congress seems to adopt this view. For at least some areas of judicial management, courts are statutorily authorized to apply “differential treatment” to complex cases. See 28 U.S.C. § 473(a)(1), (3) (2000).
37. Professors Tidmarsh and Trangsrud report the shifting understanding of complex litigation from various sources. TIDMARSH & TRANGSRUD, *supra* note 5, at 83–85. For example, the *Manual for Complex and Multidistrict Litigation* § 0.1 (1970) defined the phrase as “one or more related cases which present unusual problems and which require extraordinary treatment.” Its successor, *Manual for Complex Litigation* (SECOND) (1985), deliberately refused to define the term. See TIDMARSH & TRANGSRUD, *supra* note 5, at 85. In 1994, the American Law Institute offered that all complex cases share two defining characteristics: “the potential for relitigation . . ., and . . . enormous expenditure of resources.” AM. LAW INST., *supra* note 9, ch. 2 cmt. a. Finally, in 1995, the *Manual for Complex Litigation* (THIRD) § 10.1 (1995) identified “judicial management” as complexity’s “defining characteristic.”
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problem, Professor Tidmarsh concludes that complex litigation consists of "[l]itigation in an adversarial system in which the judicial power necessary to overcome the dysfunction of the lawyers, the jury, or the parties results in procedural disparities that cause substantively disparate outcomes among similarly situated parties, claims, or transactions."\(^3\) The key element of this definition is "judicial power necessary to overcome . . . dysfunction."\(^4\) As explored above, parties (and lawyers acting on their behalf) ordinarily control the scope of litigation.\(^5\) But sometimes this control is dysfunctional. Although many defend the virtues of this party-centered adversarial system for other reasons,\(^6\) it is designed as a means to effect justice.\(^7\) Inasmuch as it falls short of this, it becomes dysfunctional. Complex litigation refers to those cases where judicial action is necessary to address the dysfunction that arises from multiple claims, multiple parties, or some other form of litigation "complexity."

In the case of joinder complexity, dysfunction comes in three basic varieties. The first involves an insufficient fund, where the number of and size of claims exceeds the funds available to satisfy them.\(^8\) The simplest example of this is a mass disaster where the defendant carries only one insurance policy. Dozens of injured parties may have a claim for well more than the insurance proceeds. If everyone pursues their claims individually, then "the first claimant to obtain . . . a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims."\(^9\) The second situation involves the related problem of inconsistent legal obligations.\(^10\) Instead of monetary claims that exceed the ability to pay, this problem arises when one court orders a party to follow a particular course of conduct and subsequent lawsuits seek to hold the party to a different standard.\(^11\) In these first two situations,

\(^{39}\) Id. at 1801.
\(^{40}\) Id.
\(^{41}\) See supra note 5 and accompanying text.
\(^{42}\) See, e.g., Fuller, supra note 21, at 381–87 (discussing the importance of adversarial advocacy and passive judges as "forms" necessary to adjudication).
\(^{43}\) See JOHN RAWLS, A THEORY OF JUSTICE 235–42 (1971) (describing how judicial procedures are an essential ingredient of justice and therefore of liberty).
\(^{44}\) See Tidmarsh, supra note 20, at 1781; see also Fed. R. Civ. P. 22(1) (allowing for joinder when "claims are such that the plaintiff is or may be exposed to double or multiple liability").
\(^{45}\) State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533 (1967); see also Chafee, supra note 4, at 1311 ("The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table.").
\(^{46}\) See Tidmarsh, supra note 20, at 1781–82.
\(^{47}\) See id.
bringing everyone into a single lawsuit permits the court to craft a remedy that suits everyone's interests. The third form of joinder complexity involves the inefficient re-litigation of similar claims, such as in asbestos litigation, where new claimants assert essentially the same claims over and over again, against the same defendants. Professors Tidmarsh and Trangsrud argue that this type of case should be thought of as "complicated," rather than "complex," because it does not involve the same kind of dysfunction as the other two. As an analytical matter, this is probably correct, but many observers consider this a species of complex litigation, and these "complicated" cases also often involve increased exercises of judicial power to overcome a perceived "dysfunction" in the judicial system.

C. Complex Litigation and Appellate Review

Existing procedural mechanisms do, of course, address the types of complexity explored above. For example, one use of class actions under Rule 23(b)(1) of the Federal Rules of Civil Procedure is to bring together all claimants to a "limited fund." Similarly, if a party's interest will be "impaired or impeded" by the result of a lawsuit, she is ordinarily entitled to intervene in the case. Further, the Judicial Panel on Multidistrict Litigation exists precisely for the purpose of capturing instances of inefficient re-litigation and consolidating them before a single court. But the mere availability of judicial procedures does not overcome the complexities they are

