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## MDL as Public Administration

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# MDL AS PUBLIC ADMINISTRATION

David L. Noll\*

*From the Deepwater Horizon disaster to the opioid crisis, multidistrict litigation—or simply MDL—has become the preeminent forum for devising solutions to the most difficult problems in the federal courts. MDL works by refusing to follow a regular procedural playbook. Its solutions are case specific, evolving, and ad hoc. This very flexibility, however, provokes charges that MDL violates basic requirements of the rule of law.*

*At the heart of these charges is the assumption that MDL is simply a larger version of the litigation that takes place every day in federal district courts. But MDL is not just different in scale than ordinary litigation; it is different in kind. In structure and operation, MDL parallels programs like Social Security in which an administrative agency continuously develops new procedures to handle a high volume of changing claims. Accordingly, MDL is appropriately judged against the “administrative” rule of law that emerged in the decades after World War II and underpins the legitimacy of the modern administrative state.*

*When one views MDL as an administrative program instead of a larger version of ordinary civil litigation, the real threats to its legitimacy come into focus. The problem is not that MDL is ad hoc. Rather, it is that MDL lacks the guarantees of transparency, public participation, and ex post review that administrative agencies have operated under since the middle of the twentieth century. The history of the administrative state suggests that MDL’s continued success as a forum for resolving staggeringly complex problems depends on how it addresses these governance deficits.*

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\* Professor of Law, Rutgers Law School; david.noll@rutgers.edu. This Article benefited from presentations at the Administrative Law New Scholarship Roundtable at University of Wisconsin School of Law, the Civil Procedure Workshop at Stanford Law School, the Junior Faculty Federal Courts Workshop at the University of Oklahoma College of Law, and from many informal discussions with MDL practitioners and judges at the NYU Center on Civil Justice’s Fall 2018 Conference on “MDL at 50.” Thanks to Nicholas Almendares, Jack Beer-mann, Bob Bone, Pamela Bookman, Christina Boyd, Andrew Bradt, Elizabeth Chamblee Burch, Maureen Carroll, Jessica Clarke, Bethany Davis Noll, Allan Erbsen, David Freeman-Engstrom, Abbe Gluck, Andrew Hammond, Alyssa King, Kati Kovacs, Alexi Lahav, Matthew Lawrence, John Leubsdorf, Dave Marcus, Linda Mullenix, Jonathan Nash, Teddy Rave, Ellen Relkin, Glen Staszewski, Adam Zimmerman, and participants at those events for valuable feedback. Usma Ashraf-Khan provided clutch research assistance.

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## INTRODUCTION

In a widely publicized December 2017 order, the Judicial Panel on Multidistrict Litigation (JPML) transferred all litigation involving the sale and distribution of opioids that was pending in federal court to the Northern District of Ohio for coordinated pretrial proceedings.<sup>1</sup> No sooner had the cases been transferred to Ohio than the judge assigned to manage them, Dan Aaron Polster, announced he did not intend to follow the usual order of business under the Federal Rules of Civil Procedure (FRCP).<sup>2</sup> “The federal court[s],” Polster said, “[are] probably the least likely branch of government to try and tackle” the opioid crisis. “[B]ut candidly, the other branches of government, federal and state, have punted.”<sup>3</sup> Noting that around 150 Americans were dying every day from opioid overdoses, Polster declared he wanted the parties to devise a settlement that would “do something meaningful to abate this crisis.”<sup>4</sup> And he wanted it within a year.<sup>5</sup>

Twenty months into the litigation, Judge Polster’s attempts to forge a global opioid settlement had yet to bear fruit.<sup>6</sup> His remarks, however, provide a revealing window into the world of modern multidistrict litigation, or simply “MDL.” From the Deepwater Horizon disaster to the opioid crisis, MDL has become the preeminent forum for working out solutions to the most intractable problems in the federal courts.<sup>7</sup> To do so, judges and lawyers devise ad hoc solutions to problems of organization, settlement, and management that arise in particular cases. As expressed by one judge: “I see ways to change course each time, new ways to tweak it. . . . Every case is different.”<sup>8</sup> As expressed by another, “Practices are always evolving.”<sup>9</sup>

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1. *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017); see, e.g., Dave Bangert, *City Joins Opioid Suit amid Crisis*, INDIANAPOLIS STAR, Dec. 23, 2017, at A5; Mitch Smith & Monica Davey, *With Overdoses on Rise, Cities and Counties Look for Someone to Blame*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/opioid-cities-counties-lawsuits.html> [<https://perma.cc/H2MY-GNJL>].

2. See Transcript of Proceedings at 4, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-CV-2804 (N.D. Ohio Jan. 9, 2018), ECF No. 71.

3. *Id.*

4. *Id.*

5. *Id.*

6. See Jan Hoffman, *Opioid Lawsuits Are Headed to Trial. Here's Why the Stakes Are Getting Uglier.*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html> [<https://perma.cc/AJZ7-MUNJ>].

7. See, e.g., Christa Case Bryant & Henry Gass, *An Unprecedented Effort to Stem Opioid Crisis—and the Judge Behind It*, CHRISTIAN SCI. MONITOR (May 9, 2018), <https://www.csmonitor.com/USA/Justice/2018/0509/An-unprecedented-effort-to-stem-opioid-crisis-and-the-judge-behind-it> [<https://perma.cc/77FX-CH2E>]; Campbell Robertson et al., *BP to Pay \$18.7 Billion for Deepwater Horizon Oil Spill*, N.Y. TIMES (July 2, 2015), <https://www.nytimes.com/2015/07/03/us/bp-to-pay-gulf-coast-states-18-7-billion-for-deepwater-horizon-oil-spill.html> [<https://perma.cc/3LSF-EL8L>].

8. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689 (2017).

As MDL has grown in importance, critics have charged that its procedural flexibility violates the rule of law. The charges come from both sides of the “v.” Focusing on MDL’d plaintiffs, legal scholars contend that MDL’s lack of regular procedure allows the lawyers who control it to enrich themselves at the expense of plaintiffs for whom they perform “common benefit” work.<sup>10</sup> At the same time, large corporate defendants have joined longstanding academic complaints about MDL’s ad hockery.<sup>11</sup> Citing statistics that purport to show that MDL’d cases make up more than 40 percent of the federal docket, defense groups argue that MDL’s unstructured procedure encourages the filing of meritless claims and subjects them to unfair settlement pressure.<sup>12</sup>

The attack on MDL took on new urgency as the corporate defense bar mobilized behind reforms that would subject MDL to its own procedural rules.<sup>13</sup> In late 2017, three interest groups persuaded the Advisory Committee on Civil Rules to form a subcommittee to study MDL-specific amendments to the FRCP.<sup>14</sup> If those amendments are adopted, MDL would for the first time be subject to rules other than those in the ordinary Federal Rules.<sup>15</sup> Also in 2017, the House of Representatives passed H.R. 985, the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act,”

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9. *Id.* The respondents in Professor’s Gluck survey were granted anonymity. They included “twenty judges (fifteen federal, five state), each with significant experience in MDL.” *Id.* at 1675.

10. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 106–07 (2017); see also *infra* note 143 (collecting further scholarship on agency problems in MDL).

11. See, e.g., JOHN H. BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, MDL PROCEEDINGS: ELIMINATING THE CHAFF (2015), [https://www.instituteforlegalreform.com/uploads/sites/1/MDL\\_Proceedings\\_web.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/MDL_Proceedings_web.pdf) [<https://perma.cc/275R-7JBM>]; Max Heckendorn & Steven E. Swaney, *Meritless Claims Create Inefficiencies in Multidistrict Litigation*, LEXBLOG: PRODUCT LIABILITY & MASS TORTS BLOG (Feb. 12, 2019), <https://www.lexblog.com/2019/02/12/meritless-claims-create-inefficiencies-in-multidistrict-litigation/> [<https://perma.cc/SE5B-4UAX>].

12. See LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS (2018) [hereinafter LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES], <https://static.reuters.com/resources/media/editorial/20181004/rules4mdl-proposalsforrulescommittee.pdf> [<https://perma.cc/DUS2-59KV>]; LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES 14-15 (2017) [hereinafter LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING], [http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_request\\_for\\_rulemaking\\_concerning\\_mdل\\_cases\\_8-10-17.pdf](http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdل_cases_8-10-17.pdf) [<https://perma.cc/FS64-AKXY>]; Jay B. Stephens et al., *Multidistrict Litigation: Reducing Incentives for Abuse*, WASH. LEGAL FOUND.: CONVERSATIONS WITH..., Autumn 2017, at 1, 1. For an explanation of why the 40 percent figure is misleading, see Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. (forthcoming 2019) (manuscript at 19–20) (on file with the *Michigan Law Review*).

13. See generally Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87 (2018).

14. *Id.* at 98.

15. See *id.* at 89.

which included several MDL-related provisions.<sup>16</sup> Neither the new subcommittee nor H.R. 985 is likely to result in immediate changes to MDL procedure.<sup>17</sup> But they reflect a well-organized, well-funded effort to reform MDL. That project is explicitly premised on the view that MDL as now practiced violates the rule of law.<sup>18</sup>

Does it? This Article argues that one cannot answer that question without a better understanding of what MDL *is*. As this Article shows, MDL is not simply a super-sized version of the litigation that takes place every day in federal court, but a form of public administration that blends tools of ordinary litigation with tools of institutional design more commonly found in programs such as Social Security. As such, MDL is properly judged against the “administrative” rule of law that emerged in the United States in the decades following World War II. From this perspective, MDL’s ad hocery is less of a concern than the fact that it lacks structural features that underpin the legitimacy of the federal administrative state.

The attack on MDL draws on a conception of the rule of law that equates it with fair procedures laid down in advance of disputes.<sup>19</sup> The use of such procedures ensures that courts resolve cases in a predictable manner. To some, they are essential to the very idea of adjudication. For example, Lon Fuller argued that “adjudication must act through openly declared rule or principle, and the grounds on which it acts must display some continuity through time. Without this, joinder of argument becomes impossible and all the conventional safeguards that surround decision . . . forfeit their meaning.”<sup>20</sup>

But this understanding of the rule of law is hardly the only one relevant to the legitimacy of novel governmental institutions. In countless federal programs, Congress delegated open-ended authority to an administrative agency to overcome Congress’s own inability to anticipate the procedures needed to resolve future cases. MDL follows their lead. The system’s enabling statute, the Multidistrict Litigation Act of 1968, first authorizes the JPML to centralize cases before a single district judge.<sup>21</sup> It then directs the judge to conduct “coordinated or consolidated pretrial proceedings”<sup>22</sup>—a directive that judges have interpreted as an instruction to develop ad hoc

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16. H.R. 985, 115th Cong. (2017).

17. See *MDL Subcommittee Report*, in *AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES*, APRIL 2–3, 2019, at 207, 207 (2019), [https://www.uscourts.gov/sites/default/files/2019-04\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf) [<https://perma.cc/LJ66-V6KL>] (noting the subcommittee’s belief that a survey of federal judges may be valuable “but also that such a survey should be deferred until it is clearer what possible amendment ideas seem most worthy of serious study”).

18. See RULES 4 MDLS, <https://www.rules4mdls.com/> [<https://perma.cc/6KN7-KQAC>]; *infra* text accompanying note 153.

19. See *infra* text accompanying notes 127–130.

20. LON L. FULLER, *THE MORALITY OF LAW* 171–72 (rev. ed. 1969).

21. 28 U.S.C. § 1407(a)–(b) (2012).

22. *Id.*

procedures to overcome emergent problems. In all of this, MDL follows a pattern familiar from federal administrative programs, using courts rather than administrative agencies as its delegate.

If MDL's procedural flexibility is no big deal, however, other aspects of its model of aggregate litigation are a source of concern. Responding to criticisms remarkably similar to those leveled at contemporary MDL, midcentury legal reformers devised alternative structures to protect against arbitrary action in administrative programs that were not governed by regular court procedures.<sup>23</sup> In brief, those structures aimed to ensure the transparency of the administrative process (e.g., by requiring advance notice of certain actions),<sup>24</sup> the accessibility of the process (most notably by guaranteeing "an opportunity to participate" in rulemaking<sup>25</sup>), and liberal opportunities for judicial review of agency action. Those structures contributed to a distinctive administrative conception of the rule of law, which played an important role in establishing the legitimacy of the modern administrative state. And they are largely lacking in MDL. The problem, then, is not that MDL is ad hoc. Rather, it is that MDL lacks the guarantees of transparency, public participation, and ex post review that underpin modern administration.

This point has a number of implications for debates over MDL reform. Recognizing the vulnerability of a system that operates without regular procedure or the guarantees of reasoned decisionmaking that apply to administrative agencies, corporate defendants and their allies have proposed reforms that would cripple MDL's utility as a forum for controversies that cannot be resolved through regular procedure. For example, Andrew Pollis proposes that any of the thousands of parties gathered in a large MDL be permitted to appeal most interlocutory orders that raise an "important issue[] of unsettled law."<sup>26</sup> That proposal would undoubtedly address the immunity from ex post review that many of a transferee judge's decisions currently enjoy. But it invites strategic abuse that would undermine judges' ability to manage cases to resolution.

The choice is not so stark. Reconceiving MDL as a form of public administration highlights alternative reforms that would preserve MDL's dynamism while making it more transparent, accessible, and accountable. For example, MDL judges are not required to publish case management orders and transcripts of proceedings in a format that is reasonably accessible to MDL'd plaintiffs and their counsel.<sup>27</sup> The nature of lead counsel's duties to consolidated plaintiffs—and, conversely, those plaintiffs' authority to participate in case management decisions—is uncertain. And as Pollis notes, many

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23. See *infra* text accompanying notes 300–306.

24. See Lotte E. Feinberg, *Mr. Justice Brandeis and the Creation of the Federal Register*, 61 PUB. ADMIN. REV. 359 (2001).

25. 5 U.S.C. § 553(c) (2012).

26. Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1648 (2011).

27. See *infra* note 279.

case management decisions are effectively final once they are entered.<sup>28</sup> Administrative law contains models for addressing these shortcomings that would not cripple MDL's capacity to resolve complex disputes.

This Article contributes to recent scholarship on ad hoc procedure by showing how ad hoc procedure is central to the design of section 1407 and MDL's ability to resolve complex litigation.<sup>29</sup> It also holds insights for two related literatures.

The first is the burgeoning literature on MDL.<sup>30</sup> Unpacking the structural choices that underpin MDL's model of aggregate litigation, the Article helps explain the growth of MDL and highlights institutional reforms that are not apparent when MDL is approached as a larger version of ordinary civil litigation.

The second literature examines the relationship between court and agency implementation of federal regulatory programs.<sup>31</sup> Legal scholars and political scientists have long recognized that when Congress enacts a statute, it chooses between the statute being implemented by courts or an agency (or agencies) in the first instance. That choice is often said to be exclusive: Congress *either* charges an agency with implementing the statute (subject to judicial review), *or* Congress authorizes courts to hear claims under the statute.<sup>32</sup> But as MDL shows, the border between court and agency imple-

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28. See Pollis, *supra* note 26, at 1686.

29. See, e.g., Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017); Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. (forthcoming 2019); Lindsey Simon, *Chapter 11 Shapeshifters*, 68 ADMIN. L. REV. 233 (2016); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991 (2018).

30. E.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017); Burch, *supra* note 10; Judith Resnik, *From "Cases" to "Litigation"*, L. & CONTEMP. PROBS., Summer 1991, at 5; Thomas E. Willing & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010); see also Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519.

31. See, e.g., THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 47 (1982); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006); Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633 (2018). MDL's just-in-time procedure-making also resonates with recent work in "experimentalist" policymaking, though MDL lacks the feedback loops and reliance on self-regulation that figure prominently in many new governance efforts. See generally Christopher Carrigan & Cary Coglianese, *The Politics of Regulation: From New Institutionalism to New Governance*, 14 ANN. REV. POL. SCI. 107 (2011).

32. E.g., Fiorina, *supra* note 31, at 35 ("Congress delegates power to regulatory agencies instead of passing laws and allowing the courts to oversee their enforcement." (emphasis omitted)); Lemos, *supra* note 31, at 434 ("[J]udicial interpretations are likely to be narrower than those of agencies.").



mentation is more porous. In particular, MDL shows how Congress can use Article III courts to perform functions that are commonly thought to be the province of administrative agencies and executive departments. Thus, this Article adds to the small body of legal scholarship highlighting ways in which the judiciary itself functions as an administrative agency.<sup>33</sup> To date, that literature has focused on idiosyncratic issues such as the Supreme Court's certiorari process and choice of policymaking forms.<sup>34</sup> These accounts do not consider the elephant in the room of "judicial administration": MDL.

Part I of this Article describes the prevalence of ad hoc procedure in MDL. Part II connects MDL's ad hoc procedure to the debate over MDL and the rule of law. It shows that MDL's use of ad hoc procedure lies at the heart of the argument that MDL violates the rule of law, and that the recent attack on MDL approaches it as a form of litigation that is appropriately evaluated through the norms governing ordinary civil litigation. Part III argues that, contrary to this conventional wisdom, MDL is best understood as a hybrid form of public administration. Evaluating MDL through the lens of the administrative rule of law, Part III explains that while criticisms that motivate recent reform proposals miss the mark, MDL lacks structural features that are central to the legitimacy of the modern administrative state. Part IV examines the implications for proposals to reform the MDL system.

### I. MDL'S "UNORTHODOX CIVIL PROCEDURE"

As Judge Polster's remarks suggest, MDL is a site of intense procedural innovation. The attorneys and judges who control MDL do not resolve cases using a standard procedural playbook but regularly devise new ways of organizing, investigating, and resolving cases. Analogizing procedural design in MDL to the explosion of unorthodox legislative pathways in Congress, Abbe Gluck writes of MDL's "unorthodox civil procedure."<sup>35</sup> MDL critics (but not necessarily Gluck) contend that the use of such procedure makes MDL incompatible with the rule of law.

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33. See, e.g., Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011); see also Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1 (2018). This phenomenon is in one sense the converse of administrative agencies making judicial procedure, see, e.g., David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017); Urja Mittal, Note, *Litigation Rulemaking*, 127 YALE L.J. 1010 (2018), and the use of agencies to police access to Article III courts, see David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013). Each of these bodies of work draws on a body of political science scholarship that "seeks to shift from a focus on the judiciary as an autonomous bubble, in which judges make policy according to their own preferences, to a focus on the judiciary as an institution that is used, strategically and instrumentally, by the elected branches in support of their political and policy agendas." FARHANG, *supra* note 31, at 32.

34. See sources cited *supra* note 33.

35. See Gluck, *supra* note 8, at 1669, 1674–75.

This Part outlines the developments behind that charge, focusing on “mega”-MDLs<sup>36</sup> that motivate proposals in Congress and the rulemaking process to reform MDL.<sup>37</sup> This Part first situates MDL procedure-making within the larger universe of ad hoc procedure. It then provides a roadmap to the procedures that have emerged in modern MDL. Finally, it explains the larger structural features that influence procedure-making in MDL.

### A. *Ad Hoc Procedure in MDL*

While it is widely recognized that MDL is more dynamic than ordinary civil litigation, it is hardly the only context where ad hoc procedure is found. In prior scholarship, Pamela Bookman and I surveyed the many contexts in which lawmakers develop new procedures to address emergent procedural problems and the kinds of law that formalize these innovations. Ad hoc procedure is used in state and federal courts, international institutions, and private dispute resolution systems.<sup>38</sup> It is formalized in federal and state statutes, court orders, court rules, local rules, special-purpose institutions, international agreements, contracts, party agreements, and customs that lack

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36. The MDL literature conventionally defines “mega”-MDLs as those in which more than 1,000 actions are transferred to a single court. *See, e.g.*, John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230 (2008). Unless the transferee judge limits joinder under Rule 20, a single action may of course include many plaintiffs and defendants.

37. The JPML compiles some statistics about its activities and the federal MDL docket, and a handful of researchers have done valuable work on characteristics of MDL’d cases. *Judicial Panel on Multidistrict Litigation – Judicial Business 2017*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2017> [<https://perma.cc/Z6A9-LARV>]; *see, e.g.*, Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. (forthcoming 2019); Williams, *supra* note 12. However, no body systematically collects information about the progression of specific MDLs and how they are resolved. The absence of such data means that claims about how MDL functions inevitably have an impressionistic quality and invite objections along the lines of: “That’s not how MDL X worked!”