48. See, e.g., Martin v. Wilks, 490 U.S. 755 (1989). In Martin, a group of black firefighters obtained a judgment ordering the city of Birmingham, Alabama to remedy certain discriminatory hiring practices. Id. at 758-60. Then, the Court permitted a group of white firefighters, who had not been joined in the first suit, to challenge the scheme as reverse discrimination. Id. at 769. Joining everyone in one suit would have avoided this problem.
49. See Hardy v. Johns-Mansville Sales Corp., 681 F.2d 334 (5th Cir. 1982) (rejecting an attempt to bind asbestos manufacturers to a prior court decision holding that asbestos is, as a matter of fact, unreasonably dangerous). In Hardy, the court commended the search for innovative methods of resolving asbestos litigation, but refused to "elevate judicial expediency over considerations of justice and fair play." Id. at 348.
50. See TIDMARSH & TRANGSRUD, supra note 5, at 88-89.
51. See, e.g., AM. LAW INST., supra note 9, ch. 2 cmt. a (defining complex litigation as "characterized by related claims dispersed in several forums," and "the potential for re-litigation"); see also MARCUS & SHERMAN, supra note 10, at 104 ("Sometimes ... cases take on complexities by virtue of their relationship to other cases.").
52. See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991). In the Asbestos Litigation case, the judges of the Eastern and Southern Districts of New York cooperated to bring more than 700 separate asbestos cases before a single judge.
54. FED. R. CIV. P. 24.
designed to address. Defining a "fund" or an "interest" is not always easy. Moreover, individual litigants do not always utilize the procedures necessary to overcome complexity.

Faced with this, judges respond in different ways. Some make an active effort to solve the problems of complexity through creative uses of existing procedures. Others, concerned with docket management, try to keep complexity at bay by narrowing each case to its simplest incarnation. Still others struggle to interpret the essential legal questions that plague complex litigation. Then the appellate courts weigh in on these "polycentric" problems and the judges' efforts to manage them. A trial judge prone to simplifying cases may reside in a circuit that takes an activist, complexity-solving stance. Or a trial judge who advances a creative understanding of a "limited fund" may find that the appellate court disagrees with her reasoning. These complications are a common byproduct of our appellate system, and they are particularly likely when dealing with novel or difficult questions of law. But in this area of the law, one where "complexity" defines every case, the judicial system does not need the additional complications of a traditional appellate relationship. And in analogous areas, the law

56. See Ortiz, 527 U.S. at 838–41 (analyzing the meaning of a "limited fund").
57. See Bustop v. Superior Court, 137 Cal. Rptr. 793, 795–96 (Cal. Ct. App. 1977) (analyzing the meaning of "interest" under a state version of Rule 24).
58. See Martha Minow, Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies, 97 COLUM. L. REV. 2010 (1997); see also infra Part II.
59. Courts that would follow this course can draw encouragement from FED. R. CIV. P. 42(b), which permits separate trials "in furtherance of convenience."
60. Two prominent asbestos cases illustrate this point. Both concern the difficult question of the availability of settlement class actions under FED. R. CIV. P. 23. In Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), the Supreme Court set aside a class-action global settlement involving extensive and complicated negotiations between the attorneys. The District Court had certified the settlement class and approved the settlement, only to have the Third Circuit vacate the orders and the Supreme Court affirm. Id. at 597. At about the same time, a different group of asbestos plaintiffs and defendants negotiated an even more complex global settlement. That dispute, which ultimately became Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), involved District Court certification of the class and approval of the settlement after an eight-day-long fairness hearing, affirmation by the Fifth Circuit, vacation to reconsider in light of Amchem, subsequent re-affirmation by the Fifth Circuit, and ultimate reversal by the United States Supreme Court. Id. at 828–90. But even these recent Supreme Court pronouncements have not authoritatively resolved the question of the settlement class action. In fact, the Amchem Court held that settlement class actions are not only proper, but that the fact of settlement should be considered when ruling on class certification. Amchem, 521 U.S. at 619–20.
61. See, e.g., Cook v. Boorsin, 763 F.2d 1462, 1472 (D.C. Cir. 1985) (reversing a trial court’s denial of class certification despite claiming sympathy for the trial court's role in making such decisions).
62. See cases cited supra notes 59–60.
recognizes this consideration with modified notions of judicial review. Complex litigation merits a similar modification.

II. TRIAL JUDGES AND COMPLEX CASES: “TEMPORARY ADMINISTRATIVE AGENCIES”

Complex litigation casts the trial judge in a new role. Professor Tidmarsh’s definition of the phrase recognizes this, and the insight dates at least to Professor Chayes, probably earlier. Some criticize this development, and even those who recognize its benefits caution against adopting the “activist” judge as a generally applicable model. In many respects, Abram Chayes articulated the proper response to this debate years ago when he directed his attention to “what [the] federal courts and particularly federal trial judges are doing ‘in fact.’” This paper takes a similar view: right or wrong, American trial judges have become much more “managerial” in complex cases, and we ought to proceed from that reality. Moreover, the movement toward managerial justice may not be as foreign or as recent as critics imagine. In this Part, I explore the phenomenon of the managerial judge through the lenses of historical equity practice and modern administrative law procedures.

A. Equity Conquered the Common Law

Most of the Federal Rules of Civil Procedure derive from equity. Historically, equity differed from law in a key way:

63. See infra Part III.
64. See Tidmarsh, supra note 20, at 1801 (noting that complex litigation necessarily involves untraditional exercises of “judicial power”).
65. See Chayes, supra note 12 (analyzing changes to “The Role of the Judge”).
66. See Chafee, supra note 4, at 1331-32 (analyzing the “administrative problem presented by multiple suits involving common questions[,]” and concluding that “[a]ll that remains is a practical task for the trial judge”).
68. See Minow, supra note 58, at 2033.
69. Chayes, supra note 12, at 1282.
70. Discussions of “managerial judges” often focus on the way judges exert uncharacteristic control over pretrial matters in complex cases. See, e.g., Minow, supra note 58, at 2012; Resnik, supra note 67. My focus is on joinder determinations, but to the extent the judge becomes more involved in these matters, it raises the same questions concerning the propriety of judicial management.
“[c]ommon law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized.”

The Federal Rules of Civil Procedure overwhelmingly adopted the equitable mindset, to the exclusion of the common law perspective. Although some criticize this decision, the triumph of equity is an important aspect of modern civil procedure.

Equitable procedures enjoy even greater dominance in complex cases because, much like present-day complex litigation, “[t]he equity system did not revolve around the search for a single issue. Multiple parties could, and often had to, be joined.”

Thus, the present-day procedures associated most closely with complex litigation—such as class actions, party and issue joinder, and interpleader—all derive from equity practice. In defending the application of these features of equity, Zechariah Chafee explained, “unless the first lawsuit seems likely to be the last, the courts should do their best to settle the dispute in one proceeding in which the whole multitude can participate on one side together. At common law this was impossible.”

But, “[t]he multiplicity of suits should be enough to create equitable jurisdiction.”

Because modern complex litigation often represents an effort to “make[] one lawsuit grow where two [or more] grew before,” it is often quite similar to a suit in equity.

Given the similarities, we should expect equity’s characteristics to shine through in complex litigation. In particular, equity’s historical tolerance for multiple parties and multiple claims was able to function only as a “less individualized justice . . . resulting in more discretionary power lodged in a single Chancellor.”

Given the similarities, we should expect equity’s characteristics to shine through in complex litigation. In particular, equity’s historical tolerance for multiple parties and multiple claims was able to function only as a “less individualized justice . . . resulting in more discretionary power lodged in a single Chancellor.”

Modern courts continue to rely on broad judicial discretion in adjudicating equity practice and tracing the roots of the Federal Rules of Civil Procedure to these equitable procedures).

72. Id. at 920.
73. Id. at 922–26.
74. Id. at 914.
75. Id. at 919.
76. Id.; see also Waters, supra note 36, at 543 (discussing “modern aggregation devices rooted in equity practice”).
77. Chafee, supra note 4, at 1300 (footnote omitted).
78. Id. at 1302. Chafee’s contention on this issue may strain the Seventh Amendment right to jury trial. I know of no court that has fully adopted this understanding of equitable jurisdiction, but detailed exploration of this topic falls outside the scope of this Article.
79. Id. at 1297.
80. Cf. Weber, supra note 34, at 113–14 (“Equity cases were the complex litigation of the nineteenth century . . . .”).
81. Subrin, supra note 71, at 920 (emphasis added).
suits in equity,82 and judicial innovators in complex cases often find authority for their actions in the discretionary powers arising out of the equitable nature of a complex lawsuit's structure.83

Even in complex cases that do not push the bounds of accepted judicial practice, the influence of equity is well understood: "In the mass tort regime, this historical goal of equity has taken on a whole new meaning, as modern aggregation devices rooted in equity practice make possible the aggregation, adjudication, and settlement of thousands of individual claims in the same action."84 Furthermore, courts recognize the discretionary nature of the whole enterprise. As one appellate court explained,

[W]e . . . sympathize with the district court's efforts to streamline the enormous asbestos caseload it faces. None of what we say here is meant to cast doubt on any possible alternative ways to avoid reinventing the asbestos liability wheel. We [invite] . . . district courts to attempt innovative methods for trying these cases.85

Thus, equity and the discretion it entails are essential background principles in complex litigation. Many observers have recognized as much,86 but some are troubled by the results. As Stephen Subrin explains, in equity, "[j]udges were given more power."87 For him, this worked well enough as an exceptional prac-

82. See, e.g., R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (reviewing the "exercise of the sound discretion, which guides the determination of courts of equity") (quoting Beal v. Mo. Pac. R.R., 312 U.S. 45 (1941)).
83. See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315 (3d Cir. 2001). In In re Orthopedic Bone Screw Products, the court stated:

Settlement administration in a complex class action often requires courts to use their equitable powers under Rule 23 to manage the disparate interests competing over a finite pool of assets with which to satisfy the class. . . . The equitable powers of the court may be invoked to deal with other problems that commonly arise during administration of the settlement.

Id. at 321 (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.47 (1995)). See also, e.g., In re Joint E. & S. Dist's. Asbestos Litig., 129 B.R. 710, 809 (E. & S.D.N.Y. 1991) (certifying a complicated asbestos class action and noting that "[m]any equitable goals are served by class treatment of mass tort claims"), vacated, 982 F.2d 721 (2d Cir. 1992), modified, 993 F.2d 7 (2d Cir. 1993); Asset Allocation & Mgmt. Co. v. W. Employers Ins. Co., 892 F.2d 566, 572 (7th Cir. 1989) (holding that the power to prevent duplicative litigation is a "new power asserted in order to facilitate the economical management of complex litigation," moving beyond even traditional equitable powers).
84. Waters, supra note 36, at 543.
86. See, e.g., Tidmarsh, supra note 20, at 1805; Waters, supra note 36, at 530 (describing how mass torts cases "rely heavily on the flexible equity practice that has long dominated federal trial procedure"); Weber, supra note 34, at 124 ("Procedures derived from equity practice could be expected to give judges the power to control the manner in which the dispute is developed and presented.").
87. Subrin, supra note 71, at 920.
tice, in concert with the default principles of the common law, but it fails as a general framework for adjudication.\textsuperscript{88} Lon Fuller, and those who follow his lead, would probably agree. Fuller's view is grounded in theoretical concerns, and it emphasizes the importance of a passive judicial officer at the root of rational adjudication.\textsuperscript{89} This leaves little room for increasing judicial power in the model of equity's Chancellor. More recently, Melissa Waters, commenting on "Common Law Courts in an Age of Equity Procedure,"\textsuperscript{90} reached a similar conclusion. She argued that the flexible powers trial judges employ in mass torts cases must be carefully controlled through stricter review and easier access to appellate courts.\textsuperscript{91}