In the absence of systematic empirical data, this Part relies on Gluck’s interviews with MDL transferee judges and a review of all publicly available filings and transcripts in three MDLs that have been litigated over the past decade to describe practice in mega-MDLs. The MDLs are *In re Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La.) (Fallon, J.), *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La.) (Barbier, J.), and *In re National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Ohio) (Polster, J.). I selected these three MDLs because transcripts of court proceedings were available from the transferee court or Bloomberg Law’s replica of the district court’s CM/ECF system, and because they culminated in different types of resolutions: a nonclass aggregate settlement (*Vioxx*), a series of class action settlements (*Deepwater Horizon*), and a litigation that, as of writing, had not been resolved (*Opioids*). These litigations are not representative of the universe of MDLs. *See* Williams, *supra* note 12 (manuscript at 22 tbl.2). However, they illustrate the kind of mega-case that motivated both section 1407’s enactment and current proposals to rule-ify MDL. As such, they provide a workable sample for evaluating proposals that MDL should be reformed in response to problems revealed in mega-MDLs.

38. Bookman & Noll, *supra* note 29, at 784–92.

the force of law.<sup>39</sup> In short, “[o]nce one begins to look for ad hoc procedure, examples of it appear everywhere.”<sup>40</sup>

Moreover, judges have considerable discretion in even ordinary cases.<sup>41</sup> According to some proceduralists, the use of discretion to facilitate resolution “on the merits” is the guiding ethos of the 1938 FRCP.<sup>42</sup> In addition to the many matters that the rules explicitly leave to district courts’ discretion,<sup>43</sup> courts have “inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.”<sup>44</sup> And a court sitting in equity has discretion to shape procedures and remedies if an adequate remedy is not available at law.<sup>45</sup> Courts have invoked these authorities to develop new procedures in complex commercial litigation,<sup>46</sup> public law litigation,<sup>47</sup> national security cases,<sup>48</sup> and other contexts.<sup>49</sup>

Even so, MDL is home to an unusual amount of procedural innovation. In the opioid litigation, for example, Judge Polster announced that he would not entertain motion practice outside of three “track one” cases designated for accelerated litigation because he wanted the parties to focus on settlement.<sup>50</sup> In ordinary litigation, the entry of such an order would be an aggres-

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39. *Id.*

40. *Id.* at 785.

41. See, e.g., Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003); see also Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 298 (1991).

42. See, e.g., A. Benjamin Spencer, Essay, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 356 (2010); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987). District court discretion is also a prominent feature of the Federal Rules of Evidence. See Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer’s Triumph*, 88 CALIF. L. REV. 2437 (2000).

43. See Subrin, *supra* note 42, at 923 n.76 (finding that thirty of the eighty-four Federal Rules vest discretion in the district judge); cf. Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 528 n.72 (2006) (erroneously stating that Subrin identified twenty-eight discretion-conferring rules).

44. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016).

45. See generally Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1004 (2015). As illustrated by the recent debate over the propriety of “national” injunctions, the scope of this equitable discretion is contested. See generally Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

46. E.g., *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (discussing proceedings in six “focus cases” out of 310 consolidated class actions, which themselves were consolidations of thousands of separate class actions”).

47. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

48. See Sinnar, *supra* note 29.

49. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997).

50. Case Mgmt. Order No. 1, at 11, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-cv-2804 (N.D. Ohio Apr. 11, 2018), ECF No. 232 (“No party may file any motion not expressly

sive, and potentially reversible, application of a district judge's discretion.<sup>51</sup> In a mega-MDL, it is all in a day's work.

### B. A Roadmap of MDL Procedure

MDL's continual innovation makes it impossible to compile an exhaustive catalog of the procedures that it has generated. But the different stages in the lifecycle of an MDL predictably give rise to certain types of problems that are addressed through new procedures. For the benefit of those new to MDL, this Section provides a brief roadmap.

#### 1. The Statutory Framework

MDL takes place under the authority of 28 U.S.C. § 1407, which was added to the Code by the Multidistrict Litigation Act of 1968.<sup>52</sup> The statute establishes the JPML<sup>53</sup> and authorizes it to transfer cases to a district court of its choosing "for coordinated or consolidated pretrial proceedings."<sup>54</sup> Transfer proceedings may be initiated by a litigant or the JPML "upon its own initiative."<sup>55</sup> The standard for transfer echoes the standard under the ordinary venue transfer statute, 28 U.S.C. § 1404: the panel may transfer "civil actions involving one or more common questions of fact . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."<sup>56</sup> In contrast to section 1404, the transfer decision is made by the JPML, not the court where an action was filed.<sup>57</sup>

In the argot of MDL practitioners, the district court where cases are transferred is known as the "transferee" or "MDL" court. After the panel

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authorized by this Order absent further Order of this Court or express agreement of the parties."). Judge Polster's approach to motion practice invites comparisons to Judge Charles Weiner's decision not to set cases for trial in the federal asbestos MDL "except in extreme instances where the plaintiff was near death and all [settlement avenues] had been exhausted." Susan P. Koniak, *Feasting While the Widow Weeps*: *Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1071 n.127 (1995) (alteration in original) (quoting Transcript of Fairness Hearing at 68–69, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215)).

51. See *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987) (granting writ of mandamus to reverse district court's denial of motion where filing of timely motion was prevented by district court's demand for pre-motion conference).

52. Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407 (2012)).

53. 28 U.S.C. § 1407(d).

54. *Id.* § 1407(a).

55. *Id.* § 1407(c).

56. See *id.* § 1407(a).

57. Cf. 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

transfers cases to the transferee court, section 1407 authorizes the transferee judge to conduct “coordinated or consolidated pretrial proceedings.”<sup>58</sup> Section 1407 does not define the transferee judge’s powers, but courts have held that “[t]he transferee judge inherits the entire pretrial jurisdiction that the transferor court could have exercised had the case not been transferred.”<sup>59</sup> Thus, the transferee judge can rule on pretrial motions, manage discovery, appoint masters, hold settlement conferences, enter trial orders, and generally do everything that a district judge does during pretrial. At the conclusion of pretrial proceedings, “[e]ach action so transferred shall be remanded by the panel . . . to the district from which it was transferred unless it shall have been previously terminated.”<sup>60</sup> In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the Supreme Court concluded that this directive prohibited the practice of “self-transfer,” in which a transferee court used section 1404 to transfer a case to itself for trial.<sup>61</sup>

At least in section 1407’s early years, judges and attorneys believed that much procedural development in MDL would happen through the *Manual for Complex Litigation*. A publication of the Federal Judicial Center, the *Manual* aims to collect recommendations that, in the words of the first edition, are “the product of experience and the development of able minds.”<sup>62</sup> The first edition appeared in 1969 and was drafted by William H. Becker, a district judge who, as described below, played a key role in drafting section 1407.<sup>63</sup> The second, third, and fourth editions were released in 1985, 1995, and 2004, respectively.<sup>64</sup>

Although MDL has been an important form of litigation since Congress enacted section 1407 in 1968, its importance grew following the enactment of the Class Action Fairness Act of 2005.<sup>65</sup> That statute liberalized the requirements of federal diversity jurisdiction in certain “class” and “mass” actions, making it easier for defendants to remove those actions to federal court.<sup>66</sup> Once removed, MDL allows cases to be centralized in a single forum.

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58. *Id.* § 1407(a).

59. 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed. 2013).

60. 28 U.S.C. § 1407(a).

61. 523 U.S. 26, 40 (1998).

62. MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION, at xix (1969).

63. See *In Memoriam: Judge William H. Becker*, 807 F. Supp. LXV, LXXII (W.D. Mo. 1992) (quoting Alfred P. Murrah, *Foreword*, in HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351 (1960)) (attributing the first edition to “Judge Becker’s pen”).

64. MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004); MANUAL FOR COMPLEX LITIGATION (THIRD) (1995); MANUAL FOR COMPLEX LITIGATION (SECOND) (1985).

65. Pub. L. No. 109–2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715).

66. 28 U.S.C. § 1332(d) (2012).

## 2. Organizing the Litigation

An initial challenge in a large MDL is to organize the thousands of parties and lawyers whose cases are transferred to a single court. Two decades ago, Judith Resnik, Denny Curtis, and Deborah Hensler observed that MDL transferee judges create “ad hoc law firm[s]” through orders that charge lawyers with coordinating the prosecution or defense of consolidated cases.<sup>67</sup> The need for such orders arises from the sheer number of cases and attorneys in a mega-MDL. Absent centralized plaintiff’s leadership (and a centralized defense in multidefendant cases), hundreds or thousands of individual parties would engage in simultaneous discovery and motion practice, transforming the litigation into a Babel of conflicting motions, orders, and discovery demands.<sup>68</sup>

A prototypical case management order appoints a Plaintiffs’ Steering Committee (PSC) that functions as a board of directors for plaintiffs, lead counsel who is charged with day-to-day management of the litigation, and various specialized committees which are charged with tasks like communicating with non-lead counsel, performing discovery, and negotiating settlements.<sup>69</sup> Orders are entered under Rule 16, which permits a court to adopt special procedures for managing potentially difficult or protracted actions, and Rule 42, which permits a court to consolidate actions and “issue any other orders to avoid unnecessary cost or delay.”<sup>70</sup>

The court-appointed leadership cannot settle or dismiss non-lead’s cases without violating well-established limits on nonparty preclusion.<sup>71</sup> As one transferee judge observed, however, leadership nevertheless has “authority to make any number of decisions that are binding, either literally or effectively, on all . . . plaintiffs.”<sup>72</sup> Appointment orders accomplish this by restricting the authority of non-lead counsel to engage in ordinary motion practice, take discovery, and access court resources. For example, orders entered in the General Motors ignition switch litigation provided that “Lead Counsel was expected to take the lead in speaking on behalf of all plaintiffs [at conferences] and that, barring permission, [Lead Counsel] would be the only coun-

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67. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 321 (1996); see also Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1 (1982).

68. See *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1013 (5th Cir. 1977).

69. See *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 4, 2018), ECF No. 37 (marginal order granting plaintiffs’ renewed motion to approve co-leads, liaisons, and executive committee); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* No. 2:10-md-02179-CJB-SS (E.D. La. Oct. 8, 2010), ECF No. 506 (order appointing plaintiffs’ steering committee and plaintiffs’ executive committee); *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. Aug. 8, 2005), ECF No. 245 (order appointing plaintiffs’ steering committee).

70. FED. R. CIV. P. 16(c)(2)(L), 42(a).

71. See *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008).

72. *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 1441804, at \*7 (S.D.N.Y. Apr. 12, 2016).

sel to speak at conferences on behalf of plaintiffs.”<sup>73</sup> If non-leadership attorneys felt “that Lead Counsel [could not] adequately represent their views,” they were “invited either to put issues on the agenda for a particular status conference via Lead Counsel and counsel for Defendants or to submit a letter motion to the Court requesting permission to be heard.”<sup>74</sup>

The mostly theoretical control that individual plaintiffs exercise over their own cases means that MDL is not, formally, a species of representative litigation. As a practical matter, however, appointment orders carve out a limited exception to the rule against nonparty preclusion. The justification for that exception is not that, by advocating their clients’ interests, lead counsel necessarily advances the interests of the “class.”<sup>75</sup> Rather, the exception is justified by the collective action problems that would otherwise make resolution of an MDL impossible.

As the Fifth Circuit reasoned in an early decision approving the appointment of lead counsel:

An order consolidating . . . actions during the pre-trial stages, together with the appointment of a general counsel may in many instances prove the only effective means of channeling the efforts of counsel along constructive lines.

. . . .

. . . By making manageable litigation that otherwise would run out of control they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts.<sup>76</sup>

Consistent with this rationale, appointment orders recognize that plaintiffs collected before an MDL court may seek different things from the litigation.<sup>77</sup> Thus, orders aim to “ensur[e] that the PSC represents the broadest possible swath of claimants or claims,” implicitly adopting a *democratic* model of litigating authority.<sup>78</sup> Leadership is not authorized to act on behalf of the plaintiff “class” because consolidated plaintiffs necessarily want the same thing out of the MDL as leadership’s clients. Rather, leadership’s authority is premised on the practical necessity of coordinating the plaintiffs’ actions. Appointment orders assume that MDL plaintiffs will be better off

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73. *Id.* at \*2.

74. *Id.* (first alteration in original).

75. *Cf.* FED. R. CIV. P. 23.

76. *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1014, 1017 (5th Cir. 1977) (first omission in original) (quoting *MacAlister v. Guterma*, 263 F.2d 65, 68 (2d Cir. 1958)).

77. *See* Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 851 (2017).

78. *Id.* *See generally* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011); Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743 (2017).

with centralized representation, because leaders will advance the interests of plaintiffs as a group and the alternative is chaos.<sup>79</sup>

Leadership appointments are prestigious and lucrative positions.<sup>80</sup> Leadership attorneys are compensated for “common benefit” work they perform on behalf of consolidated plaintiffs through court orders that require non-lead counsel to contribute a percentage of their contingent fees to a fund that the court distributes.<sup>81</sup>

As Resnik, Curtis, and Hensler observe, however, there is little positive law governing leaders’ selection or compensation.<sup>82</sup> Neither section 1407 nor the Federal Rules address the selection of MDL leadership; often, the court simply approves a “consensus” slate negotiated by plaintiffs’ counsel.<sup>83</sup> No statute or rule specifically authorizes the court to award leadership common benefit fees or addresses how such fees should be allocated.<sup>84</sup> No statute or rule defines leadership’s legal relationship with consolidated plaintiffs.<sup>85</sup> In the absence of legislation or rules, elaborate best practices evolved surrounding each of these subjects. For example, in the Volkswagen clean diesel litigation, Judge Charles Breyer entered a sixteen-page protocol governing matters such as bookkeeping, compensable work, and compensation for the use of attorneys’ private jets.<sup>86</sup>

Even when control of the litigation is centralized in a PSC and lead counsel, docketing and organizing cases may involve serious logistical problems. To streamline filing, courts and attorneys invented the practice of “direct filing,” which allows a plaintiff to file directly in the MDL court rather than having a case transferred there by the JPML.<sup>87</sup> To manage the variety of claims asserted in MDL, courts have ordered the filing of a “master complaint” or “master administrative complaint.”<sup>88</sup> Where a single complaint

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79. See Ratner, *supra* note 77, at 851.

80. See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1526 (2017).

81. See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

82. See Resnik et al., *supra* note 67, at 326–36.

83. See Burch & Williams, *supra* note 80, at 1460.

84. See Fallon, *supra* note 81, at 376 (“The theoretical bases for the application of the common fund concept to MDLs are the same as for class actions—namely, equity and her blood brother, quantum meruit.”).

85. Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1988 (2011).

86. *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, at 8 (N.D. Cal. Feb. 26, 2016), ECF No. 1254 (order establishing protocol for common benefit work, noting “[p]rivate or charter travel will not be reimbursed except in unusual circumstances, as approved by Lead Counsel”).

87. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 796–97 (2012).

88. See *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1076–77 (S.D. Ind. 2001) (“Master Complaint . . . combines dozens of class action complaints involving Firestone tires that were filed in or removed to federal district courts throughout the



cannot accommodate all of the plaintiffs' claims, courts have used "pleading bundles"—essentially, master complaints for different types of parties or claims. In the *Deepwater Horizon* MDL, lead counsel proposed establishing different master complaints for different types of claims plaintiffs asserted against BP, Transocean, and Halliburton.<sup>89</sup> After the district court approved the idea in principle, counsel devised specific pleading bundles. The court "so ordered" the bundles, and the clerk's office modified its electronic filing system so that plaintiffs could "join" a pleading bundle by filing a short-form complaint drafted by lead plaintiff's counsel.<sup>90</sup>

### 3. Managing the Litigation

MDL's ad hocery continues in the pretrial stage. Here, the need for new procedure arises from the desire to move the litigation into a posture in which it can be resolved.<sup>91</sup> Contrary to conventional wisdom,<sup>92</sup> however, the endgame of MDL is not necessarily settlement. Douglas Smith details a variety of procedures that courts have invented to screen and cull cases.<sup>93</sup> They include plaintiff and defendant fact sheets, "show cause" orders that require parties to define claims or show they are nonfrivolous, *Lone Pine* orders that require proof of facts crucial to plaintiffs' claims, and assisted review using magistrate judges and special masters.<sup>94</sup> Judges have used a range of devices, from special committees to anti-suit injunctions, to "coordinate" related state-court litigation.<sup>95</sup> In the late 1990s, courts devised the concept of "bellwether trials" to create settlement pressure where cases remained pending after discovery and culling.<sup>96</sup> More recently, transferee judges borrowed the

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country and transferred to this MDL proceeding."), *rev'd sub nom. In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002).

89. See Transcript of Status Conference Proceedings at 11, *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* No. 2:10-md-02179-CJB-SS (E.D. La. Sept. 6, 2010), ECF No. 550.

90. The "A" pleading bundle included claims for personal injury and death. The "B" bundle included 4 sub-categories including "Private Individuals and Business Loss Claims." The "C" bundle included "Public Damage Claims." Lastly, the "D" bundle included "Injunctive and Regulatory Claims." *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* No. 2:10-md-02179-CJB-SS (E.D. La. Oct. 19, 2010), ECF No. 569 (first case management order).

91. See Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2219 (2008) (stating that the "very function" of MDL "is to coordinate and resolve multistate litigation").

92. See, e.g., D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176 (2017).

93. Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 106 KY. L.J. (forthcoming 2019).

94. *Id.* (manuscript at 7–21) (on file with the *Michigan Law Review*); see Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. (forthcoming 2019).

95. See Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014).

96. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78, 583–85 (2008); see Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325, 2331 (2008).

concept of “science days” from patent litigation to get an early handle on the scientific issues in products liability MDLs.<sup>97</sup> In rare cases, transferee judges fed up with the lack of progress toward resolution have remanded cases to transferor courts for trial or threatened to do so.<sup>98</sup>

A striking feature of MDL practice is its lack of a fixed order of battle. Federal civil litigation typically proceeds in a predictable order, with motion practice leading to discovery, summary judgment, *Daubert* motions, and, in rare cases that survive without settling or being dismissed, trial.<sup>99</sup> In the mega-MDLs that are this Article’s focus, this order of battle is often discarded. Courts separate litigation into tracks,<sup>100</sup> stay discovery in order to focus litigation on particular cases or issues,<sup>101</sup> or limit proceedings to issues such as general causation that hold the potential to make or break many cases at once.<sup>102</sup> The common thread running through these orders is that they address the needs of specific cases. As judges in Gluck’s survey emphasized, “every MDL is different.”<sup>103</sup>

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97. See, e.g., Order Regarding Science Day and MDL Website, *In re Abilify* (Aripiprazole) Prods. Liab. Litig., No. 3:16-md-2734 (N.D. Fla. Dec. 16, 2016), ECF No. 142; see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 12.34 (2004).

98. See, e.g., *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, No. 3:12-MD-2391 (N.D. Ind. Sept. 6, 2018) (order transferring proceedings under 28 U.S.C. 1404(a) and explaining the transfer to receiving courts); Nicholas Malfitano, *Federal Judge Rules 1,200 Xarelto Lawsuits Will Be Removed from MDL for Disposition in Separate Trials*, PA. RECORD (Mar. 13, 2018), <https://pennrecord.com/stories/511360626-federal-judge-rules-1-200-xarelto-lawsuits-will-be-removed-from-mdl-for-disposition-in-separate-trials> [<https://perma.cc/16GFM-LCZS>].

99. This statement is based on the author’s experience as a clerk in the U.S. District Court for the Southern District of New York and conversations with federal judges and attorneys whose practice focuses on civil litigation in federal court. There are few studies that systematically examine the progress of federal civil litigation. However, the hypothesis that cases proceed in a regular order is consistent with findings in Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010). That study coded for six mutually exclusive outcomes—(1) dismissal, (2) early settlement, (3) summary judgment loss for plaintiff, (4) late settlement, (5) trial win for plaintiff, and (6) trial loss for plaintiff—and found a drop-off of cases at each stage. See *id.* at 185–87. But see Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 823 (2018) (arguing on the basis of “appellate opinions in a variety of procedural areas” that “the textbook order is not an accurate description of civil procedure in the federal courts”).