Each of these views represents a well-reasoned analysis of the problems of increased judicial power rooted in equity and applied to complex litigation. But that is not the entire picture. Modern complex litigation is more than equity for the twenty-first century. Increasingly, both the study and practice of this area of the law draw on a legal field of more recent vintage: administrative law.\textsuperscript{92} As such, before unraveling the "problem" of managerial judges, and particularly of appellate review, one should also explore the relationship between complex litigation and the practice of administrative law.

\textbf{B. Adjudication Versus Administration}

The rise of the administrative state in the American legal system is a complex and interesting phenomenon. Instead of tracking its history here, however, I wish to focus on a few salient features of administrative law to examine how they resemble the "judicial management" associated with complex litigation. First, administrative agencies combine rule-making, adjudication, and traditional executive powers in uncommon ways that diverge from our standard notions of separation of powers.\textsuperscript{93} Second, administrative agencies exercise delegated power. Unlike other governmental organizations, whose powers derive more or less directly from the

\begin{itemize}
  \item \textsuperscript{88} Id. at 922–26.
  \item \textsuperscript{89} See supra notes 42–43 and accompanying text.
  \item \textsuperscript{90} See Waters, supra note 36.
  \item \textsuperscript{91} Id. at 584–604.
  \item \textsuperscript{92} See, e.g., Jonathan T. Molot, \textit{An Old Judicial Role for a New Litigation Era}, 113 \textit{Yale L.J.} 27, 94 & n.296 (2003) (reviewing parallels between class action litigation and administrative law).
  \item \textsuperscript{93} Ronald J. Krotoszynski, Jr., \textit{On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited}, 38 \textit{Wm. & Mary L. Rev.} 417, 421 (1997).
\end{itemize}
Constitution, administrative agencies are generally creatures of statute, with their powers subject to legislative grant and judicial interpretation. Because of this, "[t]he primary purpose of administrative law is to keep administrative powers within their legal bounds and to protect individuals against abuse of those powers." Finally, administrative agencies grow out of a need for specialized governance. As Bernard Schwartz and Roberto Corrada explain, virtually every administrative agency in the United States is based on the 1887 creation of the Interstate Commerce Commission: "In countless instances, specialization to deal with specialized problems of administration has been provided in the same way it was in 1887."

The benefits of the administrative law model mirror many of equity's benefits. By blending the executive, legislative, and judicial functions, an administrative agency is more flexible and better equipped to address the entirety of a complex problem. As Lon Fuller explained, "[i]f we survey the whole field of adjudication and ask ourselves where the solution of polycentric problems by adjudication has most often been attempted, the answer is: in the field of administrative law." It is no surprise, then, that "managerial" trial judges begin to look and act like administrative agencies when presiding over complex litigation. Martha Minow eloquently explores this tendency in her commentary on Judge Jack Weinstein, one of the most well-known judicial innovators in the area of complex litigation. Professor Minow argues that Judge Weinstein creates "temporary administrative agencies."

The dangers inherent in administrative governance and its analogical application to complex litigation also resemble the dangers of equity. Specifically, both administrative governance and equity jurisprudence concentrate a great deal of power in the relevant official. The legal system checks unbridled administrative power

95. Id. at 17.
96. Fuller, supra note 21, at 400.
97. See Minow, supra note 58.
98. Id. at 2011.
99. For purposes of this Article, that official is the judge, but note that judges in complex cases sometimes employ more clearly "administrative" officials, such as special masters. See Fed. R. Civ. P. 53; In re "Agent Orange" Prod. Liab. Litig., 94 F.R.D. 173 (E.D.N.Y. 1982). In these cases, judicial management of complex litigation resembles administrative law even more closely and presents issues similar to those treated here. For a thoughtful review of the use of special masters in complex litigation, see Danks, supra note 36.
through a variety of mechanisms, including judicial review.100 As I explore in Part III, however, judicial review of administrative action is calibrated to respect the specific delegations of administrative power.101 Appellate review in complex litigation should be similarly calibrated.

Part of the balance between administrative power and judicial review grows out of recognition of agency expertise. As described above, administrative agencies perform specialized governmental functions. The agencies bring expertise to complicated areas of policy and (arguably) thereby provide better governance than we could achieve through a "generalist" legislative, executive, and court system. Specialization can also operate as a check on the potential abuses of power, in that policy may be more just if administered by a body of specialists even if those specialists enjoy a great deal of power. As one commentator explains, "the legitimacy of administrative agencies is often defended in terms of expert legitimacy, on the ground that administrative agencies perform a primarily technical role, requiring expert knowledge, in advancing the values and goals set forth in legislation."102 This is not to say that all specialists are altruistic. Bureaucratic abuse of power is not unknown, but technical expertise is one justification for the power granted to administrative agencies.

Something similar occurs in complex litigation. In mass tort settlement class actions, for example, complex litigation has proceeded on the backs of "an elite group of private attorneys who possess formidable expertise in the subject area,"103 a development that "parallels, in several salient respects, the rise of public administrative agencies."104 Further, complex litigation is growing to resemble administrative law not only because of specialist attorneys; it also relies on "specialist" judges.105 On questions of joinder, for example, the law has long recognized the relative "expertise" of

100. See Christopher C. Taintor, Comment, Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication, 38 Me. L. Rev. 185, 185 (1986).
101. See infra notes 124–130 and accompanying text.
103. Nagareda, supra note 36, at 938.
104. Id. at 938–39.
105. See Minow, supra note 58, at 2020–21 (describing Judge Weinstein's conduct as "contextualized efforts to construct procedures tailored for a particular circumstance; judging for the situation involves generating temporary administrative structures responsive to the claims at hand"); Richard L. Marcus, Tribute, The Agenda-Setter for Complex Litigation, 149 U. Pa. L. Rev. 1257, 1274 (2001) (praising Chief Judge Edward Becker of the Third Circuit and exploring how, "across a spectrum of crucial issues in complex litigation, Judge Becker has led the way and shaped the law").
trial judges. In reviewing class certification, the most ambitious form of joinder, one court explains, "the district court maintains substantial discretion in determining whether to certify a class action . . . . Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court’s inherent power to manage and control pending litigation." Thus, in complex litigation, equity meets expertise: the joinder rules vest the discretionary powers characteristic of a chancellor in trial court judges, and because the trial court is more expert in crafting the best structure for the lawsuit, complex litigation takes on the appearance of a "quasi-administrative proceeding, conducted by the judge."  

III. A NEW (BORROWED) STANDARD OF REVIEW: CHEVRON DEFERENCE

Identifying the judicial role in complex litigation with the traditional business of administrative agencies is not a new idea, but my proposal differs by using this insight to re-evaluate the applicable standard of appellate review. Even this idea has at least one proponent. In 1996, Richard Nagareda argued that mass tort settlement mechanisms contain many of the characteristics of administrative agencies. In view of this, Nagareda proposed that appellate courts review such settlements with a standard much like the “hard look” doctrine of administrative law. Professor Nagareda's argument, however, rests on the premise that Chevron deference does not fit complex litigation. He writes: "In the context of mass torts, however, there is no obvious analogue to Chevron review; no one has delegated to the mass tort bar the authority to effect settlements of future claims through the vehicle of a class

108. See, e.g., Fuller, supra note 21, at 400 ("If we survey the whole field of adjudication and ask ourselves where the solution of polycentric problems by adjudication has most often been attempted, the answer is: in the field of administrative law."); Minow, supra note 58, at 2020 ("[J]udicial supervision of complex suits resembles administrative agency activity . . . ."); Nagareda, supra note 36, at 902 ("I contend that the rise of such settlements in [class action mass torts] mirrors the development of public administrative agencies . . . ."); Danks, supra note 36 (analogizing, from the vantage point of complex litigation, the work of court-appointed special masters to administrative agencies).
110. See id. at 945-52.
action. Focusing exclusively on mass torts, and specifically on settlement class actions, Nagareda may be correct. But if we place mass torts inside the broader context of complex litigation, as defined above, the analysis changes. The standard of review identified with *Chevron* is a proper analogue to trial judges' joinder determinations in complex cases. In particular, *Chevron* requires courts to take note of the authority specifically committed to an agency when determining whether an action merits deference.

Similarly, through their history in equity, the Federal Rules of Civil Procedure commit broad discretionary authority to trial judges to manage their cases, thereby meriting a similar measure of deference.

### A. The Doctrine of Chevron Deference

In the now-famous case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the United States Supreme Court announced a two-part standard of review applicable to administrative agency determinations. Justice John Paul Stevens, writing for the Court, explained, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." In view of this, the *Chevron* test requires a reviewing court to first look at "whether Congress has directly spoken to the precise question." If it has, then Congress's command guides both the courts and the agencies, and no deference is appropriate. But if the question is ambiguous, courts proceed to the second step. Under this prong, if the matter is explicitly or implicitly committed to the agency's authority, then "a court may not substitute its own construction."

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111. *Id.* at 942 n.166.
112. Further, since the completion of Nagareda's article in 1996, the utility of the mass tort settlement class action has been seriously undermined. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing certification of another asbestos settlement class action); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (finding certification of an asbestos global settlement class action improper).
113. *See infra* notes 125-128 and accompanying text.
114. *See supra* notes 83-85 and accompanying text.
116. *Id.* at 844.
117. *Id.* at 842.
118. *See id.* at 842-43.
119. *Id.* at 844.
The courts have struggled to determine which types of agency action merit *Chevron* deference, and academic commentators continue to debate *Chevron*'s meaning and how the courts are using it. Exploring these concerns in depth would move beyond the present discussion of complex litigation, but some general characteristics deserve attention. The standard interpretation of *Chevron*, and the one most often encountered in administrative law courses, is that it was meant to compel a greater degree of judicial deference to administrative action. In recent years, however, "[a] strong revisionist view has emerged, interpreting *Chevron* as less deferential than many initially assumed." This shift explains the uncertainty of post-*Chevron* case law and the overwhelming quantity of academic literature on the doctrine. If scores of administrative law commentators are unable to develop a uniform construction of *Chevron* deference, neither can I do so here. Further, if *Chevron* deference is a doctrine with uncertain parameters, it will do little to advance predictability and fairness in complex litigation. For these reasons, I will focus more on the theory (perhaps the myth) of *Chevron*, rather than the doctrine in practice.