100. E.g., Emily Field, *2nd Bellwether Track Set in Opioid MDL*, LAW360 (Jan. 2, 2019, 5:13 PM), <https://www.law360.com/articles/1114551/2nd-bellwether-track-set-in-opioid-mdl> (on file with the *Michigan Law Review*).

101. See, e.g., Erin Marie Daly, *Judge Lifts Discovery Stay in Qwest MDL*, LAW360 (Aug. 15, 2007, 12:00 AM), <https://www.law360.com/articles/32551/judge-lifts-discovery-stay-in-qwest-mdl> (on file with the *Michigan Law Review*).

102. See, e.g., Sara Randazzo, *In Roundup Case, the Science Will Go on Trial First*, WALL STREET J. (Feb. 15, 2019, 10:58 AM), <https://www.wsj.com/articles/in-roundup-case-the-science-will-go-on-trial-first-11550246311> (on file with the *Michigan Law Review*).

103. Gluck, *supra* note 8, at 1689.

## 4. Resolution

The aggregate settlements that many MDLs culminate in are another site of procedural innovation. The prototypical settlement resolves all the cases collected before a transferee judge by establishing a special-purpose claims facility to process claims according to streamlined procedures negotiated by the defendant and plaintiff's leadership.<sup>104</sup> These claims facilities are their own ad hoc institutions. The claims program established in the *Deepwater Horizon* MDL consisted of "the Court-appointed Claims Administrator, Patrick Juneau, and his staff of 25 people, who in turn employ five Claims Vendors employing more than 3,200 people working in locations throughout the country."<sup>105</sup> The group had headquarters in Louisiana and nineteen "Claims Assistance Centers" throughout the Gulf Coast region.<sup>106</sup>

Any settlement must pull in parties, screen and evaluate claims, and protect settling defendants against future litigation.<sup>107</sup> As Elizabeth Burch shows, provisions that perform these functions migrate from MDL to MDL as the state of the art evolves.<sup>108</sup> An example is the "inventory settlement" provisions that appeared in the early 2000s. After the Supreme Court's decisions in *Amchem* and *Ortiz* appeared to bar the use of settlement classes to resolve mass torts,<sup>109</sup> attorneys devised contractual provisions that had much the same effect. Described by their authors as a "remarkable approach to resolution of 'mass tort' litigation" that "promise[d] to become the template for similar resolution of future litigations of this kind," the provisions required attorneys to recommend a settlement to their entire client base.<sup>110</sup> After first being used in the *Propulsid* MDL, they reappeared in the *Vioxx*, *Fosamax*, and *Yasmin/Yaz* MDLs.<sup>111</sup> More recently, MDL catalyzed the reemergence of

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104. See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 796 (5th Cir. 2014); *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 559 (E.D. La. 2009).

105. *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, 910 F. Supp. 2d 891, 904 (E.D. La. 2012) (footnote omitted), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790.

106. *Id.*

107. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 690-94 (1989).

108. Burch, *supra* note 10, at 92 tbl.1.

109. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (stating it was "obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (stating that some Rule 23 requirements "demand undiluted, even heightened, attention in the settlement context"); *id.* at 627 (requiring that a "global compromise" include "structural assurance of fair and adequate representation for the diverse groups and individuals affected"); see also Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475 (2005).

110. Memorandum in Support of Plaintiffs' Steering Comm.'s Motion for Award of Attorney's Fees and Reimbursement of Costs at 1, *In re Propulsid Prods. Liab. Litig.*, No. 2:00-md-01355-EEF-KWR (E.D. La. May 3, 2005), ECF No. 1752.

111. Burch, *supra* note 10, at 98-99, 101.

settlement class actions that *Amchem* and *Ortiz* appeared to bar.<sup>112</sup> Reasoning that mega-MDLs provide structural guarantees of fairness missing in *Amchem* and *Ortiz*, courts approved class settlements notwithstanding conflicts of interests that those cases suggested could only be addressed through subclassing.<sup>113</sup>

Again, one must be careful not to overstate MDL's uniqueness. The contractual nature of settlement means that it *always* provides an opportunity to devise creative solutions that a court following the strictures of the law could not impose.<sup>114</sup> Furthermore, scholars have shown that the major developments in the lifecycle of an MDL—aggregation of related claims, transfer of control to sophisticated bargaining agents, and mass resolution through grids or algorithms that resolve claims through factors shown to drive verdicts and settlements—occur whenever the market generates large numbers of factually related claims.<sup>115</sup> In this sense, MDL structures underlying market dynamics, rather than creating the conditions for settlement from scratch.

All the same, MDL has been remarkably successful at catalyzing innovative settlements. A “Who’s Who” of the largest and most innovative settlements devised over the past decade would be crowded with settlements negotiated in an MDL.<sup>116</sup> Indeed, it would probably contain nothing but.

### C. *The Structural Environment for MDL Procedure-Making*

Before turning to the debate over MDL's legality, three overarching features of MDL procedure-making deserve mention. First, procedure-making in MDL is bottom-up, not top-down. As Burch, Gluck, and Margie Williams show, the central players in the design of MDL procedure are transferee judges and “repeat player” lawyers who have built specialized MDL practices.<sup>117</sup> Like Daniel Plainview's character in *There Will Be Blood*, lawyers travel from case to case, bringing procedures they created in prior MDLs with

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112. See Ratner, *supra* note 77; Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017).

113. See Ratner, *supra* note 77, at 827–28 (discussing the Deepwater Horizon, NFL concussion, and pet food products settlements).

114. See generally Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 916 (2000).

115. E.g., Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 155 (Austin Sarat et al. eds., 1998); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1050 (1993).

116. For an initial effort to create such a database, see *Aggregate Litigation Data Project*, CTR. ON CIV. JUST., NYU SCH. L., <http://www.law.nyu.edu/centers/civiljustice/projects> [<https://perma.cc/K3G7-H5JU>].

117. Burch & Williams, *supra* note 80, at 1475–87; Gluck, *supra* note 8, at 1701.

them to new litigations.<sup>118</sup> Even modest efforts to impose hierarchical control on MDL procedure trail the state of the art by years.<sup>119</sup>

Second, many decisions in MDL are effectively immune from appellate review. The reason is that MDL inherits the procedural apparatus of ordinary litigation, including the final judgment rule of 28 U.S.C. § 1291.<sup>120</sup> That section generally requires that a party await final judgment before taking an appeal. Thus, a party that objects to, say, the appointment of lead counsel or use of pleading bundles must wait until judgment is entered to appeal the relevant orders. During that time, the litigation may settle, presenting the party with a choice between quickly resolving the case under the settlement or appealing the objectionable order. If the MDL does not result in a settlement, years may elapse before final judgment is entered.<sup>121</sup>

These two features might suggest that procedure-making in MDL is totally unrestrained. In fact, a review of transcripts from major MDLs shows many situations in which lead counsel and transferee judges were attentive to the limits of their authority under the Federal Rules and the governing substantive law.<sup>122</sup> The reason is that plaintiff's leadership, defendant's leadership, the transferee judge, and potentially others hold an effective veto power over the use of new procedures and the progress of the litigation generally. This, however, introduces a selection effect: the errors most likely to draw an objection are those that exceed the transferee court's authority *and*

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118. See, e.g., Transcript of Discovery Conference at 28–29, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio May 11, 2018), ECF No. 416 (“MR. BUCHANAN: . . . I have a stack of order after order in the last two or three years in major pieces of litigation with many thousands of cases . . . involving Johnson & Johnson, Volkswagen . . .”); Transcript of Status Conference Proceedings, *supra* note 89, at 51 (“MR ROY: . . . We’re going to come back with a proposal that largely mirrors what Judge Fallon has done in Vioxx. THE COURT: Yes, because that’s definitely what I want to do.”).

119. See DUKE LAW SCH. CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES (2014); MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

120. See 28 U.S.C. §§ 1291, 1292(a)–(b) (2012) (generally limiting interlocutory appeals to orders entering or refusing to enter injunctions and appeals certified for interlocutory review).

121. The Supreme Court’s 2015 decision in *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015), marginally increased MDL’s exposure to appellate review in holding that an appeal could be taken from a Rule 54(b) order dismissing some of the claims consolidated in an MDL. But *Gelboim* appeals may only be taken from orders of dismissal, and not the crucial interlocutory decisions governing the organization, management, and settlement of an MDL.

122. Transcript of Status Conference Proceedings at 9, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Aug. 7, 2018) ECF No. 854 (“Plaintiffs would love to cabin discovery to what they decide is relevant with respect to how they choose to prove their case, but they cannot deprive us of our right to defend ourselves, and we have the right under the rules to take discovery that’s relevant to those defenses.”); Transcript of Teleconference Proceedings at 29, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio June 6, 2018) ECF No. 613 (“I don’t think I could have prevented motions—anyone from filing a motion.”); Transcript of Status Conference at 8, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. Jan. 18, 2008) (“[A]ny plaintiff attorney who feels that he or she is entitled to receive some common benefit funds, they have the right to petition the Court for that.”).

injure the interests of a player with power to veto the new procedure. If an unlawful procedure does not harm a player with veto power, it is likely to go unchecked.

In light of these dynamics, MDL procedure-making involves a high degree of collaboration among case leadership. Again and again in the transcripts, counsel would raise a procedural problem with the transferee judge only to be instructed to meet and confer or work something out.<sup>123</sup> When counsel returned to the court, the judge adopted their proposal for the entire MDL.<sup>124</sup>

On the whole, this environment makes MDL procedure-making fast, collaborative, and responsive to the needs of particular cases. One judge comments: “It’s problem solving together.”<sup>125</sup>

## II. MDL AND THE RULE OF LAW

MDL is a world of ad hoc procedure. This very flexibility, however, leads to charges that its approach to aggregate litigation violates the rule of law. This Part introduces the debate surrounding those charges.

This Part first introduces the conception of the rule of law that attacks on MDL implicitly draw upon. It then summarizes arguments that MDL violates the rule of law and shows that the attack on MDL approaches it as a form of litigation that is governed by rule-of-law norms associated with ordinary civil litigation. As Part III argues, that assumption is incorrect.

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123. See, e.g., Transcript of Status Conference at 16, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio May 14, 2018), ECF No. 418 (“You’ve been working cooperatively. Just continue to do that.”); Transcript of Status Conference Proceedings, *supra* note 89, at 38 (“I want liaison counsel, in consulting with other interested parties, to go back and meet and confer within the next week to ten days and report back to the Court to continue to see if you can work out some of these issues relating to timing and scope of discovery because that’s where it seems to be where the main rub is going to be right now.”); Transcript of Status Conference Proceedings at 60, *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* No. 2:10-md-02179-CJB-SS (E.D. La. Feb. 25, 2011), ECF No. 1508 (“I think it’s absolutely necessary that everyone cooperate with each other, continue to be civil with each other, and, to the extent problems arise, which I know they will from time to time, meet and confer, and then if you can’t solve them yourself, bring them to my attention.”); Transcript of Status Conference at 47, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. June 27, 2008) (“I do feel that the parties do better working this out non-judicially than allowing me to work it out because it will destroy this opportunity and make life more complicated for everybody.”).

124. See, e.g., Transcript of Teleconference Proceedings at 12, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Aug. 7, 2018), ECF No. 854 (“If I get no objections, I am going to adopt those proposals.”); Transcript of Status Conference Proceedings, *supra* note 123, at 34 (“Hearing no objection, I will sign that order today, okay?”); Transcript of Status Conference at 18, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. June 23, 2005) (“I put some handwritten notes on this form and I will simply adopt it in an order and give you my thinking on that particular form.”).

125. Gluck, *supra* note 8, at 1700–01.

### A. *The Rule of Law as Regular Procedure*

Because the “rule of law” means many things,<sup>126</sup> saying that MDL “violates the rule of law” is vacuous if the argument is not specified further. The specific strand of rule-of-law thinking that MDL critics draw upon identifies the rule of law with regular procedure—particularly, the kind of procedures used by courts. In American jurisprudence, perhaps the most famous proponent of this view is Lon Fuller.<sup>127</sup>

In *The Forms and Limits of Adjudication*, Fuller set out to describe “the optimum and essential conditions for the functioning of adjudication.”<sup>128</sup> Fuller’s project was to identify the features that distinguished adjudication from other forms of legal ordering (e.g., contract). Drawing on midcentury analytic philosophy and informal observations of adjudicators, Fuller argued that adjudication aims to provide “an authoritative determination of questions raised by claims of right and accusations of guilt.”<sup>129</sup> To accomplish this, Fuller argued, adjudication necessarily involves the “[p]resentation of proofs and reasoned argument.”<sup>130</sup> As discussed below, Fuller did not believe that all matters of social life must be resolved via adjudication.<sup>131</sup> But he claimed that, where an issue *is* to be resolved through adjudication, the rule of law demands procedures that guarantee parties the opportunity to present evidence and argument.<sup>132</sup> Thus, Fuller and those following in his tradition insist on procedures such as adversary presentation of proof and argument, the right to be present at crucial stages in the proceedings, an impartial and properly qualified judge, and a right of appeal to an impartial tribunal.<sup>133</sup> Ab-

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126. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 140–45 (2002).

127. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). This posthumously published article was based on a working paper that Fuller used as the basis for lectures and courses at Harvard Law School, *see id.* at 353, and was part of a broader Legal Process discourse that claimed to identify the appropriate functions of different parts of the federal government, *see generally* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For earlier works that anticipated Fuller’s account in some respects, see A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10th ed. 1959), and F.A. HAYEK, *THE ROAD TO SERFDOM* 112 (definitive ed. 2007). The desirability of regular procedure is also a theme of Justice Scalia’s critique of discretionary standards. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). In it, he derided “[t]he common-law, discretion-conferring approach” as violative of our “fundamental sense of justice,” the realities of the Supreme Court’s limited docket, and the proper role of a federal appellate judge. *Id.* at 1178.

128. Fuller, *supra* note 127, at 364.

129. *Id.* at 368.

130. *Id.* at 363.

131. *See infra* notes 318–320 and accompanying text.

132. Fuller, *supra* note 127, at 363.

133. *Id.* at 381–91; Jeremy Waldron, *The Rule of Law*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 5.2 (Edward N. Zalta ed., 2019), <https://plato.stanford.edu/entries/rule-of-law/#ProcAspe> [<https://perma.cc/NG5W-N8DV>] (stating that the procedural aspect of rule of

sent such procedures, we might have the application of legal authority, but we do not have “adjudication.”

As Jeremy Waldron observes, Fuller’s procedural principles are central to “the ordinary person’s conception of the Rule of Law.”<sup>134</sup> Indeed, if one distinguishes between sociological legitimacy, on the one hand, and legal and moral legitimacy, on the other, Fullerian procedure might seem essential to the legitimacy of state action.<sup>135</sup> Legitimacy in the sociological sense asks whether the relevant actors regard state action “as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.”<sup>136</sup> A large body of research shows a strong connection between perceived procedural fairness and people’s willingness to accept decisions, whether or not they win.<sup>137</sup>

### B. *The Attack on MDL*

MDL’s ad hocery is difficult to reconcile with this conception of the rule of law. As Part I described, MDL procedure evolves in response to problems that arise in particular cases instead of following a standard rulebook. While MDL formally respects the individuality of consolidated cases, control of plaintiffs’ cases is exercised by lead attorneys who make crucial decisions on behalf of the plaintiff “class.” MDL transferee judges are archetypal “managerial judges,” appointing the lawyers who prosecute cases on behalf of consolidated plaintiffs, directing the order of business, and pushing overtly and subtly for settlement.<sup>138</sup> Plaintiffs whose cases are swept into MDL have little opportunity to present evidence or argument until the litigation is settled. And many decisions are immune from appellate review.

Thus, it is not surprising that as MDL’s importance grew, critics trained their sights on its lack of regular procedures. Martin Redish and Julie Karaba

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law entails “a hearing by an impartial and independent tribunal that is required to administer existing legal norms on the basis of the formal presentation of evidence and argument; a right to representation by counsel at such a hearing; a right to be present, to confront and question witnesses, and to make legal argument about the bearing of the evidence and the various legal norms relevant to the case; and a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it.” (cleaned up)).

134. Waldron, *supra* note 133, § 5.2; see also PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 4 (2016) (noting that the weak version of rule of law requires that coercive power “be used under rules that give those over whom that power is exercised the opportunity to call the users of the power to account on the basis of reasons”).

135. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

136. *Id.* at 1795.

137. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* ch. 4 (1988).

138. See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1030 (2013).



describe MDL as a “procedural no-man’s land”<sup>139</sup> that “involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”<sup>140</sup> Linda Mullenix contends that the lawyers and judges who control MDL “manipulat[e] . . . procedure to accomplish ends the mechanism was never intended to perform.”<sup>141</sup>

Curiously, critics disagree over who is harmed by MDL’s flexibility. One line of criticism focuses on plaintiffs swept into an MDL.<sup>142</sup> Drawing on the parallels between MDL and class action litigation, critics argue that MDL is beset by the same agency problems that are thought to beset class action litigation.<sup>143</sup> The appointment of MDL leadership separates control of claims from their owners. Acting for their own interests instead of the parties they serve, leadership negotiates settlements that deliver little compensation to plaintiffs and large common benefit fees to lead counsel and members of the PSC. No institution currently collects data that allows these claims to be evaluated on a systematic basis. But scholars point to cases such as the Propulsid litigation as proof that MDL leads to collusive settlements. There, 37 of 6,012 (.6 percent) of plaintiffs recovered money through an aggregate settlement negotiated by MDL leadership, who recovered more than \$27 million in fees.<sup>144</sup>

If MDL consistently harmed plaintiffs, one might expect corporate defendants to support it. But while corporate defendants historically made heavy use of MDL,<sup>145</sup> times have changed. In recent Congresses, the U.S. Chamber of Commerce has supported legislation that would require MDL

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139. Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 142 (2015) (quoting Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 95 (2011)).

140. *Id.* at 111.

141. Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 553 (2013).

142. See, e.g., Bradt & Rave, *supra* note 30, at 1264; Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012); Burch, *supra* note 10; Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 120 (2010).

143. See generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). For a somewhat overstated critique of the literature’s focus on agency costs, which contends that regulatory regimes enforced through class action litigation focus exclusively on deterrence, see Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

144. Burch, *supra* note 10, at 127–28 (“[O]nly 0.6 percent of claimants recovered money, totaling little more than \$6.5 million. Yet, leaders collected over \$27 million in fees.” (footnote omitted)).

145. See *Delaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147 (D. Mass. 2006).

plaintiffs to submit evidentiary support for covered claims shortly after they are transferred to the MDL court, prohibit bellwether trials, and allow interlocutory appeals of orders entered by the transferee judge.<sup>146</sup> In 2018, a defense interest group called Lawyers for Civil Justice (LCJ) launched a project entitled “Rules 4 MDLs” to lobby for “clear, uniform rules that apply in MDL cases.”<sup>147</sup>

LCJ mobilized support for 2015 amendments to Rule 26 that restricted discovery in federal civil litigation.<sup>148</sup> The premise of its new project—backed by advertisements, a social media campaign, and its own hashtag (#Rules4MDLs)—is that MDL courts’ refusal to follow a regular playbook subjects defendants to unfair settlement pressure.<sup>149</sup> In August 2017, LCJ proposed seven MDL-specific amendments to the FRCP.<sup>150</sup> In September 2018, the group offered six revised proposals—governing matters such as master complaints, permissive joinder, and third-party litigation funding agreements—for discussion with the new MDL Subcommittee of the Advisory Committee on Civil Rules.<sup>151</sup> The proposals explicitly aim to prevent the

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146. Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985 § 105, 115th Cong. (2017).

147. RULES 4 MDLs, *supra* note 18.

148. LCJ’s membership brochure boasts that the group “has overcome the serious resistance of the trial lawyers to achieve important reforms” including “the 2015 amendments to the Federal Rules of Civil Procedure establishing a new ‘proportionality’ standard for the scope of discovery and a uniform rule governing sanctions for loss of ESI . . . . For these and other achievements, LCJ has been honored by the U.S. Chamber’s Institute for Legal Reform.” LAWYERS FOR CIVIL JUSTICE, SHAPE THE FUTURE OF LITIGATION (2017), [http://www.lfcj.com/uploads/1/1/2/0/112061707/membershipbrochure\\_10x19\\_october\\_2017.pdf](http://www.lfcj.com/uploads/1/1/2/0/112061707/membershipbrochure_10x19_october_2017.pdf) [<https://perma.cc/SCD7-RGUH>].