Regardless of the truth of the "revisionist view," many understand *Chevron* to encourage judicial deference. The doctrine of *Chevron* deference continues to receive this construction, and it is this myth that informs my discussion. This more deferential interpretation is rationally based on the language of the opinion itself. Justice Stevens wrote: "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." In such a case, where "a challenge to an agency construction of a statutory provision... really centers on the wisdom

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120. See, e.g., Christensen v. Harris County, 529 U.S. 576 (2000) (holding that agency opinion letters do not warrant *Chevron* deference).


122. Levin, supra note 121, at 1256.

123. Id. at 1257–58.

124. For a sampling of *Chevron* literature, Professor Levin refers the reader to John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35, 36 n.3 (1995), "[f]or a non-exhaustive list of forty-seven 'principal' articles on *Chevron*." Levin, supra note 121, at 1253 n.2.

125. See, e.g., Note, *The Two Faces of Chevron*, 120 Harv. L. Rev. 1562 (2007) (analyzing *Chevron* as the Supreme Court opinion that increased the level of deference given by courts to administrative agencies).

of the agency’s policy . . . the challenge must fail.”

This recognizes the distinctive roles of courts and agencies in our system: administrative agencies are expert in their fields and politically accountable, while federal judges are remote from the factual backdrop and removed from the political system. This reality encourages a policy of strong deference.

Despite the compelling reasons for judicial deference, Chevron recognizes that judges must exercise some measure of judicial review. As emphasized above, the tendency for great concentrations of power is one of the principal objections to the administrative state. Judicial review provides an essential check on that potential for abuse. Accordingly, Chevron holds that an agency determination, even if made pursuant to an explicit Congressional delegation of policy-making power, should be set aside if it is “arbitrary, capricious, or manifestly contrary to the statute.” Reviewing courts remain responsible for interpreting statutes, but courts also defer when administrative agencies non-arbitrarily execute their own important responsibilities.

B. Applying Chevron to Complex Litigation

The Chevron model is easily applicable to complex litigation, particularly to trial judges’ determinations on joinder. Like a legislative policy committed to agency expertise, the various aggregation devices available in complex litigation are committed to the sound discretion of the trial judge. As reviewed above, these

127. Id. at 866.
128. See id. at 865–66.
129. Id. at 845 (“If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961))).
130. See supra notes 93, 99 and accompanying text.
132. See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815, 868 (1999) (Breyer, J., dissenting) (“[D]istrict courts have ‘broad power and discretion . . . with respect to matters involving the certification’ of class actions.” (citing Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979))); Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001) (“Federal Rule of Civil Procedure 25 provides district courts with broad discretion to determine whether a class should be certified”); Painewebber, Inc. v. Cohen, 276 F.3d 197, 201 (6th Cir. 2001) (“[W]e must affirm the district court’s Rule 19(a) analysis unless we are ‘left with a definite and firm conviction that the trial court committed a clear error of judgment.’”) (citation omitted); Dye v. Jackson, 1998 U.S. App. LEXIS 51548, at *6 (6th Cir. 1998) (holding that a decision to join parties under Rule 20(a) rests within the trial courts discretion); Shaw v. Hunt, 154 F.3d 161, 168 (4th Cir. 1998) (“District courts, of course, are vested with substantial discretion to deny permissive intervention where inappropriate, thus controlling those who as parties may
discretionary powers and the flexibility they entail derive from the long history of equity.\textsuperscript{133} Additionally, in the "contemporary, complex litigation-laden legal system,"\textsuperscript{134} joinder determinations are one of the many ways that "managerial" trial judges shape the course of pending litigation in order to bring it to a successful conclusion.\textsuperscript{135} When a lawsuit is truly complex,\textsuperscript{136} that is, "polycentric,"\textsuperscript{137} the trial judge's managerial efforts take on an administrative character.\textsuperscript{138} For these reasons, the long-recognized analogy between complex litigation and administrative law should be pushed even further. Courts reviewing trial judges' rulings on aggregation\textsuperscript{140} should, as with agency determinations, apply the standard of review known as \textit{Chevron} deference.

My proposal would replace abuse of discretion review, where applicable, and it would significantly undercut \textit{de novo} review when applied to joinder determinations.\textsuperscript{141} Consistent with "Step One" of

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potentially be entitled to fees."); Hedberg v. Darlington County Disabilities & Special Needs Bd., 1997 U.S. App. LEXIS 36075, at *8 (4th Cir. 1997) ("We note that district courts are generally given broad discretion to decide the scope of a civil action.").

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133. \textit{See supra} notes 74–82 and accompanying text.


135. \textit{See generally} Minow, \textit{supra} note 58 (assessing Judge Jack Weinstein's creative use of procedures in complex cases). For just one telling example of this, see \textit{Aaberg v. ACandS, Inc.}, 152 F.R.D. 498 (D. Md. 1994), in which the Court, by the stroke of a pen, changed the case from a 1000-plaintiff dispute to a one-plaintiff case.

136. \textit{See} Tidmarsh, \textit{supra} note 20, at 1801 (defining complex litigation as "[l]itigation in an adversarial system in which the judicial power necessary to overcome the dysfunction of the lawyers, the jury, or the parties results in procedural disparities that cause substantively disparate outcomes among similarly situated parties, claims, or transactions").

137. \textit{See Fuller, supra} note 21, at 395.

138. \textit{See id. at} 400.

139. \textit{See, e.g., id. at} 400 ("If we survey the whole field of adjudication and ask ourselves where the solution of polycentric problems by adjudication has most often been attempted, the answer is: in the field of administrative law."); Minow, \textit{supra} note 58, at 2020 ("[J]udicial supervision of complex suits resembles administrative agency activity \ldots"); Nagareda, \textit{supra} note 36, at 902 ("I contend that the rise of such settlements in [class action mass torts] mirrors the development of public administrative agencies \ldots"); Danks, \textit{supra} note 36 (analogizing, from the vantage point of complex litigation, the work of court-appointed special masters to administrative agencies).

140. When I talk of joinder or aggregation determinations, I am referring, in the main, to decisions under Rules 19 through 24 of the \textit{Federal Rules of Civil Procedure}. I have, however, deliberately left the phrase undefined because other types of rulings may also amount to joinder determinations. Some examples include decisions to transfer under 28 U.S.C. § 1404, determinations of the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407, rulings on statutory interpleader under 28 U.S.C. § 1335, and possibly even various rulings arising out of a Bankruptcy proceeding. I suspect there are many other possibilities.

141. Reviewing courts sometimes give lip service to the trial judge's discretion while simultaneously characterizing the joinder ruling as one involving a "question of law," thereby triggering broader, \textit{de novo} review. \textit{See, e.g.,} Allison v. Cigo Petroleum Corp., 151 F.3d 402, 408 (5th Cir. 1998) ("We note at the outset that the district court maintains substantial dis-
Chevron, appellate courts would still exercise a kind of de novo review, but it would be limited to ascertaining the unambiguous commands of the statute or procedural rule in question. Assuming the trial determination satisfied this standard, the appellate court would proceed to "Step Two," evaluating the decision to make sure that it is not "arbitrary, capricious, or manifestly contrary to the statute." But if the ruling does not run afoul of this deferential standard, then it should be affirmed.

In practice, this kind of Chevron review may not be functionally very different from abuse of discretion review, which recognizes that "[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Alternatively, applying Chevron to complex litigation may vastly alter the relationship between trial and appellate courts. Administrative law provides us with a useful doctrine, but it does not provide a clear and predictable application of that doctrine. Because I advocate borrowing the theory, rather than the practice, we have no reliable information to help predict the effects of this modified judicial review. But that does not undercut its value. The benefit of adopting Chevron for complex cases does not lie in fewer reversals or fewer appeals. Instead, appellate courts should apply Chevron deference to joinder determinations because it will clarify their relationship with trial courts in this complex area of the law. It will also force appellate courts to draw clear lines between the respective realms of discretion and unambiguous legislative command in our procedural aggregation devices. Finally, adopting Chevron will respect what trial judges...
are doing "in fact";\textsuperscript{148} it will better reflect the characteristics of complex litigation: where equity meets expertise.

\textbf{C. Objections and Concerns with Transplanting the \textit{Chevron} Model}

One immediate objection to my proposal concerns the potential for unchecked power in the hands of trial judges. As explored above, one defining characteristic of complex litigation is the increased role of the judge.\textsuperscript{149} This troubles many,\textsuperscript{150} and some believe that our system best responds to the phenomenon of the "managerial judge" by maintaining tight appellate-court control.\textsuperscript{151} Rule 23(f) of the Federal Rules of Civil Procedure implicitly adopts this viewpoint by providing for interlocutory review of district court determinations on the question of class-action certification.\textsuperscript{152} And some academic commentators also suggest that complex cases require closer supervision from the courts of appeals.\textsuperscript{153}

At bottom, I simply disagree with this. Judicial review of administrative action is an essential ingredient in the protection against concentrations of power. Yet, administrative law doctrine recognizes the relative expertise of administrative agencies and therefore applies a deferential standard of review to decisions made within that expertise. Applying \textit{Chevron} to complex litigation would simply be a correlative development. Moreover, this Article has only sought to demonstrate the propriety of that correlation, not to praise the reality of the "managerial judge." \textit{Chevron}-based review could apply to aggregation decisions even in a system that limits trial judges' power. If Professor Marcus is correct that judicial discretion should not drive consolidation decisions and that trial determinations are reviewed for abuse of discretion), with Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 899 (3d Cir. 1993) (holding that "necessary party" determination under Rule 19 was a conclusion of law subject to plenary review).

\textsuperscript{148} Chayes, supra note 12, at 1282.
\textsuperscript{149} See supra note 63-67 and accompanying text.
\textsuperscript{150} See, e.g., Marcus, supra note 2, at 897-901 (arguing that more precise guidelines should govern trial judges' consolidation decisions); Resnik, supra note 67, at 445 ("I want to take away trial judges' roving commission . . ."); see also Subrin, supra note 71 (arguing that our current equity-dominated procedures disserve important goals of our legal system).
\textsuperscript{151} See, e.g., Waters, supra note 36.
\textsuperscript{152} See FED. R. CIV. P. 23(f) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule . . .").
\textsuperscript{153} E.g., Waters, supra note 36, at 591-602 (arguing for "The Expanded Use of Supervisory and Advisory Mandamus"); see also Harlon Leigh Dalton, \textit{Taking the Right to Appeal (More or Less) Seriously}, 95 YALE L.J. 62, 106 n.149 (1985) (outlining a scheme of more restrictive rights to appeal, but concluding that more review is required in complex litigation).
judges need clearer guidelines,\(^{154}\) *Chevron* can still apply. Under such a system, Step One of the test, which recognizes that both trial and appellate courts must follow unambiguous legislative commands, would control most appeals.\(^{155}\) Similarly, even if appellate review should be widely available in complex cases, as Professor Waters argues,\(^{156}\) that does not mean that appellate courts must exercise searching and critical review. Thus, while critics of the "managerial judge" argue from a different vantage point than this Article, their views are not necessarily inconsistent with the adoption of *Chevron* deference.