149. See @Rules4MDLs, TWITTER, <https://twitter.com/rules4mdls?lang=en> [<https://perma.cc/DYJ7-XPFA>].

150. They were: (1) require each plaintiff to file an individual complaint; (2) require individual claims to be pled with particularity under Rule 9(b); (3) create a new Rule 12(b)(8) motion “for individual claims in MDL cases that lack meaningful evidence of a valid claim”; (4) eliminate permissive claim joinder for certain plaintiffs; (5) require “plaintiffs in MDL cases to produce meaningful evidence in support of their claims, and to disclose the existence of third-party financing arrangements and the use of lead generators”; (6) establish “a confidential consent procedure without which bellwether trials in consolidated trials cannot occur”; and (7) allow interlocutory appeals of “critical rulings in MDL cases.” LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING, *supra* note 12.

151. The revised proposals are: (1) a “Multidistrict Litigation Disclosure” amendment to Rule 26(a) “requiring disclosure of evidence showing the cause and nature of the injury alleged”; (2) a new rule allowing “an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings”; (3) a prohibition of bellwether trials, unless the parties consent; (4) mandatory disclosure to opposing counsel of third-party litigation funding agreements; (5) a prohibition on permissive joinder of plaintiffs under Rule 20; and (6) new rules “defin[ing] the documents used as pleadings in MDL cases.” LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES, *supra* note 12 (alteration in original) (emphasis omitted).

experimentation and case-by-case procedural development described above. In LCJ's words, "the *ad hoc* use of mechanisms such as fact sheets and *Lone Pine* orders varies wildly and is inherently inconsistent with the fundamental idea of the FRCP that procedures should be uniform, clear and accessible."<sup>152</sup>

### C. MDL as Super-Sized Litigation

A striking feature of the attack on MDL is the assumption that it is simply a larger version of the litigation that takes place every day in federal district courts. LCJ, for example, argues that "[w]ith so much of the pending federal civil caseload consolidated into MDL cases, the [Federal Rules] should be modernized with clear, uniform rules that apply in MDL cases, benefiting all stakeholders by providing the same fairness, clarity and certainty that the [Federal Rules] ensure *for all other civil cases*."<sup>153</sup> Even opponents of LCJ's proposals do not challenge the assumption that MDL is mere litigation. For example, the plaintiff's bar through the American Association for Justice argues, "Judges need to remain empowered to exercise broad discretion in any particular case rather than be constrained by formalistic pre-conceptions of what a vocal minority consider to be 'best practices.'"<sup>154</sup>

It is not difficult to understand why parties view MDL this way. Section 1407 appears in the venue chapter of the Judicial Code, alongside provisions on interpleader, suits against the United States, and related matters.<sup>155</sup> Section 1407 speaks the language of litigation, referring to the "transfer" of "civil actions involving one or more common questions of fact" to a single district court for "coordinated or consolidated pretrial proceedings."<sup>156</sup> The institution charged with moving cases from district courts for coordinated pretrial proceedings—the JPML—is located within the federal judiciary.<sup>157</sup> The actor charged with managing the consolidated proceedings is an Article III judge. Even the title of section 1407—"Multidistrict litigation"—describes it as, well, litigation.<sup>158</sup>

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152. *Id.* at 3.

153. RULES 4 MDLS, *supra* note 18 (emphasis added).

154. Bradt, *supra* note 13, at 99 (quoting Memorandum from Am. Ass'n of Justice's MDL Working Grp. to Judge Robert Dow and Members of the MDL Subcomm. (Feb. 22, 2018), *in* AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES, APRIL 10, 2018, at 205, 205 (2018), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/DYS8-DF24>]).

155. 28 U.S.C. pt. IV, ch. 87 (2012).

156. *Id.* § 1407(a).

157. *See id.* § 1407(c)–(d).

158. *Id.* § 1407. The official title of the Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109, simply restates the act's functions. *See id.* ("An Act to provide for the temporary transfer to a single district for coordinated retrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes.").

As the next Part argues, however, MDL is not simply a super-sized version of the litigation that takes place every day in federal district courts. Rather, the structure of the MDL statute and the way that MDL functions borrow from programs such as Social Security, where an agency is charged with resolving a huge number of claims within parameters specified by law. Reconceiving MDL as a form of public administration clarifies what section 1407 does when it authorizes the JPML to consolidate cases before a single district judge for coordinated or consolidated pretrial proceedings. Equally important, it suggests a new perspective on the debate over MDL and rule of law. If MDL is a form of a *public administration*, it is properly evaluated through the distinctive rule-of-law norms that evolved with the growth of the U.S. administrative state.

### III. MDL AS PUBLIC ADMINISTRATION

As the prior Parts explained, procedural innovation is at the heart of claims that MDL violates the rule of law. Civil litigation in federal district courts prototypically follows a predictable order of battle established by the Federal Rules of Civil Procedure. By contrast, MDL depends on centralized management, case-specific solutions, and ad hoc procedure to resolve cases. This ad hocery and the massive settlements it facilitates prompt charges that MDL is a lawless Wild West.

To evaluate these charges, however, one needs a better understanding of what MDL *is*. Criticisms of MDL's flexibility draw on a textbook picture of adjudication, which equates due process with adherence to fair rules of the road that are defined in advance of specific disputes. This understanding captures deeply held intuitions about the separation of powers and the appropriate role of courts and judges. Viewed from this vantage point, MDL's ad hocery is indeed a problem. All concede that the mega-cases that critics focus on are not resolved through an evenhanded application of procedures defined in advance of disputes. In MDL, the judge is no umpire.

As this Part argues, however, the image of MDL as a form of litigation governed by the textbook understanding of due process is mistaken. When analyzing novel institutions, one should consider, among other factors, the *problem* that motivated Congress to act, the *structural choices* reflected in the statute that it enacted, and the manner that the statute *functions*.<sup>159</sup> Applied to MDL, this approach shows that section 1407 is best understood as a hybrid form of public administration that mixes procedures of ordinary civil litigation, on one hand, with structural features and tools of public administration, on the other.

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159. See, e.g., FARHANG, *supra* note 31; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 314–18 (John E. Chubb & Paul E. Peterson eds., 1989). See generally Jeb Barnes, *Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making*, 10 ANN. REV. POL. SCI. 25 (2007).

What does it mean to say that MDL is a “hybrid form of public administration”? The claim is not that section 1407 literally created a freestanding administrative agency. The MDL system operates within the federal judiciary and is administered by Article III judges. Moreover, Article III would bar Congress from creating an administrative agency to do the work of MDL if it tried to do so. Rather, the claim is that MDL uses tools familiar from administrative programs (delegation, centralization, and empowered, expert agents) to address a problem (Congress’s procedural myopia) that Congress often confronts when it creates an administrative program.

The specific administrative programs that MDL resembles most closely require an agency to adjudicate a high volume of claims. When creating those agencies, Congress anticipated a flood of claims but did not know what procedures would be necessary to address them—the very problem Congress confronted in section 1407. In both settings, Congress overcame its own ignorance by delegating to an institution that would act with better information, and was subject to fewer constraints, than Congress itself. In both contexts, the delegate used this authority to develop procedures to address procedural problems as they arose.

An accurate institutional understanding of MDL matters for at least two reasons. The first is that, in a system of separated powers, the demands of the rule of law depend on the *kind* of institution exercising state power. For example, Congress may appropriate money; the president may not.<sup>160</sup> Relevant here, a distinctive understanding of the administrative rule of law emerged in the decades following World War II as the scope of the federal administrative state expanded. Responding to criticisms remarkably similar to those leveled against contemporary MDL, policymakers rejected the idea that agencies must follow regular procedures to satisfy the rule of law. But if agencies were free to develop new procedures, alternative arrangements were needed to ensure that agencies did not act arbitrarily and stayed within the limits of their statutory authority. The settlement that emerged—reflected in the Administrative Procedure Act (APA) and precedent interpreting it—was to guarantee the transparency of administrative action and the right to participate in the development of administrative policy, while providing liberal opportunities for judicial review. Viewed from this perspective, MDL’s procedural flexibility is entirely ordinary, even to be expected.

The second reason an accurate understanding of MDL matters is that it has implications for reforms to enhance MDL’s legitimacy. If MDL’s procedural flexibility is not a cause for concern, it lacks guarantees of accessibility, transparency, and reasoned decisionmaking that underpin the legitimacy of the modern administrative state. The history of federal administration teaches that these governance deficits, not MDL’s reliance on ad hoc procedure, pose the greatest threat to its legitimacy.

This Part explains why MDL is appropriately viewed as a hybrid form of public administration and outlines the implications of that point for claims

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160. See U.S. CONST. art. I, § 9, cl. 7.

that MDL violates the rule of law. Having shown that MDL is appropriately viewed as a form of public administration, the next Part turns to proposals that would improve the transparency and accountability of the MDL process.

### A. *The Problem for Congress*

MDL's similarity to public administration begins with the problem that motivated Congress to act.<sup>161</sup> As is familiar, the Multidistrict Litigation Act was a response to the electrical equipment litigation, described by one participant as "the greatest challenge to the administration of civil justice in the history of the federal judicial system."<sup>162</sup> In 1960, the Justice Department indicted "virtually every significant American manufacturer of electrical equipment" for a conspiracy to fix prices and divide territory.<sup>163</sup> According to the indictments, the conspiracy affected \$6 to 7 billion in total sales.<sup>164</sup> In February 1961, the criminal cases were resolved through plea agreements that subjected the defendants to modest penalties.<sup>165</sup>

The pleas were only the beginning of the legal response to the scandal, however. On their heels, utilities and other companies that had purchased electrical equipment at inflated prices filed more than 1,800 treble damages actions.<sup>166</sup> The litigation was spread throughout the United States but concentrated in major cities.<sup>167</sup> Thomas Clary, the Chief Judge of the Eastern District of Pennsylvania, estimated that plaintiffs in the 1,800-plus cases asserted some 25,632 claims.<sup>168</sup>

Those cases could not be resolved through ordinary civil procedure. With litigation pending in thirty-five districts,<sup>169</sup> some mechanism was needed to prevent courts from issuing conflicting orders and to keep the discovery process from generating staggering transaction costs. In February 1962, Chief Justice Earl Warren formed an ad hoc subcommittee of the

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161. This account largely follows Andrew Bradt's pathbreaking archival research on the origins of section 1407. See Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) [hereinafter Bradt, *Radical Proposal*]; Bradt, *supra* note 13; Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711 (2017); see also Resnik, *supra* note 30, at 29–35.

162. William H. Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 269 (1978).

163. Bradt, *Radical Proposal*, *supra* note 161, at 854.

164. See CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 83 (1973).

165. Bradt, *Radical Proposal*, *supra* note 161, at 854–55. The penalties were "\$2 million in fines, some short jail sentences for relatively low-level defendant-employees, and consent decrees." *Id.*

166. BANE, *supra* note 164, at 50; Bradt, *Radical Proposal*, *supra* note 161, at 855.

167. Bradt, *Radical Proposal*, *supra* note 161, at 855.

168. *Id.*

169. *Id.*

Committee on Pretrial Procedure to “consider[] the problems arising from discovery procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits.”<sup>170</sup> The new subcommittee, termed the Coordinating Committee on Multiple Litigation (CCML), was chaired by Chief Judge Alfred P. Murrah of the U.S. Court of Appeals for the Tenth Circuit.<sup>171</sup> Eventually, it grew to include nine circuit and district judges.<sup>172</sup>

Lacking formal authority over district judges who were assigned electrical equipment cases, the committee’s modus operandi was to “encourage” judges to enter uniform orders that it drafted.<sup>173</sup> Judges “sat together at arguments, conferred, and issued proposed orders that were then sent back to the more than thirty district courts in which the cases were pending.”<sup>174</sup> Through these orders, the committee effectively created a coordinated nationwide discovery program.

“In order to manage the nationwide depositions of defense witnesses, the plaintiffs’ lawyers met in Chicago to appoint a ‘steering committee’” that divided the discovery workload.<sup>175</sup> As litigation progressed, the committee developed damages models and settlement proposals.<sup>176</sup> Manufacturers refused to negotiate until 1963. That year, Chief Judge Sylvester J. Ryan of the Southern District of New York, Judge Edwin A. Robson of the Northern District of Illinois, and Judge Wilfred Feinberg of the Southern District of New York made a push for settlement in cases against General Electric (G.E.), the largest defendant.<sup>177</sup> G.E. agreed to settle all litigation against it for \$300 million, the dam broke, and most other manufacturers agreed to settle.<sup>178</sup>

The CCML planned to handle the remaining cases by transferring all cases involving a product line to a single judge for trial. However, the plan hit a roadblock when the largest remaining defendant, I-T-E Circuit Breaker, vociferously objected to its cases being transferred to Chicago.<sup>179</sup> I-T-E sought a writ of mandamus to prevent William H. Becker, a district judge from the Western District of Missouri and member of the CCML, from transferring his cases pursuant to the committee’s plan.<sup>180</sup> The Eighth Circuit rejected the petition, noting that what I-T-E “seemingly wants done is simply to have all of the suits against it left alone.”<sup>181</sup> With its cases consolidated in

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170. *Id.* at 856 (quoting Press Release, Admin. Office of the U.S. Courts 1 (Feb. 7, 1962) (on file with the *Michigan Law Review*)).

171. *Id.*

172. *Id.*

173. *Id.* at 857.

174. Resnik, *supra* note 30, at 32.

175. Bradt, *Radical Proposal*, *supra* note 161, at 858.

176. *Id.*

177. *Id.* at 859.

178. *Id.*

179. *Id.* at 860.

180. See *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 362 (8th Cir. 1965).

181. *Id.*

Chicago, I-T-E settled on the first day of trial.<sup>182</sup> “Once I-T-E settled, settlements of the rest of the cases followed quickly . . . and by the end of 1966 the litigation was over.”<sup>183</sup>

Though the defendants complained that they had been coerced into settling, the CCML’s management of the litigation was hailed as a model for managing complex litigation.<sup>184</sup> The I-T-E episode, however, exposed the fragility of the committee’s ad hoc approach. As a defense lawyer observed, resolving the electrical equipment litigation required “an extraordinary exercise in the use of judicial prestige and persuasion.”<sup>185</sup> Had I-T-E prevailed in its objections—or had a district court judge refused to go along with the committee’s “suggestions”—the effort to manage the litigation in a coherent manner would have failed.

These problems provided the impetus for the Multidistrict Litigation Act of 1968. The key figures in drafting and lobbying for the statute were Judges Murrah and Becker, and Phil C. Neal, the Dean of the University of Chicago Law School.<sup>186</sup> Senator Joseph Tydings, the Democratic chair of the Senate Subcommittee on Improvements in Judicial Machinery, helped steer the bill through Congress.<sup>187</sup>

Section 1407’s authors realized that more cases like the electrical equipment litigation lay in the future.<sup>188</sup> They also believed that “power had to be centralized before judges who could manage cases to a conclusion, as was accomplished in the mass settlements of the electrical-equipment cases.”<sup>189</sup> Beyond this, the drafters confronted a classic problem of statutory design. Apart from the need for centralized management of geographically dispersed cases, *how* courts would resolve future mega-litigation was not obvious. The discovery program that worked in the electrical equipment litigation was specifically designed for that case. What procedures would courts use to clear hundreds or thousands of cases filed following an airplane crash,<sup>190</sup> massive securities fraud,<sup>191</sup> or the release of a defective drug or medical device?<sup>192</sup> When MDL’s drafters attempted to formalize the process that had

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182. See BANE, *supra* note 164, at 378.

183. Bradt, *Radical Proposal*, *supra* note 161, at 860.

184. See MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION, *supra* note 62, at vi, vi–viii (transcribing Chief Justice Earl Warren’s address before the American Law Institute).

185. Bradt, *Radical Proposal*, *supra* note 161, at 861 n.192 (quoting Breck P. McAllister, *Judicial Administration of Multiple-District Treble Damage Litigation*, 1966 ANTITRUST L. SYMP. 55, 58).

186. See Bradt, *supra* note 13, at 92–93.

187. *Id.* at 92.

188. Bradt, *Radical Proposal*, *supra* note 161, at 907.

189. *Id.*

190. *E.g.*, *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006 (5th Cir. 1977).

191. *E.g.*, *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308 (S.D.N.Y. 2003).

192. *E.g.*, *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).



worked in the electrical equipment litigation, they confronted a “known unknown.”

That problem would have been familiar to lawmakers who enacted statutes that charge an agency with processing a large number of claims. Consider the system of administrative courts that operates within the Social Security Administration (SSA).<sup>193</sup> To administer the Social Security Disability Insurance and the Supplemental Security Income programs, SSA operates what is “probably the largest adjudicative agency in the western world.”<sup>194</sup> In recent years, the agency has processed more than 2.5 million disability claims per year, some 200,000 of which were resolved after an ALJ hearing.<sup>195</sup>

The principal statute that authorizes SSA to operate this system is section 205 of the Social Security Act.<sup>196</sup> That section was enacted as part of 1939 amendments that added survivors and dependent benefits to the prior program of old-age and unemployment insurance, creating the basic structure of modern social security.<sup>197</sup> When Congress enacted section 205, it acted with as little information as section 1407’s drafters.<sup>198</sup> Legislators would have assumed that Article III courts could not be entrusted to adjudicate claims under new title II of the Social Security Act.<sup>199</sup> But apart from this, how claims should be processed was unknown. The Social Security system was only four years old and, to that point, had only paid benefits to retirees and their survivors.<sup>200</sup> The system faced major administrative challenges in the first years of its operation.<sup>201</sup> Its constitutionality was settled only in

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193. See generally JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983); JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS* (1978).

194. MASHAW ET AL., *supra* note 193, at xi.

195. SOC. SEC. ADMIN., SSA PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2017, at 2.77 tbl.2.F6, 2.80 tbl.2.F9 (2018), <https://www.ssa.gov/policy/docs/statcomps/supplement/2017/supplement17.pdf> [<https://perma.cc/WAN3-FGYG>].

196. 42 U.S.C. § 405 (2012 & Supp. 2018).

197. Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360, 1368; see Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, 66 SOC. SECURITY BULL., no. 1, 2005, at 1, 3–6.

198. Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administrative Justice in an Ever-Expanding Bureaucracy*, 3 HEALTH MATRIX 339, 363 (1993).

199. See Mark Tushnet, *The Story of Crowell: Grounding the Administrative State, in* FEDERAL COURTS STORIES 359, 367–68 (Vicki C. Jackson & Judith Resnik eds., 2010) (describing Progressive lawmakers’ distrust of Article III courts and their use of expert tribunals as substitutes).

200. Bernard, *supra* note 198, at 363–64.

201. See LARRY W. DEWITT ET AL., *SOCIAL SECURITY: A DOCUMENTARY HISTORY* 5 (2008) (“For years, Social Security employees faced problems matching employers’ contributions with the appropriate workers, and they were even tasked with tracking down covered employers and workers and making sure they were participating in the program.”).

1937.<sup>202</sup> Existing administrative courts, such as those in the Interstate Commerce Commission, operated in different contexts and handled many fewer claims than social security would ultimately come to handle.<sup>203</sup> Even the scope of federal disability benefits was unknown: the modern disability program was not created until two decades later.<sup>204</sup>

Like the Multidistrict Litigation Act, the creation of the Social Security Act required Congress to act in an information vacuum. Congress saw the necessity for an institution that could process a flood of claims. But it did not, and could not, foresee the procedures that would be needed to process those claims.

### B. Statutory Design

The information vacuum that lawmakers operated in when enacting title II of the Social Security Act and, later, the Multidistrict Litigation Act is a basic feature of modern lawmaking.<sup>205</sup> Congress faces constant pressure to address social problems. But lawmakers often lack a good understanding of the problem Congress is being asked to regulate and the costs and benefits of competing policy responses. In recognition of lawmakers' myopia, one political scientist describes the job of a member of the House of Representatives as "legislating in the dark."<sup>206</sup> But legislating in the dark carries political risk. Badly designed legislation may fail to accomplish its objectives, have unintended consequences, or even exacerbate the problem Congress set out to address.<sup>207</sup> Lawmakers thought to have contributed to these problems expect to be punished at the polls.

One solution familiar from contemporary legislative politics is for Congress to do nothing.<sup>208</sup> In doing so, lawmakers bet that the political costs of inaction are lower than the costs of legislating in the dark. But for much of the twentieth century, Congress followed a different strategy: delegation. That is, Congress made basic policy choices itself and tasked an agency with

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202. See *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1937).

203. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1237–42 (1986).

204. See, e.g., JONAH GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS 9 (2016); Charles I. Schottland, *Social Security Amendments of 1956: A Summary and Legislative History*, SOC. SECURITY BULL., Sept. 1956, at 3.

205. See, e.g., FRANK R. BAUMGARTNER & BRYAN D. JONES, THE POLITICS OF INFORMATION: PROBLEM DEFINITION AND THE COURSE OF PUBLIC POLICY IN AMERICA ch. 4 (2015); JAMES M. CURRY, LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES (2015).

206. See CURRY, *supra* note 205, at 4.

207. See THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 162–63 (updated ed. 2016).

208. See generally Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013).

formulating “subsidiary administrative policy within the prescribed statutory framework.”<sup>209</sup>

For instance, section 205(a) of the Social Security Act provides that the SSA “shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions.”<sup>210</sup> That section goes on to direct the agency to “adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.”<sup>211</sup> Rather than lay down rules of procedure itself, Congress delegated to the SSA.

The policy logic for such delegations is captured in the attorney general’s landmark 1941 report on administrative procedure.<sup>212</sup> As the report explains, “inherent limitations upon [Congress’s] own functioning” argue “against action by Congress itself.”<sup>213</sup> Those limitations include “[t]he total time available” for members of Congress to consider legislation, the “[l]ack of specialized information,” and the “lack of a staff or a procedure adapted to acquiring it.”<sup>214</sup> Even if Congress is able to work out all the details of statutory policy itself, there remains “constant danger of harmful rigidity” if the results “crystallize[] in the form of a statute.”<sup>215</sup> Thus, there is “steady pressure . . . to assign such tasks to the controlled discretion of some other agency.”<sup>216</sup>

Since Congress created the first modern agency in 1887, statutes that delegate regulatory authority have been attacked for authorizing another institution to exercise Congress’s Article I powers.<sup>217</sup> But for nearly as long as these objections have been advanced, they have failed. Since 1928, the Supreme Court has held that a statute satisfies Article I as long as it contains an “intelligible principle” that guides the delegate’s discretion. And the Supreme Court has struck down only three statutory provisions—each part of poorly

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209. *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

210. 42 U.S.C. § 405(a) (2012 & Supp. 2018).

211. *Id.*

212. ROBERT H. JACKSON, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941). For the history of the report and the politics of the New Deal era, see DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014), and George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1594–97 (1996).

213. JACKSON, *supra* note 212, at 14.

214. *Id.*

215. *Id.*

216. *Id.*

217. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 & n.4 (2002). Article I, Section 1 of the Constitution provides that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1.

drafted statutes that were enacted at the height of the New Deal—for lack of an intelligible principle.<sup>218</sup>

The Multidistrict Litigation Act delegates authority in manner that is strikingly similar to statutes like section 205 of the Social Security Act. In fact, it delegates twice. Section 1407 authorizes the JPML to override plaintiffs’ forum choice and move cases to a single district court for coordinated pretrial management.<sup>219</sup> Similar to many statutes administered by an administrative agency, the standard for centralization is highly discretionary. The Panel is authorized to transfer cases if it finds that doing so “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>220</sup>

Once the Panel redirects cases to a single district court, section 1407 delegates authority to the transferee court to conduct “coordinated or consolidated pretrial proceedings.”<sup>221</sup> In its “contemporary legal context,”<sup>222</sup> this instruction would reasonably have been understood as a direction to develop procedures necessary to resolve big cases that would otherwise clog the federal courts. The electrical equipment litigation was resolved only because managerial judges wrested control of the litigation from parties and devised a series of novel procedures that catalyzed a global resolution.<sup>223</sup> In proposing section 1407, MDL’s backers repeatedly cited the need to formalize this process and make it broadly available. The drafters assumed the FRCP and Article III vested the transferee court with sufficient authority to develop novel procedures to manage transferred cases. Instructing the transferee court to conduct “coordinated” pretrial proceedings, section 1407 told trans-

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218. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that § 3 of the National Industrial Recovery Act lacked an intelligible principle); *Pan. Refining Co. v. Ryan*, 293 U.S. 388 (1935) (same, National Industrial Recovery Act § 9(c)); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (same, price-fixing provisions of the Bituminous Coal Conservation Act of 1935). Even the well-organized attack on federal administration that has emerged from the conservative legal movement in recent years has failed to make headway against statutes that delegate regulatory authority. In 2010, Chief Justice John Roberts wrote, “No one doubts Congress’s power to create a vast and varied federal bureaucracy.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). *But see Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) (noting that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort”).

219. 28 U.S.C. § 1407(a) (2012).

220. *Id.*

221. *Id.*

222. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 178 (2008) (Stevens, J., dissenting) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99 (1979)); see also *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (“[I]t’s a ‘fundamental canon of statutory construction’ that words generally should be ‘interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.’” (last alteration in original) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018))).

223. See *supra* text accompanying notes 162–185.

feree judges to treat future litigation crises like the electrical equipment cases.

Indeed, this is precisely how the statute was interpreted by contemporary observers. A *Wall Street Journal* article reporting on the passage of section 1407 observed that the parties to the electrical equipment litigation “developed a nationwide pretrial discovery program” that “included the use of uniform sets of interrogatories and orders for the furnishing of documents, creation of central depositories for papers common to many cases, and the taking of joint depositions in which key witnesses were examined by representative counsel on questions common to the various cases.”<sup>224</sup> The new multidistrict litigation statute “establish[ed] formal legal machinery for consolidating pretrial handling of groups of similar cases.”<sup>225</sup> It “likely” would “result in a substantial speedup in the handling of basically similar civil court suits.”<sup>226</sup>

Or consider the views of Philip Price, Esq., a partner at Dechert, Price and Rhoads, who submitted comments opposing section 1407 when it was being considered by the Senate Judiciary Committee.<sup>227</sup> Price represented I-T-E Circuit Breaker in the electrical equipment litigation.<sup>228</sup> He objected to “the extraordinarily broad scope of the proposed section” and “the unlimited power which it would vest, not in any court as heretofore constituted, but in a ‘judicial panel.’”<sup>229</sup> In the transferee court, Price complained, judges would wield their power to “club[] into settling their cases parties who did not show what the judges thought was sufficient enthusiasm.”<sup>230</sup> This is perhaps a self-serving view of the electrical equipment litigation, and Price’s account of transferee judges’ motivations can certainly be questioned. But his letter makes clear that sophisticated observers well understood the effects of section 1407’s delegations. As Price stated: “[W]hat happened in [the electrical equipment] cases is a guide to what may be expected under the proposed § 1407.”<sup>231</sup>

Because section 1407’s drafters believed that the FRCP gave transferee judges all the authority they needed to devise procedures necessary to resolve big cases, section 1407 does not explicitly grant transferee judges procedure-

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224. *Congress Passes Bill to Speed Up Handling of Similar Civil Suits*, WALL STREET J., Mar. 20, 1968, at 12.

225. *Id.*

226. *Id.*

227. *Multidistrict Litigation: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 95 (1966) (Letter from Philip Price, Esq., of Philadelphia, Pa., to Sen Senator Hugh Scott).

228. *Id.* at 97.

229. *Id.* at 95.

230. *Id.* at 97.

231. *Id.* at 96.

making authority beyond that which generally exists in the Rules.<sup>232</sup> Nor did the drafters expressly limit transferee courts' procedure-making authority in the manner characteristic of statutes administered by an agency.<sup>233</sup> Still, the nature and limits of section 1407's delegation are apparent from its text and history. The statute reflects an expectation that transferee courts manage cases to resolution by explicitly recognizing the possibility that transferred actions will be resolved in the transferee court.<sup>234</sup> Read against the backdrop of the electrical equipment litigation, section 1407 also reflects an expectation that procedural innovation would be central to that process.<sup>235</sup> At the same time, the failure to create new procedure-making authority in the transferee court—and the instruction in section 1407(f) that the JPML's rules be “not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure”—suggests that limitations on district court discretion imposed by the FRCP and due process carry over to MDL.

Although section 1407 does not expressly recognize transferee judges' authority to devise new procedures, that power was created by 1983 amendments to Rule 16. Enacted with a package of rule amendments intended to encourage managerial judging,<sup>236</sup> amended Rule 16 authorizes district court judges to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”<sup>237</sup> The category of cases to which the amended rule applies—complex litigation—overlaps substantially with the big cases that preoccupied MDL's drafters. The amendment makes explicit what section 1407 assumes—that transferee judges will be procedural innovators.

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232. Section 1407 does authorize the JPML to “prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.” 28 U.S.C. § 1407(f) (2012).

233. *Cf., e.g.*, 42 U.S.C. § 405(b)(1) (2012 & Supp. 2018) (directing the Social Security Administrator to provide “a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner’s determination and the reason or reasons upon which it is based,” when rejecting a disability claim); 42 U.S.C. § 300aa-13(b) (2012) (specifying evidence that the court may consider in making awards under the National Vaccine Injury Compensation Program).

234. 28 U.S.C. § 1407(a) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .” (emphasis added)).

235. See Bradt, *Radical Proposal*, *supra* note 161, at 916 (“The judges’ contemporaneous papers demonstrate that, far from a modest tweak, they intended MDL to be an ambitious statute designed to transfer power over nationwide litigation from the hands of litigants and dispersed judges into the hands of a single judge who could shepherd the litigation to a final resolution.”); *cf.* Charles R. Clark, *Pre-Trial Orders and Pre-Trial as a Part of Trial*, in *Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319, 506 (1958) (“[P]erhaps the greatest advantage and the most striking characteristic of the federal rules is the power and the discretion they give to the trial judge.”).

236. See generally *supra* note 138 and accompanying text.

237. FED. R. CIV. P. 16(c)(2)(L).

MDL's similarity to statutes that delegate authority to an administrative agency raises the question why Judges Becker and Murrah did not propose a "multidistrict litigation agency" when they put forward section 1407. The simplest explanation is that the idea appears not to have occurred to the judges, who were focused on codifying the structure that was successfully used to resolve the electrical equipment litigation.<sup>238</sup> More fundamentally, Congress could not have created such an agency without violating Article III. MDL courts finally resolve private claims, and they "exercise[] the range of jurisdiction and powers normally vested only in Article III courts."<sup>239</sup> Under *Crowell v. Benson* and *Commodity Futures Trading Commission v. Schor*, these are functions that only an Article III court may perform.<sup>240</sup>

### C. *The Operation of the Statute*

MDL's similarity to public regulatory programs continues with the way it operates in practice. But there is an important difference between MDL and administrative programs like Social Security: MDL operates within the legal framework governing ordinary civil litigation, rather than the APA. Accordingly, MDL lacks structures that Congress and courts implemented to improve the transparency, accountability, and accessibility of the administrative process.

This Section outlines the functional similarities and structural differences between MDL and agency-administered programs. The following Section recounts the origins of the structural features of modern agency administration and explains how the absence of those features in MDL affects MDL's legitimacy.

#### 1. Overcoming Problems Through Bottom-Up Innovation

As Part I recounted, MDL is a world of procedural innovation. The JPML selects a judge whom it believes will competently manage the litigation. In the transferee court, the judge exercises her authority under the Federal Rules and section 1407 to manage the case to resolution—a process that often involves the adaption, development, and approval of new procedures. Successful procedures spread to other MDLs through the network of lawyers and transferee judges who control large MDLs.

With this, compare procedural design in agencies like the SSA. An initial example involves the creation of the Social Security Appeals Board (now called the Appeals Council), a body of ALJs within the agency that reviews front-line ALJ decisions to improve the system's accuracy and uniformity.<sup>241</sup>

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238. See Bradt, *Radical Proposal*, *supra* note 161, at 863–71.

239. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

240. *Id.*; *Crowell v. Benson*, 285 U.S. 22, 59 (1932).

241. An applicant for social security disability benefits currently may request review by the Appeals Board. 20 C.F.R. § 416.1467 (2019). The Appeals Board's regulations also author-

As the Board's director explained in 1959 testimony to the House Ways and Means Committee, the need for an internal appeals process arose from the slow pace of judicial review in Article III courts.<sup>242</sup> The original Social Security Act did not expressly authorize SSA to provide an internal appeals process, but the agency nevertheless provided one.<sup>243</sup> Later amendments to the Social Security Act confirmed the agency's general authority to make procedure<sup>244</sup> and formally recognized the Appeals Board.<sup>245</sup> As Pamela Bookman and I show, this pattern of bottom-up innovation followed by legislative codification characterizes many ad hoc procedural statutes.<sup>246</sup>

A more recent example of procedural design within the SSA is the medical vocational guidelines, colloquially known as the "grids," that the agency uses to adjudicate disability insurance claims.<sup>247</sup> Under the Social Security Act, an individual is entitled to disability benefits if she cannot "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment."<sup>248</sup> Before SSA adopted the grids, the availability of work was established through testimony of vocational experts who testified at individual disability hearings.<sup>249</sup> This method was criticized for producing inconsistent outcomes and requiring the agency to pay for repeated testimony on an issue that should not have varied from claimant to claimant.<sup>250</sup>

To address these problems, the SSA invoked its authority "to establish procedures" under section 205 to promulgate the grids, which answer whether a claimant is disabled based on the claimant's age, education, work history, and functional limitations.<sup>251</sup> The grids aggregate information from national hiring and occupational surveys and are updated as new versions of

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ize it to review the grant of benefits on its own motion, but this authority is rarely exercised. *See id.* § 416.1469.

242. *Administration of Social Security Disability Insurance Program: Hearings Before the Subcomm. on the Admin. of the Soc. Sec. Laws, H. Comm. on Ways & Means*, 86th Cong. 641 (1960) (statement of Joseph E. McElvain, Director of the Office of Hearings and Appeals) [hereinafter McElvain Testimony].

243. *See generally* Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

244. *See* Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360, 1368.

245. *See* Health Insurance for the Aged Act, Pub. L. 89-97, § 102(a), 79 Stat. 286, 330 (1965).

246. *See* Bookman & Noll, *supra* note 29, at 788-91, 804-07 (discussing, inter alia, section 524(g) of the Bankruptcy Code, the Prison Litigation Reform Act, and the Private Securities Litigation Reform Act).

247. *See* MASHAW, *supra* note 193, at 117-23.

248. 42 U.S.C. § 423(d)(1)(A) (2012).

249. *See* Heckler v. Campbell, 461 U.S. 458, 461 (1983).

250. *See id.*

251. *See* 20 C.F.R. pt. 404, subpt. P, app. 2 (2012).



those surveys are released.<sup>252</sup> To determine whether an individual is unable to find work in the national economy (and therefore disabled), an ALJ enters the individual's characteristics into the grids and the grids supply an answer.<sup>253</sup>

In *Heckler v. Campbell*, the Supreme Court rejected constitutional and statutory arguments that the grids deprived claimants of a fair hearing.<sup>254</sup> The agency processed “[a]pproximately 2.3 million claims for disability benefits” per year, the Court observed, making the need for efficiency “self-evident.”<sup>255</sup> The grids deprived individual litigants of the opportunity to be present when evidence relevant to a key element of their claim was developed. But the survey data could be challenged in an action for judicial review of the grids,<sup>256</sup> and an individual whose condition was not covered by the grids could “bail out” and demonstrate disability through individualized proof.<sup>257</sup> Thus, the Court concluded that the grids were consistent with due process and the APA.

Many more examples of ad hoc procedure-making in the SSA and other agencies could be cited.<sup>258</sup> But these suffice to show the basic point: like an MDL transferee court, the SSA devises procedures to address procedural problems that Congress did not—and could not—foresee when it enacted the agency's enabling statute.<sup>259</sup>

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252. Brief of the United States, *Heckler v. Campbell*, 461 U.S. 458 (1983) (No. 81–1983), 1982 U.S. S. Ct. Briefs LEXIS 669, at \*16 n.6.

253. In general, the grids give a yes/no answer to whether a claimant is disabled, or direct the ALJ to consult a vocational expert if the surveys that the grid is based upon do not indicate the availability of work for individuals with the claimant's combination of characteristics. See 1 J. DOUGLAS PETERS, *SOCIAL SECURITY DISABILITY CLAIMS* § 1.8, Westlaw (database updated June 2018).

254. 461 U.S. 458.

255. *Heckler*, 461 U.S. at 461 n.2.

256. See 5 U.S.C. §§ 701–702, 704 (2012 & Supp. 2018) (generally authorizing judicial review of “final agency action for which there is no other adequate remedy in a court”).

257. *Heckler*, 461 U.S. at 462 n.5.

258. See, e.g., Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575, 1604 (2015) (describing the development of the SSA's data analysis program and the “dramatic gains in productivity and quality of decisionmaking” that it produced (cleaned up)); Michael Sant' Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017) (describing the development of group claim-processing procedures in the Equal Employment Opportunity Commission and Office of Medicare Hearings and Appeals and the use of “Omnibus Proceedings” within the National Vaccine Injury Compensation Program); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103 (2008) (describing the development of “Fair Fund” procedures within the SEC).

259. The procedure-making that occurs in MDL is largely retroactive, because it is designed to address litigation crises after they arise. In the administrative law context, the Supreme Court has held that statutes authorizing agency rulemaking should be presumed not to authorize retroactive rules, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), but

## 2. MDL's Relationship to Other Forms of Aggregation Litigation

This Article is not the first to note the parallels between public administrative programs and aggregate litigation. As Nathaniel Donahue and John Fabian Witt observe, early twentieth-century workers' compensation statutes "formalized for work accidents what virtually private and more-or-less decentralized mechanisms [for resolving claims] had been trying to achieve for half a century and more."<sup>260</sup> Harry Kalven and Maurice Rosenfield's seminal essay on the midcentury class action likened it to a "semi-public remedy administered by the lawyer in private practice."<sup>261</sup> More recently, Richard Nagareda observed that—like workers' compensation statutes and the social security grids—mass tort settlements rationalize the resolution of thousands of related claims using rules of thumb derived from litigated and settled cases.<sup>262</sup>

MDL settlements similarly rely on grids, rules of thumb, and algorithms to resolve masses of related cases, based on claim values discerned from prior verdicts and settlements. But MDL differs from the settlements that preoccupied Nagareda in a crucial respect: they are the product of deliberate congressional choice. Read against the backdrop of the electrical equipment litigation and the discretion that district courts generally exercise under the FRCP, section 1407 is appropriately read as a delegation to transferee courts to devise procedures necessary to resolve big cases. District courts have used that statutory authority to empower leadership to act on behalf of consolidated plaintiffs and to devise novel procedures for asserting, processing, and liquidating actions. Thus, when MDL leaders propose a resolution, they act pursuant to authority that has been delegated by Congress (in sweeping general terms) and further specified by transferee judges (through, for example, leadership appointment orders, case management orders, and orders facilitating settlement).<sup>263</sup>

Perhaps because he wrote in the era before MDL had become the dominant forum for large-scale litigation, Nagareda overlooked the statutory underpinning for MDL settlements. Because of that, he believed that aggregate settlements suffer from a perpetual crisis of authority. Lacking authority to represent clients beyond the limits of traditional attorney–client relation-

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also held that the propriety of retrospective agency action ultimately turns on whether it is justified by considerations that outweigh its costs to rule-of-law values, *SEC v. Chenery Corp.*, 332 U.S. 194, 202–05 (1947) (discussing standards established via agency adjudication).

260. Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. (forthcoming 2019) (manuscript at 13) (on file with the *Michigan Law Review*).

261. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

262. See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 57–70 (2007) [hereinafter NAGAREDA, *MASS TORTS*]; Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 921 (1996).

263. Thanks to Teddy Rave for pushing me on this point.

ships and Rule 23, lawyers nevertheless negotiate global resolutions to factually related cases.<sup>264</sup> For Nagareda, private lawyers—not judges—were the actors analogous to agency heads who devise new procedures. And private lawyers decidedly lacked authority to impose global peace on unwilling parties.