A more subtle attack on this proposal would highlight the differences between administrative law and complex litigation. While it is true that complex cases sometimes blur the lines between administration and adjudication,\(^{157}\) trial courts are not administrative agencies. Part of the *Chevron* rationale recognizes that administrative agencies are not only expert; they are also politically accountable.\(^{158}\) When the question is one of policy, it makes sense that un-elected judges should defer to the decisions of a political branch of the government. But trial judges are no more politically accountable than courts of appeals. In other words, political accountability really does not come into play in complex litigation. It is a feature of administrative procedure that may offer some explanation for the deference afforded by reviewing courts in that sphere, but it simply does not affect deferential review in complex litigation one way or the other. Moreover, the political accountability of administrative agencies may be exaggerated. During the same time period as the *Chevron* case, Peter L. Strauss argued that the President must exercise greater control over administrative agencies.\(^{159}\) According to Strauss, Presidential control is essential because agencies "lack the political accountability and the intellectual and fiscal resources" to effectively balance competing policy interests.\(^{160}\) Political accountability is a difficult concept, but like federal judges, agency administrators are not elected.

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155. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").
157. See *supra* notes 95–105 and accompanying text.
158. See *Chevron*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").
160. *Id.* at 663.
Similarly, some may challenge the analogy between authority delegated to administrative agencies under their applicable statutory schemes and the discretionary authority "delegated" to trial courts under the Federal Rules of Civil Procedure. When Richard Nagareda concluded that *Chevron* has no analogue in mass torts cases,\(^{161}\) he was relying in part on this rationale. According to Nagareda, trial courts do not enjoy delegated authority like administrative agencies.\(^{162}\) As such, perhaps they should not be entitled to the same deferential standard of review. This is a potent analysis, but it is not sufficient to defeat the proposal. At least with respect to aggregation decisions, which have been the focus of this Article, the Federal Rules of Civil Procedure do delegate a degree of authority to trial judges.\(^{163}\) By applying *Chevron* review in such cases, appellate courts would give equal respect to the delegated powers of both trial courts and administrative agencies.

One final concern centers on trans-substantivity. According to Roger Trangsrud, the American judicial system is designed to use common procedures for all types of cases.\(^{164}\) By advocating a different standard of appellate review for complex cases, this Article arguably offends the principle of trans-substantivity.\(^{165}\) But my proposal also draws on a long history of Anglo-American law and politics. Even if it offends some sense of philosophical purity, it is not a radical departure from accepted practices. Further, I note (without entering the debate) that some "[c]ritics claim that the federal courts are in 'crisis' ... properly charged to ... reliance upon one trans-substantive set of rules for all kinds of cases ...."\(^{166}\) Trans-substantivity standing alone does not end the discussion.

**Conclusion**

Abram Chayes was one of the first to recognize that what we now call complex litigation casts the trial judge in a new role.\(^{167}\) More recently, Jay Tidmarsh explained this reality as arising out of the

\(^{161}\) Nagareda, *supra* note 36, at 942 n.166.

\(^{162}\) *Id.*

\(^{163}\) See *supra* notes 81, 82, and 131.


\(^{165}\) See Tidmarsh, *supra* note 20, at 1808–09 (arguing that special procedural rules for big or complex cases should be rejected in favor of trans-substantivity).


\(^{167}\) See Chayes, *supra* note 12, at 1284.
dysfunction of the lawyers and parties in complex cases. But judges are not without an historical guide in this new territory. Most instances of judicial power concerning party structure and joinder draw on the equitable powers of discretion, many of which are codified in the Federal Rules of Civil Procedure. This has provided a strong basis for aggregation in complex cases because “equity delights to do justice and not by halves.” Complex litigation’s new “managerial judge” also resembles the practice of administrative agencies, and the expertise of agencies within their field resembles the aggregation expertise of trial judges implied by the discretionary powers they exercise. As such, trial judges’ joinder determinations merit a similar standard of appellate review: the standard of Chevron deference.

This approach does not solve, or even address, the problem of trans-substantivity, nor does it remove the dysfunction that gives rise to complexity. But it responds to an additional layer of complexity that infects modern litigation of big cases. When faced with the difficult joinder problems of a complex case, Zechariah Chafee recognized long ago that “[a]ll that remains is a practical task for the trial judge, not very different from that which confronts the prospective traveller [sic] in deciding whether to put his belongings into one trunk or several suitcases.” Our system instructs the “judge to turn his thoughts to the best method of achieving satisfactory justice . . . .” And on such practical tasks, the appellate courts should defer.

168. Tidmarsh, supra note 20, at 1801.
169. Weber, supra note 34, at 121 (citing Edward D. Re, Cases and Materials on Remedies 43 (2d ed. 1987)).
170. Chafee, supra note 4, at 1382.
171. Id.