Whether or not Nagareda was correct about the crisis of authority outside of MDL, it is not the case that MDL settlements take place in a vacuum of statutory authority. A transferee judge exercises authority under section 1407 and the Federal Rules. Dominant uses of that authority are to drive settlement and to devise procedures that facilitate it—such as bellwether trials, case inventory orders, and centralized control of litigation in a PSC. Of course, MDL settlements are subject to due process limitations. But they do not occur in the legal no man’s land Nagareda portrayed. They are, instead, the consequence of section 1407’s statutory design.<sup>265</sup>

### 3. Structural Differences Between Procedure-Making in MDL and Administrative Agencies

MDL resembles a public administrative program in the problem that motivated Congress to enact its enabling statute, the structural choices Congress made in that statute, and the way the statute functions. But procedure-making in MDL is structured differently than in administrative agencies such as the SSA. This is because MDL operates under the statutes and rules governing ordinary civil litigation,<sup>266</sup> whereas administrative agencies are governed by the APA.<sup>267</sup> This difference in the systems’ statutory underpinnings results in substantial differences in how administrative agencies, on the one hand, and MDL courts, on the other, use delegated authority to make procedure.

Again, the Social Security Administration provides a useful comparison. Because the agency is subject to the APA,<sup>268</sup> it has a general obligation to

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264. See NAGAREDA, *MASS TORTS*, *supra* note 262, at 58 (“Both workers’ compensation and grid-like rules for public benefits have achieved a high degree of institutional legitimacy. By contrast, court-administered statistical sampling and mass tort class settlements have not.”).

265. The statutory basis for MDL resolutions is also deemphasized in accounts that stress operational parallels between MDL, class actions, and bankruptcy. See, e.g., Alexandra D. Lahav, Essay, *The Continuum of Aggregation*, 53 GA. L. REV. (forthcoming 2019).

266. See 28 U.S.C. § 1407(a) (2012) (authorizing transferee judge to conduct “coordinated or consolidated pretrial proceedings”); 15 WRIGHT ET AL., *supra* note 59, § 3866 (“Courts interpret the phrase ‘pretrial proceedings’ [in 28 U.S.C. § 1407(a)] broadly, to give the transferee judge control over any and all proceedings before trial. The transferee judge inherits the entire pretrial jurisdiction that the transferor court could have exercised had the case not been transferred.” (footnote omitted)).

267. See 5 U.S.C. § 551 (2012 & Supp. 2018) (setting out procedures for “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” excepting Congress, the courts, and certain territorial and military institutions).

268. See *Richardson v. Perales*, 402 U.S. 389, 409 (1971) (stating that the Social Security Act’s hearing procedure “does not vary from that prescribed by the APA”).

make agency records available under the APA's freedom-of-information provisions.<sup>269</sup> When promulgating the medical-vocational grids, the APA required the agency to "give interested persons an opportunity to participate."<sup>270</sup> In particular, the APA required agencies to provide advance notice of its intent to adopt the grids,<sup>271</sup> make data and analysis supporting the grids available for public inspection,<sup>272</sup> and respond to nonfrivolous comments before the grids were promulgated.<sup>273</sup> The final grids were subject to judicial review under the substantial-evidence and arbitrary-and-capricious standards.<sup>274</sup>

Procedural development in MDL is more opaque. The dominant mode of procedure-making in mega-MDLs is for leadership to "work out" a solution to an emergent procedural problem that is adopted or so-ordered by the transferee judge.<sup>275</sup> Lead counsel may consult non-lead counsel in these negotiations but have no legal obligation to do so. Indeed, leadership often will have strategic reasons for excluding non-lead counsel from crucial proce-

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269. See 5 U.S.C. § 552.

270. *Id.* § 553(c).

271. *Id.* § 553(b). ("General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."). "The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a "logical outgrowth" of the rule proposed.' The object, in short, is one of fair notice." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citations omitted) (quoting *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986)).

272. See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) ("Under APA notice and comment requirements, '[a]mong the information that must be revealed for public evaluation are the "technical studies and data" upon which the agency relies [in its rulemaking].'" (alteration in original) (quoting *Chamber of Comm. of the U.S. v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006))); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.").

273. See, e.g., *Action on Smoking & Health v. Civilian Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) ("An agency need not respond to every comment, but it must 'respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.'" (quoting *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975))); *Portland Cement*, 486 F.2d at 394 (noting that an agency must respond to comments that satisfy a "threshold requirement of materiality").

274. See 5 U.S.C. §§ 701, 706; *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

275. See *supra* notes 114–116. This finding is consistent with Gluck's interviews of transferee judges, who emphasized that the MDL bar is "[a] smaller community, repeat players. Lawyers are more likely to encounter each other again and again, so there is an incentive for folks to play nicely in the sandbox." Gluck, *supra* note 8, at 1702.

dural discussions.<sup>276</sup> Non-lead counsel complain of being frozen out until leadership proffers a take-it-or-leave-it aggregate settlement.<sup>277</sup> Courts are claimed to seal filings that, if made public, would embarrass leadership or thwart efforts at global resolution.<sup>278</sup>

Apart from its reliance on informal negotiation to design procedure, MDL is not subject to the APA-based transparency and participation norms that govern administrative agencies. The Judicial Code does not impose freedom-of-information requirements on district courts analogous to those applicable to agencies.<sup>279</sup> Some MDLs make transcripts of hearings freely available to the public.<sup>280</sup> In others, transcripts are only available to those willing to spend thousands of dollars to purchase them from PACER or a court reporter.<sup>281</sup> An MDL court can make important procedural decisions with little advance notice. There is nothing like the judicially enforced obligation to consider and respond to comments that applies in agency proceedings; case management orders set out requirements without any underlying reasoning.

Nor are procedural innovations in MDL subject to the same level of after-the-fact scrutiny as major agency decisions. Most of the important decisions in an MDL do not result in the entry of judgment, and thus are insulated from immediate appellate review. (As noted, settlement dynamics make it unattractive for litigants to appeal interlocutory decisions when judgment is entered.) In contrast, final agency action is presumptively subject to judicial review under the arbitrary-and-capricious and substantial-evidence standards, with “finality” determined through a “pragmatic” approach.<sup>282</sup> This provides parties who believe they have been injured by agency action an opportunity for review before a neutral decisionmaker. Indeed, preenforcement review is broadly available when agency action puts regulat-

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276. See Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1, 17–18, 18 n.60 (2018) (noting that “defendants are frequently only willing to engage in such discussions under a veil of confidentiality and will discontinue the negotiations in the event of a breach”).

277. PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 7:21, Westlaw (database updated May 2018) (“The lawyer has to call friends, try to look through Pacer, or take other difficult steps to be kept abreast [of developments in MDL].”).

278. See Burch, *supra* note 10, at 126 & n.286.

279. See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 3–4 (2d ed. 2014), <https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Clerks-2D.pdf> [<https://perma.cc/7JBG-UWYP>].

280. See, e.g., IN RE GENERAL MOTORS LLC IGNITION SWITCH LITIGATION, <https://gmignitionmdl.com/> [<https://perma.cc/6LK5-YZKZ>].

281. See, e.g., *MDL 2804: National Prescription Opiate Litigation*, U.S. DISTRICT CT., N. DISTRICT OHIO, <https://www.ohnd.uscourts.gov/mdl-2804> [<https://perma.cc/D333-VAB8>].

282. See 5 U.S.C. §§ 701, 704, 706 (2012 & Supp. 2018); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 149 (1967).

ed parties to a choice between complying with a potentially invalid directive and incurring significant costs.<sup>283</sup>

In sum, while section 1407 shares the structure of statutes that delegate authority to an administrative agency to overcome Congress's myopia, MDL courts make procedure in a different structural environment than administrative agencies. In MDL, the transferee judge's power to adopt new procedures is relatively unstructured and free of external checks. In the administrative context, the development of new procedures requires the participation of interested parties and is subject to ex post review as a matter of course.

#### D. *The Rule-of-Law Debate Revisited*

The parallels and contrasts between MDL and agencies subject to the APA go to the core of claims that MDL violates the rule of law. On one hand, the prevalence of ad hoc, ex post procedure-making in administrative agencies suggests that similar procedure-making in MDL is not fatal to MDL's legitimacy. If we accept procedural experimentation in important and highly popular programs like Social Security, why should MDL be different? On the other hand, the structural differences between procedure-making in MDL and procedure-making in public administrative agencies suggest caution about concluding that because ad hoc procedure is tolerated in one setting, it is legitimate in the other.

In fact, the structural features that MDL lacks were crucial to the development of a distinctive administrative understanding of the rule of law and played a central role establishing the legitimacy of the modern administrative state. The history of federal administration teaches that, if ad hoc procedure does not threaten MDL's legitimacy, these governance deficits do. Indeed, they are already being exploited by interest groups seeking to "reform" the MDL process for self-interested reasons.

This argument draws on historical debates over the legitimacy of federal administrative agencies and the rule of law. Accordingly, after providing some conceptual background, this Section begins by recounting that history. It then considers the lessons that history holds for contemporary debates over MDL and the rule of law.

#### 1. Conceptual Background

Claims that an institution is violating the rule of law implicate at least two different conceptions of legitimacy.<sup>284</sup> The argument might be that the institution lacks *legal authority* to take a challenged action. From this perspective, the question is whether the institution's actions are contemplated by authorities that are recognized in the relevant legal system. For example,

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283. See *Abbott Labs.*, 387 U.S. at 152.

284. See generally Fallon, *supra* note 135.

one might ask whether a federal agency has statutory authority to regulate a particular subject.<sup>285</sup>

The legal conception of legitimacy, however, has played a limited role in debates over the legitimacy of federal administrative agencies. From the Constitution's earliest days, Congress delegated regulatory authority to executive branch actors under open-ended statutory mandates.<sup>286</sup>

Because of the breadth of Congress's statutory delegations, attacks on federal administrative agencies have tended to invoke the *sociological* conception of legitimacy. The question from this perspective is whether action is "justified, appropriate, or otherwise deserving of support" apart from the formal legal authority that authorizes it.<sup>287</sup> That is, "[s]ociological legitimacy measures the extent to which members of the relevant political community regard a law as justified."<sup>288</sup> And as noted above, a key determinant of people's willingness to accept an institution's actions is procedural fairness. Again and again, social psychologists have found that people are more willing to view state action as legitimate if that action is perceived as the product of fair procedures.<sup>289</sup>

## 2. MDL's Parallels to Midcentury Administrative Law

Complaints about this kind of procedural fairness were the core of a midcentury attack on federal administration that is strikingly similar to current attacks on MDL.<sup>290</sup> The immediate cause was the growth in federal administration during the New Deal. Beginning with the seventy-third Congress, Congress created scores of new agencies and tasked them with implementing the New Deal and bringing the U.S. economy back from the

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285. See, e.g., David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665 (2018) (analyzing federal administrative agencies' authority to regulate the use of arbitration in light of the Supreme Court's broad interpretation of the Federal Arbitration Act).

286. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1294 (2006). For example, "statutes establishing the Departments of War and State in the first Congress said little more than that the Secretaries of those departments were to do what the President told them to do." Jerry L. Mashaw, Foreword, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 982 (2010). The first and second banks of the United States "handled all fiscal matters for the United States Government and, through their requirements for redemption of bank notes in specie, regulated the money supply." *Id.* at 983.

287. Fallon, *supra* note 135, at 1795.

288. Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3195 (2013).

289. See Bookman & Noll, *supra* note 29, at 779 & n.45 (collecting studies).

290. See Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 51–61 (2017); Shepherd, *supra* note 212, pts. 4–5; see generally ERNST, *supra* note 212, at 119–28; JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 14–58 (2012).

Great Depression.<sup>291</sup> Some New Deal agencies followed essentially the same procedures as courts, but others adopted a “corporatist” approach that sought to bring methods of business administration to the public sector.<sup>292</sup> Critics opposed to the growth of federal administration for political and ideological reasons latched onto anxieties over the fairness of agency procedure to launch a broader attack on the new agencies.<sup>293</sup>

The attack reached its highpoint in the notorious 1938 report of the American Bar Association Special Committee on Administrative Law authored by former Harvard Law School Dean Roscoe Pound.<sup>294</sup> The report took aim at what it termed the “administrative absolutism” of federal regulatory agencies.<sup>295</sup> As with modern attacks on MDL, the basic complaint was that agencies were making things up as they went, to the detriment of parties subject to their authority. Thus, the report charged agencies with “tendencies” such as “arbitrary rule making for administrative convenience at the expense of important interests” and “decid[ing] without a hearing, or without hearing one of the parties.”<sup>296</sup> With the New Deal failing to pull the nation out of recession by the close of the 1930s, complaints that agencies were a law unto themselves gained political momentum.<sup>297</sup>

As with MDL, critics of administrative agencies argued that the solution to agencies’ “lawlessness” was to subject them to regular procedures. Indeed, in 1941 Congress passed a bill, the Walter-Logan Act, that did just that.<sup>298</sup> Fearing that the Act would cripple federal administration, FDR vetoed it.<sup>299</sup>

When Congress returned to administrative procedure at the close of World War II, it did not continue on this path. Influenced by the success of

291. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 & n.9 (1987). Agencies created during the Seventy-Third Congress included the Tennessee Valley Authority, the SEC, the Federal Deposit Insurance Corporation, and the FCC. See ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012), <https://www.vanderbilt.edu/csdi/Sourcebook12.pdf> [<https://perma.cc/8WW7-SAP6>].

292. See ERNST, *supra* note 212, at 56–75; see generally James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747 (1991).

293. See ERNST, *supra* note 212, at 133.

294. Roscoe Pound et al., *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331 (1938). For the background to the report, see ERNST, *supra* note 212, at 121–25.

295. Pound et al., *supra* note 294, at 339–40.

296. *Id.* at 346, 350. Pound explicitly linked these deficiencies of administrative procedure to the rise of fascism in Europe. *Id.* at 345. As Ernst observes, the report was “a highbrow form of red-baiting.” ERNST, *supra* note 212, at 126.

297. See ERNST, *supra* note 212, at 132.

298. Walter-Logan Act, H.R. 6324 § 2(a), 76th Cong. (1940) (“[A]dministrative rules and all amendments or modifications or supplements of existing rules implementing or filling in the details of any statute . . . be issued by the head of the agency . . . only after publication of notice and public hearings.”); *id.* at 2(c) (authorizing any substantially interested person to demand reconsideration of a rule in effect for less than three years may under section (a)).

299. 86 CONG. REC. 13,942–43 (1940).



public-private collaboration during the war mobilization effort,<sup>300</sup> lawmakers and executive branch lawyers settled on a model in which agencies were permitted to develop new procedures, provided that they gave interested parties an opportunity to participate in administrative decisions and agency actions were subject to judicial review.<sup>301</sup> In 1946, Congress codified this political settlement in the APA, a statute that supplies procedural default rules for “each authority of the Government of the United States.”<sup>302</sup>

The new statute addressed concerns about arbitrary agency action by establishing new requirements that structured agency decisionmaking and by liberalizing the availability of judicial review. As Joanna Grisinger observes, the statute’s central reforms focused on the formal on-the-record hearings that dominated agency practice at the time the APA was enacted.<sup>303</sup> Under the new law, regulated parties had the right to be notified of pending administrative actions.<sup>304</sup> Hearing examiners (later renamed ALJs) were granted statutory job protections and prohibited from receiving certain *ex parte* communications.<sup>305</sup> And the statute opened up agency action to judicial review.<sup>306</sup> These reforms, however, stopped short of subjecting agencies to inflexible procedures. Bringing regulated parties into the administrative process and expanding the availability of judicial review was instead an *alternative* to formalized procedures. As Grisinger writes, “The act protected existing informal procedures, thus allowing cooperative relationships between regulated parties and agency officials to continue. At the same time, it made sure that those same parties had formal tools to challenge administrative action they opposed.”<sup>307</sup>

This same compromise—rejecting standardized procedures while guaranteeing the accessibility and accountability of the administrative process— informs an important line of cases on notice-and-comment rulemaking. In the 1960s and 1970s, Congress increasingly required agencies to make important decisions through informal rulemaking instead of adjudication.<sup>308</sup> The APA itself says little about the process for informal rulemaking. Elaborating on the APA’s general terms, courts in “paper hearing” cases obligated agencies to disclose the empirical and analytical bases for their actions, to

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300. See Mariano-Florentino Cuéllar, Foreword, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1376 (2014).

301. See GRISINGER, *supra* note 290, at 11.

302. 5 U.S.C. § 551(1) (2012 & Supp. 2018).

303. See GRISINGER, *supra* note 290, at 78.

304. 5 U.S.C. § 554(b) (2012).

305. Administrative Procedure Act, ch. 324, § 11, 60 Stat. 244 (1946) (“Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission.”).

306. 5 U.S.C. § 702 (2012).

307. GRISINGER, *supra* note 290, at 108.

308. See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 188 (1996).

show that they had considered evidence and argument submitted during rulemaking, and to provide a “reasoned explanation” for their choices.<sup>309</sup> Animating these requirements was the belief that a participatory rulemaking process would “not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests, but is valuable in itself because it gives citizens a sense of involvement in the process of government, and increases confidence in the fairness of government decisions.”<sup>310</sup>

The model of administrative law that emerged from the APA and judicial interpretations of the statute reflected a distinctive administrative rule of law. As Grisinger writes, the APA came quickly to represent “a standard of due process against which other government procedures might struggle to be justified.”<sup>311</sup>

Though not without flaws,<sup>312</sup> this understanding of the rule of law contributed importantly to the legitimacy of the federal administrative state. As the scope of federal administration expanded in the postwar decades, agencies such as the SSA enjoyed consistently favorable popularity ratings.<sup>313</sup> Agencies’ popularity has declined somewhat over the past two decades. But even survey respondents who say they are angry about the federal government gave positive ratings to four agencies or institutions (the military, the Postal Service, NASA, and the Defense Department) in an April 2010 poll.<sup>314</sup>

309. See, e.g., *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251–53 (2d Cir. 1977); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392–94 (D.C. Cir. 1973); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629–31 (D.C. Cir. 1973).

310. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1761 (1975) (footnotes omitted); see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 483 (2003) (“[T]he interest group representation model [reflected in paper hearing cases] recreated the administrative process into one that would maximize the satisfaction of popular preferences.”).

311. See GRISINGER, *supra* note 290, at 107; cf. ERNST, *supra* note 212, at 76 (tracing the administrative rule of law to decisions from the Hughes Court that were carried forward in the APA).

312. As Richard Stewart observes, a model of administrative law that depends on interested parties seeking to shape administrative action is biased in favor of well-organized groups that can coordinate members’ activities and invest in influencing administrative action. Stewart, *supra* note 310, at 1713. Their influence on the administrative process has prompted fears of interest group “capture.” See generally PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014).

313. See, e.g., AM. ASS’N OF RETIRED PERSONS, SOCIAL SECURITY 75TH ANNIVERSARY SURVEY REPORT: PUBLIC OPINION TRENDS (2010), [https://assets.aarp.org/rgcenter/general/social\\_security\\_75th.pdf](https://assets.aarp.org/rgcenter/general/social_security_75th.pdf) [<https://perma.cc/KQA5-5ULV>]; Sally R. Sherman, *Public Attitudes Toward Social Security*, SOC. SECURITY BULL., Dec. 1989, at 2.

314. PEW RESEARCH CTR., THE PEOPLE AND THEIR GOVERNMENT: DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR 55 (2010), <https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/606.pdf> [<https://perma.cc/8CKT-PE6A>]; see also *Trust in Government*, GALLUP, <https://news.gallup.com/poll/5392/trust-government.aspx> [<https://perma.cc/J7F6-55XT>] (finding over the past decade that between 36 percent (January 2019)

Polling from 2015 shows that federal agencies such as the Postal Service, the Centers for Disease Control and Protection, the Department of Health and Human Services, and the SSA enjoy double-digits spreads between respondents who view the agency favorably and those who do not.<sup>315</sup> Agencies' favorability far outpaces Congress's.<sup>316</sup> Many administrative agencies are even viewed more favorably than the Supreme Court, the branch of the constitutional federal government with the highest favorability ratings.<sup>317</sup>

For rule-of-law theorists like Fuller, the key to agencies' legitimacy was that they performed different functions than common law courts. In *The Morality of Law*, Fuller continued to insist that if "adjudication" is to perform its "true" function, it must follow established rules that give litigants the opportunity to offer proof and argument.<sup>318</sup> But he now argued that "economic management" was not suited for adjudication,<sup>319</sup> and that using court procedures to perform managerial functions was "certain to result in inefficiency, hypocrisy, moral confusion, and frustration."<sup>320</sup> Fuller thus accepted that, when the scope of state action exceeds the scale of a common law dispute, structural protections other than common law procedure satisfy the rule of law.

Survey data do not reveal how important the administrative rule of law was to popular support for the federal administrative state. But it is difficult to believe that agencies would enjoy the level of support that they presently do if the public thought, like Dean Pound, that agencies' failure to follow regular procedures is fatal to their legitimacy. In the APA, lawmakers hit upon a model of governance that allowed legal institutions to respond to emerging problems while providing the protection against arbitrary state action that court procedure aims to ensure.

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and 51 percent (September 2012) of survey respondents have a "great deal" or "fair amount" of "trust and confidence . . . in our federal government in Washington when it comes to handling" domestic problems).

315. See PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 58 (2015), <http://www.pewresearch.org/wp-content/uploads/sites/4/2015/11/11-23-2015-Governance-release.pdf> [<https://perma.cc/6GES-TM39>].

316. *Id.* at 63 (noting that 27 percent of respondents hold a favorable view of Congress, compared to 55 percent for the Social Security Administration).

317. See *id.* at 58 (noting that 50 percent of respondents hold a favorable view of the Supreme Court, compared to 55 percent for the Social Security Administration).

318. See FULLER, *supra* note 20, at 56. *The Morality of Law* was based on a series of lectures given at Yale Law School in April 1963. *Id.* at v.

319. *Id.* at 176 ("As lawyers we have a natural inclination to 'judicialize' every function of government. . . . Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.").

320. *Id.* at 173.

### 3. MDL's Departures from the Administrative Rule of Law

Seen with the benefit of this history, the problem is not that MDL is ad hoc. Rather, it is that MDL lacks structural features that evolved in the administrative context to ensure that state authority is exercised responsibly and consistently with statutory limitations. First, MDL is less *accessible* to interested parties than the administrative process that precedes a major agency action. Second, MDL provides fewer opportunities for interested parties to *participate* in the formulation of new procedures than the administrative process. Lastly, many important procedural decisions are effectively final when they are made.

If past is prologue, these departures from the norms of public administration pose a threat to MDL's model of resolving large-scale litigation. The history of the federal administrative state shows that neither the delegation of regulatory power nor the development of novel procedure in response to emergent problems is incompatible with dominant conceptions of the rule of law. But that history also shows that delegation without structural checks is not a stable legal and political equilibrium. If rigid adherence to a regular procedural playbook is incompatible with Congress's objectives in section 1407, the administrative rule of law demands alternate protections to ensure that delegates stay within their statutory authority and exercise their discretion in a reasoned manner. These protections are largely missing in modern MDL.

Just as opponents of federal administration latched onto the "lawlessness" of the administrative process to attack administration in the 1930s and 1940s, interest groups advancing a deregulatory agenda have latched onto the "lawlessness" of the MDL process as a reason to reform it. LCJ, for example, describes itself as a "partnership of leading corporate counsel and defense bar practitioners" that "succeeds by galvanizing corporate and defense practitioners and legal scholars."<sup>321</sup> Its board of directors includes perennial MDL defendants like Merck, Pfizer, and Johnson & Johnson.<sup>322</sup> But the group presents its MDL reform proposals—which are, literally, a defense wish list—as "consensus" solutions to the lack of regular procedure in MDL.<sup>323</sup> In the group's telling, requiring disclosure of litigation financing, prohibiting bellwether trials, and the like would "benefit[] *all* stakeholders by providing the same fairness, clarity and certainty that the [Federal Rules] ensure for all other civil cases."<sup>324</sup>

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321. LAWYERS FOR CIVIL JUSTICE, MAJOR INITIATIVES AND CURRENT AGENDA (2018), [http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_onepage\\_overview\\_january\\_2018.pdf](http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_onepage_overview_january_2018.pdf) [<https://perma.cc/BVN9-NZD7>].

322. LAWYERS FOR CIVIL JUSTICE, 2017 ANNUAL REPORT 4 (2017), [http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_annual\\_report\\_2017\\_final\\_may\\_1\\_2018.pdf](http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_annual_report_2017_final_may_1_2018.pdf) [<https://perma.cc/R2SL-LNQ8>].

323. See LAWYERS FOR CIVIL JUSTICE, *supra* note 321.

324. RULES 4 MDLS, *supra* note 18 (emphasis added); LAWYERS FOR CIVIL JUSTICE, *supra* note 12, at 3.

The framing is disingenuous, but it reflects an incisive understanding of MDL's political vulnerabilities. As mid-twentieth-century politicians realized, unfair procedure invites reform. Defenders of the modern administrative state can respond to charges of unlawfulness by noting that, while agencies are indeed laboratories of procedure, their innovation is structured and constrained by the APA's guarantees of transparency, participation, and reasoned decisionmaking. Those guarantees are missing in MDL.

#### IV. ADAPTING MDL TO THE ADMINISTRATIVE RULE OF LAW

Modern multidistrict litigation works in the sense that it allows Article III courts to resolve incredibly complex controversies that could not be resolved through ordinary legal procedures. The tools that MDL uses to accomplish this—delegation of authority to an empowered manager who develops new procedures in response to emergent problems—are basic tools of modern public administration. But while MDL uses the tools of public administration, it is an unusual “administrative” scheme. MDL is administered by Article III judges, and it operates within the legal framework of ordinary civil litigation instead of the Administrative Procedure Act. Because it evolved in parallel with modern administrative law, MDL lacks guarantees of transparency, participation, and *ex post* review applicable to administrative agencies. As Part III argued, these structural deficits pose the greatest threat to MDL's model of aggregate litigation.

Thus, the question becomes whether MDL can incorporate aspects of the administrative rule of law that have contributed to the legitimacy of the modern administrative state. Proposals to subject MDL to a regular rulebook misunderstand section 1407's objectives and statutory design. Unsurprisingly, they would destroy MDL's capacity to resolve complex litigation. Other proposals, such as expanded appellate review, are more attentive to MDL's governance deficits but similarly threaten MDL's utility as a forum for resolving complex litigation. This tradeoff highlights a basic tension in MDL reform proposals. Reforms that would increase MDL's accessibility and exposure to *ex post* review would diminish its capacity to resolve complex disputes.

Drawing on examples from public administrative programs, this Part argues that this tension is best addressed through reforms that would improve the transparency, accessibility, and accountability of the MDL process *at the transferee-court level*. These reforms generally take their inspiration from institutional designs that seek to foster an “internal” separation of powers. Recognizing that many agency functions cannot be controlled through judicial review or political oversight, those structures promote rule-of-law values by arranging internal agency relationships in a way that promotes transparency, participation, and reasoned decisionmaking.<sup>325</sup> In MDL, simi-

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325. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423

lar interventions would address the opacity, inaccessibility, and lack of ex post review by restructuring proceedings in the transferee court.

This Part first explains the problems with proposals to subject MDL to a regular rulebook. It then considers a number of proposals with the potential to improve the transparency, accessibility, and accountability of the MDL system. Finally, this Part zooms out and considers a more basic objection to MDL's legitimacy: that it goes beyond the authority Congress has granted.

#### A. *The Misguided Quest for MDL Rules*

An initial insight from understanding that MDL functions as a system of public administration involves proposals to subject it to a regular procedural rulebook. As proponents of MDL-specific rules emphasize, regular procedures could potentially improve MDL's transparency and accessibility as well as constrain the transferee court's discretion. But when one recognizes MDL's administrative pedigree, it is obvious why those proposals are misguided.

For example, the "Rules 4 MDLs" project is premised on the assumption that for MDL to be fair, it must be governed by regular procedures like ordinary litigation. The actual proposals that LCJ has put forward stop short of offering a complete rulebook for MDL.<sup>326</sup> But one can imagine what such a rulebook would look like. Rules drafted by the defense bar might require plaintiffs to file individual complaints, direct courts to screen complaints through a *Lone Pine* device early in the lifecycle of a litigation, instruct courts to require early evidence of specific causation, and allow individual cases to be worked up only after general defenses that promised to dispose of many actions all at one time were resolved. If cases survived these screens, bellwether trials would be prohibited and cases would be remanded within a defined timeframe. This order of battle would ensure that MDLs were resolved in a predictable manner that minimized opportunities for rent-seeking by plaintiff's leadership.

The difficulty is that this image of litigation is incompatible with section 1407's design. The statute addresses Congress's inability to anticipate the procedures needed to resolve complex disputes by delegating authority, first to the JPML and then to the transferee judge.<sup>327</sup> The premise of those delegations is that the procedures appropriate to resolve, say, the opioid litigation cannot be defined *ex ante*. If Congress could anticipate the necessary procedures, it could enact them itself.

At least since *SEC v. Chenery Corp.*, the necessity of such after-the-fact lawmaking has been an accepted feature of federal administrative law.<sup>328</sup> In

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(2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

326. See *supra* notes 150–151.

327. See *supra* text accompanying note 219.

328. 332 U.S. 194 (1947).

*Chenery*, the Supreme Court addressed complaints that the SEC had abused its discretion by defining fiduciary duties under the Public Utility Holding Company Act of 1935 through adjudication rather than rulemaking.<sup>329</sup> The Court rejected the argument, reasoning that—

problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.<sup>330</sup>

Although *Chenery* concerned securities regulation, it may as well have been describing MDL. Just as the SEC could not identify all the activities that might violate the Holding Company Act ex ante, lawmakers could not define procedures needed to resolve, say, the opioid litigation before it occurred. The argument that MDLs should be subject to “clear, uniform rules that apply in MDL cases” ignores this problem and the way that section 1407 addresses it.

### B. Structural Reforms

Though the impulse to rule-ify MDL is misguided, this does not mean that MDL’s reliance on ad hoc procedure-making is not a cause for concern. As Part III showed, MDL’s guarantees of transparency, accessibility, and accountability are far weaker than those that apply to modern administrative agencies. As a prescriptive matter, understanding that MDL operates as a form of public administration teaches that reforms should focus on these structural deficits. While the design of those reforms is ultimately a political question, this Part sketches several possible reforms that would better align MDL with the administrative model it builds upon. Like Part I, this Section focuses on “mega”-MDLs that have prompted calls for new MDL-specific FRCP.

#### 1. Standards and Reason-Giving

An initial insight from administrative law is that statutory standards and reason-giving can provide some of the transparency and protection against arbitrary decisionmaking that regular procedure aims to secure.<sup>331</sup> Thus, the nondelegation doctrine requires statutes that delegate regulatory authority to

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329. *Chenery*, 332 U.S. at 197–200.

330. *Id.* at 202–03.

331. See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1279–84 (2009) (summarizing theoretical arguments for reason-giving in public programs).

specify an “intelligible principle” to guide the delegate’s discretion,<sup>332</sup> and many statutes go considerably further in constraining the delegate.<sup>333</sup> At the back end, leading cases on judicial review of agency action require agencies to demonstrate that challenged actions were “based on a consideration of the relevant factors” identified by statute.<sup>334</sup>

In the MDL context, there is broad agreement on the general standards that should govern large-scale aggregations. For example, the American Law Institute’s Principles of the Law of Aggregate Litigation instruct that aggregate proceedings should aim to “(a) enforc[e] substantive rights and responsibilities; (b) promot[e] the efficient use of litigation resources; (c) facilitat[e] binding resolutions of civil disputes; and (d) facilitat[e] accurate and just resolutions of civil disputes by trial and settlement.”<sup>335</sup> These goals, to be sure, are stated at a high level of generality. Even so, recognizing them by statute—and requiring transferee judges to explain important procedural decisions by reference to them—would have positive effects on the MDL system. Although existing empirical research is far from conclusive, there is evidence that the combination of statutory standards and reason-giving leads to better compliance with the governing law and reduces variance among actors exercising delegated authority.<sup>336</sup> Those goals are shared by virtually every participant in ongoing debates over MDL reform.

## 2. Transparency

Another area that is ripe for reform is MDL’s opacity, particularly for transferred plaintiffs and their counsel. Some transferee judges direct lead counsel to develop websites with orders and transcripts.<sup>337</sup> But happenings in other MDLs are inaccessible to anyone who is not willing to spend thousands of dollars on PACER fees and court transcripts. Apart from basic case information, information about MDL outcomes is notoriously difficult to obtain. The terms of aggregate settlements are occasionally made public. But there is no apparent rhyme or reason to the disclosure. Settlement designers often choose to keep settlement terms confidential and file their agreement

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332. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

333. See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 86–89, 99–120 (1999) (surveying devices Congress has used to constrain delegates’ discretion based on a dataset of major federal laws enacted between 1947 and 1992).

334. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

335. *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 1.03 (AM. LAW INST. 2010). Similar statements appear in the case law. See *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring) (“Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality.”).

336. See Edward H. Stiglitz, *The Reasoning Constraint* (Aug. 29, 2019) (unpublished manuscript) (on file with author) (reporting results of experiments that test survey participants’ responsiveness to reason-giving requirements).

337. See *supra* notes 280–281.



under seal.<sup>338</sup> Data on common benefit fees, claiming rates, and referral fees are not systematically collected. Where such data are collected, they may be filed under seal.<sup>339</sup>

As transferee judges increasingly recognize, there is no good reason why basic case information should not be made available to parties and the public. Since 1946, the APA has required agencies to make available basic information about their structure and operations. That information includes “statements of the general course and method by which [the agency’s] functions are channeled and determined,” “rules of procedure,” “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.”<sup>340</sup> The APA further provides that “a matter required to be published in the Federal Register and not so published” has no legal effect unless a party has notice of the matter and is not prejudiced by its non-publication.<sup>341</sup>

Following the APA’s model, a publication requirement in MDL would extend to case management orders, transcripts of status conferences, agreements concerning the structure of the litigation, and information about proposed and final settlements. To ensure that all MDLs made the same data available, disclosure requirements would, ideally, be implemented through amendments to section 1407. Of course, the political economy of such amendments is fraught. Absent statutory amendments, the same requirements could be implemented as an FRCP, a best practice, a local rule, an individual practice, or a case management order.<sup>342</sup>

Disclosure of outcomes data is a more complicated problem. When MDL is viewed as a form of administration, the lack of regular data on outcomes is anomalous. Agencies are subject to a wide range of statutory reporting requirements, which both shape decisionmaking and allow it to be policed by Congress.<sup>343</sup> No such requirements apply to MDL, but parties may have legitimate interests in keeping settlements confidential. Further-

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338. See Burch, *supra* note 10, at 126 & n.286.

339. *Id.* at 131–32.

340. 5 U.S.C. § 552(a)(1) (2012 & Supp. 2018). The Freedom of Information Act of 1966 imposes a separate obligation to make certain agency records available upon request. Pub. L. No. 90-23, 80 Stat. 54 (1967) (codifying at 5 U.S.C. § 552 the amendments of the Freedom of Information Act of 1966, Pub. L. 89-487, 80 Stat. 250).

341. 5 U.S.C. § 552(a)(1).

342. Although the JPML could not promulgate a disclosure rule under the plain language of 28 U.S.C. § 1407(f) (2012) (authorizing the Panel to “prescribe rules for the conduct of its business”), it conceivably could order improved disclosure in transfer orders entered under § 1407(a).

343. See generally SAMUEL WORKMAN, *THE DYNAMICS OF BUREAUCRACY IN THE U.S. GOVERNMENT: HOW CONGRESS AND FEDERAL AGENCIES PROCESS INFORMATION AND SOLVE PROBLEMS* (2015).

more, MDL practitioners contend that, without the ability to ensure confidentiality, settlement would be more difficult or impossible.<sup>344</sup>

The design of a reporting scheme that balances these considerations is beyond the scope of this Article.<sup>345</sup> But the current system of essentially random disclosure does not reflect a sustainable long-term equilibrium. Performance monitoring is a basic feature of modern administration; the lack of outcomes data makes such monitoring impossible in MDL.

### 3. Accessibility

Another of MDL's departures from the structure of modern administration involves the accessibility of its "administrative" process. As described above, the appointment of a leadership structure results in de facto control of the litigation being transferred to court-appointed attorneys. Appointment orders provide varying degrees of protection for non-leads' control of their cases.<sup>346</sup> But all accept that appointed leaders are in the driver's seat. This can result in non-leads' exclusion from crucial discussions about the structure and resolution of the litigation. At worst, non-leads complain that they have no role until their clients are presented with a take-it-or-leave-it aggregate settlement.<sup>347</sup>

The functional parallels between aggregate litigation and public administration have led some scholars to propose that the former incorporate notice-and-comment procedures from public law. For example, Nagareda proposed that an agency such as the Food and Drug Administration (FDA) be charged with entering a rule that memorialized the terms of an aggregate

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344. Herman, *supra* note 276, at 16–19.

345. For an idea of the type of information outcome reporting might cover, see *Procedural Guidance for Class Action Settlements*, U.S. DISTRICT CT., N. DISTRICT CAL., <https://www.cand.uscourts.gov/ClassActionSettlementGuidance> [<https://perma.cc/D3AM-QDXA>]. Following approval of a class action settlement, the guidance requires class counsel to provide an accounting that reports, inter alia, "the number and percentage of claim forms submitted," "the average and median recovery per claimant," "the largest and smallest amounts paid to class members," "the administrative costs," "the attorneys' fees and costs," and "the attorneys' fees in terms of percentage of the settlement fund." *Id.*

346. Compare, e.g., *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, at 4 (N.D. Cal. Jan. 21, 2016), ECF No. 1084 (order appointing PSC) ("It is intended and expected . . . that . . . to the fullest extent consistent with the independent fiduciary obligations owed by any and all plaintiffs' counsel to their clients and any putative class, that pretrial proceedings shall by [sic] conducted by and through the PSC."), with *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), at 2 (S.D.N.Y. Sept. 26, 2014), ECF No. 304 (order establishing case management procedures) (directing that lead counsel must "determine (after such consultation with members of the Executive Committee and other co-counsel as may be appropriate) and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the Court and opposing parties the position of the Plaintiffs on matters arising during the coordinated pretrial proceedings").

347. See RHEINGOLD, *supra* note 277, § 7:21.

settlement.<sup>348</sup> As he envisioned it, post-settlement rulemaking would provide a stronger legal basis for restructuring parties' rights and obligations than either class actions or nonclass aggregate settlements. Rulemaking would also provide an opportunity for an agency such as the FDA to review and restructure attorney's fees to align attorneys' incentives with the long-term interests of the parties bound by a settlement.<sup>349</sup>

But notice and comment is not the only tool in administrative law's arsenal, nor is it an attractive option for increasing MDL's transparency. A rulemaking at the conclusion of settlement negotiations would suffer from the same limitations as a Rule 23 fairness hearing: an outsider with little information about the bargaining process and the settling parties' resources and risk preferences would be called on to evaluate the fairness of a deal proffered by parties with every incentive to see it approved.<sup>350</sup> Earlier comment periods would provide a formal opportunity for non-leads to participate in important litigation decisions. But it is difficult to see how notice and comment would map onto decisions involving privileged and confidential information, and even a short comment period would interfere with MDL's capacity to resolve litigation in a timely manner. For instance, if the court had provided a standard thirty-day comment period in *Deepwater Horizon* before approving the use of pleading bundles, the case would have been delayed for weeks, if not months, as the structure of the pleadings was debated. Add ten or twenty comment periods during the lifespan of a case, and the already lengthy MDL process would drag out further.

A better model is provided by statutes that impose duties on designated actors to act for the benefit of a class of statutory beneficiaries. For instance, the Employee Retirement Income Security Act of 1974 (ERISA) provides that a person "is a fiduciary" with respect to a retirement plan if, among other things, "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets."<sup>351</sup> As the Supreme Court has held, an ERISA "fiduciary" is not the same thing as a fiduciary at common law.<sup>352</sup> Rather, the statute defines duties specific to the functions that plan fiduciaries perform. Under Title I of ERISA, a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to partici-

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348. See NAGAREDA, *MASS TORTS*, *supra* note 262, at 257–65.

349. See *id.* at 263–64.

350. See, e.g., William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 *UCLA L. REV.* 1435, 1445 (2006) (stating that judges conducting Rule 23(e) hearings "suffer from a remarkable informational deficit in the fairness-hearing process"); Samuel Issacharoff, *Class Action Conflicts*, 30 *U.C. DAVIS L. REV.* 805, 808 (1997) ("Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.").

351. 29 U.S.C. § 1002(21)(A) (2012).

352. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253–58 (1993).

pants and their beneficiaries and defraying reasonable expenses of administering the plan,” and act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”<sup>353</sup>

Leadership appointment orders in MDL already articulate similar understanding of leaders’ duties. As shown above, courts enter those orders under FRCP that give the transferee judge authority to consolidate actions and use special procedures in complex actions. The orders assume that leadership will advance the interests of all consolidated plaintiffs. Implicitly or explicitly, they adopt a democratic model of representation, in which leaders are expected to advance the interests of a heterogeneous group of plaintiffs.<sup>354</sup>

But if appointment orders follow a model of representation with parallels in public law, they do not articulate the implications for leaders’ authority and duties with anything near the specificity of ERISA. On one hand, attorneys appointed to MDL leadership positions have greater freedom of action than class counsel formally possess. Under the Supreme Court’s decisions in *Amchem* and *Ortiz*, a single attorney may not make trade-offs among class members who seek different, incompatible outcomes from a litigation.<sup>355</sup> That limitation follows from the model of representation the class action is premised upon: a class representative is only permitted to act on behalf of class members because she “possess[es] the same interest and suffer[s] the same injury” as the class.<sup>356</sup> In contrast, MDL leadership appointment orders do not assume that plaintiffs want essentially the same thing. Instead, they give leadership limited control over non-leads’ claims to overcome the collective action problems that would otherwise prevent cases from progressing toward resolution. Thus, like an ERISA fiduciary or trustee, MDL leaders have authority to make reasonable tradeoffs among the parties for whom they perform common benefit work. Even the most basic functions performed by leadership—for example, selecting one case over another as a focus for discovery—require such tradeoffs.

The corollary is that MDL leaders have obligations to *engage* with “class members” that do not apply to class counsel. Without interacting with consolidated plaintiffs, leaders cannot know the nature of their claims, what they hope to accomplish from the litigation, or their capacity to contribute to its prosecution. Accordingly, Elizabeth Cabraser and Samuel Issacharoff observe that in the *Deepwater Horizon*, *Volkswagen*, and *NFL Concussion* MDLs, plaintiffs “contact[ed] class counsel frequently, [made] demands for

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353. 29 U.S.C. § 1104(a)(1) (cleaned up).

354. See *supra* text accompanying notes 78–79.

355. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

356. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

consumer service, [were] frequently represented by independent counsel, and [had] points of intermediate organization on Facebook or Twitter that allow[ed] them to function more like a group.”<sup>357</sup> These were “gold plated” MDLs prosecuted by leading plaintiffs’ attorneys. In less prominent cases, non-leads complain that this level of engagement is missing.<sup>358</sup>

The appropriate policy intervention is to better define leaders’ duties and responsibilities along the lines suggested here. That is, appointment orders should explicitly recognize that leaders do not have the same obligations as class counsel and that, because of this, they have heightened duties to engage with plaintiffs for whom they perform common benefit work. In essence, the proposal is to require something like the model of interactive representation that Cabraser and Issacharoff contend already applies in gold-standard MDLs. Like the transparency reforms sketched above, the proposal would ideally be implemented through legislation or rulemaking, though less formal implementation mechanisms could be used in the interim.<sup>359</sup>

There remains the question of remedy: If leaders violate their duty to include non-lead counsel in decisionmaking, what is the appropriate remedy? Commenters generally assume that violations of leadership’s duties will be brought to the attention of the transferee judge, who will then take corrective action—the procedure followed in the GM ignition switch litigation.<sup>360</sup> But a better approach might be to route complaints to a special master or an arbitrator identified at the outset of the litigation. Compared to routing complaints to the transferee judge, doing so would provide greater protection for confidential information and less distraction from the central work of an MDL.

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357. Cabraser & Issacharoff, *supra* note 112, at 865.

358. See RHEINGOLD, *supra* note 277, § 7:21.

359. The selection of MDL leadership provides another opportunity to open up the MDL process to non-lead counsel and their clients. Elizabeth Burch argues that “judges need to employ truly competitive processes in appointing lead lawyers” as opposed to relying on consensus slates. Burch, *supra* note 10, at 138. To accomplish this, Burch recommends that judges elicit information about: (1) counsel’s role in past MDLs and the outcomes of those litigations; (2) “structural conflicts” between plaintiffs that are likely to arise in the course of the litigation; (3) plans for financing the litigation; and (4) counsel’s relationship with third-party vendors. *Id.* at 162–63. She proposes that judges appoint steering committees with “five to six members who are not like-minded,” and appoint a special master who can receive objections to attorneys or leadership slates in confidence. *Id.* at 138. Burch’s proposals aim to mitigate the agency-cost problems that have preoccupied class action scholarship for decades. By providing an opportunity for consolidated plaintiffs to weigh in on the selection of their leaders and furnish information to the transferee court, the proposals also make MDL more accessible to consolidated plaintiffs.

360. See, e.g., Herman, *supra* note 276, at 12–13; cf. Silver, *supra* note 85, at 1986 (noting that non-lead attorneys’ “only recourse is to complain to the trial judge, who, for a variety of reasons, is unlikely to be sympathetic”).

#### 4. Accountability

MDL's final departure from the structure of public administration involves the opportunities for ex post review of the transferee judge's decisions. As explained above, the final judgment rule bars appeals of interlocutory case management decisions.<sup>361</sup> Due to the unique settlement dynamics in large MDLs, those decisions are effectively immune from ex post review, a contrast with the broad availability of judicial review in administrative programs.<sup>362</sup>

*a. Ex post review.* — The most obvious policy response would be to relax the final judgment rule and allow more interlocutory decisions to be appealed to the court of appeals. Thus, Pollis proposes “a right of immediate appellate review in MDLs from interlocutory orders that raise important issues of unsettled law (or departures from settled law) and that are potentially dispositive of a significant number of the consolidated cases.”<sup>363</sup> Others suggest that appeals be allowed in the discretion of the court of appeals.<sup>364</sup>

Even proposals to provide discretionary review of interlocutory decisions, however, would have a major disruptive effect on MDL's ability to drive resolutions. In 2018, the median time to resolve an appeal in the federal circuit courts was 8.5 months.<sup>365</sup> The average MDL teems with important interlocutory decisions, from the selection of lead counsel to the award of common benefit fees. Appeals in even a handful of these matters would compromise MDL's capacity to resolve mega-litigation in a timely manner.

Proponents of nondiscretionary interlocutory appeals argue that this is the price of civilization; to subject MDL to the rule of law, there must be “meaningful” appellate review.<sup>366</sup> But this conflates the desirability of ex post checks on the exercise of delegated authority with the specific form of ex post review used in ordinary civil litigation. When MDL is understood as a form of public administration, it becomes clear that alternative institutional mechanisms would serve the same function with fewer costs for MDL's capacity to drive resolutions.

One such mechanism would provide for review of transferee judge's decisions by a panel of judges at the *district court* level. As noted above, the So-

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361. See *supra* notes 120–121 and accompanying text.

362. See *supra* notes 282–283 and accompanying text.

363. Pollis, *supra* note 26, at 1648.

364. Perry Cooper, *Consensus on MDL Problems, but Not on Solutions*, BLOOMBERG L. (June 27, 2017), <https://news.bloomberglaw.com/us-law-week/consensus-on-mdl-problems-but-not-on-solutions> (on file with the *Michigan Law Review*) (citing Professor Maria Glover's suggestion that the rulemaking committees “import[] the Rule 23(f) discretionary appeal from class action practice into the MDL system to allow for review when the appeals court deems it necessary”).

365. ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS FEDERAL COURT MANAGEMENT STATISTICS 2 (2018), [https://www.uscourts.gov/sites/default/files/fcms\\_na\\_appprofile1231.2018.pdf](https://www.uscourts.gov/sites/default/files/fcms_na_appprofile1231.2018.pdf) [<https://perma.cc/892U-82NS>].

366. Pollis, *supra* note 26, at 1646.

cial Security Administration has long maintained an internal appeals process that allows claimants to seek review of adverse decisions.<sup>367</sup> The system is faster and more flexible than judicial review in Article III courts. In recent years, novel analytics programs undertaken by the Social Security Appeals Counsel “have provided information that has led to breakthroughs in how SSA conducts training and gives feedback to staff, which has in turn led to improved productivity and accuracy of work products.”<sup>368</sup> A peer review system in MDL might create the opportunity to seek reconsideration of the transferee judge’s decisions before a panel of other federal judges operating within the transferee court. Because the system would not require the perfection of an appeal and full merits briefing, it would neither oust the district court of jurisdiction nor require the procedural formality of a full appeal. Instead, reconsideration motions would be presented in much the same manner as parties seek review of magistrate judge orders.<sup>369</sup>

A simple model of interlocutory peer review in MDL might subject transferee judges’ decisions to review by a three-judge panel of other federal judges—say, two judges with experience as an MDL transferee judge and one circuit judge. Upon application of an interested party, the panel would have authority by majority vote to reconsider the transferee judge’s decisions and exercise all powers of the transferee court. Review would be available for appointment orders, rulings on pretrial motions, case-structuring decisions, and any other action taken by the transferee judge.

By providing an opportunity for independent review of a transferee judge’s decisions, this model would address complaints about MDL’s insulation from *ex post* oversight. And it would be far less disruptive than expanding the availability of nondiscretionary interlocutory appeals.

*b. Settlement review.* — Another intriguing proposal seeks to increase *private* oversight of settlements that emerge from MDL consolidations. Focusing on settlements in which plaintiffs appear to be sold out by common benefit counsel, Andrew Bradt and Theodore Rave propose that judges publicly opine on the fairness of nonclass settlements.<sup>370</sup> According to Bradt and Rave, “[t]he MDL judge just needs to force the disclosure of enough information so that the individual claimants can decide for themselves whether their lawyers are doing a good job at protecting the claimants’ interests.”<sup>371</sup>

At first glimpse, the Bradt/Rave proposal seems to address one of the most glaring governance deficits in MDL. The decision to accept or reject an aggregate settlement is one of the few junctures at which leadership’s deci-

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367. See *supra* text accompanying note 242.

368. Ray & Lubbers, *supra* note 258, at 1576.

369. See 28 U.S.C. § 636(b)(1) (2012) (providing that a party may file objections to a magistrate judge’s proposed findings and recommendations, and that a district judge “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made”).

370. Bradt & Rave, *supra* note 30.

371. *Id.* at 1298–99.

sions are put to a market test. Yet as Bradt and Rave observe, parties who have not been actively involved in the prosecution of the action often lack sufficient information to make an informed decision about whether to take the settlement.<sup>372</sup> The proposal aims to provide a richer information base for non-lead counsel and the plaintiffs they represent to decide whether to participate in aggregate settlement. In so doing, the proposal promises improved oversight of leadership's work.<sup>373</sup>

But these benefits are only as strong as the advice that the transferee judge renders, and it is not likely to be good. To see why, one can divide settlements into two categories: (1) those where the district judge plays an active role in settlement negotiations, and (2) those where the judge is not involved in settlement negotiations but is asked to facilitate a deal that was negotiated by an MDL's leadership.<sup>374</sup>

In type 1 settlements, the incentives for the judge to serve as a trusted "information intermediary" are not present. Where a managerial judge pushes parties to settle, the Bradt/Rave proposal puts the judge in the position of evaluating her own work product. Having driven the settlement, the judge is unlikely to decide that it is fatally flawed.

In contrast, the judge in a type 2 settlement does not sit in judgment of her own work. But she faces the same information deficit that has frustrated judicial review of class action settlements for decades.<sup>375</sup> A judge who did not participate in settlement negotiations has not seen client inventories and damages models. She is not privy to the financial position of the parties and their attorneys. She does not know their preference or tolerance for risk. In short, the reviewing judge approaches the settlement from the same perspective as an informed outsider like a law professor or professional objector. She can evaluate the settlement's general features but depends on leadership to explain its logic.

If settlement review is unlikely to solve the information problems that prevent plaintiffs from effectively checking the actions of MDL leadership, what is? The need for judges to weigh in on a settlement arises from the practical control that MDL leaders exercise over settlement negotiations. As argued above, the most promising proposal for bringing non-lead counsel into the MDL is to better define and enforce leadership's duties to plaintiffs and non-lead counsel. A judge who has been out of practice for decades is unlikely to have a good sense of case valuation or the fairness of deal structures. An attorney with live clients is. With better representation *throughout*

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372. See *id.* at 1272 ("Often, the only real control that MDL claimants may have is over the ultimate decision whether to consent to participate in a global settlement or to wait for remand and press forward with a trial.").

373. See *id.* at 1288.

374. These categories are of course points on a spectrum, not mutually exclusive alternatives.

375. See *supra* note 350.



the litigation, the need for an “information forcing” judge at the settlement stage is diminished.

### C. *The Question of Statutory Authority*

The reforms sketched in the preceding section would bring MDL closer to the structure of administrative programs in which a delegate devises novel procedures to overcome problems that could not be addressed through ex ante lawmaking. Yet even if policymakers implemented all of these reforms, MDL remains subject to a more fundamental criticism: that transferee judges exceed the authority granted by section 1407 and the Federal Rules.<sup>376</sup> This is a different and more basic objection than the complaint that MDL’s structure is inconsistent with the administrative rule of law. The objection is not that the system operates unfairly but that it is *ultra vires*.

Like the administrative programs it emulates, however, MDL draws upon broad delegations of statutory authority. Section 1407 provides that the JPML may transfer cases pending in different district courts to a single court “for coordinated or consolidated pretrial proceedings.”<sup>377</sup> Pursuant to the Rules Enabling Act, the scope of “pretrial proceedings” in the transferee court is defined by the FRCP.<sup>378</sup> The Rules, in turn, expressly authorize district courts to control the timing and scope of motion practice and discovery,<sup>379</sup> to dispose of cases through motion practice and settlement,<sup>380</sup> and to manage their trial calendar.<sup>381</sup> Furthermore, Rule 16 authorizes the district court to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”<sup>382</sup>

These sources authorize many of the practices that critics attack as *ultra vires*. First, they authorize the case-by-case procedural development that this Article has argued defines modern MDL. This point was central to the Fifth Circuit’s decision in *Center for Biological Diversity, Inc. v. BP America Pro-*

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376. See Mullenix, *supra* note 141, at 553 (arguing that lawyers manipulate MDL “to accomplish ends the mechanism was never intended to perform”); Redish & Karaba, *supra* note 139, at 132 (finding that MDL consolidation was “originally envisioned as a temporary transfer to facilitate convenience and avoid duplicative discovery” but has become a “black hole” (quoting Fallon et al., *supra* note 96, at 2330)); *id.* at 154 (“[W]hile MDL promises respect for the individual day in court, it delivers only a ‘Wild West’ form of rough group justice, on the court-appointed steering committee’s terms.”).

377. 28 U.S.C. § 1407(a) (2012).

378. 28 U.S.C. § 2072(a)–(b) (2012) (authorizing Supreme Court “to prescribe general rules of practice and procedure . . . for cases in the United States district courts,” and prohibiting rules from infringing “substantive right[s]”).

379. See, e.g., FED. R. CIV. P. 12(i), 16(a).

380. See, e.g., FED. R. CIV. P. 12, 16, 41, 56.

381. FED. R. CIV. P. 40.

382. FED. R. CIV. P. 16(c)(2)(L).

*duction Co.*,<sup>383</sup> which upheld the use of pleading bundles in the *Deepwater Horizon* litigation. There, the appellant argued that the MDL court's refusal to create a separate pleading bundle for its claims violated the citizen-suit provisions of three federal environmental statutes and "resulted in a *de facto* dismissal of those claims."<sup>384</sup> Quoting Rule 16, the court of appeals answered that "[t]he Federal Rules of Civil Procedure specifically contemplate that in complex matters the district court may adopt 'special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.'"<sup>385</sup> The litigation "present[ed] an exceedingly complex matter, consisting of hundreds of individual cases and tens of thousands of claimants."<sup>386</sup> The court concluded: "In the face of this daunting litigation, and given the 'broad grant of authority' to the district court, we perceive no error in those aspects of the court's management of the MDL that are involved in this case."<sup>387</sup>

As the Fifth Circuit's discussion shows, the question in a challenge to MDL's procedural ad hocery is whether a novel procedure is grounded in a source of court or party-rulemaking power. Often, the answer will be yes. The broad authority that the rules give to parties and district courts provides formal legal authority for much of MDL's procedural development.

Second, MDL's enabling statutes authorize the common practice of "managing to resolution"—that is, retaining jurisdiction over transferred cases until it is clear that the MDL is incapable of resolving transferred cases. To be sure, section 1407's remand clause provides that transferred actions "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."<sup>388</sup> But it defies logic to say that a clause that explicitly recognizes the possibility that a transferred action "shall have been previously terminated" opposes pretrial resolution.

If complaints about courts' exercise of *ultra vires* authority generally miss the mark, the exception is the practice of awarding common benefit fees to MDL leadership. From the early days of MDL, transferee courts recognized that they would need to appoint lead counsel to overcome collective action problems in cases with hundreds or thousands of parties.<sup>389</sup> But there

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383. 704 F.3d 413 (5th Cir. 2013).

384. *Ctr. for Biological Diversity*, 704 F.3d at 432.

385. *Id.* (quoting FED. R. CIV. P. 16(c)(2)(L)).

386. *Id.*

387. *Id.* (quoting *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1013 (5th Cir. 1977)).

388. 28 U.S.C. § 1407(a) (2012).

389. See *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1013 & n.9 (5th Cir. 1977).

is no authority in section 1407 to rewrite contingent-fee contracts,<sup>390</sup> and the allocation of attorney's fees may be "substantive" for purposes of the Rules Enabling Act, taking the issue out of Rule 16.<sup>391</sup> As Geoffrey Miller and Charles Silver show, equitable doctrines that courts have invoked to reallocate attorney's fees are a shaky foundation for the practice.<sup>392</sup>

On the whole, however, most MDL procedures can be justified under section 1407 and the Enabling Act. When MDL is seen as a form of public administration, this should come as no surprise. Because Congress has delegated broadly, the most serious objections to the legitimacy of public administrative agencies have focused on agency structure rather than the formal authority conferred by Congress. MDL operates under similar delegations and invites the same objections.

#### CONCLUSION

In recent years, it has become common for litigation crises to be resolved through billion-dollar settlements that resulted from MDL consolidations.<sup>393</sup> As MDL developed into a powerful mechanism for enforcing state and federal regulatory policy, critics charged that its ad hoc procedure was incompatible with the rule of law. If accurate, those charges would mean that a central and increasingly important component of the federal court system is illegitimate. But attacks on MDL misconceive what it is. In terms of statutory objectives, institutional design, and the way it operates, MDL is best understood as a form of hybrid public administration that mixes tools of ordinary civil litigation with tools of public administration. As such, MDL is properly evaluated through the administrative rule of law that evolved in the decades following World War II and underpins the legitimacy of the modern administrative state.

Approaching MDL as a form of public administration does not eliminate concerns about its compliance with the rule of law. But it shows that

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390. See Silver & Miller, *supra* note 142, at 120 ("The MDL statute says nothing about fees.")

391. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975) (calling modification of the American rule of attorney's fees a "policy matter that Congress has reserved for itself"). For the point that the Rules Enabling Act's substance/procedure dichotomy allocates power between Congress and the courts, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982).

392. See Silver & Miller, *supra* note 142, at 120–21. *But see* Burch, *supra* note 10, at 147–48 (arguing that quantum meruit principles authorize the award of common benefit fees under certain conditions).

393. See, e.g., David Shepardson, *U.S. Appeals Court Upholds Volkswagen's \$10 Billion Diesel Settlement*, REUTERS (July 9, 2018, 12:04 PM), <https://www.reuters.com/article/us-volkswagen-emissions/u-s-appeals-court-upholds-volkswagens-10-billion-diesel-settlement-idUSKBN1JZ21G> [<https://perma.cc/8BEH-2GRP>]; Associated Press, *Federal Judge Approves NFL Concussion Settlement*, NFL (July 7, 2014, 5:04 PM), <http://www.nfl.com/news/story/0ap2000000363672/article/federal-judge-approves-nfl-concussion-settlement> [<https://perma.cc/7PAQ-85YU>].

critics' focus on MDL's ad hocery is misplaced. The greatest threat to MDL's legitimacy is the absence of structural features—guarantees of transparency, participation, and ex post review—that played a key role in building popular and legal support for the modern administrative state. Whether MDL continues to be the preeminent forum for addressing intractable legal problems depends in large part on whether it is able to incorporate those features.

